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L&E Global's Employment Law Tracker February 2017

Brussels, Feb. 28, 2017

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AUSTRALIA

- **Latest Case Law**

Court clarifies distinction between overtime and recall to duty payments

In *Polan v Goulburn Valley Health (No 2)* [2017] FCA 30, the Federal Court dealt with the calculation of wages payable to an employee it had previously found was entitled to "overtime" rates and not "recall to duty" payments for work carried out from home while she was "on call".

As was established in the original case, *Polan v Goulburn Valley Health* [2016] FCA 440, the Applicant was a nurse who worked for the Goulburn Valley Health Hospital between 1997 and 2014. She was responsible for, inter alia, managing the roster of staff at the hospital, which involved her making and receiving calls regarding changes to roster arrangements.

The terms of the enterprise agreement governing the Applicant's employment provided for various penalty rates, including an "on call" allowance, a "recall to duty" allowance and overtime. The Applicant was paid an "on call" allowance for those occasions where she was expected to be available to make and receive calls outside her ordinary work hours and while she was at home.

The Applicant contended that she ought to be a paid "recall to duty" in addition to the on call allowance, for each occasion where she actually made and received calls while she was at home.

The court observed that the purpose of the "on call" allowance was to recompense employees for the inconvenience of making themselves available to perform work at short notice. It was not designed to remunerate the employee for the actual performance of their duties.

Contrary to the submission made by the Applicant's employer, the fact that the Applicant carried out her duties from home did not necessarily preclude her from being paid a "recall to duty" allowance. The Court emphasised that in modern employment situations there can be no assumption that work is inevitably or necessarily performed in the workplace. However, the Court held that the notion of an employee being "recalled" to duty involved an active decision or instruction by an employer to require an employee to work, and did not cover the Applicant's circumstances where there was an "ongoing arrangement" under which work was triggered by calls made to the Applicant from any number of doctors and others engaged at the hospital.

The better view, according to the court, was that the Applicant was entitled to be paid overtime payments, which are designed to compensate employees for reasonable additional hours.

In determining the quantum of the overtime that was owed the Applicant, the court held that the absence of any accurate record of the Applicant's hours of work did not prevent the Court from doing its best, on the evidence before it, to try and quantify her loss.

The court used a sample of phone bills to estimate the average time spent making and receiving phone calls and then added 50% to that figure to account for the performance of the duties. The court then used this figure to estimate the quantum of overtime owing to her throughout her entire period of employment.

Court rules on adverse action provisions

In *Shizas v Commissioner of Police* [2017] FCA 61, the Federal Court confirmed that the prohibition on discrimination section 351 of the *Fair Work Act 2009* (Cth) ("**FW Act**") applies to prospective employers as well as actual employers and that an Applicant need not establish a prima facie case in order to enliven the reverse onus of proof in section 361 of the FW Act.

Under section 351 of the FW Act it is unlawful for an employer to take adverse action against an employee because of their age, race, physical disability and other grounds, unless the action is taken because of the inherent requirements of the position. Under section 361 of the FW Act, it will be presumed that the action was taken for a prohibited reason unless the person proves otherwise.

In 2012, Mr Shizas applied to join the Australian Federal Police ("**AFP**"), but was unsuccessful because, following a diagnosis of ankylosing spondylitis (a form of arthritis), a decision was made that he did not satisfy the AFP's medical clearance requirements. Mr Shizas claimed that because of his physical disability, the AFP took adverse action against him by deciding not to employ him.

The employer submitted that because section 351 only referred to an "employer", it did not apply to prospective employers. However, taking into account the ordinary meaning of employer and the text and context of the provision, the Court held that the prohibition in section 351 also applies to both actual and prospective employers.

Mr Shizas' employer also submitted that the reverse onus of proof in section 361(1) of the FW Act is not enlivened until the Applicant establishes a prima facie case that the action was taken for a prohibited reason. The Court rejected this submission. It was held that once the applicant has proved the "factual circumstance" that is said to be the reason for the taking of the adverse action (which in this case was the fact that Mr Shizas had a disability), the burden of proof was on the employer to prove that the adverse action was not taken because of Mr Shizas' disability.

The Court was satisfied that the adverse action was taken because of Mr Shizas' disability, but ultimately held that it was also taken because of the inherent requirements of the job. Therefore, it was held that Mr Shizas' employer had not contravened section 351 of the FW Act.

AUSTRIA

- **Impending Changes of Legislation**

Right to part time reintegration for employees expected July 2017

Employees who plan for reintegration at their workplace after a long absence due to sickness will have the option to conclude an agreement on part time re-integration, if certain conditions are met. Such an agreement is possible, if the sick leave has lasted at least six months without interruption. The agreement has to be concluded in written form. The employee must produce a written confirmation by a doctor about his ability to work. Furthermore, a plan for integration will be laid out by a public initiative. Relevant criteria for this plan are: The remuneration must exceed the maximum salary for minor employment. The working time must fall within a range of 50 % to 75 % of the previous working time. The location of the working time must not be changed by the employer. Mandatory overtime is

also prohibited, however, the employee can agree to work extra hours. On the other hand, the plan for reintegration can be unilaterally withdrawn by the employer, if the employee exceeds more than 10 % of his working time. The conclusion of such an agreement is not in any way mandatory for the employer - a plan can be made for the duration of six months with the option to extend the plan for another three months.

BELGIUM

- **Latest Case Law**

Converting a dismissal - no new obligation to motivate the dismissal

In general, an employee who is fired has the right to request his/her former employer to motivate the dismissal. Such request must be done in case of a dismissal with a period of notice, within a period of 6 months after the dismissal, without however, exceeding a period of 2 months after the end of the employment contract. This 2-month period is also the deadline in case of dismissal with immediate effect.

In the case at hand, an employee was fired with a period of notice. However, 5 months after the beginning of the notice period, the employer terminated the employment contract with immediate effect and the payment of a severance indemnity corresponding to the remaining part of the period of notice. One month later, the employee made a formal request to the employer to motivate the dismissal. As the employer did not respond to this request, the employee claimed an indemnity of 17 weeks salary, for a manifestly unreasonable dismissal, before the Labour Court of Ghent. However, the Court rejected the claim and stated that the decision to dismiss the employee was taken by the employer at the moment of the notification of the termination, with a period of notice. The employee was therefore too late with his request (the deadline of 6 months had already expired).

