Littler® The Global Guide Quarterly

Labor and employment law updates from around the globe

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Latest headlines from our featured countries.

Australia

New Whistleblowing Laws in Australia

New Legislation Enacted

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel – Littler United States

The new Australian Whistleblowing laws passed in Parliament on February 19, 2019, and will likely take effect in the next couple of months (July 2019) after it receives Royal Assent. The aim of the Whistleblower Act is to harmonize various current regimes under the federal law, expand protections and remedies for whistleblowers and create a regime for tax misconducts and contraventions. Employers should have a whistleblower policy prepared within the six-month transition period after July 2019 and must be in place by January 1, 2020. Significant penalties apply for businesses and individuals that contravene the Whistleblower Act, which include 5,000 penalty units (AUD1.050m) (or three times the benefit derived or detriment avoided) for an individual; and for a body corporate, 50,000 penalty units (AUD10.5M) or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to 2.5 million penalty units). Penalties also include imprisonment.

Can Employee's Silence Be Used as Grounds for Dismissal?

Precedential Decision by Judiciary or Regulatory Agency

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel – Littler United States

On January 14, 2019, the Fair Work Commission ruled on whether employers can demand employees to answer questions and if an employee's silence could be used as grounds for employee dismissal. In the case of *Mr Jordan Lamacq v Smerff Electrical*, the employer demanded the employee provide information for allegedly taking a cash job on the side while working for him under the threat of losing his job if the information was not provided. The employee refused, so he was fired for failing to carry out a "lawful and reasonable instruction that was consistent to his employment contract". The Commission found that the language used by the employer was so threatening and offensive that the employee did not have an option to comply and that "silence in the face of a tirade of expletive laden and threatening abuse ... is entirely understandable and not an indication that [the employee] was guilty of anything". Therefore, the FWC decided in favor of the employee. As employees generally enjoy the right against self-incrimination, investigations made by employers should ensure procedural fairness.

Changes to Immigration Visas and Other Related Changes

New Regulation or Official Guidance

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel – Littler United States

On March 11, 2019, changes to the Australian immigration system were announced, along with a list of eligible occupations. The changes affect a number of Australian visa subclasses. Occupations are divided into two lists (medium-long term list and short term list) which dictate how long a visa holder can work and stay in Australia. Eight of these occupations were added into the medium-long term list which means that subclass 482 visa applicants under these occupations can be sponsored to stay for up to four years with the option to apply for permanent residency

under the subclass 186 visa. The working holiday visa program (subclass 417 and 462) has also been amended to allow visa holders to qualify for a third visa after they have spent six months doing regional work. Additional changes were announced and likely will occur within the next quarter.

State Updates and Labor Hire Licensing Scheme in Australia

Upcoming Deadline for Legal Compliance

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel – Littler United States

As part of the state updates: (i) the Government proposes to introduce a compulsory national licensing scheme after the next federal election between now and May 2019; (ii) Victoria's labor hire licensing scheme is set to take effect on April 29, 2019, with a six-month transition period for employers ending on October 29, 2019; (iii) New South Wales proposes to introduce a state-based licensing scheme after the NSW elections; and (iv) Australian Capital Territory has introduced the scheme which will apply to companies who engage work in the territory but further details are yet to be confirmed. Once established, the National Labour Hire Licensing Scheme will require all labor hire companies to be licensed and will capture overseas-based companies that supply workers directly or indirectly to Australian firms. Scheme compliance will need to be demonstrated under the Fair Work Act, health and safety laws, superannuation and tax obligations and immigration conditions. The proposal is for licenses to be issued for up to three years and would be cancelled anytime if the labor hire firm is noncompliant.

Employees' Privacy Right Relative to the Use of Biometric Technology

Trend

Authors: Naomi Seddon, Shareholder & Merille Raagas, Counsel – Littler United States

The Fair Work Commission (FWC) recently allowed an employee to appeal the denial of his unfair dismissal claim for refusing to use biometric fingerprint scanning technology as part of his employment. The biometric technology was rolled out in the organization predominantly for time-keeping purposes and the employer announced that "all employees must use the biometric scanners to record attendance on site". The employee was dismissed after objecting that he was concerned about his personal information being collected. With the appeal, the FWC Full Bench will examine the progression of biometric technology and its connection to workers' rights to privacy, as this is the first case that considered whether an employer has grounds to dismiss workers for refusing to provide biometric information.

Brazil

President Issues a Decree on Union Contributions

New Order or Decree

Author: Renata Neeser, Shareholder – Littler United States

The Brazilian President signed into law the Provisory Measure (MP) # 873 on March 1, 2019. The MP # 873 modified and deleted some provisions of the Brazilian Labor Code (CLT) relating to union dues. When the CLT was modified in 2017, the mandatory payment of union dues became subject to employee's authorization. The unions have since struggled with the severe reduction in their revenues and have been using different approaches to collect some of such dues. The main changes brought by the new MP is clarification that unions need prior, individual, voluntary, and express authorization from employees and cannot impose union fees approved by assembly vote and apply an opt-out system. The MP is legally binding from the date it is enacted, but Congress must approve it within 120 days or its effectiveness ends.

Brazilian Superior Labor Court Issues New Conciliation and Mediation Protocol

New Regulation or Official Guidance

Author: Renata Neeser, Shareholder – Littler United States

On March 26, 2019, the Brazilian Superior Labor Court (TST) issued a procedure for the Vice Presidency of the Court to mediate settlements of collective claims subject to the TST's ordinary jurisdiction. It is also to be used as a reference by the 24 Regional Labor Courts (TRTs) on the conciliation and mediation of collective claims under their ordinary jurisdiction. The idea is to harmonize the procedures. According to the TST, this methodology has provided good results. In 2018, of 19 pre-trial requests for conciliation, 16 reached a settlement. In general, the court-sponsored settlements are growing whether for collective or individual claims, through the Conciliation Centers of the Labor Justice (Cejuscs) in each state. The 77th Cejusc was installed in the State of Parana this March. In 2018, there were 217,081 conciliation meetings and 96,081 resulted in settlements amounting to about $750,000,000 in payments to employees.

Judge Accepts Settlement via WhatsApp

Trend

Author: Renata Neeser, Shareholder – Littler United States

A judge from the 76th Labor Court of Sao Paulo accepted the participation of a plaintiff by video conference using WhatsApp. The plaintiff lives more than 1,000 miles from Sao Paulo and could not attend the hearing in person. The plaintiff's lawyer present at the hearing called the client during the hearing at the agreement of the judge. After showing his ID to the judge and agreeing to the terms of the proposed settlement, the judge ratified the settlement. The number of courts allowing the use of this app for the purpose of settlements is growing based on the interpretation that the Mediation Law 13.140 of 2015 allows mediation using the internet and other communication systems, and the Civil Procedure Code of 2016 also allows conciliation and mediation hearings to be conducted electronically. The use of technology has been an important tool to resolve disputes.

Canada

Bill 47 Reverses Many Amendments to Ontario's ESA Made by Bill 148

New Legislation Enacted

Authors: Monty Verlint, Partner and Rhonda B. Levy, Knowledge Management Counsel – Littler Canada

Among other things, the *Fair Workplaces Better Jobs Act, 2017* (Bill 148) significantly amended Ontario's *Employment Standards Act, 2000* (ESA). Most of Bill 148's ESA amendments came into force in 2018, with the remainder to take effect on January 1, 2019. In November 2018, the *Making Ontario Open for Business Act* (Bill 47) received Royal Assent and substantially reversed amendments to the ESA made by Bill 148. With one minor exception, Bill 47's changes to the ESA came into force on January 1, 2019.

Canada Launches Employment Insurance Parental Sharing Benefit for Eligible Two-Parent Families

New Legislation Enacted

Authors: Monty Verlint, Partner and Rhonda B. Levy, Knowledge Management Counsel – Littler Canada

On March 17, 2019, the federal government launched a new parental sharing benefit. Two-parent families are eligible for the benefit, including adoptive and same-sex parents of children born or placed for adoption on or after March 17, 2019. If the parents agree to share parental benefits, the duration of Employment Insurance parental benefits will increase by an additional five weeks if the standard parental option is chosen by the parents, or an additional eight weeks if the extended parental option is chosen.

