# DEVELOPMENTS IN EMPLOYMENT LAW AROUND THE WORLD 2006

Erika C. Collins,[*] Marjorie R. Culver, and Laura Marino

## I. China

### A. DRAFT LABOR CONTRACT LAW

On March 20, 2006, the National People's Congress ("NPC") of the People's Republic of China ("PRC") issued the initial draft Labor Contracts Law for public comment (the "Draft Law").[1] The Draft Law reiterates many of the basic requirements of the existing PRC Labor Law[2] with respect to labor contracts, and provides several significant changes in favor of employees. For instance, the Draft Law contains provisions favoring open-ended labor contracts over fixed-term contracts;[3] providing that in the event of multiple interpretations of an issue, the interpretation favoring the employee shall prevail;[4] and granting labor unions the apparent power to veto an employer's proposed employment-related rules.[5] The Draft Law also includes significant changes concerning non-compete provisions,[6] penalties for unlawful termination,[7] and restrictions on secondment arrangements.[8]

---

[*] Erika C. Collins is a Partner in the Employment Law Department of Paul, Hastings, Janofsky & Walker LLP in New York, where she chairs the International Employment Law Practice Group. Marjorie R. Culver, a senior attorney, and Laura Marino, an associate, are also members of the same department at Paul, Hastings, Janofsky & Walker LLP. Ms. Collins wishes to thank the following contributors: K. Lesli Ligorner and Willa Ying with Paul, Hastings, Janofsky & Walker LLP (China), Anders Etgen Reitz with Bech-Bruun (Denmark), Christopher Walker and Christopher Bracebridge with Paul, Hastings, Janofsky & Walker LLP (European Union and United Kingdom), Philippe Desprès with Gide Loyrette Nouel (France), Thomas Griebe with Taylor Wessing (Germany), Michael J. Downey with Paul, Hastings, Janofsky & Walker LLP (Hong Kong), Yukiko Tsunoda and Setsuko Ueno with Paul, Hastings, Janofsky & Walker LLP, Juan Bonilla with Cuatrecasas (Spain), and Laura Marino with Paul, Hastings, Janofsky & Walker LLP (United States of America).

[1] *Available at* http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=347910&pdmc=110126.

[2] Reference number: Order No. 28 of the President of the PRC, 1994.

[3] *See* Draft Law arts. 9, 31, 33, 39.

[4] *See* Draft Law art. 10.

[5] *See* Draft Law arts. 5, 51.

[6] *See* Draft Law art. 16.

The Draft Law has attracted considerable attention and comment, both positive and negative.[9] From an employer's standpoint, many foreign investors have expressed the concern that the Draft Law may negatively affect China's investment environment by increasing labor costs.[10] The Draft Law is expected to be enacted in 2007.[11]

B. THREE-YEAR ACTION PLAN TO PROMOTE LABOR CONTRACT SYSTEM

On March 31, 2006, the Three-Year Action Plan to Promote the Labor Contract System (the "Plan")[12] came into effect. The Plan was jointly promulgated by China's Ministry of Labor and Social Security, the All-China Federation of Trade Unions, China Enterprise Confederation, and China Enterprise Directors Association. The Plan established the following targets for employers to comply with the requirement to enter into written employment contracts with their employees: 80 percent of employers in compliance by 2006; 90 percent of employers in compliance by 2007; and 100 percent compliance by 2009. The Plan also proposes to accelerate the legislative process of the Draft Law and to enforce more strictly the requirement that every employer file employment information with the local labor authorities.

(...continued)

7 *See* Draft Law art. 42.

8 *See* Draft Law arts. 12, 24, 41.

9 By April 6, 2006 the NPC received 191,849 comments from a broad spectrum of interested parties, approximately 65 percent of which came from employees. *See* "Feedback on Draft Labor Contract Law", *available at* http://www.gov.cn/xwfb/2006-04/21/content_260252.htm.

10 *See* Zhang Liwei and Chen Huan, *Foreign Investors Oppose the Labor Contract Law and Threaten to Withdraw Investment*, *available at* http://finance.people.com.cn/GB/1039/4364703.html; *see also* Laurie Underwood, *Return to the Iron Rice Bowl?*, INSIGHT Apr. 2006.

