



# Dernières nouvelles

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## Editorial: Taking control of overtime

Asking an employee to work beyond their normal hours has never seemed much of a risky proposition, especially if they are salaried and not entitled to overtime. But in the USA the situation is changing and an increasing number of lawsuits are involving 'non-exempt' workers.

The Fair Labor Standards Act (FLSA) has been around since 1938 and this contains a requirement to pay overtime at time and a half for certain jobs carried out by non-exempt workers. The threshold for non-exempt status is \$23,660 per annum, so not many employees are currently covered by FLSA rules. However, the US Department of Labor (DOL) has issued draft regulations raising the threshold to the 40th national pay percentile (currently \$50,440 per annum) and numerous court cases have also effectively extended overtime pay entitlements to most exempt jobs. The 'highly compensated' threshold under the FLSA is also on the move - with the DOL proposal lifting it to the 90th pay percentile (\$125,148 per annum).

The problem for companies is that many do not keep a strict record of their workforce's working hours - let

alone apply any controls. In the modern world of the Internet and mobile telecommunications there is far more scope to carry out work duties out of hours – especially by remote workers. It is just all too easy for a manager to call a non-exempt colleague out of hours and talk about business issues.

To overcome the risks of potential litigation it is therefore important to ensure that out of hours work obligations are clearly spelt out and agreed to (especially for remote workers). All working time must be tracked and documented. If there is no formal overtime pay then that must either be rectified or a (partly self-certified) system of time off in lieu introduced. There must also be a formal understanding that if the employer fails to pay overtime due, the employee will notify them in good time – and not just sit on a potential arrears claim and let the value mount.

## **Austria: Case on international jurisdiction of individual employment contracts**

The Austrian Supreme Court recently issued a decision concerning the international jurisdiction of individual employment contracts.

The case involved an employee who was employed by an Austrian employer and worked in Austria, but who lived in the Czech Republic. After the birth of his second child, the employee decided to take part-time parental leave. The employer wished to dismiss the employee whilst they were on part-time parental leave - which meant prior permission had to be obtained from the competent court. However, when the employer submitted their request to dismiss to the labour court, the court stated that it did not have jurisdiction to make a decision.

Upholding the decision of the lower courts the Supreme Court affirmed the lack of jurisdiction based on the fact that article 20(1) of Council Regulation No 44/2001 states that an employer may bring proceedings relating to a contract of employment only in the courts of the Member State in which the employee is domiciled. [8 Ob A 41/15k]

## Canada: Guidance on 'bring your own device' schemes

New guidance on 'bring your own device' (BYOD) schemes has been published by the Office of the Privacy Commissioner of Canada, together with the provincial Offices of Alberta and British Columbia.

In their guidance, the three Offices of the Privacy Commissioner recommend that companies have specific BYOD policies in place — even where specific mobile device and security policies already exist. A BYOD policy should set out the company's monitoring practices, acceptable and unacceptable uses of BYOD devices, the duties of users, device and information security requirements and access requests. Employers should also have policies that deal with the storage and retention of personal data that is subject to its control.

The guidance also gives advice on testing a BYOD scheme before fully implementing it, on developing

training materials for BYOD schemes and on mitigating risks. The guidance can be viewed in full [here](#).

## Czech Republic: No duty to reveal criminal convictions that have been removed from the register

The issue of pre-employment background checks was recently brought before the Supreme Court of the Czech Republic.

In this case, an employer had discovered that one of their employees had been convicted of embezzling their former employer and given a suspended prison sentence. At the time of hiring, the employee had said that he did not have a criminal record. The employer claimed that they would never have employed the employee if they had been aware of this conviction and, as the employment contract had been concluded on the basis of an error, the contract was invalid. However, the employee opposed this contention on the basis that his conviction had been deleted from the Criminal Register before he attended the job interview, as a result of successful completion of the suspension period.

According to the Czech Labour Code, employers may not request information from employees that is not directly related to the performance of work and the employment relationship. This includes information concerning pregnancy, financial circumstances, trade union membership and criminal records. These restrictions may be ignored only if there is a valid reason for requesting this information relating to the type of work to be carried out, and the request is appropriate or permitted by law.

In its judgment of this case, the Supreme Court explained that the reason convictions are deleted from the register is so that the individual in question does not suffer detriment — for example in trying to find a

job — as a result of the conviction. As such, the Court held that an employee is not obliged to reveal their criminal record if the conviction or sentence has already been deleted from the Criminal Register and employers have no right to ask for such information. The employee in this case had therefore not been in error by not revealing their conviction and their employment contract was held to be valid. [21 Cdo 2005/2014]

For more information on the rules concerning [background checks in the Czech Republic](#), please see our HR Knowledgebase.

