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**INTERNATIONAL LABOUR AND EMPLOYMENT:
RECENT DEVELOPMENTS AROUND THE WORLD**

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I. ARGENTINA

A. SUSPENSION OF DISMISSALS

In Argentina, since 2002, employer's ability to dismiss employees without cause has been suspended and such dismissals penalized. In December, 2005, the government extended the effective period of suspension until such time when the unemployment rate published by the National Institute of Statistics and Census (INDEC) is lower than ten percent.¹ Currently, the unemployment rate published by the INDEC is 11.1 percent.² The penalty assessed on an employer for dismissing an employee without cause during this period, however, is now equal to

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¹ See Law 25,972, § 4, B.O. (Arg.), available at <http://diputados.gov.ar>.

² See EL CRONISTA COMERCIAL, Nov. 21, 2005.

50 percent of the employee's severance payment that is considered to be "compensation for seniority."³

B. SALARY INCREASES

During the second quarter of 2005, the Labor Ministry approved 110 new collective bargaining agreements, which exceeded the number of approved collective bargaining agreements for the same period of the previous year. Eighty-four percent of the approved collective bargaining agreements for the second quarter of 2005 included salary increases, the most important of which was for the commerce sector, which employs approximately 600,000 registered workers.⁴

C. SOCIAL SECURITY CONTRIBUTIONS

In July, 2005, the government suspended the gradual re-establishment of mandatory contributions by private sector employees to the Integrated Pension System (S.I.J.P.) until July, 2006.⁵ The contribution rate for these employees will remain at seven percent of base salary until July, 2006, when it will increase to nine percent, and the rate will be re-established at 11 percent in October, 2006.⁶ The contribution rate for employees in the public pension system, on the other hand, was never reduced from 11 percent of base salary and will remain the same.

³ See Law 25,972, § 4, B.O. (Arg.), available at <http://diputados.gov.ar>.

⁴ See Ministry of Labor, Sub-secretary of Technique Programming and Labor Studies, *Employment and Social Security, The State of Collective Negotiation*, Second Trimester 2005.

⁵ See National Decree 788/2005, available at <http://diputados.gov.ar>.

⁶ See National Decree 390/2003, National Decree 809/2004 and National Decree 788/2005, available at <http://diputados.gov.ar>.

In April, 2004, the government implemented a regulation that gradually increased employers' contributions to the S.I.J.P. The regulation removed all caps on employers' contributions as of October 1, 2005.⁷

D. REGISTRATION OF NEW EMPLOYEES

Prior to July 1, 2005, employers were obligated to record certain information regarding each new employee with the tax authority prior to his or her effective start date under the "Early Record Key" (CAT) system.⁸ In May, 2005, however, the CAT system was amended, and the "Record of Entry and Exit in Social Security" system was created.⁹ As a result, since July 1, 2005, employers have been required to record the entry and exit of every employee who is included in or discharged from the employer's payroll. Furthermore, students under trainee programs (*pasantes*) must be included in the record. This new system allows employers to amend certain data after recording the employment or termination of an employee or even to annul an entry record when a hired person fails to report to work. An employer may record employees' data *via* the Internet at the tax authority's official website or by submitting an affidavit that includes the relevant information to the tax authority's office where the employer is registered.

⁷ See National Decree 491/2004 and General Resolution of the General Administration of Public Income ("AFIP") 1750/2004, available at <http://diputados.gov.ar>.

⁸ See General Resolution of the AFIP 899.

⁹ See General Resolution of the AFIP 1891.

II. AUSTRALIA

On December 7, 2005, the Australian Parliament passed the Workplace Relations Amendment (WorkChoices) Act 2005 (Cth) (the “Act” or “WorkChoices”).¹⁰ The Act, and the regulations made under it, came into full effect on March 27, 2006.

Historically, Australia had a dual system of workplace relations. Employment and industrial laws were made at the federal and state levels. Minimum terms and conditions of employment were also determined by federal and state tribunals *via* a process known as conciliation and arbitration. In many cases, these minimum terms and conditions were enshrined in industrial instruments known as awards. The key objective of WorkChoices is to move, over time, to a single workplace relations system and a single set of universal minimum terms and conditions. A greater number of employers (by some measures about 85% of all employers) now fall within the ambit of the federal workplace relations system.

The various state governments are currently challenging the validity of WorkChoices before the Australian High Court on the basis that WorkChoices exceeds the federal government’s powers under the Australian constitution. It is anticipated that the Australian High Court will hand down its decision about this in late 2006 or 2007.

In the meantime, employers, employees, unions, tribunals, governments, and other interested parties now are dealing with a complex set of transitional arrangements to give effect to the new WorkChoices system. Some of the key changes are the following:

1. *Most of the state systems have been subsumed into the new federal system.* Awards and other industrial instruments made before WorkChoices under state employment and industrial laws are now treated as federal transitional agreements. For the most part, they will continue to apply to the relevant employees although with some modification.

¹⁰ Workplace Relations Amendment (WorkChoices) Act, 2005 (Austl.).

2. *Conciliation and arbitration are no longer the cornerstone of the system.* The emphasis is now on employers, unions, and employees to determine their own arrangements without the involvement of tribunals such as the Australian Industrial Relations Commission.
3. *Australian Industrial Relations Commission's role is reduced.* Its powers to make new or modify existing awards is now limited. Its main role is as a provider of dispute resolution services. It also will deal with some industrial disputes, will be involved in simplifying federal awards, and will hear and determine claims by certain employees alleging unfair dismissals.
4. *Awards will progressively become less relevant.* Awards do not apply to employers with workplace agreements made under WorkChoices, and the award system will be simplified and greatly rationalized. The award rationalization process is expected to result in a dramatic reduction of the number of awards. At the most extreme, some 4,000 federal and state awards may be reduced to as few as 20 federal awards.
5. *Minimum entitlements under WorkChoices comprise the Australian Fair Pay and Conditions Standard.* The Standard guarantees a maximum working week of 38 hours (which may be averaged by agreement over a period up to 12 months) for many employees, plus reasonable additional overtime pay, a minimum wage, minimum entitlements to annual, parental, personal (sick person's and carer's), and compassionate leave and minimum entitlements with respect to loadings for casual employment.
6. *Two classes of workplace agreement can be made more easily—collective agreements (between employers and multiple employees) and Australian Workplace Agreements (between an employer and a single employee).* These agreements existed in similar forms prior to WorkChoices, but are now easier to make and register. Collective agreements will operate to the exclusion of awards, and Australian Workplace Agreements will operate to the exclusion of collective agreements and awards.
7. *Industrial action is harder to take.* The laws prohibiting industrial action, and regulating when it may legally be taken, are now much stronger.
8. *Rights of entry to workplaces have changed.* A union official's right to enter a workplace has been further restricted.
9. *Availability of unfair dismissal and other claims has been limited.* For example, claims alleging unfair dismissal may not be brought by employees of employers with less than 100 employees (which includes employees of related entities). Nor in most cases may they be brought by an employee employed by an employer for less than 6 months. Also, employees, arguably, cannot make claims under state laws alleging that their employment contracts were unfair, arguably, against employers to which WorkChoices applies.

III. CANADA

A. COURT AWARDS PUNITIVE DAMAGES FOR FAILURE TO ACCOMMODATE DISABLED EMPLOYEE

In *Keays v. Honda Canada Inc.*,¹¹ a judge of the Ontario Superior Court of Justice awarded 24 months notice and \$500,000 (Canadian Dollars) in punitive damages to an employee suffering from Chronic Fatigue Syndrome in a wrongful dismissal case, the largest sum ever awarded in a Canadian wrongful dismissal action. Honda has applied for leave to appeal the decision in *Keays*. Whatever the outcome, it remains clear that the Courts in Canada are prepared to punish employers for mistreating their chronically ill employees. Discrimination on the basis of disability will not be tolerated and the failure of an employer to properly discharge its duty to accommodate to the point of undue hardship will have ramifications for employers.

B. B.C. LABOUR RELATIONS BOARD DECLARES “FORCED LISTENING” VIOLATES LABOUR CODE

The British Columbia Labour Relation Board’s (the “Board”) long-awaited decision in *RMH Teleservices International Inc. and the B.C. Government and Service Employees’ Union et al.* was, after one year of waiting, finally rendered.¹² The decision was expected to clarify the permitted scope of employer expression allowed under the British Columbia Labour Relations Code (the “Code”). One of the first changes that the Liberal government made in British Columbia was to amend the Code in 2002, to allow as follows:

Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.¹³

¹¹ [2005] O.J. No. 1145 (QL).

