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Labour Law

NEWS

Australia adds further protections for employees

and further information from the Labour Law environment

Newsletter
No. 04 | Spring 2018

Editorial

Dear Reader,

We are proud to present to you the Spring Edition of the Newsletter Labour Law. You will find various contributions from employment law experts on current topics, such as #metoo and sexual harassment, internal research into labour matters, how to deal with family business conflicts, etc.

A number of articles are written by new members of our practice group, who we very much welcome. Over the past year, our practice group has grown to almost 70 members and we aim to expand further. This will enable us to improve information exchange through webinars and meetings.

You are cordially invited to make an active contribution, including during our upcoming meeting at the GGI European Conference in Berlin. This meeting deals with the very real consequences of the General Data Protection Regulation (GDPR) in relation to the employment contract. It is a meeting that cannot be missed.

We would like to thank all the member firms that have contributed to this edition and hope that you will enjoy

and benefit from the worldwide updates.

Jeffrey Kenens
Global Chairperson of the
GGI Labour Law Practice Group

Australia adds further protections for employees

By Erin Kidd

Recent amendments to Australia's primary piece of workplace legislation, the Fair Work Act, will hold franchisors and holding companies responsible for contraventions by their franchisees and subsidiaries where they knew, or ought reasonably to have known, of the contraventions and failed to take steps to prevent them.

The changes stem from national concerns about a widespread lack of protection for vulnerable workers, particularly migrant and young persons, following an inquiry that exposed circumstances

suggesting that 7-Eleven franchisees had systematically underpaid workers by coercing them to return a portion of their wages in a 'cash back' scheme. The practice was allegedly aided by profitability issues caused by the franchise's corporate structure.

As a result of the amendments, franchisors and holding companies that exercise significant influence or control over a franchisee or subsidiary must ensure that any requirements imposed on the franchisee or subsidiary do not result in a breach of Australian workplace laws.

The legislative changes have also increased the maximum penalties for serious contraventions, strengthened the Fair Work Ombudsman's investigatory powers and expressly forbidden employers from receiving unreasonable

cash payments from employees (such as the 7-Eleven 'cash back' scheme).

Employer record keeping has also become far more important as employers now bear the onus of disproving wage claims if they have failed to maintain accurate pay records. This element of the new laws has already been applied in the case of Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor, which resulted in an employer and its director being penalised 100,000 AUD and 21,000 AUD respectively for failing to disprove a young employee's underpayment claim. In the absence of proper employer records, the court found that the employee's diary entries were good evidence of the hours he had worked and that his employer had not paid him properly for those hours.

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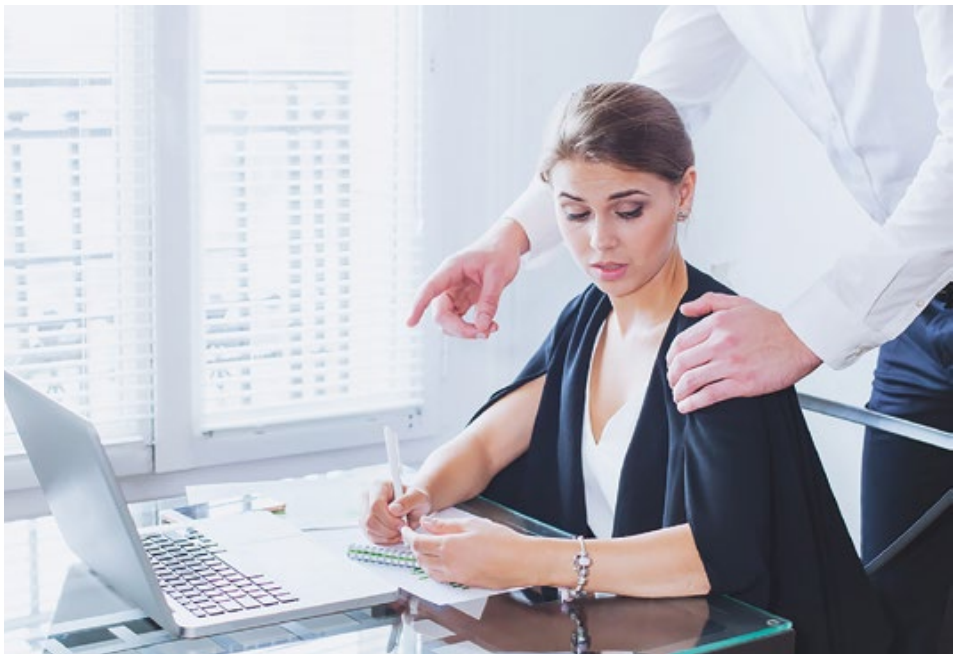
Erin Kidd advises on all aspects of the employment relationship. With qualifications in law, human resources management and industrial relations, Erin understands the complexities of people management and provides pragmatic, commercially astute advice.

