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Key employment law issues for companies in 2010

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Looking back, 2009 was a whirlwind of employment law changes – from new laws and regulations to an unprecedented number of reductions in force and benefits amendments. Looking forward, 2010 may not be quite so dramatic, but there are many important issues brewing that require employers' careful attention.

Retaliation claims. Employers and the EEOC are seeing the heightened effects of the US Supreme Court's Burlington Northern case as employees use the broadened retaliation standard to try to insulate themselves against discipline or dismissal. The Court's ruling has made it is easier for employees to claim they have suffered retaliation after engaging in a protected activity, and to prove an adverse employment action, an employee need only show the action complained of might have dissuaded a reasonable worker from making or supporting a charge of discrimination. We expect employers to see an increase in retaliation claims in 2010 as the economy continues to force companies to make tough business decisions and employees remain fearful of losing their jobs. Education, documentation and proactive approaches continue to be the key components to preventing and defending retaliation claims. Supervisors and management need to understand what retaliation means under the law and how they can avoid it. They also need to understand that a retaliation claim can be enforceable even if the employee's underlying discrimination claim was without merit. As always, it is critical to document performance problems to help defend against claims. Being proactive is essential to help avoid or minimise such claims.

GINA claims. This is a sleeper of an issue. To many, the Genetic Information Non-Discrimination Act seemed ahead of its time. Although genetic testing is certainly not a common practice for the average employee, the employment provisions of GINA are now in effect and we expect 2010 to be the year that employees begin to explore more 'creatively' the impact of these new protections. Because genetic information is broadly defined and can include an employee's family medical history, it will be difficult for employers to avoid having protected information. The law and its proposed regulations provide for a 'water cooler exception' that states good faith acquisition of genetic information is not itself a violation of the law, but the problem instead is that once the employer has the information, it has it. An employee who has a performance problem for example, and is disciplined or let go, may now be able to claim that the problem is not poor performance but the fact that "my mother has a rare disease that I am likely to get too". We recommend employers take a second look at the nuances of GINA and train their supervisors on these overlooked provisions of the law. Employers should examine return-to-work and fitness-for-duty issues, medical exams pre/post employment and similar typical issues that require rethinking. Documentation of performance problems will be critical to overcome claims.

Title VII – sexual orientation and/or transgender protection. The Employment Non-Discrimination Act, which would amend Title VII to add sexual orientation and gender identity as protected classes, has the support of President Obama and is one of the top priorities of GLBT advocacy groups in 2010. Some gay and transgender employees have successfully brought Title VII claims under existing law, arguing that they were discriminated against on the basis of sex because they did not conform to gender stereotypes. However, the cases are mixed and employers still find these issues tricky to navigate. Regardless of whether ENDA passes, the key for employers is to focus on employee performance – not employees' personal lives. They must educate supervisors and management to do the same and to report any type of harassment or perceived discrimination.

Pay-related class actions. Possible wage-and-hour class actions continue to be in the forefront of issues to which employers in the US need to pay attention in 2010. Most wage-and-hour class actions stem from allegations that an employer misclassified employees as exempt from federal or state wage-and-hour laws. Class action lawsuits are being filed against all sizes of employers, and frequently result in large verdict awards or settlements. For example, in 2009 Wal-Mart paid $640m to settle 63 federal and state class-action lawsuits alleging wage-and-hour violations. Prudent employers will audit their employee exemption classifications to ensure that they are properly paying employees and complying with wage-and-hour laws. This truly is a ▸▸

case of 'an ounce of prevention is worth a pound of cure'.

Classification of workers. Employers also need to be careful about classifying workers as 'independent contractors' rather than 'employees'. During tough economic times, it can be tempting to classify as 'independent contractors' workers who become responsible for paying their own business expenses, worker compensation premiums, payroll taxes, benefits, etc. But just calling a worker an 'independent contractor' does not make him one, and both federal and state 'independent contractor' tests are difficult to meet. If a government agency determines that an employer misclassified employees as 'independent contractors', the penalties can be severe. Misclassified workers may also have claims against the employer for such issues as additional wages and expenses and taxes paid by the worker.

Disparate impact claims. The Obama Administration has indicated that it intends to step up government efforts in the area of 'disparate impact' claims in 2010. Under the 'disparate impact' theory of liability, the employer is alleged to have a facially neutral policy or practice that unintentionally has a disparate impact on a statutorily protected group, for example ethnic minorities, women or employees 40 years of age or older. Employers who are considering large scale employee layoffs should examine and test the criteria being used to identify which employees will be laid-off to determine whether there might be a disparate impact on protected groups. Employers should also review any hiring or promotion tests or criteria for possible disparate impacts.