Impairment from Medical Cannabis Use Causes Undue Hardship in a Safety-Sensitive Workplace

Precedential Decision by Judiciary or Regulatory Agency

Authors: Monty Verlint, Partner and Rhonda B. Levy, Knowledge Management Counsel – Littler Canada

IBEW, Local 1620 v. Lower Churchill, 2019 NLSC 48, released in February 2019, is a judicial review decision that affirmed a labor arbitrator's decision that an employer had met its duty to accommodate the grievor's disability without undue hardship when it denied him safety-sensitive employment due to his use of medically prescribed cannabis. In rendering its decision, the court was influenced by the unavailability of technology and resources to measure impairment from cannabis.

Employees May Bring Unjust Dismissal Complaints after Signing Settlement Agreement and Release

Precedential Decision by Judiciary or Regulatory Agency

Authors: Monty Verlint, Partner and Rhonda B. Levy, Knowledge Management Counsel – Littler Canada

In late December 2018, in *Bank of Montreal v. Li*, 2018 FC 1298 (FC), the Federal Court of Canada dismissed an application for judicial review of an Adjudicator's decision to assume jurisdiction over the employee's complaint of unjust dismissal even after the employee signed a settlement agreement and release. The court stated that the Adjudicator was correct to consider herself bound by an earlier decision, where she decided that an employee is not precluded from relief under the *Canada Labour Code* because of an agreement made with the employer regarding termination and a release given in favor of the employer.

Court of Appeal for Ontario Refuses to Recognize the Tort of Harassment

Precedential Decision by Judiciary or Regulatory Agency

Authors: Monty Verlint, Partner and Rhonda B. Levy, Knowledge Management Counsel – Littler Canada

In March 2019, in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, the Court of Appeal for Ontario (OCA) decided that a lower court decision establishing a common law tort of harassment was made in error and declined to recognize the tort. While the OCA did not "foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts," it stated that compelling reasons to recognize the tort had not been presented.

Ontario Securities Commission Awards: First Ever Whistleblower Awards by a Canadian Regulator

Important Action by Regulatory Agency

Authors: Monty Verlint, Partner and Rhonda B. Levy, Knowledge Management Counsel – Littler Canada

On February 27, 2019, the Ontario Securities Commission (OSC) announced that it had made the first ever award under its Whistleblower Program (launched in 2016) to three whistleblowers on three separate matters in the total amount of CDN $7.5 million. The identities of the whistleblowers, details about the three matters, and the amount of each award were not disclosed; however, the OSC noted that the information was voluntarily provided and was also, "high quality, timely, specific and credible information, which helped advance enforcement actions resulting in monetary payments to the OSC."

Central America

Costa Rica | Amendment Seeks to Strengthen Equal Pay Law

New Legislation Enacted

Author: Lucía Solórzano, Senior Associate – BDS, Member of Littler Global

On March 18, 2019, the Legislative Chamber amended the Law for the Promotion of the Social Equality of Women. This reform adds three new articles to the law, to strengthen the legal requirement for all employers to pay men and women equally when working in equal conditions. Although such obligation already existed in the general anti-discrimination regulations of the Labor Code, this new law creates a commission in charge of studying the issue of unequal pay and making recommendations to eradicate the gender salary gap.

Costa Rica | Deadline to Furnish Lactation Rooms

Upcoming Deadline for Legal Compliance

Author: Marco Arias, Partner – BDS, Member of Littler Global

As of May 5, 2019, all companies employing thirty or more women at their workplaces will be required to have a lactation room that meets specific requirements. This deadline comes from Executive Decree 41080-MTSS-S, which was published in the official government publication on May 4, 2018, and granted companies one year to comply. All lactation rooms must be furnished with a refrigerator, a small table, two chairs, a sink with liquid soap (if not possible, there must be a rest room within 20 meters), a paper-towel dispenser, and ventilation, among other requirements.

Panama | New Protections for Employees Regarding Work-Related Accidents

New Legislation Enacted

Author: Yeris Nielsen, Partner – BDS, Member of Littler Global

On February 14, 2019, Law No. 72 was passed to amend Government Decree No. 68 from 1970, related to workers' compensation coverage. With this amendment, any employer who fails to register with the Social Security Administration or pay the insurance premiums is liable for all medical treatment costs related to any work-related accidents that its employees might suffer. Employers can appeal the administrative decision that orders them to cover these costs, but will ultimately have five business days to fulfill payment if the appeal is rejected. The law's effects are retroactive to March 15, 2015.

Colombia

Companies to Implement SG-SST Standards by November 2019

New Regulation or Official Guidance

Author: Emma Fernández Díaz, Attorney at Law – Littler Colombia

The Ministry of Labor issued a new Resolution 0312, dated February 13, 2019, which defined the minimum standards to be implemented by employers in relation to the Occupational Safety and Health Management System (SG-SST). Employers must implement these standards in accordance with the number of employees, work, and business or economic activity. The Resolution also changes the dates for the implementation of the system in stages, as follows: monitoring and improvement plan (deadline: January-October 2019); and surveillance and control (commences in November 2019).

Maternity Leave and Pregnancy-Related Protection for Father in Case of Mother's Death

New Regulation or Official Guidance

Author: Emma Fernández Díaz, Attorney at Law – Littler Colombia

In response to a legal consultation, the Ministry of Labor established that in the case of the death of the mother before the expiration of maternity leave, the employed father of the child should be entitled to take leave of a duration equal to the unexpired portion of the maternity leave and have the same pregnancy-related protection.

All Companies Must Contribute to Social Security System for Their Independent Contractors

Upcoming Deadline for Legal Compliance

Author: Emma Fernández Díaz, Attorney at Law – Littler Colombia

On July 23, 2018, the Ministry of Health and Service Provision issued Decree 1273, which mandates that all companies must contribute to the Social Security, Health and Pension system for their independent contractors. Prior to this decree, this obligation fell on contractors who were responsible to make such contributions. Decree 1273 will become effective in June 2019, though the Ministry may enact a new decree to postpone the effective date of this new obligation.

Deadline to Implement Nursery Rooms in the Workplace

Upcoming Deadline for Legal Compliance

Author: Emma Fernández Díaz, Attorney at Law – Littler Colombia

Pursuant to Act 1827, enacted in 2017, and Regulation 2423, issued by the Ministry of Health and Service Provision, companies with more than 1,000 employees must comply with the first phase of the implementation of nursery rooms by January 2019. Significantly, the local health department will inspect workplaces to determine compliance, not for penalizing companies, but to provide support and guidance. The objective of the Ministry of Health and Service Provision is to increase by 50% the availability of nursery rooms in the workplace.

Denmark

Amendment of the Danish Stock Options Act

New Legislation Enacted

Author: Tina Reissmann, Partner – Labora Legal

The Danish Stock Options Act has been amended with effect from January 1, 2019, repealing the freedom of contract in relation to employee share schemes. In the previous Act, the reason for termination of employment impacted employees' rights. Then a termination due to the employer's circumstances would entail that the employee was considered a "good leaver" and would not affect the employee's stock options rights. The employee was entitled to keep his/her options according to the original program – irrespective of what the program said – and would also be entitled to receive a proportional "allocation" that the employee would have had the right to if the employee had been employed at the end of the fiscal year. With the amended Act the article securing the employee's rights in the event of a termination due to the circumstances of the employer, has been annulled. Furthermore, it is possible for the parties to agree for the employer to buy back stocks, which the employee has been granted. The aim of the amended Act is to increase flexibility and simplify the rules. This comes at the cost of employees' current rights, but will be more aligned with the intentions behind such incentive schemes.

