ABA International Labor and Employment Law Committee Newsletter

Spring 2023

Editor: Tequila Brooks

Contents

Message from the Chairs

Dear Friends and Colleagues:

Welcome to the latest edition of the Newsletter of the ABA International Labor and Employment Law Committee, which finds us Co-Chairs deep in the throes of organizing the Committee's Midyear Meeting, taking place in the beautiful city of Amsterdam.

We are very pleased to have an exciting lineup of topics and speakers drawn from all constituencies of the practice of labor and employment law and representing jurisdictions from all over the world. One of our principle aims with this conference is to ensure a wide range of viewpoints, which at times makes this process a bit more complicated. We are extremely grateful to our Host Committee, which has given its valuable time to help make this year's conference as successful as all the others that have gone before. We look forward to seeing old friends again and meeting new ones and to exploring the delights of our host city! Additionally, we have also started to make plans for the Annual Section Conference in Seattle in November 2023.

In February, the world was shaken by the earthquake in Turkey and Syria, which resulted in the tragic loss of tens of thousands of lives. Our hearts go out to all those affected by this tragic event. It sometimes feels like we lurch from one challenging event to another having just come out of a worldwide pandemic, only to be confronted with Russia's ongoing war against Ukraine and global reports of economic doom, impending recession and mass layoffs. At times such as these, it is important to remember to take care of yourself and your families.

Thankfully, behind the scary headlines there are some positive news stories of workers standing up for themselves, employers trying to lead the way in diversity, inclusivity and ESG efforts, governments passing new work-life balance laws and regulations, and exciting technological innovations. It has been impossible to escape the excitement of ChatGPT and the discourse about the impact of AI on our lives and specifically on the world of work. While no one seems to know exactly how AI will change the way we work or what work we do, it is clear that change is coming and that labor and employment law practitioners everywhere will have to be prepared for it, which is why two of our panels at the conference this year will be focusing on AI. One panel will discuss "*Advances in AI Regulation in Relation to Labor and Employment,*" moderated by the Hon. Keith E. Sonderling, Commissioner, U.S. Equal Employment Opportunity Commission, and Samantha C. Grant, from Reed Smith LLP. The other panel will discuss the "*Legal Implications of the Use of AI Regulation in Relation to Labor and Employment Law,*" moderated by Hugo Hernández-Ojeda Alvírez, from Hogan Lovells.

We are sure you will not want to miss them and all of the other fantastic panels, and we look forward to seeing you all in Amsterdam!

Warm regards,

Committee Co-Chairs
Kelly Bunting, Employer
Paul Callaghan, International – Employer
Cristiano Cominotto, International – Union & Employee
Claire Dawson, Employee
Monika Mehta, Union & Employee
Ify Okoli-Watson, In-House Corporate Counsel

Editor's Note: Spring 2023 Issue of the *Newsletter*

Welcome to the Spring 2023 Issue of the *Newsletter*!

The overriding theme of this issue is that of equality for women at work. Thanks to our authors, we have articles on pay transparency in the Canadian province of **British Columbia** and in the **European Union** – with some bonus information on developments in several **U.S. states** in the EU article. Other articles discuss workplace childcare centers in **El Salvador**, menstrual leave in **Spain**, and a comprehensive overview of maternity, paternity and adoption leave in **Switzerland**.

One article ties gender to fundamental labor rights, highlighting main points from a recently published report on decent work for domestic workers in several African countries, including **Ethiopia**, **Kenya**, **Mauritius** and **Uganda,** to name a few. This article maps legal developments and compares legal exclusions of domestic workers from labor law in several African countries. It also discusses recent case law from **South Africa**. The theme of fundamental labor rights is also raised in an article on due diligence in the cotton sector of **Pakistan**.

In addition, this issue features articles on recent labor reforms in **Mexico** and the state of Karnataka in **India,** with two articles about recent legal developments in workplace sobriety checks and labor market access for Ukrainians in **Poland**. Finally, the issue contains an essay comparing employee termination laws in **Italy** and the **U.S.**

Thank you to all of the authors for your interesting and informative submissions! Note upcoming deadlines below. The June and September deadlines have been adjusted to a week later than before. Please reach out to submit an article or article idea!

Summer 2023 Issue
Article deadline: Monday, June 19, 2023

Fall 2023 Issue
Article deadline: Monday, September 18, 2023

Winter 2023-2024 Issue
Article deadline: Monday, December 18, 2023

Tequila Brooks

AFRICA*:* *Between Decent Work and Discrimination: Mapping Legislative Exclusion of Domestic Workers from Labor Law in Africa*

By Ziona Tanzer
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The International Lawyers Assisting Workers (ILAW) recently launched a report, entitled *"Mapping Discrimination and Domestic Workers in Africa,"* which analyses International Labor Organization, United Nations and African regional approaches to domestic workers, and conducts nine case studies of regulation of domestic work in Ethiopia, Lesotho, Nigeria, Kenya, Uganda, Malawi, Mauritius, Ghana and South Africa. The report was born of two historic milestones in the recognition of domestic work: the ten-year anniversary of the adoption of ILO Convention 189 and the second anniversary of the landmark South African Constitutional court decision in *Mahlangu v Minister of Compensation (2020)*.