How to Avoid Sexual Harassment Claims

By Theodore P. Stein



In the wake of a flood of publicised sexual harassment incidents in the past few months, employers are well-advised to review their own procedures and practices when faced with an employee complaint of sexual harassment. Employers should consider these three areas:

Does the employer have a clear written policy on sexual harassment? Each employer should have a written employee handbook or policy that instructs employees on what steps they should take if an incident of sexual harassment is observed or is the basis of a complaint. The existence of a strong anti-sexual harassment policy enables the employer to avoid liability if the wrongdoer is not a supervisor and the victim has failed to avail himself or herself of the complaint procedures instituted by the company.

How will the employer respond to a sexual harassment complaint? Employers must ensure their response is written in the policy and then implemented. The employer should make it clear that

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the policy is based on zero tolerance. It also should advise employees that all complaints will be investigated and that a finding by the employer of misconduct based on sexual harassment will lead to discipline, up to and including termination. If necessary, outside counsel should be retained to head an investigation when the subject of the complaint is a member of senior management, an officer or a director.

Once the employer has an effective policy, how can the employer ensure that the policy is enforced in every case? Employers must take pains to follow and enforce such a policy. This means that the employer should review its written policy periodically to make sure it is up to date. An employer also should require its employees, regardless of rank, to attend onsite anti-harassment training seminars. Each new employee should have to sign a written acknowledgement that he or she has read and will adhere to the company's anti-sexual harassment policy.

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The importance of internal investigations to reduce labour liabilities

By Pedro Ackel and Henrique Dias

Since the Anti-Corruption Law (Law 12.846 / 13) became effective in Brazil, corporate governance and compliance practices have emerged as important tools for integrating good business practices, with positive impacts throughout the organisation. Following this trend, a specific branch of Compliance has also gained more visibility in recent times: the 'Labour Compliance', which aims to ensure that organisations operate in accordance with legislation, judicial decisions, collective provisions and other relevant internal regulations, all with the scope of guaranteeing the good functioning of the companies, supporting their decisions and shielding them in eventual future labour lawsuits.

In this sense, it is necessary to emphasise the importance of internal investigations in labour matters, most commonly performed to investigate possible irregular acts of employees and to support dismissals with cause. Such investigations are extremely relevant because, when carried out in accordance with good Compliance practices and in compliance with Brazilian law and judicial decisions, they support business decisions and avoid the inconvenient reversals of dismissals with cause. Indeed, there are recent decisions of the Brazilian Courts maintaining dismissals with a cause when supported by a previous inter-

nal investigation procedure, in which conclusive documentary evidence has been collected and the right of defence has been granted to the employee.

Therefore, companies must always be aware of the correct conduct of their internal investigations and the correct evaluation of legislation and jurisprudence, in order that they can adopt disciplinary measures in a safe and effective way, significantly reducing their labour liabilities and providing savings on tax of an approximately 30% levy on the amount that could have been charged by the employee.

