

Employment

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The Global Employer™

Bringing Light to Employment Law Changes
and New Developments



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Bringing light to employment law changes and new developments

The Editors

Denise R. Gerdes (Chicago)

Tel: +1 312 861 8942

denise.gerdes@bakermckenzie.com

Jeffrey H. Kessler (Chicago)

Tel: +1 312 861 3078

jeff.kessler@bakermckenzie.com

For more information regarding the Global Employment Practice Group, please contact:

Paul Brown (Sydney)

Tel: +02 9225 0120

paul.brown@bakermckenzie.com

J. Richard Hammett (Houston)

Tel: +1 713 427 5016

j.richard.hammett@bakermckenzie.com

Manuel Limon (Mexico City)

Tel: +52 55 5279 2904

manuel.limon@bakermckenzie.com

Alex Valls (Barcelona)

Tel: +34 93 206 0820

alex.valls@bakermckenzie.com

Baker & McKenzie's Global Employment Practice Group is pleased to present its 46th issue of *The Global Employer*TM entitled "Bringing Light to Employment Law Changes and New Developments."

This issue contains a collection of articles on legal developments from 11 jurisdictions that examine changes to labour laws, employment practices, and benefits issues. The global economy is still affecting change on the employment landscape with new legislation being passed in many jurisdictions. The challenge for the multinational employer is to stay informed of these changes and the effects they will have on the workplace and their employees.

We have several articles that deal with new employment legislation – the new law in Austria designed to reduce the pay gap between men and women; the ground-breaking Minimum Wage Ordinance in Hong Kong; the 2010 Malaysian Whistleblower Protection Act; and the Employees Food Assistance Law in Mexico are all discussed in this edition.

Other jurisdictions have reformed or amended existing employment laws such as the reform of the French retirement scheme; the reform of certain procedural aspects governing Italian labour disputes; Spain's major employment and labor law reform package; and amendments to current Swedish legislation.

Finally, we have articles from several jurisdictions that further clarify existing laws and policy, such as the recent ruling in Argentina concerning unlawful intermediation of employment; the requirements and limitations that must be observed during an investigative proceeding in Brazil; the required contributions by Brazilian employers into severance fund deposits; and the effect that the NLRB's August decisions will have on U.S. employers.

Our Global Employment Practice includes more than 400 locally qualified practitioners in 39 countries. We have more lawyers with mastery of the subtle intricacies of labor, employment, immigration and benefits issues in more jurisdictions around the world than any other leading law firm. *Chambers Global 2010* ranks both our Global Employment and Global Immigration practices as Tier 1. Baker & McKenzie is recognized by *PLC Which lawyer?* as one of the top Global 50 law firms with our Global Employment practice ranked in 23 countries in 2010, and we are among the 10 firms US general counsel list most often as "go-to" advisors on employment matters.

Recent ruling on penalties due to unlawful intermediation of employment

A recent *en banc* decision (called “*fallo plenario*” in Argentina) of the National Labor Court of Appeals (with jurisdiction in the Buenos Aires District) in the case *Vazquez vs. Telefonica de Argentina S.A.*, held that unlawful employment intermediation through an intermediary (the “Formal Employer”) is to be defined as irregular employment with the “user” of the services (the “Real Employer”) and subject to all the penalties of irregular employment.

Although this is not a binding decision for other judicial districts, it is a very important precedent. This decision has significant relevance due to the economic impact on the Real Employer, because said user of the services must acknowledge the employment relationship as a direct relationship, pay the severance along with the penalty, and may be liable for the social security contributions.

Intermediation Under Argentine Employment Contract Law (“ECL”)

Argentine ECL authorizes the outsourcing of specific work or services related to the normal and habitual business of a company with a contractor. Said contractor must direct the work or services and is responsible for the result of such work or service.

Intermediation of employment appears when the Formal Employer (the one that registers the employee in its records, pays salaries and social security contributions) provides the Real Employer (the one that does not acknowledge a direct relationship with the employee) with one or more employees that in fact render services for the Real Employer, under the directives and supervision of said user, with the tools and materials of said user, etc.

The ECL only authorizes the lease of

employees through authorized companies that must be registered as temporary agencies. The law requires that said lease of staff be justified with the extraordinary need of the user, and for said limited period. The law does not accept the mere intermediation of permanent staff through outsourcing entities or through lease of employees.

The ECL sets forth joint and several liability in all these cases (outsourcing of a work or service, lease of staff, or unlawful intermediation). However, it was not clear what additional consequence or sanction was applicable to the cases in which there was unlawful intermediation, besides the potential penalty from the labor authority for infringement of the law.

Scope of the Decision in *Vazquez*

Before the decision issued in the *Vazquez* case, our courts have debated whether the sanction applicable to the employers who failed to register their employees (thus failing to pay the social security contributions and other employer liabilities) was also applicable to the case of unlawful intermediation, in which the employment was registered and declared by a Formal Employer.

The chambers of the National Labor Court of Appeals were divided. Prior to the *Vazquez* ruling, some decided

that the sanctions due to lack of registration (a penalty in the form of an aggravated severance) should not apply to this kind of case because the employee was duly registered by the Formal Employer. However, other chambers decided in the opposite way, arguing that for the Real Employer there was an unregistered employment relationship.

These opposite decisions are the basis for the *en banc* ruling that we are analyzing herein. According to the Argentine system, judicial precedents are not binding for courts. In fact, a court decision is only applicable to the particular case it is deciding. However, when there are controversial and opposite decisions of the different chambers of the National Labor Court of Appeals, parties to a lawsuit are allowed to file a petition for achieving unified criteria on the issue in question. This petition gives rise to an *en banc* judgment, where the ten chambers of the National Labor Court of Appeals vote to define and unify the legal doctrine regarding the issue raised to an *en banc* decision. The decision derived from an *en banc* judgment is significantly relevant since for future and for similar cases such doctrine shall then be applied by all lower courts and by all of the chambers of the Court of Appeal. Such ruling may only be replaced by a new *en banc* judgment.

By means of the *en banc* decision in the *Vazquez* case, the National Labor Court

of Appeals ended the debate. Under the ruling, the aggravated penalties apply because the Real Employer failed to register the employee (i.e., Ms. Vazquez) in its employment records, despite the fact that said employee was erroneously registered by the Formal Employer.

Applicable Sanction Due to Intermediation

The National Employment Law No. 24,013 and the Tax Evasion and Prevention Law No. 25,345 provide for additional indemnification in case employers fail to register the relationship in the mandatory labor books.

Said special indemnification is granted when: 1) the employee demands his or her registration to their employer prior to his or her termination; and 2) the employee sends a copy of said demand to the AFIP (National Tax Authority) within 24 business hours after having requested it from the employer. Therefore, the fines set forth in Section 8 of Law No. 24,013 (there are two other possible fines described in Sections 9 and 10 of the Law but they do not apply in case of intermediation) may only be enforced whenever the employee previously fulfills both requirements (the demand to the employer and the notice to the AFIP).

According to Section 8, employers who fail to register the existence of the employment relationship shall pay 25 percent of all accrued remuneration. Under no circumstance shall this compensation be lower than three times the best regular and habitual monthly salary of the employee.

In addition, Section 15 rules that if the employee is being terminated for any reason whatsoever two years after his or her demand of registration, the employer would also have to pay the terminated employee an additional 100 percent of the regular mandatory

severance pay based on seniority paid to the employee upon his or her dismissal without just cause.

Finally, in the case of employees who do not demand their registration during the employment relationship, and whose employment relationships are not duly registered in the labor books at the time of their respective dismissals, Law 25,323 sets forth a special indemnification equivalent to an additional 100 percent of the regular mandatory severance pay based on seniority paid to employees upon their dismissal without just cause.

Although it was not mentioned by the Court in the *Vazquez* decision, it is likely that the additional compensation set forth by Law 25,323 that penalizes unregistered employment relationships will apply to intermediation cases.

Furthermore, there is an additional indemnification equivalent to 50 percent of the mandatory severance pay for those employees who file legal actions in order to collect the payment of their severance. This additional indemnification is typically part of the package claimed when the employee terminates the relationship due to the Real Employer's lack of acknowledgement of said employment (constructive termination).

Vazquez Ruling Impact on Social Security Obligations

The recognition of employment by the Real Employer implies registering the employee in its payroll book and issuance of work certificates as a direct employee.

This acknowledgement of said direct relationship could trigger an additional issue that was not discussed in the ruling. This issue is related to the social security contributions that, pursuant to Argentine Law, all employers must pay for each registered employee, along with the mandatory

withholdings. Therefore, this ruling will trigger a new debate about whether the Real Employer is obliged to pay social security contributions and withholdings for that employee, despite the fact that the Formal Employer already paid them.

Considering that the *Vazquez* ruling is very recent, it is not clear what criteria the Tax Authority will follow regarding this issue. However, it would be reasonable to hold that the contributions and withholdings were made by the Formal Employer, so no damage was produced to the social security system. Still, this is an issue that would need to be defined by the Tax Authority and the Courts, in light of the current scenario following the *Vazquez* ruling.

Conclusion

Foreign companies doing business in Argentina must be aware that this *en banc* decision in the Buenos Aires district constitutes a serious threat to their model of engagement of personnel through contractors or temporary agencies due to headcount restrictions. Furthermore, other jurisdictions may follow the legal doctrine of this case. This ruling has a significant impact on said model of engagement, and triggers uncertainty on the social security contributions and withholdings.

Diego Bongiovanni (Buenos Aires)

Tel: +54 11 5776 2394

diego.bongiovanni@bakermckenzie.com

Daniel Orlansky (Buenos Aires)

Tel: +54 11 4310 2273

daniel.orlansky@bakermckenzie.com

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Closing the gap

In the next few weeks, a new law will come into force that is designed to improve income transparency within companies and reduce the pay gap between men and women.

Within the member countries of the European Union, Austria is one of the last countries to address the issue of equal pay. According to recent publications, full-time female employees have to work approximately 70 days more per year in order to achieve the same yearly income as that of their male colleagues. In other words, women still earn 18 to 23 percent less than their male colleagues in comparable positions. In 2004, Austria implemented the EU-Directive 2000/78/EC establishing a new general framework for equal treatment of men and women in the workplace as stipulated in the Austrian Act on Equal Treatment, even though equal pay laws had already been in effect for more than 30 years. Thus, the demand for equal pay is not new, but it has recently become a hot topic among the public as well as the politicians. The Austrian Government has listened to these demands and the

new law will take further steps to reduce the existing salary gap, since the current law does not sufficiently protect women in this regard. Lack of transparency has turned out to be one of the crucial issues and Austria will now follow the example of other countries since greater transparency of income within a company is a vital prerequisite for preventing income discrimination and closing the existing salary gap.

Without apparent justification, women entering the workforce are often directly or indirectly discriminated against through a job grade scale that is different from that of male employees. Most employees are subject to a collective bargaining agreement which sets forth a minimum salary requirement based on the initial grading by the employer and men seem to be consistently graded higher. Discrimination on the entry level often also includes differing treatment, without reason, when it comes to the acknowledgement of seniority. Seniority is also an important factor in assigning job grades and in determining the salary. Throughout the continued employment relationship men tend to receive more frequent and larger pay raises, bonus payments and overtime pay than their women co-workers with similar seniority.

Still, court claims remain uncommon, largely because female employees are reluctant to take action that might prejudice their jobs. Employees typically prefer to seek advice and information from the Non-Discrimination Commission or from

the Equal Opportunities Lawyer. The Commission has the power to determine whether an act of discrimination has occurred and can formally request that the employer remedy the breach. The Commission can also seek declaratory action, but it has no power to impose a penalty on the employer or to award compensation to an employee.

Discrimination claims can still be brought in the labor courts by the employee or the Federal Chamber of Employees. However, female employees suing their employers as a result of the Commission's report still face risking their employment and they incur high costs: Even though the burden of proof was reversed by Austrian legislature in 2004, it has not helped due to the lack of an inquisitorial system in such proceedings. Therefore, as a first step the Non-Discrimination Commission and the Equal Opportunities Lawyer shall now be given the right to legally obtain information from the Austrian social security authorities with regard to the income data of comparable employees.

Furthermore, the current draft for the new law sets forth a new obligation for companies of a certain size to regularly perform an internal salary study. Beginning in 2011, companies with more than 1,000 employees will be required to issue such a salary report. Companies with fewer than 1,000 employees, but more than 150, will be required to issue income reports starting in 2012. Companies with less than 150 employees will not be subject to this new regulation in order to



protect individuals and take data protection rights into account. The new law will state in detail the proper procedures for completing these reports and instructs that they must keep identity information confidential. Whereas employers had to issue such reports once a year in the first draft of the new law, the current draft requires that the reports be prepared every two years. Employers have to inform the works council of the findings in the report and the works council will be entitled to demand consultations with the employer. If there is no works council, the employer must publish the report on an internal bulletin board or otherwise make it available to the employees within the company. The contents of the report must remain confidential and all informed persons are subject to this duty of confidentiality. Informed employees breaching this duty may be punished by a penalty amounting to a maximum of EUR1,500. This penalty has recently given rise to many complaints and is still under debate, as employers will not be

subject to any penalty in the event that they fail to prepare the salary report.

