EMPLOYMENT LAW ONLINE GUIDE 2012

in association with CorporateINTL

Editor's Talk

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This guide is presented in association with Corporate INTL, and is intended for use by investors and other commercial operators.

It contains profiles of advisers within the area of Employment Law / Labour Law. Each profile provides firm summaries, as well as service availability information and the latest industry observations.

The advisers' profiles are organised alphabetically by region. In addition, at the back of the guide you will find an index, wherein firms are listed alphabetically by name, in order to assist with quick searches.

Corporate INTL hopes that this guide will be a useful tool in finding the right adviser for you.

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Employment Law

Employment law, or labour law, is the body of laws, administrative rulings, and precedents which address the legal rights of, and restrictions on, working people and their organisations. As such, it mediates many aspects of the relationship between trade unions, employers and employees.

There are two broad categories of labour law. First, collective labour law relates to the tripartite relationship between employee, employer and union. Second, individual labour law concerns employees' rights at work and through the contract for work. The labour movement has been instrumental in the enacting of laws protecting labour rights in the 19th and 20th centuries. Labour rights have been integral to the social and economic development since the industrial revolution.

Global variations

The basic feature of labour law in almost every country is that the rights and obligations that bind the worker and the employer are mediated through the contract of employment between the two. This has been the case since the collapse of feudalism, and is the core reality of modern economic relations. Many terms and conditions of the contract are, however, implied by legislation or common law, in such a way as to restrict the freedom of people to agree to certain things in order to protect employees, and to facilitate a fluid labour market.

Unlike in the US, in many countries it is compulsory to provide written particulars of employment with the essentialia negotii (Latin for essential terms) to an employee. This aims to allow the employee to know what to expect and what is expected: in terms of wages, holiday rights, notice in the event of dismissal, job description and so on. An employer may not legally offer a contract in which the employer pays the worker less than a minimum wage. An employee may not agree to a contract which allows an employer to dismiss them unfairly. There are certain categories that people may simply not agree to because they are deemed categorically unfair. However, this depends entirely on the legislation of a particular country.

A worldwide arena

The expansion of international trade, investment and business operations to a worldwide arena has brought considerable changes in the employment laws in many countries. Businesses planning to expand their operations globally should understand the current legal environment and the laws that govern employment in a particular country to be able to create a successful workforce. It is essential to be familiar with the specific laws relating to hiring and

firing, unions, employee benefits and other important aspects. One of the crucial concerns of workers and those who believe that labour rights are important, is that on a global platform, common social standards ought to support economic development in common markets. At the same time, international enforcement of rights has to be in place.

A primary concern is that with the breaking down of trade barriers in the global economy, while this can benefit consumers, it can also make the capacity of multinational companies to bargain down wage costs even greater – in wealthier Western countries and developing nations alike. The ability of corporations to shift their supply chains from one country to another with relative ease could be the starting point for the limitation of regulations on employment.

In that case, many countries are forced into a merciless downward spiral – for instance slashing tax rates and public services. Countries are forced to follow the process because, otherwise, foreign investment will dry up.

On the other hand, however, one should remember that free competition for capital investment between different countries increases the dynamic efficiency of the market place. Faced with the discipline that markets create, countries are then incentivised to invest in education, training and skills in their workforce to obtain a comparative advantage. Government initiative is spurred, because rational long term investment will be perceived as the better choice to increasing regulation. This theory concludes that an emphasis on deregulation is more beneficial than not. That said, it is worth mentioning that the International Labour Organization does not share this opinion.

The International Labour Organization (ILO) is a specialised agency of the United Nations that deals with labour issues. One of the principal functions of the ILO is setting international labour standards through the adoption of conventions and recommendations covering a broad spectrum of labour-related subjects and which, together, are sometimes referred to as the International Labour Code. The topics covered include a wide range of issues, from freedom of association to health and safety at work, working conditions in the maritime sector, night work, discrimination, child labour and forced labour.