In the opinion of the Labour Court, the conversion of a dismissal with a period of notice into an immediate dismissal with the payment of a severance indemnity, did not trigger a new deadline to motivate the dismissal. Whether or not this jurisprudence will be followed by other courts, is still to be determined. It has not been not excluded, that a new element, other than the original reason to dismiss the employee, could justify the interruption of the notice period.

Is an assassination attempt outside working hours always a reason for a dismissal for serious cause?

An employee was dismissed for serious cause after his employer read in the newspapers that the employee was arrested for an assassination attempt. The employee had fired two gunshots at the sisters of his ex-wife. The employee opposed the dismissal for serious cause in court. He argued that the facts had taken place in his private life and therefore could not be used as grounds for a dismissal for serious cause.

The Labour Court of Appeal of Brussels considered that facts, which occurred in the private life of an employee, may form a reason for a dismissal for serious cause, but only when these facts impact the professional relationship between the employee and the employer, and this, in an immediate and definitive way. Unlike the employer had argued, the Labour Court of Appeal did not believe that the employer had suffered damage to its reputation, which rendered the professional cooperation with the employee immediately and definitely impossible, nor did the Court believe that the safety of the other employees and suppliers of the employer were in danger.

With regard to the damage to its reputation, the Court stated that every normal person could make a distinction between the wrongdoings of the employee in his private life and his capacity as an employee.

Concerning the safety of the co-workers and the suppliers of the employer, the Labour Court of Appeal argued that one single act of violence does not necessarily mean that the employee would demonstrate such behaviour when carrying out his professional duties. A severance indemnity was granted to the employee.

- **Impending Changes of Legislation**

New reintegration procedure for employees on long-term sick leave abolishes the old legislation

As of 1 January 2017, employees on long-term sick will have the opportunity and are encouraged to (partially / progressively) return to work, by running through a reintegration path. As a result, the old rules regarding the reintegration of definitively disabled employees expired as of 16 February 2017.

The legal interest rate for 2017 fixed at 2%

When an employer does not pay an employee's salary in due time or does not immediately pay the severance indemnity after a dismissal, he must pay interest on these amounts. As of January 2017, the legal interest rate decreased from 2,25 %, which was the legal interest rate in 2016, to 2%.

The Social Partners conclude the inter-professional agreement 2017-2018

Among other things, the Social Partners have set the wage norm for 2017-2018 at 1,1%. The wage norm determines to which extent the salaries may increase in the upcoming years, in addition to the salary indexation. This agreement determines the context for the upcoming negotiations between the Social Partners at sector and company level.

CANADA

- **Latest Case Law**

Attendance Management Programs Do Not Set the Legal Standard for "Excessive Absenteeism"

The grievor worked as a full-time transit operator starting from June 5, 2006. Beginning in January 2010, the grievor began to be "chronically" absent from work for various common or short-term illnesses such as "the flu," "stomach problems" and "food poisoning."

Under the employer's Attendance Management Plan ("AMP"), an employee's absences could be considered "excessive" if the employee had been absent in excess of the applicable standard for at least three consecutive years. The standard was based on the average number of non-culpable absences in the same period for employees in a similar occupational classification. The grievor exceeded the average under the AMP in each of 2010 to 2014 by margins of 31% to 192%. Prior to terminating the grievor's employment in April 2014, the employer had met with and counseled the grievor on 19 occasions regarding his attendance.

The Board of Arbitration (the "Board") ordered reinstatement. The Board found that the employer had inappropriately relied on the grievor's absences related to periods of disability to support the

termination. It also found that the grievor's record of absences was otherwise not so excessive as to support termination.

The employer applied to the Court for judicial review of the Board's decision. The Court found that the AMP had significant potential to discriminate against some employees on the basis of "health" and to discriminate against some employees on the basis of age. Specifically, the Court noted that people become more prone to health issues as the body ages. Interestingly, the Court suggested that the AMP should not have created an employee-wide average against which all employees would be measured, as it was reasonable to expect a higher level of attendance for, for example, a healthy 18 year-old than for a 64 year-old employee.

The Court rejected the employer's argument that the Board had erred in excluding disability-related absences from the grievor's record when considering whether his non-culpable absences were "excessive". The Court found that this approach was consistent with the Alberta Human Rights Act.

This case serves as an important reminder for employers that although AMPs are useful tools in promoting attendance, even a very reasonable AMP that has not been challenged by a union has its limits and will not replace the common law doctrine of frustration of contract or the duty to accommodate under human rights legislation.

- **Impending Changes of Legislation**

Federal Bill to amend several labour and income tax laws now at the third reading stage

In or about December 2014, certification and de-certification procedures applicable to individuals employed by federally-regulated businesses or undertakings were changed by the enactment of government Bill C-525.

Bill C-525 changed the former card-check-based union certification requirements to a system whereby employees could choose whether to certify or decertify a union by way of a mandatory secret ballot vote. Bill C-525 also simplified the decertification process. Specifically, it required evidence that 40% of employees no longer wished to be represented by a union. Prior to this bill, decertification required an employee to claim he/she represented a majority of the employees in the bargaining unit in order to file an application for decertification.

A related private bill, Bill C-377, also introduced tax reporting requirements for labour organizations. In particular, as per Income Tax Act amendments introduced by the bill, labour organizations were required to disclose the details of certain financial transactions and employee compensation, as well as disclose information regarding lobbying, political and non-labour relations activities. These reporting requirements were waived by the current Minister of National Revenue, given the current federal government's intention to repeal Bill C-377.

Current Bill C-4 would repeal the amendments brought in by bills C-525 and C-377, thereby restoring the previous certification and decertification procedures and eliminating tax reporting requirements introduced by the previous federal government. Changes brought in by Bill C-4 would affect federally regulated employers and labour organizations, as well as change the tax reporting requirements of labour organizations across Canada.

Bill C-4 received third reading in the House of Common on October 19, 2016, and was introduced in the Senate the following day. After receiving a second reading in the Senate on December 15, 2016, the bill was referred to the Standing Senate Committee on Legal and Constitutional Affairs. The Committee

reported Bill C-4 back to the Senate on February 9, 2017. Bill C-4 is now being considered for third reading in the Senate. Given that this is a government-sponsored bill that has been proceeding through the Senate reasonably smoothly, we expect Bill C-4 to receive third reading and Royal Assent relatively soon.