C189 represents the most comprehensive source of norms on domestic worker rights, but it is not widely ratified. Indeed, it has only been ratified by five countries in Africa and only two in the study: South Africa and Mauritius. However, there is an increasing recognition of human rights violations in the domestic work sector by UN treaty bodies, which are widely ratified by the nine countries. Treaty bodies have recommended labor inspectors be empowered to inspect home without prior notice or consent of the homeowner, be included in workers compensation, social security schemes and national minimum wage. In the Special Rapporteur 2018 report on contemporary forms of slavery, former SR *Urmila Bhoola* describes domestic work as on a continuum, framed on the end by decent work, and on the other by slavery-like practices and forced labor. She concludes that *not all women in domestic work are equally vulnerable to slavery like practices.* On this analyses, decent work and inclusion in labor law protection decrease vulnerability and is the antidote to slavery like practices.

In *Mahlangu,* the South African Constitutional Court found that exclusion of domestic workers from claiming from the workers compensation fund amounted to an irrational differentiation and constituted direct discrimination. The court went further to find that since domestic workers are predominantly black women, the exclusion amounted to *indirect discrimination* on the grounds of *race, class and gender,* and was retrospectively unconstitutional. The court recognized that the legislative exclusion was a product of the invisibility of domestic workers, itself a legacy of colonial and apartheid legal systems.

"Mapping Discrimination and Domestic Workers in Africa" identifies three predominant forms of continued exclusion of domestic workers under labor law, in the post-colonial African context. The first approach is characterized by the exclusion of the category of "domestic worker" either entirely from labor law (Ethiopia) or their exclusion from critical labor law provisions, such as the exclusion from workers compensation (Lesotho) or the exclusion of recruiters of domestic workers from regulation (Uganda). The widespread exclusion of the subcategory of family members employed as domestic workers entirely from labor laws (Ethiopia, Uganda, Kenya, Nigeria, Mauritius) makes clear that they are of the most vulnerable domestic workers.

In the second category, domestic workers as a sector are not explicitly excluded from labor law; rather, they are *structurally* excluded from critical labor law protections which only apply to employers employing above a certain threshold number of employees. For example, preventative provisions on sexual harassment bind employers of 20 or more employees in Kenya (in Uganda, employers of more than 25 employees), while in Malawi, only employers of more than 5 employees are obliged to provide written contracts. In Nigeria, maternity protection provisions apply to industrial, commercial and agricultural undertakings, thereby excluding domestic workers. Similarly, the requirement to pay national

minimum, wage, applies to employers of over 50 workers. These neutral frameworks *"structurally"* exclude domestic workers -frequently the sole employees in private homes- from labor law protection.

While decent work presupposes inclusion within labor law protections, this in and of itself is frequently not sufficient to ensure decent work for domestic workers. For example, in eight of the nine countries surveyed, domestic workers are not legislatively excluded from collective labor rights. Despite the absence of exclusion, in none of the countries are they effectively able to enjoy dedicated bargaining structures in the sector. Further, labor inspectors are largely excluded from inspection of homes without either the consent of the owner or a court order, rendering law largely unenforceable.

Hence, the third approach is to pass sector-specific regulations, which reflect the specific needs of workers in the sector and as such are positive models for regulation. However, even within these specific domestic worker regulations, in some cases, the standards entrenched for domestic workers are lower than those afforded other workers (e.g., disparities in Mauritius with respect to leave, hours of work. etc.). Further, there are tensions as to which standards prevail in the event of conflict between domestic worker regulation and labor law (e.g., in Ghana, labor law trumps regulations, while in Mauritius, regulation trumps labor law). In addition, critical issues that are specific to live in-domestic workers – another particularly vulnerable category of domestic workers, such as standards of accommodation, rights of access to family and visitors and freedom of movement – remain unaddressed in labor law frameworks.

The report is, however, optimistic that the nine country constitutional frameworks could develop the doctrinal tools to effectively respond to discrimination. Indeed, many of their textual starting points include the recognition of intersectional disadvantage. For example, constitutions prohibit discrimination on a wide range of grounds, including "social origin" (Ethiopia, Lesotho) and "economic status" (Uganda, Ghana). Further, many of these constitutions explicitly obligate states to adopt special measures to address those who have historically discriminated against and eliminate laws customs and practices that oppress or cause harm to women. Accordingly, *Mahlangu* provides a critical precedent for analyses of the discriminatory impacts of facially neutral laws; and its use of intersectionality provides an important guide to "letting history in" to the conversation on discrimination and domestic work.

CANADA: *Proposed Legislation in British Columbia to Address the Gender Pay Gap*

By Mike Hamata, Partner
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On Tuesday, March 7, 2023, the British Columbia Provincial Government announced new legislation designed to reduce the gender pay gap for provincially regulated employees. The BC Pay Transparency Act has now received its first reading in the Provincial Legislature and is expected to pass before summer recess, given the majority government presently enjoyed by the governing New Democratic Party. However, we note that there has been significant pushback from certain influential stakeholders in the province that believe the legislation does not go far enough with respect to its stated objective. We note this because the legislation is still subject to change, and employers in BC should watch carefully as it progresses.

In its current form, the Pay Transparency Act attempts to address the gender pay gap by requiring employers to disclose salary ranges in job postings, prohibiting employers from seeking a job applicant's "pay history," prohibiting employers from punishing employees who share pay information, and requiring employers to prepare publicly accessible pay transparency reports in a prescribed form.