11 *See* CHINA NEWS, *available at* http://www.chinanews.com.cn/news/2004/2004-12-10/26/515419.shtml.

12 Reference number: *Lao She Bu Fa* (2006) No.13.

### C. JUDICIAL INTERPRETATION ON LABOR DISPUTE

On August 14, 2006, the Supreme Court of the PRC released the Second Interpretation on the Application of Law in Labor Disputes (the "Second Interpretation"). According to the Second Interpretation, the sixty-day statute of limitations for a party to initiate an employment arbitration after the occurrence of a labor dispute under the PRC Labor Law[13] may be tolled if the party can prove that within the sixty-day period (i) it has claimed rights towards the other party, (ii) it has sought remedies from the relevant authorities, or (iii) the other party has agreed to perform its obligation. The sixty-day period will begin again once the other party expressly refuses to perform its obligations or the relevant authority releases its decision or expressly refuses to take the case. The Second Interpretation took effect on October 1, 2006.

## II. Denmark

### A. EMPLOYEE STOCK OPTIONS

In 2005, Danish courts rendered significant rulings that affected the administration of stock option plans. In 2006, stock options and other equity awards continued to be frequent subjects of litigation, as the Maritime and Commercial Court rendered the following rulings:

- The Maritime and Commercial Court found that employees who were granted stock options prior to the enactment of the Danish Stock Option Act[14] are not entitled to holiday allowances or severance pay based on the value of their stock options.[15] This ruling has been appealed to the Supreme Court.[16]

[13] *See* Labor Law (P.R.C.), art. 82.

[14] *See* Act no. 309 of May 2004.

[15] *See* Ingeniørforeningen i Danmark acting for A, I and H vs. Intel Denmark ApS, the Danish Maritime and Commercial Court ruling of 20 June 2006.

[16] *See* Supreme Court Case no. 368/06.

- In another ruling,[17] the Danish Maritime and Commercial Court considered whether the right of Intel Denmark ApS employees to their options may lapse as a consequence of laches. The Court found that such right did not lapse. The employees waited a year and a half from the termination of their employment relationships to claim their right. This ruling has been appealed to the Supreme Court.[18]

- The Maritime and Commercial Court also considered whether a yearly allotment of an equity award to an employee may be conditional on an employee's not having received notice of termination of employment. In *Jyske Bank*,[19] the Court considered two types of employee stock plans: (i) free allotment of stock to all employees regardless of the employees' individual performances and (ii) offering of stock at a favorable price. The Court found the stock allotted under the first plan to be part of the employees' salaries, subject to the Salaried Employees Act section 17a. Thus, the above condition was declared null and void, and the employee had a right to a prorated share of the stock allotment for the year of termination. The Court, however, declared the second plan not subject to the Salaried Employees Act section 17a, as participation in the plan was voluntary and involved substantial investment by the employees.

B. THE ACT ON THE TRANSFER OF UNDERTAKINGS

On May 28, 2006,[20] the Danish Maritime and Commercial Court rendered a ruling that broadened the scope of the Act on the Transfer of Undertakings, the Danish national legislation implementing the European Union Transfer of Undertakings Directive.[21] Under this ruling, transactions that are subject to this Act now include simultaneous transfer of employees and

[17] *See* HK Danmark acting for L and K v. Intel Denmark ApS (Danish Maritime & Commercial Court April 20, 2006).

[18] *See* Supreme Court Case no. 211/06.

[19] *See* Finansforbundet acting for K, B and M v. Finanssektorens Arbejdsgiverforening acting for Jyske Bank A/S (Danish Maritime & Commercial Court December 22, 2005).

[20] *See* HK Danmark acting for L v. IndepenDent Solutions A/S and the Danish Association of Dentists acting for A (Danish Maritime & Commercial Court May 18, 2006).

[21] *See* Act no. 710 (August 20, 2002) and Council Directive 2001/23/EC (March 12, 2001).

assets to several cooperating parties, even if each such party does not receive a coherent economic unit. The ruling has been appealed to the Supreme Court.