The new regulations will be integrated into the existing Austrian Act on Equal Treatment. Further important changes aiming at minimizing the gender pay gap shall be as follows:

- Beginning in 2012, in job advertisements, employers must publish the statutory minimum salary according to the applicable collective bargaining agreement as well as state their willingness to pay amounts in excess of this minimum. After a first warning, employers can be fined up to EUR360 if they fail to do so.
- As to disabled persons, protection against discrimination will be extended to other persons who have a close relationship with any persons showing a protected characteristic (“discrimination through association”). The protection not only covers relatives (siblings,

children, parents, spouses and life partners) but also other persons who have a social or ethical duty to help and assist disabled persons.

- The minimum damages to be awarded in harassment cases will be raised from EUR720 to EUR1,000.

Thus far, politicians are still reluctant to implement more rigorous laws to force employers to treat men and women equally. It remains to be seen if these current steps, in particular a higher transparency of income within a company, are a suitable means for eliminating income discrimination and closing the existing gender pay gap.

Simone Liebmann-Slatin (Vienna)

Tel: +43 1 24 250-530

simone.leibmann-slatin@bakermckenzie.com

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News from Brazil

Split of salary and contribution of employers to severance fund deposits (FGTS)

In Brazil, each month all employers are required to deposit, in a blocked bank account, eight percent of their employees' compensation. This is the so-called Severance Fund Deposit (“FGTS”).

In addition to the monthly contribution, in cases of termination without cause, companies are required to pay a fine of 40 percent of all amounts existing in an employee's FGTS account on the day of termination, plus another ten percent over the FGTS balance for the purpose of updating the FGTS funds. The amounts deposited in this fund may be

withdrawn by employees upon their retirement, as well as in certain special cases, such as buying a house or particularly, termination of employment, without cause.

In July 2010, the Ministry of Labor and Employment enacted Normative Instruction No. 84, which provides

general guidance on the procedure to be adopted by the auditors of the Ministry of Labor and Employment when investigating companies in relation to the collection of the FGTS. The “news” is that this Normative Instruction differs from the prior Normative Instruction (No. 20, December 20, 2001) that dealt with the same matter and it contains a



clause stating that the severance fund shall be collected over the portion of the salary paid abroad to foreign employees providing services in Brazil under an employment agreement.

In fact, although this issue is currently being considered a “new” tendency of the Ministry of Labor and Employment, the truth is that this matter is not new at all. This is because since 2005 the Ministry of Labor and Employment already understood that the part of the remuneration paid abroad should be considered as salary for all purposes (including the collection of the FGTS) and such understanding was consolidated in a Technical Note (Technical Note No. 02/CGIg/GM/MTE of the General Immigration Coordination Office of the Ministry of Labor and Employment). However, the auditors of the Ministry of Labor and Employment, for some reason, did not focus their investigations with regard to this matter.

In view of the Technical Note mentioned above and based on the fact that under Brazilian Labor Law, when the services are provided in Brazil, in principle, the employment contract is being fulfilled in Brazil and therefore is subject to Brazilian legislation rules and to Brazilian labor rights (i.e., Christmas

bonus, vacation payment, severance fund deposits – “FGTS” etc). Employers have always been warned that the “split of salary,” although relatively common, could ultimately be harmful.

Employers should also be warned on the risks related to the payment of salaries abroad which basically are (i) labor claims filed by an employee, alleging that the amount that was paid outside Brazil, must also be considered for purpose of calculating the Brazilian Labor rights, labor and termination payments, or (ii) inspections by the auditors of the Ministry of Labor and Employment and of the Social Security Institute, and consequently, issuance of tax assessments against the company for non-payment of social security contributions and labor rights (including the FGTS) for the portion of the remuneration paid abroad.

In order to minimize (but not eliminate) the potential risks in cases of split of salary, an employer should maintain a relationship between the expatriate and the company abroad paying the portion of expatriate’s compensation in order for the company

to be able to argue that the compensation received abroad relates to specific services provided by the expatriate to the foreign payer, and that there is no link with the work he or she performs in Brazil to the Brazilian employer. This argument is not quite strong, but may increase the chances of success for the company in the event that an assessment or labor claim is filed.

As stated above, in reality, Normative Instruction No 84 of July 13, 2010 only included a specific clause stating that the severance fund shall be collected on the portion of the salary paid abroad to foreign employees providing services in Brazil under an employment agreement. The understanding of the Ministry of Labor and Employment, even before the enactment of this Normative Instruction, was that this was to be the case.

Although we have not noticed a significant increase of investigations by the auditors of the Ministry of Labor and Employment in this regard, we believe that this may increase during the upcoming months. It is also valid to stress that under Brazilian Law, FGTS contribution is subject to a 30-year statute of limitations. This means that Labor authorities have 30 years to charge any employer that did not pay or had paid less than the amount due as FGTS contributions to its employees.

Ana Paula Vizintini (Rio de Janeiro)
Tel: +55 21 2206 4913
ana.vizintini@bakermckenzie.com

Camila Vieira (Rio de Janeiro)
Tel: +55 21 2206 4936
camila.vieira@bakermckenzie.com

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Requirements and limitations provided under Brazilian laws concerning employee interviews within internal investigations

Introduction

Brazilian laws do not provide for legal requirements or limitations specifically related to the conducting of internal investigations of alleged misconduct. There are general principles in the law that result in requirements and limitations – some of which are summarized below – that must be observed during an investigation proceeding.

One measure that employers can adopt to clarify the facts in internal investigations is the interview of the involved or suspected employee(s). In this regard, the employee can be invited to a confidential meeting for the purpose of providing the employer with clarification of the facts. The employee's participation in interviews is, however, not mandatory by law even if provided for under the company's code of conduct or other policies.

As further explained below, although employee interviews in internal investigations are admissible, the interviewed employee may refuse to attend the interview, to talk, to provide any kind of information, or to tell the truth. As a general rule, and depending on all of the circumstances of the specific case, employees cannot be terminated for cause for refusing to cooperate. It is, however, important to note that employers may, under Brazilian laws, dismiss employees without cause by making the severance payments due to a terminated employee.

Another aspect that must be taken into account is that the employer's investigation is limited to the employee's fundamental right to intimacy and privacy as set forth by the Brazilian Federal Constitution, as follows:

*Article 5 – All persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
(...)*

X: The intimacy, private life, honor and image of persons are inviolable, and the right to compensation for material or moral damages resulting from their violation is ensured.

With these considerations in mind, it is possible to conduct employee interviews for the purpose of clarifying facts during an internal investigation. Nonetheless, in order to reduce the risks of claims from the employees (e.g., based on allegations of offense to the rights of privacy, intimacy, or other labor rights), below are some observations concerning internal investigation interviews, which, if observed, should help the company minimize possible moral damage-related claims.

1. The interviews with employees should, to the extent possible, be performed on a confidential basis in order to avoid allegations that the company exposed the employee to judgment and false interpretation by his or her

colleagues. If appropriate, interviews should be conducted outside of the company's facilities. In this sense, a decision ruled by the Regional Labor Court of São Paulo stated that as long as the interviews were conducted with confidentiality and there were no constraints, bad treatment, or offense to the honor and dignity of the employee, no indemnification was due.

2. The employee should, to the extent possible, be expressly informed that (i) all discussions in the interview should be kept in strict confidence and the employee cannot discuss anything with others, including his or her superiors; (ii) any attorneys conducting the interview for the company represent the company, not the interviewee, meaning that any privilege protection belongs to the company, not to the interviewee, and because of that, only the company can decide to keep or waive such privilege; and (iii) the company does not admit any form of retaliation against other employees for reporting facts or suspicions to the company.
3. Whenever appropriate, it should be stressed to the employees that they

are being invited to cooperate in the context of a confidential internal investigation proceeding conducted by the company. In view of that, the employee is being requested by the company to provide complete and truthful information. As mentioned above, employees may refuse to cooperate and to participate in the interview, and the company's ability to take measures against the employee will be determined on a case-by-case analysis. Depending on the specific situation, it may be advisable for the company to expressly inform the employee that he or she is free not to participate in the interview and can refuse to answer specific questions in the interview.

4. The employee should be informed that they can interrupt the interview at any time and take short breaks.
5. Only a few people should be present during the interview in order to make the employee feel more comfortable.
6. Whenever possible, the interview should be conducted in the native language of the employee, because:
(i) the interviewee will feel more comfortable to answer the questions; (ii) by speaking in their native language, an employee's answers tend to be more specific, complete, and clear, also allowing interviewers to better evaluate body language and other signs (e.g., nervousness, uncertainty, etc.); (iii) it will reduce the risk of claims from the employee in the event that he or she did not understand the question well or that the responses provided were not exactly what he or she wanted to say; and (iv) it will reduce the risk of claims from employees for moral damages alleging that the interview was intended to shame or embarrass them. Indeed,

questions that would be generally accepted as reasonable in one country may be offensive when made to a Brazilian employee, simply because of language or toning matters.

7. From a Brazilian law perspective, it is possible to record and to videotape the interviews, but the employees must first be aware of the recording/videotaping and must have previously consented to it. However, in addition to the fact that recording naturally makes interviewees feel less comfortable, other aspects must be taken into account including, and especially, whether the investigation may have any type of implication or be relevant for other jurisdictions with different rules on discovery and privilege matters (e.g., Foreign Corruption Practices Act – FCPA).
8. It is also possible to prepare a summary of employees' answers during the interview or minutes of the proceedings. From a Brazilian law perspective, there is no impediment to prepare a transcript of the interview and request the employee to read and attest to the accuracy of the statements made in the interview, or signing the transcript at the end of the interview (although, as mentioned above, the employee may refuse to sign it). On the other hand, and similarly to our comments above on the recording of the interview, preparing an exact transcript of the interview and requiring the interviewee to sign it is not advisable in all circumstances – especially because it may not be protected under the attorney-client privilege doctrine – being subject to discovery duties in other jurisdictions outside Brazil.
9. It is advisable to avoid direct accusations against the employees of any wrongdoing, in order to

reduce the risks of moral damages claims from the employee. To the extent possible, questions should be made in an objective manner, without showing prejudice by the company in the sense that the employee has actually committed any wrongdoing. If the company wants to confront the employee with documents or other type of evidence collected and reviewed before the interview, this confrontation should be made in a respectful manner (for instance, by showing the document to the employee as additional help in order for the employee to recollect the facts, avoiding direct accusations of lying or hiding the truth).

10. The employees being interviewed must be treated with respect and without pressure or any type of aggression. The right of the company to perform internal investigations with respect to any violation of the laws or ethical rules and policies must be properly exercised, without any threats or accusations. The company must avoid any embarrassment to the interviewee and always take cultural and language differences into account.

Conclusion

In view of the above, when conducting internal investigations, the company must take into account the fact that an employer's investigative powers are limited by the employee's fundamental rights which must be respected at all times.

Maurício De Lion (São Paulo)

Tel: +55 11 3048 6907
mauricio.lion@bakermckenzie.com

André Fonseca (São Paulo)

Tel: +55 11 3048 6967
andre.fonseca@bakermckenzie.com

Camila von Ancken (São Paulo)

Tel: +55 11 3048 6994
camila.ancken@bakermckenzie.com

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Recent employment law developments

France has been in the headlines over the past few months, in particular in light of the numerous protest movements against the reform of the French retirement scheme which took place in September and October of 2010. Notwithstanding the demonstrations and strikes, the law reforming retirement in France was definitively adopted on November 9, 2010, after validation by the French Constitutional Court.

The French retirement regime is based on an allocation system (“répartition”), i.e., the contributions paid by the working population to the retirement funds are re-allocated to the retirees. Due to the increasing number of retirees and life expectancy compared to the number of working persons, the French government determined that a reform of the retirement scheme was long overdue in order to be able to continue to finance the pension benefits on a medium and long-term basis.

This reform has taken place in a context where the French government needed to take appropriate measures in order to reduce the budgetary deficit, or at a minimum maintain it at an acceptable level. The reform of the French retirement regime appears to be the first

step of various budgetary constraining measures for employers and employees.

Another measure in the finance law for the French social security scheme for 2011 provides for a significantly less favorable regime for termination indemnities.

The Reform of the French Retirement Scheme

The main measures of the reform of the retirement scheme which met with the most opposition concern (i) the retirement age and (ii) the age required to receive a pension at the full rate.

Retirement Age

Currently, employees can decide to

retire and receive their pension (paid by the French social security funds) at 60. In accordance with to the new law, this minimum retirement age will be progressively increased to 62.

The minimum retirement age will be increased by four months per year until 2018 at which time all employees born on or after January 1, 1956, will then be able to retire at 62. This measure will come into effect as of July 1, 2011, and apply to those born on or after July 1, 1951. The following chart summarizes the timeline of the implementation of this particular measure:

Some exceptions are provided for certain categories of employees, and in particular employees who started

DATE OF BIRTH	POSTPONEMENT COMPARED TO THE CURRENT RETIREMENT AGE	MINIMUM RETIREMENT AGE
Before July 1, 1951	none	60 years (no change)
Between July 1 and December 31, 1951	4 months	60 years and 4 months
1952	8 months	60 years and 8 months
1953	1 year	61 years
1954	1 year and 4 months	61 years and 4 months
1955	1 year and 8 months	61 years and 8 months
1956 and after	2 years	62 years

working at age 16 or earlier, employees in particularly physically difficult jobs, partial incapacity of employees and handicapped workers. Under certain conditions, those employees will still be able to receive their pension benefits before they turn 62.