Amendment to Equal Treatment Law Based on the #Me-Too Movement

New Legislation Enacted

Author: Tina Reissmann, Partner – Labora Legal

The Danish Parliament has passed the bill to amend the Danish Act on Equal Treatment of Men and Women, which was introduced by the Danish Ministry of Employment in November 2018, based on the #Me-Too movement. In numerous sexual harassment cases, the Danish courts have focused on the question of whether there was a sort of "relaxed work tone" and casual work environment. The bill emphasizes that the Government regards breaches of the Act on equal treatment as serious and, therefore, "It should not be of importance, in the consideration of whether sexual harassment occurred or not, if there were a relaxed work tone or casual work environment. This is not the employee's choice, whether or not this is the case."

Dress Code Not in Conflict with Equal Treatment Law

Precedential Decision by Judiciary or Regulatory Agency

Author: Tina Reissmann, Partner – Labora Legal

The Danish Board of Equal Treatment found that a workplace dress code setting different attire rules for men and women was not in conflict with the Danish Act on Equal Treatment of Men and Women. As part of a large merger process, the company implemented a dress code requiring "professional appearance," "formal appearance" and that the employees "dress accordingly". The male employee worked in an open-office space where both customers and business partners visited. The company thus wanted the male employee to wear formal and professional attire. Shortly before summer, the manager at the employee's department sent an email to the employees, specifying how the dress code should be understood. In the email, the manager stated that men had to wear trousers and closed-toe shoes, whereas women could wear bare-legged outfits and open-toe shoes, as such attire was considered professional for women. The Board of Equal Treatment found that the company's dress code set requirements for professional and formal attire for both men and women. Taking into account the open-office landscape and visits from international customers and business partners, the Board of Equal Treatment held that the company's enforcement of the dress code was not in conflict with the Act.

The Christmas Party – Summarily Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Author: Tina Reissmann, Partner – Labora Legal

Behave appropriately at all times – including at the Christmas office party. This is clearly illustrated by this case: As a nice Christmas office party was about to end, a middle manager suddenly made advances towards a female employee, grabbing her breast and stomach while she was sitting at a table. She expressly asked him to stop and moved to the other side of the table. The middle manager then did the same thing again. The umpire found that the middle manager had behaved in a sexually offensive way towards the female employee at the party, which constituted gross misconduct. An aggravating factor in this assessment was that the incident involved a manager. It did not matter that the manager and the employee worked in separate departments and that the manager had had an immaculate employment record for more than 25 years. Accordingly, the summary dismissal was justified and the tribunal found in favor of the employer.

Proposal on "No Deal Brexit" and British Citizens in Denmark

Proposed Bill or Initiative

Author: Tina Reissmann, Partner – Labora Legal

All Brexit scenarios are possible right now, and the Danish government has therefore announced the proposal for measures concerning British citizens living in Denmark in case of a "no deal Brexit". Under the proposal, if put forward

to the Danish Parliament and passed, British citizens residing in Denmark pursuant to EU law before Brexit will be able to stay in Denmark on conditions largely corresponding to the rules in the "EU-Residence Order." Such scheme would be temporary and apply until a permanent solution is put into place. British citizens currently residing in Denmark will thus be able to continue to legally reside and work in Denmark without a work and residence permit. Accordingly, it is recommendable for employers to identify the employees affected and stay updated on the situation to clarify any uncertainties – hopefully – as quickly as possible.

European Union

Court of Justice Clarifies Holiday Pay Entitlements Under EU Law

Precedential Decision by Judiciary or Regulatory Agency

Author: Ben Smith, Trainee Solicitor – Littler United Kingdom

The European Court of Justice recently concluded that remuneration for the minimum required period of annual leave under EU law must not be less than the employee's normal average pay during periods of actual work. In this case, the claimant's holiday pay had been calculated as an average of pay over a period that included "short-time" working, resulting in a significant reduction in holiday pay compared to his usual pay for periods where he did work. "Short-time" working are periods where an employee remains employed, but is not required to do any work and is paid a "short-time" working allowance, which is significantly less than normal pay. The Court of Justice found this was not permissible. In addition, the Court of Justice confirmed that annual leave as a matter of EU law accrues only when the employee is doing actual work, therefore, no annual leave was accrued during periods of "short-time" working.

Finland

New Working Hours Act, Effective January 1, 2020

New Legislation Enacted

Author: Maria Wesander, Counsel – Dottir Attorneys Ltd.

A new Working Hours Act (työaikalaki) approved by the Finnish Parliament on March, 13, 2019, will enter into force on January, 1, 2020, and applies to remote working, but it does not apply to work that is performed almost entirely outside a fixed workplace so that the employer cannot monitor it. The new Act also introduces a new flexible working hours scheme (joustotyöaika) for employees (especially specialists) who may decide independently over 50% of their working time and place. The Act also makes it possible to introduce a statutory working-time account in all workplaces subject to agreement between the employer and employee representatives or the personnel as a whole. In addition, the contractual freedom regarding flexible working hours (liukuva työaika) has been increased and the possibility to agree on regular working hours at workplaces has been widened. The new Act does not include limits for overtime hours. Instead, the statutory maximum amount of working hours (including overtime) is 48 hours per week calculated as the average of a four-month period.

Amendment of the Act on the Protection of Privacy in Working Life

New Legislation Enacted

Author: Maria Wesander, Counsel – Dottir Attorneys Ltd.

An amendment of the Act on the Protection of Privacy in Working Life (759/2004) entered into force on April 1, 2019, to bring Finnish legislation within compliance with the GDPR (EU 2016/679) and, to the extent possible, update the Finnish legislation regarding privacy in working life. Consequently, the Act has introduced changes to the general requirements on collecting personal employee data, the processing of health-related information and camera surveillance. However, it would appear that the current employee whistleblowing practices might contravene the

Act's requirements on the collection of personal employee data. Under the Act, an employer is entitled to collect an employee's personal data only from the employee in question, and from other sources only with the employee's consent. As personal data can be collected without the employee's consent only when the law explicitly provides it, whistleblowing practices not explicitly provided for by law, e.g., in respect of harassment allegations, may be problematic in the light of the amended Act.

Supreme Court Rules on Scope of Noncompete Clauses

Precedential Decision by Judiciary or Regulatory Agency

Author: Maria Wesander, Counsel – Dottir Attorneys Ltd.

On March 22, 2019, the Supreme Court of Finland held that a clause – under which an employee must compensate the employer for the costs of employment-related training provided by the employer during the last 24 months of employment if the employee takes up a competing position within six months from the end of the employment relationship – was not a noncompete clause. In fact, said clause was unreasonable and unenforceable due to the customary nature of the provided education, the amount of the agreed compensation and the long duration of the obligation. Therefore, the scope of noncompete clauses should not be broadly interpreted. Rather, an obligation to compensate for customary training (such as preparatory training in relation to a legalized real estate broker examination, for example) is most likely nonenforceable. Whereas an obligation to compensate for extensive, expensive, noncustomary and nonmandatory education (such as an M.B.A. or LL.M. degree) would likely be enforceable if taking up a competing position within a relatively short time from the completion of the education.

France

Changes to the Social and Fiscal System of Overtime Hours

New Legislation Enacted

Author: Guillaume Desmoulin, Partner – Littler France

A new provision of the French social security code (Article L.241-17) reduces employers' social contributions on overtime. This reduction, which was enacted by a Law on Emergency Measures in response to the "yellow vests" movement, does not apply when the payment of overtime replaces a different type of remuneration already in place. An exception applies when such replacement occurs more than twelve months after the last payment of the other type of remuneration.

Employers Responsible for Misconduct of Those Exercising Authority Over Other Employees

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Littler France

Employers are bound by a security obligation regarding employees' health and must ensure that no employee falls victim of discrimination. In this matter, a female employee working in a charity sued her employer and claimed damages because one of her coworkers used sexist comments against her, while others threw wasted goods at her. These events occurred in the kitchens during one of the charity's organized events, in front of several colleagues. The Court ruled that the supervisor, in charge of the integration of employees, should have taken immediate action to protect the plaintiff. Due to the inaction, the employer was sentenced to pay.