## III. European Union

Two legislative proposals were introduced to the European Commission in 2006. The first, introduced on February 21, 2006, is a proposal to codify Council Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer. The second, introduced on November 6, 2006, is an amended proposal for a Regulation on the law applicable to non-contractual obligations. In addition, the key European Court decisions in the field of employment law in 2006 are outlined below.

### A. Disability Discrimination

The European Court of Justice (ECJ) has confirmed that sickness is not in itself a prohibited ground of discrimination, and that a person dismissed for sickness is not protected by the disability provisions of the Equal Treatment Framework Directive ("Directive"). The ECJ ruled that "disability" refers to a limitation that results in particular from physical, mental or psychological impairments, hinders the participation of the person concerned in professional life, and is likely to last for a long time.[22]

### B. Equal Pay

*Cadman v. Health & Safety Executive*[23] is perhaps the European "case of the year". There, the claimant discovered that she was earning less than four male colleagues on the same grade because the men had longer terms of service, and pay was assessed (in part) on length of service. She claimed this was discriminatory and breached European equal pay law because the

[22] Case C-13/05 Chacon Navas v. Eurest Colectividades SA.

[23] Case C-17/05.

pay scheme disproportionately affected women. The European Court of Justice (rejecting the Opinion of the Advocate General) ruled that an employer does not generally have to provide specific proof that experienced staff perform their job duties better then less-experienced staff, and are thus entitled to higher pay. Employers, therefore, now have the freedom to use length of service as a criterion in pay scales without the fear of sex discrimination claims. However, the Court went on to say that there may be cases where the employee raises "serious doubts" as to whether the length of service criterion achieves the objective of rewarding experience – thus leaving the door open to future claims. It is also possible that the legality of such pay structures may soon be challenged under new laws on age discrimination that are being introduced throughout Europe.

C. ROLLED-UP HOLIDAY PAY

Pursuant to the European Union Working Time Directive (the "Directive"), workers are entitled to four weeks of paid holiday leave per year. Some employers who pay their employees by the hour or the day attribute a proportion of an employee's pay to holiday pay, rather than pay the employees when they actually take their holiday leave. This practice is known as "rolling up" holiday pay.

In the case of *Robinson-Steele v PD Retail Services Ltd*,[24] the claimant argued that rolled-up holiday pay constitutes a payment in lieu of holiday, which contravenes the Directive. The respondent argued that the Directive did not require holiday to be made at any particular time, or in any particular way. The European Court held that the practice of rolling-up holiday pay is unlawful, and stated: "The Directive precludes the payment for minimum annual leave…from

[24] Case C-131/04.

being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave."

## IV. France

### A. MAJOR LEGISLATIVE REFORMS

In 2006, after a failed attempt to introduce a new type of employment contract, a "first-job contract" *(contrat première embauche*, or CPE), broadly modeled after the "new hiring contract" *(contrat nouvelles embauches*, CNE), the French government issued Decree 2006-1070 that now permits "senior indefinite-term contracts" *(contrat à durée déterminée senior*, or CDD senior).[25] This contract is for a 18-month term that can be renewed once, and is available for job seekers over 57 years of age. In a country where fixed-term employment is otherwise greatly restricted, senior indefinite-term contracts are intended to introduce flexibility in the labor markets with the hope of reducing unemployment.

The Law 2006-340[26] introduced new provisions aimed at achieving equal pay for men and women with the following requirements:

- Elimination of wage discrepancies between men and women by the end of 2010, requiring mandatory annual wage negotiations to implement measures to achieve this end; and
- Reconciliation of employment and parenthood, by guaranteeing both changes in the salary structure and an equal right to paid vacation for persons on maternity/adoption leave.

[25] Decree n°2006-1070 (August 28, 2006); J.O. n°199 (August 29, 2006), page 12763, *available at* www.legifrance.gouv.fr.

[26] Law n°2006-340 (March 23, 2006).