Consequences for the employer: As from 2018, the statutory minimum retirement age being 62, an employee who decides to terminate his or her employment contract will be considered as having resigned and will not be able to claim for the payment by the employer, of a retirement indemnity (except in the case of a particularly difficult physical job).

Moreover in the case of a dismissal of an employee who has not yet turned 62, in the event of litigation, the employee will be able to show an increased prejudice due to the extended time until retirement and will consequently claim for higher damages.

Age at Which the Employee May Receive a Pension at the Full Rate

Currently, any employee who turns 65 can receive his or her pension at the full rate irrespective of whether he or she has accrued the minimum number of quarters with the retirement funds.

The new law provides that the age to be able to receive a pension at the full rate will be the retirement age (62) increased by five years, i.e., 67 (since the new minimum retirement age is 62 as from 2018). This measure will be applicable to employees born on or after January 1, 1956.

However, as for the change in the minimum retirement age, the implementation of this measure will be progressive, i.e., the age for pension at a full rate will be increased by four months per year between 2016 and 2023.

Consequences for the Employer

According to relatively recent French

law (article L. 1237-5 of the French Labor code), the employer cannot unilaterally decide to put an employee on retirement before he or she has reached the age allowing them to receive their pension at the full rate (unless the employee accepts to retire and the employer has complied with a specific procedure required by law). Currently, the employer can only expressly request if the employee is interested in retiring three months in advance of the employee's birthday each year from age 65. As from 2023, the employer will not be allowed to propose to the employees to be put on retirement before age 67.

Notwithstanding the above, the age on which the employee can be required to retire by the employer remains the same, i.e., 70 years.

The New Social Treatment of Termination Indemnities

In accordance with French law, various categories of amounts paid to the employees upon the termination of their employment contract are exempt from most social security contributions. This is, for example, the case of severance indemnities paid to the employees in the framework of an employment protection plan (previously known as a "social plan") or damages granted by a Labor court for an unfair dismissal which are entirely exempt from social charges.

A settlement indemnity paid in the framework of a settlement agreement is also not subject to social charges (with the exception of C.S.G. and C.R.D.S., i.e., 8 percent of 97 percent of the amount of the settlement indemnity borne by the employee), to the extent the indemnity can be qualified as damages and when combined with the statutory or collective bargaining agreement dismissal indemnity (settlement indemnity plus dismissal indemnity), the total amount does not exceed the lower of two years of remuneration or €207,720 (for 2010).

The 2011 finance law for the French social security scheme provides that indemnities paid to employees upon the termination of their employment contract are exempt from social charges within the limit of three times the annual social security threshold. The social security threshold is determined each year by the French government. For 2011, the annual threshold will be equal to €35,352; therefore, as from 2011, the portion of any termination indemnity paid to employees exceeding €106,056 will be fully subject to social charges (approximately 45 percent for the employer and 25 percent for the employee).

However, the law also provides for a transitional period during which the limit of exemption of such indemnities is increased to six times the annual social security thresholds (i.e., €212,112) in the following cases:

- Indemnities paid in 2011 for a termination effective on or before December 31, 2010, at the latest.
- Indemnities paid in 2011 for a termination carried out in the framework of an employment protection plan and notified to the Labor authorities' on or before December 31, 2010, at the latest.
- Indemnities paid in 2011 for a termination effective in 2011 within the limit of the amount of the dismissal indemnity provided by the applicable collective bargaining agreement (or company agreement if any) in force on December 31, 2010.

Denise Broussal (Paris)

Tel: +33 1 44 17 53 93
denise.broussal@bakermckenzie.com

Delphine Girodroux (Paris)

Tel: +33 1 44 17 53 46
delphine.girodroux@bakermckenzie.com

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Special administrative region's first minimum wage announced

Statutory Minimum Wage

In an historical development for labour relations in Hong Kong, the Government recently passed the Minimum Wage Ordinance (“MWO”), the first piece of wage-fixing legislation in Hong Kong since early colonial days. The Government also announced that Hong Kong’s first statutory minimum wage (“SMW”) will be HK\$28 per hour (approximately US\$3.61). The SMW will take effect on May 1, 2011. Employers with operations in Hong Kong have less than four months to ensure they are compliant with the MWO.

Once the SMW takes effect, it will be a criminal offense for an employer to pay any employee covered by the MWO at a rate which is less than HK\$28 per hour. Upon conviction, an employer is exposed to a maximum fine of HK\$350,000 and three years’ imprisonment per breach. Directors and other senior persons involved in the contravention may be held personally liable.

The announcement of the SMW comes after months of deliberation by the statutory body established for the purpose of recommending the first SMW to the Government, the Provisional Minimum Wage Commission

(“PMWC”). At the time of deliberations, there was heated debate among business interests and local trade unions as to whether the proposed level would be an adequate safety net for the Special Administrative Region’s most vulnerable employees and whether it would cause a significant reduction in employment opportunities. The final figure recommended by the PMWC is roughly midway between the initial figure proposed by the business interests (around HK\$24 an hour) and the trade unions (around HK\$33 an hour).

Going forward, the MWO does not prescribe a fixed timetable for adjustments to the SMW. The MWO

requires that the soon-to-be-established Minimum Wage Commission submit a report to the Chief Executive at least once every two years. This report, however, would only contain the Commission’s recommended minimum wage. The power to adjust the SMW ultimately rests with the Chief Executive. There have been calls for a yearly review of the SMW, but the present position remains that there is no fixed review mechanism in the MWO.

Implications That Go Beyond Take-Home Pay for the Lowest Paid

While the SMW is estimated to have a direct impact on the take-home pay for approximately 300,000 of Hong Kong’s lowest-paid workers and their employers, the MWO introduces additional requirements that have a significantly broader impact. Beyond the introduction of SMW, the three key new implications from the MWO are:

1. New record keeping requirements which apply for any employees earning less than HK\$11,500 per month. This would capture a significantly larger number of employees and their employers beyond those whose take-home pay will be affected by the SMW.



2. The remuneration structures for employees who have a low base salary and derive a substantial portion of their income from variable pay will need to be reviewed.
3. The exceptions in the MWO will need to be considered, such as student interns and work experience students.

Record Keeping and Hours Worked

The MWO makes it mandatory for employers to keep records of “hours worked” for any employee who earns less than HK\$11,500 (approximately US\$1,484) per month. Failure to keep such records will be a criminal offense, punishable by a maximum fine of HK\$10,000 per count.

Hours worked is a new concept introduced by the MWO. The definition of hours worked in the MWO captures time that an employee:

- Is at work in accordance with the employment contract, or otherwise as directed by or agreed with the employer; or
- Is traveling in connection by reason of work.

Traveling time between the employee’s home and his or her usual place of employment is excluded from hours worked. However, if the employee is required to travel between his or her home and a place outside Hong Kong for work, this will count as hours worked, unless the place of employment outside Hong Kong happens to be the usual place of employment. The exception appears to cater for a growing number of employees in Hong Kong who commute daily to Mainland China and Macau for employment.

The definition of “hours worked” in the MWO does not give further guidance on

some issues that are likely to arise in practice, such as how the usual place of employment should be defined for employees whose job duties require them to travel extensively (for example, travelling salespersons). The Labour Department is expected to release further guidance materials closer to May 1, 2011 with examples of how the MWO should apply in practice.

Please note the new record keeping requirements introduced by the MWO are in addition to the existing record-keeping requirements under the Employment Ordinance (“EO”). It is a statutory requirement for employers to keep records, for all employees (regardless of their monthly income) for, among other things, absences, starting and leaving dates, and wages paid per payroll period.

Variable Income Employees

The statutory requirement under the MWO does not make any exception for employees working in industries with low base salaries and highly variable income, such as commission-based workers in sales and real estate. Therefore, employers of such employees will need to assess whether changes to the remuneration structure for such employees are necessary to ensure that they receive the minimum wage for each wage period.

In this regard, the MWO expressly prevents employers from counting advance payment of wages and overpaid wages as wages payable for the purpose of assessing compliance with the MWO. In other words, an employer cannot pay a portion of the employee’s wages from next month (such as commissions) in advance to make up for the shortfall. The portion of wages paid in advance would not be counted as wages until the next month, when it is paid.

Furthermore, the MWO does not allow the counting of any wages paid for “any time which is not hours worked” for the

purpose of assessing compliance with the MWO. Explanatory materials from the Labour Department have indicated that employers cannot count wages paid to employees on leave days, such as statutory rest days, annual leave, sick leave, and maternity leave. For employees who are paid a monthly salary and whose employment contracts do not expressly explain which days of the month are considered unpaid days, the implication is that their wages for the purpose of MWO compliance may be lower than their take-home pay, which makes compliance more challenging for the employer.

Exemptions

The MWO does not apply to:

- Student interns;
- Work experience students, but only for the first 59 days of employment in any calendar year;
- Registered apprentices under the Apprenticeship Ordinance;
- Domestic workers who take residence in the household free of charge; and
- Other categories of persons not covered by the EO, such as employees who are family members working in their own business and certain ship crew.

For most businesses, the exemptions for student interns and work experience students are likely to be the most relevant.

Student interns are students who are enrolled in an accredited program offered by specified education institutions in Hong Kong, such as universities and higher education institutions or overseas education institutions and undergoing a period of work as part of that program. There is no prescribed time limit under which

student interns are exempt from the MWO although it appears to be the assumption that their length of employment with the employer will be constrained by their own accredited program. This exemption will not be available once the student has graduated, however.

Work experience students must also be enrolled in an accredited program but the key difference is that they need not be working for an employer as part of the program. Because the work experience is not part of a study program and can continue indefinitely, the MWO has imposed a maximum exemption period of 59 days. Further, if exemption is sought, the employer must obtain a statutory declaration from the student to the effect that they have not undertaken work experience with another employer in the same year. This is intended to prevent the work experience student from being denied the SMW more than once every calendar year.

Conclusion

Labor Department representatives have stated in industry briefings that the MWO is as much an employees relations issue as it is

a legal issue. As such, employers need to assess, well ahead of the commencement of the MWO, what they need to do and whether their workforce needs to be engaged to secure any consent to changes in terms of employment, and if so, when the engagement will take place. Some potential items for action include:

- It is likely that with the introduction of the concept of "hours worked," there will need to be clear internal guidelines on how "hours worked" is counted in a particular workplace. For example, there will need to be clear guidelines on when the employee is authorized to remain at work, given the legislative definition depends largely on whether the employee's attendance is at the direction of or the agreement with the employer. The employer may also need to amend employee contracts or introduce a new policy so the "hours worked" is clearly understood. This action item is most pertinent for employers with employees who earn less than HK\$11,500 per month, the record keeping threshold.
- Likewise, there will need to be new infrastructure in place so the hours worked for employees earning less than HK\$11,500 per month can be properly

recorded. Keeping track of hours worked is also critical for the employer to assess whether they are complying with SMW. Employers will need to consider the mechanism for which employees record their time.

- For those employees whose variable pay structures mean that there are wage periods where their income may fall below SMW, employers will need to consider how to remedy the situation. This may mean adjusting the base salary upwards, or paying variable income in installments to spread out the wages. Changes to remuneration structures will require employee consent. Therefore, a communication strategy will need to be developed and implemented.
- Consider whether the exemptions under the MWO will apply, and adjust the hiring practices for student interns and work experience students accordingly.

Jennifer VanDale (Hong Kong)

Tel: +852 2846 2483

jennifer.van.dale@bakermckenzie.com

Bernard Ng (Hong Kong)

Registered foreign lawyer

Tel: +852 2846 2542

bernard.ng@bakermckenzie.com

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News from Italy

The new reform of Italian labor disputes: an attempt to alleviate the workload of Labor Courts

On November 24, 2010 an important reform of certain procedural aspects governing Italian labor disputes came into force after more than two years of collaboration and heated discussions in Parliament and in the media.

This new reform is the most significant part of the so called "Labor Attachment" – so named because it was originally intended as an attachment to the Budget

Law for 2010; which also includes measures such as hard works, reorganization of certain public offices, incentives to employment, and new

sanctions against irregular work. This article concentrates particularly on the new rules and procedures that will, at least in the intention of the law, have a



significant impact on labor disputes, making them quicker and simpler, if not at all avoidable.

Certification of Employment Contracts

The Reform has significantly strengthened the possibility for the parties to apply for certification of any kind of employment contract to a special Certification Board within local labor offices, thus limiting judicial control on the legal characterization of the contract. Besides, specific provisions in the individual employment contract listing typical cases of dismissal for cause or justified reasons shall also be possible and the Court shall have to take them into account in assessing the reasons for termination.

New (Voluntary) Conciliatory Procedure

An attempt to conciliate a dispute before filing a claim in Court is no longer compulsory. In past years, this requirement had indeed failed to work as an effective tool to relieve Labor Courts from their workload and had turned a great number of cases into a legal hurdle with the only result being the delayed filing of a judicial dispute for two months or more.

The Reform now contemplates a voluntary conciliatory procedure, which can be initiated by one party and must be accepted by the other within 20 days. Both parties are now also required to file briefs outlining their respective claims and defenses; if the attempt to conciliate fails, the Board has the obligation to write down, in the minutes of the meeting, a proposal for a settlement that the Labor Court will have to take into consideration.

An attempt to conciliate before filing a lawsuit shall nonetheless continue to be compulsory only in the event that one of the parties intends to challenge the employment contract previously certified by a Certification Board.

