International Employment Law Alliance

Around the World in 60 Minutes

A Rapid Fire Look at the Hot Employment Law Developments Around the World

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Innangard

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Termination of Employment Contracts in China

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1. The importance of the issue

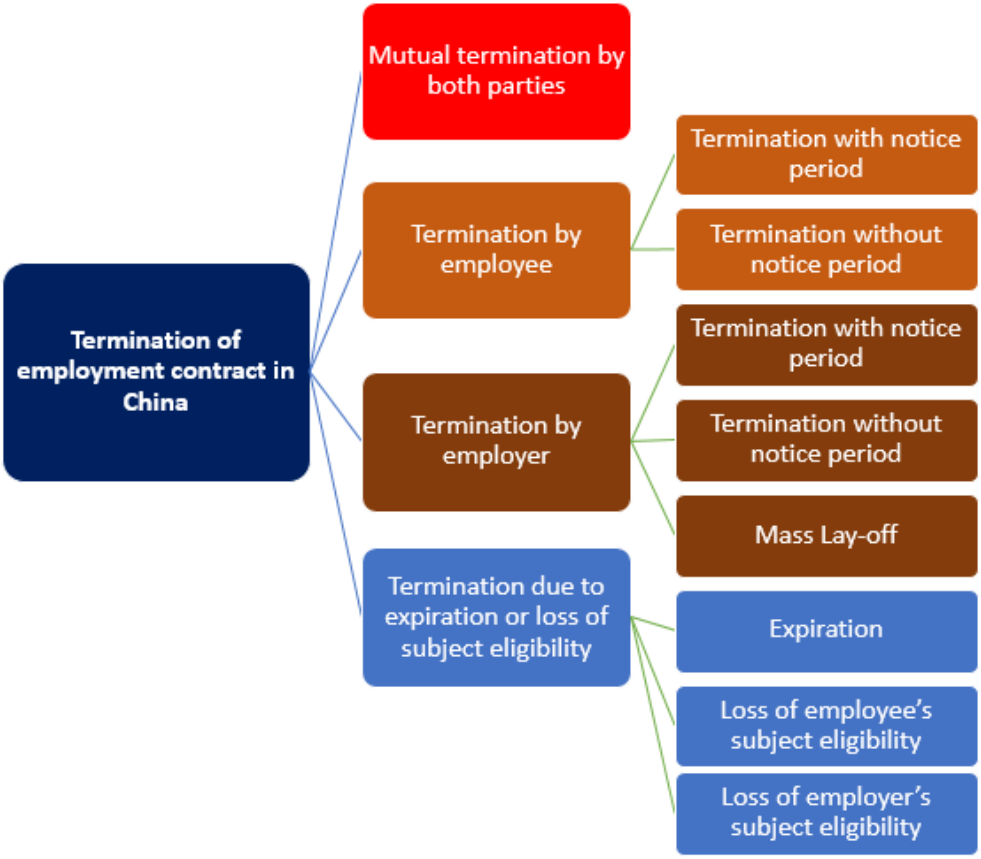
1.1 Employment contracts other than collective agreements play the leading role in China.

1.2 Termination of employment contracts is the main pivot of balance between security and flexibility of employment.

1.3 The importance of termination of employment contracts grows significantly with the extensive mandatory application of open-ended employment contracts in China and the downturn of the global economy.

1.4 Most labor disputes in China arise out of termination of employment contracts.

2. A whole picture of the termination of employment contracts in China:



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3. The statutory causes for each type of termination

3.1 Mutual termination by both parties: Cause is not required.

3.2 Termination by employee

3.2.1 Termination with notice period of 30 days: Cause is not required.

3.2.2 Termination without notice period: Cause is required and is based on employer's serious breach of employment contract, for example, failing to pay timely the full amount of remuneration.

3.3 Termination by employer

3.3.1 Termination with notice period of 30 days: One of the following causes is needed:

a. The employee is sick or is injured for a non-work-related reason, and is unable to take up his or her original post after the expiration of his or her prescribed medical treatment period, nor is he or she able to take up another post assigned by the employer;

b. The employee is incompetent to his or her post, and is still so after being trained or being transferred to another post;

c. The objective circumstance on which the

conclusion of the employment contract is based has changed so considerably that the employment contract has been unable to be performed. Moreover, no agreement on the amendment to the employment contract can be reached after negotiation between the employer and the employee.