Workforce reduction. No system can guarantee freedom from grievances or lawsuits, but well-planned reductions in force (RIFs) are less likely to result in disputes. Legal issues raised by RIFs include possible discrimination claims; allegations that federal pension law (Employee Retirement Income Security Act) was breached; claims that notice requirements were not met; or that collective bargaining agreements or individual employment contracts were violated. Before implementing an involuntary RIF, employers should consider possible alternatives that might pose fewer legal risks, including shortened work weeks, voluntary leaves, salary reductions or voluntary separation incentives. Employers increasing their workforces as the economy improves must also pay careful attention to legal risks. Collective bargaining agreements that dictated the terms of layoffs are certain to do the same with regard to recalls; and employers who tried to ease the pain of layoffs by telling even their mediocre employees that they'd have the opportunity to come back when 'business picks up' may be held to that promise in a stronger economy. Recruitment and selection procedures – which may have seen little use during a 'down' economy – need to be reviewed, revised and followed with care.

Layoffs of less-senior workers, in combination with losses in retirement accounts and other savings, have contributed to the aging of the American workforce, highlighting another key issue for employers in the US this year. For the first time, US employers face a workplace with a substantial representation from four easily recognisable – and not always harmonious – generations. And this phenomenon raises important legal, policy and practical concerns for employers. The generations can be loosely identified as 'traditionalists', who remain in the workforce in their 70s and beyond; the Post World-War II Boomers; Generation X, now in their 30s and early 40s; and the 'millenials', who comprise the youngest segment of the workforce. Management and legal issues abound – ergonomics, age and other discrimination; creation of benefits packages that meet the needs and interests of 60-somethings and 20-somethings alike; development of work rules and policies that apply fairly to workers with vast generational differences; and effective knowledge transfer from senior workers to younger ones while avoiding grievances or claims of discrimination.

Discrimination claims. Discrimination claims, in fact, is yet another key issue for employers in 2010. While the Equal Employment Opportunity Commission (EEOC) filed fewer large-scale 'systemic' lawsuits in 2009, discrimination charges continue to be filed in large numbers—well over 93,000 during the last fiscal year alone. Disability, age, sex harassment, race and retaliation claims were among the most-common; smart employers in the US will continue to hone their workplace policies and practices to ensure compliance with the federal law, as well as any applicable state and local laws. ■

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2010 key employment issues

BY JONATHAN CHAMBERLAIN

To those at the sharp end of business, it can sometimes seem that employment law runs in a parallel universe, where employers are not fighting for their very existing existence or, at least, fighting their corner in ultra-competitive markets. Politicians, judges and – yes – lawyers seem constantly to alter the rules of the game, just as employers think they might be winning.

Get used to that feeling: 2010 is yet another year of change. In the financial sector, changes in the law on bonuses, on equal pay and discrimination could have a big impact on how institutions work. And that's just for starters.

Bonuses

Bankers' bonuses will continue to grab headlines. Big bonus disputes used to settle out of court – now it seems that at least some financial institutions would rather be forced by a court to make a payment to placate public wrath, let alone shareholders. More cases means more law.

Labelling a bonus scheme 'discretionary' does not give employers a free hand: the decisions of whether to pay and how much to pay are still subject to law. The employer must exercise any discretion rationally and in good faith.

This is not new, but the background against which banks are exercising that discretion is. To what extent is it legitimate to take into account public and political pressure or overall performance of the employers' group? The year may tell us.

That is just the Courts. The government has said it will push through the Financial Services Bill before the election. There will be tough new policies aimed at ensuring remuneration policies do not contribute to excessive risk taking. The FSA will be able to make rules to prohibit specified types of remuneration, void contractual terms if they breach the rules and provide for claw back of payments already made. And this will apply to current contracts.

Discrimination

The Equality Bill. Physicists search for the Great Unifying Theory: Employment lawyers the unifying discrimination law. This is it, the law which supposedly consolidates and harmonises all the existing equality legislation. But it also makes some major changes: (i) positive action allowing employers to take into account under-representation of ▸▸

a particular protected group when selecting between equally qualified candidates for appointment or promotion; (ii) measures to make gender pay discrepancies more transparent. This includes curbing the use of secrecy clauses which prevent employees discussing their pay. Some more controversial provisions, such as those requiring private sector employers with more than 250 employees to publish pay gap information look increasingly unlikely to make it into the Act as opposition mounts; (iii) a widening of the definitions of direct discrimination and harassment to cover claims based on 'association' and 'perception' for all protected grounds; and (iv) new powers for employment tribunals to make recommendations in discrimination cases, for the benefit of the whole workforce.