- **Other Observations**

Ontario Human Rights Commission releases policy statement on medical documentation to be provided upon disability-related accommodation requests

The Ontario Human Rights Commission (the "Commission") recently released a policy statement regarding the medical documentation to be provided by an employee when disability-related accommodation requests are made (the "Policy Statement"). The Policy Statement was released in follow-up to the Commission's Policy on ableism and discrimination based on disability, which was released in June 2016. The Commission indicated that it had become aware that there was confusion amongst employers regarding the type and scope of medical information to be provided to support an accommodation request. The Policy Statement seeks to clarify the type and scope of medical information that can be requested by employers.

The Commission outlined that the following types of medical information may appropriately be requested by an employer to support an accommodation request:

• that the person has a disability
• the limitations or needs associated with the disability
• whether the person can perform the essential duties or requirements of the job with or without accommodation;
• the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job;
• regular updates about when the person is expected to return to work (if they are on leave).

The Commission further noted that employers generally do not have a right to know a person's confidential medical information, including the cause of the disability, and the employee's diagnosis, symptoms or treatment. However, the Commission noted that this otherwise confidential medical information may be required if it is related to the accommodation being sought, if the employee's needs are complex, challenging or unclear, or if more information is needed.

The Commission's Policy Statement reminds employers that the information requested must be the least intrusive of the person's privacy as possible while still giving the organization enough information to make an informed decision about the accommodation requested.

CHINA

- **Impending Changes of Legislation**

Fujian Province releases regulations on nursing leave to protect the rights and interests of the elderly

On January 22, 2017, Fujian Province released the Regulations on Protection of the Rights and Interests of the Elderly (hereinafter referred to as the "**Regulations**"), which will come into effect as of March 1, 2017. According to the Regulations, an employee who is the only child in his/her family, will be entitled to up to 10 days of nursing leave each year to care for his/her parent, who is over 60 years old and is in

the hospital for treatment. The salary and benefits of the employee during the nursing leave shall remain unchanged. As the first generation of parents with one child in China have successively entered their older years, it is expected that more local governments, or the central government, will release regulations on such forms of nursing leave to protect the rights and interests of the elderly.

- **Other observations**

The Circular on Implementing the Treaty between China and Canada on Social Security came into effect on January 1, 2017

On December 27, 2016, the Ministry of Human Resources and Social Security released the Circular on Implementing the Treaty between China and Canada on Social Security (hereinafter referred to as the "**Circular**"), which came into effect on January 1, 2017. According to the Circular, Canadians who are dispatched by Canadian companies to work in the territory of China, or who are self-employed, or staff working on vessels and aircraft, or government employees, could be exempt from the payment of the endowment insurance premiums in China. The exemption period for the said dispatched employee is up to 72 months, unless otherwise extended by the competent authorities or administrative institutions. As of now, the Chinese government has signed bilateral treaties on social security with France, the Netherlands, Germany, Korea, Denmark, Finland, Canada and Switzerland.

FRANCE

- **Latest Case Law**

No extra protection during maternity leave extended by CBA

A national collective bargaining agreement (in this case, for the Bank sector) can allow for an employee to take an additional 45 days of paid leave, after her legal maternity leave, at full salary or 90 days off at half-pay. Such CBA provisions however, do not extend the employee's protection from termination by the employer, which she enjoyed during her initial maternity leave.

- **Impending Changes of Legislation**

The new Equality and Citizenship law is published in the "Journal officiel"

The Law on Equality and Citizenship (*La loi relative à l'égalité et à la citoyenneté*), published in the Journal Officiel on January 28, 2017 aims to facilitate the social integration of youths (development of civic services by diversifying welcoming structures, international mobility of apprentices outside of the European Union), combat discrimination (training of hiring personnel, at least once every five years, on non-discriminatory hiring practices), and encourage citizen's engagement (creation of a right to unpaid leave to exercise responsibilities in an association, up to six days per year). These measures entered into effect on January 29, 2017, with the exception of those that require a decree that is still pending.

- **Other observations**

2017 base salaries set for executives in metalworks industry

The social partners of the metalworks industrial sector reached an agreement on January 20, 2017, that raises the pay grid for engineers and executives in 2017. The increase for 2017 affects five grids, corresponding to different work time arrangements that are offered to engineers and executives (lump

sum arrangements in hours, in days, the 35 hour workweek, and arrangements with no time reference). This agreement sets out an appointment clause for September, which will bring the social partners back together in order to evaluate the implementation of this agreement and potentially revise it.

GERMANY

- **Latest Case Law**

Compensation owed by public employer for not inviting a severely disabled applicant to a job interview

In the present case, a severely disabled technician applied for a job offered by a public employer. He indicated his disability in the application. The employer did not invite the severely disabled person to an interview and employed another candidate. Thereupon, the rejected applicant sued the employer for compensation in the amount of three times the monthly salary due for the position he applied for. The rejected applicant based his claim on the allegation that the employer discriminated against him on grounds of his disability, by not inviting him to an interview.

For public employers, there is a statutory obligation under German law to invite a severely disabled applicant to a job interview. In August 2016, the German Federal Employment Court ruled that, already, the fact that the public employer violated this obligation by not inviting the severely disabled candidate to a job interview, gave reason for the presumption that the applicant was not considered in the application process, because of his disability. Pursuant to the court, an exception to the statutory obligation for public employers of inviting severely disabled applicants to a job interview may only be made if the applicant obviously lacks the professional qualifications required for the position. This was not the case here. The court awarded compensation in the amount of one monthly salary to the rejected applicant, as it considered compensation in this amount reasonable, based on the concrete circumstances. Considering the risk of having to pay compensation to a rejected applicant, public employers should generally always invite severely disabled applicants to a job interview.

For private employers, there is no statutory obligation to invite severely disabled applicants to an interview. However, a rejected applicant may still claim compensation if his/her application was rejected due to the disability.

Therefore, applications of severely disabled persons should always be reviewed carefully and a rejection needs to be based on non-discriminatory criteria. Hence, it can be beneficial to invite the applicant to an interview in order to gain more insight with regard to his/her qualifications.

- **Impending Changes of Legislation**

Federal Government proposed new Data Protection Act

On 1 February 2017, the Federal Government of Germany presented a draft of a new Data Protection Act. The draft is based on EU Regulation 2016/67, on the protection of private persons with regard to the processing of personal data and on the free movement of such data, which came into force on 24 May 2016. The draft law shall replace the current German Federal Data Protection Act (BDSG).

Under the current Data Protection Act, the distribution of personal data shall be permissible if this is necessary to establish, carry out or terminate the employment relationship. In addition, the draft allows

the processing of personal data if this is necessary to fulfill the rights and obligations resulting from a collective agreement with the trade union or the works council. Data processing with the consent of the affected employee shall also continue to be permissible. However, the employee's consent always needs to be voluntary.