B. CASE LAW DEVELOPMENTS

*Redundancy*. On January 11, 2006, in a major decision regarding the French Yellow Pages *(arrêt "Pages Jaunes")*, the *Cour de Cassation*, France's highest court, ruled that a company can justify a redundancy based on anticipation of foreseeable economic difficulties due to technological changes that adversely would affect employment, even if the company is not experiencing any economic hardship at the time of the redundancy.[27] On May 31, 2006, however, the *Cour de Cassation* clarified this standard by stating that, in the absence of any of the statutory grounds for a redundancy,[28] a company cannot justify a redundancy without a threat to its competitiveness.[29] In this case, the court found that the redundancy was only for the purpose of increasing the company's profit margin. On March 8, 2006, the *Conseil d'État*, France's Administrative Supreme Court, confirmed this view by ruling that a reorganization leading to redundancies cannot be motivated by a downturn in economic activity and search for increased productivity.[30]

Two District Courts, the Nanterre and Paris District Courts,[31] also recently ruled that implementation of forward-looking labor force and competence management[32] measures *(gestion prévisionnelle de l'emploi et des competences*, or GPEC) was a precondition to a redundancy. These measures demonstrate that a company seeking to initiate a redundancy anticipated changes in its needs in terms of skills and headcount. The Courts ordered companies to implement these

---

[27] *See* Cass soc. January 11, 2006, n°05-40977 & n°04-46201, *available at* www.legifrance.gouv.fr.

[28] The statutory grounds for redundancy are economic difficulties and technological evolutions (Art. L.321-1 of the French Labor Code). The *Cour de Cassation* also allows redundancy for cessation of activity.

[29] *See* Cass soc. May 31, 2006, n°04-47376, *available at* www.legifrance.gouv.fr.

[30] *See* Conseil d'État, March 8, 2006, n°270857, *available at* www.legifrance.gouv.fr.

[31] TGI Paris, emergency proceedings *(référé)*, October 5, 2006, n°06/57817, Nextiraone; TGI Nanterre, emergency proceedings *(référé)*, September 5, 2006, n°06/01523, UES Capgemini, *available at* www.legifrance.gouv.fr.

[32] Art. L.320-2 of the French Labor Code.

measures prior to engaging into the information and consultation procedure leading to economic redundancy.

*Whistleblowing*. On October 9, 2006, the Lyon District Court (*TGI Lyon*) [33] upheld the validity of a whistleblowing system created by a local subsidiary of German agro-chemical Bayer CropScience for the purpose of complying with the U.S. Sarbanes-Oxley Act. The whistleblowing system was found to be in compliance with the Data Protection Authority's December 8, 2005, guidance (*Commission Nationale de l'Informatique et des Libertés,* or CNIL), on the grounds that:

- it is intended as an optional system that can only be used for legitimate interests (accountancy matters, financial control and fight against corruption);
- the identity of the whistleblower is kept confidential; and
- the person implicated has a right to access and correct the data collected.

## V. Germany

### A. NEW PROBLEMS WITH THE TRANSFER OF UNDERTAKINGS

A new decision by the European Court of Justice from 2005 is brewing up a storm and is leaving the national legal positions on restructuring and outsourcing in a more blurred state than ever before.[34] The decision in the *Güney-Görres* case relates to § 613a of the German Civil Code,[35] which governs the rights and obligations of employers and employees during a transfer of undertaking. The statute provides that the new owner of a business that has been acquired

[33] TGI Lyon, Chambre des Urgences, September 9, 2006, Union Départementale CGT du Rhône v. Bayer Cropscience (docket number unavailable).

[34] See ECJ judgment from December 15, 2005, C-232/04, C-233/04, Nurten Güney-Görres & Gül Demir v. Securicor Aviation (Germany) Ltd. & Kötter Aviation Security GmbH & Co. KG, NJW 2006, 889.

[35] Section 613a BGB has been applicable in its current version since April 1, 2002, and was last amended on March 23, 2002. BGBl. I 2002, p 1163.

through a legal transaction assumes the same rights and obligations that the previous owner had under the existing contracts of employment.[36] This statutorily-prescribed assumption of rights and obligations already posed considerable employment law risks for external service providers, as well as for buyers and sellers of businesses and parts businesses. The decision of the European Court of Justice has not improved this situation.