Age discrimination. The latest buzzword is apparently 'wellderly', referring to the growing number of well, older people wishing to work beyond the age of 65. The government has already started its review of the default retirement age (DRA). The complete removal of the DRA is on the horizon, although we may see a halfway house of a new DRA of 68 or 70.

Employers should try to stay ahead of the game by starting to rethink how they manage their older workforce if forced retirement is no longer an option. Specific areas for consideration are flexible retirement options, performance management and workforce demographics planning.

Agency Workers

New regulations come into force in October 2011: (i) after 12 weeks in a job, agency workers will be entitled to equal treatment on basic working and employment conditions; (ii) from the first day of their assignment, agency workers will be entitled to information about vacancies in the hirer to give them the same opportunity as other workers to find permanent employment and equal access to on site facilities such as childcare and transport services; and (iii) additional rights for new and expectant mothers.

Working time and time off work

Sickness. The demise of the sick note as we have known it for over 60 years has arrived. A new system of so-called 'fit notes' replaces the current system from April.

The new 'fit notes' allow a doctor to indicate whether a patient is fit, not fit for work or fit for work taking account of certain issues. The doctor will be able to record information to help employers and employees discuss whether there are any changes to the employee's working environment or job role which could help achieve an earlier return to work. Employers will however not be bound to implement the suggested changes, so change will be at the discretion of the employer with the agreement of the employee. The focus is on empowering individuals to return to work, which is in itself a good thing, but the new system will no doubt raise difficulties where agreement is not reached over suggested changes.

Paternity leave. Additional paternity leave and pay will be brought into force in April, although only effective for parents of children due on or after 3 April 2011. Broadly speaking, mothers will be able to transfer some or all of the second half of their maternity leave period, if she returns to work. APL will be paid at the same rate as SMP if the leave is taken during the mother's 39-week maternity pay period. The remainder will be unpaid. Businesses will need to ensure their policies are updated in 2010 to provide for the forthcoming changes.

Training. A new right to request time off for training is introduced for businesses with more than 250 employees In April. The new 'right to request' will be available to all employees who have completed six months service where they consider that the training will improve both their effectiveness at work and the performance of their employer's business.

Working time opt out. At the end of 2008, it looked like after five years of negotiating, the revision of the Working Time Directive (WTD) had finally been agreed with the opt-out of the 48 hour working week being retained, but with some significant new restrictions. However, this agreement fell apart at the final hurdle.

The Commission, never one to be beaten, is currently working on a revised proposal with the social partners and hopes to be able to put forward a new legislative proposal in the summer. ■

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Changes afoot in Ireland | BY GEOFFREY DUNNE

Irish employment law has undergone a sea change in recent years with the adoption of a range of modifications in areas from the regulation of collective redundancies to parental leave, providing in each case greater protections for employees.

With that increased range of regulation and an economy growing at a level considerably above the long term Western European average, it seemed that the two trends could co-exist in mutually beneficial harmony.

In that pre-credit crunch world, few questioned whether the economy could sustain strong employee protection in the domestic law alongside high unit labour costs. Many saw such protections as beneficial in attracting the highly skilled labour that is needed across the range of industries and services that make up the Irish economy.

The past three years

Since August 2007 with the downturn in the domestic construction sector and, more particularly since September 2008 with the 'post Lehman' scenario, Irish employers are having some success in attracting: (i) more favourable recognition of their need for lower employment costs; and (ii) more leniency from the courts when faced with employee claims for compensation and injunctions restraining dismissal.

The drive for increased competitiveness

Indeed, the call from all sectors of Irish industry is to increase competitiveness. The focus is not only on reducing the cost of labour, but also on enhancing the productivity and skills needs of the workforce, on reducing energy costs, waste management costs and local authority charges and on reducing the costs of leasing commercial and industrial premises.

It is widely recognised that the competitiveness challenge is what Ireland must focus on as there has been a significant loss of international competiveness for Ireland between 2003 and 2008.

The National Competiveness Council and the newly appointed chief of the Irish Central Bank, the highly regarded Professor Patrick Honohan, formerly Professor of Economics in Trinity College Dublin and a senior advisor to the World Bank, have recently urged wage restraint in the context of focusing on increasing national competitiveness.