3.3.2 Termination without notice period: One of the following causes is required:

a. It is proved that the employee does not meet the recruitment conditions during the probation period;
b. The employee severely violates the employer's labor rules;
c. The employee causes severe damage to the employer because of his or her serious neglect in duty or malpractice;
d. The employee simultaneously establishes an employment relationship with other employers and may seriously affect the performance of his or her own job, or he refuses to make a correction though the employer has pointed it out;
e. The employment contract is invalidated due to the fact that it is concluded or amended by the employee's deception, coercion or taking advantage of the employer's jeopardy and thus in contrary to the employer's true will;

f. The employee is subject to criminal liabilities in accordance with the law.

3.3.3 Lay-off: Cause is required and must be under the objective economic circumstance on which the conclusion of the employment contract is based has changed so considerably that the employment contract has been unable to be performed. As a matter of fact, it is rare for employers to be able to use this provision of lay-off to cut down the number of employees due to the passive attitude of the labor administrative department towards lay-off.

3.4 Termination due to expiration or loss of subject eligibility

4. Legal remedies for illegal unilateral termination

4.1 Illegal termination by employee: The employee should compensate the employer for the loss caused by the illegal termination.

4.2 Illegal termination by employer: There are two options:

- Reinstatement + back pay, if the employee requires so; or
- Compensation (2 months' wages per year of service with caps in some cases), if the employee does not require reinstatement, or the reinstatement is not feasible.

5. Some recent arguments on the issue

5.1 Whether the causes for termination by employer are over strict?

5.2 Whether the causes for termination by employer are too abstract or general?

5.3 Whether the remedy of reinstatement should be applied in a narrower way?

5.4 Whether the employee's legal responsibility for illegal termination should be increased?

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The Protected Disclosures Act 2014

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1. What is the Act?

The Protected Disclosures Act 2014 (the "Act") came into force in Ireland in July 2014 to protect whistleblowers from any retributive actions by their employers and others.

2. Whom does the Act Protect?

The Act protects workers in both public and private sectors and a worker includes employees, contractors, trainees and agency workers.

3. What is a Protected Disclosure?

A protected disclosure is a disclosure by a worker of **'relevant information'** through a specified disclosure channel. Relevant information is information (actual information and not just opinion/value allegation) which the worker reasonably believes tends to show one or more **'relevant wrongdoings'** and which came to his/her attention through his/her employment. The Act provides a wide definition of **'relevant wrongdoings' which includes**:

- an offence that has been or is likely to be committed;
- a failure to comply with legal obligations (excluding under a contract of employment or contract for service);
- a miscarriage of justice has occurred/is occurring/is likely to occur;
- health and safety of an individual has been, is being or is likely to be endangered;
- the environment has been, is being or is likely to be damaged;
- unlawful/improper use of funds by a public body;
- gross mismanagement/oppressive or discriminatory or negligent acts or omissions of a public body.

The minimum requirement for making a protected disclosure is that the employee **reasonably believes** the information to be substantially true. The employee's motivation is irrelevant to whether a disclosure is a 'protected disclosure' but will be taken into account in any unfair dismissal award (award may be reduced by up to 25%).

4. Is an Employee Grievance a Protected Disclosure?

Possibly – e.g., in the context of a grievance for bullying on the basis of the obligation to provide a safe place of work. There is no public interest element required by the Act (unlike in the UK). However, an employee's grievance in relation to their terms and conditions would not constitute a protected disclosure. Also, a

disclosure of information where it is that person's job to disclose the information will not constitute a protected disclosure.

5. To whom must a Protected Disclosure be made?

Workers are encouraged to bring the information to **their employer** in the first instance. Alternatively, they may disclose to a prescribed person i.e. **Ombudsman, Data Protection Commissioner, Minister, legal adviser or, at the outside, the Media.**

6. What are the Protections?

Penalisation

Workers who make a protected disclosure are protected from dismissal and/or other penalisation (potential compensation of up to 5-years where a worker is dismissed). There is no minimum service requirement before they can avail of this protection but there must be a causal link between the disclosure and the detriment suffered.

Interim Relief

Employees may also apply for an injunction pending the hearing of unfair dismissal proceedings, by which they receive salary while awaiting the hearing. If the Court decides that the employee has **substantial grounds** for granting interim relief, then it can invite the employer to say whether it is willing:

- to re-instate the employee; or, if not

- to re-engage the employee in another position on terms and conditions not less favourable than those which would have been applicable to the employee had he/she not been dismissed.

The employee can object to either option and, if the Court thinks the employee's objection is reasonable, it can (in effect) order garden leave until the employee's unfair dismissal claim is heard.

Other relief and immunities

Outside of the employment context, makers of protected disclosures also get immunity from civil liability, except in respect of defamation where they still get qualified privilege. They can also bring a tort action for suffering detriment (coercion, intimidation, harassment) because of making a protected disclosure, and it affords them a defence in criminal prosecution.

