The Harmonie Group presents Employment Law Changes Around the World

January 2014

Updates In This Edition Include:

	Page
CANADA	**1**
CZECH REPUBLIC	**7**
SPAIN	**9**

CANADA

Social Media

1. *Bell Technical Solutions v. Communications, Energy and Paperworkers Union of Canada*, [2012] O.L.A.A. No. 481[1]

In *Bell Technical Solutions*, an arbitrator considered an employer's decision to terminate two employees after they had made disparaging comments on Facebook regarding their supervisor and the employer. The arbitrator noted that:

> [I]t is well-established that inappropriate Facebook postings could result in discipline or discharge, depending upon the severity of the postings. The nature and frequency of the comments must be carefully considered to determine how insolent, insulting, insubordinate and/or damaging they were to the individual(s) or the company. In some cases, the issue is whether the comments were so damaging or have so poisoned the workplace that it would no longer be possible for the employee to work harmoniously and productively with the other employees or for the company.[2]

[1] [*Bell Technical Solutions*].

[2] *Ibid* at 112.

Also, several employees filed grievances alleging unjust dismissal, discrimination, and harassment after they were discharged for pictures and comments they had posted on their Facebook accounts over a period of more than a year. The postings were allegedly insulting and offensive to the employer and the grievors' supervisor.

The employer submitted that the employees had engaged in a deliberate, offensive, and malicious course of ridicule of the company and harassment of the supervisor. The employer maintained that the postings were seen by several employees. The union submitted that the postings were off-duty conduct and were meant to be private communications among them, not public communications. The union argued that, in fact, it was the supervisor who was acting in an improper, intimidating, aggressive and harassing manner at work.

In determining whether the employer's decisions regarding discipline and discharge of the employees were appropriate, the arbitrator noted that being uncooperative, defiant, or dishonest during the employer's investigation has been taken into consideration in a number of cases.[3] In addition, the cases have often taken into account an employee's acceptance of responsibility, show of remorse, and offer of a genuine apology.[4] Further, the arbitrator noted that provocation, such as inappropriate behaviour by a manager which incited, in whole or in part, the misconduct of an employee, can be considered to be a significant mitigating factor.[5]

The arbitrator ultimately upheld the discharge of one of the employees on the basis that his Facebook postings were frequent, deliberate, prolonged, and derogatory to both the company and the supervisor. The arbitrator further noted that the employee received two warnings but did not cease to make derogatory comments and that his apology letter lacked sincerity. However, the arbitrator held that the other employees should be reinstated to their employment, in part due to their length of service with the employer and the fact that provocation was a greater factor.

Statutory Updates

1. Canadian Federal Anti-Spam Legislation (CASL)

New Anti-Spam Legislation will come into force in July 2014. The new law will amend four federal statutes: the *Canadian Radio-television and Telecommunications Commission Act*; *Competition Act*; *Personal Information Protection and Electronic Documents Act*; and the *Telecommunications Act*.

1. sending a "commercial electronic message" without the recipient's consent, including commercial email, commercial messages sent via social networking accounts, and commercial text messages;
2. installing a computer program without the express consent of the owner of the computer system or the owner's agent;
3. the use of misleading representations online in the promotion of products or services;
4. collecting personal information via accessing a computer; and
5. collecting email addresses without permission (address harvesting).

A commercial electronic message is a message that promotes commerce or business and can apply to messages between employers and employees. The amendments define a commercial electronic message as follows:

[3] *Ibid* at 120.

[4] *Ibid* at 121.

[5] *Ibid* at 122.

For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

a. *offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;*
b. *offers to provide a business, investment or gaming opportunity;*
c. *advertises or promotes anything referred to in paragraph a or b; or*
d. *promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs a to c, or who intends to do so.*

The legislation requires that these messages must conform to a list of requirements including:

a. information that identifies the person who sent the message and the person — if different — on whose behalf it is sent;
b. information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph (*a*); and
c. an unsubscribe mechanism.

The maximum fine is $1 million per violation for individuals and $10 million per violation for other entities, such as corporations. However, the amendments sets out a private right of action, meaning that a person who believes they were affected by a person or corporation who violated that Act, can obtain, depending on the circumstances, up to a maximum of $1,000,000 for each day on which the conduct occurred.

Various government bodies will be involved in the enforcement of the new legislation including the CRTC, the Competition Bureau, and the Office of the Privacy Commissioner.