Public and Private Arbitration

The parties can resolve any labour dispute before an arbitration panel set up before the Conciliatory Board or the Certification Board or in front of the bodies and according to the procedures that shall be introduced by national collective agreements. They may also set up an arbitration panel privately, whose chairman must be appointed from either university professors or attorneys admitted to the Court of Cassazione.

The arbitrators may be required to decide the dispute on equitable grounds, but without prejudice for the general principles of law and the fundamental provisions regulating the specific subject matter, also originating from the European Union.

Arbitration Clauses

In the future, the parties shall also have the opportunity to include an arbitration clause in the individual employment contract, whereby they agree to remit to an arbitration panel, any future dispute arising from the employment relationship, with the only exception being those regarding termination of contract (which can still be submitted to an arbitration panel but only by express agreement of the parties after the dispute has arisen).

The insertion of an arbitration clause shall only be possible under the following conditions:

- i) The relevant collective agreement allows for this possibility (or, lacking collective regulation within 12 months, arbitration is in compliance with the guidelines that shall be adopted by the Labor Ministry on experimental basis);
- ii) The arbitration clause is agreed upon after the probationary period has elapsed or after 30 days following commencement of employment;
- iii) The clause has been certified by a Certification Board.

Expiration Terms in Labor Disputes

The Reform also contemplates a triple limitation barring remedies against a number of decisions taken by the employer (including dismissal and termination of project-work contracts, posting of employees to different

locations or a change of their duties, transfer of employees resulting from the transfer of a going concern, and for disputes regarding nullity of a fixed term or a different characterization of the working relationship):

- i) Non-judicial objections must be brought in writing, no later than 60 days from the date of the employer's decision (or from the expiration of a fixed-term contract or the termination of employment, if notified in writing. The term does not seem to apply in cases of oral dismissal);
- ii) No later than 270 days following the objections raised in writing, an employee must file a claim before the Labor Court or attempt to conciliate or arbitrate the dispute;
- iii) Finally, in case the employer has rejected the invitation to the conciliatory procedure or this has otherwise failed, application to Court shall have to be filed within the following 60 days.

Failure to comply with any of the above terms makes the remedies no longer admissible.

Conversion of Fixed-Term Contract

In a dispute regarding the nullity of a fixed-term contract, the Labor Court must limit the sentence against the employer to payment of an all-inclusive

indemnity to be assessed within 2.5 and 12 months and calculated on the latest global salary; an exception is provided for conversion by effect of collective negotiation, in which case the indemnity is reduced by half.

According to the majority of commentators and the Labor Ministry, the monetary indemnity above cumulates with automatic re-hiring of the employee in the same or equivalent duties and on a permanent contract.

This provision also applies to disputes pending in Court at the time when this provision of law shall come into force.

Conclusion

In conclusion, the evident purpose of the Italian legislator is to alleviate the workload of Labor Courts and materially reduce (or speed up) the number of judicial proceedings, obliging both employer and employee (or assimilated work providers) to comply with a tighter and compulsory time-frame to propose and resolve a labor dispute.

In the intention of the Legislator, this should be achieved particularly by:

- i) Enlarging and reinforcing the scope of certification of contract thus barring (or at least substantially limiting) subsequent disputes on their interpretation and enforcement;

- ii) Introducing new conciliation and arbitration procedures which, in spite of certain cumbersome requirements of law, should offer new and speedier dispute resolution models alternative to judicial ones;

- iii) Providing tighter terms to challenge some decisions taken by the employer (including most notably all types of termination of contract, except for oral dismissals), thus limiting uncertainties and sometimes sheer speculation (previously, the longer the employee could wait to file certain disputes, up to five years, the larger the claim that would accrue during that time).

All in all, the scope of the reform seems pretty ambitious and has, at least on paper, an undeniable potential to achieve its objective and alleviate the workload of Labor Courts (the latest statistics count over one million cases pending in 2010, with 400,000 new ones added every year). Its effectiveness though, shall ultimately depend on the approach that unions and lawyers shall take towards the new conciliation and arbitration procedures, which traditionally has always been very timid in Italy.

Massimiliano Biolchini (Milan)

Tel: +39 02 76231 310
massimiliano.biolchini@bakermckenzie.com

Alessia Raimondo (Milan)

Tel: +39 02 76231 433
alessia.raimondo@bakermckenzie.com

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The Malaysian Whistleblower Protection Act of 2010

Introduction

In Malaysia, legislative protection of whistleblowers is not a new concept. Legislation mandating officers to disclose the existence of serious offenses involving fraud or dishonesty already exist in certain sectors.

The Whistleblower Protection Act of 2010 (“WPA”) which came into force on December 15, 2010, is intended to provide all-encompassing protection in both the private and public sectors. One of the WPA’s key objectives is to fill in the gaps left by the said sector-specific legislation. The WPA is also a key legislative initiative to combat corruption by facilitating protected disclosures through immunity from civil and criminal actions, confidentiality of information disclosed, and protection from retaliatory action in the workplace.

The WPA will, for the first time, introduce employment-specific criminal liability for retaliatory action in the workplace. Employers in Malaysia should therefore review and, if necessary, implement appropriate revisions to their existing whistleblower policies.

Improper Conduct

To qualify as a protected disclosure, the disclosure must be made to a designated enforcement agency with a reasonable belief as to the improper conduct. “Improper conduct” is defined to include, among other things, conduct constituting a criminal offense or a disciplinary offense. The latter has in turn been phrased widely to include any action or omission which constitutes a breach of discipline in a public body or a private body as provided by law or in a code of conduct, a code of ethics, or contract of employment. Disclosures may be made even where

the individual anticipates that someone is presently or will in the future engage in improper conduct. Similarly, disclosures can still be made where the improper conduct had occurred in the past and the individual is not able to identify the person to whom the conduct relates.

Although the WPA does not provide a definition of what constitutes “reasonable belief,” the English case of *Babula v Waltham Forest College* [2007] IRLR 346 (CA) may provide guidance. In interpreting similar whistleblower protection legislation, the Court of Appeal confirmed that the “reasonable belief” that a wrongdoing has occurred must be based on the facts as understood by the employee. It is therefore a subjective test.

Enforcement Agency

Only disclosures of improper conduct to a designated enforcement agency (“Agency”) will fall under the protective ambit of the WPA. The Malaysian Deputy Minister who tabled the Whistleblower Protection Bill confirmed, in response to the question posed in Parliament as to whether certain well-known political bloggers would be protected by the WPA, that any disclosure to the media will disentitle the individual from WPA protection. The premise for this lies in the fact that any information divulged by the whistleblower to the Agency will be deemed confidential and any disclosure to the media thereafter

constitutes a breach of this obligation.

The Agency is not altogether clear. The WPA sets out a very broad definition of what could constitute an Agency. Any ministry, department, agency, or other body set up by the Federal Government of Malaysia, State Governments, or local governments could be regarded to be an Agency.

At this juncture, it is uncertain whether the designated Agency will be certain existing agencies or a centralized agency to be established in the future. It appears that the latter is more likely. The centralized Agency will be in overall control of all matters relating to the protection of whistleblowers and it will be empowered to conduct investigations into improper conduct and complaints of detrimental action.

Immunity from Civil and Criminal Action

Under the WPA, whistleblowers will be immune from civil/criminal actions or liability as a consequence of the disclosure of improper conduct. This should include any potential defamation action being brought against the whistleblower.

Protection of Confidential Information

All information disclosed in relation to the improper conduct, including any information on the nature of the improper conduct, the identity of the person perpetuating the improper conduct, and the identity of the

whistleblower (including his occupation, residential address, work address, or his whereabouts) will be deemed confidential. Contravention of this confidentiality obligation is an offense and will result, on conviction, to a fine not exceeding RM50,000 or imprisonment for not more than 10 years, or both.

Protection from Detrimental Action

The WPA stipulates that any detrimental action taken against the whistleblower in reprisal is an offense attracting a fine not to exceed RM100,000 or to an imprisonment for a term not exceeding 15 years, or both. In the employment context, detrimental action taken in reprisal may include: termination of employment; withholding of wages or any payment due and payable under contract; refusal to enter into a subsequent contract; or, any act of harassment or intimidation against the employee. Such protection is also extended to include any detrimental action committed against any person related to or associated with the whistleblower.

In the event any such detrimental action occurs, the affected persons may make a complaint to the Agency which will subsequently investigate the veracity of such an allegation. In situations of dire need, the whistleblower and persons related to him or her can also request to be relocated to another place of employment.

Notably, the WPA also introduces civil liabilities against any individual who perpetrates the acts of reprisal. In such circumstances, these individuals will be personally liable for damages and compensation. This is contrasted with the pre-WPA position where there was no personal liability exposure and the whistleblower must first exit the organization and then claim constructive dismissal against the former employer in situations of reprisal.

A whistleblower anticipating that an individual will act in reprisal against him may also take pre-emptive measures by seeking an interim injunction to restrain the person from committing any detrimental acts. This protection is also extended to any person related to, or associated with, the whistleblower.

Revocation of Protection

Similar to comparable laws of other jurisdictions, the protection can be revoked where, for example, the whistleblower himself participated in the improper conduct disclosed or if the disclosure was motivated in bad faith. That said, the protection conferred on the whistleblower will not be limited or affected merely because the improper disclosures do not lead to any disciplinary action or prosecution. Any persons willfully making a false material statement in his disclosure of improper conduct will be liable to a fine not exceeding RM20,000 or to term of imprisonment not exceeding five years, or both.

Investigation by Enforcement Agency

The Agency, upon receiving a disclosure of improper conduct or a complaint that a detrimental action has occurred, will conduct its own investigation after which, a report of the finding must be prepared along with recommendations for further steps to be taken, if any. The Agency is then obliged to inform the whistleblower of the results of the investigations.

It is anticipated that a standard operating procedure will be issued by the Prime Minister's Department concurrent with various publicity campaigns to better illustrate and educate the public on the reporting procedures to be adhered to when making a disclosure or complaint.

Implications of the WPA

Similar to the law in other jurisdictions, the WPA does not obligate individuals to disclose the occurrence of improper conduct and merely seeks to facilitate such disclosures. It does, however, require that employers not stigmatize nor allow its employees to suffer reprisal where he or she does make such disclosures. Any employment agreement or contractual term which purports to prevent its employees from making a protected disclosure, will not be enforceable.

The WPA's introduction provides organizations with a greater impetus to introduce internal whistleblowing policies. This could allow organizations to take pre-emptive action in order to reduce the risk of investigations being conducted by the Agency. As a matter of good practice, organizations should adopt a self-regulatory approach through the introduction of an effective whistleblowing policy and procedure to facilitate the internal reporting of wrongdoing, notwithstanding the lack of a statutory obligation to do so. Not only would such matters be handled relatively quickly, it may be possible to effectively pre-empt any further liability.

Given that the WPA will be of a universal application without constraints as to the sector, this will have broad implications on all employers. Employers are therefore advised to introduce comprehensive whistleblower protection policies, towards encouraging disclosure of wrongdoing.

Serene Kan (Kuala Lumpur)

Tel: +603 2298 7891
serene.kan@bakermckenzie.com

Wei Kwang Woo (Kuala Lumpur)

Tel: +603 2298 7898
weikwang.woo@bakermckenzie.com

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New Employees Food Assistance Law

On October 5th 2010, the Mexican Senate enacted the Employees Food Assistance Law (EFA). The EFA regulates schemes to promote and regulate food assistance for employees, with the main goal to enhance their nutritional health, as well as to prevent diseases related to a malnutrition and to protect their health at work.

Food Assistance is Not Mandatory

As per the terms of the EFA the employer may elect, voluntarily or contractually, to grant food assistance to its employees. It is understood that food assistance is granted contractually when such benefits are included in the applicable Collective Bargaining Agreement (CBA). If the employer decides to provide to its employees food assistance and these benefits are not incorporated in the CBA regulations or the employees are not unionized, then these benefits would be considered to be granted voluntarily by the employer.

Schemes for Granting Food Assistance

The EFA provides that employers may establish basic schemes to grant food assistance to the employees through cafeteria services, restaurants or any other related establishment; and through printed or electronic food coupons. Both food coupons must comply with specific regulations established by the EFA.

The EFA also regulates that the amount and quality of the food assistance to be granted to the employees, will be established by the Ministry of Health, through NOMs (Mexican Official Regulations)

Tax Implications

In all cases, any expenses incurred by the employer in providing cafeteria

services and electronic or printed food coupons will be deductible as per the applicable provisions of the Income Tax (ISR) and Company's Single Rate Tax (IETU) Laws, providing that the employees' income will not be characterized as a basis to determine the social security dues payment as per the Mexican Social Security Law.

This implies that even though the Income Tax Law and the Social Security Law contain applicable provisions that must be met in order to qualify for these tax benefits, employers who are granting these benefits or that will grant them in the future, must not only comply with the tax laws regulations, but also the terms of the EFA.

Penalties

The Ministry of Labor, Ministry of Health and State authorities are responsible for overseeing compliance with the EFA provisions. Failing to comply with the obligations contained in the EFA may result in administrative penalties, such as fines, which may vary depending on the seriousness of the violation, and which are calculated on the basis of the Minimum Wage in force at the time of assessment.

Currently many employers provide food coupons to their employees and/or provide cafeteria services as a

way to enhance the employee's overall benefits and to keep compensation within the market. The EFA regulates the granting of these benefits which are already in place in many work places.