¹² [2005] B.C.L.R.B.D. No. 280 (QL).

¹³ Labour Relations Code, R.S.B.C. 1996 (Can.), c. 244, s. 8.

The Board found that, in order to determine whether an expression of views falls within the scope of above Section 8 or is excluded by virtue of being coercive or intimidating, it was not sufficient to merely consider the words expressed. The Board held that the entire context must be considered and that, where the context is an organizing drive and the employer is expressing its views about unionization to its employees, the concern about protecting free choice of the employees from coercion or intimidation is particularly strong. It remains to be seen whether the *RMH* decision will be considered an anomalous interpretation of Section 8 or whether this decision will have long-term ramifications on labour relations decisions both in British Columbia and Canada as a whole.

C. SUPREME COURT OF CANADA ENDORSES WHISTLEBLOWING

In its recent decision in *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*,¹⁴ the Supreme Court held that a union's dismissal of its bookkeeper after she reported her supervisors' financial misconduct to representatives of the union was retaliation for whistleblowing that violated s. 74(1)(a) of the Saskatchewan Labour Standards Act.¹⁵ This section protects employees from retaliation for reporting to a "lawful authority" any activity that is likely to result in an offense under an Act of the province or Parliament. The Court held that reporting to a "lawful authority" includes not only the police or other agents of the state, but also individuals within the employer organization who exercise lawful authority over the employee(s) complained about or the matter that may give rise to an offense. While the case is specific to a particular statute, it also marks a clear endorsement from the highest Court that whistleblowing ought to be encouraged as a matter of public policy, and employees ought to be protected from any adverse consequences that may

¹⁴ [2005] S.C.J. No. 72 (QL).

¹⁵ The Labour Standards Act, R.S.S. 1978 (Can.), c. L-1, s. 74 [as am. 1994, c. 39, s. 41].

flow from blowing the whistle. The Supreme Court specifically endorses an “up the ladder” approach as a way of best reconciling an employee’s duty of loyalty and the public’s interest in whistleblowing on the basis that internal reporting allows for internal resolution of alleged misconduct.

IV. CHINA

A. INCREASED PRESSURES ON FOREIGN INVESTED ENTITIES TO ESTABLISH TRADE UNIONS

Since the end of 2004, China has been pressuring private entities, especially foreign invested entities (FIEs), to establish trade unions.¹⁶

China’s Trade Union Law stipulates that all employees in China relying on wages as a main source of income have the right to participate in and form trade unions.¹⁷ Higher level trade unions, *i.e.*, the state-run All China Federation of Trade Unions (ACFTU) and its local branches, may assign delegates to assist and guide the employees of an enterprise in establishing a trade union, and companies are not permitted to obstruct such efforts.¹⁸

At the end of 2004, the Standing Committee of the National People’s Congress (SCNPC) released a national survey report regarding the enforcement of the Trade Union Law, which pointed out that most private enterprises (including FIEs) have not established trade unions. ACFTU also publicly criticized certain FIEs sponsored by large multinational companies by claiming that they had resisted the establishment of trade unions despite its repeated requests.

¹⁶ See *China’s Progress in Human Rights in 2004*, Apr. 25, 2005, available at <http://members.aol.com/junmanew/cover-htm>.

¹⁷ See Trade Union Law (P.R.C.), Oct. 27, 2001, art. 2.

¹⁸ See Trade Union Law (P.R.C.) art. 11.

After the SCNPC's national survey, the General Office of the State Council issued a new circular requesting local governments to support the work of trade unions,¹⁹ and the ACFTU indicated that it would take measures to request all FIEs in China to establish trade unions, including drafting a "blacklist" of uncooperative FIEs, assignment of delegates to the FIEs to help establish trade unions, exerting pressure through local labor authorities and other government agencies, and even bringing legal action against FIEs that violate the Trade Union Law. Local governments in Jiangsu, Shandong and Fujian provinces also indicate that they will begin enforcing local rules that require FIEs, even if they fail to establish a trade union within a prescribed period, to contribute two percent of the total employee payroll to a "trade union preparation fund." Such contribution is to be withheld by the tax bureau and then transferred to the local branch of ACFTU.

Although a large number of FIEs in China have yet to establish trade unions, some FIEs already have taken the initiative to establish trade unions under pressure from the enforcement campaign,²⁰ and others have agreed to form a trade union upon employees' request.

B. "SEXUAL HARASSMENT" CONCEPT RECOGNIZED BY LAW

On August 28, 2005, the SCNPC amended the Law on Protection of Women's Rights to prohibit sexual harassment against women and to enable victims to file complaints with relevant government units and other authorities. If sexual harassment constitutes a violation of relevant public security administration regulations, the victims are entitled to request the public security

¹⁹ See Circular Number: Guo Fa Ban [2004] No. 90, available at http://www.gov.cn/gongbao/content/2005/content_63301.htm.

²⁰ Carefuor's subsidiary in Harbin has established its first trade union in China consisting of 160 members. See HARBIN DAILY NEWS, Dec. 28, 2004.

bureau to impose administrative penalties on the violators or directly bring civil legal action against the violators.²¹

This law represents China's first effort at addressing sexual harassment in a legal context, although it is still limited to female victims. Prior to such amendment, the victims of sexual harassment could make claims only based on the General Principals of Civil Code, which vaguely states that no one should infringe upon others' reputation or personal dignity by insulting or labelling them.²² The Supreme People's Court allows damages for emotional distress in cases of injury to an individual's body or personal dignity rights.²³

Out of approximately ten sexual harassment lawsuits brought prior to the new law's enactment, only one victim won her case, receiving a miniscule amount approximately equal to \$210 (United States Dollars) as emotional distress damages.²⁴ Since the new law became effective on December 1, 2005, it is expected that an increasing number of sexual harassment victims will pursue legal action.

V. COSTA RICA

A. COMPENSATION FOR MORAL DAMAGES (DAMAGES FOR EMOTIONAL DISTRESS) CAUSED BY DISMISSAL OF A WORKER

The Second Chamber of the Supreme Court of Justice recently issued a resolution, Vote No. 2004-00481 (the "Resolution"), which laid the foundation to modify the line of cases with regard to compensation for moral damages, or emotional distress, caused by employment termination.

²¹ See *Law on Protection of Women's Rights* (P.R.C.) art. 40 & 58.

²² See *General Principals of Civil Code* (P.R.C.) art. 101.

²³ See Supreme People's Court, *Judicial Interpretations on Several Issues regarding the Determination of Compensation Liabilities on Emotional Distress*, Feb. 26, 2001.

²⁴ See *Victim Won First Trial of "Sexual Harassment" Case in Wuhan*, CHINA WOMEN NEWS, June 11, 2003.

Prior to the Resolution, under the Labor Code an employee who suffered an unjustified termination was entitled to payment in an amount equivalent to six months of salary, granted upon meeting certain conditions. No distinction was drawn between material and moral damages. Following the Resolution, an employee may seek all damages arising from the unjustified termination, regardless of whether they are inflicted directly on the individual, or on his or her property, interests, or emotions. Through the regular labor proceedings, such employee may now seek a severance payment, prior notice of termination, vacation, mandatory Christmas bonus (*aguinaldo*), and any other accrued compensation that can be claimed at the time of the unjustified termination, as well as any moral damages, if he or she suffered emotional distress at the time of the dismissal.

To be granted moral damages, an employee must demonstrate the existence of an immediate and direct causal relationship between the dismissal and the emotional distress. It is also necessary to take into account the magnitude of the injury, intensity of the distress, trajectory of the distress, repercussion on the emotional health, hospitalization period, side effects, and medical treatment. All such factors must be analyzed from the subjective perspective of the victim, in light of his or her personality, employment situation, social, family, and financial situation, physical and emotional sensibility, and other relevant circumstances. Faced with a case of moral damages, a judge must establish objectively the amount of the compensation to be granted to the employee by applying the principles of proportionality, equality, and reasonableness.

The employee has the burden of proof as to the existence and amount of the damages, and is required to demonstrate the alleged facts, including their gravity. For this purpose, an employee is allowed to produce all types of evidence, including presumptions or indicia sufficient to infer the damages.