Health and Safety in Employment Law

1. *Blue Mountain Resorts Limited v. Ontario (Labour)*, 2013 ONCA 75

This case involved the unfortunate death of a guest while swimming in an unattended indoor pool at Blue Mountain Resorts on Christmas Eve, 2007. The primary issue on appeal was whether Blue Mountain was required to report the death to the Ministry of Labour on the basis that it was a "death or critical injury incurred by a person at a workplace". Blue Mountain took the position that it was not required to report the death because the recreational facility, particularly the swimming pool, was not predominantly a workplace and a worker was not present at the site when the death occurred. In contrast, the respondent, an inspector under the
Occupational Health and Safety Act (the "OHSA"), took the position that reporting the death was required under the OHSA.

Section 51(1) provides that where a person is killed or critically injured from any cause at a workplace, the employer, *inter alia*, shall immediately notify an inspector of the occurrence and send a written report of the circumstances within 48 hours.

The inspector under the OHSA issued an order that Blue Mountain was required to report. The Ontario Labour Relations Board upheld the order. The Divisional Court subsequently dismissed Blue Mountain's application for judicial review, finding that the Board's determination that the swimming pool was a

"workplace" was reasonable. The Board's decision was based on an inference that Blue Mountain employees must have been present at other times in the pool area in order to check and maintain it. The Divisional Court also found that the swimming pool was "a place where one or more workers work."

However, the Court of Appeal set aside the decisions of the Divisional Court and the Board, noting that such a broad interpretation of the OHSA would make virtually *every place* in the province of Ontario a "workplace", including any and all commercial, industrial, private or domestic places because at some point, a worker may be at that place. The Court of Appeal concluded that such an interpretation was absurd and would lead to the conclusion that every death or critical injury to anyone, anywhere, would have to be reported. Consequently, the Court of Appeal interpreted the OHSA as requiring that there must be a reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that site. There was no such nexus in the case at bar.

This case is significant for employers or those who advise employers of risk-management best practices. The OHSA's purpose is to protect workers from health and safety hazards while on the job. It sets out the duties of various workplace parties (employers, supervisors, etc.), establishes procedures for dealing with workplace hazards, and contains enforcement provisions in the event compliance is not voluntarily achieved. However, this case confirms that reporting requirements under the OHSA are not engaged every time there is a critical injury or death in an area that may otherwise be considered a "workplace". As the Court noted at paragraph 6 of this decision, "sometimes a swimming pool is just a swimming pool".

Privacy in Employment Law

1. *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62

The Supreme Court of Canada ("SCC") unanimously found Alberta's *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA") to be unconstitutional as it does not strike an appropriate balance between an individual's right to control the collection, use, and disclosure of its personal information and a union's right to freedom of expression.

In this case, employees of the Palace Casino at West Edmonton Mall conducted a lawful strike in 2006 which lasted 305 days. The United Food and Commercial Workers, Local 401 representing the workers (the "Union") and a security company hired by the employer video-taped and photographed the picketers at the Casino's entrance. The Union posted signs stating that images of persons crossing the picket line may be posted on "www.casinoscabs.ca". Several people who were filmed crossing the picket line complained to the Alberta Information and Privacy Commissioner (the "Commissioner") under PIPA, alleging that the Union infringed their privacy rights by collecting, using and disclosing their personal information without their consent.

An Adjudicator was appointed by the Commissioner to decide whether the Union had contravened PIPA by collecting, using and disclosing the video and pictures depicting the individuals crossing the picket line. The Adjudicator concluded that the Union's collection, use and disclosure of the information was not authorized by PIPA because the collection, use and disclosure was done without consent, and did not fall under one of PIPA's exceptions.

On final appeal, the SCC confirmed that PIPA establishes a general rule that organizations cannot collect, use or disclose personal information without consent. This rule generally applies to every organization and in respect of all personal information (PIPA is broader that the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"), which only applies to activities undertaken for commercial purposes). PIPA defines "personal information" broadly as information about an identifiable individual. However, PIPA creates exceptions to the consent requirement where the collection, use or disclosure of information is reasonable for the purposes of an investigation or a legal proceeding, or is "publicly available as prescribed or otherwise determined by the regulations".

