#### **FedEE**

The Federation of International Employers La Federación de Empresarios Internacionales La Fédération des Employeurs Internationaux

# Dernières nouvelles

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#### **COMMENT: Mincing words**

The UK Supreme Court has sought to resolve a potential contradiction in previous rulings about the wording of contracts. In one ruling (Arnold vs Britton) it was determined that commercial interpretations should not override literal (called 'natural' by the court) interpretations. However, in another case (Rainy Sky vs K Bank), common sense business interpretations were preferred. Now, in Wood vs Capita Insurance Services, the court has concluded that either path may be taken, depending on the context of the clause. The court stated that there was a duty to consider the quality of drafting, the sophistication of the parties, the inability of one party to foresee consequences not in their interests, and also that drafting may have been a reflection of a compromise where neither party could find more precise words.

This case illustrates very clearly how legal training fails to impart linguistic skills. Much about what a lawyer is required to do involves the precise use of language, but little of their professional training involves syntax, punctuation and grammar - let alone usage of the language they have to operate within. Their historical origins as a scribe meant that language skills were once critical to their role, but as public literacy grew they altered their role so that they were the gatekeepers to the justice system. Rather than be the interpreters of language, their jargon was invented to make laws opaque to the uninitiated. Today their lack of linguistic skills is coming back to bite them and leading arbitrary, and sometimes contrary. conclusions. English is a particularly subtle and sophisticated language, with numerous apparent synonyms and antonyms and grammatical pitfalls for the unwary. There is, outside poetry, only ever one principal interpretation for any phrase or sentence. It

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does depend on context and tone. But primarily it depends on punctuation, choice of words, tense and modern grammatical usage. Things well outside the natural skill set of a lawyer – if only they knew it.

#### **BRAZIL: Troubled world of work**

Latest figures from Brazil's national statistics institute reveal that in 2015, a total of 1.5 million workers were trapped in their jobs by owing money to their employers. The most common debts related to meals, transportation to work and union fees.

Meanwhile, a Bill introducing extensive labour law reforms has passed through the Congress and is now before the Senate. This introduces changes thought necessary to attract international investment - although their removal of mandatory union dues has angered union leaders and resulted in often violent protests across the country.

In fact, the reforms will strengthen the role of unions by allowing collective agreements to replace any requirements set by the narrowly drafted Labour Code, which has been in force since it was hurried into existence by the Getúlio Vargas dictatorship in 1943. The new law will also increase the duration of temporary contracts to 120 days — with a further 120-day option. Although such workers would not be entitled to severance pay, they would have to be given pay, terms and conditions in line with permanent workers.

The proposed maximum workweek would be raised to 48 hours (inclusive of 4 hours overtime) and the maximum working day would be 12 hours. However, working time would also include travel to work time. Part-time workers will also be able to work

standard workweeks of up to 30 hours (instead of 25 hours) or 26 hours with up to 6 hours overtime. Their annual leave time will be raised to 30 days to bring them in line with full-time workers, but they will be able to exchange 10 of these days for cash in lieu of leave.

Finally, the most controversial labour reform has already passed through the Senate by means of a parliamentary manoeuvre. This concerns the use of contract labour. In the past this was only possible for functions like security and plant maintenance, but now all jobs could potentially be outsourced. The end user will also no longer be responsible for labour law violations - as these will be the responsibility of the staffing agency.

### **EU: Temporary work contracts**

Major changes are sweeping the European Union's labour market, and probably the area of greatest concern to lawmakers is temporary employment.

Last year 26.4 million people in the EU had a temporary employment contract – 14.7% of the EU's total working population. The highest incidence was in Poland (27.5%) and Spain (26.1%), and the lowest incidence in Romania (1.4%). Moreover, 43.8% of such contracts were held by people aged 15 to 24, compared to 6.9% in the 50 to 64-year-old population.

The latest reforms to be introduced are in Germany. The new Temporary Employment Act that came into force on the 1<sup>st</sup> of April 2017 seeks to combat the 'misuse' of temporary work contracts and overhaul personnel leasing. It restricts total deployment periods by a single end user to a maximum of 18 months. A few additional

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exemptions exist to the licence required by companies for the intra-group hiring of temporary workers (although the 18-month limit will now apply for all group assignments). However, the key change will be a requirement to offer temporary workers pay, terms and conditions in line with permanent workers in the end user organisation after they have been assigned in that company for 9 months. The only way that this may be delayed is through a collective bargaining agreement allowing for convergence after 15 months, or a training contract followed by progressive movements towards full parity.