Much to the disappointment of the parties concerned, the jurisprudence on the question of transfers of undertaking at a European and national level has undergone extensive change,[37] particularly the law relating to external contracts and the renewal of contracts. For example, until now, the German Federal Employment Court had held that when a service provider is directed to use resources that are to be surrendered to him by the instructing party, a transfer of undertaking would only take place if the resources were surrendered for the exclusive economic use of the external appointed party. Only if the resources had been surrendered for stand alone use at the external contractor's own risk and at his account, would the resources be apportioned to that party and accepted as a transfer of undertaking.[38]

The European Court of Justice denounced this restrictive and therefore business-friendly jurisprudence as out of line with the Directive, and once again the law of the Federal German Republic on the question of transfers of undertaking fell into disarray. In the meantime, the

---

[36] At a European level a transfer of undertaking was governed by Directive 77/187/EWG (February 14, 1977), which was re-promulgated as Directive 2001/23/EG (March 12, 2001).

[37] As a general rule the changes were conditional upon guidelines from Luxemburg. Leading judgments with repercussions on the jurisprudence of the German Federal Employment Court included: ECJ, judgment from March 11, 1997, C-13/95 Ayse Süzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice, NJW 1997, 2039; ECJ, judgment from March 18, 1986, C-24/85, Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir C. V. und Alfred Benedik en Zonen B.V.

[38] This jurisprudence is based on the so-called Catering-Decision of the Federal Employment Court from December 11, 1997, 8 AZR 426/94, NJW 1998, 2549.

German Federal Employment Court had applied the guidelines of the ECJ in two new decided cases without opposition.[39] The existing legal uncertainty deepened even further.

The new case law from the European Court of Justice and the German Federal Employment Court will have considerable effects on business practice particularly for outsourcing plans and succession of contracts. Following the *Güney-Görres* decision, it is no longer possible to avoid the legal consequences of a transfer of undertaking by using a form of contract that excludes the use of resources in the appointed external party's own economic commercial interests. Instead, from now on, every service provided in relation to resources owned by the appointing party runs the risk of being a transfer of undertaking. For the appointed party, the new case law can lead to the unintentional and sometimes costly take-over of personnel. The instructing party runs the risk of unintentionally losing a valuable employee to the appointed party who generally does not want to take on the employee in question. Greater vigilance is urgently required from both sides, especially in the case of outsourcing.

## VI. Hong Kong

The Race Discrimination Bill[40] was published on December 1, 2006, and provides for the protection of minority groups in Hong Kong. The term "race" is defined as meaning the race, color, descent, national origin, or ethnic origin of a person. This definition is consistent with the definition internationally adopted under the International Convention on the Elimination of All Forms of Racial Discrimination, but does not include discrimination on the basis of nationality, citizenship, resident status, length of stay and indigenous villager status.

---

[39] *See* Case C-340/01 Carlito Abler et. al. v. Sodexo MM Catering Gesellschaft mbH (November 20, 2003).

[40] The bill was published on December 1, 2006 in Legal Supplement No. 3, at C778.

Racial discrimination refers to both direct and indirect discrimination. Direct discrimination occurs when a person treats another person less favorably than he or she would treat other persons of a different race in similar circumstances. Indirect discrimination occurs when a person imposes a requirement or condition that applies to everyone, but will put people of a certain racial group at a particular disadvantage (because, for example, they are less likely to meet the requirement or condition), and that requirement or condition cannot be justified by reasons unrelated to race. Because proving indirect discrimination may not always be straightforward, two alternative tests have been introduced to help gauge whether indirect discrimination has occurred, i.e., the "rationality and proportionality" test and the "reasonable practicable" test.

Other unlawful acts under the Bill include racial harassment and racial vilification. Serious vilification, involving threatening physical harm or inciting others to threaten physical harm, is a criminal offense. The definition of "racial harassment" has been expanded to include situations in which a person makes the environment of work, study, or training hostile or intimidating for another person because of that person's race.

The Bill proscribes six areas of activities in which racial discrimination and harassment are rendered unlawful, and these provisions bind both the Government and the private sector. The six areas are: (1) Employment; (2) Education; (3) Provision of goods, facilities, services, and premises; (4) Election and appointment to public bodies; (5) Pupilage and tenancy by, and instruction to, barristers; and (6) Membership of and access to clubs.