## Indonesia: Further restrictions on the hiring on foreign workers

A new ministerial regulation (No 16 of 2015) recently came into force in Indonesia placing additional restrictions on the employment of foreign workers.

One of the most significant changes is the formal increase of the ratio of foreign-to-local workers. Employers will now need to have at least 10 local workers in order to hire one foreign worker. Previously a ratio of 1:1 or 1:3 foreign workers to local workers was generally accepted by the Ministry of Manpower.

In addition, the new regulations remove previous exemptions to the requirement to possess a work permit. For example, employers must now apply for work permits (IMTAs) for both resident and non-resident foreign directors and other senior staff. Temporary work permits must also now be obtained for short-term business visitors and these can be for a maximum of one month or six months - depending on the type of activity to be undertaken in Indonesia. Finally, regulation 16 introduces further reporting

requirements for employers concerning their use of foreign workers and requires the levy of 100 US dollars per month for each foreign worker employed to now be paid in Indonesian currency. On a more positive note, however, there still remains no obligation on foreign workers to learn an appropriate Indonesian language.

## Irish Republic: Rules on employment permits amended

The Employment Permits (Amendment) Regulations 2015 entered into force in the Republic of Ireland on September 1st 2015. The amendments have brought about changes to the list of jobs that are eligible and ineligible for employment permits.

Owing to a shortage of skills, companies will now be able to apply for employment permits for IT engineers, telecommunications engineers and mobility instructors for the visually impaired. Previously these occupations were not eligible for employment permits. The amendments have also added a number of occupations to the list that are not eligible for employment permits. These include plant hire managers, production managers, estate managers and graphic design managers.

As of August 31st 2015 there are new application forms for the issue and renewal of employment permits. However, there are no changes to the Trusted Partner Registration forms and Trusted Partner Employment Permit application forms.

## Poland: Changes to parental leave from 2016

The rights of working parents in Poland are set to change from the beginning of 2016, following publication of a number of amendments to the Polish Labour Code in the Journal of Laws.

In an attempt to simplify the rules on parental leave, additional maternity leave will be abolished and instead the additional six weeks of leave (or eight weeks in the case of multiple births) will be added to parental leave. This means working parents will be entitled to 32 weeks of parental leave (or 34 weeks in the case of multiple births) instead of the current 26 weeks.

The period during which parental leave and unpaid childcare leave can be used will also be extended. Currently all paid parental leave must be taken within 12 months of the birth of the child and unpaid childcare leave can be taken until the child's fifth birthday. From January 2016, working parents will be able to take childcare leave and 16 weeks of paid parental leave until the child's sixth birthday.

Furthermore, fathers will be able to take their two weeks of paternity leave within the first 24 months after the birth of their child - instead of within the first 12 months as is currently the case.

## **South Africa: Intervention plan adopted in an attempt to save jobs**

In South Africa, employers and trade unions in the mining industry, together with the government, have adopted a ten point intervention plan in order to prevent significant job losses in the industry.

The plan was adopted after a number of large mining companies, including Anglo American and Lonmin, announced plans to reduce their workforce. The government has now been notified of plans to cut up to 11,798 jobs. The plan attempts to curtail the number of redundancies by encouraging companies to consider other options before terminating a contract of employment. These options include enhancing productivity and managing cost pressures to improve efficiency, retraining workers and selling mining assets in an attempt to save or create jobs at other companies.

The National Union of Mineworkers, Solidarity Union, Chamber of Mines and the department of mineral resources have all signed the plan.

## **USA: No cause of action for retaliatory failure to hire**

The Supreme Court in the US state of Tennessee recently ruled that job applicants have no cause of action against an employer who fails to hire them because they have filed, or are likely to file, a workers compensation claim against a former employer.

As the Court explained, although some US states allow claims for retaliatory failure to hire under statute, Tennessee does not. The state of Tennessee recognises the doctrine of 'employment at will'. This means that not only can employers and employees terminate their employment relationship with or without cause, but prospective employers and job applicants may freely choose whether or not they wish to enter into an employment relationship.