The Union collected, used and disclosed the personal information, without obtaining the consent of those crossing the picket line. Furthermore, the Union's collection, use and disclosure did not fall under one of PIPA's exceptions. However, the right to freedom of expression under s. 2(b) of the Charter was clearly engaged by the Union's activities. One of the primary purposes for the Union's collection of personal information was to dissuade people from crossing the picket line. Recording conduct related to picketing is expressive activity, as its purpose was to persuade individuals to support the Union. The SCC held that PIPA failed to strike an acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and the Union's freedom of expression.
The SCC further held that individuals do not automatically forfeit their interest in retaining control over their personal information by appearing in public. The SCC stated that "like privacy, freedom of expression is not an absolute value and both the nature of the privacy interests implicated and the nature of the expression must be considered in striking an appropriate balance." The SCC concluded that to the extent that PIPA restricted collection for legitimate labour relations purposes, it breached s. 2(b) of the Charter and could not be justified under s. 1.
The SCC declared that PIPA in its entirety was invalid, but suspended the declaration of invalidity for twelve months to provide the Alberta legislature with time to amend PIPA.

2. *Bernier v. Nygard International Partnership* (2013) ONSC 4578[6]

The plaintiff succeeded on a motion for summary judgment in which she claimed for the difference between her common law entitlement to reasonable notice and the *Employment Standards Act (ESA)* statutory minimums. Initially, her employer paid her the ESA's statutory minimum.

The plaintiff was a management level employee who worked for the defendant for 13 years. On December 4, 2012, at the age of 54, the plaintiff was terminated without cause by the defendant.[7] The defendant conceded that a term in the employment contract stating that the plaintiff's employment could be ended with 30 days notice from either party was rendered void by the *ESA*[8]. However, the defendant claimed that this term was replaced by an amendment to the contract, which limited the plaintiff's notice to the *ESA* minimums.

The defendant was unable to offer any credible evidence that an agreement was reached which gave effect to the alleged amendments of the plaintiff's employment contract. At the request of plaintiff's counsel, the court drew an adverse inference against the defendant for the failure to provide any evidence on this issue.

In granting the plaintiff's motion, the court quoted *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.*, stating that the defendant was not entitled to "sit back and rely on the possibility that more favourable facts may develop at trail."[9] The court was able to achieve a "full appreciation of the facts" according to *Combined Air Mechanical Services Inc v Flesch,*[10] thus satisfying the test for summary judgment.

3. *General Motors of Canada Limited v. Johnson* 2013 ONCA 502[11]

This case addressed the burden of proof on plaintiffs alleging a constructive dismissal from a poisoned work environment.

---

[6] [*Bernier*].
[7] *Ibid* at para 5.
[8] *Ibid* at para 16.

[9] 1996 CanLII 7979 ONSC at para 29.

[10] [2011] OJ No 5431 at para 50.
[11] [*Johnson*].

The plaintiff claimed that his work environment was poisoned by racism, after one of his colleagues, Mr. Markov, refused to attend a training session led the plaintiff. Another employee provided a hearsay statement to the plaintiff, which implied that Mr. Markov's failure to attend the training was because the plaintiff was black. The plaintiff was exposed to further hearsay statements regarding Mr. Markov's intention to do harm to the plaintiff harm.

Alternative explanations for Mr. Markov's refusal to attend the training were obtained through an investigation conducted by the defendant. The plaintiff allegedly laughed at an insensitive comment made about Mr. Markov. Evidence collected by the defendant supported a finding that Mr. Markov was not racist, nor was his refusal to attend training provided by the plaintiff motivated by racism.

The trial judge awarded the plaintiff $159,999.92. On appeal, the Court of Appeal discussed the plaintiff's burden for proving that his workplace was poisoned. The court held that "a plaintiff's subjective feelings or even genuinely-held beliefs are insufficient to discharge this onus. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created."[12] Further, "as a matter of law, the offending conduct must be persistent and repeated unless the incident in question is sufficient, standing alone, to taint the entire workplace."[13] The Court granted the employer's appeal and dismissed the plaintiff's action.

Pension Benefits

1. IBM Canada Limited v. Waterman, 2013 SCC 7[14]

In *IBM*, a 65 year old plaintiff with 42 years of service was terminated without cause. Despite the fact that no mandatory retirement provisions were contained in the employment contract between the parties, IBM told the plaintiff that he would be treated as a retiree and that he must begin receiving monthly pension payments as of the date of his termination.[15] Subsequent to the termination, the defendant deducted the plaintiff's pension benefits from his termination pay. The plaintiff sued.