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Use Of Employment Contracts

By Kelly Holden

Most employees in the U.S. do not have employment contracts, which is different from many European or Asian countries, where contracts are often the norm. U.S. workers are generally at-will, meaning they can be terminated at any time and are free to leave employers at any time. Use of a contract can substantially change this to the employer's detriment and obligate employment or salary for a specific length of time.

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However, it may be advisable for some U.S. workers to have a contract if restrictive covenants such as a non-compete or non-solicitation are necessary. This usually applies in cases where a salesman is employed and has direct contact with clients that can easily be persuaded to move with the employee if he/she leaves for a new company.

Other high level executives such as CEOs and CFOs may also have contracts for a specified length of time and due to the unique nature of the benefit and compensation system offered. Many healthcare workers such as physicians, physical therapists, nurse practitioners, etc. also have agreements.

The importance of agreements with these individuals is to assure the healthcare provider cannot leave without notice and leave patients without transferring care. A non-compete and non-solicit is also important to ensure the healthcare provider does not steal patients.

Contracts can also be helpful to avoid litigation by using alternate dispute resolution (ADR) or arbitration in lieu of a lawsuit and jury trial. The ADR provision must be written correctly and in compliance with each state's laws, which can vary greatly. Some states will also allow a contract to shorten a statute of limitations for legal actions against the employer. In some states, a discrimination claim can be filed for up to 5 years and, by contract, this can be shortened to one year in some states.

In conclusion, whether to have an employment contract or not is a complex question and how it should be drafted raises many issues. Employers need to be advised of the specific state's laws and legal issues to make an informed decision.

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DBL Law provides a complete range of services to meet legal needs in a wide variety of industries. With cross-industry collaboration, their attorneys offer comprehensive services on complex matters that transcend simple categorisation in many areas of law.

The Netherlands: Company car or reimbursement of business kilometres?

By Robin de Raad

Many employees travel for their work. For example, commuting (e.g. to the office), other business trips (e.g. to clients) or traveling to attend training required for work. In the Netherlands, these business kilometres can be reimbursed by the employer to the employee.

Dutch tax legislation regulates that business kilometres, travelled with a private vehicle, can be reimbursed tax-free to employees at a max rate of 0.19 EUR per km. Traveling by public transport can be reimbursed on the basis of the actual costs. In that case, the full reimbursement is tax-free.

Instead, employers can consider leasing or buying a car at the expense of the company and making this 'com-

pany car' available to the employee. For the deemed personal use of the company car, the employee will be taxed unless he applies for an exemption (which will only be granted if the employee demonstrates that he uses the car less than 500km per year for private purposes).

The taxation at the employee's expense depends on the employees' salary level and on the CO_2 pollution, date of first ascription and Dutch value of the car. To stimulate the use of environmentally friendly cars, the taxation for the private use of a full electric car is based on 4% (instead of 22%) of the value of the car. The employer can deduct all costs related to the company car from his business profits.

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#metoo in the workplace from a Dutch employment law perspective

By Paulien van der Grinten

The recent '#metoo-discussion' has revealed that sexual harassment occurs in various shapes and forms. The question arises of how employers should deal with the situation when such harassment takes place in the workplace, as these situations regularly occur in the work environment too.

Under Dutch law an employer is obliged to – in short – provide a safe workspace. This also entails properly handling sexual harassment situations. An employer should always properly investigate a suspected sexual harassment situation.

The investigation needs to be timely

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and thorough. If necessary, the investigation can be carried out by a specialised research firm. An employer should treat both the accused employee and the victim with care. Both parties should be heard with regards to their view of the matter. To secure a safe work environment, it is strongly recommended that employers have a sexual harassment policy in place. When the accusations turn out to be true, the employer is (strengthened by this policy) able to take immediate and adequate disciplinary measures.

How do Dutch judges rule in these situations?