The draft law still has to pass the German parliament before it can come into force.

- **Other observations**

Opinion of the ECJ-Attorney General concerning contractual references to collective bargaining agreements in case of a transfer of undertaking

At the end of 2015, the German Federal Employment Court submitted a request to the European Court of Justice. It concerned the effect of a transfer of undertaking on a clause in an employment contract that "dynamically" refers to a collective bargaining agreement, i.e. refers to a collective bargaining agreement as amended from time to time.

In the case before the court, the parties agreed in the employment contract that the provisions of a collective bargaining agreement should apply. The reference to the provisions of the collective bargaining agreement was "dynamic", with the result that the employment contract not only referred to the current version of the collective bargaining agreement, but also to all supplementary, changing and replacing collective bargaining agreements. Under current German case law, such contractual references continue to be "dynamic" even after a transfer of undertaking, i.e. the transfer of a business unit to a new owner, who by law, becomes the employer of the employees employed in that business unit.

Meanwhile, the Attorney General of the European Court of Justice presented his opinion on this case. The Attorney General proposed that maintaining the dynamic nature of the reference after a transfer of undertaking is contrary to Article 3 para. 3 of the Directive 2001/23/EC. The referral is instead subject to the temporal limits of Article 3 para. 3 of the Directive, which can be set by the member states and shall not be less than one year. During this time, the new employer must maintain the working conditions provided in the collective bargaining agreement. In the opinion of the Attorney General, this applies irrespective of whether the transferor was normally bound to the collective bargaining agreement or merely on the basis of the contractual reference clause. The decision of the European Court of Justice is still pending. The court is not bound by the statement of the Attorney General, but his opinion is generally accepted.

INDIA

- **Latest Case Law**

Summary of Recent Case Law in India

Gratuity denied to an employee terminated due to misconduct: An employee, aggrieved by the termination from service, raised an industrial dispute with the company. The lower most labour court set aside the order of dismissal, but awarded only a one-time compensation of an amount equivalent to 50 per cent of the back wages. The Supreme Court heard the arguments on both sides and found that the High Court was wrong to set aside the order of the labour court. Given that, the Supreme Court upheld the order of the labour court and ruled that in order to deny gratuity to an employee, it is not

enough that the alleged misconduct of the employee constitutes an offence involving moral turpitude as per the report of the domestic inquiry. There must be termination on account of the alleged misconduct, which constitutes an offence involving moral turpitude.

High Court not to interfere in the decisions of the disciplinary authority: A departmental inquiry was conducted against an employee due to certain charges of misconduct. The High Court interfered with the decision of the disciplinary authority and changed the penalty of dismissal to stoppage of 2(two) increments, for a period of 3 (three) years. After hearing the two sides on the matter, the Supreme Court ruled that the High Court cannot interfere with the decision of the disciplinary authority under each and every circumstance, unless it is found that the punishment/penalty awarded by the disciplinary authority/employer is wholly disproportionate - to an extent that it shakes the conscience of the High Court - and compels it to interfere and alter the punishment.

- **Other observations**

Summary of Employment Law Observations in India

An insured woman eligible for 26 weeks of maternity leave under ESI Rules: An "insured woman" under the Employees' State Insurance (Central) Rules, 1950 ("ESI Rules") has been defined to include a woman who is, or was, an employee in respect of whom contribution is or was payable under the Employees' State Insurance Act, 1948 and who is, by reason thereof, entitled to any of the benefits provided under the said Act and shall include: (i) a commissioning mother who, as biological mother wishes to have a child and prefers to have the embryo implanted in any other women; and (ii) a woman who legally adopts a child of up to three months of age.

Conditions to be followed by the principal employer under EPF Scheme: The conditions to be followed by the principal employer under the Employees' Provident Fund Scheme, 1952 ("EPF Scheme") to pay provident fund to a contract worker are as follows: (i) Principal employer should ensure that the contractor is registered with the EPFO; and (ii) payments due to the contractor should be made only after verifying that the statutory provident fund payments have been made to EPFO. Rule 30 (3) of the EPF Scheme provides that it shall be the responsibility of the principal employer to pay both the contribution payable by him, in respect of the employees directly employed by him, and also in respect of the employees employed by or through a contractor, as well as administrative charges. The Employees' Provident Fund Office published certain conditions to be followed by principal employers if they are advised to discharge the provident fund to the contract employees.

ITALY

- **Latest Case Law**

Company's director is not a para-subordinate worker

Through Court Ruling n. 1545/2017, the Court of Cassation at joint sessions has changed its own interpretation, dated 1994, on directorships, stating that the relationship between the director and the company is not characterised by coordination, therefore the company's directors cannot be considered as para-subordinate workers. Indeed, according to the Court, the relationship between the company and the director is not based on a contract, because the director's powers are provided only by the law and are autonomous.

- **Impending Changes of Legislation**

Amendments to law regulating offshore call centers

Through an informative note, the Minister of Economic Development has clarified some provisions of Law n. 232/2016 aimed to prevent/regulate offshore call centers. According to the note, every operator who wants to establish an offshore call center in a country which is not member of the EU, shall communicate its intentions, at least 30 days before the transfer, to the Minister of Labour, the Minister of Economic Development and the Data Protection Authority. The violation of this obligation is punishable by a fine equal to € 150.000.

Furthermore, every time a user makes a call to a call center, the user shall be informed, in advance, by the call center operator as to the country where the center is located. Violation of this obligation is punishable by a fine equal to € 50.000.

Also, the Minister pointed out that if an operator entrusts an external call center, joint and several liability will apply to and between the operator and the external call center.

- **Other Observations**

Metalworkers choose the company level agreements

The new NCBA for metalworkers approved at the end of 2016 has re-designed the relations between the National and Company level agreements, providing that the salary raises will be negotiated at Company level. Therefore, the NCBA will regulate the salaries with reference to the inflation rates, while the Company level agreements will regulate the salary raise, taking into account the differences between companies at national level.

MEXICO

- **Impending Changes of Legislation**

The Local Congresses Approved the Constitutional Reform on Labor Justice

On April 28, 2016, President Enrique Peña sent a bill to the Senate to substantially amend the Constitution on Labor Justice.

The bill proposed eliminating the Conciliation and Arbitration Labor Boards, which have been the agencies in charge of Labor Justice, and their replacement by Labor Courts belonging to either the Federal or Local Judicial Branch.