## VII. Japan

### A. ENACTMENT OF LABOR TRIBUNAL LAW

The Labor Tribunal Law,[41] which came into force on April 1, 2006, prescribes a new industrial tribunal system designed to settle individual labor disputes in a speedy, professional and flexible manner suitable for individual situations.

The industrial tribunal system is applied only to individual labor disputes, including disputes concerning termination of employment, non-renewal of a fixed term employment contract, and disputes relating to wages and retirement allowance/severance. An industrial tribunal committee, consisting of two experts with special knowledge and experience in labor related issues and one professional judge, tries a case within three sessions and works towards solution by mediation (*chotei*) or settlement (*wakai*).

As the trial period is very short, the first trial session, where more of the substantial facts of a dispute are examined, is extremely important — the outcome of a case depends on whether each party can present effective allegations and verifications at this session. The first trial date occurs within forty days after the date of filing, and an answer is required to be submitted seven to ten days before the actual trial date. Unlike a formal litigation procedure, this system mainly adopts oral arguments and each of the parties are allowed to make written allegations only once, in the petition or answer. Thus, prompt, adequate and thorough preparation for trial early on is required of each party.

If no objection is filed within two weeks of a decision rendered by the committee, the decision becomes final and binding and has the same effect as a judgment rendered by a court.

[41] Law No. 45 of 2006.

However, if an objection is filed, the decision will lose its effect and normal litigation process will begin.

### B. AMENDMENT TO THE LAW CONCERNING THE STABILIZATION OF EMPLOYMENT OF THE AGED

The amendment to the Law Concerning the Stabilization of Employment of the Aged came into force on April 1, 2006.[42] The main objective of the amendment is to ensure continuous employment until age 65 and improve the "age-60" mandatory retirement system that has been widely adopted by Japanese companies to date.

The amendment contemplates three options available to employers to ensure continuous employment: (1) extension of the mandatory retirement age from 60 to 65; (2) abolishment of mandatory retirement; and (3) introduction of a re-employment system.[43]

If the re-employment system is adopted, an employer can maintain the "age 60" mandatory retirement system, as long as it rehires 60 year-old employees who desire to remain employed until age 65. If a written agreement with the labor union or with a representative of the employees is executed, an employer can screen employees who will be rehired. The objective and specific criteria for screening of employees must be prescribed by the agreement, and include criteria such as ability and intention, work attitude (attendance, absenteeism), health, performance and experience (based on performance evaluations). This approach seems to be the most practicable and workable for employers.

Adoption of any of the options requires an employer to amend its work rules and notify the same to the labor standards office.

---

[42] Law No. 103 of 2006.

[43] The Law Concerning the Stabilization of the Employment of the Aged art. 9.

## VIII. SPAIN

### A. REFORM OF THE SPANISH EMPLOYMENT ACT

On June 9, 2006, a new law[44] entered into effect to regulate certain measures intended to improve the growth of the employment sector. This law focuses on improving employment sectors that require a high level of protection, by promulgating some of the following measures: (i) encouraging the hiring of employees for an indefinite period by deeming employees hired for a fixed-term period of more than 24 months within 30-month period as permanent employees; (ii) enhancing the certainty of the definition of "illegal body lending," which prevents companies from employing individuals who are then placed at the disposal of a third company, unless the company is registered as a Temporary Work Agency; and (iii) setting forth the right of a contractor's employees to consult with the employees' representatives of the contracting company if the contractor has no employee representative.

### B. REGULATION OF SUBCONTRACTING ACTIVITIES IN THE CONSTRUCTION INDUSTRY

A new law aimed at regulating the subcontracting activities in the construction and building industry has been enacted[45] and will enter into force on April 19, 2007. This law provides some minimum requirements that subcontracted building companies must meet in order to participate in a building site. These requirements are meant not only to avoid the illegal transfer of employees (a usual practice in the building industry) but also to improve the Health and Safety at Work measures and to reduce the number of accidents at work. The new law expressly regulates the amount of subcontracting that can be carried out at every building site in order to control the number of companies carrying out services at each building site. In this

[44] *See* Royal Decree 5/2006 (Spain), which regulates the growth of the employment sector.