The Pay Transparency Act is expected to have a gradual and phased-in application. The measures listed above will go into force for all provincially regulated employers in BC on November 1, 2023, except for the reporting obligations. The reporting obligations will first apply to all BC Public Service and Crown corporations with more than 1,000 employees on November 1, 2023, to all BC employers with 1,000 employees or more on November 1, 2024, to all BC employers with 300 employees or more on November 1, 2025, and to all BC employers with 50 employees or more on November 1, 2026.

The Pay Transparency Act will be a significant shift in the way the BC employers deal with compensation and how they treat information that might otherwise be considered private employee personal information. The changes will be felt throughout the employment lifecycle, from hiring through to prohibiting some kind of terminations. However, this legislation is not out of step with other Canadian jurisdictions. As an illustration, the Federal Government introduced the similar Pay Equity Act for federally regulated employers in 2018. And if the legislation does help to close the gender pay gap in British Columbia, both employers and employees will be better off.

EL SALVADOR: *El Salvador Adopts Technical Norms Governing Workplace Childcare Centers*

By: Tequila Brooks
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Washington, D.C.

On February 16, 2023, El Salvador's National Council for Early Childhood, Childhood and Adolescence (CONAPINA – *Consejo Nacional de la Primera Infancia, Niñez y Adolescencia*) adopted Agreement No. 4 on Technical Norms for the installation and operation of early childhood care centers. Agreement No. 4 details the technical standards for the establishment, operation, and supervision of Early Childhood Care Centers (CAPI), including for those established by employers for the children of their workers.

Background

Adoption of technical requirements for early childhood care centers comes after a six-year odyssey beginning with a 2017 Supreme Court decision.

Article 42(2) of the Constitution of El Salvador requires employers to establish and maintain childcare centers for the children of their workers. In November 2017, the Supreme Court of El Salvador issued a legal decision requiring the Legislative Assembly to adopt legislation implementing Article 42(2) of the Constitution. In June 2018, the Legislative Assembly of El Salvador adopted legislation requiring employers to make childcare centers available to their workers. Legislative Decree No. 20 of 19 June 2018, the Law on Workplace Childcare Centers outlined employers' obligations making childcare accessible to workers.

On May 23, 2018, the Salvadoran Coalition on Decent Work for Women (CEDM), Canada-based *Maquila* Solidarity Network, and the Americas Group co-sponsored a bi-national forum on childcare needs and solutions for *maquila* workers in El Salvador and Honduras. The forum brought together El Salvadoran and Honduran trade unions and NGOs, supplier factory representatives, employer groups and international brands to exchange views and consider options.

The law was to enter into force 24 months after it was adopted, on June 17, 2020. Implementation of the law was delayed at the request of the El Salvadoran Supreme Labor Council in 2020 and 2022. In May 2022, *La Prensa Gráfica* reported that the law was still in a state of limbo after multiple delays.

Employer options for providing childcare to workers

Legislative Decree No. 20 was to apply to both public and private sector employers with at least 100 employees. Under Article 6 of the Decree, employers would have three options for complying with their obligation to provide childcare access to their workers' children. These included establishing and maintaining an independent childcare center at or near the workplace, establishing a workplace center jointly, and paying an independent service childcare service provider.

After many delays, a new law

On June 22, 2022, the Legislative Assembly adopted a new law, Legislative Decree No. 431, the Law on Growing Together for the integral protection of infants, children and adolescents, which supersedes the 2018 law. Unlike the 2018 law, which frames childcare centers as a work benefit, the new law creates a comprehensive normative framework that encompasses childcare centers for workers and in general. The law also incorporates general child protection services, superseding the Law on the Integral Protection of Children and Adolescents.

Title III on Programs and Early Childhood Care Centers (CAPI – *Centros de Atención a Primera Infancia*) contains the key operational provisions governing employer-provided childcare centers for workers' children. Chapters 1 and 2 on Programs detail accreditation and other technical requirements for CAPI, including services to be provided (personal care, education and mental stimulation, and monitoring of growth and development).

Title III (2)(2) of the new law sets forth requirements on CAPI for public and private sector employers. Employer obligations are similar to those in the 2018 law with some key exceptions. For example, employers are not required to provide working parents payment in lieu of childcare if parents decide to choose their own childcare provider.

Coverage by employer-provided CAPI begins when a worker returns to work after maternity leave and includes lactating babies and children up to the age of 4. CAPI shall operate between working hours on weekdays only, which leaves workers without childcare options for the swing shift, nights and weekends. Services no longer covered under the law include food, prescription medication, personal articles, personal hygiene and educational materials. As in the 2018 law, employers are entitled to a tax incentive to offset the costs of providing child care centers. Article 149 of the new law specifies that non-compliant employers will be subject to fines.

Finally, workplace childcare centers – but with a twist

After a long and winding path from the 2017 Supreme Court decision ordering the El Salvadoran Legislative Assembly to adopt a law requiring employers to provide childcare centers for the children of their workers, the administration has finally created the regulatory framework implementing that requirement. Along the way, the focus of the law transformed from a workplace benefit to a comprehensive national early childhood education program combined with childhood protective services. Unfortunately, the new law does not address employers' concerns about how to pay for childcare options for their workers. Not does it address working parents' concerns like transporting children from home to work or providing childcare outside regular week day work hours. Finally, combining child protective services in the same legal regime as early childhood education may prove to be confusing and potentially perilous for working moms.

New childcare laws and regulations are set to into force for employers in August 2024.

EU: *European Parliament and Council Reach Agreement on a Pay Transparency Directive*

By: Gretchen C. Corliss,* International Benefits Analyst
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* *Reprinted with permission from the Alliant Insurance Services, Global Practice*.