Contractual Termination Invalidated Only by Fraud or Defect of Consent

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Littler France

The French Supreme Court ruled that a mutual termination agreement is not necessarily cancelled because the employee has been a victim of bullying. The Court stated that only fraud or lack of consent could potentially invalidate the contractual termination of employment. Therefore, the court overruled the previous decision of a lower court that invalidated the mutual termination on the sole basis that bullying had occurred. This matter will come before a new court and the employee will have to demonstrate that his consent was not real.

Working Time Control Via a Geolocation System Is Legal If Used as Last Resort

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Littler France

An employer set up a geolocation system to track employees' working time via a mobile case they had to carry with them (they were delivering fliers and newspapers). A union sued the employer and asked the system to be removed, arguing that this type of geolocation is illegal. The union claimed that there were other ways to track the employee's working time, such as a mobile timesheet, auto-declaration or hiring a supervisor. The French Supreme Court ruled that the use of a geolocation system is legal only when there are no other ways to ensure working time control, even if the system is not as efficient. The Court sided with the union, adding that using such system is not justified when employees have total freedom in their work organization.

New CSR Polices in Upcoming "Growth and Business Transformation" Bill

Proposed Bill or Initiative

Author: Guillaume Desmoulin, Partner – Littler France

The "Growth and Business Transformation" bill is reinforcing corporate social responsibility within limited companies. Unlisted companies employing at least 1,000 people in France or 5,000 people worldwide will be required to appoint to their board one or several directors representing employed shareholders. This obligation will be extended to listed holdings exercising strategic influence. The directors representing employees (shareholders or not) will be provided a reinforced training. Starting January 1, 2020, limited companies, as well as companies and partnerships partly limited by shares, that violate equal representation within executive boards will be sanctioned by cancelling every decision in which the director would have participated. Finally, corporate governance reports presented to the board of directors must provide information regarding pay gaps between senior executives and employees.

Hungary

Harsh Burden of Proof Placed on Employers

Precedential Decision by Judiciary or Regulatory Agency

Author: Zoltán Csernus, Attorney at Law – VJT & Partners Law Firm

The Hungarian Supreme Court declared that the employer has the burden to prove that the damage suffered by an employee was caused solely by the unavoidable conduct of the injured employee even if nobody witnessed the accident. In said case, an employee died while replacing the lighting in a theatre managed by the defendant employer.

Employee's Liability for the Penalty Paid by the Employer

Precedential Decision by Judiciary or Regulatory Agency

Author: Zoltán Csernus, Attorney at Law – VJT & Partners Law Firm

If an employer undertook a contractual obligation to pay a penalty and has complied with it, the amount paid by the employer shall be deemed as damage, which may be enforced against the employees liable for the breach of the said contract, according to the rules on the employees' liability for damages. The trade union has no standing to bring proceedings against a unilateral instruction and regulation of the employer on its operation and organization. The legality of a unilateral instruction can be reviewed in a litigation initiated by the affected individual.

Ireland

So Long Zero Hours Contracts

New Legislation Enacted

Author: Emmet Whelan, Partner – ByrneWallace

The Employment (Miscellaneous Provisions) Act 2018, which came into effect on March 4, 2019, requires employers to provide new recruits with five core terms of employment in writing within five days of starting employment and prohibits the use of zero hour contracts, except in very limited circumstances. Further, it introduces a new entitlement to banded hours which better reflect actual hours worked in a reference period, and provides for certain minimum payments to employees who are required to be available for work and work is not provided. Employers who breach the Act may face criminal convictions and complaints by employees to the Workplace Relations Commission.

Update on Gender Pay Gap Reporting

Proposed Bill or Initiative

Author: Emmet Whelan, Partner – ByrneWallace

On March 8, 2019, the Government announced that it had agreed to the text of the Gender Pay Gap Information Bill, to be published shortly. This follows the publication of a General Scheme to the Bill last year and a subsequent Joint Committee Report on the General Scheme. The Bill seeks to require certain employers to publish information relating to the pay gap between male and female employees. The reporting requirement will apply on a phased basis, beginning with employers of more than 250 employees, then reducing to employers of more than 150 employees and then to employers of more than 50 employees. Further, the law will cover both full-time and part-time employees and extend to bonus payments and benefits-in-kind.

Brexit & the Common Travel Area

Trend

Author: Emmet Whelan, Partner – ByrneWallace

The Common Travel Area (CTA) is an arrangement between Ireland and the United Kingdom which allows Irish citizens to freely travel, work and access social welfare benefits and health services in the UK (and UK citizens to have reciprocal rights in Ireland). The CTA pre-dates Irish and UK membership of the EU, and is not dependent on it. In this way, Ireland is in a different position to other EU countries in respect of its relationship with the UK, and specifically in terms of the right to travel and work following Brexit. There is good reason for this special arrangement, including the significant cross-pollination between Ireland and the UK. Irish census statistics in 2016 estimated that approximately 103,113 UK nationals were living in Ireland. British census statistics from 2011 estimated that 430,000 Irish born people were residents in Great Britain. Many thousands of people also commute daily between Ireland and the UK for work. Concerns have been expressed related to the CTA in Brexit negotiations. While it has been confirmed in guidance

from the Irish and UK Governments that the CTA will be protected, we await the final outcome of the UK's withdrawal process, and note that a failure to protect the CTA would cause havoc for employers in both Ireland and the UK. Another item to add to the long list of Brexit-related employment concerns.

Italy

Amendments to Compulsory Maternity Leave

New Legislation Enacted

Author: Carlo Majer, Partner – Littler Italy

The Budget Law, in force since January 1, 2019, introduced the possibility for pregnant employees to work – in the event of documented good health – until the ninth month of pregnancy, and to take compulsory maternity leave after the childbirth. Under Italian law, work is forbidden for pregnant employees for five months – so called mandatory maternity leave. Until the Budget Law, the five months were divided into two months before the childbirth and three months after the childbirth (with the possibility to work until the end of the eighth month of pregnancy in the event of documented good health). The new provision extends the faculty of working until the day of childbirth. Compulsory maternity leave provides for the payment of 80% of the salary by the INPS (plus any supplements provided for by NCLAs).

Controls on Employees through the Detective Agency

Precedential Decision by Judiciary or Regulatory Agency

Author: Carlo Majer, Partner – Littler Italy

On March 1, 2019, the Supreme Court ruled that controls on employees carried out through a detective agency may be considered lawful when aimed at verifying whether an employee has engaged in a criminal or a fraudulent conduct during work hours, which conduct can damage the employer. In the specific case, the employee registering his presence at the workplace using the badge system frequently exited the company's premises between 15 minutes up to more than one hour. The Supreme Court specified that, in this case, the control was not aimed at verifying the manner in which the work was carried out. Accordingly, this extent of control was permissible.

Employee Must Prove Causal Link Between Work Task and Alleged Pathology

Precedential Decision by Judiciary or Regulatory Agency

Author: Carlo Majer, Partner – Littler Italy

The Supreme Court recently held that employees bear the burden of proof of the existence of a causal link between the tasks performed and the pathology that has arisen. In this regard, the employee who sued the company for damages based on the work activity shall demonstrate the working environment's harmfulness and the breach of Article 2087 of the Civil Code. Here, the employee claimed compensation for damages suffered resulting from the employer's mobbing behaviors. The applicant claimed that the employer had deliberately assigned him to heavy-duty tasks, outside his level of classification, which had caused him allergic contact dermatitis, as well as a depressive syndrome.

Guidelines of Data Protection Authority on Electronic Wristbands

New Regulation or Official Guidance

Author: Carlo Majer, Partner – Littler Italy

The Data Protection Authority recently found that the use of electronic wristbands for employees – aimed not at controlling employees' activity, but at verifying the correct fulfilment of the procurement contract – is allowed, but

the employer must adopt all available precautions to protect employees' dignity. Under the Guidelines of the Data Protection Authority, unions or alternatively the local office of Ministry of Labor (as provided for by article 4 of Law no. 300/1970) must agree with the use of such an electronic system. In addition, the employer shall preserve employees' privacy, by adopting the measures provided by the GDPR.