VI. DENMARK

A. EMPLOYEE STOCK OPTIONS

The Danish government enacted the Stock Option Act (the “Stock Option Act”),²⁵ which covers most financial instruments granted to employees that enable them to buy or subscribe to shares in the future. Under the Stock Option Act, an employee is entitled to retain granted stock options in case of termination for any reason other than breach of contract regardless of the relevant plan language, except that forfeiture clauses in the plan, if any, are valid if the employee resigns. The Stock Option Act was enacted in response to recent Supreme Court cases that held that stock options were considered to be salary and that employees had acquired a final right to the stock options on the grant date, invalidating forfeiture clauses in stock option plans.

In the beginning of 2006, the Maritime and Commercial Court will decide whether the employees who have been granted stock options prior to the Stock Option Act are entitled to holiday allowance and/or severance pay based on the value of the stock options. Stock options granted under the Stock Option Act will not be subject to holiday allowance or severance pay.

B. OUTSOURCING OF SERVICES AS A TRANSFER OF UNDERTAKINGS

Courts have interpreted the Act on Transfer of Undertakings (the “Transfer Act”) broadly.²⁶ In a recent decision by the Labour Court, however, the transfer of garbage collection activities in an outsourcing agreement did not qualify as a transfer of undertaking within the meaning of the Transfer Act.²⁷ Based on a previous European Union judgment defining the transfer of business (*liikenne*),²⁸ the Labour Court found that the transfer of the garbage

²⁵ See Stock Option Act (Den.) no. 309 of 5 May 2004.

²⁶ See Consolidated Act (Den.) no. 710 of 20 Aug. 2002 (implementing the Acquired Rights Directive 77/187/EEC).

²⁷ See Landsorganisationen i Danmark acting for Specialarbejderforbundet i Danmark v. Dansk Arbejdsgiverforening / ATL acting for Nord-Ren A/S, case A2004.244, Labour Court Decision, Mar. 25, 2005.

²⁸ Oy Liikenne Ab v. Pekka Liskojärvi, Pentti Juntunen, ECJ Decision, Jan. 25, 2001 (C-172/99).

collection activity from a business primarily characterized by its physical assets did not constitute a transfer of a going concern under the Transfer Act.

C. ELECTRONIC MAIL

In a judgment rendered by the Western High Court, the Court held that an employee's disloyal comment in a private email to a former colleague, in which the employee referred to a manager as a "bitch," did not justify the employer's dismissal of that employee.²⁹ The High Court also held that the employer did not violate the employee's right to privacy by reading the private email.

D. FREEDOM OF RELIGION IN EMPLOYMENT

In the beginning of 2005, a unanimous Supreme Court upheld the Eastern High Court's judgment that a large Danish retail chain was entitled to summarily dismiss an employee who, in violation of the employer's dress code, announced that she intended to wear a headscarf because of her Muslim faith.³⁰ The Supreme Court found that the purpose of the prohibition against wearing headgear in the dress code was to signal to the customers that it was a politically and religiously neutral company. On this ground, the Supreme Court found that the prohibition against wearing headgear did not violate the Anti Discrimination Act,³¹ and was not a violation of the European Convention on Human Rights.

²⁹ See *Scan-Pot ApS v. HK Danmark acting for F*, Western High Court Judgment, Feb. 23, 2005.

³⁰ See *HK i Danmark acting for Najla Ainouz v. Føtex A/S*, Supreme Court Judgment, Jan. 21, 2005, (UfR.2005.1265H).

³¹ See *Anti Discrimination Act (Den.) no. 459 of 12 June 1996*.

VII. FINLAND

A. NEW ANNUAL HOLIDAYS ACT

In Finland, a new Annual Holidays Act (the “Act”) entered into force on April 1, 2005.³² The scope of the Act was extended to cover both employment and civil servant relationships. The goal of the Act is to better respond to the requirements of working life and to implement the relevant European Union (“EU”) legislation. The most significant change from the employees’ point of view is the improvement of the annual holiday benefits for fixed-term and part-time employees.

1. Holiday Credit System

Under the Act, the annual holiday is determined on the basis of a holiday credit system. A holiday credit month is a calendar month during which an employee works at least 14 days or 35 hours. Days on which an employee is unable to work due to reasons such as parental leave, illness, accident, or study leave are considered working days for the purpose of calculating the annual holiday.

Depending on the length of the employment relationship, the employee either has a right to two or 2.5 days of paid annual holiday for each full holiday credit month, which aggregate to four or five weeks of annual holiday, respectively. A holiday week contains six days, as Saturdays are considered holidays. An employee who works less than 14 days or 35 hours during a calendar month is entitled to prorated paid holiday upon request. An employee who has worked for the same employer under repeated fixed-term employment contracts is entitled to the same holiday credit system.

2. Amount of Holiday Pay

³² Finnish Annual Holidays Act 18 Mar. 2005/162 (Fin.).

Under the Act, an employee has a right to receive at least his or her regular or average pay during the annual holiday. Fringe benefits included in the pay must be given in full during the annual holiday. An employee with a weekly or monthly salary is entitled to a normal payment during the annual holiday. The holiday pay must be made before the start of the holiday. For a holiday period not exceeding six days, the holiday pay may be given on the employee's normal payday. At the end of the employment relationship the employee is paid a holiday bonus for unused holiday.

The Act has improved the entitlement of fixed-term employees. It is now possible for a fixed-term employee to agree to have holidays carried over into a new employment relationship with the same employer.

3. **Time of the Holiday**

Twenty-four days of holiday accrued must be given to the employee between May 2 and September 30 of each year. Holidays exceeding 4 weeks must be given between October 1 and April 30. Within these periods, the employer is entitled to define the time when the holiday must be taken. The Act has provided the employer and employee with greater freedom in negotiating the time when the holiday can be taken. The employee can also carry any holiday exceeding 24 working days into the following year, or use it to shorten the working time.

VIII. FRANCE

A. MAJOR LEGISLATIVE REFORMS

The passage of Act 2005-32³³ relating to social cohesion has made the following changes to redundancy procedures:

³³ See Act 2005-32 (Fr.), Jan. 18, 2005, available at <http://www.legifrance.gouv.fr/>.

1. An employer may conclude agreements with its majority trade union to establish conditions for drafting a collective redundancy plan. Such “method agreements” (*accords de méthode*) can be concluded at the company, group, or branch level.
2. A personalized redeployment agreement (*convention de reclassement personnalisé*) is mandatory in a company of fewer than 1,000 employees. Employees may elect benefits ranging from psychological support, orientation, coaching, training, to assessment of professional skills, all of which are designed to aid their redeployment.
3. When collective redundancies are likely to have a negative impact on the local employment market, the company must contribute to the development of business in the area, based on the number of redundancies and its financial capacity.

The second major legislative development in French employment law has been Ordinance 2005-893,³⁴ which introduced new hiring contracts (*contrat nouvelles embauches*, or CNE). A company with fewer than 20 employees may offer a new employee a contract that allows the company to unilaterally terminate employment during the first two years without presenting grounds for termination. After two years, the CNE becomes a standard indefinite-term employment contract.

B. CASE LAW DEVELOPMENTS

According to the *Cour de cassation*'s (France's highest court) decision of May 17, 2005,³⁵ an employer can open employee computer files identified as “personal” and saved on company computers only in the employee's presence or when he or she has been duly summoned, in the event that there is no risk or particular incident justifying such access.

In its decision of June 15, 2005,³⁶ the *Cour de cassation* ruled that, even if a redundancy is found null and void for failing to meet the statutory requirements, the employees' reinstatement is not compulsory if it has become impossible due to the relevant site's closure.

³⁴ See Ordinance 2005-893 (Fr.), Aug. 2, 2005, available at <http://www.legifrance.gouv.fr/>.

³⁵ See Cass. soc. (chamber for employment law) May 17, 2005.

³⁶ See Cass. soc. June 15, 2005.

C. WHISTLEBLOWING AND FRENCH DATA PROTECTION ISSUES

On May 26, 2005, the French Data Protection Authority, *Commission Nationale de L'Informatique et des Libertés* (“CNIL”), issued an opinion on two notifications made by the French affiliates of Exide Technologies Inc. and McDonald’s Corporation regarding whistleblowing hotlines.³⁷ In both opinions, the CNIL ruled that these hotlines (i) were subject to the prior authorization from the CNIL and (ii) did not comply with the data protection principles set out under French law.