Another restriction introduced by the new German Act relates to strike breaking. Once the user company is in dispute with its workforce, it may not hire additional staff until matters are resolved. Existing temporary workers in post will not be permitted to undertake any of the duties performed by striking workers.

Another recent development has arisen in Norway. Back in 2005, the Norwegian outlawed temporary Supreme Court contracts that assumed the appearance of permanent contracts. Then in March 2017, the District Court in Bergen ruled that the employment of temporary agency workers on contracts that did not offer any remuneration between assignments was unlawful. Because this case involved workers who were not guaranteed working hours, it has effectively put pay to all forms of 'zero-hour' arrangements.

Both the German statutory and Norwegian judicial reforms are interesting because neither address the critical aspect of temporary work revealed by recent official statistics. The fact that temporary work is

primarily characteristic vouth а of employment has simply not been considered. The incidence of temporary work could be almost halved if the barriers to permanent employment could be reduced - and that means removing many job protection safeguards. Practices such as zero-hour contracts are invariably considered as negative without having regard for the fact that many employees do not want to be committed to regular hours. Legislation without impartial prior analysis frequently results in unwieldy and stifling legislative constraints that may, once again, please lawyers, but sadly just stems the flow of private sector jobs.

#### **GLOBAL: Bridging the legal chasm**

It is often assumed that the law covers all areas of human activity and that, with a little research, it is possible to uncover a statute, regulation, court ruling — or at least a constitutional clause — that will lay the path to legitimate conduct. But this is not the case.

One of the empty, or grey, areas of the law is accrual of rights during an employment relationship. In most jurisdictions, an employee's holiday entitlement increases with service on a pro-rata basis during the first year. In some jurisdictions, limitations also apply to core days of annual leave that must be taken within a certain period of the year. Entitlement to a minimum of 4 weeks leave is also guaranteed in the European Union (EU) Working Time Directive.

In the EU it took many European Court of Justice cases to clarify the accrual of annual leave rights during maternity and sickness leave, but what about paternity leave, parental leave, adoptive leave and sabbaticals? Furthermore, what about other

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rights that accrue during an employment period – such as employment protection, rights to redundancy compensation, pension rights and benefits that come with seniority? At a more fundamental level, what about opportunity costs? If someone takes time off at a critical age then promotional opportunities may pass them by. Is there such a thing as accrued work opportunities?

There is, of course, always an option to build in such rights to an employment contract or incorporate them into a collective agreement. But employers are hardly likely to welcome the added costs and administrative complexity of recording and according these rights. So where do we currently stand?

In the European Economic Area we have Pereda v Madrid Movilidad (ECJ 2009). Here a worker who was sick during a scheduled holiday period claimed the right to take their time off (including public holidays) when they had returned to work. In another case (ANGED v FASGA), this right was extended to where an employee became sick whilst taking leave. In 2009 we have HMRC vs Stringer. This confirmed that annual leave entitlement could not be lost because of sickness absence (although the UK House of Lords curiously found that annual leave could coincide with holiday leave). Then, finally, we have KHS AG v Schulte, which set a limit to holiday carryover at 15 months. But we have yet to find an ECJ case that truly deals with accrual per se - where holidays increase with service. Neither have we challenges to the denial of rights - as in Portugal - where additional holiday entitlement is geared to good attendance. This would appear to run against the spirit of Stringer et al.

In respect to maternity, the ECJ case Merino Gomez v Continental Industries del Caucho SA established that during a period of maternity leave, entitlement to annual leave continues to build up in the same way as if the employee had been at work. But Gomez only applied to statutory leave entitlement, so any additional leave due to an individual contract or collective agreement is not yet established at law.

Parental and adoptive leave may be seen to be subject to the Gomez ruling, but so far no specific connection has been applied to make a clear legal precedent. In the UK, Parental leave does involve an accrual of annual leave entitlement – but only in respect statutory leave. In Hungary employees accrue leave for up to six months if they continue to look after their child after maternity leave and they remain in employment. But in the Czech Republic accrual of annual leave does not occur during additional parental leave. In fact, it is specifically reduced in line with additional leave taken.