[45] *See* Act 33/2006 of October 18 (Spain), which regulates the outsourcing activities in the building industry.

sense the law also regulates the coordination measures that must be complied with among the subcontracting companies to avoid and reduce accidents in the building and construction sites.

### C. NEW PROPOSAL FOR EQUAL TREATMENT

The Spanish Parliament is currently studying a new proposal of law that incorporates new measures to improve the equal treatment of women and men.[46] This proposal set forth certain measures to ensure, among others, the equal participation of women in the management of companies, such as requiring a minimum percentage of female participation in company boards of directors. The project's main objectives are to improve the presence of women in the workforce of companies, eliminate discriminatory trends, and ensure the application of equal opportunities policies. This proposal seeks the equal treatment of women and men not only in the private labor market, but in the Public Administration as well.

### D. PARTICIPATION OF EMPLOYEES IN THE EUROPEAN COMPANIES

On October 18, 2006 the Spanish law on implementation of the EC Regulation 2157/2001, which regulates the involvement of employees in the European public limited companies, took effect.[47] The law includes a specific regulation to create a Works' Council, which will represent employees' interests in European Companies when a European Company is incorporated in Spain.

### E. RECENT CASE LAW ON USE OF CORPORATE EMAIL BY THE UNIONS

The Spanish Constitutional Court has recently ruled[48] that the use of the email by unions to inform their affiliates and the rest of the workforce about union-related activity is considered

---

[46] *See* Proposal of Law 121/000092 (Spain) for the equal treatment of women and men.

[47] *See* Law 31/2006 of October 18, 2006, which regulates the involvement of employees in the European public limited companies.

[48] *See* Decision of the Constitutional Court of Justice of Spain number 281/2005 of November 7, 2006.

part of the constitutional right of Union Freedom. Consequently, when a company expressly provides an email server as a business tool for the entire workforce, the company cannot block reception of emails sent by unions to employees.

## IX. United Kingdom

### A. AGE DISCRIMINATION

Easily the most significant development in UK employment law during 2006 was the introduction of age discrimination laws. The UK Employment Equality (Age) Regulations 2006 ("Age Regulations"),[49] which came into force on October 1, 2006, implement the age-related provisions in Council Directive 2000/78/EC, the European Directive establishing a general framework for equal treatment in employment and occupation. The Age Regulations' more significant features include:

- The Age Regulations prohibit direct discrimination, indirect discrimination and victimization on grounds of age. Victimization arises where an employee is subjected to less favorable treatment because he/she has asserted rights under the Age Regulations, or assisted another person to do so.

- Employers may be able to justify both direct and indirect discrimination where the discriminatory act or omission is a "*proportionate means of achieving a legitimate aim.*"

- "Harassment" is defined under the Age Regulations as "unwanted conduct [on grounds of age] which has the purpose or effect of violating [an employee's] dignity or creating an intimidating, degrading, humiliating or offensive environment…"

- The use of the length of an employee's service to determine an award of benefits is permitted, although (in relation to employees with over 5 years service) it must reasonably appear to the employer that the service criterion fulfils a business need. The examples of such a "business need" given in the Age Regulations are: encouraging loyalty or motivation, or rewarding the

[49] SI 2006/1031.

experience of some or all workers. There are specific rules in the Age Regulations on how 5 years service should be calculated.

The Age Regulations will impact several different employment practices. Major changes relate to the issue of compulsory retirement, which was vigorously debated while the legislation was in its draft stages. Some observers, such as the UK charity "Age Concern," consider compulsory retirement fundamentally inconsistent with the aims of age discrimination laws. Nevertheless, the Government has decided to retain the right of employers to retire employees - although a few important changes have been made to the rules:

- Employers will need to justify a normal retirement age ("NRA") of below 65 as a proportionate means of achieving a legitimate aim; otherwise, the retirement will constitute age discrimination.
- Employers must follow a "duty to consider" procedure before retiring an employee.
- The upper age limit on unfair dismissal claims – currently set at the employer's NRA, or 65 if there is no NRA – will be removed.
- A retirement may be an unfair dismissal.