Wage cuts have become the norm across many parts of private industry.

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The drive to reign in government spending

In the public sector, wage cuts have been imposed by government in a series of three austerity budgets over the course of a year. Those budgets have also contained significant social welfare cuts.

It remains to be seen whether the phlegmatic and stoical aspects of the Irish character will continue to dampen the understandable anger caused by reduced public sector incomes and social welfare payments where significant negative equity is widespread amongst owners of residential property and where opportunities for alternative work in private industry are currently limited..

So far, there is no sign of Mediterranean style opposition to the government imposed public sector austerity measures, though short work stoppages in the public sector are becoming more common. What are most apparent are heated disputes between representatives of public sector employees and of private industry as to who is bearing the appropriate cost of the economic adjustment that it is widely accepted Ireland must undergo.

Private sector

In the private sector, unions no longer have anything like the power they once had and unilateral wage cuts, while strictly speaking unlawful, are commonplace.

From a legal point of view, employers are advised to consult and reach agreement with employees and their representatives when wage cuts are contemplated as unilateral wage cuts expose employers to potential breach of contract actions.

However, employers, in practice, may often consult much more intensively with the finance director, and for 'bottom line' reasons, before presenting what is in effect a fait accompli to employees or their representatives.

Nevertheless, it remains true that the more consultation in advance with employees, the better in terms of protecting the employer and in terms of enhancing good industrial relations.

Apart from wage cuts, other cost cutting alternatives to redundancies that are being adopted in Ireland are career breaks (recently introduced in one of Ireland's leading high street banks), job-sharing and part time working.

Redundancies

Unfortunately, overcapacity in the troubled markets of construction, hospitality, motor, retail, transport and retail banking have led to significant redundancies over the past two years. On the other hand, the technology, chemical, pharmaceutical, computer services and financial services areas have, with some significant and notable exceptions (including the greater part of Dell's operations in Ireland), been largely unscathed. In fact, those industrial and service areas continue to attract significant inward investment with consequent positive contributions to workforce numbers in Ireland.

Where large redundancies take place, the rules on collective redundancies apply. That is, in general terms, for any redundancy of over five employees, there are strict requirements to provide advance notice of the intention to the relevant government department and to consult with employee representatives at least 30 days before the redundancy.

There has been no reduction in statutory redundancy payments in terms of the proportion of annual salary that is payable. However, ex gratia payments on redundancy are no longer standard and are becoming matters of intensive negotiations as employers in industries where large ex gratia payments on redundancy had become the norm struggle to meet the high expectations and needs of employees in a depressed labour market.

However, it is inevitable that further redundancies in the property sector will follow having regard to the fact that many of the borrowers are insolvent.

Banking restructuring

The general economic backdrop is coloured by a major restructuring of the largest components of the Irish banking system, which is being overseen by the European Commission.

In that context, domestic bank lending to the construction and property development sector of €77bn is in the course of being transferred to a new government established loan asset management agency, known as the National Asset Management Agency (NAMA). The employment implications of those transfers have yet to emerge.

However, it is inevitable that further redundancies in the property sector will follow having regard to the fact that many of the borrowers are insolvent.

Further recapitalisation and restructuring measures in banking in Ireland are running in parallel with the operations of NAMA and, again, it is inevitable that employment implications will follow.

Insolvency mechanisms and how they impact on employment

Insolvencies are at a record high in the problem areas of the private sector mentioned above (including hospitality, construction services, retail, motor, etc.) The creditors' voluntary winding up (the non-court and often quicker and almost always more private mechanism for winding up of insolvent companies) is the most frequently chosen route. Other routes such as the court liquidation, receiverships and examinerships are also seeing much use.

Ireland has its own equivalent of the US Chapter 11 proceedings known as an 'Examinership' where insolvent companies are protected by the High Court from their creditors for a period of up to 100 days. The idea and practice being that the examiner would put together a survival plan and an investor to bring the company out of its troubles and onto firmer land.

The Court has significant discretion as to whether to appoint an Examiner and to approve the survival plan. Judges have displayed a marked reluctance to do so where there would be no significant employment maintenance benefit from the survival plan.

Liquidations generally operate to sever the employment relationship and though employees can be retained temporarily, effectively the appointment of the liquidator is the end or almost the end of the employment relationship.

On the other hand, liquidators, like receivers, sometimes sell the business and employees sometimes transfer with such a sale.