Turning to further afield, in Singapore accrual take place during parental leave, but in Australia an employee does not accumulate paid leave whilst they are on unpaid parental leave, or whilst receiving paid parental leave scheme payments.

The right of accrual during sabbaticals is denied by most jurisdictions unless, as in the Czech Republic, it is associated with the taking of specific examinations. In the UK - where ECJ rulings are generally interpreted in a broader context - an employee who remains employed during an unpaid sabbatical could still claim accrued holiday benefits on their return. To overcome this, it

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would be necessary to carefully draft a sabbatical contract to make holidays an integral part of the time-off period, although it still begs the question whether the courts would support a claim for payment in respect to concurrent holiday periods during a sabbatical.

#### **GLOBAL: Smoking whilst driving**

One place where privacy would seem to be sacrosanct is your own private car, but smoking bans in private vehicles are becoming more prevalent across the world. So far only Mauritius applies a general smoking ban to private vehicles. All other countries, such as Australia, Cyprus, France and Scotland, apply them when the car contains children or young people. But a new wave of legislation is on its way in proposals currently before parliaments in Greece, Israel and Taiwan.

Much of the safety concerns about smoking in vehicles is the fact that lighting up is itself a distraction; a lit cigarette falling onto someone's lap is likely to cause panic by a driver and discarded cigarettes can pose a fire risk. For employers the issue is important because employees frequently give lifts to work colleagues and also use private cars for driving to meetings with clients and suppliers. This poses a health risk to smokers and passengers and leads to unpleasant odours on clothes.

In the UK, regulations exist concerning smoking in all company vehicles. The regulations differ in Scotland and Northern Ireland, but in England and Wales the rule is that a clear 'No Smoking' sign of 75mm diameter must be prominently displayed. The only exempted vehicles are company cars only ever used by one person and private

cars used occasionally for business purposes.

Although there have not yet been any reported challenges by fellow employees, there remains the possibility of complaints (and even litigation) concerning smoking in cars used for business purposes in any country where a workplace smoking ban exists. Moreover, at least three countries -Finland (2030), New Zealand (2025) and Sweden (2025) have national targets to end all smoking. In most cases such bans apply equally to e-cigarettes, although consequence unintended is the risina incidence of Marijuana and other drug consumption in countries with tight smoking bans.

### Pay, Tax and Benefit Trends

CAMBODIA: A national minimum wage in Cambodia has been in existence since 1997. However, it has always lacked a clear mechanism for wage determination, with timeframes established or а assessment of the cost of living. Last year the government proposed the establishment of a new universal national minimum wage system. However, they have still not acted on the proposal. This is perhaps due to the wide-scale concerns about two clauses in their draft Bill that outlawed the surveying of wage rates without government approval and a ban on all protests concerning the chosen wage. The Labour Ministry continues to claim that it will be introducing the revised wage date has vet been system. but no announced. Currently minimum rates are only fully recognized in the garment and footwear sector where the minimum monthly wage rose this year to US\$153 a month.

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CANADA: According to Statistics Canada, the average weekly earnings of non-farm payroll employees in the country were \$968 (US\$709). This was achieved by working an average of 32.6 hours per week (February 2017). Compared with February 2016, average weekly earnings rose in three of the ten largest economic sectors – healthcare and social assistance, manufacturing, and professional, scientific and technical services. Over the same period, average weekly earnings of non-farm payroll employees rose in seven provinces, led by Newfoundland and Labrador.

**ESTONIA:** In October 2016, the average gross hourly earnings – without irregular bonuses and premiums – were 6.04 euros (US\$6.57) for female employees and 7.63 euros (US\$8.30) for male employees. Overall, the average gross hourly earnings of female employees were 20.9% lower than the average gross hourly earnings of male employees although the gender pay gap decreased by 1.3% compared to the previous year.

### Other Global HR News in Brief

AUSTRALIA: When lower paid workers in Australia are in dispute with their employer, they often turn to one of the country's 190 community legal centres where they can obtain free legal advice. The national government announced last year that one third of the budgets for these centres would be cut this July - but this decision has now been revoked. The state government in New South Wales has even decided to increase its spending on such centres.