This initiative was discussed and approved by both the Senate and the Chamber of Representatives and was sent to the Local Congresses for their approval. Last February 3rd, the proposed constitutional reform was approved by 17 Local Congresses. We are only waiting for the President to publish the corresponding Decree in the Official Gazette.

As a result of this Constitutional Reform, Labor Justice will be administered by Labor Courts belonging to the Federal or Local Judicial Branch, which will give them more independence in relation to the Executive Branch.

It is also relevant that with the constitutional reform a decentralized organism is created, independent of the Federal Administration and similar bodies in the States, which will be in charge of substantiating a mandatory pre-trial instance for the parties, aiming to speed up labor proceedings so that long, expensive processes will be avoided.

A Federal, Public and Decentralized Organism will be in charge of registration of unions and collective bargaining agreements (CBAs).

This Constitutional Reform will come into effect within one year following its publication in the Official Gazette.

Given that the Constitutional Reform necessarily involves adjustments to the Regulatory Law, especially on procedural labor matters, it is very feasible that a Procedural Labor Code to rule the administration of labor justice will be discussed and enacted, which, according to the Ministry of Labor, is already being developed.

THE NETHERLANDS

- ### Latest Case Law

EUR 141,500 is the highest amount of "fair payment" for dismissal granted so far

Instead of supporting the Operations Manager who was unfit for work in his process of recovery and returning to work, and contrary to the advice of the company doctor, the CEO of the company claimed the employee could not return to his position as Operations Manager. Although the claim was not substantiated, the company dismissed the employee. The court ruled that the company did not have a proper ground for termination and it had acted seriously culpable towards the employee. Subsequently, the court granted the employee a fair payment ("billijke vergoeding") of EUR 141,500 gross, in addition to the statutory severance payment (the so-called "transitievergoeding") of EUR 27,513,90 gross to which the employee was entitled. The amount of fair payment equals about one year's salary (including the average bonus). This is the highest amount granted as fair payment under the new dismissal legislation so far.

- ### Impending Changes of Legislation

Amendments to Working Conditions Act take effect 1 July 2017

As of 1 July 2017, several amendments to the Working Conditions Act will be implemented. The amendments regulate, among other things, the right of the employee to consult the company doctor about work related health and safety issues (before actually becoming ill), the right of the employee to ask for a second opinion regarding the advice of the company doctor, the right approval of the works council or employee representative body as to the appointment of the occupational health and safety officer, and the obligation for the company and the occupational health and safety service to have a contract in place in which certain specific elements are included, such as the right of the company doctor to visit the workplace and the obligation of the company doctor to have a complaint procedure in place and to report occupational illnesses to the Netherlands Center for Occupational Diseases.

NEW ZEALAND

- **Latest Case Law**

Penalty imposed on New Zealand employee for breach of good faith

A recent Employment Court judgement has upheld an Employment Relations Authority finding and penalty against an employee. In New Zealand, penalties against employees are only imposed in rare circumstances. In this case, the employee had claimed she was "injured" and took more than a year off work. She was photographed by a private investigator to be in a healthy condition.

The Employment Relations Authority found that that the employee had not only misled her Employer regarding her condition and provided inaccurate information, but she had failed to attend weekly meetings with the Employer to assess what capacity she could return to work or to comply with her rehabilitation plan. The Authority found that her conduct was "deliberate… serious and sustained over a long period of time". This conduct was a breach of the implied terms of her employment agreement and her duty to act in good faith.

The case is an excellent reminder that in New Zealand, the duty of good faith works both ways and employees who bring vexatious, misleading claims, may be penalised.

NORWAY

- **Latest Case Law**

Failure to execute work task due to conscientious objection was valid reason for dismissal

A doctor working for the municipality refused to give her female patient a coil as a contraceptive, due to her religious faith. The municipality dismissed her from her position and reasoned it with the disadvantage endured by the patient and the fact that the doctor had not made any reservations for conscientious objection in her employment contract. The district court concluded that the dismissal did not infringe the employee's freedom of conscience / religion.

In the court's view, the core issue was that the employee would not come to perform a type of medical treatment, which she is obliged to carry out on the basis of the regular general practitioner scheme in the municipality. The regulation concerning the regular general practitioner scheme had correctly weighed the doctor's freedom of conscience against the female patient's right to not have to endure their regular doctor transferring the responsibility to perform the type of treatment to another doctor. The Court concluded that the dismissal was not contrary to the plaintiff's right to conscience / religion.

POLAND

- **Latest Case Law**

Shorter notice periods allowed only if employee terminates the employment contract

As per the Supreme Court (case signature II PK 323/14), it is neither illegal nor unacceptable to make an agreement between an employer and employee, according to which, notice periods of contracts of employment can be reduced to periods shorter than prescribed by the Labour Code. This provision may

be included in the contract of employment itself, or in a separate agreement. However there are two conditions necessary for such a provision. Firstly, this period is acceptable when it is the employee who terminates the contract. It is not possible to use shortened periods when an employer terminates the contract. The second condition is the necessity of the provision being for the benefit of the employee in the moment when the agreement was concluded. Previously, the Supreme Court's approach found it acceptable to extend the notice period only (under the same two conditions). It also confirms that article 36 § 1 of the Labour Code is treated as a semi-imperative rule.

Claim for discrimination is allowed even if employee failed to appeal the termination before the deadline

Prior to the Supreme Court resolution of 28 September 2016 (III PZP 3/16), there were two discrepant approaches to this matter. There was an approach, according to which, if the termination of contract of employment itself was not successfully appealed, it was not possible to seek a claim for compensation based on a discriminatory reason of termination or a discriminatory choice of dismissal. It was justified that if the termination was not declared illegal it cannot be the justified cause for another claim. As for now, a discriminatory claim is treated completely separate from the appeal against termination, and is no longer treated as the circumvention of law constituting conditions and terms of such an appeal. The illegality behind both claims may be the same, however it is not necessary. After all, an employee may be dismissed for illegal reasons which are not discriminatory and, au contraire, reasons for termination that are not always justified means that the dismissed employee was not discriminated by this act.

ROMANIA

- ### Latest Case Law

The isolation of a football player during practice, because he has judicial claims related to his employment, is discrimination and harassment

The National Council for Fighting Discrimination is not a court of law in its own right and such decisions lead to administrative sanctions. However, the individual affected by the discrimination can ask the court to be compensated for the discrimination, based on the CNCD ruling. The CNCD found that in this case, the criteria for the discrimination was the use of a legally recognized right – the right to access the courts of law, in this particular case, for employment related matters. The administrative sanction the football club received is one of the highest ever.