Recent government policy trends committing to diversity, equity and inclusion (DEI) in general, and to pay equity in particular, have been fueled by stakeholder activism and labor advocacy groups. As a result, several countries and/or jurisdictions have passed or are in the process of developing pay equity legislation.

In this context, on December 15, 2022, the European Parliament and Council reached an agreement on pay transparency measures initially proposed on March 4, 2021. The binding pay transparency measures provided for by the proposed EU Directive are part of the European Commission's (EC) Gender Equality Strategy 2020-2025. The agreement came shortly after the EU passed its "Women on Boards" Directive that requires that by 2026 EU listed companies have 40% of the underrepresented gender among their non-executive directors or 33% among all their directors.

Once this agreement is approved by co-legislators, the Directive will enter into force 20 days after its publication in the EC Official Journal. EU Member States will then have three years to transpose the provisions of the Directive into their national legislation.

According to the EU press release, the new rules would enhance transparency and provide for effective enforcement of the equal pay principle, while improving access to justice for individuals experiencing pay discrimination. These key components of the proposed directive are detailed below.

Pay transparency measures

Pay transparency measures agreed to by European Parliament and the Council include:

• Employers' obligation to provide information about the initial pay or the pay range in job postings or prior to a first interview process. Furthermore, employers would be prohibited from asking prospective employees about their pay.
• Employees' entitlement to request information about their pay and the average employees doing the same work or work of equal value.
• Gender pay gap (GPG) reporting obligations for employers with 100 employees or more. This measure would be phased in over a 5-year period, starting with larger employees (those with 250 employees or more) publishing their GPG annually. Furthermore, the frequency of GPG publication requirement would vary according to employers' workforce size, with smaller employers being required to publish their GPG data once every three years.
• In cases where GPG is at 5% or more and the gap cannot be explained by objective gender-neutral determinants, the employer would have carryout a pay assessment in collaboration with employee representatives.

It is worth recalling that a number of EU Member States already have robust GPG reporting requirements in place, especially for larger employers while gradually requiring smaller employers to report their GPG data. These include the United Kingdom, France, Germany, Belgium, Austria, and most recently, Ireland and Italy.

Enhanced access to justice in discrimination cases

Under the measures agreed to by the European Parliament and the Council, employees having experienced gender pay discrimination could receive full compensation retroactively, including bonuses and in-kind benefits.

The employer would not only bear the burden of proof in cases of non-compliance with non-discrimination provisions of the law but would also be subject to penalties, including fines that would be introduced by Member State's legislation.

Finally, national public institutions set up across the EU to promote equality for all and address discrimination (i.e., "equality bodies") and employee representatives would be empowered to represent employees in legal or administrative proceedings.

Similar US pay transparency laws

Recently, in the United States, some states have already begun to pass their own pay transparency laws. Some recent examples are detailed below.

California

In California, effective January 1, 2023, an act to amend Section 12999 of the Government Code, and to amend Section 432.3 of the Labor Code, relating to employment, requires any private employer with 100 or more employees to annually submit a pay data report to the government staring by the second Wednesday of the month of May, starting in 2023. Data reports are to include the average and the median hourly wages for every combination of race, ethnicity and gender within every job classification. The law also requires any employer to provide employees with the pay scale of their current position upon request, and any employer with more than 15 employees to include a pay scale in any new job posting.

New York

The state of New York also passed a similar pay transparency law in December of 2022, to take effect September 17, 2023. As of February 13, 2023, the scope of application of the New York law has been expanded to also include out-of-state employees who report to a supervisor or an office within the state of New York. This effectively expands pay transparency measures to remote jobs as well.

Rhode Island

Rhode Island's Pay Equity Act was amended to require that employers provide pay range information to a prospective employee, either upon their request, or when discussing their pay expectations, or when making an offer of employment conditions, whichever occurs first.

Washington

An Administrative Policy on the state's Equal Pay and Opportunities Act was issued by the Department of Labor and Industries on November 30, 2022. The Administrative Policy stipulates that "All employers, with 15 or more employees, engaging in any business, industry, profession or activity in Washington must disclose a wage scale or salary range and a general description of benefits and other compensation on job postings that recruit Washington based employees."

Illinois

In Illinois, 2022 regulations governing the Illinois Equal Pay Amendments clarified that employers 100 employees are required to, once every 2 years, apply to the State's Department of Labor for an Equal Pay Registration Certificate between March 24, 2022, and March 23, 2024.

Concluding remarks

As new pay equity legislation comes into effect across an increasing number of jurisdictions, they serve as a catalyst for change across other countries around the world. Once the Directive is in force, each of the 27 EU Member States would need to transpose its provisions into their national legislation. EU Member States typically have a period of two years (occasionally three years) to implement the provisions of an EU Directive. To provide Member States the necessary time to implement the provisions of this particular Directive, the EU Parliament and Council have agreed to a three-year timeline for its implementation. If any Member State fails to comply within the stipulated timeframe, EU citizens would be entitled to directly derive rights from the EU Directive.

INDIA: *New Labor Law in India: In Favor or Against Those it is Meant to Benefit?*

By: Kalyani Menon, LL.M. Candidate
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Washington, D.C.