CHINA/USA: Official data shows that in China 3.34 million new jobs were created in the first quarter of 2017 and that the Chinese unemployment rate fell to 4%. Meanwhile, employment in Chinese-owned firms in the USA grew by 46% in 2016 - to 141,000. Chinese investment in the USA last year more than trebled to US\$46bn. In fact, the more that the US administration seeks to rectify the trade balance with China, the more China will switch its production not only to the US itself - but to other low-cost production centres such as Cambodia and Bangladesh.

EGYPT: President Abdel Fattah Al-Sisi is pressing Egypt's parliament to progress a new Labour Code and Trade Union Law. These draft measures set new rights, such as an entitlement for women to take three months' 'birth leave' (compared to four months in the public sector). However, after six years of debate, the substance of the reforms still remains a mystery. Likely changes include the removal of collective bargaining rights and a facility to fire at will. It is also probable that all rights to strike will end - reflecting the reality of the last year when hundreds of workers have been arrested and 2,691 workers professionals have lost their jobs for taking part in peaceful protests.

EUROPEAN UNION: Although the maximum permitted length of temporary border controls within the EU Schengen zone is 18 months, many countries have now been operating controls since the Autumn of 2015. Now Dimitris Avramopoulos, the EU Commissioner responsible for implementing Schengen rules, has woken up to the infringement and, although beyond his powers, has given all countries with controls

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in place a further six months to open up their borders. Sweden has already announced that it will be removing controls shortly and Germany may relax controls across its southern borders this Summer.

**EU/USA:** The European Commission has decided that the EU will not be imposing visa requirements on US citizens. This is in spite of the continued insistence by the US immigration authorities that citizens of five EU member states apply for full entry visas ahead of any trip to the United States.

**GERMANY:** The lower house of the German federal parliament has given way to pressure from right wing populist parties by passing a ban on the wearing of the full face-covering burga and nigab by civil servants, judges and the military. The decision has still to be ratified by the upper house of parliament and does not affect the wearing of the hijab or Muslim headscarf. This is largely a symbolic gesture in a country where few non-Christian women wear religious dress in public. It also falls short of the complete public bans on dress both Belgium in France. Germany's constitutional court has also previously ruled that "in a society that gives space to different religious beliefs. individuals do not have the right to be shielded from professions of faith by others".

**INDIA:** Although the Rights of Persons with Disabilities Act was approved by the national parliament last December, its implementation has been frustrated by poorly coordinated ministerial actions. On the 10<sup>th</sup> of March, detailed regulations concerning the Act were posted for public comment, then on the 13<sup>th</sup> of April they were sent to the Justice Ministry for final approval. But the notification about commencement of the Act had not been

published – so it was rejected. The Social Justice and Empowerment Ministry therefore had to start again with notification of commencement in the official Gazette on the 19<sup>th</sup> of April. There is now a further period of public consultation with expected implementation by the end of May.

ITALY: A Bill liberalising the Italian market in a fundamental way has passed through the Italian Senate and must now complete its second reading in the Chamber of Deputies before becoming law. This measure opens ownership of pharmacies companies rather than be confined to individuals or cooperatives, and allows nonlawyers to take a stake in law firms. Switching telecommunications suppliers will get cheaper and easier, and employers will be able to enter into agreements about the allocation of severance payments to pension administered bν unions schemes professional associations.

**KURDISTAN (IRAQ):** A 5% regional income tax is now payable by employees in the private sector. Those not registering or paying on time will be fined 75,000 IQD (US\$63), and a further 5% on incomes will be payable as a penalty.

LIBERIA: The Liberian President, Ellen Johnson Sirleaf, has submitted a Bill to the House of Representatives seeking an amendment to Section 6.1(5) of the aliens and nationality law of Liberia, title 4. This would remove the need for foreigners living in Liberia to re-register their work and residence permits with the authorities each year and to meet other bureaucratic requirements. It would also provide (as yet undisclosed) advantages to those foreigners who are married to Liberian nationals and

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have made substantial investments in the country.