On December 8, 2005, the CNIL issued guidelines for the self-certification of whistleblowing hotlines.³⁸ The CNIL’s main requirements include the following:

1. The hotline should complement other regular means of internal control, without being compulsory and with a limited scope (covering mainly financial offenses).
2. The whistleblowers should be identified so as to make them be aware of their responsibilities, while guaranteeing their confidentiality (*i.e.*, generally no anonymous calls).
3. Employees should be clearly and thoroughly informed about the hotline. An employee who is the subject of a whistleblowing report must be informed not only about the complaints issued against him or her, but also of his or her rights and the way to exercise them—notably the possibility to ask for the rectification or elimination of data concerning the employee.
4. Data should be retained for a limited period of time. It must be (i) destroyed at once if the report proves to be groundless, or after a maximum of two months following the end of the investigation procedure, unless litigation or a disciplinary procedure has been launched; or (ii) securely archived for a period of time that is consistent with the applicable statute of limitations.

³⁷ See Commission Nationale de L’Informatique et des Libertés, Decision, May 26, 2005, available at <http://www.cnil.fr/>.

³⁸ See Commission Nationale de L’Informatique et des Libertés, Decision, Dec. 28, 2005, available at <http://www.cnil.fr/>.

IX. GERMANY

A. NEW FEDERAL GOVERNMENT IN GERMANY

The new coalition federal government (Grand Coalition), comprising the Christian Democratic Union (CDU), Christian Social Union (CSU), and Social Democratic Party (SDP), has declared that its primary aim is to strengthen Germany's economy. In order to generate economic growth and employment in Germany, the Grand Coalition aims to enact drastic changes to the legislation on protection against dismissal and fixed-term contracts of employment.

Under Section 14 II of the existing provisions of the Part-Time and Fixed Term Contract Act in Germany,³⁹ it is possible to limit an employment contract to a fixed term of up to two years, without stating any reasons. Currently, Section 14 I sets out a non-exhaustive list of circumstances where this limitation is permitted beyond two years. Under the proposed changes, any limitation on duration of a contract will have to be made for the reasons currently stated under Section 14 I. Such circumstances include (i) where the operational requirement for the job in question is only temporary; (ii) where an employee is covering for another employee; or (iii) where the limitation is pursuant to a legal agreement. The most important exception from this rule is available to employers setting up new businesses. During the first four years following the establishment of a new business, an employer may grant fixed term contracts of up to 48 months without providing any reason, pursuant to Section 14 II a.

The existing provisions of Section 622 II of the German Civil Code allow for a probationary period of up to six months.⁴⁰ The proposed regulations will greatly expand this provision by permitting employers to have the option of agreeing to a probationary period of 24

³⁹ See Part-time and Fixed Term Contract Act (F.R.G.) (BGB § 14).

⁴⁰ See § 622 II BGB.

months with a newly-hired employee.⁴¹ A contract of employment during this probationary period is a genuine and valid indefinite-term contract, but may be terminated more easily during this time. This option will also be available to an employer who re-employs the same employee, provided at least six months have elapsed since the end of the earlier contract of employment.

German policy-makers hope to encourage employers to actively recruit employees. In allowing employees to be dismissed during an agreed probationary period without giving reasons, this new regulation should help the policy-makers achieve their purpose.⁴²

X. HONG KONG

A. CONTINUITY OF SERVICE

Courts in Hong Kong frequently confront cases regarding the extent to which employment undertaken with a former employer should be taken into account in calculating an employee's severance or long service payment that is to be paid by an employer that is related to the former employer. In *Law Shu Fat v. Ng Kwong Yiu (trading as Ng Yiu Kee Transportation Company)*,⁴³ the court held that, where the son had continued operating the business of his deceased father under a separate entity, that entity was required to calculate the statutory entitlements of staff by taking into consideration the combined employment service of staff who had worked for both the son and his deceased father.

⁴¹ According to the Coalition Agreement, however, the circumstances in which an employer is exempt from dismissal protection rules during the probationary period will not be codified.

⁴² See Comments by Thüsing NJW 2005, 3477 *et seq.*

⁴³ Court of First Instance, Labour Tribunal Appeal No.126 of 2003, available at http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=44782&QS=%28Law%2BShu%2BFat%29&TP=JU.

B. CALCULATING STATUTORY PAYMENTS

The calculation of different types of statutory entitlements continues to create uncertainty under the existing law. In *Wong Yin Fong & 97 Ors. v. ISS Hong Kong Services Limited*,⁴⁴ the court held that the employer could not refuse to pay an attendance bonus to an employee by reason that the employees concerned had taken annual leave. In *Laing Agnes & Ors v Lisbeth Enterprises Limited trading as Phillip Wain International*,⁴⁵ the question arose as to whether an employee was entitled to be paid statutory holiday pay and annual leave pay at rates which included substantial commissions the employee was entitled to receive had annual leave not been taken. In declaring that the term “wages” within the meaning of the relevant statute included all commissions, the court held that the employee was entitled to be paid both holiday pay and annual leave inclusive of the hypothetical commissions that the employee would have earned had she not taken leave. This decision of the High Court was upheld on appeal to the Court of Appeal by a majority.⁴⁶

C. FIXED-TERM EMPLOYMENT

Even the most technical failure to comply with a statutory requirement sometimes can result in unexpected and even far-reaching consequences. In *Elizabeth Harrington v Cap Gemini Ernst & Young Hong Kong Ltd*,⁴⁷ a very senior executive claimed that she had entered into a contract for a fixed term of two years that could not be terminated prior to the expiration of the

⁴⁴ Court of First Instance, Labour Tribunal Appeal No. 56 of 2003, *available at* http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=45576&QS=%28%24iss%29%7C%28Wong%2BYin%2BFong%29&TP=JU.

⁴⁵ Court of First Instance, Labour Tribunal Appeal No 133 of 2003, *available at* http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=39968&QS=%28Phillip%2BWain%2BInternational%29&TP=JU.

⁴⁶ Court of Appeal, Civil Appeal No. 204 of 2004, *available at* http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=45025&QS=%28Phillip%2BWain%2BInternational%29&TP=JU.

⁴⁷ Court of First Instance, Commercial Action No 10 and No 61 of 2002, *available at* http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=40416&QS=%28Elizabeth%2BHarrington%29&TP=JU.

fixed term. The executive's claim for substantial damages for wrongful termination was dismissed by reason that the parties had failed to sign the employment agreement as required by law. As a consequence of this failure, the executive was held to have entered into a default employment contract that could be terminated by either party giving the other party one month's notice of termination.

D. UNREASONABLE DISMISSAL

The circumstances in which an employee might be regarded as unreasonably dismissed in accordance with Part VIA of the Employment Ordinance⁴⁸ has created confusion ever since it first was enacted. In *Thomas Vincent v. South China Morning Post Publishers Limited*,⁴⁹ Hong Kong's highest appellate court held that a journalist whose employment had been terminated for plagiarism could not consider himself to have been unreasonably dismissed simply because he lost his entitlement to a long service payment. The Court of Final Appeal held that, so long as the reason provided by an employer for the termination is true, and so long as the conduct that provided the reason for termination is relevant and not trivial, then an employee cannot be regarded as having been unreasonably dismissed.

XI. IRELAND

A. EMPLOYEES (PROVISION OF INFORMATION AND CONSULTATION) BILL 2005

European Union ("EU") legislation continues to remain highly influential, as demonstrated by the passing of the Employees (Provision of Information and Consultation) Act

⁴⁸ The Employment Ordinance (H.K.) is Hong Kong's principle employment statute. See Employment Ordinance, available at http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc?OpenView&Start=55&Count=30&Expand=57#57.

⁴⁹ Court of Final Appeal, FACV 2/05, available at http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=46811&QS=%28South%2BChina%2BMorning%2BPost%2BPublishers%2BLimited%29&TP=JU.

2006 (the “2006 Act”).⁵⁰ The 2006 Act was passed on April 9, 2006, although an Order implementing its commencement has not yet been signed. It is intended to implement the provisions of the EU Information and Consultation Directive,⁵¹ which provides for a general right of employees to information from, and consultations with, their employers. It is being implemented on a phased basis, with the legislation initially only applying to undertakings with at least 150 employees. From March, 2007, the legislation will also apply to undertakings with at least 100 employees and from March, 2008, it will be fully applicable to all undertakings with at least 50 employees.