Japan

Bill to Promote Women and Prevent "Power Harassment" at the Workplace

Proposed Bill or Initiative

Author: Aki Tanaka, Of Counsel – Littler United States

On March 8, 2019, the Ministry of Health, Labor and Welfare (MHLW) submitted a draft proposal to Congress, to amend the Act to Promote Women in Workplace. If approved, the amendments would (i) require employers with more than 100 employees to disclose the employer's plan to promote women in the workplace, which was previously required only for the employer with more than 300 employees, and (ii) require the employer to take appropriate measures to prevent "power harassment" (i.e., bullying) at the workplace.

Promote Employment of Employees with Disabilities

Proposed Bill or Initiative

Author: Aki Tanaka, Of Counsel – Littler United States

On March 19, 2019, the Ministry of Health, Labor and Welfare (MHLW) submitted a draft proposal to Congress, to amend the Act to Promote Employment of Employees with Disability. Currently, employers with at least 45.5 employees (some part-time employees are counted as 0.5) are required to hire at least one employee with disability. If approved, the law will create governmental subsidies and make them available to employers as an incentive to hire full-time and part-time employees with disability. Further, to boost the rate of employment of employees with disability among small employers, the government will give a special certificate to those small employers who do well in that regard.

Malaysia

New Applications for Category 3 Employment Passes Now Accepted

New Regulation or Official Guidance

Author: Tan Su Ning, Attorney at Law – Skrine

New applications for Category 3 expatriate employment passes for jobs paying below RM5,000 will now be accepted only on a case-by-case basis with priority given to technical jobs, said the Immigration Department. This comes on the heels of a recent announcement by Human Resources Minister M. Kulasegaran that the government is phasing out Category 3 and Category 2 expatriate employment passes in a bid to open up more job opportunities to locals. The Category 3 employment pass allows expatriates who are earning the basic monthly salary of RM3,000 to RM4,999 with an employment contract of up to 12 months to work in Malaysia. In view of the policy, the immigration authorities are now processing applications for Category 3 expatriates on a case-by-case basis, especially for technical positions. There are still no decisions on Category 2 employment passes, as to date.

Outsourcing Companies for Foreign Workers to Be Abolished

New Regulation or Official Guidance

Author: Tan Su Ning, Attorney at Law – Skrine

Outsourcing companies in recruiting and managing foreign workers will be abolished in line with the Malaysian government's recent policy. This is to ensure better welfare of the foreign workers. The services of outsourcing companies, which supply and manage foreign workers in sectors like manufacturing, construction, as well as in some services and agriculture, was terminated effective March 31, 2019. These outsourcing companies are required to repatriate their foreign workers within the stipulated period to avoid prosecution. Foreign workers who are not involved in the process of changing employers will be terminated through the system.

Netherlands

Employer Obligation to Reassign Expat to New Suitable Position Within the Group

Precedential Decision by Judiciary or Regulatory Agency

Author: Dennis Veldhuizen, Partner – Littler Netherlands

On January 18, 2019, the Supreme Court of the Netherlands clarified that employers have a certain margin of discretion in determining whether they can reassign an expat employee to an alternative suitable position within an operating group of companies. Although employers are obliged to use their best efforts to reassign expats, this obligation is limited by reasonableness. Here, an expat's work permit had expired and the employer attempted but could not find a new suitable position for this employee within the group. The court ruled that the absence of reassignment possibilities could qualify as a reasonable cause for dismissal, falling under the "h-ground" of dismissal (i.e., a residual category). The Supreme Court's decision offers special insights for employers and employees (expats) who are part of an internationally operating group of companies on the importance of a good understanding of (the scope of) the reassignment obligation.

Norway

Employer's Duty to Pay Salary During Temporary Layoffs

New Legislation Enacted

Author: Ole Kristian Olsby, Partner – Littler Norway

As of January 1, 2019, employers' obligation to pay salaries during the first period of a temporary layoff increased from 10 to 15 days. Previously, an employer's duty to pay salaries during a temporary layoff was reinforced for a limited period if the temporary layoff had lasted 30 weeks. This obligation has been repealed, and the total period during which the employer is exempted from the obligation to pay salaries during a temporary layoff has been reduced from 49 to 26 weeks. On January 31, 2019, the Supreme Court concluded that the basis for calculating the salary that an employer is obligated to pay employees during a temporary layoff is the full ordinary salary, without any limitations.

Selection Criteria and Documentation in Workforce Reductions

Precedential Decision by Judiciary or Regulatory Agency

Author: Ole Kristian Olsby, Partner – Littler Norway

On February 28, 2019, the Supreme Court pronounced a judgement concerning the use of the selection criteria "length of service" in a redundancy process. The principle in the matter had its basis in a collective bargaining agreement that applies to a large number of companies in Norway. The Supreme Court concluded that, according to the circumstances, it was objectively justified to deviate from the principle concerning length of service, even when

there was no substantial difference in the employee's competence and professional excellence. The Supreme Court also emphasized the importance of the employer's assessments and thorough processing and documentation of the redundancy process, especially in relation to the assessment of employees made redundant based on discretionary and subjective selection criteria.

Peru

Recognition of De Facto / Domestic Partners Relationships for Pension Matters

New Legislation Enacted

Authors: César Gonzáles Hunt, Partner and Mariella Antola Rodríguez, Associate – Littler Peru

Through Law N° 30907, the Peruvian Government recognized the equivalence between de facto/domestic partners relationships and traditional legal marriage, for purposes of pension benefits under the social security system. The law provides that couples who want this recognition need to register their relationship at the Public National Personal Registry.

New Regulation on Vacation (Paid Annual Leave)

New Regulation or Official Guidance

Authors: César Gonzáles Hunt, Partner and Mariella Antola Rodríguez, Associate – Littler Peru

Through the Supreme Decree N° 002-2019-TR, the Ministry of Labor and Promotion of Employment has regulated different aspects for how employees can use the legal benefit of vacations. Under this decree, the employer and employee must celebrate a written agreement for advanced payment of vacations. If the employment relationship ends before completing the period of services that form the basis for the advanced payment, the employee is not obligated to reimburse anything to the employer. Further, vacations may be fractioned. Only the employee can request the division of the 30 days of vacation that the law grants. However, the employer has the final decision for authorizing such request. To fraction a vacation period, both the employer and employee must agree to it in writing.

Amendments to the Regulation of the Collective Labor Relations Law

New Regulation or Official Guidance

Authors: César Gonzáles Hunt, Partner and Mariella Antola Rodríguez, Associate – Littler Peru

The Supreme Decree N° 003-2019-TR amended the Regulation of the Collective Labor Relations Law related to the number of members from the Union Management Board who are entitled to hold licenses and on employer communications concerning the union fees to be paid to federations and confederations.

Philippines

105-Day Expanded Maternity Leave Law

New Legislation Enacted

Author: Emerico O. De Guzman, Managing Partner – Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)

The "105-Day Expanded Maternity Leave Law," which became effective on March 8, 2019, extends maternity leave benefits to all female workers in the government and private sectors, including those in the informal economy, regardless of civil status or child's legitimacy. From 60 days for normal delivery or miscarriage, or 78 days for caesarean delivery under the old Social Security Law, working women are now entitled to 105 days' worth of maternity leave with full pay, with an option to extend the same for an additional 30 days without pay. Benefits are also available

for solo parents, the child's father (or in his absence or incapacity, a qualifying alternate caregiver), and the current partner of the female worker sharing the same household. The maternity benefits will apply to every instance of pregnancy, miscarriage or emergency termination of pregnancy regardless of frequency. Employers are responsible for payment of the salary differential between the actual cash benefits received by the female worker from the Social Security System and her regular wage.