Labour and employment policies within companies are shaped by the law and practice of the countries in which they operate. Many of these laws are based largely on international labour standards that are designed to eliminate unjust and inhumane labour practices. The ILO advocates international standards as essential for the eradication of labour conditions involving 'injustice, hardship and privation'. According to the ILO, international labour standards contribute to the possibility of lasting peace, help to mitigate potentially adverse effects of international market competition, and help the progress of international development.

Specifics of German employment law

Germany's economy is the biggest on the European continent, and one of the best performing in the world. It recovered from the recession faster than any other European country, and in the first three months of 2011 it grew by 1.5%, beating forecasts. Aside from its stable economic situation, its central location in Europe and reliable business partners make it an ideal place for investment in all business areas. Nonetheless, those planning to open up their businesses and employ a workforce in Germany need to be aware of a broad range of provisions of the national labour law.

German employment law is not consolidated into a single labour code. It is based instead on the service contract provisions of the German Civil Code and a plethora of individual statutes, including German health and safety law, occupational health insurance, The Works Constitution Act, Federal Data Protection Act, Equal Opportunities Act, Hours of Work Act, Collective Bargaining Agreement Act and European Works

Councils. Collective agreements in Germany have full legal status, and collective labour law is one of the few areas where judicial precedent has helped to develop a systematic body of rights.

Germany – Co-determination and cooperation rights of works councils

The works council in Germany is a form of institu¬tionalised representation of interests for employees within an organisation. Its relationship to the work¬force is governed by a duty to conduct its business impartially, without regard to race, religion and creed, nationality, origin, political or union activity, sex or age. Consequently, manual workers and white-collar workers and – in principle – both sexes, as well as the individual departments of the establishment, must have representation on the council proportional to their presence among the workforce.

Works councils have been an integral part of Ger¬man business and industry since the early 20th century and are the most important pillar of workplace indus¬trial relations in Germany.

The UK – The changing face of employment law

At present, persons employed in the UK benefit from a minimum charter of employment rights. These include: the right to a minimum wage of £6.08 under the National Minimum Wage Act 1998, 28 paid holidays, no longer working hours than one agrees to under the Working Time Regulations 1998, the right to leave for childcare, as well as the right to request flexible working patterns under the Employment Rights Act 1996.

Meanwhile, the Equality Act 2010 ensures that people are judged by the content of their character rather than regulated characteristics such as race, gender, sexuality, beliefs, disabilities or age. The Employment Rights Act 1996 adds that unless the employee repudiates the relationship, before a dismissal, every employer must give reasonable notice after one month of work, backed by a sufficiently fair reason after one year of work, and with a redundancy payment after two years.

If a company gets taken over, the Transfer of Undertakings (Protection of Employment) Regulations 2006 state that employees' terms cannot be worsened, including to the point of dismissal, without good economic, technical or organisational reason.

Further, beyond individual rights, workers have the ability to participate in decisions about how their enterprise is managed, via a widening set of statutory rights as well as the traditional models of collective bargaining. The number of 'John Lewis' style participatory institutions at work has grown and now closely mirrors European standards. Workers have the right to codetermine how their occupational pensions are managed under the Pensions Act 2004, as well as managing how health and safety policies in the workplace are formulated under the Health and Safety at Work Act of 1974.

In large-sized firms with more than 50 staff, workers must also be kept informed about major economic developments – especially those concerning business difficulties.

This is happening via a steadily increasing number of works councils, something which must usually be requested by staff.

UK – Changes to pensions

Occupational pension schemes are one of the three pillars of pension provision in the UK, in addition to the state pension administered by the government based on National Insurance contributions, and private or 'personal pensions', which individuals may arrange for themselves. After the Pensions Act 2008, due to begin in October 2012, every 'jobholder' – defined as a worker, aged 16 to 75, with wages between £5,035 and £33,540 – must be automatically enrolled by the employer in an occupational pension scheme, unless they choose to opt out.

As a means of reducing the administrative complexity that will come with this, a new non-departmental trust fund, called the National Employment Savings Trust, is established as a cheaper public competitor, able to take advantage of significant economies of scale, compared to existing fund manager options on the private pension market.