The obligation to inform and consult can arise either when the employer offers to negotiate an information and consultation agreement with its employees, or when at least ten per cent of the employees (subject to a minimum of 15 employees and a maximum of 100) request that an employer set up an information and consultation procedure. Once the request has been made, the parties must enter into negotiations in order to agree to a consultation and information procedure. Once the obligations are triggered, and a negotiated agreement, or pre-existing agreement, has been put in place, the employer must inform employees on recent and probable developments in relation to its activities and economic situation. The employer also must inform and consult on the situation, structure, and probable development of employment issues in the workplace, and also must inform and consult with a view to reaching agreement on decisions likely to lead to substantial changes in work organization or in contractual relations, such as changes in reporting lines or working hours.

Penalties for breaches of the 2006 Act include a maximum fine of €3,000 on summary conviction and/or six months imprisonment. There is a further fine of €500 per day if the offense

⁵⁰ Statutory Instrument no. 9 of 2006 *available at* www.irlgov.ie.

⁵¹ Council Directive 2002/14/EC of 11 Mar. 2002.

continues after conviction. On conviction on indictment, the maximum fine is €30,000 and/or three years imprisonment. There is a further fine of €5,000 per day if the offense continues after conviction.

B. CASE LAW

Cases concerning work related stress claims continue to be considered and developed by the Irish Courts.⁵² There have also been some developments in the area of Industrial Relations, including a high profile case *Ryanair v. Irish Municipal, Public and Civil Trade Union (“IMPACT”)/Irish Airlines Pilots Association (“IALPA”)*, details of which are set out below.

In November, 2004, IALPA (which is affiliated with IMPACT) applied to the Labour Court to investigate a trade dispute that it claimed existed with Ryanair in relation to pilots’ terms and conditions. Ryanair claimed that the Labour Court did not have jurisdiction to investigate the dispute, on the basis that the criteria set out in the Industrial Relations (Amendment) Act 2001 (the “2001 Act”), which must be met as a pre-condition to a referral of a matter thereunder to the Labour Court, had not been satisfied. In particular, Ryanair claimed that there was no trade dispute, as defined under the 2001 Act, which the Labour Court could investigate. Ryanair also claimed that its practice was to engage in collective bargaining negotiations with employee representatives who were party to the dispute, and that the internal dispute resolution procedures had not failed to resolve the dispute. Relying on the definition of “trade dispute” contained in the Industrial Relations Act 1990, the Labour Court ruled that there was, in fact, a trade dispute. It also found that Ryanair’s communication and consultations with employees in relation to their pay and conditions of employment were not sufficient to be deemed collective bargaining negotiations. It also found that Ryanair had no operative internal

⁵² See, e.g., Michael Maher v. Jabil Global Services Limited [2005] IEHC 130 (May 12, 2005); McGrath v. Trintech Technologies & Anon [2004] 1EHC342.

dispute resolution procedures. The Labour Court, therefore, held that the pre-conditions for investigating a dispute under the 2001 Act were satisfied and that it had jurisdiction.

In November, 2005, upon an appeal from Ryanair, the Supreme Court granted an interim order restraining the Labour Court from proceeding with its investigation pending the outcome of Ryanair's appeal. The outcome of the appeal is likely to have significant implications for the effectiveness of the 2001 Act.

XII. ITALY

A. IMPLEMENTATION OF COUNCIL DIRECTIVE 2001/86/EC

In August, 2005, the Italian government issued a decree (the "Decree") in order to implement Council Directive 2001/86/EC of 8 October 2001, Supplementing the Statute for a European Company ("SE") with Regard to the Involvement of Employees.⁵³ The fundamental principle of the Decree is to secure employees' acquired rights when the employees are affected by their employers' decisions. When an SE makes these decisions, employees must be "involved" in one of three ways: (i) "information" (informing employee representatives with respect to issues that concern the SE or any of its subsidiaries or establishments in another European Union member state (a "Member State") in a manner that allows the employee representatives to properly evaluate the issues and the impact of any relevant decisions); (ii) "consultation" (establishing dialogue and exchange between the SE and employee representatives in a manner that allows the latter to express an opinion on measures envisaged by the SE), and (iii) "participation" (empowering employee representatives with the right to elect, recommend, or oppose the appointment of, members of the administrative or supervisory body of the SE).

⁵³ Legislative Decree no. 188 of 19 Aug. 2005.

With respect to the election procedure for the members of the Special Negotiating Body (SNB) to be elected, Article 3 of the Decree provides that the relevant employee representatives will be appointed by the internal trade unions representatives (R.S.U.) and the national trade unions that executed the applicable collective labour agreements. These members may include representatives of the trade unions regardless of whether or not they are employees of an SE. Also, where an SE does not have any employee representative, the national trade union that executed the applicable collective labour agreement will establish the means of participation by the employees in the election of the SNB members.

With respect to confidentiality, Article 8 of the Decree provides that the members of the SNB, employee representatives, and experts who assist them are not authorized to reveal information that has been given to them in confidence. Such obligations continue to apply after the expiration of their terms of office. Persons in breach of their confidential obligations are subject to an administrative sanction ranging from €1,033 to €6,198, as well as to the disciplinary sanctions set forth in the applicable collective agreement.

An SE is not obliged to reveal information that is not subject to confidentiality obligations, when its nature is such as to seriously harm the functioning of the SE. A technical conciliation committee must be established by a body representing the SE, including its covered subsidiaries and affiliates in Italy, and the SNB to evaluate confidentiality questions and to determine whether certain information may harm the functioning of the SE. The committee must be composed of three members each of whom will be appointed, respectively, by the (i) employee representatives, (ii) supervisory or administration body of the participating companies, and (iii) SNB and a body representing the SE, including its covered subsidiaries and affiliates, by mutual agreement. The committee must conclude its activity within 15 days of the receipt of the claim brought by the employee representatives.

XIII. JAPAN

A. NEW PERSONAL INFORMATION PROTECTION LAW

On April 1, 2005, the Personal Information Protection Law of Japan (PIP Law)⁵⁴ came into full effect. The PIP Law applies to business entities, whether corporate or individual, whose business activities include use of personal information databases or comparable systems. The PIP Law does not apply to business entities that have handled personal information of fewer than 5000 individuals in the past six month period. Under the PIP Law, “personal information” means information concerning a living person based on which such person may be identified.⁵⁵

A business entity covered by the PIP Law must specify, to the greatest extent possible, the purpose for using personal information when obtaining and handling the information. It also must handle personal information securely, confidentially, accurately, and reasonably only to the extent necessary to achieve the intended purpose. In addition, such business entity is prohibited from obtaining personal information falsely or otherwise by wrongful means. Furthermore, generally, such business entity may not provide any third party with personal data without the consent of the individual to which the data relates.⁵⁶ Consent may be obtained in advance by stipulating how the personal information may be used in work rules or in a pledge letter from the employee.

⁵⁴ Kojin Joho no Hogo ni Kansuru ho [Personal Information Protection Law] (Japan), Law No. 57 of 2003, *available* *at*
http://www.cs-trans.biz/Personal_Information.htm.

⁵⁵ *See id.* art. 3, para. 1 & 3; Personal Information Protection Law Enforcement Order art. 2.

⁵⁶ Personal Information Protection Law (Japan) art. 15, 16, 17, 19, 20 & 23.

B. AMENDMENT OF THE PATENT LAW

On April 1, 2005, the amendment to Article 35 of the Japanese Patent Law⁵⁷ (the “Amendment”) concerning employees’ inventions went into effect. Prior to the Amendment, when an employer patented an employee’s invention, the employee was entitled to “reasonable remuneration,” determined based on expected profits attributable to the invention and the extent of the employee’s contribution to the invention. Following court decisions that awarded large amounts of compensation to certain employees who claimed they were not adequately compensated for their inventions,⁵⁸ the Diet passed the Amendment, which is intended to address the uncertainty in the “reasonable remuneration” standard as interpreted by these courts.

Pursuant to the Amendment, the remuneration payable to the employee when the employer patents an employee’s invention is determined now generally by “voluntary agreement” between the employer and employee. If the relevant work rules stipulate the method of calculating the remuneration, the method is presumed to be appropriate and reasonable. Due to the disparity in the bargaining power of employers and employees, however, certain employers may force their employees to agree to unreasonable remuneration systems. In light of this risk, the amended Patent Law grants the court the authority to test the reasonableness of remuneration paid to an employee on a case-by-case basis. The court may examine the reasonableness of the remuneration by reviewing the facts and circumstances including whether the employer considered an opinion from the employee regarding the remuneration. If the court considers the remuneration to be unreasonable, then it must determine the reasonable amount of

⁵⁷ See Tokkyo Ho [Patent Law] (Japan), Law No. 121 of 1959, *amended by* Law No. 79 of 2004.