At trial, the plaintiff was granted 20 months of reasonable notice. On appeal to the Supreme Court of Canada, the court held that pension payments received by the plaintiff after he was terminated were not deductible from his wrongful dismissal damages. The court took into account that there was no language in the employment contract stating that pension benefits would be deducted from payments, in lieu of reasonable notice. Additionally, the majority of the Court stated that "pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment"[16]

The court took into account policy considerations in rendering their decision. The fact that employers would be incentivized to terminate pensionable employees if the notice period was offset by pension benefits would create a system of incentives that promotes age inequality.[17]

---

[12] *Ibid* at para 66.

[13] *Ibid* at para 70.

[14] [*IBM*].

[15] *Ibid* at para 7.

[16] *Ibid* at para 4.

[17] *Ibid* at para 95.

The Court provided the following comments to aid in the determination of whether a benefit is deductible from termination payments:

(a) There is no single marker to sort which benefits fall within the private insurance exception.
(b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
(c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
(d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.
(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.[18]

CZECH REPUBLIC

2013 witnessed three important developments in Czech employment law. At the start of the year employers had to cope with major changes in the area of employment medical services, with all employees now having to pass a medical entrance examination. Then, in the middle of the year, the parliament finally passed long called-for changes to regulations governing employment contracts for a definite period of time. Finally, the second half of the year concerned itself with preparing for the massive recodification of Czech civil law and its impact on employment law and HR practices.

Employment Medical Services

Until March 31, 2013, only employers with employees performing hazardous work were required to have employment medical services, i.e. entrance, periodical and medical examinations of employees, regular monitoring of the workplace with regard to health risks, etc. On April 1, 2013, the Specific Medical Services Act became fully applicable and extended these obligations to all employers.

The Specific Medical Services Act requires that all prospective employees undergo an entrance medical examination prior to entering into an employment contract. The point of the examination is to ascertain whether the employee is fit enough for the particular job. Any person who does not undergo an examination is deemed unfit for employment and the employer may not assign work to such person.

The entrance examination is not obligatory for employee working under an agreement on performance of work (a contract for less than 300 hours during a calendar year) or an agreement on working activity (agreements for less than half the regular weekly working hours), as long as the employee does not perform hazardous work (as defined by applicable legal regulations) or the employer has no concerns regarding the employee's health.

The Specific Medical Services Act also states that each employer must enter into an agreement with a provider of employment medical services. The provider is to monitor workplace conditions and suggest improvements. Employers and lawyers alike spent much of the first quarter of 2013 negotiating contracts between employers and providers, and dealing with related legal and administrative.

[18] *Ibid* at para 76.

Changes to Regulations concerning Employment Contracts for a Definite Period

With the aim to protect employees from uncertainty regarding continued employment, the Czech Labour Code only allowed a maximum of three consecutive contracts for a definite period (of up to three years each) between an employer and an employee. Any further contract for a definite period was deemed to be for an indefinite period. This limitation was often criticized by employers in the fields of agriculture, tourism and other seasonal work, who need employees only for several months a year. This meant that although both the employer and the employee were satisfied with repeated contracts, they were not legally allowed to work together more than three times.

As of July 1, 2013, an amendment of the Czech Labour Code made an exception to this rule. A contract for a definite period may now be repeated without limitation if there are operational reasons on the side of the employer or if the nature of the work requires it. The employer must conclude a contract with the labor union, or, if there is no labor union, issue an internal regulation stating the positions to which the contracts for a definite period will apply, the reasons for this approach and the rules for concluding these employment contracts.

The aim of the amendment is clear, to allow for repeated definite contracts where necessary while at the same time continuing to ensure that contracts for a definite period are not misused.

Civil Law Recodification and its Impact on Employment Law

On January 1, 2014, the Civil Code, which formed the basis of Czech civil law for almost 50 years, was revoked and replaced by the New Civil Code. It is without a doubt the biggest change in Czech law since the end of the communist era, and although employment law remains partly isolated, many provisions of the New Civil Code will also affect employment relationships.

The direct changes to the Labour Code as of January 1, 2014, are not very significant. The contents of employment contracts and other employment conditions will mostly remain the same. What will have to change, however, is HR practices, and the manner in which employers, employees and prospective employees deal with each other. Some specific changes are described below.

The New Civil Code brings major changes to the rules for entering into all contracts, including employment contracts. The main change is that a contract is deemed executed even if the party accepting the offer accepts it with minor changes or reservations; a contract is considered executed in the version amended by the accepting party unless the offering party rejects the accepting party's changes to the original offer without undue delay. This requires HR departments to check whether an employment contract was signed as offered. Alternatively, an employer and a prospective employee may agree in advance on the process for executing the employment contract.