There is an exception to the doctrine of 'employment at will', however. According to statute an employee may not be dismissed for taking an action encouraged by public policy. The filing of a workers' compensation claim is considered to be an action encouraged by public policy and the courts recognise that employers may not dismiss an employee for filing such a claim. However, the Court analysed the language of the relevant statute and firmly concluded that this exception applies to employees only. As a job candidate is not yet an employee, they may not rely on this exception. [No. M2014-01723-SC-R23-CV – Filed August 21, 2015]

## **Pay, Tax and Benefit Trends**

**BRAZIL:** The federal government of Brazil has proposed that the national monthly minimum wage



should increase from the current 788 real (213 US dollars) to 865.50 real (234 US dollars) from January 2016. The proposal is part of the 2016 Budget and has been submitted to Congress for its review.

**CHINA/TAIWAN:** On August 25<sup>th</sup> 2015 China and Taiwan signed a treaty for the avoidance of double taxation and the strengthening of taxation cooperation. The agreement means that individuals from one jurisdiction working in the other jurisdiction for up to 183 days will not be taxed on their employment income in that jurisdiction. Taiwanese companies without a permanent establishment in mainland China will also no longer be subject to Chinese corporation tax for profits made in China. In addition, the agreement will facilitate the exchange of information between the two tax administrations and the resolution of disputes. The treaty will take effect once ratified by both national governments.

**CYPRUS/IRAN:** On August 4<sup>th</sup> 2015 Cyprus and Iran also entered into a double taxation treaty. The agreement is based on the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention framework and will come into force once ratified by both countries.

**CZECH REPUBLIC:** The government of the Czech Republic has now approved the draft regulation submitted by the Minister of Labour and Social Affairs to increase the national minimum wage. As of January 1<sup>st</sup> 2016, therefore, the monthly minimum wage will be 9,900 koruna (approximately 400 US dollars) and the hourly minimum wage will be 58.70 koruna (2.45 US dollars).

**EUROPE:** A study of developments in collectively agreed pay during 2014 has been carried out by the European Foundation for the Improvement of Living and Working Conditions (Eurofound). In eight of the fourteen European countries considered by the report, the average increases were lower than in 2013 — but

only collective agreements in Finland failed to keep pace with retail price inflation. In fact, during 2014, real (inflation adjusted) increases in pay levels were 3.3% in Slovakia, 2.3% in Germany, 2.1% in the Czech Republic and 2.0% in Slovenia. Despite there being price indexation in Belgium, wages here still grew by 0.5% above inflation. Only in the UK did wage deals match retail price fluctuations to produce zero growth in real wages.

**GERMANY:** Germany's Federal Statistical Office (Destatis) has published preliminary data on gross earnings and hours of work in Q2 2015. According to the data, during this period monthly gross earnings - excluding bonuses - averaged 3,767 euros (4,206 US dollars) for full-time workers in industry and 3,525 euros (3,936 US dollars) for full-time workers in the service sector. Full-time workers in industry worked an average of 38.7 hours per week and in the service sector they worked an average of 39.5 hours per week.

**GLOBAL:** The Organisation for Economic Co-operation and Development (OECD)'s latest data on comparative price levels around the world shows that living costs continue to be highest in Switzerland, Norway, Denmark, Australia and the UK. The UK's position is relatively new, largely because of the strength of the pound. Although the weak euro has generally depressed international price parities across much of Europe, there are significant differences within the eurozone — particularly between ailing national economies such as Greece and traditionally strong economies like Luxembourg. The best spending power advantage for business visitors or expatriates coming from the USA (1 US dollar = 100) to another OECD country are to be found in Poland (49), Hungary (50), Turkey (56) and the Czech Republic (58).

**KAZAKHSTAN:** Recent debates in the Kazakhstani Parliament have revealed concerns that a new pension supplement may give rise to further growth of the 'grey economy'. The proposed new

pensions law will add a third tier to employee pension rights based on an obligatory additional 5% levy on employers. Under the law as it stands, employers must pay 10% into pensions saving accounts on behalf of their employees — but they are permitted to deduct 10% from employee wages to cover the expense. The only pensions contribution that must be directly funded by employers is an additional 5% added to the accounts for employees subject to extreme work hazards. The new third-tier payment, due to be levied from 2017, will also be an additional expense for employers.

**MYANMAR:** A new national minimum wage was introduced in Myanmar (also known as Burma) on September 1<sup>st</sup> 2015. The daily minimum wage based on an eight-hour working day is now 3,600 kyat (2.80 US dollars) and the monthly minimum wage based on a six-day working week is 67 US dollars. This minimum wage applies to all industries.

