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Editorial: When compliance is not enough

Companies around the world struggle to keep pace with mounting legal changes in the jurisdictions where they operate. But reaching the Nirvana of compliance is only the beginning of potential woes.

As every experienced HR professional knows, employees may take legal action even though their employer is not at fault. This will simply take up HR time and add to costs. Then accusations can be made where it is often impossible for a company to defend itself — such as where the burden of proof is reversed in discrimination cases within EU countries. In the UK, for instance, it has long been the practice of employees dismissed in the first two years of employment to claim harassment or discrimination on one of the protected grounds — as that is the only basis upon which they can question the dismissal.

Then, of course, there are the actions of faceless officials who frustrate overseas hiring plans and intra-company transfers. Governments frequently ignore the laws they put in place because they know that it is

difficult to hold them to account. An example of this is the practice of many embassies to rely upon local agencies to deal with business visa applications. Under EU Schengen rules this is severely restricted, but that does not stop countries such as France from leaving all but the rubber stamping of decisions to local nationals rather than French officials.

The most serious problems arise in the sphere of health and safety — where regulations and codes of practice generally abound. Here the difficulty is that most legislators lack the experience of those who understand the way things go wrong on the ground. Rules often focus on issues such as the size of safety guards or weights lifted and not upon more relevant factors that give rise to real, substantial risk. One example is in the fire safety regulations applying to multi-story offices or factory premises. The regulations focus on the number of egress points and the width of fire escape stairs, but frequently do not address the more serious matter of trapping employees on inner stairways. Regulations are generally silent on whether access doors from different levels should have a handle allowing those entering inner stairways to re-enter their floor. Thus, if a fire turns out to be on a

lower floor the inner stairway will fill with smoke and a retreat back to an upper floor could be prevented. Finally, there is the common confusion between legal compliance and morality — and the equally common belief that if the law is silent about something it is 'fair game'. It is wrong to dismiss someone during a probationary period because of the fact that they drive a better car than you do, but it is not generally unlawful to do so. Similarly, certain actions that give advantages to a customer personally may not count as a bribe before the law, but they often do amount to corruption and a potential loss to a company's reputation.

Therefore, alas, legal compliance is not enough. There are still choices to be made by HR managers about how far it is necessary to go beyond basic requirements, how to avoid the damaging actions of officials and the best ways to deal with spurious legal claims from employees.

Costa Rica: Overhaul of the Labour Code

In spite of past opposition from Costa Rica's former President, Laura Chinchilla, a wide-scale review of Costa Rica's labour laws has now been completed and amendments approved by the national parliament. They are due to take effect on July 25th 2017.

Of benefit to employers will be a new six-month statute of limitations on challenges concerning a change in terms and conditions of employment. Previously there was no limit, except where employment had ceased. It will also be an advantage for employers that, in future, employment disputes will be heard by courts through the giving of oral rather than purely written submissions. This will speed up the judicial process which currently can take up to ten years to complete.

By far the majority of reforms are for the benefit of individual employees and trade unions. These include

the addition of several new grounds for discrimination (social background, sexual preference, union involvement and marital status) plus a fast track court process for unjustified dismissal, discrimination and maternity right claims — with working mothers and young people (aged 15-17) receiving free legal aid. In future employers will also have to provide a very detailed written statement to back up their termination decisions.

Perhaps of even greater concern is the fact that it will soon be much easier for trade unions to call a strike and much harder for employers to respond by sanctioning employees who join illegal strikes. A strike will only require ratification by 50% plus one for it to become legal, and even if correct procedures are not followed, an employer will not be able to punish an employee who joins an illegal strike if they return to work within 24 hours of it being declared illegal.

European Union: Tackling loopholes in the Trade Secrets Directive

Although preliminary agreement was reached between representatives from the principal EU decision making bodies on a Trade Secrets Directive last December, progress has been slow in moving the draft towards formal individual ratification by parliament and the EC Council. It has now been scheduled to be put to the plenary session of the European Parliament on April 13th prior to probably receiving final approval by the Council of Ministers ahead of the Summer break. It would then have to be incorporated into national legislation by 2018.

The Directive brings EU trade secrets law broadly into line with that operating in the USA. However, it contains an honesty and 'good faith' defence which protects those coming upon information without intent to steal it (unless a party should have known a product incorporated a trade secret) or through 'experience and

skills honestly acquired in the normal course of [...] employment'. There will also be a whistleblower defence where revealing trade secrets can be proven to be in the public interest.