Receivership, strictly speaking, should not affect the employees' contracts as the secured assets are in focus and the legal status of the company is unchanged. Again, a sale of the business will generally ⏩

involve a transfer of employees. In that context, the EU Transfer of Undertakings Regulations will apply thereby providing a significant measure of protection of the employees, in that those employees related to the business being sold should retain their employment but with a new employer.

Those regulations do also apply to an out of court liquidation sale of a business, but strangely they do not apply to a sale of a business by a court appointed liquidator.

Conclusion

As Ireland's euro zone economy emerges from the recession over the next 12 months, a greater sense of caution and lower consumer expectations should bring tangible benefits in terms of cost reductions for employers and job opportunities in existing and new multinational and indigenous enterprises.

Flexibility in employment practices and sensitivity to the economic realities are likely to significantly influence employment law to a much greater extent than over recent decades.

It seems safe to assume that the job opportunities that will emerge will be found in largely export oriented growth areas, funded by chastened bankers, and operating on the basis of real comparative advantage in a harsher but perhaps more realistic domestic and international economy.

Ireland continues to be ranked as the third most open economy in the world in terms of international trade after Hong Kong and Singapore and international trade will be the engine for recovery of Ireland's currently depressed labour market. ■

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Non-competition clauses in Russian labour law | BY ANTON KLYACHIN

More and more Russian businessmen who created their own businesses are thinking of passing management and day-to-day control to professionals. In order to do so, they seek mechanisms ensuring liability of managers. An important issue in such circumstances is an obligation not to compete with the employer during the employment term and for a certain amount of time thereafter.

However, there is no certainty as to the legal power of such an obligation under Russian law. Many researchers and practitioners believe this is an unenforceable obligation since it: (i) violates the freedom of labour guaranteed by the Russian constitution; and (ii) is not provided in the Labour Code of the Russian Federation.

We shall distinguish between a non-competition obligation undertaken: (i) during the employment; and (ii) after the employment is over.

In the first case, according to the Labour Code of the Russian Federation, the employer may prohibit its employee from undertaking any out-of-hours work only if this employee is a general director or member of the management board – collegial managing body of a company. Any other employee is free to undertake an out-of-hours job. This regulation is obviously too imperative. In our opinion Russian law should be modified to include the right of the employer and the employee to agree on whether or not they are allowed to undertake a part-time position. For certain employees, especially those carrying commercial secrets of the employer, a secondary job would be restricted.

In the second case, when a non-compete obligation is undertaken for a certain time period after actual employment, the situation is even more restrictive. The courts tend to declare such provisions as violating Article 37 of the Constitution of the Russian Federation, which provides that "Everybody shall be free in applying his labour abilities and to choose occupation and profession". The courts say that it is impossible to prohibit a person from employment since it would restrict his freedom to choose occupation.

In our view this approach is incorrect and the language of the Constitution should not be construed as prohibiting a non-competition clause.

First, the Constitution article is based on the norms of International law, in particular on Article 23 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Economic, Social and Cultural Rights. These documents contain very similar language guaranteeing the freedom of labour. These documents are legally binding in most countries. However, in the majority of countries the freedom of labour is not being construed as a prohibition of non-competition undertakings.

Second, when construing the freedom of labour clause as a prohibition to undertake a non-competition obligation, we actually constrict the freedom of labour because it shall include the freedom to refuse from labour for a compensation.

Third, restricting non-competition clauses we violate the freedom of contract, a basic principle of Russian civil law stipulated in Article 1 of the Russian Civil Code.

Finally, Russian antimonopoly law is prepared to construe breach of non-competition undertaking as an unfair competition. Russian law on commercial secrecy would probably consider a non-competition clause as a measure to ensure the confidentiality of commercial secrets of a company. Furthermore, the Russian Corporate Conduct Code, which is a recommendatory document issued by the government of the Russian Federation, directly recommends the inclusion of non-competition clauses in labour contracts for general directors of companies.

All these positions show that non-competition clauses would be readily adopted by Russian law.

To be accepted by Russian courts and practice, the concept of non-competition obligation should be regulated by the Labour Code. In our view, the regulation should include the following restrictions on non-competition obligations: (i) it shall be limited in time (usually for no longer that two to three years); (ii) it shall be limited in territory; (iii) it shall describe which companies are prohibited employers; (iv) it shall define what occupation is prohibited (e.g., employment, consultancy services, membership in board of directors, shareholding); and (v) it shall be compensated.

If these restrictions are honoured, we believe the non-competition clause would not infringe the employee's rights and freedoms. At the same time, it would be of great benefit for the employer who will be able to protect its commercial secrets from competitors. ■

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