Telecommuting Institutionalized as Alternative Work Arrangement

New Legislation Enacted

Author: Emerico O. De Guzman, Managing Partner – Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)

The "Telecommuting Act," which became effective last January 26, 2018, has institutionalized telecommuting as an alternative work arrangement for workers in the private sector. Employers in the private sector may offer such work arrangement on a voluntary basis, provided it: (1) complies with the labor standards set by law, and (2) includes compensable work hours, minimum number of work hours, overtime, rest days, and entitlement to leave benefits. Under the law, employees covered by the telecommuting program must receive the same treatment as that of comparable employees working at the office/business premises of their employers. Employers shall be responsible for taking the appropriate measures to ensure the protection of data used and processed by the telecommuting employees for professional purposes.

Social Security Act of 2018

New Legislation Enacted

Author: Emerico O. De Guzman, Managing Partner – Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)

The "Social Security Act of 2018," which became effective on March 5, 2019, amended the 21-year-old charter of the state-run pension fund. To strengthen the pension fund in the private sector, the new law implements new rates of employer and employee contributions: from a total of 11% of the monthly salary in 2019, until the same reaches 15% in 2025. It also provides for the gradual adjustment of employees' minimum and maximum monthly salary credits. The new law also expands the powers, duties, and responsibilities of the Social Security Commission, which include, among others, the power to determine the salary credit and monthly contributions of member-employees and adjudicate penalties imposed due to delinquent social security contributions. The law also provides for the mandatory coverage of Overseas Filipino Workers (OFWs), provided they are not over 60 years of age.

Philippine HIV and AIDS Policy Act of 2018

New Legislation Enacted

Author: Emerico O. De Guzman, Managing Partner – Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW)

The Philippine HIV and AIDS Policy Act of 2018, which became effective last January 25, 2019, criminalizes discrimination against persons with HIV/AIDS. In the context of the workplace, discrimination pertains to the rejection of a job application, termination of employment, or other discriminatory policies in hiring, provision of employment and other related benefits, promotion or assignment of an individual solely or partially on the basis of actual, perceived, or suspected HIV status. Such discriminatory acts are punishable by imprisonment of six months to five years, and/or a fine ranging from Php50,000 to Php500,000. Moreover, anyone who knowingly or negligently causes another to get infected with HIV in the course of the practice or profession through unsafe and unsanitary practice and procedure, or who compels any person to undergo HIV testing without his/her consent, shall suffer imprisonment

of six to 12 years. If the offender is a corporation or any other juridical person, the penalty of imprisonment shall be imposed upon the responsible officers and employees who participated in or allowed the gross negligence or commission of the crime.

Portugal

Increase to Work Accident Pensions

New Legislation Enacted

Authors: Ricardo Grilo and Gonçalo Machado dos Santos, Attorneys at Law – Garrigues Portugal SLP Sucursal

On January 17, 2019, the official gazette published Ordinance No. 23/2019, which increased the work accident pensions for 2019 by 1.60%. Such increase has a retroactive effect, from January 1, 2019, onwards.

Update to Indexing Reference for Social Support

New Legislation Enacted

Authors: Ricardo Grilo and Gonçalo Machado dos Santos, Attorneys at Law – Garrigues Portugal SLP Sucursal

On January 17, 2019, the official gazette published Ordinance No. 24/2019, which set the indexing reference for social support to 435.76€ for the year 2019. This value is the reference measure in the determination, calculation and updating of several social benefits, such as the unemployment allowance. Such increase has a retroactive effect, from January 1, 2019, onwards.

Age to Access Old-Age Pension in 2020

New Legislation Enacted

Authors: Ricardo Grilo and Gonçalo Machado dos Santos, Attorneys at Law – Garrigues Portugal SLP Sucursal

Ordinance no. 50/2019, of February 8, sets the age to access the regular retirement pension in the Portuguese general social security system for year 2020. This new ordinance is in accordance with Decree-Law no. 187/2007, of October 10, which determined the gradual update of the regular age to access the retirement pension in the Social Security general system, considering the average life expectancy at 65 years old, between the second and third year prior to the attribution of the pension. Under the new ordinance, the age to access the regular retirement pension for 2020 is maintained at 66 years and five months. This Ordinance also updates the sustainable factor of 0.8533 to apply when calculating old-age pensions, at the time of their attribution or conversion. These rules are considered effective as of January 1, 2019.

New Legal Changes Were Introduced to the Financial Support Program to Promote

New Legislation Enacted

Authors: Ricardo Grilo and Gonçalo Machado dos Santos, Attorneys at Law – Garrigues Portugal SLP Sucursal

Ordinance no. 95/2019, of March 29, 2019, amends the "Contrato-Emprego" Program, a public program which provides financial incentives to employers, to increase the employment rate. The new ordinance introduces significant changes. For example, individual entrepreneurs and entities that have initiated an extrajudicial company recovery program (Regime Extrajudicial de Recuperação de Empresas) may now present an application to Program as an employer. Further, the program may recruit persons who are not registered with the Social Security as "dependent worker" or "self-employed" during 12 consecutive months prior to the disclosure of the job offer. The applications must be adjudicated within 20 working days. The ordinance also provides guidance on the schedule of payments and employers' obligation to return the financial support if the employment contract ends prematurely.

Puerto Rico

Extension of Deadline to Claim Benefit Related to Hurricanes Irma and María

New Regulation or Official Guidance

Author: Ana María Bigas-Kennerley, Senior Counsel – Littler Puerto Rico

The Puerto Rico Department of the Treasury (the PR Treasury) issued Internal Revenue Informative Bulletin No. 19-01 extending the deadline to March 31, 2019, to request the Federal Employee Retention Benefit related to Hurricane Irma and María (the Benefit). Also, the deadline to submit a Benefit Claim (for those employers who requested the Benefit by March 31, 2019 and do not receive it in accordance with the PR Treasury guidance) was also extended until April 30, 2019. Pursuant to the PR Treasury guidance, both the request and the claim for Benefit can be made only through the PR Treasury's digital platform.

Employers to Submit Unemployment Tax Returns Electronically

New Regulation or Official Guidance

Author: Ana María Bigas-Kennerley, Senior Counsel – Littler Puerto Rico

On March 14, 2019, the PR Department of Labor (PR DOL) announced that in an effort to improve services and reduce public expenses, employers must electronically file their unemployment tax returns for the first quarter of 2019, between April 1 and April 30, 2019. To file their returns, employers must access the PR DOL wage page. Although the ability to submit the returns electronically through the PR DOL website is not new, employers had the alternative of filing the returns on paper. Starting for the first quarter of 2019, employers will no longer have that option, as the PR DOL will not accept or consider any returns in paper.

Singapore

Amendments to Employment Act Enacted Expanding Coverage

New Legislation Enacted

Authors: Benjamin Gaw & Elizabeth Tong, Directors – Drew & Napier LLC

Parliament has approved proposed amendments to the Employment Act (EA), which took effect on April 1, 2019. The EA extends its coverage to managers and executives earning more than S$4,500 per month, thus expanding its coverage to include about 430,000 managers and executives. Additionally, the current salary cap and overtime salary cap for nonworkmen is increased. Further, the Employment Claims Tribunals will now hear both salary-related disputes and wrongful dismissal claims, instead of the latter being heard by the Ministry of Manpower.

District Court Clarifies Test for Independent Contractors

Precedential Decision by Judiciary or Regulatory Agency

Authors: Benjamin Gaw & Elizabeth Tong, Directors – Drew & Napier LLC

The District Courts of Singapore held that a gym instructor engaged by a country club was an employee, and not an independent contractor. Accordingly, the country club was penalized for failing to pay the gym instructor's mandatory Central Provident Fund contributions. The Courts clarified that to determine if a person is an independent contractor or an employee, the test is whether the person is carrying on an independent business on his own account. As a multifaceted and fact-sensitive inquiry, the factors to consider include: the company's degree of control over the person; whether the person enjoys any employment benefits from the company; whether the person took on any degree of financial risk or investment in the running of the enterprise; and whether the services were an integral part of the company's business.