Most importantly of all the Directive harmonises the actions a company may take to protect itself once it becomes aware of an infringement. These include injunctive relief (stopping the unlawful use and further disclosure of misappropriated trade secrets), the removal from the market of goods that have been manufactured on the basis of a trade secret that has been illegally acquired and the right to compensation for the damages caused by the unlawful use or disclosure of a misappropriated trade secret.

Because a loophole remains in the Directive regarding skills and experience, employers will need to ensure that clauses in employment contracts explicitly prevent departing staff from divulging company secrets — even indirectly or implicitly — in the work they undertake for future employers. Moreover, the whistleblower defence is circumscribed by the necessity for an employee to be able to claim with considerable certainty that what they reveal is in the 'general public interest'. A contractual clause pointing out the consequences of a spurious public defence claim would, however, require very careful wording.

Finland: Recovery plan fails to gain full union backing

A government plan to pull Finland's ailing economy away from the brink of a downward spiral has come adrift after several leading labour unions refused to endorse it.

The plan involved increasing the number of working days per year by three without an increase in remuneration and increasing the proportion paid by employees towards social security funds. Initially the

Trade Union Confederation SAK endorsed the plan, but when it came to a vote five unions decided to opt-out, including Finland's largest SAK affiliate, the service sector union PAM.

It is now uncertain whether the national employers' confederation EK will continue discussions with the government as the failure to gain trade union unanimity is likely to make implementation virtually impossible. In most other countries the government would continue to impose the changes, but in Finland's culture of enduring consensus this would be a high-risk and potentially disastrous strategy.

New Zealand: Significant changes to parental leave and zero-hour contracts

In New Zealand, the Employment Standards Bill has now passed its final reading in parliament and will come into force on April 1st 2016 as previously planned. This Bill makes a number of changes to the country's employment laws — particularly in relation to parental leave and zero-hours contracts.

The Employment Standards Bill extends eligibility for parental leave by giving a wider definition of the term 'primary carer'. It also gives parents of premature babies the right to additional paid parental leave in the amount of one week's leave for each week before the full gestation period. Furthermore, the Bill introduces the right for parents to work for up to 40 hours during the 18-week period of paid leave in order to 'keep in touch' with work and to take unpaid parental leave on a flexible basis — provided, in both cases, that their employer agrees to these arrangements. An extension of the length of parental leave from 16 weeks to 18 weeks from April 1st 2016 had already been agreed under the previously passed Parental Leave and Employment Protection Amendment Bill (No 2). In an attempt to remove unfair employment practices the new Bill introduces a number of rules which

severely limit the use of zero-hour contracts. From April 1st it will be unlawful for employers to require employees to be available for work if no hours of work are guaranteed under the employment agreement. It will only be lawful for an availability provision to be included in an employment agreement if the employer has genuine reasons (based on 'reasonable grounds') for including such a provision and provided it includes agreement on the payment of reasonable compensation for the employee making themselves available for work. Employees will also be entitled to compensation if they are not provided with reasonable notice of the cancellation of a shift.

South Africa: Court rules on enforceability of non-compete clauses and garden leave

A South African Labour Court recently considered for the first time the impact of garden leave on the enforceability of a non-competition clause.

The case concerned a senior executive who was subject to a six-month notice period under the terms of his employment contract. His contract also included a garden leave provision and a six-month post-termination restraint of trade (non-competition) clause. When the senior executive resigned in order to take up employment with a direct competitor, his employer sought to enforce the garden leave clause for the duration of his six-month notice period as well as the restraint of trade clause.

In deciding whether or not both the garden leave clause and restraint of trade clause could be enforced the court considered the approach of the courts in both New Zealand and the United Kingdom. In line with the approach of these jurisdictions the court considered that the period of garden leave should be taken into account when considering the reasonableness of the length of the non-competition restriction. In this specific

case, the court held that a total restraint of trade period of 12 months from the date of resignation was reasonable, given the employee's knowledge of his employer's strategic plans for both the short and long term. [Vodacom v Godfrey Motsa and MTN Group]

Pay, Tax and Benefit Trends

AUSTRALIA: The escalating cost of private health insurance in Australia has led Health Minister Sussan Ley to intervene in order to limit increased profit taking by insurers in the sector. Last year the average increase in premiums was 6.2%. On April 1st this year the average rise will be 5.59%. Continuing premium increases well ahead of inflation may be driven by a concern in the industry about the prospect of stricter regulation following highly critical responses in a major government survey of private health insurance last year.