Taking recent case law into consideration, judges seem to attach great value to carefully executed investigation. Dutch employment law is very employee-friendly, so an employer should be absolutely sure the suspected sexual harassment has actually taken place before it is legally allowed to take action. For example, taking disciplinary measures based on hearsay is not allowed. Also, it should be clear for the employee what is, and what is not, allowed. For instance, an employer should not 'tolerate' sexual harassment, but take action right away. That gives the aforementioned policy great importance, as it will support the employer when sanctioning an employee.

Should you have any questions regarding this matter, or regarding other employment law issues, please do not hesitate to contact Paulien van der Grinten via email vandergrinten@tk.nl or telephone +31 71 535 80 86.

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Paulien van der Grinten is an attorney at law at TK and part of the international Corporate Employment Law team.

New Salary History Bans Change Hiring Practices

By Patricia W. Goodson and Sarah M. Saint

Over the past year, numerous state and local governments across the U.S. have enacted salary history bans. Generally, these laws ban employers and recruiters from asking an applicant about their current or past salary, which may include bonuses and benefits and other types of pay. The aim of the salary history ban is pay equity: to eliminate the wage gap for women and minorities. Some states have reasoned that when employers ask prospective employees for their salary history, it perpetuates disparities in pay from job to job.

For example, California, Delaware, Massachusetts, Oregon, Puerto Rico, New York City, San Francisco, and Albany County, New York have all enacted salary history bans. Even more state and local governments have similar legislature pending. This rapid and widespread adoption indicates that laws prohibiting inquiries into an applicant's previous pay will likely be implemented throughout the U.S. The terms of the salary bans vary from jurisdiction to jurisdiction, thus employers need to be familiar with the laws in all jurisdictions.

The consequences for violating these laws indicate that the U.S. is taking pay equity seriously. For example, in New York City, a civil penalty of up to 125,000 USD for any violation, or up to 250,000 USD for a wilful violation, may be imposed in addition to tort damages and injunctive relief. Philadelphia's law, currently stayed, even includes jail time for repeated violations.

While these laws have major implications for compensation negotiations, employers still have access to multiple tools to create a reasonable salary package. For example, employers may still ask applicants about their salary expectations and may use market data to determine whether an applicant's salary expectation is reasonable. In addition, most of the salary history bans do not prohibit an applicant from voluntarily disclosing their previous salary. However, jurisdictions vary on whether an employer can rely on voluntary disclosures to determine the applicant's pay.

In light of these laws, organisations hiring or recruiting employees in or from the U.S. must revisit their hiring and compensation practices. Organisations should be familiar with the laws in the jurisdictions where they are recruiting and hiring to ensure compliance with this fast-growing trend.

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Sick employees in the Netherlands:

A serious financial burden for the employer

By Nadine van Pol

In the Netherlands, sick employees enjoy long-term rights concerning the continued payment of wages; in principle they are entitled to two years payments of at least 70% of their wages, and sometimes even up to 100%.

Some form of income protection in the event of illness is hardly unusual, however in the Netherlands it is

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remarkable that such a heavy financial weight for the continued payment of wages should fall on the shoulders of the individual employer; and for such a protracted period. The Employed Person's Insurance Administration Agency (UWV) only assumes obligation for payments after two years, and this again only after the employer has first been subject to a meticulous 're-integration' check. If the employer is considered to have performed inadequately with the reintegration process, then the obligation for payments can be extended by up to another year.

If the employer decides to dismiss the employee after a two year period, then he is also obliged to provide the employee with transition compensation. Employers, particularly in SMEs, often experience this as a double 'penalty' and too heavy a burden to bear. Such risks to employers can prevent them from hiring permanent staff.

The new government is finally beginning to listen to the representations calling for relief from this financial burden. It has put forward a plan to reduce the period of continued payment to a maximum of one year. In addition - from July 2019 - employers will be compensated for any transition compensation paid in the event of dismissal after two years of illness.