⁵⁸ One such case was that of *Shuji Nakamura v. Nichia Kagaku* (Tokyo Dis. Ct., Jan. 30, 2003), in which the Tokyo District Court granted ¥20 billion to an employee as additional compensation for a patented invention. Following the conclusion of this case on January 30, 2005 (which involved an appeal), ¥600 million often is considered to be the largest amount of remuneration that a Japanese court would consider to be reasonable. See http://www.tokyoeiwa.com/index_e.html, for details of the *Nakamura* case.

remuneration. Many companies have amended their work rules following the passage of the Amendment, and these work rules sometimes set the remuneration in an amount up to several hundred million yen, depending on the profits generated by the invention.

XIV. THE NETHERLANDS

A. BACKGROUND OF THE EUROPEAN UNION POSTING OF WORKERS DIRECTIVE 1996

Free movement of services and free movement of workers are two of the four basic freedoms that constitute the core of the European Union (the “EU”).⁵⁹ Many directives, regulations, and other instruments have been introduced in the EU in order to facilitate these freedoms and to harmonize the different national legal systems.

One of these harmonization instruments is the Rome Convention of 1980 (the Treaty on the Law Applicable to Contracts) (the “Treaty”).⁶⁰ The Treaty created the possibility for employers and employees to choose the law applicable to their employment relationship. However, even if parties to an employment agreement choose a governing law, the employee always may seek protection under the law that would have been applicable if no choice of law had been made. To find the applicable law in situations where no choice of law is made, one must look at (i) the country where the employee usually works, even if the employee has been temporarily posted to another country; or (ii) if such country cannot be established, the country where the employing entity hired the employee. Notwithstanding the above, if there is a country with which the employment relationship is more closely connected, the law of that country would apply.

⁵⁹ See generally Treaty Establishing the European Community, Mar. 25, 1957, art. 8-130.

⁶⁰ See 80/934/EEC, OFFICIAL J. EUR. COMMUNITIES 1980, L 266 of 19 June 1980.

In practice, despite the Rome Convention, workers from low-wage EU member states (“Member States”) frequently were posted to other Member States on temporary assignments, while they remained subject to the terms and conditions based on the law of their home countries. The laws of their home countries remained applicable in many cases because they were still deemed to be “usually” performing their work in their home countries. In these cases, employers would pay them lower salary than the employees would earn in their host countries. In order to solve this problem the Posting of Workers Directive was issued in 1996 (the “Directive”).⁶¹

B. FEATURES OF THE DIRECTIVE

The Directive requires the Member States to implement (national) legislation to ensure that employers apply to employees temporarily posted to other countries national (local) employment legislation of such host countries in certain areas such as minimum wage and holidays, maximum working hours and rest periods, health and safety, maternity, and equal treatment of men and women. The Directive is designed only to provide a minimum level of protection. Thus, an executive, for example, who usually performs his activities in four Member States will fall within the scope of the Directive, but generally will not gain any benefit from the Directive because of the high level of his compensation. The Directive applies only to employees who remain employed with their employers in their home countries. For the definition of “employee,” one must look at the law of the host country. Employees can seek protection under the rules of the Directive (implemented in the pertinent country) in the courts of their host countries and, once repatriated, also in the courts of their home countries.

⁶¹ 96/71/EC, OFFICIAL J. EUR. COMMUNITIES 1997, L 018 of 21 Jan. 1997.

C. DIRECTIVE IN PRACTICE

Most employees likely do not understand their new rights under the Directive, and thus likely have not used them adequately to protect themselves. In any case, workers from lower wage countries can still successfully cross the borders and “illegally” work in higher wage countries on terms and conditions that do not meet the Directive’s standards. Thus, further development is expected through case law.

XV. SINGAPORE

A. REGISTRATION OF CRIMINALS ACT

Pursuant to the Registration of Criminals Act (the “RCA”),⁶² the Singapore government maintains a Register of Criminals (the “Register”) containing information regarding persons convicted of registrable crimes as specified in the First and Second Schedules of the RCA. With effect from October 17, 2005, the RCA was amended to provide for spent criminal records.⁶³ As a result of the amendment, a person will be deemed to have no record of a spent conviction. Those eligible to have their records spent will largely be those who have committed minor offenses such as theft and shoplifting. The RCA specifies the categories of persons who are disqualified from having their records spent.

Except for those of disqualified persons, all records in the Register of any person convicted in Singapore of any crime may become spent whether the conviction took place before, on, or after the day the changes come into force (the “appointed day”). The record will become spent on the expiration of a five-year “crime-free period,” as defined in the RCA.

If the record of a person’s conviction in the Register is spent or is treated as spent, there are three consequences. First, the person will be deemed to have no record of that conviction,

⁶² Cap 268 (Sing.) , 1985 Revised Edition.

⁶³ *See* Registration of Criminals (Amendment) Act 2005 (A20/2005) (Sing.).

and it will be lawful for the person to answer a question asked of him on or after the appointed day about his criminal record, or to disclose information about his criminal record, in a manner as if he had no record of that conviction. Second, the Registrar of Criminals will, without delay, make an entry in the register to show that the record of that conviction is spent. Third, any reference in any agreement or other document made on or after the appointed day to the person's criminal record will be taken not to refer to the conviction the record of which is spent, but to refer only to any of his convictions the records of which are not spent. The amendments, however, do not expunge a person's criminal record. A record that becomes spent does not remove the fact of the conviction. Therefore, if asked specifically about a "previous conviction," an ex-offender whose record is marked as spent must still disclose his or her conviction. For example, if the person is asked whether he or she has ever been convicted by a court of law, the answer should be "yes."

B. WORKPLACE SAFETY AND HEALTH BILL 2005

On March 1, 2006, the Workplace Safety and Health Act 2006 (the "Act") came into force.⁶⁴ The Act was first introduced in Parliament on October 17, 2005, and passed on January 17, 2006. The Act repeals the Factories Act and provides the legal framework for the new occupational safety and health regulatory system applicable to a "workplace," defined to mean premises where a person is at work or is to work, for the time being works, or customarily works, including a factory. The key reforms are as follows: (i) allocation of responsibility to a range of stakeholders at the workplace along lines of control; (ii) focus on workplace safety and health systems and outcomes; (iii) more effective enforcement through issuance of "remedial orders";

⁶⁴ Act 7 of 2006 (Sing.).

and (iv) higher penalties for non-compliant and risk-taking behaviour to prevent accidents upfront.

C. FLEXIBLE WORK SCHEDULES

With rapidly changing market demands and volatile business cycles, companies need to have greater flexibility to schedule work patterns to optimize their worker resources. Toward this end, the Employment Act⁶⁵ was amended with effect from October 1, 2004, to empower the Commissioner for Labour (the “Commissioner”) to exempt employers from certain statutory provisions on overtime, working on rest days, and public holidays.⁶⁶ The power of exemption may be exercised only after considering the operational needs of the employer and the interests of the employee or a class of employees. To assist the Commissioner in this regard, the Tripartite Work Group issued the Tripartite Guidelines on Flexible Work Schedules (the “Guidelines”) on December, 27, 2004, listing the conditions for an exemption.⁶⁷ These conditions include the rationale for implementing a flexible work schedule, income stability, occupational safety and health, gain sharing or incentives for employees, and consent from unions and affected employees. Applications for exemption must be submitted in writing to the Commissioner at least two months before the implementation of the schedule.

⁶⁵ Cap 91 (Sing.), 1996 Revised Edition.

⁶⁶ Employment (Amendment) Act 2004 (A41/2004) (Sing.).

⁶⁷ See, e.g., Press Release, Ministry of Manpower, Tripartite Guidelines on Flexible Work Schedules (Dec. 27, 2004), available at <http://www.mom.gov.sg/PressRoom/PressReleases/Archived2004/20041227-TripartiteGuidelinesOnFlexibleWorkSchedules.htm>.