In February 2023, the Karnataka legislature (a state legislature in India) passed a bill (the bill/act) that allows for 12-hour workdays in industries, women to work night shifts and lets overtime extend from 75 hours to 145 hours in three months. The bill amends the Factories Act of 1948, which is a social legislation that was established to ensure the safety, health and welfare of workers at work. This bill was passed without a debate in the Legislative Assembly but was opposed by the opposition party in Karnataka's Legislative Council. Despite the opposition in the upper house, the bill was subsequently passed by the Legislative Council.

The bill tries to make flexible labor laws to increase investments in India and so that the country can stay in competition with others. The state government argues that such labor reforms will push India closer to its competitors in the manufacturing sectors, such as China, Vietnam and Taiwan. The Karnataka government also stated that the act would increase capacity and create more working opportunities for the women in the state. The participation of women in India's labor force is abysmal, and China and Vietnam have better representation in comparison. The law tries to increase employment opportunities and economic activities. With this law comes a concern of safety and consent. The bill seems to take this into account by laying down various conditions such as sufficient restrooms for women, transportation at night, good lighting in the place of work, CCTVs and the setting up of a complaint redressal mechanism. It also requires the written consent of workers in order to enforce overtime or night shifts.

However, labor union representatives have been and continue to be highly apprehensive of the amendment provisions. These provisions will set an unhealthy precedent in the state, overstretching worker capacity to the detriment of their health and well-being. It allows companies to reduce hiring more employees to cut costs. The amendment is only applied to a particular sector and is not a generalized law that adversely affects only those who already are oppressed. This bill was passed without any input or discussions with trade unions and has been opposed as being exploitative.

If there is a need for increased production, the companies must hire new people. But the law that was passed only keeps in mind the interest of company owners and not laborers. Further, even though the amendments are based on consent, it will put a higher burden on the workers and may not always be voluntary or consensual. The workers in factories already lack bargaining power, these amendments will only further their issues and could create an environment where humans are made to work like machines.

ITALY and U.S.: *Employee Termination Laws in the U.S. and Italy: A Comparison*

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Nate Wach, Intern, A.I. Assistenza Legale
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Philadelphia, Pennsylvania

There have always been significant cultural differences between America and Italy, differences that can be seen reflected in their approaches towards the process of hiring and firing employees. These differences could be attributed to various factors, such as labor unions, political ideologies, or economic systems that may have shaped the economic cultures of both countries. A result of these various influences is that the two countries approach the hiring and firing process from very different perspectives, with the America view tilted towards favoring the employer and the Italian view more inclined towards supporting the employee.

Regarding contracts in America, the majority of employment contracts are considered at-will unless stated otherwise within the contract. This means that the employer can fire employees at any time without the need to prove "just cause," placing all the power in the hands of the employer. Provided the employer avoids any discriminatory or illegal actions during the firing process, they do not have to give any warning to the employee being fired or any justification for termination. All US states practice at-will contracts, but various restrictions can differ within states. The only state that has real material restrictions on at-will clauses is Montana, which only allows at-will clauses to apply for the first six months of employment, after which their contract would transform into a more secure position with stipulated amounts of compensation and notice. In the US, it is typical for employers to give the employee a 90-day probationary period, after which they will either be kept on full time or terminated. Employees also have the ability to quit at any time without giving a warning.

On the other hand, in Italy, the typical employment agreement is an indefinite-term contract, which places considerably much more power in the hands of the employee. The indefinite-term contract and its termination are regulated by Italian law, specifically by the Italian Statute of Workers L 300/1970, D.Lgs. 368/2001, by the CD Jobs Act Legislative Decree 23/2015, and the so-called Dignity Decree D.L. 87/2018 and subsequent modifications. The indefinite-term employment contract is also regulated by collective economic agreements with specific provisions depending on the sector to which the company belongs. The employer is free to insert a maximum probationary period of six months. Once the period has expired, the employee is considered a subordinate worker, meaning the contract can only be terminated for just cause, justified subjective reason, or justified objective reason.

Just cause for termination is when the employee commits a serious offense that merits disciplinary sanctions. In this case, the employer does not have to pay the employee beyond the termination date or even provide a notice period before termination. The employee is entitled to the TFR (Trattamento di Fine Rapporto) and all the end-of-employment benefits, which consist of a calculated payment based on their yearly salary and years under employ. Justified subjective reason for termination applies when the employee commits an offense of lesser gravity than those specified in the just cause provision. In this case, the employer must pay the employee through a notice period in addition to the amounts due as TFR and end-of-employment benefits. Justified objective reason may for termination be used in cases of dismissal for economic reasons or company restructuring. In these cases, the employee is due the notice period pay, TFR payment, and end-of-employment benefits – a stark contrast from the American at-will contracts.

Another large divergence between Italian and America law involves terminations of multiple employees at once. In Italy, if a collective dismissal of more than five employees within a certain period is determined, a mandatory severance procedure must be established with the participation of the territorial labor inspectorate to ensure the rights of workers. In America, when terminating multiple employees, an employer typically must address each employee's termination individually rather than as a group. Depending on the jurisdiction, US employers may have to provide a certain amount of notice before termination, even if under an at-will contract. They must be careful to avoid discrimination and must be able to prove that all terminations are based on legitimate, non-discriminatory business reasons. They also must provide a clear explanation for the terminations, such as reduction in workforce or restructuring of business. However, if they have over 100 employees, the Federal Worker Adjustment and Retraining Notification Act (WARN) mandates a 60-day notice prior to the mass layoff. This notice must be given to employees, their representatives, and certain government agencies. An employer who fails to comply with these laws would be met with substantial financial penalties brought about by the US District Court. And again, as in all other dismissals, the employer must be able to show the legitimacy of all layoffs to avoid any discriminatory behavior.