It would indeed be wonderful if the intended measures eased this onerous financial burden, creating a win-win situation all round.

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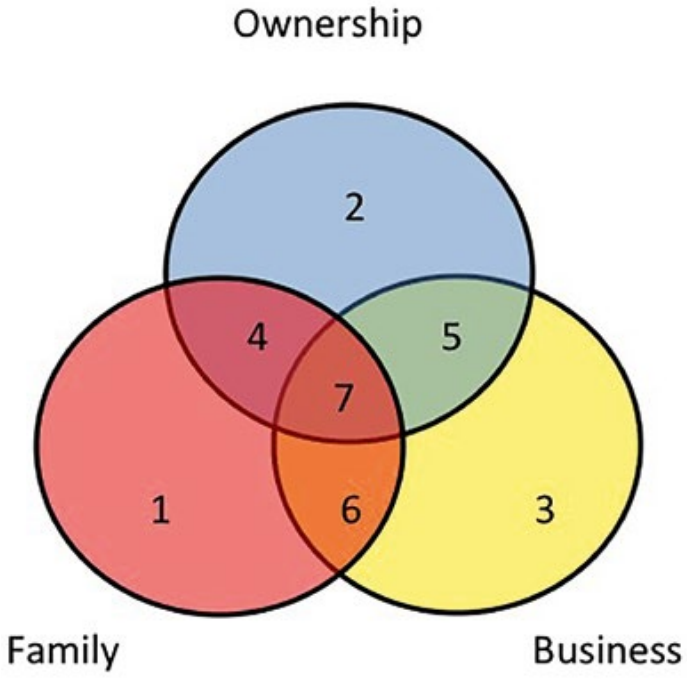
Nadine van Pol is Head of the legal department, advising clients on a wide range of matters concerning employment legislation, including various types of contracts, negotiations, illness and dismissal.

Is Nepotism a Dirty Word?



By Liam A. Entwistle

Imagine this scenario - An Employer has a Sales Manager who is about to leave his employment and set up on their own, taking business and employees with them. Normally an employment lawyer would consider the relevant employment legislation, and give advice through the lens of their specialism. Perhaps they need an Injunction? If this is a Family Business, normal rules won't apply. Say the Sales Manager is the cousin of the owner and a Shareholder? Actually, the real question is why the second generation are thinking of setting up on their own to the detriment of the Family Business. Advisers must understand where each part of the Family Business is now and will go over time. This will allow them to identify the different interests and needs that are competing, causing employment problems. The Tagiuri & Davis Family Busines 'Three Circle

1) [Tagiuri R and Davis JA (1982) Bivalent Attributes of a family firm; Family Business Review; Vol 1 X2 PP199-208].

Model'[1] allows advisers to identify the self-interests contained in Family Business systems. The model shows the Family Business made up of three independent, overlapping sub-systems – ownership, management and family. Anyone within a Family Business can be put in one of the seven segments created by the intersection of the sub-systems. This allows advisers to explain and predict the motivations of those individuals, and understand what individuals fear, expect and need. The cousin who may leave the business and take employees and customers may already be a minority shareholder in the business, placing him in the family/owner/business sector. If they are uncertain about the future – ownership, promotion – one can see why they want to leave, with 'assets'. Addressing ownership and succession issues has a better chance of preserving the family and the business, rather than seeking injunctions. When an Adviser is faced with a conflict in a Family Business, the first thing they should do is to gather information about the Family Business and everyone in it. Advisers must remember that succession issues are not as important in non-family businesses. Being able to spot family dynamic problems when faced with what appears to be a straightforward employment issue will help to ensure that when employment advice is given it will be a real solution.

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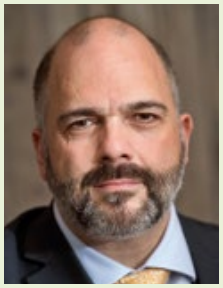

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