**UNITED KINGDOM:** According to the UK's Office for National Statistics, bonuses accounted for 6% of total pay for the whole UK economy in the financial year ending 2015. This is 0.1% less than the previous year. If the finance and insurance industry is excluded, however, bonuses as a percentage of total pay increased by 0.2% as compared with the previous year. In the Finance and insurance industry, bonuses as a percentage of total pay decreased by 7.7% (from 25.1% in 2014 to 20.4% in 2015).

## Other Global HR News in Brief

**AFRICA:** Although Africa remains one of the few continents where the incidence of smoking is on the increase, some African countries have taken modest steps to ban smoking, both at work and in public places. In 2014 Ethiopia passed a smoking ban, but left it to local authorities to implement. Elsewhere the Kenyan city of Nairobi operates a partial ban and

Uganda bans smoking within 50 metres of any public place. However, the laws are widely flouted and workplace prohibitions are operated by only a few international employers, often purely for safety reasons.

**DENMARK:** The Danish government has established a committee to review and amend the Holiday Act in order to bring national legislation in line with EU law and to make the rules on annual leave simpler. In April 2015, the European Commission stated that Danish rules on annual leave are contrary to the EU Working Time Directive. The Commission asked Denmark to fully recognise the right employees have to enjoy their minimum paid annual leave in the same year in which it was accrued. As Danish law currently stands, annual leave must be taken in the holiday year following the qualification year. This means that for certain workers, such as those that are new to the Danish labour market, paid annual leave cannot be taken for up to 16 months following recruitment.

**INDIA:** The Indian government has launched a new online visa application system which saves casual business visitors and tourists from having to visit a visa processing centre or complete a lengthy postal visa application process to obtain a visa. People from 113 countries will be able to use the system and obtain documents via email within four days. They must, however, have at least six months left on their passport and have two or more blank pages for stamping by immigration officials. Those entering India on an e-visa must do so via one of 16 designated arrival points and biometric data (including fingerprints) will be collected on arrival.

**LUXEMBOURG:** A law has recently been passed in Luxembourg that will significantly change the rules on social dialogue from January 1st 2016. Under the new law, company joint committees (les comités mixtes), which are currently mandatory in all companies with 150 employees or more, will be abolished and the

powers and competences held by these committees will be given to employee delegates (les délégués du personnel). Young worker delegates (les délégués des jeunes salariés) will also be abolished and occupational safety delegates will be renamed occupational health and safety delegates (les délégués à la sécurité et à la santé) and given minor additional areas of responsibility. Delegates' rights to receive training will also be extended - as will the number of hours a delegate may spend carrying out their mandate during normal working hours.

**NETHERLANDS:** Research commissioned by the Dutch Ministry of Social Affairs and Employment has shown a high level of discrimination towards certain workers in the labour market in the Netherlands. The research demonstrates that workers aged 45-50 years and workers who have a non-Dutch background are twice as likely to not be invited to a job interview as a Dutch male national who is under the age of 35. In a first step towards combating this problem the Ministry will, this Autumn, examine to what extent collective bargaining agreements promote diversity in the workplace.

**SAUDI ARABIA:** As part of its campaign to encourage the employment of Saudi Arabian nationals, Saudi Arabia's Ministry of Labour recently announced 19 jobs that may not be filled by foreign nationals. These jobs include: chief administrator of human resources, head of a personnel department, director of labour affairs, director of personnel relations, employment clerk, cashier and typist. Foreign nationals currently employed in these jobs will not be able to renew their work permits. Local companies have also been prohibited from transferring the services of such expatriate workers between companies.

**SINGAPORE:** The Prime Minister of Singapore, Lee Hsien Loong, has announced that paternity leave is to be doubled from one week to two weeks. Initially,

employers will be able to choose whether or not to offer this additional paternity leave to its employees, but where it is offered eligible fathers will receive paternity pay from the state. At some point in the future, however, employers will be obliged to offer this extra paternity leave.

**SINGAPORE:** Employers should be aware that Friday, September 11th 2015 will be a one-off non-working public holiday in Singapore. President Tony Tan Keng Yam has announced that, following the dissolution of Parliament, this day will be Polling Day. For more information about public holidays in Singapore, please see the section on [Singapore](#) in our HR Knowledgebase.

**SPAIN:** According to statistics published by Spain's Ministry of Employment, during the period January to May 2015 there were 331 strikes in Spain. These strikes involved 93,027 workers and resulted in 229,757 days not being worked. 282 of these strikes — that is 85.2% of the total number — occurred in the private sector.