In the case of collective bargaining agreements or other group employment contracts, employers must follow the specified procedures outlined in the original contract. In these cases, any notice period or termination compensation can be negotiated freely before the finalization of the contract. In the US, these contracts are far less common than at-will contracts.

In Italy, if a dismissal is declared illegitimate, the law that was in force at the time of hiring applies to the process of compensation. For workers hired after 2015, following recent revisions in the Jobs Act, in the event of an illegitimate dismissal a worker is entitled to compensation ranging from 6 to 36 months of salary depending on the duration of the employment relationship and the severity of the illegitimacy of the dismissal. Furthermore, in cases of discriminatory dismissal, the employer may be obligated to rehire the worker or provide further compensation.

In essence, the key difference between labor laws in the US and Italy is the placement of burden of proof. In Italy, it is the employer's responsibility to prove that the grounds for dismissing the worker existed, while in the US, the burden of proof is generally on the employee. This makes Italian employees safer from illegitimate terminations than Americans, but it also places a much higher burden on the employer that may hinder the efficiency of the termination process. This difference can be seen more clearly in the use of notice periods and payments of compensation required in the event of terminations in the two respective countries. In Italy, all employees are entitled to notice periods and various forms of compensation depending on the reason for termination, while in the US, all at-will employees can be terminated without any notice or compensation.

The US and Italy have fundamentally different labor laws, with the former affording employers greater leeway in terminating workers while the latter providing robust safeguards for employees who face job loss. These distinct systems reflect the cultural contrasts between the two nations, with each approach highlighting the two cultures' perspectives and values.

MEXICO: *The Time Is Yet to Come: A New Labor Justice Era in Mexico*

By: José María Galindo Füguemann, Partner
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Mexico, D.F., Mexico

In May 2019, an important labor reform was made public in Mexico. This reform to the Mexican legal system encompassed:

• Replacement of Labor Boards by Labor Courts, dependent on the Judicial Branch;
• Creation of a public federal center with conciliatory and registry functions, with similar local centers with conciliatory functions;
• Personal, free, direct and secret vote for the election of union representatives;
• Creation of procedures to guarantee the freedom of collective bargaining, assuring the representativeness of unions, the certainty in the execution and registry of agreements; and
• **Obligation of unions to ratify all existing collective bargaining agreements (CBAs).**

For each specific reform a date was set to finalize implementation. Importantly, Section 23-A of the United States, Mexico and Canada Agreement (USMCA) established the obligation of all unions to ratify before May 1, 2023, by direct, personal, secret and free vote of all the workers, all existing collective bargaining agreements.

This deadline is about to arrive, and recently the Labor Authority made public a resolution stating that the unions have until May 1, 2023, to register their ratification process, which must be executed before July 31, 2023. This resolution was grounded on the number of CBAs that have been ratified. According to the public information of the labor authority, there are 139,000 existing CBAs as of March 2023, and only 13,468 of them have been ratified.

Only 9.6% of the existing CBAs, have been ratified up to now. It will be impossible for the unions to fulfill the obligation to ratify the 100% of the existing CBA. As a result, a new labor era will begin. As mentioned before, the importance of the creation of procedures to guarantee the freedom of collective bargaining and freedom of association will be relevant.

The consequence of not ratifying the existing CBAs is the termination of the CBAs, giving to interested unions the opportunity to request the representativeness certificate, or even a union free environment could be possible in Mexico.

We can conclude that a new Mexican labor era will begin after the expiration date for the ratification of the CBAs, several requests to obtain the representativeness certificate will be filled before the labor authority and possibly a lot of voting processes to determine which union represents the majority of the workers, will be executed.

PAKISTAN: *The Application of Traceability Technology to Enhance Global Labor Rights Due Diligence in Pakistan's Cotton Sector*

By: Jeffrey Wheeler, Director, Global Trace Protocol Project
ELEVATE, Ltd. (an LRQA company)
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As global supply chains have grown more complex and labor rights problems have only increased, governments, brands, investors, consumers, workers and other civil society actors have been demanding greater transparency, including through new traceability technologies. One driver has been the alarming evidence of labor rights abuses. The International Labor Organization (ILO) concluded that global progress against child labor, estimated to include 160 million children in 2020, has stalled for the first time in two decades. The ILO also estimated that in 2021 about 27.6 million people were in forced labor.

Another important set of drivers include mandatory import requirements, including the U.S. Customs and Border Protection's vigorous enforcement of the Tariff Act's prohibition of the importation of goods made by forced labor through withhold release orders and the new Uyghur Forced Labor Prevention Act (2021), which strengthens the prohibition against the importation of goods mined, produced or manufactured with forced labor in China, most particularly Xinjiang. The EU draft ban to prohibit importation of goods made with forced labor (2023) is also expected to come into effect soon, on the heels of the EU Corporate Sustainability Reporting Directive (2022).

In response, the U.S. Department of Labor has funded the Global Trace Protocol project (GTP), implemented by ELEVATE Ltd. ELEVATE Ltd (an LRQA company), which aims to reduce child and forced labor in global supply chains through traceability, including with a pilot in Pakistan's cotton sector. The Project produced the Pakistan Cotton Supply Chain Mapping Report (2022) to guide implementation, which has included conducting a worker survey at the farm level and tracing cotton from the ginner to the spinners Nishat and AFM with a trace tool developed with assistance from Diginex and a DNA marker administered by Haelixa. The Project supported a Yarn Ethically and Sustainably Sourced (YESS) assessment at the spinners, which will be supplemented by an ELEVATE Responsible Sourcing Assessment (ERSA). Stakeholders in Pakistan's cotton sector have responded favorably, viewing these efforts has helping to improve their competitive edge. USDOL is also funding a sister project implemented by Verité ("STREAMS") in India's cotton sector.