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Smart working: The current Italian situation

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What is state-of-the-art in Italy compared to Europe and USA?

According to research undertaken by the Polytechnic of Milan, there are about 250,000 workers in Italy who use the smart working methods to perform their duties. That number represents about 7% of the national workforce. Smart workers are located mainly in the north of Italy, with an average age of 40, and they are mostly women.

According to those figures, Italy is still at the tail-end in Europe both in terms of employees who choose to work from home (on teleworking) and smart workers who work anywhere by using new technologies.

The European countries that currently make the greatest use of these types of flexible working are: Denmark (around 37%), Sweden, the Netherlands, the United Kingdom, Luxembourg, and France.

Italy is at the end of the list after Germany, Portugal, Hungary, Poland, the Czech Republic, and Greece.

In any case, the European average is 17%, and it is low if compared with USA average which seems to be 37%.

The fact that the percentages for teleworking and smart working in Italy are amongst the lowest seems to be a negative and surprising factor.

In fact smart working aims to:

- innovate and increase efficiency, competitiveness and work rate;
- reduce costs (in terms of workstations, lighting, heating, canteens, cleaning, commuting, etc.) and allow companies to enter the market with their services at an ever lower and more competitive cost;
- reconcile the individual needs of the workers with those of the companies. Smart working is characterised by a very flexible nature (both in terms of workplace and in terms of working hours) and it gives the workers the opportunity to organise themselves and conciliate their working hours with their private life, family and friend relationships.

The utilisation of such working methods would then be of great importance in a country such as Italy, which is rapidly ageing and in which the number of workers needing to take care of elderly parents is increasing considerably.

What are the main provisions of the recent Italian Law N. 81/2017?

The law relating to smart working had been the object of study for several years: the first draft law was presented on 29 January 2014.

Since 2014 nothing has happened until 2017, the year in which, finally, the first real law (Law 81/2017) on smart working has been issued. Such law entered into force on 14 June 2017.

Law 81/2017 requires, prior to the adoption of smart working, a written agreement, between employer and employee, which must have the following contents:

- **Duration:** the agreement may be for a fixed term or permanent (non-fixed term).
- **Termination** is possible with at least 30 days' notice (90 for disabled workers) for permanent agreements or on justified grounds. Fixed-term agreements may be terminated before their natural expiry only on justified grounds.
- **Remuneration:** equality of treatment compared to other colleagues.
- **Hours of work:** equality of treatment compared to other colleagues and the application of working hour limits as provided for by current law and collective contract. It must define which days of the week are to be worked in a smart way, and can also state various periods of availability or the need for the worker to at least be contactable (while not guaranteeing actual performance)

during normal opening hours of the company's office. Overtime work should be always forbidden in that it can be difficult to measure it and it is a contradiction in terms as far as smart working, a by-word for flexibility, is concerned.

- **Technologies:** it must indicate the technologies to be used and the "*the worker's right of disconnection*" (that is the right of the employee at the end of the day to disconnect without the employer being able to oppose or object to this in any way). Every smart working programme must in fact provide for a fair balance between the work life and private life of the employee.
- **Controlling and disciplinary powers**: it must state the means of exercising the employer controlling and disciplinary powers on working activities outside the office, and what smart worker's conduct would give rise to the application of disciplinary measures.

It is important that the agreement also provides for:

- **Training -** a smart worker must be trained:
  - in the correct utilisation of work time;
  - on how working activities outside the office can impact on private life;
  - on security at work and collaboration with the employer on this.
- **Incentives:** provision of a proper system of incentives to reward performance measured via a Performance Appraisal System is fundamental.

- **Technology**: it must state that the company places all the technological means necessary at the disposal of the worker, which thus means a mobile telephone, computer, email, antivirus systems and all other informatics that the worker may utilise in performing this working activity.

Are Trade Unions involved?

The involvement of Trade Unions is not required by the law.

However, the adoption of smart working is often preceded, though not a strict requirement, by the signing of agreements with Trade Unions on the issue.

The involvement of Trade Unions, also through their workplace representatives (termed RSAs), can in fact prove useful in guaranteeing smart workers further and more detailed rules than those conditions (which in truth are minimal) set out by Italian law, and establish objective methods and procedures of selection of personnel allowed the chance to choose a smart working option.

The biggest companies that have set up a smart working programme up to now (Bayer, Siemens, Ferrovie dello Stato, Enel, TIM, Vodafone, Ferrero, Barilla, etc.) have involved Trade Unions, by signing union agreements on the issue to establish more detailed rules on the way to best achieve this mode of work.