Amendments to Employment of Foreign Manpower (Work Passes) Regulations 2012

New Regulation or Official Guidance

Authors: Benjamin Gaw & Elizabeth Tong, Directors – Drew & Napier LLC

Amendments to the Employment of Foreign Manpower (Work Passes) Regulations 2012 came into force on January 1, 2019. The amended repatriation provisions clarify that in the event of the expiration, cancellation or revocation of the foreign employee's work pass or in-principle approval for the same, the employer shall repatriate the foreign employee to the international port of entry within the foreign employee's home country that affords reasonable access to the foreign employee's hometown. In addition, the new Work Permit condition now prohibits employers of foreign domestic workers from preventing or restricting the access to or the use by these workers of any salary or moneys due to them.

Reduction in Foreign Worker Quota for the Services Sector

Proposed Bill or Initiative

Authors: Benjamin Gaw & Elizabeth Tong, Directors – Drew & Napier LLC

The Ministers for Finance and Manpower announced during the Budget Statement in March 2019 that the Dependency Ratio Ceiling (DRC) – which sets out the maximum permitted ratio of foreign workers to the total workforce that a company is allowed to hire – will be reduced for the services sector in two steps. The overall DRC in the services sector will be reduced from 40% to 38% on January 1, 2020, and then to 35% on January 1, 2021. The sub-DRC for mid-level skilled S-Pass holders in the services sector will be reduced from 15% to 13% on January 1, 2020, and then to 10% on January 1, 2021.

Proposed Amendments to the Work Injury Compensation Act

Proposed Bill or Initiative

Authors: Benjamin Gaw & Elizabeth Tong, Directors – Drew & Napier LLC

The Ministry of Manpower (MOM) is conducting a public consultation on proposed amendments to the Work Injury Compensation Act (WICA). MOM proposes to broaden the coverage of mandatory work injury compensation insurance and to expand the scope and limits of compensation. In addition, MOM proposes to expedite WICA claims by introducing several measures like auto-processing of WICA claims, allowing compensation based on current incapacities, and allowing MOM to determine basis of compensation to resolve disputes.

Spain

Obligation to Provide Nonfinancial Information

New Legislation Enacted

Authors: Juan Bonilla, Partner, Ana Campos, Senior Associate and Jennifer Bel, Associate – Cuatrecasas

Act 11/2018, which recently came into force, imposes on certain companies the obligation to prepare an informative report regarding environmental and labor matters, such as those relating to their personnel, the respect for human rights and the fight against corruption and bribery. Specifically, this obligation exists for companies that must prepare consolidated accounts and which meet a number of requirements. Regarding labor matters, companies are obliged to provide information on employment, including number of employees and their distribution by gender, age, country, and occupational category; contract types; pay gaps; compensation; dismissals; work organization; health and safety; labor relations; training; persons with disabilities; and equality.

Obligations on Equal Treatment and Opportunities for Men and Women

New Order or Decree

Authors: Juan Bonilla, Partner, Ana Campos, Senior Associate and Jennifer Bel, Associate – Cuatrecasas

Royal Decree Law 6/2019, has come into force. Its urgent measures to guarantee equal treatment and opportunities for men and women at work include: (i) the obligation to prepare equality plans is gradually extended to companies with 50 or more employees; (ii) every company must register the disaggregated salary information by gender and professional classification (this register is accessible to employees through their legal representatives, and all employees carrying out equal value jobs must receive the same salary); (iii) companies with 50 or more employees that identify a pay gap of 25% or more between employees of either gender must provide an objective and reasonable justification for it; (iv) objective dismissal in especially protected cases requires proof of the specific need to terminate the employee's contract; (v) the suspension of the employment contract due to childbirth is gradually extended to 16 weeks for each parent in 2021; and (vi) the right to adjust and rearrange working hours and the way of working to achieve a work-life balance, without having to reduce working hours and salary, is strengthened.

New Obligation to Register Standard Working Day

New Order or Decree

Authors: Juan Bonilla, Partner, Ana Campos, Senior Associate and Jennifer Bel, Associate – Cuatrecasas

On May 12, 2019, Royal Decree Law 8/2019, of March 8, on urgent social protection measures aimed at fighting job insecurity in relation to the working day comes into force. It expressly introduces an obligation for all companies to keep a daily register of each employee's standard working day, with their start and finish times. It also introduces new incentives to encourage indefinite employment and includes improvements in certain social security contributions. Companies have to negotiate with the employees' representatives how to organize and keep that register, which must be kept for four years. Employees, their representatives and the labor inspectorate are entitled to access these registers.

Brexit – Contingency Measures

New Order or Decree

Authors: Juan Bonilla, Partner, Ana Campos, Senior Associate and Jennifer Bel, Associate – Cuatrecasas

Because of the possibility of a no-deal Brexit, the Spanish Government, in line with the European Union's recommendations, has enacted *Real Decreto-Ley 5/2019*, of March 1 on contingency measures in case of the United Kingdom and Northern Ireland withdrawal from the European Union with no agreement as foreseen in section 50 of the European Union Treaty. This Royal Decree's enforceability is conditioned to the UK's effective withdrawal with no agreement, and its purpose is to globally safeguard the rights of EU citizens in the UK and UK citizens in Spain, subject to reciprocity in the UK. Regarding residency and working permits, the Government has decided to maintain all their rights. It has issued instructions for the procedure to apply for new documents, in case of no-deal Brexit, for UK nationals residing in Spain, and their families. UK residents in Spain have 21 months as of the date of withdrawal to apply for the new documents.

Sweden

Reasonable Notice Period for a Managing Director

Precedential Decision by Judiciary or Regulatory Agency

Author: Anna Jerndorf, Partner – Advokatfirman Törngren Magnell KB

On February 20, 2019, the Labor Court granted an interim order prohibiting a former managing director who had resigned to compete with his former employer until the notice period expired. The court held that the managing director shall observe a reasonable notice period of six months since no notice period had been agreed upon between the parties. Managing directors are normally exempted from the Swedish Employment Protection Act, which contain statutory provisions on notice periods for both the employee and the employer. Instead, managing directors and their employers are free to agree upon the terms and conditions of employment in accordance with general principles of contract law. Based on this ruling, a six months' notice period is reasonable in case a managing director wants to terminate the employment and no notice period has been agreed upon.

Labor Court Finds Director-General Wrongfully Terminated by the State

Precedential Decision by Judiciary or Regulatory Agency

Author: Anna Jerndorf, Partner – Advokatfirman Törngren Magnell KB

In a case that has garnered much public scrutiny, on March 6, 2019, the Labor Court found that the state had wrongfully terminated Maria Ågren, the former director-general of the Swedish Transport Agency. Under Maria Ågren's leadership, a foreign outsourcing IT company received access to confidential information without undergoing legally required security clearance checks. After admitting to a summary imposition of a fine (fine of SEK 70,000) for being "careless with secret information", the state terminated her employment with immediate effect. Invalidating her termination, the Labor Court noted that Maria Ågren, without fault of her own, had been put in a difficult situation as a newly appointed director-general and that she had not breached her obligations in such serious way that it justifies a termination with immediate effect from her employment in the Government Offices.

New Guide by the Equality Ombudsman Regarding Active Measures

New Regulation or Official Guidance

Author: Anna Jerndorf, Partner – Advokatfirman Törngren Magnell KB

In January 2017, the rules regarding active measures in the Discrimination Act became stricter. The Equality Ombudsman is now launching a new digital guide to support employers' work with active measures to prevent discrimination and promote equal rights and opportunities. The guide will give employers guidance on how to work with active measures and an insight into the various areas covered by the law. During 2019, the guide will be supplemented with more tips and examples.