The Project is engaging with trace experts, global brands, the Pakistan cotton sector, and worker organizations to design, implement and critique the pilot trace tool with the aim of improving its future application and developing publicly available commodity agnostic trace resources for enhanced due diligence.

POLAND: *More and More changes: Expanding Employers' Rights with Sobriety Checks*

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Polish companies have recently experienced numerous changes to employment regulations (regular and migrant). This results from both the geopolitical situation and the need to adapt national regulations to the European Union law, like work-life balance or transparent and predictable working conditions Directives. Implementation of the latter is now subject to very intensive efforts in the Polish Parliament. These regulations are being implemented late, which unfortunately does not have a positive impact on the quality of respective legislation.

Partially, the newest changes to Polish labor law reflect needs of the market. This refers to a complex regulation on the remote work as well as sobriety checks, which have been enabled to Polish employers as of February 21, 2023.

The sobriety checks regulations cover the possibility of verifying if an employee is under influence of alcohol and/or drugs. It is a much expected and needed regulation, in particular as regards to drugs. Those have been defined as substances having similar effects to alcohol and are listed in the respective regulation of the Health Ministry. Until now employers were deprived of any legal way of carrying out a drug test, which was a problem in particular in many production companies operating at night.

The new law allows the carrying out of sobriety checks on employees not only if there is a reasonable suspicion that the employee is not sobber but also if it is necessary to ensure protection of life or health or property (so called preventive sobriety checks). There is no obligation to specify in advance when exactly a sobriety test will be carried out. Still, it must be clear to personnel when they may expect a preventive check, e.g., each week.

Rules on sobriety checks carried out by an employer must be specified in internal company regulations; hence, a collective bargaining agreement, or work regulations, or – in case of a headcount below 50 persons – an employer's announcement. Solely in the latter case may the employer introduce rules on sobriety checks on its own, in others the employer must discuss sobriety check rules with trade unions or other employees' representatives in the company.

Employers that decide to introduce sobriety tests are required to indicate: (i) the groups of employees subject to the check, (ii) the manner in which it is to be performed, and (iii) time and periodicity of the checks. The test will be carried out by using a certified breathalyzer and a slime test for verifying if the employee has used drugs. In all other cases, including those when the employer did not specify the sobriety check rules, the inspection will be carried out by the police.

Sobriety control must be carried out in such a manner that does not violate the employee's dignity or other personal rights. Therefore, it shall be conducted in a separated place with presence only of indispensable and respectively empowered persons.

It is also important to maintain appropriate rules for processing employees' personal data obtained during the sobriety checks. This will be the case if the sobriety check result turns to be positive. In such an event the employer will be obliged to draw up a protocol and store the results in a separate part of the

employee’s file. The employee will be then not allowed to perform his tasks. Such a situation may also lead to further disciplinary actions towards the employee. Should, however, a test show a negative result, the time spent on the control procedure will be treated as working time and as a result compensated with the employee’s regular remuneration.

POLAND: *And Still More Changes: Access to the Labor Market for Citizens of Ukraine*

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The war in Ukraine has necessitated the passage of a law that will quickly allow hundreds of thousands of people to obtain title to legal work in Poland. The Polish legislature has expanded access to the national labor market – in fact, the Law of March 12, 2022 (on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that country) opened the Polish labor market to all Ukrainian citizens legally residing in Poland. The condition for legal work for all Ukrainian citizens (including those who came to Poland because of the war) is the notification of employment. Notification is made by the employing entity through the IT system, and it has to be done within 14 days from the start of work.

In its next steps, the Polish legislature is expanding rights related to residency and work for people who fled Ukraine before the war. Poland is bound by EU regulations adopted in the event of a mass influx of displaced persons [Council Directive 2001/55/EC of July 20, 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof and Council Implementing Decision (EU) 2022/382 of March 4, 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC].

Abovementioned regulations established temporary protection for displaced persons. Such protection, by design, is intended to last for the necessary period of time, and is not intended to seek the settlement of displaced persons in the host country.

Given the huge shortage of workers in the labor market, the Polish legislator aims to facilitate the legalization of the stay of those displaced persons from Ukraine who are economically active in Poland. An amendment to the Law of March 12, 2022, made by the Law of January 13, 2023, introduces important exceptions to the general rule that prevents temporary protection beneficiaries from applying for a temporary residence permit. Under the new regulations, as of April 1, 2023, such applications will be allowed for displaced persons who apply for:

- a temporary residence and work permit,
- a temporary residence permit for the purpose of working in a highly skilled occupation, or
- a temporary residence permit for the purpose of business activity.

In addition, it should be borne in mind that the procedure for granting the aforementioned permits will be conducted in a simplified manner to the regular one.

At the same time, it is worth bearing in mind the social significance of the discussed change. Its regulation covers persons who are economically active but no longer family members of such persons. Due to the nature of wartime migration from the Ukraine (migration mainly of women with children), multitudes of children remain outside the possibility of legalizing their stay for a longer period of time. They can, of course, stay in Poland on the basis of general rules that guarantee protection to displaced persons, but they are deprived of the opportunity to legalize their stay to the same extent as their guardians.