Does smart working also involve other legal aspects, such as Privacy and Remote control provisions?

It is important to remember that an efficient monitoring system of the results obtained by the smart worker is fundamental.

This monitoring activity involves privacy and remote control aspects.

First of all, for the purpose of validly effecting such monitoring without violating the Italian legislation on the **remote control of workers** (Article 4 of Law 300/70 as recently amended), smart workers must be given a specific document indicating which technological devices will be at their disposal and what controls the employer will be able to put on these devices.

As for the **protection of privacy** aspects (Legislative Decree n. 196/2003), it must be said that the Italian Data Protection Authority set forth specific obligations and limitations on an employer, some of which are:

- An obligation to provide the worker with detailed information on the means of use of the internet and email and the possibility that controls on these will be carried out;
- A ban on the systematic reading and monitoring of email and web pages visited by the employees;
- The adoption of specific measures aimed at preventing the risk of improper use, thus reducing subsequent monitoring (for example prohibiting the access to sites on a blacklist, without registering attempts at access);

- With regards to email, in case of prolonged and planned absences (e.g. holidays), the provision of automatic replies to clients with an indication as to the period of absence and a colleague who may be referred to, or, in the case of unplanned absences (e.g. illness), the designation of a colleague authorized to access the relevant email account.

It goes without saying that, in the case of smart working, which involves the possibility of working anywhere, employees will be required to have particularly diligent conduct, both in terms of custody of technological devices and in the retention and confidentiality of data.

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What are the consequences for employers if Catalonia breaks Away from Spain?

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Background

The Spanish transition of democracy began shortly after Francisco Franco's death. In 1978 the Spanish Constitution was passed. A few years later Spain joined the European Economic Community.

At the same time, on the 18th September 1979 the Statute of Autonomy of Catalonia was promulgated.

On the 30th September 2005 the Catalan Parliament approved a revised version of the Statute of Autonomy, with the support of Catalan political parties.

The Central Government lead by the "*Popular Party*", colloquially known as the "*PP*" did not support this decision. Therefore, the approval of the Statute of Autonomy was taken to the Congress, in compliance with the provisions set forth in the Spanish Constitution.

After many modifications to the regulatory body of the Statute in Congress, on the 18th June 2006 a referendum was held. The question asked was "*Do you approve of the Statute of Autonomy of Catalonia Bill?*" The voter registration ascended to a total sum of 5,310,103 people out of which 2,433,639 voters participated. There was a turnout of 48.85% voters from which, 78.07% were in favour and 21.29% were against.

In July of 2006 the PP presented an appeal based on Constitutional Law, challenging 128 articles of the Statute of Autonomy.

The Court ruling regarding this matter was submitted four years later, in June 2010. The ruling contained 881 pages and declared that there was no legal effectiveness in the declaration of Catalonia as a Nation.

In December 2015 general elections were held in Spain, the PP won with small margins, as other political parties rose such as *Ciudadanos,* a central right-wing party and *CUP*, *Junts pel Si* and *Podemos*, left wing parties, strong defenders of Catalonia's Independence.

Today, the Congress distribution is as follows: majority of left-wing parties. Such distribution was used to pass the Referendum Law on Self-Determination on the 6th September 2017, with 72 votes in favor, 52 against and 10 abstained. This Law was immediately suspended by the Spanish Constitutional Court. The day after, on the 8th September 2017 the Law of Juridical

Transition and Foundation of the Republic was passed in Parliament, with 71 votes in favour, again suspended by the Spanish Constitutional Court.

The Catalan Parliament convoked a referendum on the 1st October 2017, regarding the right to self-determination as an Independent Republic, on the grounds of the provisions set out in the Referendum Law on Self-Determination, despite being suspended. The referendum was held with no guarantees and the results were published on the 6th of October: a turnout of 43.03% voters out of which 89.29% voted yes (2,020,144 people) and 10.71% voted no (176,565 people).

On the 10th October 2017 the president of the Catalan Parliament, Carles Puigdemon claimed Catalonia as an Independent Republic, but suspended the effects of the independence, with the objective of reaching an agreement or mediation with the Central Government. On the 27th of October of 2017 the Catalan Parliament declared Catalonia as an Independent Republic.

In response to this declaration, the Central Government dissolved the Catalan Parliament and convoked regional elections, to be held on the 21st December 2016, on the grounds of article 155 of the Spanish Constitution.