BULGARIA: A proposal put before the National Council for Tripartite Cooperation to make employers fully responsible for the payment of social security in Bulgaria has been defeated. This would have put a heavy burden on employers in a country where expenditure on social security has risen from 9.3% of GDP in 2008 to around 12% of GDP today. Since 2008 state pensions have risen by 50%, sickness benefit costs by 45% and state expenditure on pregnancy and childbirth by 145%.

CUBA: It is always difficult to determine the truth behind news reports from government statements in planned economies like Cuba. At the end of 2015 it was officially projected that average salaries would rise to 653 pesos (24.64 US dollars) per month in 2016. However, earlier this month the Deputy Labor and Social Security Minister, Maria Molina, announced that average salaries had already risen to 743 pesos per month (28.04 US dollars). This unexpected change may partly be due to the operation of 'Resolution 17'

which officially gears pay to productivity. According to the Deputy Minister this has suffered from an 'inappropriate use of what was legislated'.

EUROPEAN UNION: The European Parliament has been debating a revised Directive on Posted Workers submitted by Commissioner Marianne Thyssen. Under the initial draft, posted workers would become entitled not just to the minimum wage in the host country, but to the same pay and benefits for the same work in the same location. Moreover, workers posted for over two years would have to be treated as if they were fully integrated into the host labour market. There is some work to do on this draft and it is unlikely to be put before the EU Council of Ministers until at least early Autumn.

INDIA: India's Prime Minister, Narendra Modi, has intervened to defer proposed changes to the tax rules applicable to the state pension Employee's Provident Fund (EPF). In his latest budget, Finance Minister Arun Jaitley proposed that from April 1st 2016 only 40% of funds withdrawn from the EPF would be tax free unless used to purchase annuities. At the same time the second tier 'National Pension System' was to be given similar tax treatment by allowing retirees to commute 40% of funds tax free before the remaining 60% is placed into a taxable annuity. This would have removed the significant advantage of making contributions to the EPF. However, these plans met with fierce opposition from salaried employees, trade unions and opposition parties, resulting in their withdrawal for further review.

ISRAEL: In Israel, salaries in the IT and communications sectors rose by 6% in 2015 to an average of 18,400 new Israeli shekel (4,718 US dollars) per month. This compares to an overall increase in salaries during 2015 of 3% to 9,590 new Israeli shekel (2,460 US dollars) per month. The high increases in IT and communications were almost wholly due to the difficulty of recruiting workers in this sector —

especially in communications services where the annual average rise was 8%.

ITALY: There is increasing controversy over the use of job vouchers as payment for a broad range of positions throughout the private sector in Italy. Vouchers were originally introduced in 2008 in order to prevent casual agricultural workers escaping tax and social security contributions. However, gradually the sectors covered have widened and in last year's Jobs Act the upper annual limit on the receipt of vouchers was raised from 5,000 euros (5,550 US dollars) net to 7,000 euros (7,770 US dollars) net. So what started as an experiment involving the sale of 535,000 vouchers in the first year has now escalated to cover 1.7 million workers. Job vouchers can be bought by employers in post offices and used to pay workers who can then cash them in for 75% of their face value. The workers may continue to claim welfare benefits, but have no right to sick or holiday pay.

JAPAN: Although price levels remain virtually static in Japan, Prime Minister Shinzo Abe is pressing for even small rises in spending power as a way to boost the country's lacklustre economy. For this reason many leading Japanese companies have been considering whether to concede to the often modest wage demands from labour unions. Hitachi Limited has, for instance, just given an average pay increase of 1,500 yen (13.2 US dollars) per month, whilst Nissan is set to agree a 3,000 yen (26.4 US dollar) per month increase. Other automakers are considering monthly deals worth 2,000 yen (17.6 US dollars).

PORTUGAL: On March 9th 2016 Decree-law 10/2016 came into force in Portugal re-establishing temporary early-retirement rules that had been in effect during 2015. These rules provide that access to early retirement benefits is only available to workers over the age of 60 who have contributed to the social security system for at least 40 years. During the short period from January 1st 2016 to March 8th 2016 early

retirement benefit was once again available to individuals aged over 55 who had made at least 30 years of contributions to the social security system.