Employers will be required to set aside their jobholders' wages at an agreed percentage, and negotiate how much they will give in contributions. Outside this 'public option', it has typically been up to the employer, often in negotiation with the trade union, to establish a trust fund for pension schemes; however, there has not yet been any legal duty on employers to do so, leaving most people with nothing but the state pension. However, when there is a pension in place as a result of a term in the jobholder's employment contract, the employer is under a duty to inform staff about how to make the best of their rights pertaining to their pension.

It is also important that workers are treated equally, on grounds of gender or otherwise, in their pension entitlements. Where occupational pensions exist, the employer typically acts as a trustee and creates a board of trustees, or contracts with a trust corporation, to oversee the management of the workforce's pension savings. Following the Goode Report of 1993 on pensions, it has been a requirement that pension trust members have the right to 'codetermine' the pension management by having a vote to elect a minimum of one third of the trustees, or corporation directors, either directly or through their trade union.

Often, member nominated trustees are one half of the scheme, and the Secretary of State has the power by regulation, as yet unused, to increase the minimum up to one half. Trustees are charged with the duty to manage the fund in the best interests of the beneficiaries – in a way reflecting their preferences – by investing savings in company shares, bonds or real estate, etc.

US employment law

US employment law is comprised of both state and federal laws. Federal law not only sets the standards that govern workers' rights to organise in the private sector, but also overrides many state laws. In addition, federal law establishes minimum wages and overtime rights for the majority of workers in the private and public sectors, while state laws may provide more expansive rights.

Employment law in the US has traditionally been governed by the common law rule of 'at-will employment', meaning that an employment relationship could be terminated by either party at any time for any reason, or without a reason. This is still true today in most states. However, commencing in 1941, a series of laws prohibited certain discriminatory firings. That is, in most states, an employer is free to discharge individuals 'for good cause, or bad cause, or no cause at all', and an employee is equally free to quit, strike or otherwise cease work. However, an employee cannot be fired because of certain characteristics, such as their race, religion or gender, nor can they be fired because they have complained about illegal activity, discrimination, or health and safety violations.

Americans with Disabilities Act amendments

Due to an increased number of lay-offs, there are likely to be more class action claims, as well as an upsurge in discrimination claims. Some commentators speculate that there will be a substantial upsurge in disability claims following amendments to the Americans with Disabilities Act (ADA) of 1990. In September 2008, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA), overturning a series of decisions by the US Supreme Court and expanding the scope of medical conditions protected by the law.

Under the ADA, a person is 'disabled' if he or she has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or is regarded as having such an impairment. This definition remains the same, although until the ADAAA, 'major life activities' were not clearly defined. The ADAAA, which took effect on January the 1st 2009, specifies that major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

The law's 'original intent', as conceived by Lex Frieden and Mitchell J. Rappaport, was to create civil rights law protections for people with disabilities that: would be permanent, would not be able to be reversed or weakened, and would prohibit all discrimination. It was also conceived so that Americans with disabilities would be kept in the mainstream in terms of scientific and medical developments as well as public policy changes, healthcare law and policy changes, civil rights protections, and public law changes for Americans with physical, mental and cognitive disabilities.

It was intended to be a flexible set of laws that could only be strengthened by future case law.

Employee Free Choice Act

Meanwhile, the Employee Free Choice Act was a legislative bill that was introduced to both chambers of the US Congress – in its latest form – on March the 10th, 2009. The bill's purpose was to amend the National Labor Relations Act in order to establish an efficient system enabling employees to firm, join or assist labour organisations / unions. This would of course, therefore, provide for mandatory injunctions for unfair labour practices during organising.

Overall, the desired result would be an easier system for workers to bargain for wages, benefits and working conditions – by allegedly restoring workers' freedom to personally choose to join a union. Specifically, the Act would allow employees to form unions by signing majority sign-up cards authorising union representation, and would establish harsher penalties for employers who violate employee rights when workers seek to form a union.