The New Civil Code also introduces so-called adhesive contracts. These are contracts where the terms are dictated by one party and the other (weaker) party can only either accept or reject the contract or influence the terms only slightly. Employment contracts quite often are adhesive contracts. Terms of an adhesive contract that are incomprehensible or especially disadvantageous to an employee are invalid. However, even an incomprehensible provision is valid if its content was explained to the employee. This means that employers will have to instruct their HR departments to be more active and go through employment contracts with prospective employees in order to ensure that the employee understands everything and will not be able to claim invalidity of certain provisions at some point in the future.

Finally, the New Civil Code notably also extends pre-contractual liability. The contracting parties are obliged to inform each other of everything that is material to their contract otherwise they have to compensate the other party for damages incurred as a result of incorrect or incomplete information. The same applies to situations where one party misleads the other party into thinking the contract will be concluded and then refuses to execute the contract without a legitimate reason. This applies to selection procedures as well. Candidates must be informed of the actual situation, e.g. that hiring of a new employee is subject to final approval from the parent company, or subject to budget approval for the new employee etc. This also applies to candidates' obligations towards prospective employers. If either side plays some type of game, purposefully delays the process or knows that the contract will not be executed, that party will be obliged to pay damages up to the amount of loss due to the contract not being concluded.

The New Civil Code has numerous other possible implications, many of them unclear, and practice as well as judicature will have to show whether other provisions of the New Civil Code will apply to employment law. 2014 will surely be an interesting year for Czech employment law.

Submitted by:
Marie Janšová, Jindřich Fuka
GLATZOVA & Co., s.r.o.
Advokátní kancelář - Law Firm
Betlémský palác, Husova 5
110 00 Prague 1
Czech Republic
Tel: (+ 420) 224 401 440
marie.jansova@glatzova.com
www.glatzova.com

SPAIN

Year 2013 has been a very active time regarding employment legislative changes. Spanish legislator has passed several Acts which have had a significant impact on the Spanish employment law framework. In this article we will highlight some of the main changes introduced by some (4) of the most important Acts approved in 2013.

I. ROYAL DECREE-LAW 5/2013 OF MARCH 15TH: MEASURES TO ENCOURAGE EMPLOYEES TO WORK FOR LONGER

In line with Europe's economic strategies, one of the targets of reforms in Spain in the last couple of years has been to ensure long term viability for the Spanish Social Security System by adapting its structure to current times. Instigated by the increase in life expectancy and the decrease in birth rate, this explains why in 2011 the usual retirement age was changed from 65 to 67, to take effect in stages. In another effort to encourage older employees to work longer, in March 2013 the Spanish government passed this RDL 5/2013 that incorporates new measures connected with retirement.

The RDL came into force on March 17, 2013, although transition provisions are in place for some of its provisions. The main modifications introduced, are the following:

- Allowing those in receipt of a retirement pension to work: The RDL allowed all eligible employees (except civil servants) to combine receiving 50% of their retirement pension with a working activity, either full time or part time. Amongst other requirements, to be eligible the employee must (i) have reached the ordinary retirement age, and (ii) be in receipt of a 100% retirement pension (i.e. a pension that has not been adjusted as a result of early receipt or for other reasons). The work undertaken during retirement will attract the usual Social Security contributions for temporary illness and professional contingencies, as well a special 8% "solidarity contribution".

- Changes regarding early and partial retirement: The RDL modified the regulatory framework for early retirement and partial retirement, discouraging these practices so as to move the actual retirement age closer in practice to the ordinary retirement age. Thus, the amendments aim to harden the requirements for eligibility for an early pension and impose larger discounts to pensions received early.

    - Early retirement: Requirements in order to gain access to early retirement vary depending on whether retirement is involuntary (forced early retirement) or by choice (voluntary early retirement). Retirement is considered to be "forced" when the employment relationship is terminated due to (i) collective redundancies; (ii) individual redundancies due to economic, productive, organisational or technical reasons; (iii) judicial resolutions as a result of a company bankruptcy; (iv) the employer's death, retirement or disability, or (v) a force majeure event.

      The RDL also modified -both in percentages and time periods- the reduction coefficients to be applied upon early retirement in order to determine the resulting level of pension. The requirements demanded for access to an early pension in voluntary early retirement situations are harder than the ones required for forced early retirement.