SOUTH KOREA: The pay gap between employees of large and small companies has widened, at least in aggregate, across the South Korean economy. In 1997 the pay of employees in companies with less than 300 employees stood at 80% of the pay of those in larger enterprises. According to the latest statistics from the Ministry of Employment and Labor, last year that proportion had fallen to 62%. The reason for this is largely due to the virtuous circle that can be achieved through economies of scale. Large companies can afford to trade capital for labour, improve productivity and continue to reduce labour content — thus enhancing their ability to pay, or to pay more per capita to a smaller workforce from an otherwise static pay pot.

SRI LANKA: Although wage boards have been in existence in Sri Lanka since 1941, there has — until now — been no universal minimum wage for the private sector as a whole. Earlier this month parliament passed both the National Minimum Wage of Workers Bill and the Budgetary Relief Allowance of Workers Bill. These establish a new national minimum wage of 10,000 Sri Lankan rupees (69.75 US dollars) per month and an additional allowance of 2,500 rupees (17.44 US dollars) per month for all those earning under 40,000 rupees (279.00 US dollars) per month. The Allowance must be backdated to May 1st 2015. There is to be no special dispensation for small and medium-sized enterprises (SMEs) and employers not complying with the orders will face heavy fines and their Directors up to six months imprisonment.

SWEDEN: According to Statistics Sweden (SCB), the Swedish Labour Cost Index (AKI) for the private sector in December 2015 was 122.3 for salaried employees and 120.8 for wage-earners. When compared to December 2014, labour costs increased by 3.4% for salaried employees and 3.6% for wage earners.

UK: Both the UK's Prudential Regulation Authority and Financial Conduct Authority have informed the European Banking Authority that they will not comply with its requirements and apply caps on banker bonuses in smaller institutions from January 1st 2017. Senior staff bonuses in larger institutions have been limited to 100% of fixed salaries (or 200% with shareholder approval) since early in 2015.

Other Global HR News in Brief

CHINA: Recent critical remarks by China's Minister of Human Resources and Social Security and also its Finance Minister reveal deep concerns in the government about the strangling effect on the economy caused by the 2007 Labour Contract Law. The law is widely blamed for the exodus of manufacturing jobs to neighbouring states, the lack of investment in company training programmes and acute shortage of medium- to highly-skilled technicians. Many employers see it as too biased in favour of the employee and creating a disincentive to hire particularly lower-skilled workers. A proposal for several fundamental amendments to the law can therefore be anticipated later this year.

CHINA: China's growing trade union movement is being largely fed by a high take-up amongst migrant workers entering major cities from often distant rural areas. Of China's estimated 274 million migrant workers 120 million are already union members. According to the deputy Chair of the All-China Federation of Trade Unions this number is expected to grow to 140 million this year as unions target such workers with the offer of special services to assist them in their vulnerable position and unfamiliar working environment.

ECUADOR: A proposed labour reform submitted by President Rafael Correa has begun its passage through the unicameral Ecuador parliament. The draft law seeks to introduce unemployment benefit for those

who have been employed for at least the past six months, to allow employers to reduce daily working hours (with employee consent) for up to six months where there is a good business reason for doing so, and to promote job creation for young workers. Because of impending private-sector lay-offs, the government is pressing parliament to complete all legislative stages by early April 2016.

EUROPEAN UNION: The European Commission is taking the Czech and Hungarian governments to the European Court of Justice (ECJ) because they refuse to open up the profession of Notary to foreign nationals. The ECJ has previously made judgments against Austria, Belgium, Germany, Greece, France, Luxembourg and the Netherlands for applying the same discriminatory restriction when notaries in those countries were not found to 'exercise official authority' under Article 51 of the Treaty on the Functioning of the European Union.

SCOTLAND: The Scottish government has unveiled an action plan which aims to remove discrimination against pregnant and new working mothers. This move follows a UK-wide survey by the Equality and Human Rights Commission last year which found that as many as 54,000 women are forced out of their jobs each year due to pregnancy and maternity discrimination. As part of the Scottish plan, new guidance will be issued to employers and best pregnancy/maternity practice incorporated into the 'Scottish Business Pledge' — a voluntary initiative that also includes a commitment to pay a 'living wage' and avoid zero-hour contracts.