MALAYSIA: The new Malaysian Employment Insurance Scheme (EIS) is likely to be introduced later this year, with first payments due from January the 1st 2018. It will be administered by the Social Security Organisation (Socso) and will principally serve to handle the payment, job search and re-training of redundant workers. It will be supported by a contribution of 0.5% of salaries, with payments split evenly between employers and employees.

MEXICO: Audi's new plant in San Jose Chiapa has now been in operation for seven months, but its 4,000-strong workforce are in dispute with their union over a deal they claim gives them only an average of US\$15 a day and none of the usual bonuses and benefits that are typical in the auto industry. The Independent Union of Auto Workers has offered to step aside if 66% of the workforce vote for them to stop representing them, but meanwhile the company is disputing that it is offering an uncompetitive reward package.

ROMANIA: The new law (16/2017) on the "posting of workers for the delivery of transnational services" will come into force on May the 20th 2017. This requires foreign employers to notify the Romanian Labour inspectorate (Inspectia Muncii) one business day before they dispatch a posted worker to Romania. The law guarantees workers posted between Romania and another EU state (plus Switzerland) basic terms and conditions that are the most generous on offer by law or sectoral collective agreement in either state. Wages, holidays, working time and related data must also be held by posting companies for three years after the

posting has taken place. Companies not established in the EU (including Switzerland) that post employees to Romania must only comply with standards set by Romanian law.

SOUTH KOREA: The election of Moon Jaein as President ushers in a new era of liberal politics in South Korea, just as threats from the north grow over the deployment of the THAAD anti-missile defence system. Moon promised to root out the corruption of the former government and "close links between government and big business". However, his party lacks an overall majority and one of the best supported minority contenders in the election was the Justice Party - which is committed to rewriting anti-discrimination legislation to uphold the rights of minorities. Other policies that may come to the fore over the next five years are the combatting of youth unemployment and a significant improvement in the minimum wage.

SAUDI ARABIA: King Salman has signed a Royal Decree allowing women to perform certain, as yet unspecified, public duties without permission from a male relative. Although women can now officially work without male consent, they still cannot drive a car unless they have written permission from their guardian. Women remain subordinate to men and it remains unclear how far the decree will remove their subordinate status.

**UAE:** Indian nationals who hold a valid US visa or a green card may now obtain a two-week UAE visa on arrival in the country, with a single extension possible for a fee.

**UNITED KINGDOM:** Early Brexit talks between the EU Commission President, Jean-Claude Juncker, and UK Prime Minister,

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Teresa May, have not gone well. The EU wants the UK to pay a 92bn euro (US\$100bn) exit fee and is refusing to discuss any other matters until this financial matter is settled. The pawns in this game are also UK expatriates living in the European Union. Their position could be adversely affected if the UK refuses to settle the EU divorce bill, but settlement in line with current demands would also bankrupt the UK - just as a weakening city finance sector is tipping its balance of payments heavily into the red. The answer, of course, would be to declare UDI and stop all negotiations with the EU. There is little the European Commission could do as individual EU member states would be unlikely to support a trade embargo of the UK or apply heavy trade tariffs.

UNITED KINGDOM: The UK government has temporarily dropped provisions in the Finance Bill concerning the tax treatment of termination payments. This was to enable the Bill to be passed before Parliament was dissolved ahead of the forthcoming General Election in June. It is still likely, however, that the intended discontinuation of the £30,000 exemption for dismissal in lieu of notice (where there is no PILON clause) will still take place as intended in April 2018. The legislation to bring this into effect will undoubtedly be introduced this Autumn, whoever wins the election. The proposal does not only tax such payments, but also requires employers to pay social security contributions on the entire sum.

### **Dates for your diary:**

May 28<sup>th</sup> 2017: Italy referendum on labour issues

June 05-17<sup>th</sup> 2017: ILO Annual Conference

July 1<sup>st</sup> 2017: California employers will be obliged to inform their employees about domestic violence protection rights

July 18<sup>th</sup> 2017: Caste discrimination consultation ends in the UK

October 22<sup>nd</sup> 2017: Federal elections in Germany

**April 4<sup>th</sup> 2018:** First report under Equality Act 2010 (Gender Pay Gap Information) Regulation 2017 submission by **United Kingdom** employers

May 25<sup>th</sup> 2018: Final effective date for EU General Data Protection Regulations



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### **Travel Warnings**

**BURUNDI:** Higher numbers of malaria cases than expected have been reported in all of the country's 18 provinces. The nine provinces—Gitega, Kirundo, Muyinga, Karusi, Kayanza, Ngosi, Ruyigi, Cankuzo and Cibitoko—have been especially hard-hit.