For majority sign-up under current law, a majority of workers must sign cards and submit them to a third party neutral for verification. An employer, however, can refuse to recognise a union based on cards, and insist on a National Labor Relations Board (NLRB) secret-ballot election. Under the EFCA, if workers choose to use majority sign-up, the employer would not have the right to veto workers' decisions, and a union based on cards therefore becomes possible without the need for a secret-ballot election. The EFCA would also give the right to employees to choose a secret-ballot election in cases where less than a majority of employees has chosen to unionise through card-check.

Proponents of the legislation assert that this 'levelling of the playing field' between employer and employee is necessary to protect workers' rights to join unions. Opponents contend that emphasis on card-check elections may lead to overt coercion on the part of union organisers, resulting from a compromise of workers' privacy during the election process. Additionally, some small- to mid-sized firms, which lack resources such as in-house legal and human resource teams, fear their businesses will be pressured by the high costs associated with collective bargaining – especially now, as they cope with the effects of the economic downturn.

This online guide

During the coming pages, Corporate INTL profiles a number of selected employment law advisers from some of the jurisdictions mentioned above, as well as from elsewhere around the world. Contact information is provided alongside firm summaries. We also highlight the most up-to-date commentary on industry developments that is available from the selected firms.

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SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) is the largest law firm in the Philippines. Although its work centres on business activity, the firm, which is comprised of 135 lawyers, offers a broad and integrated range of legal services that cover such areas as family relations, constitutional issues and other matters of law unrelated to commerce.

Areas of expertise

The firm's practice is diversified, as reflected in its seven principal departments: banking, finance and securities; corporate services; intellectual property; labour; litigation; special projects; and tax. Moreover, SyCipLaw has a wide and varied international law practice in the Philippines, and maintains links with established and leading firms in major cities in Asia, Europe, Canada, the US, Central and South America, Australia and New Zealand.

The Philippines and its Labour Laws:

The firm's partners noted that the Philippines has the broadest base of literate, skilled and English-speaking people in Asia. It is very resilient, being one of the few countries that managed to register a growth rate during the global economic downturn triggered by the housing problem.

"We are optimistic, considering the expected upswing of economic activities in the Philippines attributable to: full implementation of the Philippine government's public-private partnership program; and, the increasing interest of investors in the Asia Pacific region following economic uncertainties in the Eurozone and in the US."

The Philippines' Labor Code contains several provisions that are beneficial to labour. It prohibits termination from employment of private employees except for just or authorised causes as prescribed in Article 282 to 284 of the Code. Moreover, the Philippine jurisprudence applies a rule that any doubts in the interpretation of law will be resolved in favour of labour and against management.

Of this, the partners added: "This makes it difficult for an employer to release an employee and implement some managerial actions. SyCipLaw has the experience and expertise to mitigate this disadvantage.

"Of further note: the Philippine Department of Labor and Employment recently issued Department Order No. 18-A, regulating labour contracting and subcontracting activities. This new issuance has imposed more restrictions and requirements governing these activities, making it more difficult for companies to contract out some aspects of their operation."

It is thus important for an employer to be assisted and advised ably by a law firm that has the experience and expertise not only in problem solving, but also in problem avoidance. SyCipLaw is such a firm, whose preeminence is further underscored by the fact that a partner became the president of the Employers Confederation of the Philippines, while three other partners headed the country's largest association of personnel managers.

SyCipLaw's labour practice group is composed of seven partners, four senior associates, 12 associates, and two of-counsels.

Industry recognition

SyCipLaw has consistently received professional recognitions and accolades. These include: National Law Firm of the Year for the Philippines, International Financial Law Review Asia Awards 2010 & 2011; Most Responsive Philippine Firm of the Year, ASIAN-MENA COUNSEL Community Awards 2010 & 2011; Project Finance Deal of the Year, International Financial Law Review Asia Awards 2011; and Philippine Law Firm of the Year, Chambers Asia Awards for Excellence 2010.