1. Who has the right to self-determination under international law?

There is a distinction between the right to self-determination and the right to secession. International law is largely silent regarding secession as, on one hand, the international community seeks to protect the integrity of States and to discourage division but, on the other hand, the community has an interest in protecting the human rights of minorities and preventing outbreaks of civil war over secessionist claims.

Who has the right to self-determination? In certain circumstances, the right to self-determination may include the right to secede. For this, there are three requirements:

a) They must be a people. Characteristics that define a people are common history, common racial or ethnic identity, linguistic unity, common religion or ideological affinity, territorial connectedness and a common economic life.
b) They must be oppressed.
c) They must have been a Colony.

Under domestic Law, and in broad terms, secession can also be obtained through (a) an agreed secession; (b) through Constitutional provisions, if any and (c) in most cases, through a Unilateral Declaration of Independence legitimated by the people, via democratic referendum.

2. Legal Context – Other Examples (Independency Processes Since World War II)

a. Kosovo: independence in the context of war and the role of International Law

Throughout the 1980s, the ethnic tensions in Kosovo worsened. Kosovo Albanians started a separatist non-violent movement which lead to the proclamation of the *Republic of Kosova* as an Independent State in September of 1992, coinciding with the time of the Bosnian War, which took place between 1992 and 1995. Crimes against humanity and war crimes were committed, putting Kosovo in a ruptured social and violent context.

In 1999 the UN Security Council placed Kosovo under transitional UN administration, commonly known as UNMIK. In 2007, UNMIK proposed a supervised independence of Kosovo, backed by the US, UK and other European members of the Security Council and refused by Russia and Serbia. In November of 2007, Parliamentary elections were held in Kosovo and on the 17th February 2008, Kosovo officially declared independence from Serbia. As of 27th February 2017, 111 UN States recognise Kosovo's independence, except for Serbia. Today, Kosovo has become a member of international institutions such as the International Monetary Fund and the World Bank, though it is not part of the United Nations.

On the 8th October 2008 Serbia requested the International Court of Justice to render an opinion on the legality of Kosovo's declaration of independence, which was submitted on the 22nd July 2010, holding that Kosovo's declaration of independence was not in violation of International Law because the right to self-determination and subsequent secession under International Law was respected. What's more, the Court's ruling stated that there is no provision under International Law that forbids unilateral declarations of independence.

Self-determination under International Law can be carried by (a) People; (b) when they are oppressed and (c) if they are a Former Colony. When there are no other effective remedies under both International and Domestic Law, secession in these circumstances is legitimate.

- Kosovo's declaration of Independence was done in a context of threat to international peace and security.
- The state from which Kosovo was seceding, Serbia, seriously violated their human rights. As mentioned previously, there is a past of war crimes and crimes against humanity (the people were oppressed).
- Kosovo is a former Colony.
- The secessionists are considered "*people*".
- While Resolution 1244 does not allow Kosovo's independence without Serbia's agreement, the truth is that when Kosovo stopped being solely under Serbia's sovereignty and was administrated by the UN's

international administration, Kosovo's declaration of Independence became accepted by the International Community, on the grounds of the circumstances in which it was declared.

b. *Slovenia: a peaceful referendum.*

An independence referendum was held in the Republic of Slovenia on 23 December 1990. In said referendum, the voters were asked the question "*Should the Republic of Slovenia become an independent and sovereign state*?" The turnout was of 93.5% of the electoral register, out of which 88.5% voted yes and 4% voted no.

The Slovenian Parliament set a threshold for the validity of the referendum: 50% plus one of all electors. The referendum exceeded the threshold. Independence was declared and on June of 1992 the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia was passed.

c. *Scotland: independence fails though referendum*

On the 18th September 2014 a national referendum was held in Scotland. The voters were asked to answer either "Yes" or "No" to the following question: "*Should Scotland be an independent country?*". The turnout was of 84.5% of those registered to vote, out of which 44.7% voted yes and 55.3% voted no.

Nicola Sturgeon, the leader of the Scottish National Party and First Minister of Scotland announced that she would seek authority from the Scottish Parliament, prior agreement with the UK Government, for a second referendum. Prime Minister of the UK, Theresa May stated that her government would not agree to this proposal.

d. *Sweden: independence through agreement, the Treaty of Malmö*

The Treaty of Malmö signed on the 1st of September of 1524 put a stop to the Swedish War of Liberation, allowing Sweden to secede from the Kalmar Union. Denmark and Norway acknowledged the independent status of Sweden, as Sweden renounced claims to Scania and Blekinge. Sweden's independence was accomplished in a war context, by the means of a Treaty that regulated territorial claims, therefore, an agreed secession.

e. *Quebec sovereignty movement*

In 1980 Partí Québécois (PQ) held a referendum regarding if Quebec should pursue a path towards sovereignty. With a 98.26% turnout, the proposal to pursue secession was defeated by 59.56%.