- ### Impending Changes of Legislation

New tax regime for seasonal workers that are kept active for the entire duration of the year

This measure aims to impact workers in traditional seasonal activity areas, such as tourism and agriculture. The scope, according to the substantiation note, is to ensure a higher standard for the services provided in the areas with seasonal activity, by ensuring the fidelity of the workers for extended periods of time, beyond the standard season period. Prior to the change made in the Tax Code, seasonal workers were subject to the 16% income tax rate.

- **Other observations**

New occupations to be introduced in the National Classification of Occupations

The National Classification of Occupations (the COR) is a normative act that includes codes that are to be assigned to each job and is divided by occupational families. The assignment of a COR code to each employee is mandatory. The Labour Code requires that each individual employment agreement should state the COR code for the job that the employee will perform. The COR is revised periodically, yet still there are occupations that are not included, and employers need to assign the COR code for the most similar occupation.

RUSSIA

- **Latest Case Law**

A collective agreement establishes only the minimum amount of compensation to employees

A collective agreement establishes only the minimum amount of compensation to employees. The final amount of damages determined by the parties themselves should be sufficient and proportionate. The Presidium of the Russian Supreme Court, in its Resolution as of 26.10.2016 in case No. 6-PV16, determined that an employee may demand a larger sum than that specified in the collective agreement. If there is a reason to pay compensation to employees, the amount of pay from the agreement and the collective agreement is money that an employer must pay on an uncontested basis. The final sum must be negotiated by the employee and the employer. If they fail to agree, the amount of compensation shall be determined by court.

Employees have to revoke letters of resignation through an authorized person

Employees have to revoke letters of resignation through an authorized person. The Moscow City Court, in its Resolution as of 28.11.2016 in case No. 4g/5–13690/2016, stated that when an employee withdraws a resignation (within two weeks from the date of filing), but it is reviewed by an unauthorized person and the employee is aware of this, his\her dismissal shall be deemed valid.

The Supreme Court of Russia has approved the procedure for filing court documents electronically

The Supreme Court of Russia has approved the procedure for filing court documents electronically. From 01.01.2017, the participants in a trial have the right to apply documents to courts of general jurisdiction over the Internet. According to the Resolution of the Judicial Department at the Supreme Court of Russia as of 27.12.2016 No. 251, electronic documents are submitted through a personal account (made by an authorized representative of a company in his/her own name). To confirm an application process, an enhanced qualified electronic signature or an account on a website of public services is required. The court may accept the electronic document itself (originally created in electronic form) or a scan of a paper document.

- **Impending Changes of Legislation**

New Bill to allow for salaries in foreign currency

The Ministry of Finance of Russia prepared a Bill allowing to receive a salary in foreign currency when labor duties (on regular basis) are performed outside the territory of the Russian Federation (Draft of

the Federal Law "On Amendments to Article 131 of the Labor Code of the Russian Federation and Article 9 and 12 of the Federal Law "On Currency Regulation and Currency Control").

State Duma Bill would increase the amount of compensation for the delay in salaries

The State Duma has prepared a Bill that would increase the amount of compensation for the delay in salaries. According to deputies, the law provides for a small compensation for delayed salaries. Nowadays, an employer is obliged to pay interest at the rate of not less than 1/150 the key rate of the Central Bank of the Russian Federation. Duma members propose to increase the surcharge to 1/100 (Draft of the Federal Law No 83422-7 "On Amendments to Article 236 of the Labor Code of the Russian Federation").

- **Other observations**

Labor inspection plan in Russia for 2017 is published

The official website of the Prosecutor General's Office published the Labor Inspection plan in Russia for 2017 (http://plan.genproc.gov.ru/plan2017/). The plan details: 1) time of checking, 2) its duration, and 3) the subject of checking - what will be checked. To do this, one could enter in the search box at least one of the following data: name of organization, full name of the individual entrepreneur, OGRN, INN, address of the inspected object. Plan checking of the State Labor Inspection in Moscow (https://www.git77.rostrud.ru/plan/), in St. Petersburg (https://git78.rostrud.ru/plan/).

SAUDI ARABIA

- **Impending Changes of Legislation**

New regulation on termination of KSA nationals' employment by reason of redundancy

The resolution is aimed at regulating and, in so far as possible, limiting the collective termination of KSA nationals by reason of redundancy. In any cases other than an employer's bankruptcy and the closure of the employing establishment entirely, the resolution prohibits large and medium sized entities from making collective redundancies of KSA nationals for any reason, without first informing the local labor office at least 60 days prior to serving written notice of termination. Various documents must be provided when notifying the local labour office of the intended dismissals. The labour office will consider and evaluate such documentation and issue the employer with its opinion to the termination proposal within 45 days of the notice.

National Budget introduces fees for dependents

These fees will start to be levied from July 2017 and increase on an incremental basis as follows:

- From July 2017, the expatriates will have to pay SAR 100 every month for each dependent.

- In July 2018, the expatriates will have to pay SAR 200 every month for each dependent.

- In July 2019, the expatriates will have to pay SAR 300 every month for each dependent.

- In July 2020, the expatriates will have to pay SAR 400 every month for each dependent.

- **Other observations**

Citizenship account programme

The Ministry of Labour and Social Affairs launched the citizenship account programme in January 2017, which provides for Saudi citizens with dependents to apply for assistance by way of additional allowances, payable through the programme to supplement their incomes.

Reserved roles for KSA nationals

The Ministry of Labour has now published what effectively amounts to job descriptions for each of the reserved roles for Saudi nationals and stated that it will examine the actual role performed by any non - KSA national, to see if they are effectively doing a reserved role under a different title.

SPAIN

- **Latest Case Law**

Employees may receive special rights of trade union representatives even if legal requirements are not met

In Spain, pursuant to the Organic Law of Freedom of Association ("LOLS" by its acronym in Spanish), the number of trade union representatives that can be appointed depends on the number of employees in the company or workplace according to the following scale:

From 250 to 750 employees: 1 trade union representative (TUR)
From 751 to 2.000 employees: 2 TUR
From 2.001 to 5.000 employees: 3 TUR
From 5.001 onwards: 4 TUR

Of course, such trade union representatives have a special protection against dismissal that ordinary employees do not have. One of these additional rights is, in the event of an unfair dismissal, the capacity of deciding whether the employee prefers the severance pay corresponding to unfair dismissal or to be readmitted to the company with the same working conditions as before the dismissal (the decision corresponds to the company in the case of an ordinary employee).