SOUTH KOREA: The Korean Ministry of Health and Welfare has announced that it will be introducing a number of legal and procedural reforms to remove the

disadvantage faced by mentally disabled people when seeking insurance and employment. It is thought that around one third of suicides are caused by such discrimination. The focus of reforms will be on the privacy of medical records, the right to see only a general medical practitioner rather than a psychiatrist and a focus on related problems such as alcoholism and eating disorders. Once the formal measures have been introduced they will be promoted through awareness campaigns — particularly aimed at employers.

TAIWAN: Rules which restricted the right of new mothers to work at night have now been relaxed in Taiwan. Previously women could not be employed at night until at least 12 months after giving birth. Now, however, it is possible for new mothers to choose to work between 10pm and 6am as long as they have the agreement of their employer and are provided with transport to and from work, or other appropriate 'transport benefits'.

UNITED KINGDOM: The UK Supreme Court has further clarified the issue of vicarious liability in the context of an employee's conduct. As a consequence, it will now be much easier for third parties to sue a business when an employee abuses or assaults a customer. In this case involving Morrisons supermarkets, lower courts had found the company was not to blame because there was not a sufficiently close connection between the employee's wrongdoing and the duties that they were hired to perform. However the Supreme Court disagreed and ruled that even if an employee leaves their normal work location and duties their conduct remains relevant if they are engaged in serving customers.

Dates for your diary:

April 1st 2016: A new law requiring large companies to encourage the employment and promotion of women comes into force in [Japan](#).

April 1st 2016: Employers will be able to hire foreign workers in [Vietnam](#) for the first time since 2003.

April 1st 2016: The minimum entitlement to paid parental leave increases from 16 weeks to 18 weeks in [New Zealand](#).

April 1st 2016: Changes to parental leave and zero-hour contracts in [New Zealand](#) under the Employment Standards Bill.

April 4th 2016: The Health and Safety at Work Act 2015 comes into force in [New Zealand](#).

May 1st 2016: The minimum wage will increase in [Ukraine](#) to 1,450.50 hryvnias.

Latest news for business travellers:

A planned 24-hour work stoppage by immigration staff at international airports in [Australia](#) on Thursday, March 24th is likely to cause significant disruption to air travel to and from the country over the Easter period.

Workers at [Spain](#)'s rail operators ADIF and RENFE plan to take strike action on 23rd March from 12am to 11pm. The minimum rail services that will continue to run have not yet been confirmed by the Spanish Ministry of Public Works, but travellers can expect significant delays and cancellations on the day.

A series of 24-hour strikes are planned by tube drivers on the Piccadilly line of the London Underground in the [UK](#) in the coming weeks. The first strike is scheduled for Wednesday, March 23rd starting at 9pm with two further strikes scheduled for Tuesday, April 19th and Thursday, April 21st each starting from 12pm.

The short-stay visa-waiver agreement between the [European Union](#) and [Peru](#), now under the ratification procedure in the European Parliament, is being applied provisionally since March 15th. It provides that Peruvians who meet the requirements are exempted from needing a short-term visa to enter the Schengen area for up to 90 days in a period of 180 days.

Elections will be taking place in Rivers state in [Nigeria](#) on March 19th and in [Benin](#) on March 20th. Those travelling to these destinations should remain vigilant and avoid demonstrations and political rallies for safety reasons.

Travellers to [Belgium](#) should be aware that there have been a number of police raids and arrests in the Brussels region and other Belgian cities in recent weeks and further security operations could be carried out any time at short notice.

New Caledonia has been added to the list of countries and territories in the Americas noted to be experiencing on-going active transmission of the Zika Virus. The list of areas affected by this virus currently includes **Brazil**, **Costa Rica**, **Ecuador**, **Mexico** and **Venezuela**.

FedEE news:

WEBSITE IMPROVEMENTS: We are delighted to announce that the first stage of our website upgrade is now live! Our [Members' Area](#) has a **new look** and it is now possible to **search** our resources using our **new and highly-effective search function**. We also have some **new material** in our [HR Knowledgebase](#) including a brand new country section on [New Zealand](#). Furthermore, we have introduced a facility that allows members to **change their passwords online** at any time, day or night. We hope these changes will have a positive impact on your experience of using our resources. Further website upgrades will be taking place over the coming months and we will keep you informed of the latest developments.

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