It is important to mention that the Supreme Court and the Labor Courts have issued several decisions in which it has been determined that the granting of this kind of benefit can become (i) a vested right which cannot be eliminated, suspended or reduced unilaterally by the employer, and (ii) it is considered an integral part of the salary for purposes of calculating severance in cases of termination and a portion of this benefit could also be considered "salary" for the calculation of social security contributions.

Réne Pérez-Ruiz (Tijuana)

Tel: +52 664 633 4308
rene.perez-ruiz@bakermckenzie.com

Carlos Martín del Campo (Tijuana)

Tel: +52 664 633 4325
carlos.martindelcampo@bakermckenzie.com

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Major Spanish employment and labor law reform package confirmed and passed into definitive legislation

On September 19, 2010, the new Law 35/2010 on Employment Law Reform came into effect. The law substitutes the emergency employment legislation that was passed by the government last June in response to financial pressures and Spain's 20 percent unemployment rate.

Most of the legal provisions originally passed in June have been maintained and, as such, the new legislation constitutes the most significant employment and labor law reform in recent years. To summarize, the new package of employment and labor legislation includes an array of amendments that aim to:

- Increase flexibility and reduce costs of individual and collective redundancies;
- Create a capitalization fund over the next two years to help fund severance costs for future dismissals;
- Increase incentives for employers to hire employees with indefinite term contracts, and restrict the use of defined term contracts;
- De-regulate temporary employment agencies and placement agencies and extend liability for the use of temporary employment agencies; and
- Substantially increase flexibility in collective negotiations and facilitate decision-making on labor measures, such as collective redundancies and temporary suspensions, temporary reductions to work hours, modification of collective work conditions, agreements opting out of collective bargaining provisions, etc.

The amendments are numerous and substantially modify very different areas of employment and labor law. Before proceeding on any of a broad variety of employment or labor matters, companies should bear in mind the possible amendments to employment law which affect many basic aspects of employee contracting and terminations, including amendments to types of contracts that can be used and existing social security discounts, causes and procedure for redundancy, limits to severance compensation, future payment of severance compensation by means of a new fund, and use of temporary employment and placement agencies. At the same time, the significant changes to the procedure and rules on collective consultations and negotiations from a labor relations standpoint should also be considered, as the changes affect fundamental aspects such as employee representation matters, restrictions on the required length of consultations, alternative dispute resolution mechanisms, provisions on modifications of work conditions and on opting out of provisions under the applicable collective bargaining agreement.

Despite the lengthy and varied nature of the reform package, given the significance of the employment and labor law reform, below we provide a summary of the most notable aspects of the diverse legal amendments and the

definitive new employment legislation as a whole, with reference to the changes that the new law has made to the original emergency legislation from last June.

More Flexible and Less Costly Redundancies

The law substantially facilitates the process and somewhat reduces the costs for companies that make employees redundant as follows:

Less Demanding Definition of Good Cause for Redundancy

The law provides a new definition of the causes for dismissal that are based on economic, technical, organization or productive reasons. The new definition, which now applies to both individual and collective redundancies, is by no means clear, but it does seem to constitute an attempt to lessen the burden of proof on companies in cases of redundancies.

Reduced Required Prior Notice for Individual Redundancies and Other Objective Dismissals

The prior notice required for individual objective dismissals is reduced from 30 days to 15 days. Any notice not provided can still be substituted with pay.

Increased Flexibility Procedurally

In the past, failure to comply with the procedural formalities of an individual objective dismissal (including the failure to pay the employee the correct amount of severance compensation at the time of termination) invalidated the dismissal and, as a general rule, required the company to reinstate the employee with back pay. Under the amendments, failure to follow the correct procedure will result in the dismissal being considered unfair and generally trigger the severance compensation for unfair dismissal, but it will not automatically render the dismissal null and void.

Wage Guarantee Fund and Partial Payment of Severance Costs for New Contracts

The law provides that the Spanish Wage Guarantee Fund (FOGASA) will bear part of the cost of severance compensation for employees who are hired as of June 18, 2010, and who subsequently are made redundant by individual or collective dismissal, so long as the employee has been working for at least one year. The amount that the Wage Guarantee will pay in these cases (and which the Company will not have to pay) is eight days of salary per year worked, which constitutes a substantial saving over the standard 20 days of salary per year that is due for fair redundancies, or the 33 or 45 days of salary per year that is due for unfair redundancies, as the case may be. This partial payment by the Wage Guarantee Fund will only apply until the new Capitalization Fund enters into effect, which should be January 1, 2012, as explained below, and will not apply to any employment contracts entered into prior to June 18, 2010.

Modification to Absenteeism as a Cause for Dismissal

In negotiations with employer associations prior to the labor reform, the employer associations in Spain seriously argued in favor of simplifying

the rules on redundancy due to generalized employee absenteeism. The government has refused to do so, however, and the employment reform has simply reduced the percentage of employee absenteeism that would justify an employer in making an employee redundant. No changes have been made to help clarify how the percentage should be established, and the new law now simply provides that instead of requiring five percent absenteeism at a company, the company can make an employee redundant if the general percentage of absenteeism is 2.5 percent.

Additional Modifications for Collective Redundancies

Additional amendments affect the collective redundancy procedure, as discussed below.

Creation of a New Capitalization Fund

The new definitive law confirms the text of June provisions to provide that within one year, the Government and the most representative unions and trade organizations should regulate the creation of a so-called “Capitalization Fund” for employees, to be funded apparently with company contributions, although the law provides that the Fund will not entail an increase to the Company’s social security contributions. The Fund should be operational on January 1, 2012.

The contributions made on behalf of employees to the Capitalization Fund will be available for employees in case of dismissal, in case they change their work place location, retirement, or for the development of certain training activities. Once the Fund is operational, the severance compensation the employer will need to pay employees dismissed will be reduced by the same number of days of salary per year worked as the amount of the contributions made to create the Fund.

Measures that Aim to Reduce the Use of Defined Term Contracts and Promote Employers to Hire Employees on an Indefinite Term Basis

New Maximum Length of Defined Term Contracts for a Specific Task or Service

Defined term contracts that are based on the limited duration of a particular task or service are limited to a general maximum term of three years. If agreed in the industry level collective bargaining agreement, the maximum may be up to four years. If the maximum term established by law or collective bargaining agreement is exceeded, the employee will become an indefinite term employee. These new maximum limits will apply only to contracts entered into as from the date that the new employment law reform came into effect.

New Limits on the Repeated Use of Defined Term Contracts

The prior legislation provided that employees who worked through two or more contracts (either directly or through a temporary employment agency) for a period of over 24 months in any 30 month period for the same job position and at the same company, would become indefinite term employees. The new legislation now clarifies that employees who work through two or more defined term contracts (either directly or through a temporary employment agency) for a period of over 24 months in any 30 month period at the same company or within a group of companies, or as a result of a transfer of undertakings, will become indefinite term employees, regardless of whether the job positions under the contracts are the same or not.

Increases to Severance Compensation Established for Defined Term Contracts for Exceptional Accumulation of Work or for a Specific Task or Service

Severance compensation will continue to be eight days of salary per year worked for these types of defined employment contracts that were entered into in the past and through the end of 2011. As of January 1, 2012, however, the severance compensation will increase to nine days of salary per year worked, and subsequently to ten days of salary per year worked as from January 1, 2013, to 11 days of salary per year worked as from January 1, 2014, and to 12 days of salary per year worked as from January 1, 2015.

Social Security Subsidies for Contracting Employees as Indefinite Term Employees Prior to December 31, 2011

Three new subsidies for social security contributions are established for indefinite term contracts entered into on or before December 31, 2011. The new subsidies range from 800 to 1,400 Euros per year and can last up to three years depending on the circumstances.

Extended Application of Indefinite Term Contract to Encourage Companies to Contract Employees on an Indefinite Term Basis

The law substantially extends the use of the so called “contract to promote indefinite contracts” (or “*contrato de fomento*”), which allows companies to terminate contracts for redundancy at a cost of 33 days of salary per year worked (capped at a maximum of 24 months of salary) in the case of unfair redundancy that is due to economic, technical, productive or organization reasons, instead of the standard 45 days of salary per year worked that applies to unfair dismissal in general. Coupled with the Wage Guarantee Fund’s payment of eight days of salary per year worked, the law in essence reduces costs for unfair redundancy to as low as 25 days of salary per year worked. Given



the new lax requirements for the use of this special contract, companies currently considering hiring employees will most likely be able to take advantage of this contract in most cases of new hires.

Temporary Employment Agencies and Placement Agencies

Temporary Employment Agencies

In general, the law increases the rights of temporary employment agency employees and amends the Law on Temporary Employment Agencies to include provisions that had already been established under court case law. Specifically, the new law (i) guarantees employees lent by temporary employment agencies not only the same salary as employees in the same job position at the company where services are being provided, but the same essential conditions of employment, such as works hours, night work, vacations, rest periods and holidays, and the right to use common services such as the company cafeteria, day care center, and other common services at the company where such services are provided, (ii) requires that adequate measures be taken to facilitate access training programs for temporary employment agency employees at the

company where services are being provided, which is a new requirement introduced by the new definitive law, (iii) establishes joint liability of the company where services are provided not only for salary and social security liabilities of the temporary employment agency employee, but also with respect to severance compensation, (iv) temporary agencies will be permitted to provide services in industries in which they were previously prohibited from doing so (construction, mining, marine platforms, etc.), although limitations should be established by collective bargaining prior to March 31, 2011, and (v) as of April 1, 2011, limitations and prohibitions on the use of temp agency contracts should be eliminated, including prohibitions in the public sector (without prejudice to the rights of functionaries).

Placement Agencies

Until recently, only not-for-profit placement agencies were legally permitted. Private for-profit placement agencies will be permitted as a result of these amendments, although before the amendments are effective, they will need to be implemented by regulations. For the time being, then, private for-profit placement agencies are still not permitted. The law provides that for-profit placements activities will need to

be coordinated with employment services and will be subject to the corresponding authorization from the public employment service.

Increased Flexibility in Collective Negotiations to Facilitate Decision-Making and Labor Measures

The labor reform in the new law addresses a number of issues that traditionally have complicated reaching company level agreements with employee representatives on labor measures. The amendments can be divided into general amendments that affect how consultations should be handled in most cases where consultations are required, and specific amendments that affect the procedure for certain types of labor measures. Following, we limit our summary to the general amendments, although before proceeding with specific procedures, companies should bear in mind possible further amendments.

Alternative Means of Representing Employees and Employer in the Absence of Employee Representatives

The new law responds to the issue of how to proceed when the law requires consultation with the works council or other employee representatives but when a company lacks any works council or employee representatives. Under the new law, which has modified the provisions of the June law, employees who lack a works council or employee representatives can choose other representatives when consultation is required for substantial modifications of work conditions, collective dismissals or collective suspensions of employment, collective relocations, opt-out procedures from salary minimums under the CBA or temporary reduction in work hours. This alternative constitutes one of the most novel aspects of the employment law reform and aims to foment collective negotiations.

Restrictions on Possible Bases to Invalidate Collective Agreements

In addition, the recent new law adds that various collective agreements reached by the company and employee representatives will be presumed to be valid and can only be considered invalid if the agreement was entered into on the basis of fraud, bad intent, threat or abuse of influence, or abuse of law.

Limits to Length of Required Consultation

The period of negotiation and consultation required in the procedure for substantial modification of collective work conditions or collective relocations is reduced to a maximum of 15 days (instead of the previously existing minimum of 15 days). In consultations on collective redundancies, the maximum term of consultation is established as 30 days (or 15 days in companies with less than 50 employees), such that consultations cannot exceed this term, whereas before it was the minimum term.

Mediation and Arbitration as Alternatives to Consultations

The law emphasizes alternatives in the event negotiations within required consultations come to a stand still, such as mediation or arbitration, even in negotiations on the modification of employment conditions established in the applicable collective bargaining agreement. In the case of collective redundancies and substantial modification of collective employment conditions, for example, the applicable consultation period can be substituted by agreement between the parties with any mediation or arbitration procedures applied at the company. The law also requires, for example, that industry agreements should establish mechanisms to resolve cases where the

parties cannot reach an agreement and that binding arbitration must be included as a mechanism.

Other

In addition to the numerous modifications outlined above, the new law establishes rules on salary in kind, which cannot be more than 30 percent of the employee's fixed salary or substitute minimum wages. The new law also modifies the administrative role of certain physicians in granting sick leave, provides for a major reform of the Labor Court Procedure Act, establishes measures to train and "recycle" certain types of employees, and amends training contracts.

Conclusion

The numerous amendments clearly constitute the most significant employment and labor law reform package in years. Many of the modifications introduced are still pending development by additional laws or regulations, such as the Capitalization Fund, or through pending collective bargaining, such as the de-regularization of temporary employment agencies. How the new general principles will finally be structured and the impact that the reform package will have on Spain's current approximate 20 percent unemployment rate is yet to be seen.

Teresa Candel (Madrid)

Tel: +34 91 391 5980
teresa.candel@bakermckenzie.com

Margarita Fernandez (Madrid)

Tel: +34 91 230 4579
margarita.fernandez@bakermckenzie.com

Luisa Gomez (Madrid)

Tel: +31 91 230 4608
luisa.gomez@bakermckenzie.com

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Update on Swedish Legislation

Hiring Third-Country Nationals

In order to harmonize Swedish legislation with the Directive of the European Parliament 2009/52/EG, amendments to current Swedish legislation within the immigration area have been suggested. The proposal provides for sanctions and measures against employers of third-country nationals who illegally stay in Sweden.