In these cases, where the company/workplace has less than 250 employees, even if there is no legal requirement to appoint trade unions representatives, it can be done. However, such employees do not have the status of trade union representatives, but trade union spokespersons. The difference between both is that spokespersons have no special rights.

In this new ruling of the Spanish Supreme Court, a company dismissed an employee who was a trade union representative and the employee asked for his right to decide whether he had to receive a severance pay corresponding to unfair dismissal, or if he had to be rehired by the company. However, the company had less than 250 employees and, from a strict point of view, this employee was a trade union spokesperson with no special rights.

In this case, despite the fact that the employee was legally a trade union spokesperson (and not a trade union representative) and the right to decide belonged to the company, the Spanish Supreme Court

ruled that the employee had the status of trade union representative, since the employee argued that he was a trade union representative instead of spokesperson, and the company did not oppose such statement. Thus, those facts that deprived the employee of his status of trade union representative were not alleged nor proven by the company.

SWEDEN

- **Latest Case Law**

A dismissal of an employee was declared invalid due to a close connection with the employee's upcoming parental leave

The case concerned an employee who was dismissed four days after he had requested parental leave from work. The question in the case was whether the dismissal constituted a violation of the Parental Leave Act or if the dismissal was based on legal grounds.

The Parental Leave Act (*Sw. föräldraledighetslag (1995:584*)) contains a non-discrimination principle in Sections 16 and 17, according to which an employee is discriminated against if the dismissal is in any aspect related to the parental leave. The Labour Court found that the short time between the application for parental leave and the dismissal indicated that the dismissal had such connection to the parental leave that it was in breach of the previously mentioned principle. Due to a reversed burden of proof concerning discrimination in the Parental Leave Act, the employer had to prove that the dismissal was not related to the parental leave. The employer claimed that the dismissal had been made in order to cut costs. However, the court found that the employer had hired other people to perform the claimant's work and thus that the employer had failed to prove that the dismissal was not related to the parental leave. The employer was obligated to pay general damages to the employee amounting to SEK 40,000. (Labour Court – AD 2017 no. 7)

Disobedience and general unwillingness to perform work constituted grounds for dismissal

The case concerned an employee, a seller, who was dismissed via email for neglecting his undertakings by not reporting to his supervisor as instructed, failing to report sick leave, not meeting the selling requirements and refusal to work. The questions before the Labour Court were whether the circumstances constituted legal grounds for dismissal and whether the employee was entitled to compensation, since the dismissal lacked some statutory formal requirements. The Labour Court found that the employee, despite warnings from the management, had failed to comply with the instructions regarding reporting to the supervisors. The Labour Court concluded that the disobedience of the duty to report and the general unwillingness to perform in accordance with his job description constituted legal grounds for dismissal. However, it was also found that the company had neglected formal requirements concerning a dismissal that follow from the Employment Protection Act (*Sw. lag (1982:80) om anställningsskydd*), Sections 8 and 10. The employer was ordered to compensate the employee by paying SEK 15,000 in general damages. (Labour Court - AD 2017 no. 3)

UAE

- **Other Observations**

New Emiratisation recruitment procedures

The Ministry of Human Resources and Emiratisation (MHRE), around 7 December 2016, introduced a new program called Tawteen, in an effort to promote Emiratisation in the private sector. Tawteen is a recruitment portal, which allows UAE nationals to register on the portal as a job seeker and be eligible to apply for vacancies in the private sector as they are advertised. Companies falling under the jurisdiction of the MHRE may be required to advertise new positions via the Tawteen portal.

UK

- **Latest Case Law**

Disability discrimination - whether a condition is likely to result in a substantial adverse effect on normal day-to-day activities

The EAT considered the employee's argument that type 2 diabetes should be treated as a progressive condition and therefore deemed to be a disability under the Equality Act 2010.

To assess whether it was a progressive condition, the correct question was whether the condition was likely to result in a substantial adverse effect on normal day-to-day activities. Even if there was a small possibility of the employee's condition deteriorating in the future, that is sufficient to make it 'likely' and may result in the employee having a disability.

It should not be assumed that type 2 diabetes is a progressive condition under the Equality Act; indeed neither type 1 nor type 2 diabetes are given as examples of a progressive condition in the Guidance.

The EAT did not explore the extent to which the individual's control over their lifestyle should be taken into account when assessing the long term effect of a condition.

Gross negligence by a failure to act may justify dismissal without notice

The claimant was a Regional Operations Manager responsible for 20 stores. When an HR Partner sent an email to 5 store managers in his region, which undermined and manipulated the employer's procedure for measuring staff engagement, the Manager failed to take any action. Following his dismissal without notice for gross negligence tantamount to gross misconduct, he brought a claim for wrongful dismissal.

The Court of Appeal confirmed that gross negligence can amount to gross misconduct, justifying summary dismissal without notice. However, there will only be limited circumstances in which an employee's failure to act justifies summary dismissal, if they did not intend to act contrary to, or to undermine, the employer's policies.

This case illustrates that where a manager's negligence relates to a procedure, which the employer treats as an important part of its culture, and the individual is responsible for the success of that procedure, this can amount to a serious dereliction of duty which may justify dismissal.

That said, there are not likely to be many occasions where dismissing a grossly negligent employee without notice is risk-free, particularly if the negligence is a result of their failure to act, rather than their action.

- **Impending Changes of Legislation**

Statutory guidance on 'Managing gender pay reporting in the private & voluntary sectors' published

The new gender pay gap regulations for companies with at least 250 employees have received parliamentary approval and are awaiting sign off by ministers.

The Government and Acas have issued draft statutory guidance to assist employers with gender pay gap reporting. The guidance provides practical advice on how to carry out gender pay gap reports, clarification of some of the key terms and provisions in the regulations, and "essential considerations" on how employers can reduce the gender pay gap.

The snapshot date for collecting data is 5 April 2017, and the first deadline for publishing gender pay gap reports is 4 April 2018.

The advice, in the guidance, on steps employers can take to reduce their gender pay gap, includes:

• effective monitoring of gender differences in the recruitment balance, starting salaries, promotions, and flexible working requests across all job types and levels of seniority, etc.
• managing family-friendly leave successfully by encouraging men to consider taking shared parental leave and considering whether maternity, adoption, paternity and shared parental pay should be given comparable financial value.
• ensuring that promotions, especially for senior roles, can function with flexible working arrangements in place.

- **Other Observations**

Ministry of Justice's employment tribunal fees post-implementation review published

The Ministry of Justice has published its long-awaited post-implementation review of the introduction of fees in the employment tribunals and the EAT.

