New Developments in European Employment Law

Austria:
The Reform of the Act on Wage and Social Dumping – High Risk for Employers

Austria's central location in the heart of Europe and its many borders to Eastern European Countries provide for many business opportunities, but also pose challenges in the field of labour law: cheap labour costs across the eastern (and sometimes southern) borders and high labour costs in Austria make it difficult for Austrian companies, especially in the building industry, to compete on prices. Often the fear that competition from low-wage countries will lead to wage dumping in Austria has been expressed.

In 2011, the Austrian legislator introduced the Act on Wage and Social Dumping. Heavy administrative fines can be issued if employers don't have the required documentation on their posted workers ready at hand or if the posted workers aren't paid according to the basic/general rate of pay in the applicable collective agreement.

The Act on Wage and Social Dumping has now been amended, the amendment entering into force on 1st January 2015. This amendment brought not only significant changes to the Act itself, but also for Austrian labour law in general as the two most notable amendments show:

Until now, employers who paid less than the basic rate of pay were subject to fines. Now, the relevant level of pay is the one required by the respective collective agreement. This change is not a mere play with words but has significant consequences: collective agreements often contain a vast number of allowances and regulations on overtime etc. Any mistake in the difficult calculation of pay can potentially lead to hefty administrative fines.

Administrative fines now not only concern foreign employers posting workers to Austria, but every Austrian employer. They too are now potentially subject to the above mentioned administrative fines if they do not pay according to the collective agreement.

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Germany:
Statutory minimum wage as of 1 January 2015

The new German Minimum Wage Act (the “Act”) provides for a statutory gross minimum wage of EUR 8.50 per hour as of 1 January 2015. Companies registered in Germany and abroad are responsible for the payment of minimum wage to their own employees working in Germany. The new legislation will affect all companies, even if they already pay their staff well over the hourly minimum. This is because the statutory minimum wage is a component part of every wage paid. If it is paid late or not at all, it constitutes an administrative offence which may carry a fine of up to EUR 500,000.00. Failure to comply with the new legislation could also render a company criminally liable for not remitting social insurance contributions and/or withholding payment for work. Companies who have been fined EUR 2,500.00 or over may also be barred from bidding for public contracts.

Even companies with their registered seat outside of Germany and without any employees in Germany may face claims based on the newly introduced German Minimum Wage Act.

While the Act explicitly mentions that both, employers registered in Germany as well as those registered abroad are responsible for the payment of minimum wage to their employees, the Act is not as explicit in this respect with regard to the sub-contractor-liability. There has not yet been a court decision on this question nor has any legal commentary dealt with it. Since this is a situation involving a conflict of laws, the rules and regulations of private international law will decide upon the sub-contractor-liability for foreign companies.
In the European Union the Rome I Regulation (EC No 593/2008 of 17 June 2008 on the law applicable to contractual obligations) applies. The parties' freedom to choose the applicable law is one of the cornerstones of the system of conflict-of-laws – not without limitations, though. Regardless of the choice of law, effect must be given to the so-called overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed. Generally speaking, there are not many “overriding mandatory provisions” in German employment law. In our opinion there are good arguments in favor of the characterisation of section 13 of the Act as an overriding mandatory provision, such as:

— section 21 of the Act provides for an administrative offence for working together with a contractor being aware or negligently failing to be aware that such contractor fails to pay the minimum wage;
— the minimum wage will be guaranteed even if the employer becomes insolvent;
— all companies profiting from the employees’ work will be held responsible for the payment of minimum wage;
— companies with a registered seat in Germany would be disadvantaged in comparison to companies registered abroad;
— companies could easily circumvent sub-contractor-liability by contracting via companies with a registered seat out-side of Germany.

There is much to suggest that such claims fall under the jurisdiction of German employment courts.

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Dutch employment rules change drastically

As of 1 July 2015, the legal landscape for employers in the Netherlands will change drastically with the introduction of new dismissal rules.

1. Timely notification prevents payment of penalty to employee:

Employers have the obligation to inform an employee with a temporary contract in a timely manner that the employer does not intend to continue the employment relationship or in case the employer intends to continue the employment relationship, of the applicable terms and conditions. Recent case law has provided more clarity on the topic. The employer must ensure that it is able to prove that the employee has been notified in writing and that such notification has reached the employee.