    - Partial retirement: The requirements in order to access partial retirement were also made more difficult by the RDL. Amongst the most relevant changes we should outline the following:
        - ✓ The minimum age in order to qualify for partial retirement will be increasing gradually from the age of 61 in 2013 (or 61 and 2 months if the employee contribution period is lower than 33 years and three months) to the age of 63 in 2027 (or 65 if the contribution period of the employee is lower than 36 years and 6 months).
        - ✓ The minimum contribution period required in order to access to partial retirement was increased from 30 to 33 years.
        - ✓ The working hours of the partially retired employee may only be reduced between 25% and 50% (previously 75%) or 75% (previously 85%) depending if the substitute employee (the so called "*relevista*") is hired by the company full time and for an indefinite term or not.
        - ✓ Employees that have already reached their legal retirement age and wish to access partial retirement may only reduce their working hours between 25% and 50% (previously 75%). In this case it is not mandatory for the company to hire a substitute employee.
        - ✓ Both employer and employee will have to continue paying Social Security contributions as if the partially retired employee were still working full time.

- Measures in order to avoid discrimination of older employees regarding collective redundancies: Spanish Law 27/2011 established mandatory contributions to be paid by companies making collective redundancies affecting employees aged 50 or over. The RDL introduced three key modifications to the scenarios in which this mandatory contribution applies. These came into force on the 1st of January 2013

- The contribution will only apply when employees of 50 and over are disproportionately affected by a collective redundancy (i.e. a greater percentage are included in the group at risk of redundancy as compared to the percentage in the workforce as a whole).
- It established a new scenario in which the mandatory contribution applies - that is when the company (or the group of companies to which it belongs) makes a profit in two consecutive years within a five year period (comprising the fiscal year before the collective redundancy and the 4 fiscal years after that date) - as well as new rules as to determine the applicable rate of contribution in this scenario.
- It widened the scope of the obligation - the mandatory contribution will also apply to all Public Entities not considered "Public Authorities" as defined under clause 3.2 of RD 3/2011 (Public Sector Contracts Law)-.

II. LAW 11/2013 OF JULY 26TH: MEASURES TO SUPPORT ENTREPRENEURS AND PROMOTE ECONOMIC GROWTH AND EMPLOYMENT

Law 11/2013 transposed previous Royal Decree Act 4/2013, dated 22nd February. In force since July 28th, this law included several measures of all types to support entrepreneurs, with the aim of promoting employment and business initiatives among young people (which are defined by the Law for these purposes as those under 30).

From an employment law point of view, the key measures introduced by this Law may be classified into 2 groups: (i) measures in order to promote self employment of young people and the start up of new business activities (ii) measures in order to promote the hiring of young people. Moreover, we will briefly outline another change introduced regarding Temporary Employment Companies.

- Promotion of business initiatives and self-employment of young people: Several measures were included in this regard, the most relevant ones being the following:

    - Reductions and discounts in Social Security contributions: Self employed under 30 (under 35 for women), registering under the Social Security Self-employed regime, are now entitled to several Social Security reductions and discounts for common contingencies. In this regard, the Law established different scenarios, which require the fulfilment of different requirements in order to apply.
    - Compatibility of unemployment benefits with self employed work: Self employed under 30 starting a new business activity are now entitled to continue receiving their pending unemployment benefit for a maximum period of 9 months.
    - Unemployment benefits capitalisation: Self employed under 30 starting a new business activity are entitled to capitalise 100% of unemployment benefits as long as (i) it is used as a contribution to the capital of a new or fairly new (constituted no more than 12 months before) company, and (ii) provided they are rendering services for an indefinite term for such company (either as a self employed or through a labour relationship).

- Suspension of unemployment benefits: The period to suspend unemployment benefits (due to staring a new business activity) was extended from 24 months to 60 months for self employed under 30.
- Voluntary contributions for self employed: Self employed under 30 were entitled to choose whether they want to pay contributions for professional contingencies and for self employed termination benefits or not.