The review concludes that the fees regime is working well and is meeting the original objectives for the introduction of fees, namely the financial, behavioural and access to justice objectives. Although the review accepts that the fees regime may have discouraged many individuals from bringing employment tribunal claims, it does not believe that individuals have been prevented from bringing employment tribunal claims.

However, the Ministry of Justice concedes that the substantial reduction in claims since the fees regime was introduced means that some action is necessary. It has decided that certain claims under the national insurance fund will be exempt for fees with immediate effect. It will also consult on proposals to widen access to the Help with fees remission scheme. The consultation closes on 14 March 2017.

USA

- **Other Observations**

President Trump Nominates Neil Gorsuch to U.S. Supreme Court

Ending months of speculation, President Donald Trump has nominated the Honorable Neil McGill Gorsuch to succeed Justice Antonin Scalia on the U.S. Supreme Court. If confirmed by the Senate, Judge Gorsuch would bring more than 10 years of judicial experience to the position. Still, the Supreme Court is *sui generis*, different than any other court in the land, and any nominee will be the subject of intense scrutiny as Court watchers assess the nominee's record for clues as to how his or her vote will affect the landscape.

Judge Gorsuch is a federal judge on the U.S. Court of Appeals for the Tenth Circuit, in Denver. He received a B.A. from Columbia University in 1988, a J.D. from Harvard Law School in 1991, and a Doctorate of Legal Philosophy from Oxford University in 2004. Gorsuch clerked for D.C. Circuit Judge David B. Sentelle in 1991-1992 and then for Supreme Court Justices Byron White and Anthony Kennedy in 1993-1994. He practiced law with Kellogg, Huber, Hansen, Todd, Evans & Figel from 1995-2005 and then became a Deputy Associate Attorney General at the U.S. Department of Justice in 2005-2006. On May 10, 2006, President George W. Bush nominated Judge Gorsuch to the Tenth Circuit, and he was confirmed on July 20, 2006.

Judge Gorsuch has been described as having a deep commitment to the original understanding of the Constitution and the distinction between legislative and judicial powers. For example, in Gorsuch's concurrence in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), he took aim at the role of administrative agencies and, in particular, the doctrine of *Chevron* deference. Gorsuch stated that courts "are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty expressly assigned to them by the [Administrative Procedure Act] and one often likely compelled by the Constitution itself." Id. at 1153. According to Gorsuch, this judicial abdication means that "liberties may now be impaired not by an independent decision-maker seeking to declare the law's meaning as fairly as possible—the decision-maker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whims may rule the day." Id. Explicitly calling for reconsideration of the doctrine of *Chevron* deference to administrative agencies, including those that regulate labor and employment such as the Equal Employment Opportunity Commission and the National Labor Relations Board, he wrote, "Chevron … permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." Id. at 1149.

Judge Gorsuch's adherence to the doctrine of separation of powers extends to his recognition that courts of appeal are creations of Congress, and the boundaries of their jurisdiction are staked by statute. *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1292 (10th Cir. 2011). He has only rarely issued decisions in class or collective matters, typically finding that the Court of Appeals lacked jurisdiction. Those opinions he has authored reviewing district courts' class certification decisions reflect his commitment to the proposition that the district court enjoys considerable discretion.

According to Judge Gorsuch, there may be no single right answer to the question, but a range of possible outcomes sustainable on the law and facts, and he is apt to "defer to the district court's judgment so long as it falls within the realm of these rationally available choices." S*hook v. Bd. of County Comm'rs of El Paso*, 543 F.3d 597, 603 (10th Cir. 2008). That said, his decisions recognize the necessity of practicality or, as similarly stated in Federal Rules of Civil Procedure Rule 23, manageability. In Shook,

affirming the district court's denial of certification, he confirmed that manageability, as it relates to the provision of injunctive relief, is a valid consideration under Rule 23(b)(2) — meaning that, in practice, the relief must be appropriate for the class as a whole. Thus, "[a] class action may not be certified under Rule 23(b)(2) if relief specifically tailored to each class member would be necessary to correct the allegedly wrongful conduct of the defendant." Id. at 604. Gorsuch reasoned that requiring the Court to undertake a time-consuming inquiry into individual circumstances or characteristics of class members or groups of class members would render the suit "unmanageable and little value would be gained in proceeding as a class action." Id.

Judge Gorsuch has applied discrimination charge filing deadlines strictly against plaintiffs, rejecting arguments that would expand those time periods. He also has not hesitated to reject federal whistleblower claims. In doing so, he has looked at the plain language of the statute and reject plaintiffs' arguments that coverage would serve the greater purpose of the statute at issue.

Judge Gorsuch's most notable benefits-related opinion was a concurrence in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), in which several employers challenged the contraceptive mandate imposed by the Affordable Care Act on religious-liberty grounds. The Tenth Circuit, in an en banc opinion, reversed the district court's refusal to enter preliminary injunctions against the mandate. Gorsuch wrote a separate concurrence to emphasize that the individual owners of the plaintiff-employers also had standing to challenge the mandate. Id. at 1152-59. The Supreme Court affirmed the Tenth Circuit's ruling on a 5-4 vote. *See Burwell v. Hobby Lobby Stores*, Inc., 134 S. Ct. 2751 (2014). The interests of religiously affiliated employers will come into play as early as this term, when the Supreme Court considers the scope of ERISA's exemption for "church plans."

With respect to leave-management issues, Judge Gorsuch authored the decision in *Hwang v. Kansas State Univ*., 753 F.3d 1159 (10th Cir. 2014), in which the Tenth Circuit determined that a leave of absence of more than six months was an unreasonable accommodation. Gorsuch wrote, "It's difficult to conceive how an employee's absence for six months … could be consistent with discharging the essential functions of most any job in the national economy today." Id. at 1162.

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Next steps: The nomination must be approved by the U.S. Senate after the Senate Judiciary Committee holds a hearing. After a hearing, the committee votes on whether to put the nominee before the Senate. If the committee votes to move forward with the nominee, the Senate will vote on the nomination. A majority vote of the Senate is needed to put the nominee on the Court.

President Trump may have occasion to fill another Supreme Court seat in the next four years, with Justice Ruth Bader Ginsburg at age 83, Justice Anthony Kennedy at age 80, and Justice Stephen Breyer at age 78. Moreover, Trump will have the opportunity to leave a lasting mark on the federal judiciary, which currently has more than 100 vacancies pending in the U.S. District Courts and the Courts of Appeals.

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