Proposed New Regulation

If the proposed legislation is passed, an employer that hires a third-country national (i.e., a person from outside the EU) will be obliged to keep a copy of the documents proving that the employee is allowed to stay and work in Sweden. In other words, that the employee holds both valid work and resident permits. The copy of the documents should be kept by the employer throughout the employment period and for an additional six months after the employment period has ended. Furthermore, the employer will be obliged to notify the Swedish Tax Agency of the employment of a third-country national. In addition, the proposed new legislation covers a wider variety of situations where an employer could potentially be exposed to paying damages for employing third-country nationals that do not have adequate permits to work in Sweden. For example, if a contractor hires a sub-contractor that uses illegal workers, both the contractor and the sub-contractor can be held jointly liable and subject to penalty fees (in addition to the obligation to pay salary to the illegal workers). Furthermore, there will be a presumption that an illegal worker has been employed for at least three months and that the agreed salary is at least as high as under the applicable collective agreements. The new legislation is suggested to come into force on July 20, 2011.

Concluding Remarks

The new legislation imposes stricter requirements on employers to verify third-country nationals' right to stay and work in Sweden. Moreover, the legislation aims to prevent unreasonable employment terms and conditions for such employees.

New Rules On Whistleblower Hotlines

As of November 1, 2010, the Swedish Data Inspection Board (the "DIB") has decided not to maintain the current obligation for companies to request permission with the DIB to implement a whistleblower hotline in Sweden. Instead, the limitations that the DIB has developed over time regarding companies' whistleblower hotlines/policies and that were previously communicated through the approval of an application, have been added to the DIB's regulation on "providing an exemption from the prohibition preventing entities other than official authorities from processing personal data relating to offenses etc." The changes are motivated by, *inter alia*, practical reasons, since almost all companies applying for permission were deemed permitted to implement a whistleblower hotline.

Applicable Limitations for the Use of a Whistleblower Hotline

The following limitations apply when implementing and using a whistleblower hotline:

- i) Only severe matters may be reported, such as serious financial misconduct;
- ii) Only managers and key employees may be reported and processed

in the system;

- iii) The whistleblower hotline shall be voluntary to use and may only be used as a complement to the employer's ordinary reporting system (such as the usual managerial hierarchy); and
- iv) The employer shall comply with the Swedish Personal Data Act.

This fact that the Swedish Personal Data Act shall be complied with means that the employer, *inter alia*, must make sure that sensitive data is processed only where it is absolutely necessary and that adequate safeguards are provided for when transferring personal data to a country located outside of the European Economic Area. Moreover, under certain circumstances, the employer may need to enter into a processor agreement and notify the DIB of its personal data processing.

Concluding Remarks

The removal of the obligation to apply for a permission to implement a whistleblower hotline in Sweden facilitates the implementation process for employers. However, it should be noted that the removal of the obligation does not imply any changes to the rules on whistleblower hotlines as such – the same limitations as before apply. The main difference is that these changes will now be codified instead of communicated after an application to the DIB.

Sten Bauer (Stockholm)

Tel: +46 8 566 177 16
sten.bauer@bakermckenzie.com

Åsa Nelhans (Stockholm)

Tel: +46 8 566 177 16
asa.nelhans@bakermckenzie.com

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The changing labor landscape: what every employer should know about the NLRB's August decisions

While labor law legislation such as the Employee Free Choice Act has stalled in Congress, unions continue to push for labor law reform through the NLRB. In this forum, they may have found a receptive audience.

At the NLRB, unions can rely on having majority support as three of its five members are former union lawyers, and a former NLRB attorney fills the role of Acting General Counsel. Moreover, after announcing that it would reconsider nearly 100 decisions pending in the appeals court in the wake of the U.S. Supreme Court's decision in *New Process Steel*, the NLRB has begun to decide cases raising significant labor policy issues. In August alone, the Board issued 118 decisions. While employers should continue to monitor legislative developments, more rapid change is likely to take place at the NLRB in the form of new decisions and rulemaking favorable to unions. Employers will need to revisit their labor strategies and policies in light of these decisions, which impact both union and non-union employers.

Composition of the NLRB

The composition of the National Labor Relations Board (NLRB) can dramatically impact the labor landscape for employers. Traditionally, the NLRB is comprised of five members – three members from the President's political party and two from the opposing party. However, from December 2007 to March 2010, only two of the five seats were occupied – one by Chairman Wilma Liebman (D), and the other by Member Peter Schaumber (R). The empty seats were due to expired terms and political wrangling that made it impossible for either party to confirm

new candidates. Since the NLRB could only act if both members agreed, most of the cases involving significant labor policy questions were deferred. By practice and tradition, the NLRB generally does not establish new law or reverse prior precedent without three affirmative votes and typically does so only when there is a Board of four or five members.

Over the next several months, the NLRB returned to its full complement of five members. In March 2010, President Obama exercised his power to make recess appointments by appointing Democrats Craig Becker and Mark Pearce to the NLRB. The Senate subsequently confirmed Member Pearce and, in June, a Republican, Brian Hayes. In the meantime, the U.S. Supreme Court invalidated all of the decisions issued by the two-member NLRB, finding that a quorum of at least three members is required for NLRB decisions. The five-member NLRB then had to decide how to handle the several hundred cases potentially affected by *New Process Steel* and make a final push to issue decisions before Member Schaumber's term expired in August – which would require the NLRB to reassign all cases involving Member Schaumber to a new three-member panel. As a result, the NLRB issued 118 decisions during the month of August. These decisions have expanded labor law in ways favorable to unions, particularly when it comes to union organizing and election conduct. Some

of the most significant decisions are discussed below.

The NLRB's Decisions of August

Union Organizing and Election Conduct

The NLRB's recent decisions reflect increased scrutiny of employer conduct during union organizing campaigns. In several cases, the NLRB overturned the results of the election based on the union's objections and ordered a rerun election. For example, in *Mandalay Corp. d/b/a Mandalay Bay Resort & Casino*, 355 NLRB No. 92 (August 17, 2010), the NLRB held that the employer unlawfully solicited grievances with the express or implied promise to remedy the grievances when it held a series of "focus meetings" with security officers shortly after the union filed a petition to represent the officers. During these meetings, the employer discussed the union campaign and asked officers about work-related concerns. The employer also reinstated overtime opportunities for full-time officers after the officers raised concerns to the CEO during one meeting. While the record was unclear whether this occurred prior to the election, the NLRB determined that the employer's conduct violated the Act and directed a new election. The NLRB further found that there was no evidence that the employer had a past practice of soliciting grievances as it had done before the union election. In doing so, the NLRB dismissed evidence that the employer had an established practice

of holding regular shift meetings during which employees raised employment concerns with management.

Practical Tip: Holding periodic meetings with employees for the stated purpose of discussing work-related concerns can help employers maintain open lines of communication with employees and possibly avoid union organizing campaigns. Moreover, if a campaign is initiated, employers with a past practice of discussing work-related concerns with employees can continue to meet with employees and address their concerns in a legal manner.

The NLRB similarly directed a second election in *Stabilus, Inc.*, 355 NLRB No. 161 (August 27, 2010), based in part on its finding that the company unlawfully prohibited employees from wearing pro-union T-shirts during an election campaign. While the employer had a pre-existing uniform policy, the NLRB determined that the company selectively enforced its policy against union supporters and applied it in a disparate manner to Section 7 activity relative to comparable, non-Section 7 activity because the employer had permitted isolated exceptions (i.e., allowing employees to wear Carolina Panthers T-shirts before the Super Bowl, costumes during the Halloween period).

Employer Property Rights

The NLRB also ordered a rerun election in *Research Foundation of the State University of New York at Buffalo*, 355 NLRB No. 170 (August 27, 2010), based on its holding that a SUNY official acted unlawfully when he insisted that a union representative meeting with an associate in that associate's office leave the building or he would call the police. According to the NLRB, SUNY's conduct, which occurred on state property and was witnessed by a potentially determinative voter, reasonably tended to interfere with

employee free choice in the election for union representation.

Practical Tip: Employers generally have the right to control access to property which they occupy; however, it is important for employers, particularly government contractors, to ensure they possess a property interest in the workspace before excluding a union representative.

Employee Discipline and Misconduct

The NLRB's August decisions also reflect an increased scrutiny of employer discipline of employees during union organizing campaigns as well as a more expansive view of protected activity. In *Altercare of Wadsworth Center for Rehabilitation & Nursing Care, Inc.*, 355 NLRB No. 96 (August 19, 2010), the NLRB held that the employer's verbal warnings to employees that they must refrain from discussing union matters during work hours were unlawful because verbal warnings were the first step in the employer's progressive disciplinary system. It did not matter that the employer did not take adverse action or memorialize the verbal warnings in the employees' personnel files. See also *Faurecia Exhaust Systems, Inc.* 355 NLRB

No. 124 (August 26, 2010) (employee's suspension for asking for unit employees' contact information in violation of employer's personnel privacy policies was unlawful because the employee only asked for the information – he did not actually receive it).

Practical Tip: Significantly, in *Altercare*, the NLRB held that the employer's verbal directions to employees to remove pro-union buttons were not unlawful because the directions were not part of the progressive disciplinary system and did not lay a foundation for future disciplinary action against the employee. The parties' collective-bargaining agreement specifically provided that "verbal counseling and coaching shall not count for purposes of progressive discipline." While a well-defined policy can help employers defend against NLRB charges, employers should proceed cautiously when directing or disciplining employees during an organizing campaign.

In *Plaza Auto Center, Inc.*, 355 NLRB No. 85 (August 16, 2010), the NLRB held that the employer unlawfully terminated an employee for communications in the course of



protected activity notwithstanding the employee's use of obscenities and threatening language. In *Plaza Auto*, an employee began questioning his employer's policies concerning breaks, restroom facilities, and compensation. In response, his supervisor told him that he did not need to work at Plaza if he did not like the policies. The employee then began calling the supervisor obscene names, stood up and pushed his chair aside, and said that, if he was fired, the employer would regret it. Following this outburst, Plaza Auto terminated the employee for misconduct. While the administrative law judge determined that the employee's conduct and profanity were physically threatening, if not menacing, and thus not protected by the NLRA, the NLRB dismissed this finding. According to the NLRB, the employee's conduct was not "so violent or of such serious character as to render the employee unfit for further service." See also *Kiewit Power Constructors Co.*, 355 NLRB No. 150 (August 27, 2010) (employer unlawfully terminated two employees for misconduct; threats that "it was going to get ugly" if they were terminated and that the supervisor "better bring his boxing gloves" were protected).

Union Conduct During An Organizing Campaign

The NLRB's recent decisions also suggest that it is less eager to sustain unfair labor practice charges against unions or to overturn union election victories based on the employer's objections. In *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (August 27, 2010), the NLRB held that pro-union letters sent from a U.S. Congressman and a New York State Senator to the employer's employees did not improperly interfere with the election. The NLRB dismissed the employer's argument that the letters could have improperly led employees to believe that the government supported the union's bid for election.

Court Actions Challenging Employee Conduct

In *DHL Express, Inc.*, 355 NLRB No. 144 (August 27, 2010), the NLRB held that both DHL and its consultant unlawfully threatened to sue an employee in court for defamation based on an article in the Union's newsletter.

Notwithstanding the lack of a factual basis for the employee's claim that a partner consultant had admitted to "misrepresenting union members and lying to them about 'stealing' their money," the Board found that the statement was protected. It further noted that while the consultant discussed the matter with more than one attorney, no lawsuit was ever filed.

Bargaining and Unilateral Changes

An employer's bargaining obligations frequently are the subject of litigation. In *E.I. DuPont de Nemours and Company*, 355 NLRB No. 177 (August 27, 2010), the NLRB found that the employer's unilateral changes to employee benefit plans after the expiration of the collective bargaining agreement were unlawful because it had failed to negotiate with the union to impasse. According to the Board, while the employer had established a past practice of making unilateral changes, it had not done so during the hiatus periods between labor contracts.

In *Stella D'oro Biscuit Company, Inc.*, 355 NLRB No. 158 (August 27, 2010), the NLRB found an employer's offer to allow a union to view an audited financial statement was not a valid accommodation of a union's lawful information request. Instead, when an employer claims an inability to pay, the employer must provide an actual copy of the financial statement to the union (particularly if the union agrees to keep the information confidential).

Union Conduct Against Third-Parties

In *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506*

(*Eliason & Knuth of Arizona, Inc.*), 355 NLRB No. 159, (August 27, 2010), the NLRB found that the Union's display of large stationary banners did not violate the Act, which makes it an unfair labor practice for unions or their agents "to threaten, coerce, or restrain" persons or industries engaged in commerce with an object of "forcing or requiring any person to . . . cease doing business with any other person." While the banners announced a "labor dispute" and sought to elicit "shame on" the employer or persuade customers not to patronize the employer, the NLRB found that the display did not constitute picketing or coercive nonpicketing.