United Kingdom

Compensatory Rest Breaks Need Not Be Single Continuous Period of Rest

Precedential Decision by Judiciary or Regulatory Agency

Author: Mark Callaghan, Attorney at Law – Littler United Kingdom

On March 5, 2019, the UK Court of Appeal considered whether the entitlement to a compensatory rest break under Regulation 24 of the Working Time Directive (WTD) requires a continuous rest period of twenty minutes. Regulation 24 applies where employees are exempted, due to the nature of their work, from the generally applicable entitlement to a 20-minute break following six hours of continuous work. In this case, the claimant had been able to take frequent

short periods of compensatory rest throughout his eight-hour shift but, due to the nature of his work, none of these rest periods reached 20 minutes. The Court of Appeal ruled that Regulation 24 required the compensatory rest be "equivalent" to the general right, not "identical," and therefore noncontinuous periods of rest were permitted.

UK Court of Appeal Rules on Landmark Equal Pay Case

Precedential Decision by Judiciary or Regulatory Agency

Author: Raoul Parekh, Partner – Littler United Kingdom

The UK Court of Appeal ruled on January 31, 2019, that shop floor staff working for national supermarket chain could compare their pay and terms to distribution center workers. Over 7,000 mostly female shop floor staff have brought equal pay claims based on the fact that they are paid less than the predominantly male distribution center workers. The company had resisted the claims partially on the basis that the workers were based at different sites. In a victory for the claimants, the Court of Appeal found that the comparison can be made. The employees must now bring evidence to demonstrate that their work is equivalent to that of their male comparators. An appeal by the company to the Supreme Court is also likely.

Supreme Court Finds Aspects of Criminal Record Disclosure Regime Incompatible with ECHR

Precedential Decision by Judiciary or Regulatory Agency

Author: Lisa Rix, Attorney at Law – Littler United Kingdom

On January 30, 2019, the UK Supreme Court determined that the statutory schemes for the disclosure of criminal convictions and cautions to potential employers in England and Wales and Northern Ireland was incompatible with the European Convention on Human Rights (ECHR). Specifically, there are two categories that are incompatible with ECHR: First, the multiple conviction rule, when a person with more than one conviction of whatever nature must disclose any conviction in a criminal record certificate, irrespective of the nature of the offences, their similarity, the number of occasions involved, or the intervals of time separating them. Second, the warnings and reprimands administered to young offenders, which are used as an alternative to prosecution to avoid any deleterious effect on the young offender's subsequent life, so disclosure to a potential employer are inconsistent with the ECHR. Parliament will most likely amend the schemes in the near future (although such amendments may be delayed in the midst of Brexit).

Court Restores Burden of Proof Status Quo in Discrimination Claims

Precedential Decision by Judiciary or Regulatory Agency

Author: Dónall Breen, Attorney at Law – Littler United Kingdom

On January 23, 2019, the UK Court of Appeal held that claimants bear the initial burden of proof when bringing a claim for discrimination under the Equality Act 2010. The court overruled a lower court that had decided that it could draw inferences from the respondent's failure to adduce evidence in order to find there was a prima facie case of discrimination. The Court of Appeal found that this approach was wrong and restored the orthodox position that the burden is on the claimant to prove a prima facie case of discrimination. In this case, the claimant had not provided the tribunal with sufficient evidence to discharge that burden.

Unfavorable Treatment Motivated by Alleged Discriminator's Religion is Not Direct Discrimination

Precedential Decision by Judiciary or Regulatory Agency

Author: Ben Smith, Trainee Solicitor – Littler United Kingdom

On February 12, 2019, the UK's Employment Appeal Tribunal examined the case of a teacher at an orthodox Jewish school who was dismissed following the discovery that she co-habited with her partner despite not being married (which was contrary to the school's religious ethos). A lower tribunal had found that this amounted to discrimination based on religion, as the school's religious belief was the motivation for the unfavorable treatment. The Employment Appeal Tribunal disagreed, concluding that there can be no discrimination where the reason for the treatment is the alleged discriminator's religion or belief. This case confirms the position of the Supreme Court in *Lee v. Ashers Baking Co. Ltd.* in 2018.

United States

Second California Court Rules that Employee Non-Solicitation Clauses Are Invalid Restraints on Trade

Precedential Decision by Judiciary or Regulatory Agency

Author: James Witz, Shareholder – Littler United States

On January 11, 2019, a California federal district court issued a decision bolstering the argument that employee non-solicitation clauses are unenforceable under California law. In *Barker v. Insight Global*, the judge declined to interpret narrowly another recent California state court of appeal decision finding that a clause restraining former employees from soliciting former co-workers constituted an unenforceable restraint on trade, and was therefore invalid. In light of these decisions, employers need to carefully consider eliminating such clauses from their employment contracts for employees located in California.

U.S. Supreme Court Vacates and Remands Ninth Circuit's Decision in Equal Pay Case

Precedential Decision by Judiciary or Regulatory Agency

Authors: Tara Presnell, Shareholder and Alexandra Hemenway, Associate – Littler United States

On February 25, 2019, the U.S Supreme Court vacated and remanded the Ninth Circuit's decision in *Rizo v. Yovino*, in which it held an employer cannot justify a wage differential between men and women by relying on prior salary. In remanding *Rizo*, the Supreme Court made no pronouncements regarding the substance of the Ninth Circuit's holding with respect to the Equal Pay Act. However, many California employers have already implemented the premise of *Rizo*, banning salary history from considerations in compensation decisions. State law developments have dramatically altered the landscape in this area over the last few years, with California, Oregon, Washington, and Hawaii all having introduced prohibitions against consideration of prior salary when determining wage levels. Many other states outside of the Ninth Circuit have followed suit. It is recommended that employers continue to monitor pay disparities, and ensure that any distinctions in employee pay are based upon job-related factors – including an applicant or employee's training, education, ability, or experience – and not prior salary.

A New Cause of Action: Massachusetts High Court Rules That Denying a Lateral Transfer Request Could Constitute Discrimination

Precedential Decision by Judiciary or Regulatory Agency

Authors: Jennifer Duke, Associate and Gary Lieberman, Shareholder – Littler United States

On January 29, 2019, the Massachusetts Supreme Judicial Court held that failing to grant a lateral transfer for discriminatory reasons may constitute an "adverse employment action" that violates Massachusetts law, G.L. c. 151B. An employee may therefore be able to recover for illegal discrimination even if the position requested provides exactly the same base salary and benefits as his or her current position. The decision expands the scope of potential discrimination claims under Massachusetts law and may make it more difficult for employers to prevail on motions for summary judgment.

OSH Act Penalties Increase

New Regulation or Official Guidance

Authors: Thomas Metzger, Shareholder and Benjamin W. Mounts, Associate – Littler United States

The U.S. Department of Labor (DOL) has published a final rule that increases civil monetary penalties the DOL assesses and enforces, as required under federal law. The increases apply to penalties assessed after January 23, 2019 under the Occupational Safety and Health Act (OSH Act), which the DOL is responsible for enforcing. Section 18 of the OSH Act requires OSHA-approved State Plans to have standards and enforcement programs that are, at a minimum, as effective as the federal OSH Act's standards and enforcement program. As a result, OSHA-approved State Plans are required to have maximum and minimum penalty levels that are at least as effective as their federal counterpart's. State Plans are now obliged to increase their penalties consistent with the final rule. The only exception is for State Plans in Connecticut, Illinois, Maine, New Jersey, New York, and the Virgin Islands, which cover only state and local government employees. The final rule does not apply to those State plans.

DOL's Guidance on Complying with H-1B LCA Posting Requirement Electronically

New Regulation or Official Guidance

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Citing a rise in the use of electronic communications in the workplace and an increase in the number of employers providing documents to employees electronically, the U.S. Department of Labor issued a *Field Assistance Bulletin* (FAB) on March 15, 2019 providing guidance on acceptable ways to notify employees electronically of plans to hire foreign workers. H-1B regulations provide that the required notification must occur in one of three ways: (1) by posting a hard-copy notice; (2) via electronic notification; or, when applicable, (3) by providing notification to a collective bargaining representative. The DOL's new guidance makes clear that no matter which method employers use, they must ensure that the notification is readily available to all affected employees. This may require employers to evaluate their current LCA posting practices at their worksites, including those of third-party employers that place H-1B workers at their worksites.