**UNITED KINGDOM:** A new requirement for large companies in the UK to produce a slavery and human trafficking statement every financial year is expected to come into force in October 2015. Under the Modern Slavery Act 2015, companies that operate all or part of their business in the UK, supply goods or services and have a turnover of at least 36 million pounds (approximately 55.2 million US dollars) will be required to produce such a statement and publish it in a prominent location on the company's website. The statement should include information on the steps taken by the company to ensure slavery and human trafficking does not take place within their supply chains. If no steps are taken, then this should be declared. Please note that a [model company policy on Modern Slavery and Human Trafficking](#) is now available in our HR Knowledgebase.

**UNITED KINGDOM:** The UK's Advisory, Conciliation and Arbitration Service (ACAS) recently published three new guides to assist employers in understanding their obligations under equality and discrimination legislation. The guides provide a summary of the meaning of the nine characteristics protected under the

Equality Act 2010. They also explain how employers can prevent discrimination from occurring in the workplace and how an employee's complaint of discrimination should be dealt with. To access the guides in full, please click [here](#).

## Dates for your diary:

**September 30<sup>th</sup> 2015:** Deadline for comment on potential change to the [European Union](#)'s labour and migration policies and Blue Card system.

**October 1<sup>st</sup> 2015:** As of this date, companies must publish the salary range of job vacancies placed in the Job Bank in [Singapore](#).

**October 1<sup>st</sup> 2015:** Amendments to the municipality of [Shanghai](#)'s Rules on Collective Agreement come into force.

**October 1<sup>st</sup> 2015:** A consultation seeking views on the new gender pay regulations in the [UK](#) ends.

## Latest news for business travellers:

In recent weeks, there has been a significant influx of migrant and asylum seekers entering [Europe](#). This has resulted in disruptions to transport services, including trains and ferries. Travellers should monitor local media and check with transport service providers for updates.

Semaf, a trade union representing train drivers, has announced that there will be strikes on September 14<sup>th</sup> and 15<sup>th</sup> in [Spain](#). Each strike will last 24 hours.

A high number of cases of the Chikungunya virus and dengue fever have been confirmed in [EI Salvador](#). The government has issued alerts in various provinces, including Cabañas, Cuscatlán, San Miguel, Ahuachapán, Sonsonate and Usulután.

On October 25th 2015, parliamentary and presidential elections will be taking place in [Tanzania](#). As a result of political tension and civil unrest, all travellers are urged to exercise caution and remain vigilant in the run-up to the elections.

Many important border crossing points between [Venezuela](#) and [Colombia](#) have been closed or partially closed, so travellers should expect significant delays to their journeys.

## FedEE news:

**FEDEE ADVICELINE:** Due to a temporary coincidence of leave arrangements the FedEE Adviceline will not be operating fully effectively between Monday, 14th September and Thursday, 17th September. During this period members may experience some delays in answering their enquiries.



**FEEDBACK FROM MEMBER SURVEY:** We have had a very encouraging immediate response to this week's survey of member requirements. Responses are still coming in, but it is already clear that the top ten countries are (in order of importance): Germany, the UK, France, USA, Italy, Belgium, Australia, UAE, South Africa and Mexico. In Asia there is considerable interest in the PR China, India, Hong Kong and Japan.

The ten most important issues are generally more unexpected. They are (once again, in order of importance): employment contracts, data protection, disciplinary procedures, career development, workplace harassment, works councils, employee productivity, employee incentives, continuous professional development and immigration.

If you have not completed the survey it is not too late. Every response we receive allows us to improve the support we can offer our members.

**FELLOWSHIP MEETING:** The next Fellowship meeting will take place in London during November (date still to be finalised). If you are a Fellow and have not yet booked your place, contact us now on +44 (0)117 975 8611. For more information about Fellowship and our Fellowship meetings, please contact Cassandra Lu on [Cassandra.lu@fedee.com](mailto:Cassandra.lu@fedee.com)

**UPDATED LAW PROGRAMME PRESENTATIONS:** We have now completed the updating of our audio-visual law programme presentations for 2015. Updated presentations are now available for England and Wales, France, Germany, the Netherlands, Poland, Russia, Spain and Sweden. New presentations are also now available for Argentina, Brazil, Mexico, New Zealand, Peru and Venezuela. Our [Law Programmes](#) can be found in the Members' Area.

**NEW COUNTRY COVERAGE:** As some of you may have noticed we are currently in the process of adding Knowledgebase entries for Hong Kong, Kenya, Canada, USA and Taiwan. An entry will also soon be available for New Zealand. If there are any countries which we do not currently cover and you would particularly like to see covered in the Knowledgebase, please let us know by writing to us at [admin@fedee.com](mailto:admin@fedee.com).

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