- Promotion of the hiring of young people: the Law established different measures (essentially new hiring possibilities) to encourage the employment of young people. Moreover, it established that these measures would be applicable until the Spanish unemployment rate is reduced to under 15% (please note that by the end of 2013 third quarter unemployment rate was nearly 26 %). The most relevant measures introduced by the Law were the following:

  - Benefits applicable to part time contracts for training purposes: The employer's Social Security contribution payments are reduced during a minimum term of 12 months (and maximum of 24 months) due to hiring with a part-time contract for training purposes unemployed employees under 30. The reduction amount applicable is equal to (i) 75% for companies employing more than 250 employees and to (ii) 100% for all other companies. Several requirements (e.g. regarding the training to be given, or the young employees lack of previous experience) must be fulfilled in order for this benefit to be applied.
  - Indefinite term employment contract for young people hired by micro-companies and self employed: Both companies with a maximum of 9 employees in their staff (the so called "micro-companies") and self employed may now benefit from a 100% reduction in the company's Social Security contributions for common contingencies when hiring a young unemployed employee under 30 for an indefinite period (either full time or part time). This reduction applies for 12 months, and as a general rule, only for one contract per company/self employed. Several requirements must be met in order for this benefit to be applied.
  - Benefits for young self employed hiring long term unemployed individuals over 45: Self employed may now benefit from a 12 months 100% reduction in all company's Social Security contributions when hiring for the first time an employee as long as (i) it is a long term unemployed person over 45 (ii) he/she is hired for an indefinite period -either full time or part time- (iii) the contract lasts at least 18 months.
  - First employment contract for young people: The Law established a new temporary contract, the so called "first job contract". This contract entails companies and self employed to hire unemployed young people (under 30) with working experience not exceeding three months. The duration of the contract may range between 3 and 6 months (unless the collective bargaining agreement states a longer period, being a maximum of 12 months). This contract may be part time, as long as the working hours agreed are at least 75% of those of a full time employee. The Law stated several benefits to Social Security contributions to the employers that convert this temporary contract into an indefinite one.
  - Benefits for first employment trainee contracts: It is now possible to enter into a trainee contract with an employee under 30, disregarding of the 5 years limit since the studies were

finished. This is an exception to the general rule that states that trainee contracts cannot be entered after above mentioned 5 years period. Moreover, companies and self employed may benefit from a reduction on the employers Social Security contributions for common contingencies of 50% (75% if the employee was carrying out a non-work-based training -RD1543/2011- at the time the contract is entered into).

- Temporary Employment Companies and trainees: the Law introduced the possibility for Temporary Employment Agencies to subscribe one type of trainee contracts (the so called "contratos para la formación y aprendizaje") with their employees in order to temporary loan them to User Companies. For the sake of clarification, Temporary Employment Agencies are the intermediary companies hiring employees and assigning them thereafter to other companies -the User Company- by means of an availability contract. In virtue of such contractual relationship they delegate to these User Companies the management and control of the work to be carried out.

III. LAW 14/2013 OF SEPTEMBER 27TH: MEASURES OF SUPPORT TO ENTREPRENEURS AND PROMOTION OF BECOMING MORE INTERNATIONAL.

The so called "Entrepreneurs' Act", in force since September 29th , aims to boost entrepreneurial activity by introducing several measures in order to simplify business activities and the process of creating new companies. From an employment law perspective, the key modifications introduced by this Law are the following:

- Temporary reductions in Social Security costs: the Law stated temporary reductions for several self employed individuals such as: (i) employees starting their own business whilst working for an employer; (ii) newly self employed individuals over 30, without dependent employees; and (iii) self employed individuals over 30, without dependent employees as long as they have not been registered with the Self Employed Social Security System in the previous 5 years. The Act also introduced greater Social Security savings for disabled self employed individuals.

- Health and Safety obligations for entrepreneurs: Entrepreneurs who employ fewer than 10 employees (or fewer than 25 employees in a single location) are now allowed to personally assume occupational health and safety legal obligations, as long as they (i) normally work in that single location; and (ii) are capable of assuming this function, taking into consideration the associated risks of the activity.

- Reducing requirements to obtain a VISA to work in Spain: Changes to the regular immigration processes were proposed in order to encourage foreigners to enter and remain in Spain. The changes introduced by this Law aim to facilitate Visa access (and to reduce the time required to obtain it) for key foreigners like capital investors, entrepreneurs, top managers, researchers or employees moving within a company. Different requirements were established for each of these groups.

IV. ROYAL DECREE ACT 16/2013 OF DECEMBER 20TH: MEASURES TO ENCOURAGE RECRUITMENT AS WELL AS TO IMPROVE THE EMPLOYABILITY OF WORKERS

In force since December 22nd, RDL 16/2013 aims to encourage recruitment as well as to improve the employability of workers. This RDL included some quite important changes such us:

- Contributions to Social Security: RDL widened both the company and the employees Social Security costs, by including in the Social Security contribution base fees in cash and in kind that used to be excluded of Social Security contributions (e.g. meal vouchers, health insurance, travel allowance, etc.).