The UK Department for Work and Pensions has published draft amending regulations aimed at clarifying the application of the Age Regulations to pension schemes.[50]

## B. TRANSFER OF UNDERTAKINGS

UK transfer laws have the effect of transferring the employment of employees engaged in a business "undertaking" where the operation of the undertaking is assumed by a third party/new employer. Such employee transfers frequently occur in asset sales or outsourcing situations.

[50] SI 2006/2931.

The long-awaited UK Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006") came into force on April 6, 2006.[51]

TUPE 2006, which replaces the 1981 regulations, is intended to:

- address the uncertainty surrounding the application of TUPE in outsourcing, insourcing and re-tendering exercises ("service provision changes");
- improve the quality of information available to incoming contractors and other transferees ("employee liability information");
- create joint and several liability for any failure to inform and consult appropriate representatives in relation to the transfer;
- clarify the circumstances in which transfer-related dismissals and changes to terms and conditions of employment will be legally effective; and
- reduce employment liabilities for those transferees involved in insolvency "rescue procedures."

C. FAMILY LEAVE

The Work and Families Act 2006, and regulations made under it,[52] make important changes to many family-friendly rights. Various provisions came into force on October 1, 2006 and will apply to women whose expected week of childbirth or date of adoption falls on or after April 1, 2007. The main changes include: (1) an extension of the period of statutory maternity pay, maternity allowance and statutory adoption pay from 26 weeks to 39 weeks; (2) an extension of "additional" maternity leave to all employees who already qualify for 26 weeks of "ordinary" maternity leave; and (3) the introduction of up to ten "keeping in touch" days for both female employees on maternity leave and adopters.

[51] SI 2006/246.

[52] SI 2006/2014; SI 2006/2236; SI 2006/2379.

## X. United States

### A. CLARIFIED STANDARD FOR UNLAWFUL RETALIATION UNDER TITLE VII

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964 ("Title VII")[53] prohibits an employer from discriminating against an employee or job applicant that "opposed any practice" outlawed by the Title VII, or because such an individual "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.[54] Recently, the United States Supreme Court attempted to clarify the applicable test that a factfinder must use to judge the retaliatory nature of an employer's conduct. The Court held that Title VII's anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Burlington N. & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2409 (2006). Under this newly articulated standard, a plaintiff alleging retaliation must prove that "a reasonable employee would have found the challenged action materially adverse," and the employer's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[55]

The Court also made clear that in determining whether an employer's conduct constitutes retaliation, the focus must rest on the "reasonable employee," because it is an objective standard for judging the harm caused by an employer's alleged actions that is "judicially administrable," and avoids the inherent difficulties and uncertainty of "a judicial effort to determine a plaintiff's unusual subjective feelings."[56] The Court added a layer of complexity, however, by holding that

---

[53] Title VII is a federal anti-discrimination statute that prohibits employment discrimination based on a person's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

[54] 42 U.S.C. § 2000e-3(a).

[55] *Id.* at 2415 (internal quotations omitted).

[56] *Id.* at 2415

"[c]ontext matters" when determining whether an employer's conduct constitutes retaliation.[57] For example, the Court noted, while a work schedule change might not significantly impact "many workers," it could "matter enormously to a young mother with school age children."[58]

Justice Samuel A. Alito's concurring opinion focused on the possible practical application problems with the majority's articulated standard. Most importantly, he found the "conception of a reasonable worker" to be unclear. Although the majority emphasized the importance of using an objective test to determine the extent to which an employer's alleged act harmed an employee (and, thus, to determine whether the act was "materially adverse"), the majority's example of the impact of a work schedule change on a young mother with small children injected into the analysis at least three "individual characteristics of the actual retaliation victim" – age, gender, and family responsibilities.[59] As Justice Alito noted, such a commingling of an objectively-centered standard with specific individual attributes of the complainant could lead to uneven and inconsistent applications of this newly articulated standard.[60] The concurrence also took issue with the majority's "loose and unfamiliar causation standard," opining that an analysis that asks whether an employer's act "*well might have*" dissuaded an employee from engaging in protected Title VII activity was unnecessarily complex.[61]

---

[57] *Id.*

[58] *Id.*

[59] *Id.* at 2421 (Alito, J., concurring).

[60] *See id.*

[61] *Id.* (emphasis in the original).