In 1995 a second referendum was held, asking voters whether Quebec should proclaim national sovereignty and become an independent country. With practically a

100% turnout, the referendum failed again, with 50.58% of votes against. Quebec has not yet obtained the legitimacy to unilaterally declare its independence.

3. Transition Law to Independency – Key Factors:

a. Status of the Law – enforceability / Resolution of Constitutional Court

The Law of Transition to the Independency and functionality of the Catalan Republic was passed on the 6th September 2017 and suspended by the Constitutional Court. The enforceability of this Law is now in a grey zone, as the Central Government has challenged Catalonia's Unilateral Declaration of Independence by convoking regional elections in December 2017, on the basis of article 155 of the Spanish Constitution.

Therefore, from a conservative point of view, we could say that the enforceability of this law will depend on the result of said elections.

b. Nationality

If the Law were to be in force, Catalan nationality would be obtained in the following scenarios:

- By people who hold Spanish nationality at the time of enforceability of the Law and at the same time are

registered in a Catalan municipality prior to 31 December 2016;

- The people who hold Spanish nationality and register in a Catalan municipality after this date will have the right to request Catalan nationality when they complete two continuous years of registration in a Catalan municipality;
- The people who hold Spanish nationality at the time of enforceability of the Law and within a period of three years may request Catalan nationality if:

    - They were born in Catalonia.
    - Despite residing outside Catalonia, if their prior administrative domicile was in Catalonia for at least 5 years.
    - If they are children (birth or adopted) of a mother or father which holds Catalan nationality.
    - Additionally, Catalan nationality can be obtained by people who, after the enforceability of the Law and within a period of three years since:

        - Are were born in Catalonia, with foreigner parents and their applicable legislation does not determine a nationality, or if the parents have none.
        - Are born in Catalonia and their filiation is not determined.

c. Applicable regulations

The Transition Law to Independency states that it is the supreme applicable Law, until the Constitution of the Republic is approved. Nevertheless, the Transition Law to Independency provides a legal regime of continuity. That is, all the regulations will continue applying and will conserve their rank, except for those declared inapplicable.

Therefore, under this Law, the Spanish Constitution would lose its rank, becoming an Ordinary Law in all what does not contradict the Transition Law.

d. Applicability of European Law and International Treaties

The law of the European Union maintains its nature and position with respect to domestic law. Additionally, Catalonia ensures the priority application of International Law. Therefore, the principles and customs of general International Law are part of the Catalan legal system. Nevertheless, the Catalan Government holds the right to authorize the application of International Treaties and only when such authorization is made, the International Treaties would apply in preference to domestic laws.

e. Transfer of public contracts to new administrative bodies of the new country

The transfer of public contracts to the new administrative bodies of Catalonia would be done respecting the recognized

employment conditions. The Catalan State is subrogated in the position of the Spanish State, in all aspects (contractual, agreements, position, etc).

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The developing impact of Brexit for multinational employers in the UK

CM | MURRAY

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In 1972 the UK joined the then European Economic Community, now the European Union ("the EU"). Since joining the EU, the UK's membership has shaped domestic law in many significant ways and one area which has been influenced heavily by EU law is UK employment law.

In June 2016 the UK voted to leave the EU and the UK "gave notice" to leave the EU in March 2017. That notice period is meant to be two years long, but there is wide held doubt as to whether that is sufficient time in which to negotiate and finalise the terms of the UK's exit from the EU.

The draft European Union (Withdrawal) Bill is now working its way through the UK legislative process. This piece of legislation will put in place the framework which the UK needs to exit the EU, including ensuring that EU legislation does not disappear overnight after the exit date. This should give multinational employers some certainty and the ability to plan for the short to medium term based on current EU laws.

How will EU law affect UK law during and after Brexit?

- At present, EU law affects UK law through three key sources: EU regulations, EU directives and Court of Justice of the European Union ("CJEU") case law. Some EU law is directly effective into UK law; other EU law requires the UK Government to implement the law into domestic legislation.
- EU-derived law will be preserved immediately following Brexit so there are no immediate changes expected and employers cannot start to ignore any EU law which has applied in the UK before Brexit – it still applies after Brexit, unless specifically repealed or amended.
- EU derived law is to be interpreted in line with the CJEU's interpretation of it as at the date the UK leaves the EU, so many CJEU's decisions will remain relevant for so long as the UK retains the EU-derived law. Again this provides some predictability and certainty for employers after Brexit.
- *"Courts and tribunals need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so" – Draft European Union (Withdrawal) Bill.* Therefore after Brexit, new decisions of the CJEU will not be binding on UK courts but UK courts will be free to look to the CJEU if they consider it appropriate. It is likely that, when it comes to interpreting legislation derived from EU law, domestic courts will still make themselves aware of, and possibility be influenced by, EU case law.