  Moreover the minimum contribution base of some self employed workers (those which employ at any point of an annual period more than 10 employees simultaneously, and corporate self employed workers -as defined by additional clause 27 of General Social Security Law 4/1997-) was adjusted, establishing that their minimum contribution base for the following year will have to be equal to that provided for workers included in the General System contribution group 1

- Measures established to facilitate part time contracts and encourage its actual implementation: as a general rule, part time employees are forbidden to work "extra time", unless it is due to force majeure reasons. Notwithstanding the foregoing, the employees could exceed the ordinary hours limit provided in their part time employment contract in virtue of the so called "complementary hours".

  RDL increased from 15% to 30% (of the total ordinary working hours) the amount of maximum complementary hours which may be agreed with a part time employee. It was expressly stated that this percentage could be increased up to 60% by the collective negotiation in the collective bargaining agreements. Moreover, RDL reduced from 7 to 3 days the notice period that must be given by the employer to work said complementary hours. This minimum 3 days' notice may be subject to further reduction if so determined by the collective bargaining agreements.

  Additionally, RDL stated the employer's entitlement to offer the employee at any time "voluntary complementary hours", provided that his part time contract is of an indefinite nature and includes at least 10 ordinary working hours per week. Thus, the employer is now provided with the possibility to increase the working period up to an additional 15%. This percentage of "*voluntary complementary hours"*, which may be further increased by collective bargaining agreement up to a maximum of 30%, is not to be computed when calculating the above mentioned percentages of "complementary hours".

- Trial period: the maximum trial period applicable to temporary contracts not exceeding a length of 6 months is now reduced to one month, unless otherwise stated in the applicable collective bargaining agreement.

- Childcare work time reductions: The employee`s entitlement to reduce their working hours due to childcare was extended by 4 years, ending thus on the 12th birthday of the protected child.

- Indefinite term employment contract in support of entrepreneurs: this employment contract, stated for companies with less than 50 employees, was introduced by Law 3/2012. The change introduced by RDL is the opportunity to use this employment contract for part time employees as well (prior to RDL it was established only for full time employment contracts).

  RDL clarified that the tax benefits and reductions to the Social Security contributions linked to this employment contract will also apply to part time contracts. In those cases the benefits should be applied proportionally, taking into consideration the actual working time agreed with the employee.

- Temporary Employment Companies and trainees: RDL introduced the possibility for Temporary Employment Agencies to enter into trainee contracts with their employees in order to temporary loan them to User Companies. Consequently, now temporary employment agencies and the User Companies are legally granted to enter into availability contracts to cover all those situations where the Law allows any company to enter into trainee and work experience contracts (art. 11 of RDL 1/1995).

- Contributions for collective dismissals affecting employees fifty years old or over: In relation to the obligations to pay financial contributions to the Public Treasury in the case of collective dismissals affecting employees of fifty years old or over within the frame of a group of companies generating annual profit, RDL clarified two new points:

  - By "group of companies" the law refers to the corporate concept of group of companies, i.e., the one stated in clause 42.1 of the Spanish Commercial Code.
  - To determine whether the group of companies generates "profit" or not, it should only be taken into account the outcomes obtained by the companies of the Group established in Spain.

- Employment contracts and Social Security reductions and benefits: RDL established for the Government to organize and harmonize every Social Security reduction and benefit regarding the recruitment of employees currently in force. For the sake of certainty and legal security, all those incentives shall be included in a single provision. Linked to this (but not included in this RDL) the Spanish Employment Authorities has recently reorganized all employment contract models in force, in order to simplify companies' recruitment proceedings.

As a general conclusion, it should be outlined that the 2013 amendments introduced by the Spanish legislator aim essentially to boost the Spanish economy (and reduce the current high unemployment rates) by promoting entrepreneurial activity and encouraging its globalization, promoting recruitment, increasing the employer's flexibility and forcing older employees to work longer. Overall, these amendments can be of great use for companies and entrepreneurs willing to open a branch or start a new business in Spain.

Submitted by:
Carmen Torres Colmenares

DAC BEACHCROFT
C/ Serrano 37, 28001
Madrid, Spain
Tel: (+34) 917816300
ctorres@dacbeachcroft.com
www.dacbeachcroft.com