XVI. SPAIN

A. RETIREMENT AT 65

In July, 2005, Spanish Parliament passed a new law to allow industry-level collective agreements to set compulsory retirement at age 65 for employees covered by the agreements, provided that they are entitled to retirement benefits.⁶⁸

B. REQUIREMENT TO ADOPT A SOCIAL PLAN IN THE EVENT OF A COLLECTIVE REDUNDANCY

Recent administrative decisions at local levels have strengthened the requirement on employees to provide for a social plan if a collective redundancy is to be authorized by the competent labor authority. This requirement applies to employers regardless of whether or not an agreement with the unions and employee representatives as to the redundancy has been reached.

C. SMOKE BAN AT THE WORKPLACE

In December, 2005, Parliament passed a new law to prohibit smoking at the workplace, unless the services at the workplace are provided in open spaces.⁶⁹ This marks the first time that a smoke ban has been broadly implemented at workplaces in Spain.

D. RECENT CASE LAW DEVELOPMENTS ON STOCK OPTIONS AND TERMINATION OF EMPLOYMENT

Controversy has arisen with respect to an employee's ability to exercise outstanding stock options or other equity based awards after an unfair dismissal. Certain rulings of High Courts of Justice held that an unfairly terminated employee can exercise outstanding stock options after the termination of employment pursuant to clauses within the plan documents dealing with exercisability after a non-voluntary termination. Other rulings of different High Courts of Justice

⁶⁸ See Act number 14/2005 (Spain), July 1, 2005.

⁶⁹ See Act number 28/2005 (Spain), Dec. 26, 2005.

held that the terms and provisions dealing with exercisability after a termination by any reason or no reason should prevail.⁷⁰ Further rulings by the Supreme Court of Justice are expected.

E. NEW PROPOSAL FOR A REFORM OF LABOR AND EMPLOYMENT LAWS

It is expected that in 2006 a new reform on labor and employment laws will be enacted. Among other measures, this new reform likely will focus on the following issues: (i) reduction of the number of permitted purposes for using fixed-term employment contracts; (ii) modification of the employment-related implications of subcontracting and outsourcing, namely, by giving more protection to the employees of the subcontracting and outsourcing companies; (iii) provision of incentives to create part-time work; and (iv) increase of the role of Temporary Work Agencies to provide fixed-term work and in the labor market.

XVII. SWITZERLAND

A. FEDERAL STATUTE ON INCOME COMPENSATION FOR MILITARY SERVICE PERSONS AND MOTHERHOOD

July 1, 2005, the Federal Statute on Income Compensation for Military Service Persons and Motherhood entered into force.⁷¹ The Act regulates the compensation of persons serving in the Swiss army or the red cross or providing alternative civilian services (instead of military service) and, since July 1, 2005, the compensation for motherhood. A claim to compensation for motherhood requires that the mother (i) was “insured” (as used in the Swiss Federal Statute on the Insurance for Old Age and Surviving Dependants⁷²) during the nine months immediately preceding the birth of the child (which period will be reduced in case of a premature birth of the

⁷⁰ See, among others, rulings issued by the High Court of Justice of Madrid number 235/2005, Apr. 7, 2005, and 561/2005, June 28, 2005.

⁷¹ Federal Statute on Income Compensation for Military Service and Motherhood (Switz.), SR 834.1, AS 2005 1429 1437.

⁷² Federal Statute on Insurance for Old Age and Surviving Dependants (*Bundesgesetz über die Alters- und Hinterlassenenversicherung (AHVG)*) (Switz.), SR 831.10, AS 1978 319 419.

child) and (ii) during this period was gainfully employed (including with the European Union or the European Free Trade Association) for at least five months. The compensation for motherhood is paid out as a daily sum and amounts to 80 percent of the average (daily) income, but is limited to 172 Swiss Francs per day. An employee's compensation for motherhood will be claimed *via* her employer; a self-employed or unemployed mother can make her claim directly with the Social Security Agency (*AHV-Ausgleichskasse*).

B. CONTRACTUAL AGREEMENT TO ABSTAIN FROM ALCOHOL

On July 5, 2005, the Swiss Federal Tribunal determined whether an employer (here the Swiss Federal Railway Company) was justified in terminating an employee (a lead train conductor) for violating a contractual agreement obligating the employee to completely abstain from alcohol.⁷³ Even though the Federal Tribunal regarded the obligation as a limitation of the employee's constitutionally guaranteed personal freedoms, the Tribunal did not rule that the obligation was unconstitutional. The Federal Tribunal reasoned that, first, the obligation was necessary for reasons of security and, therefore, in the public interest; and second, the obligation did not violate the employee's personal freedom fundamentally. Accordingly, the Federal Tribunal held that the termination of the employment relationship as justified.⁷⁴

C. TERMINATION: TIMING

Another decision by the Federal Tribunal concerned Article 336c of the Swiss Code of Obligations (CO).⁷⁵ Article 336c of CO provides that an employer may not terminate an employment relationship during certain periods of time, such as when the employee is permitting obligatory military service, the employee is unable to work (without the employee's fault) due to

⁷³ See *X v. Schweizerische Bundesbahnen (SBB)*, BGE 2A. 6/2005.

⁷⁴ See *X v. Schweizerische Bundesbahnen (SBB)*, BGE 2A. 6/2005

⁷⁵ See *X. and Öffentliche Arbeitslosenkasse des Kantons Aargau v. A. AG*, BGE 131 III 467.

an illness or accident, the employee is pregnant, or 16 weeks after the employee's delivering a child. The most common case is the employee's inability to work due to an illness or accident. In all of these cases, the employer may not terminate the employment relationship for (i) 30 days during the first year of employment, (ii) 90 days during the second and fifth years of employment, and (iii) 180 days thereafter. A termination during this restricted period is void. If an employee is terminated before a restricted period begins but during the notice period, the notice period would be interrupted and continue to run only after the end of the restricted period. In its decision of April 14, 2005, the Federal Tribunal held that an inability to work due to an illness or accident during the notice period and prior to the end of any calendar month, the period between the disability date and the end of the month must be added to the end of the notice period. The Federal Insurance Tribunal, on the other hand, has determined that, in such case, the additional days must be added to the front of the notice period.⁷⁶

XVIII. TAIWAN

A. IMPLEMENTATION OF THE LABOR PENSION ACT

The Republic of China ("ROC") Labor Pension Act ("LPA") was promulgated on June 30, 2004, and took effect on July 1, 2005. The LPA provides a more flexible pension contribution scheme whereby qualified retired individuals may receive from their individual pension fund accounts ("IPA") at the Bureau of Labor Insurance ("BLI"),⁷⁷ a lump sum or monthly payments of pension benefits. The LPA pension scheme will gradually replace the statutory pension scheme prescribed under the Labor Standards Act ("LSA"), according to which

⁷⁶ See *B v. Gegen Öffentliche Arbeitslosenkasse des Kantons Solothurn und Versicherungsgericht des Kantons Solothurn*, BGE 115 V.

⁷⁷ See Article 9, LPA (Taiwan).

an employee upon retirement is entitled to receive a single lump sum payment of pension benefits.⁷⁸

For the enforcement of the LPA, the Council of Labor Affairs promulgated the Enforcement Rules of the LPA (“Rules”) on January 19, 2005, and the Rules took effect, concurrently with the LPA, on July 1, 2005. The Rules provide that, when an employer inquires in writing to the employee as to whether the employee wishes to continue with the LSA pension scheme or to switch to the LPA pension scheme, the employee should make his or her own choice, which should be confirmed by the employee’s signature.⁷⁹ The Rules explicitly provide that an employee who opts for the LPA pension scheme may inform the BLI of his or her choice. If the choice reported by an employer differs from that declared by its employee, the employee’s choice would prevail.⁸⁰ Under the LPA, if an employee has two or more jobs concurrently, each employer must make the monthly pension fund contributions or annuity insurance premium payments, depending on the pension scheme in which the employee is enrolled.⁸¹

When an enterprise is restructured or sold as referred to in the LSA, or becomes the subject of a merger or acquisition under the Corporate Mergers and Acquisitions Act, the affected employees’ pension scheme before their enrollment in the LPA pension scheme shall, in all cases, be assumed by the surviving, newly incorporated, or acquiring company after the restructuring, sale, or merger, without changes to their seniority in the scheme.⁸²

⁷⁸ See Article 55, LSA (Taiwan).

⁷⁹ See Article 5, Rules.

⁸⁰ See Article 5, Rules.

⁸¹ See Article 9, Rules.

⁸² See Article 11, Rules.