- When the EU introduces new legislation, the UK will not be bound to implement it, nor will any such legislation have direct effect in UK law. We therefore expect to see some divergence between the employment rights of citizens in the UK, and the other EU countries over time.
- With the freedom and flexibility to change its laws independently of the EU, the UK may seek to have greater harmonisation and cooperation in some matters with other countries such as the US, on matters such as tax treaties, dispute resolution arrangements and the movement of skilled workers.

Will UK employment law change?

- A question being asked is: will we see rise of employment "at will" as in US? This is unlikely as UK unfair dismissal protection pre-dates the EU's unfair dismissal protection, having been introduced in 1971. Further, the UK Government has vowed to protect workers' rights and removing the right not to be unfairly dismissed would go against the assurances which have been given by the Government to date.
- The UK Government will have to deal with many issues following Brexit and it is likely that trade deals and immigration issues will come higher up the list than changing employment rights.
- UK employee protection is unlikely to be stripped back immediately after Brexit but it likely will be altered in some way over the months and years that follow.

Key areas where we may see change after the dust has settled

- Working Time Regulations 1998 – the UK legislation that gives all workers the right to paid holiday but is derived from EU legislation. There has been a huge amount of EU and UK litigation around this issue and conflicts between UK domestic legislation and EU legislation have arisen. The law is now complicated and largely decided by case law. As such, employers would welcome a review and consolidation so they can have more certainty as to their future financial liabilities to employees and, potentially, less onerous obligations.
- Transfer of Undertakings (Protection of Employment) Regulations ("TUPE"). TUPE protects employee rights following the sale or transfer of a business. It ensures that the acquiring business retains all the employees on the same terms and conditions as those they enjoyed with the transferor. This is one piece of legislation which some businesses hope could be removed following Brexit, however, at present the UK "gold plates" the legal requirements of the relevant EU Directive, going further than required and demonstrating that it values the protections which this legislation provides. Of course, that may change in the future and the Government may use legislation like this to make it easier to buy and sell businesses, to encourage economic activity.
- Equality law. This is an area of law which could become vulnerable from a legislative perspective following Brexit

because equality law in the UK is not enshrined in any constitution. However, the UK has shown a commitment to equality legislation through successive governments and therefore, we expect UK equality law to remain relatively stable immediately following Brexit. Some protections were introduced to UK legislation before it was a requirement under EU law, such as discrimination on the grounds of sex, race and disability. Where we might see some change, for example, is the capping of discrimination tribunal awards which are currently uncapped (unlike unfair dismissal awards which are capped). It is also possible that we could see the constitutionalisation of equality law following the removal of the EU's influence and the minimum requirements we have become used to.

A short note on immigration

The UK Government has given assurances that the rights of EU citizens in the UK, and UK citizens in the EU will be protected.

Those EU citizens in the UK will fall into three broad categories:

1. those who have been in the UK for more than 5 years as at the relevant time – they should apply for settled status;
2. those who have been in the UK for less than 5 years as at the relevant time – they should apply for temporary status until they have been in the UK for 5 years, at which point they should apply for settled

status;

3. those who arrive in the UK after Brexit should apply for temporary status but will have no guarantee of being able to stay in the UK indefinitely.

Employers should be careful not to let potential future immigration status affect their recruitment decisions because that could constitute unlawful discrimination on the grounds of nationality under UK law.

The UK Government has stated that it will have as a priority the continued freedom of movement of workers across the EU. Depending on their individual circumstances, some workers may, nevertheless, have to take steps to preserve their rights and employers should consider if they want to help with this, whether by giving guidance or access to legal advice to employees, and/or paying for immigration applications.

In summary, the possible impacts for multinational employers as a result of Brexit are:

- Less regulation.
- A simpler law making process in the UK which is easier to predict and understand following the removal of the European Court.
- More business friendly laws as the UK focuses on doing business on a global scale and seeks to encourage inward investment.
- Small business exemptions from some employment laws

have been discussed – this could benefit multinationals with smaller UK operations.

- Some relaxation to equality laws to a limited extent – e.g. capping discrimination awards.
- Key aspects of EU being constitutionalised in UK law, e.g. equality law.
- In the immediate aftermath we are expecting only minimal change (if any) in the area of employment law of the UK's exit from the EU.