2. New dismissal rules:

Contrary to the situation before 1 July 2015, employees will be able to challenge termination decisions in appeal procedures in court and with more and more employees taking out insurance coverage for legal assistance, employers fear an increase of legal procedures and legal costs. One thing which all sides agree on is that as of 1 July 2015, employers must ensure that they are well prepared before presenting a case for the termination of an employment agreement to the Cantonal Court or the UWV (a governmental body). The employer is also obliged to substantiate that it has offered sufficient training to the employee and that there is no alternative position for the individual within the group of companies. In the case of a reorganisation the employer can no longer choose to file a dismissal case with the Cantonal Court since only the UWV will be competent to decide in that case whether the employment agreement can be terminated or not. However, in the case of unsatisfactory performance of the part of an employee or conflict with him/her the case may only be presented to the Cantonal Court.

3. Introduction of transition payment:

An employee whose employment agreement has been terminated by the court or by notice following the permission of the UWV is entitled to a transition payment capped at EUR 75,000 gross (or at the yearly income should this exceed EUR 75,000).

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Russia:

Employer’s liability for labour law violations increased. New rules related to employment of foreigners

The latest set of amendments to the Russian Code on Administrative Offences (the “Code”) came into force on 1 January 2015. These new rules create a greater level of liability for non-compliance with labour laws and labour safety requirements through an extension of the limitation period for bringing a claim against the offending employer, the creation of new ‘special offences’, and an increase in the maximum level of fines for each category of violations.
The new rules regulating employment of foreign citizens have come into force on 13 December 2014 and, in particular, include the following:

As a general rule, employment agreements with foreign employees have to be concluded for an indefinite period. Entering into fixed-term employment agreements with foreign citizens is allowed only on the general grounds established by Article 59 of the Russian Labour Code.

There are additional grounds for suspending foreign employees from work, terminating their employment and payment of severance upon termination. All such additional grounds for the suspension of a foreign employee from work and for the termination of his/her employment are connected with the suspension, expiration or cancelation of the employee’s work permit, patent, temporary residence permit or residence permit and expiration of the voluntary medical insurance agreement (policy) or contract for the provision of paid medical services to the employee.

As of 1 January 2015, representative offices of foreign companies may apply to a fast-track simplified procedure for obtaining work visas and work permits for their foreign employees who are classified as Highly Qualified Foreign Specialists (the “HQFS”).

As of January 2015 foreigners are to prove knowledge of the Russian language and civilisation to work or reside in Russia. Highly qualified specialists and their relatives will not need to satisfy the Russian Language and Civilisation requirements. The law provides for additional exemptions, such as full-time foreign students with accredited educational institutions in Russia.

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Switzerland:
New Rules on time tracking duties

Pursuant to the Swiss Labour Act (the “ArG”) currently in force, as well as Ordinance No. 1 to the Labour Act (the “ArGV 1”), the employer has a duty to ensure that all employees maintain a detailed record of their working time. Only employees in very senior and executive positions, i.e. the few members of the top management, are exempt (they are, in principle, not subject to the ArG).

The State Secretariat for Economic Affairs (the “SECO”) by a directive of 19 December 2013 has called on the cantonal labour inspectorates to adapt their practice of controlling recording of working time starting from 1 January 2014. The said directive notes, in particular, that simplified time recording may be sufficient for employees of a specific category. Simplified time recording is appropriate for employees, whose work entails a wide scope of decision making, who to a large extent plan their work independently and who schedule their work on their own. This, however, applies only to employees that do not conduct night and Sunday work on a regular basis. The SECO directive will now be replaced by an amendment to the ArGV 1 which was agreed by the social partners. The exact date on which the amendment is to enter into force is not yet determined. According to a press release of the Federal Department of Economic Affairs, Education and Research dated 22 February 2015, the amendment will, after a brief consultation, enter into force as soon as possible, with the third quarter of 2015 mentioned as a potential time for its entry into force.

The proposal provides for two new provisions, articles 73a and 73b in the ArGV 1. Pursuant to article 73a ArGV 1, the recording of working time can be waived by means of a collective bargaining agreement. Pursuant to article 73b ArGV 1, simplified time recording can be agreed on between an industry’s social partners or on a corporate level.

At first glance, the possibilities created by the revision of the ArGV 1 (waiver of working time recording and simplified time recording, respectively) appear attractive. This positive picture, however, is considerably put into perspective by the fact that a waiver of working time recording requires the conclusion of a collective bargaining agreement. Thus, the new regulation is of interest mainly to industries and employers that are subject to a collective bargaining agreement already today. To subject oneself to a (comprehensive) collective bargaining agreement solely for the purpose of this new regulation on the recording of working time is unlikely to constitute a genuine alternative for all other employers. For these employers the current (unsatisfactory) situation remains.

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