Overruling Prior Precedent

Some of the most controversial cases have yet to be decided. In August, the NLRB granted review and requested public comment through the filing of amicus curiae ("friend of the court") briefs on whether the NLRB should modify or overrule its decisions in two key cases that address the issue of when a labor union's support among employees can be challenged. In *Rite Aid Store #6473* and *Lamons Gasket Co.*, the Board will reconsider its 2007 decision in *Dana Corp.*, 351 NLRB 434, holding that when a union is voluntarily recognized, whether or not a card-check or neutrality agreement existed, no election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition.

In *UGL-UNICCO Service Company and Grocery Haulers, Inc.*, the Board will review its 2002 decision in *MV Transportation*, 337 NLRB 770, concerning the duties of a successor employer to an incumbent union. Before *MV Transportation*, under the

successor bar doctrine, if a successor employed a majority of predecessor employees represented by a union, then the union's majority status could not be challenged for a reasonable period to allow the new company and union a period to negotiate. *MV Transportation* overruled the successor bar doctrine and instead made the presumption of majority status rebuttable and open to challenge by the employer, employees, or a rival union.

Conclusion

As the above summaries demonstrate, the NLRB is taking an active role in reshaping labor law and issuing decisions that reverse prior precedent and expand labor law in ways favorable to unions. Both union and non-union employers should carefully monitor NLRB developments. Those who don't risk NLRB charges and the threat of a re-run election in those cases where employees rejected union representation.

Douglas Darch (Chicago)

Tel: +1 312 861 8933

douglas.darch@bakermckenzie.com

Ryan Vann (Chicago)

Tel: +1 312 861 2588

ryan.vann@bakermckenzie.com

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From the Bookshelf

Baker & McKenzie's Global Employment Practice is pleased to present the 2011 edition of the *Global Mobility Handbook*. This handbook identifies the key global mobility issues to consider regardless of the countries involved. Although the issues are inevitably intertwined, the

chapters separately deal with immigration, employment, employee benefits and taxation. The handbook provides an executive summary, identifies key government agencies, and explains current trends before going into detail on visas appropriate for

short-term business travel, training, and employment assignments for 42 jurisdictions. For a copy of this handbook, please contact Denise Gerdes at denise.gerdes@bakermckenzie.com

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Baker Showcase

Of particular note, **Stewart Saxe** of the Toronto Office, was granted the prestigious award of "Fellow" from the Chairman of the Board of Directors and the President of the Human Resources Professional Association ("HRPA"). The HRPA is the pre-eminent human resources professional association in Canada. Amongst its role, it is the statutory body that accredits and regulates human resource professionals. The Fellow Award is rarely awarded and is reserved for those that have made an "exemplary contribution to the human resources management profession." This is only the sixth time that the "Fellow" award had been granted in the HRPA 75-year history.

Corporate Compliance

Employer Corporate Compliance: A New Era of Global Enforcement and Liability:

On September 28, 2010, in San Diego, California, our attorneys hosted a seminar which discussed the legal, practical and cost effective strategies for responding to complaints by whistleblowers and others in the workplace; how to conduct domestic and cross-border investigations; and how to establish a culture of compliance.

Also covered at the event were new laws such as Dodd-Frank and Sarbanes-Oxley. Speakers included Brian Arbetter, Sanjay Bhandari, Colin

Murray, and Howard Wisnia (San Diego) and Cynthia Jackson (Palo Alto).

Employee Whistleblower and Bounty Hunter Claims: How to Manage, Investigate, and Defend Here and Abroad: The North America Compensation and Employment Law Practice Group hosted this seminar on November 3, 2010, in New York, New York. Our attorneys discussed the legal, practical and cost effective strategies for responding to complaints by whistleblowers and others in the workplace, conducting domestic and cross-border investigations and

establishing a culture of compliance. Speakers at the event were Cynthia Jackson (Palo Alto), Rob Lewis (New York), and Bob Mignin (Chicago). Also presenting at the seminar were Paul McNulty (Washington, D.C.) and Doug Tween (New York) from the Tax and Corporate and Securities practice groups.

How to Make Whistleblowing Work: On November 25, 2010, in Kuala Lumpur, Malaysia, Wei Kwang Woo (Kuala Lumpur) presented on the **legal aspects of whistleblowing in Malaysia** at a conference organized by the Malaysian Institute of Accountants.

Executive Compensation & Employee Benefits

What the Heck is a Form 3922 and What Do I Do With It?: In this November 16, 2010 webinar, our attorneys focused on **employee communications to accompany the Form 3922.** Speakers included Ed Burmeister and Alison Wright of the San Francisco Office.

Employment Counseling

Ute Krudewagen and Susan Eandi of the Palo Alto Office co-authored an article titled, **“Designing Employee Policies for an International Workforce”** that was published in the June 2010 issue of *Workspan*, a monthly magazine published by WorldatWork.

Jennifer Van Dale of the Hong Kong Office was quoted in an article entitled, **“Beware of leaving ‘footprints’: Employers have a right to monitor the use of their equipment within legal privacy guidelines,”** which appeared in the *South China Morning Post*, on June 5, 2010

Focus on Latin America: Legal Developments, Strategies and Opportunities for U.S. Companies: This seminar, which addressed **U.S./Latin America cross-border issues in employment, FCPA anti-corruption, corporate, and**

intellectual property, was held on September 1, 2010, in San Diego, California. Speakers included Brian Arbetter (Chicago).

Focus on Spain & Eastern Europe: This seminar, the first in an on-going series of **informal conversations with employment attorneys from around the globe,** was hosted by our attorneys on October 6, 2010, in San Diego, California. Each discussion allows the visiting attorney and the audience to explore the **latest labor and employment developments and workplace topics.** Speakers at this event included Brian Arbetter (San Diego), Piotr Rawski (Warsaw), and Alex Valls (Barcelona).

Privacy in the Workplace: This breakfast briefing, which is part of the San Diego Office’s Breakfast Briefing Series, was held on October 12, 2010. Our attorneys addressed the **balancing act that exists between a company’s need and right to obtain information about its employees, both current and prospective, and the concern for the employee’s individual privacy.** Speakers included Brian Arbetter (San Diego) and Lothar Determann (Palo Alto).

Navigating Uncertain Waters: Effective Leadership in Today’s Market: At the 2010 Mid-Year Meeting of the National Association of Professional Background Screeners in LaJolla, California on October 12, 2010, Brian Arbetter (San Diego) and Lothar Determann (Palo Alto) presented on the topic of **“Background Checks and Global Data Compliance.”**

Transitioning Your HR Focus From Local to Global: On October 15, 2010, HRMAC hosted this breakfast briefing at Baker & McKenzie’s Chicago Office. Brian Arbetter (Chicago), moderated a panel which addressed a number of **legal, business, and HR issues that arise when a business expands into new territories.**

Hong Kong Association of Southern California’s International Conference: On October 19, 2010, in San Diego, California, our attorneys addressed the topic of **“Recent Employment and Compliance Developments in Hong Kong and China.”** Speakers at the event included Brian Arbetter and Collin Murray of the San Diego Office.

European Employment Law: Briefing and Update: On November 30, 2010, Baker & McKenzie hosted this event in the New York Office with the Federation of European Employers and Clark S Herman Associates. Speakers at the event included Denise Broussal (Paris) and Rob Lewis (New York).

Do’s and Don’ts for a Successful Employee Relationship: This seminar was held on December 9, 2010 in San Diego, California. Our attorneys discussed **the contracts, handbooks and performance documentation needed for a successful employee relationship.** Speakers included Brian Arbetter and Colin Murray of the San Diego Office.

Annual California Employer End of Year Update: This seminar was held on December 14, 2010 in Palo Alto, California and provided participants with a **year-end update on California employment issues and challenges for 2011.** Speakers at the event were Susan Eandi, Jenni Field, Cynthia Jackson, Ute Krudewagen, Matt Schulz, Michael Westheimer and Alison Wright of the Palo Alto Office.

Global Equity Services

Wacky Grant Provisions: This webinar, held on September 29, 2010, addressed the **provisions that lurk in many plan documents and award agreements that seem harmless enough but often can have unintended (and unfavorable) consequences for**

the plan sponsor. Speakers included June Ann Burke (New York) and Alison Wright (San Francisco).

Global Equity Training Series—Advanced Training: This webinar series consisted of three sessions, the first being “**Tax and Compliance Issues in ‘Top’ Countries,**” on November 3, 2010; discussed the **tax and compliance issues for offering equity awards in key countries where most companies grant awards or would like to grant awards, such as Australia, Canada, China, France, India and the U.K.** The second session entitled, “**Post-Grant Changes to Awards, Global Recharge Arrangements, and IFRS 2,**” held on November 10, 2010, examined the **impact of different corporate transactions (such as mergers, reorganizations, acquisitions and spin-offs) on international equity awards.** The final session, “**Globally Mobile Employees,**” was held on November 17, 2010, and reviewed the many **challenges posed by equity awards held by globally mobile employees.**

An Overview of Filing/Reporting Requirements for Global Employee Stock Plans: In this webinar, which was held on December 16, 2010, our attorneys discussed **year end planning issues for global equity professionals.** Speakers included Jennifer Kirk (San Francisco) and Brian Wydajewski (Chicago).

Global Immigration & Mobility

Tony Haque, of the London Office was quoted in an article entitled “**City lawyers protest UK Gov’t proposed cap on immigration,**” which appeared in the September 2, 2010, issue of *LegalWeek*.

Effective Strategies to Manage Global Workforce Mobility: Employment and Tax Issues Related to Transfers, Secondments, Rotations and Global Employment Companies: On September 29, 2010,



in Houston, Texas, this webinar presented **practical advice for any company which is creating, expanding or contracting its global workforce.** Speakers included David Ellis (Chicago) and Scott Nelson (Houston).

Immigration Enforcement and Compliance: This breakfast briefing was held on October 6, 2010, Palo Alto, California. Our attorneys addressed the **immigration and employment enforcement and compliance issues and arise when moving employees around the world.** Speakers at the event included Jenni Field (Palo Alto), Betsy Morgan (Chicago), Matt Schulz (Palo Alto), and Paul Virtue (DC).

Global Changes to Immigration: This webinar, discussing **global compliance trends,** was held on December 9, 2010. Speakers included Alan Diner (Toronto), Raul Lara-Maiz (Monterrey), Pamela Mafuz (Madrid), Ginger Partee (Chicago), and Grace Shie (Hong Kong).

International Executive Mobility

One World International Benefits Group: On July 15, 2010, in Chicago, Illinois, Kerry Weinger spoke on “**International Assignment**

Considerations for Multinational Employers.”

Essentials of International Assignment Management-2010: This webinar sponsored by IOR Global Services addressed the hot topics of **Employment Law and Benefits Considerations in International Assignments** was held on October 13, 2010 and speakers included Kerry Weinger (Chicago) and Brian Arbetter (Chicago).

Essentials of International Assignment Management: This webinar, sponsored by IOR Global Services, addressed the hot topic of **Employment Law & Benefits Considerations in International Assignments,** on October 13, 2010. Speakers included Brian Arbetter (San Diego) and Kerry Weinger (Chicago).

Labor Relations/Trade Unions

Andreas Lauffs of the Shanghai Office, was quoted in an article entitled, “**Rising wages there may lead to higher prices here**” on the topic of **rising costs for Chinese manufacturers getting passed along to U.S. companies.** The article appeared in the June 17, 2010 edition of *USA Today*. He was also quoted in an article entitled “**Trainee**

Workers at Issue in China” on the widely used technique by foreign companies which hire large number of trainee workers at less than the legal minimum wage in an effort to keep costs down. The article appeared in the June 16, 2010 edition of the *Wall Street Journal*.

On June 16, 2010, the **International Labour Organization (ILO)** announced that Kevin Coon of Baker & McKenzie’s Toronto Office was appointed the **Employers’ Delegate to the ILO Committee for HIV/AIDS**.

Labor Management Relations:

This conference, sponsored by American Conference Institute (ACI), was held on October 28, 2010 in New York, New York. Our attorneys moderated a panel consisting of General Counsels and VP’s of several Fortune 500 companies entitled, **“In-House Counsel and HR Officials Roundtable on Labor Management Relations: Adapting to the New NLRB, Containing Costs, and Managing Workforces Through a Difficult Economy.”** Brian Arbetter (Chicago) acted as Moderator at the event.

US/UK Labor Law and Equal Pay Act: This client roundtable program was hosted by our attorneys in the

Chicago Office on November 1, 2010. Speakers included Brian Arbetter, Andrew Boling, Doug Darch, Carole Spink (Chicago) and John Evason, Daniel Ellis, and Monica Kurnatowska, (London).

Mark Ellis of the Toronto Office was highlighted in an article entitled **“BC Law Society to Publish One More Discipline,”** which appeared in *The Lawyers Weekly*, on November 19, 2010. The article focused on his victory at the Supreme Court of Canada on behalf of our client Native Child and Family Services of Canada, wherein the SCC dismissed the appeal of the Communications, Energy and Paperworkers Union (“CEP”).

Pensions

Arron Slocombe of the London Office authored an article entitled, **“Walking the Tightrope,”** tackling the delicate balancing act employers have to perform over member choice and

risk reduction, which appeared in the October 2010 issue of *Pensions World*.

Pensions Breakfast Briefing: This breakfast briefing was held on November, 23, 2010, in London, England. The briefing dealt with the **issues of auto-enrollment, pensions tax relief and RPI/CPI**. Speakers included Robert West, Arron Slocombe and Jonathan Sharp.