SPAIN: *Could Spain's New Menstrual Leave Inspire Other Countries?*

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* *Reprinted with permission from the Alliant Insurance Services, Global Practice*.

On February 16, 2023, the Senate passed new legislation entitling individuals with menstrual pain paid leave provided the leave is authorized by a physician. The legislation does not specify the maximum duration of menstrual leave. Employees' pay during menstrual leave days will be covered by the social security system at 75% of earnings up to a monthly cap.

Menstrual Leave was introduced as one of the key measures of the Organic Law amending Organic Law 2/2010, of March3, on sexual and reproductive health and the voluntary termination of pregnancy (*Ley Orgánica por la que se modifica Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*), which is commonly referred to as the Abortion Law. It was published in the Official Journal (*Boletín Oficial del Estado, BOE*) on March 1, 2023. The new provision will come into effect three months after its publication (July 1, 2023).

The outlook

With this legislation, Spain becomes the first EU country to introduce statutory menstrual leave and one of less than a handful of countries worldwide to mandate menstrual leave (Indonesia, Japan, South Korea, Taiwan, Vietnam and Zambia).

Looking forward, it is anticipated that other countries and/or jurisdictions will consider introducing statutory menstrual leave. In fact, on February 14, 2023, the Congress of Mexico City approved to submit a menstrual leave related proposal to Mexico's Federal Congress, which, if passed at the federal level, would concern all menstruating employees in Mexico, including cisgender women, trans men, non-binary and intersex individuals. If approved, the proposal would amend certain provisions of the Federal Labor Law (*Ley Federal del Trabajo*).

The challenges

When considering implementing menstrual leave policies, be it mandated by law or offered as a voluntary employee benefit, employers ought to take into account privacy aspects as well as menstrual discrimination given that only individuals with menstrual pain and those who are of menstruating age are entitled to this leave.

The topic of menstruation has been a taboo at the workplace, making it challenging for individuals who are menstruating to express their needs. The new legislation is a positive initial step that will help mitigate this taboo: make menstrual leave a fundamental and recognized women's health right, and hopefully trigger other gender and/or age-related employment benefits, e.g., menopause leave.

SWITZERLAND: *Overview of Maternity, Paternity and Adoption Leave under Swiss Law*

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Introduction

A current and much-discussed topic in Switzerland revolves around legally anchored leave for newly parents. As recently as September 27, 2020, the Swiss electorate voted in favor of the introduction of two weeks paternity leave in a referendum with a majority of 60.34%. Previously, Swiss law already knew a legally regulated maternity leave of 14 weeks. As of January 1, 2023, employees who take in a child under the age of four for adoption are also entitled to two weeks of leave, which may be taken within the first year of adoption. In addition, employers may provide for more extensive leave entitlements in employment contracts on a voluntary basis.

Maternity Leave

In Switzerland, mothers who had been subject to compulsory pension insurance for at least nine months before the birth and worked for at least five months during the pregnancy are entitled to 14 weeks of maternity leave. This is subject to the further condition that they were still pursuing a job at the time of giving birth. During the 14 weeks of maternity leave, 80% of the salary is covered by a state insurance scheme. Under certain circumstances, maternity leave may be extended by a maximum of eight additional weeks.

By law, mothers are prohibited from returning to work during the first eight weeks after giving birth. If work is resumed after said eight weeks (full-time or part-time) but before 14 weeks have elapsed, the entitlement to further maternity leave will be lost.

Paternity Leave

Since January 1, 2021, fathers having been compulsorily insured for old-age benefits during nine months prior to the birth and employed for at least five months during the mother's pregnancy, have been entitled to two weeks of paternity leave as well. The prerequisite here – besides pursuing a job at the time of the birth – is that the father is actually the legal father of the child. In the event of unmarried parents, the child must be legally acknowledged by the father.

As regards maternity leave, 80% of the salary during the two weeks in question is covered by a state insurance scheme. As opposed to maternity leave, paternity leave may be taken as a block or interspersed with work days without losing the entitlement.

Leave for adopting parents

Leave for adopting parents was introduced on January 1, 2023. Working parents will be entitled to a two-week adoption leave if they take in a child under the age of four for adoption, to be taken within the first year of adoption. Provided that both parents have a job, they are free to divide the two weeks between them so long as they do not take their leaves simultaneously. If only one of the adoptive parents meets the requirements, the other one will miss out on his/ her entitlement to parental leave.

In the event of adoption leave, 80% of the salary will be covered by a state insurance scheme. Yet, only around 30 children under the age of four are adopted in Switzerland in total each year.

Outlook

Only recently has the Federal Commission for Family Affairs proposed that parental leave be increased from today's total of 16 weeks (14 weeks maternity leave, two weeks paternity leave) to a total of 38 weeks, whereby the entitlement to 38 weeks should be conditional on the father taking at least 15 weeks of paternity leave. Otherwise, the entitlement to parental leave is to lapse. The Commission’s proposal has sparked renewed debate in Switzerland about the scope of parental leave and its cost-benefit ratio for the economy. For example, the Commission's proposal has been strongly criticized by the employers' association.

Even though a statutory paternity leave has been introduced as of January 1, 2021, the discussion about a general parental leave will likely continue in Switzerland in the years ahead, particularly in light of the fact that overall maternity and paternity leave in Switzerland is still substantially shorter than in the surrounding European countries.