If an employee chooses the LPA pension scheme and accepts a cash-out of his or her accrued pension benefits in a manner consistent with the LSA, and the employer withdraws money from its retirement reserve fund account at the Central Trust of China to make such cash-out payment, the employee may choose to have a part of or the entire amount transferred into his or her IPA at the BLI, or to his or her employer's annuity insurance company. If an employee elects to have the entire amount transferred, the number of his or her contributing years under the LSA pension scheme can be credited towards the LPA pension scheme for applying for monthly pensions benefit payments.⁸³

In general, all pension fund contributions made by an employer for its employees are at a rate of six percent. An employer, however, may make contributions at higher rates for individual employees after reporting such cases to the BLI.⁸⁴ Furthermore, an employee or mandate such as a manager who is not entitled to the benefits under the LSA may make voluntary contributions with their employers' consent (limited to ROC nationals only). In such cases, the employers may make contributions on behalf of the employees or the mandates, at rates not exceeding six percent.⁸⁵ If an employee receives a pension distribution under the LPA after terminating an employment relationship, but subsequently resumes employment with the same employer, his or her contribution record would start from zero.⁸⁶

⁸³ See Article 12, Rules.

⁸⁴ See Article 16, Rules.

⁸⁵ See Article 20, Rules.

⁸⁶ See Article 36, Rules.

XIX. UNITED KINGDOM

A. INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 2004

The Information and Consultation of Employees Regulations 2004 (ICE),⁸⁷ which came into force on April 6, 2005, establish a general framework of minimum requirements that employers must follow for providing information to and consultation with employees.

The ICE regulations require employers to establish a works' councils or similar employee representative bodies, and an employer generally has six months in which to negotiate an ICE agreement before a default model is put in place. If an employer adopts the "works' council" model, a single, "national" level works' council is not required. Works' councils can exist for different sites or business units, and there may be a hierarchy of consultative bodies or works' councils for selected parts of the business, while less formal arrangements apply to other parts of the business.

Although all employees in an undertaking must be covered by some information and consultation arrangement, a group of companies that is considered to be comprised of several "undertakings" for the purpose of the ICE regulations need not all be covered by one information and consultation arrangement. Each company within the group may be treated differently and either be covered by a separate arrangement or be part of one arrangement applicable to the entire group. A European works' council operating at a pan-European level, however, is not sufficient for the purpose of the ICE regulations.

⁸⁷ See Information and Consultation of Employees Regulations 2004 (U.K.), Statutory Instrument 2004 No. 3426, available at <http://www.opsi.gov.uk/si/si2004/20043426.htm>.

B. EMPLOYMENT EQUALITY (SEX DISCRIMINATION) REGULATIONS 2005

The Employment Equality (Sex Discrimination) Regulations 2005⁸⁸ came into effect on October 1, 2005, and prohibit sex-based harassment (harassment of a sexual nature) and harassment on the grounds of gender reassignment (meaning an employee's change of gender). Previously, individuals who complained about harassment at work had to pursue claims for direct sex discrimination. New regulations, however, outlaw harassment-related victimization and provide a new definition of indirect discrimination that states a person now discriminates against a woman "if he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but—(i) which puts or would put women at a particular disadvantage when compared with men, (ii) which puts her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim."

This new indirect discrimination definition also applies to discriminatory treatment against married people, but does not apply to gender reassignment cases (currently only direct discrimination on grounds of gender reassignment is prohibited). Also, the new regulations underscore the fact that treating a woman less favorably on the grounds of pregnancy or maternity leave constitutes sex discrimination.

C. DISABILITY DISCRIMINATION ACT 2005

The Disability Discrimination Act 2005 (DDA)⁸⁹ makes several amendments to the employment-related provisions of the Disability Discrimination Act 1995, the most significant of which are that (i) the definition of "disability" is extended to cover HIV, cancer, and Multiple

⁸⁸ See Employment Equality (Sex Discrimination) Regulations 2005 (U.K.), Statutory Instrument 2005 No. 2467, available at <http://www.opsi.gov.uk/si/si2005/20052467.htm>.

⁸⁹ See Disability Discrimination Act 2005 (U.K.), ch. 13 2005, available at <http://www.opsi.gov.uk/acts/acts2005/20050013.htm>.

Sclerosis from the point of diagnosis, and (ii) there no longer is a requirement that a type of mental illness must be clinically well-recognized to amount to an impairment.

D. CIVIL PARTNERSHIP ACT 2004

The introduction of the Civil Partnership Act 2004 (CPA)⁹⁰ has enabled two people of the same sex to gain legal recognition of their relationship by entering into a “civil partnership” in the United Kingdom with effect from December 5, 2005. The CPA provides for rights between the civil partners and third parties, including employers, and amended then-existing legislation so as to create employment rights for civil partners in respect of discrimination on the grounds of marital status and sexual orientation; paternity and adoption leave and pay (including adoption from overseas); the right to request flexible working; and the right to pensions and other benefits.

XX. UNITED STATES⁹¹

A. SUPREME COURT EMPLOYMENT CASE LAW

In March, 2005, the United States Supreme Court resolved a split in the federal appellate courts regarding the Age Discrimination in Employment Act of 1967 (ADEA). In *Smith v. City of Jackson, Mississippi, et al.*, a 5-3 decision (former Chief Justice Rehnquist did not take part in the decision), the Supreme Court clarified that a covered individual (*i.e.*, a present or former employee or a job applicant who is age forty or older) may bring a disparate impact claim against an employer under the ADEA.⁹² Under *Smith*, a covered individual does not need to establish that the employer engaged in intentional discrimination in order to prevail. Rather, a covered

⁹⁰ See Civil Partnership Act 2004 (U.K.), 2004 ch. 33, available at <http://www.opsi.gov.uk/acts/acts2004/40033--v.htm>.

⁹¹ For the calendar year 2005, the National Labor Relations Board (NLRB) operated with only three members after two of the members' terms expired in 2004. Although the short-staffed NLRB managed to decide many cases, the NLRB did not decide significant pending cases such as *Dana Corporation* and *Metaldyne Corporation*, involving the use of neutrality and card-check agreements, which could have sweeping effects on the organizing efforts of unions.

⁹² 125 S. Ct. 1536, 1544 (2005). This decision is consistent with the interpretation of the ADEA by the United States Department of Labor and the Equal Employment Opportunity Commission (EEOC). See *id.*

individual may now prove his or her claim by showing that an employer’s facially-neutral policy, when applied, adversely affects employees age forty or older more than it does employees under forty years of age. In reaching this decision, the Court relied on the language of the ADEA that closely mirrors that of Title VII of the Civil Rights Act of 1967 (Title VII), which the Court previously held authorizes a disparate impact theory of recovery.⁹³ The Court further distinguished a disparate impact claim under the ADEA from Title VII and narrowed the scope of claims available under the former. Under language unique to the ADEA, an “otherwise prohibited” action of an employer is lawful if the employer based the action on “reasonable factors other than age.”⁹⁴ The Court ultimately affirmed the Court of Appeals’ decision and rejected the plaintiffs’ claims because they failed to isolate and point out any specific employment practice that was allegedly responsible for any statistical disparity based on age.

In November, 2005, the Supreme Court resolved another split among the Circuit Courts in the wage and hour context. In *IBP, Inc. v. Alvarez*, the Supreme Court held that, when the donning and doffing of unique or specialized clothing or other gear are so integral to the employee’s principal activity that they are themselves principal activities, then the time an employee spends walking between the clothes changing area and the work production area is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.⁹⁵ The Court further held that pre-donning waiting time is not compensable, but pre-doffing waiting time is compensable. The Court reasoned that “any activity that is ‘integral and indispensable’ to

⁹³ *Id.* at 1541-42 (*citing* Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

⁹⁴ *Id.* at 1544.

⁹⁵ 126 S. Ct. 514 (2005).

a ‘principal activity’ in the workplace is itself a ‘principal activity’” for which an employer must compensate non-exempt employees.⁹⁶

B. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

In October, 2005, the Office of Federal Contract Compliance Programs issued new rules, which take effect on February 6, 2006, concerning the tracking of internet job applicants. The new rules require employers who are federal contractors and subcontractors to take affirmative action to ensure that they do not discriminate unlawfully in their employment processes. The new rules provide guidance as to when employers who use the Internet and electronic data processing technologies in their recruitment efforts must collect and maintain data about a job “applicant.”

⁹⁶ *Id.*

(i)
(ii)