Trustee Governance Seminar: This seminar which addressed the **topic of trustee governance**, was held on December 14, 2010, in London, England. Speakers at the event included Chantal Thompson and Sue Tye of the London Office.

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Locations Worldwide

Argentina - Buenos Aires

Avenida Leandro N. Alem 1110
Piso 13
C1001AAT Buenos Aires
Tel: +54 11 4310 2200
Fax: +54 11 4310 2299

Australia - Melbourne

Level 19 CBW
181 William Street
Melbourne, Victoria 3000
Tel: +61 3 9617 4200
Fax: +61 3 9614 2103

Australia - Sydney

Level 27, AMP Centre
50 Bridge Street
Sydney NSW 2000
Tel: +61 2 9225 0200
Fax: +61 2 9225 1595

Austria - Vienna

Schottenring 25
1010 Vienna
Tel: +43 1 24 250
Fax: +43 1 24 250 600

Azerbaijan - Baku

The Landmark Building
96 Nizami Street
Baku AZ1000, Azerbaijan
Tel: +994 12 497 18 01
Fax: +994 12 497 18 05

Bahrain - Manama

6th Floor, Al Salam Tower
P.O. Box 11981, Manama
Tel: +973 17 538 800
Fax: +973 17 533 379

Belgium - Antwerp

Meir 24, 2000 Antwerp
Tel: +32 3 213 40 40
Fax: +32 3 213 40 45

Belgium - Brussels

Avenue Louise 149
Eighth Floor, 1050 Brussels
Tel: +32 2 639 36 11
Fax: +32 2 639 36 99

Belgium - ELC (Brussels)

149 Avenue Louise, Eighth Floor
1050 Brussels
Tel: +32 2 639 37 66
Fax: +32 2 538 77 26

Brazil - Brasilia

SAF/S Quadra 02, Lote 04, Sala 203
Edifício Comercial Via Esplanada
Brasília - DF - 70070-600
Tel: +55 61 2012 5000
Fax: +55 61 3323 3312

Brazil - Porto Alegre

Avenida Borges de Medeiros
2233, 4º andar, Centro
Porto Alegre, RS, 90110-150
Tel: +55 51 3220 0900
Fax: +55 51 3220 0901

Brazil - Rio de Janeiro

Av. Rio Branco, 1, 19º andar, Setor B
Rio de Janeiro, RJ, 20090-003
Tel: +55 21 2206 4900
Fax: +55 21 2206 4949; 2516 6422

Brazil - São Paulo

Av. Dr. Chucri Zaidan, 920
13º andar, Market Place Tower 1
São Paulo, SP, 04583-904
Tel: +55 11 3048 6800
Fax: +55 11 5506 3455

Canada - Toronto

Brookfield Place
181 Bay Street, Suite 2100
P.O. Box 874
Toronto, Ontario M5J 2T3
Tel: +1 416 863 1221
Fax: +1 416 863 6275

Chile - Santiago

Nueva Tajamar 481
Torre Norte, Piso 21
Las Condes Santiago
Tel: +56 2 367 7000
Fax: +56 2 362 9875

China - Beijing

Suite 3401, China World Tower 2
China World Trade Center
1 Jianguomenwai Dajie
Beijing 100004, PRC
Tel: +86 10 6535 3800
Fax: +86 10 6505 2309

China - Hong Kong - SAR

14th Floor, Hutchinson House
10 Harcourt Road, Hong Kong
Tel: +852 2846 1888
Fax: +852 2845 0476

China - Shanghai

Unit 1601, Jin Mao Tower
88 Century Boulevard, Pudong,
Shanghai 200121, PRC
Tel: +86 21 5047 8558
Fax: +86 21 5047 0020

Colombia - Bogotá

Avenida 82 No. 10-62, piso 6
Bogotá, D.C.
Tel: +57 1 634 1500; 644 9595
Fax: +57 1 376 2211

Czech Republic - Prague

Praha City Center
Klimentská 46, 110 02 Prague 1
Tel: +420 2 2185 5001
Fax: +420 2 2185 5055

Egypt - Cairo

Nile City Building
North Tower, Twenty-first floor
Cornich El Nil, Ramlet Beaulac, Cairo
Tel: +20 2 461 9301
Fax: +20 2 461 9302

France - Paris

1 rue Paul Baudry
75008 Paris
Tel: +33 1 44 17 53 00
Fax: +33 1 44 17 45 75

Germany - Berlin

Friedrichstrasse 79-80
10117 Berlin
Tel: +49 30 20 38 7 600
Fax: +49 30 20 38 7 699

Germany - Düsseldorf

Neuer Zollhof 2
D-40221 Düsseldorf
Tel: +49 211 31 11 6 0
Fax: +49 211 31 11 6 199

Germany - Frankfurt

Bethmannstrasse 50-54
D-60311 Frankfurt/Main
Tel: +49 69 29 90 8 0
Telex: +414239
Fax: +49 69 29 90 8 108

Germany - Munich

Theatinerstrasse 23
80333 Munich
Tel: +49 89 55 23 8 0
Fax: +49 89 55 23 8 199

Hungary - Budapest

Andrássy-út 102
1062 Budapest
Tel: +36 1 302 3330
Fax: +36 1 302 3331

Indonesia - Jakarta

The Indonesia Stock Exchange Bldg
Tower II, 21st Floor
Sudirman Central Business District
Jl. Jendral Sudirman Kav. 52-53
Jakarta 12190
Tel: +62 21 515 5090
Fax: +62 21 515 4840

Italy - Milan

3 Piazza Meda
20121 Milan
Tel: +02 76231 1
Fax: +39 02 76231 620

Italy - Rome

Viale di Villa Massimo, 57
00161 Rome
Tel: +39 06 44 06 31
Fax: +39 06 44 06 33 06

Japan - Tokyo

The Prudential Tower, 11F
13-10 Nagatacho 2-chome
Chiyoda-ku, Tokyo 100-0014
Tel: +813 5157 2700
Fax: +813 5157 2900

Kazakhstan - Almaty

Samal Towers, Samal-2, 8th Fl.
97 Zholdasbekov Street
Almaty 480099
Tel: +7 727 250 99 45
Fax: +7 727 258 40 00

Luxembourg

12 rue Eugène Ruppert
2453 Luxembourg
Luxembourg
Tel: +352 26 18 44 1
Fax: +352 26 18 44 99

Malaysia - Kuala Lumpur

Level 21, Suite 21.01
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur
Tel: +603 2298 7888
Fax: +603 2282 2669

Mexico - Cancun

Edificio Galerías Infinity, Piso 2
Av. Nichupté 19, Mza 2 SM 19
77500 Cancún, Q. Roo
Tel: +52 998 881 1970
Fax: +52 998 881 1989

Mexico - Chihuahua

Edificio Punto Alto 2, Piso 4
Av. Valle Escondido 5500
Fracc. Desarrollo El Saucito
31125 Chihuahua, Chihuahua
Tel: +52 614 180 1300
Fax: +52 614 180 1329

Mexico - Guadalajara

Bldv. Puerta de Hierro 5090
Fracc. Puerta de Hierro
45110 Zapopan, Jalisco
Tel: +52 33 3848 5300
Fax: +52 33 3848 5399

Mexico - Juárez

P.T. de la Republica 3304, Piso 1
32330 Cd. Juárez, Chihuahua
Tel: +52 656 629 1300
Fax: +52 656 629 1399

Mexico - Mexico City

Edificio Scotiabank Inverlat, Piso 12
Bldv. M. Avila Camacho No. 1
11009 México, D.F.
Tel: +52 55 5279 2900
Fax: +52 55 5557 8829

Mexico - Monterrey

Oficinas en el Parque - Piso 10
Bldv. Antonio L. Rodríguez
1884 Pte.
64650 Monterrey, Nuevo León
Tel: +52 81 8399 1300
Fax: +52 81 8399 1399

Mexico - Tijuana

Bldv. Agua Caliente 10611
Piso 1
22420 Tijuana, B.C.
Tel: +52 664 633 4300
Fax: +52 664 633 4399

Netherlands - Amsterdam

Claude Debussylaan 54
1082 MD Amsterdam
1000 CS Amsterdam
Tel: +31 20 551 7555
Fax: +31 20 626 7949

Phillippines - Manila

12th Floor, Net One Center
26th Street Corner 3rd Avenue
Crescent Park West
Bonifacio Global City
Taguig, Metro Manila 1634
Tel: +63 2 819 4700
Fax: +63 2 816 0080

Poland - Warsaw

Rondo ONZ 1
00-124 Warsaw
Tel: +48 22 445 31 00
Fax: +48 22 445 32 00

Russia - Moscow

Sadovaya Plaza, 11th Floor
7 Dolgorukovskaya Street
Moscow 127006
Tel: +7 495 787 2700
Fax: +7 495 787 2701

Russia - St. Petersburg

57 Bolshaya Morskaya
St. Petersburg 190000
Tel: +7 812 303 90 00
Fax: +7 812 325 60 13

Saudi Arabia - Riyadh

Olayan Centre Tower II
Al-Ahsa Road
P.O. Box 4288
Riyadh 11491
Tel: +966 1 291 5561
Fax: +966 1 291 5571

Singapore

8 Marina Boulevard #05-01
Marina Bay Financial Centre Tower 1
Singapore 018981
Tel: +65 6338 1888
Fax: +65 6337 5100

Spain - Barcelona

Avda. Diagonal, 652
Edif. D, 8th Floor
08034 Barcelona
Tel: +34 93 206 08 20
Fax: +34 93 205 49 59

Spain - Madrid

Paseo de la Castellana, 92
28046 Madrid
Tel: +34 91 230 45 00
Fax: +34 91 391 51 49

Sweden - Stockholm

Advokatbyrå KB
P.O. Box 5719
SE-101 23 Stockholm
Tel: +46 8 566 177 00
Fax: +46 8 566 177 99

Switzerland - Geneva

Rue Pedro-Meylan 5
1208 Geneva
Tel: +41 22 707 98 00
Fax: +41 22 707 98 01

Switzerland - Zürich

Holbeinstrasse 30
P.O. Box, 8034 Zürich
Tel: +41 0 44 384 14 14
Fax: +41 0 44 384 12 84

Taiwan - Taipei

15th Floor, Hung Tai Center
No. 168, Tun Hwa North Road
Taipei 105
Tel: +886 2 2712 6151
Fax: +886 2 2716 9250

Thailand - Bangkok

25th Floor, Abdulrahim Place
990 Rama IV Road
Bangkok, 10500
Tel: +66 2636 2000
Fax: +66 2636 2111

Ukraine - Kyiv

Renaissance Business Center
24 Vorovskoho St.
Kyiv 01054
Tel: +380 44 590 0101
Fax: +380 44 590 0110

United Arab Emirates

Villa A12, Marina Office Park
Breakwater, P.O. Box 42325
Abu Dhabi,
Tel: +971 2 658 1911

United Kingdom - London

100 New Bridge Street
London EC4V 6JA
Tel: +44 20 7919 1000
Fax: +44 20 7919 1999

United States - Chicago

One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601
Tel: +1 312 861 8000
Fax: +1 312 861 2899

United States - Dallas

2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201
Tel: +1 214 978 3000
Fax: +1 214 978 3099

United States - Houston

711 Louisiana, Suite 3400
Houston, Texas 77002-2716
Tel: +1 713 427 5000
Fax: +1 713 427 5099

United States - Miami

Mellon Financial Center
1111 Brickell Avenue
Suite 1700
Miami, Florida 33131
Tel: +1 305 789 8900
Fax: +1 305 789 8953

United States - New York

1114 Avenue of the Americas
New York, New York 10036
Tel: +1 212 626 4100
Fax: +1 212 310 1600

United States - Palo Alto

660 Hansen Way
Palo Alto, California 94304-0309
Tel: +1 650 856 2400
Fax: +1 650 856 9299

United States - San Diego

12544 High Bluff Drive
Third Floor
San Diego, California 92130
Tel: +1 858 523 6200
Fax: +1 858 236 0429

United States - San Francisco

Two Embarcadero Center
Eleventh Floor
San Francisco, California 94111-3802
Tel: +1 415 576 3000
Fax: +1 415 576 3099; 576 3098

United States - Washington, DC

815 Connecticut Avenue, NW
Washington, DC 20006-4078
Tel: +1 202 452 7000
Fax: +1 202 452 7074

Venezuela - Caracas

Torre Edicampo, P.H.
Avenida Francisco de Miranda
cruce con Avenida Del Parque
Urbanización Campo Alegre
Caracas 1060
Tel: +58 212 276 5111; 276 5112
Fax: +58 212 264 1532

Venezuela - Valencia

Edificio Torre Venezuela,
Piso No. 4
Av. Bolivar cruce con Calle 154
(Misael Delgado)
Urbanización La Alegria
Valencia, Estado Carabobo
Tel: +58 241 824 8711
Fax: +58 241 824 6166

Vietnam - Hanoi

13th Floor, Vietcombank Tower
198 Tran Quang Khai Street
Hoan Kiem District
Hanoi
Socialist Republic of Vietnam
Tel: +84 4 825 1428
Fax: +84 4 825 1432

Vietnam - Ho Chi Minh City

12th Floor, Saigon Tower
29 Le Duan Blvd.
District 1, Ho Chi Minh City
Socialist Republic of Vietnam
Tel: +84 8 829 5585
Fax: +84 8 829 5618

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