**CANADA:** Flooding in Quebec is likely to return in the central part of the province later today because of more heavy rain.

**CHINA**: An earthquake has struck Taxkorgan county, a mountainous area that borders Tajikistan, Afghanistan and Pakistan in the Xinjiang region. Eight people are reported dead and local communications severely disrupted.

**FRANCE:** All parts of the country can expect severe storm conditions today. Orange alerts are placed on Ain (01), Isere (38), Rhone (69), Savoie (73) and Haute-Savoie (74).

**GREECE:** The General Confederation of Employees of Greece (GSEE) and the civil servants' union federation ADEDY — between them representing the majority of Greece's unionized workers are to hold a 24-hour general strike on the 17th of May. Public transport and ferry schedules may be affected.

**INDIA:** Engineering works on different sections of the East Coast Railway and the South East Central Railway zones will pose problems for passengers in Odisha, Chhattisgarh and Andhra Pradesh until the 15th of May.

**ITALY:** Passengers are advised to check the status of flights before departure on the 12th May 2017, as a nationwide strike of airport staff has been announced to take place tomorrow. Affected are the airports Fiumincino and Ciampino in Rome, the airports in Bologna and Turin – as well as the airlines Alitalia and EasyJet. In a further development, Venice Treviso Sant Angelo Airport will close to all traffic from the 4th to 18th of October due to resurfacing works.

**NIGERIA:** It's been reported that militant Islamist group Boko Haram is actively planning to kidnap western foreign workers in the Bama Local Government Area of Borno state, along the Kumshe-Banki axis.

**PORTUGAL:** Security staff are planning strike action at Portuguese airports from the 13th to 17th of May. Travelers should expect delays whilst going through security control and the checking-in of luggage.



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**SOUTH KOREA**: All visits to South Korea should be only on a strictly "as need" basis – due to the recent buildup of tensions along the border with the North and prospects of devastating military conflict at any time.

**TUNISIA:** Due to the threat of terrorism, travelers should avoid travel to southeastern Tunisia along the Libyan border, as well as certain mountainous areas in the country's west.

**UNITED KINGDOM:** The A505 trunk road is currently closed eastbound towards Hitchin after a car overturned this morning. The A127 road is blocked and there is is queuing for almost 11 miles between Southend and Basildon following another car crash.

**UKRAINE:** Kyiv Zhuliany International Airport (IEV) will be closed to all traffic from the 14th to the 24th of May due to runway reconstruction. All affected flights will be operated from Boryspil International Airport (KBP) for the duration of the closure.

**UKRAINE:** Visitors should avoid political demonstrations and take extra care during large public gatherings. The country is currently in a very volatile state.

**USA:** Virgin America is moving from Terminal 3 to Terminal 6 at Los Angeles International Airport (LAX) on May the 12th, 2017. Passengers should call the airline for further information.

**VENEZUELA:** Travelers this month are advised to avoid protests, particularly in the country's capital. Many people have been injured and there is a danger of arrest, even of bystanders.



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INDONESIA, PHILIPINNES, USA FEDERAL AND CALIFORNIA: Knowledgebase entries are currently being prepared for these jurisdictions and will be posted into our members' area in the next few weeks.

**EMPLOYMENT LAW PROGRAMME**: The latest addition to our online law programme presentations covers, hiring, working time and termination in India. The next videos in our new series of online audio-visual briefings will cover Germany and the USA.

FELLOWSHIP MEETING: Our next round table meeting in London will take place on Friday, June 16<sup>th</sup>. We have selected an interesting new venue which fronts the river Thames. There will be a wide range of highly relevant topics that we have selected from the issues raised by members over the last six months. Discussions will be led by our Secretary-General and FedEE's new head of legal research, Vasiliki Filippou, who is a qualified practicing Barrister with an LLM in International law. If you are not a Fellow, but would like to attend then please contact our Membership Secretary, Julia Zhu (membershipsevices@fedee.com) for further details.

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