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Employer-friendly labor law reform in France: *quoi de neuf?*

Mathilde Houet Weil, Weil & Associés, France

France's complex labor laws have often been perceived as a hindrance to investors and employers. The recently elected President Emmanuel Macron has pledged to overhaul the French labor market in an endeavor to stimulate the country's sluggish economy by injecting greater flexibility.

Five executive orders were released on September 22, 2017, detailing 36 measures aiming to provide greater visibility for employers and thereby foster growth and reduce the nation's stubbornly high unemployment rate.

The new rules, discussed at length in advance with unions, will cap payouts on dismissals that are judged unfair, while also giving companies greater freedom to hire and fire employees and to negotiate working conditions. They will take effect later this year with decrees spelling out finer details.

The overhaul of the labor code is the first in a number of reforms that the new President has promised. There are also plans to

amend the unemployment benefits, pension schemes and professional training.

The new rules to date can be summarized as follows.

More emphasis on in-house labor talks as opposed to sector-level discussions:

Small businesses (less than 50 employees) without a trade union delegate may negotiate collective agreements directly with the employee representatives and will no longer have to have an employee appointed by a trade union. This is a challenge to the trade union monopoly for smaller companies; however, trade unions remain the sole interlocutor for companies with more than 50 employees.

Within companies with less than 20 employees, the company may organize a referendum of the employees unilaterally in relation to any topic for a collective agreement, with a requirement to obtain 2/3 of the employees' votes for the agreement to become enforceable.

On certain subjects however, agreements negotiated locally cannot be less favorable than national level agreements: job classifications, minimum wage, equality between men and women, trial period etc.

This is a move towards German- or Swedish-style negotiations, depriving powerful French unions of some of their power.

A firm's global economic health cannot be used to oppose plans to fire employees:

In the past, a court could block layoff plans or penalize the organization by pointing out that its global operations were profitable and the dismissals therefore not justified. From now on, the economic difficulties of multinational companies who are laying-off employees in France will be recognized at the national level.

This is a major shift as global profitability was the central issue in many recent controversies over company shutdowns. Redeployment obligations are also simplified, in particular with regard to redeployments abroad.

A set scale of damages in the event of wrongful dismissal:

Companies have long demanded more predictability on the topic of damages for wrongful dismissal which amount was freely and subjectively determined by Labor Courts.

The courts will now be bound by a set scale based on length of employment.

For anyone with a 2-year seniority or more, the minimum amount of damages is 3 months, when it used to be 6 months. This minimum amount does not increase with seniority.

The cap is 3.5 months for a 2-year seniority and progressively increases up to 20 months for a 30-year seniority.

However, legal severance pay is increased from 20 % of wages for each year in a company to 25%.

Merger of the employee representative bodies into one single body:

The personal delegates, Works Council and Health and Safety Committee are merged into one sole employee representative structure: the Social and Economic Committee. The trade union delegates may also integrate into this body.

This will significantly reduce the number of required meetings and cut down on related costs.

Separate Health and Safety Committees will remain in high-risk sectors such as nuclear power.

Homeworking becomes a right:

Employees now have a right to work from home unless the employer can identify a business reason justifying that a home office arrangement is not possible.

Simplification of notification of dismissals:

To avoid formal mistakes that led to condemnation of employers who often acted in good faith, a form can now be used for the notification of dismissals.

Until now, the dismissal letter had to provide all details on the cause for termination and could not be supplemented afterwards.

With the new rules, the employer can add to his explanations at a later stage and the employee can also ask for additional information – if he doesn't, he cannot obtain damages based on the absence of a just cause.

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New Dutch government to change rules on dismissals, independent contractors and payrolling

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The Dutch coalition agreement, that was presented on 10 October 2017, proposes a number of amendments to Dutch employment and dismissal law that will affect employers, employees and independent contractors alike. Here we outline the most important changes.

The main takeaways from the employment-related proposals in the coalition agreement are:

1. Dutch dismissal laws will include the possibility of 'combining' several partially materialised statutory grounds for termination. This instrument, currently unavailable to Dutch courts, will allow a court to dissolve an employment agreement even where no single statutory dismissal ground has fully materialised. The coalition agreement proposes that the employee be awarded a higher severance payment for a termination based on this 'cocktail of dismissal grounds'.
2. The way in which the statutory severance payment ('transition payment') is calculated will change. This will

mainly affect employees with many years of service or who have been employed for less than two years.

3. Rules on using trial periods and fixed-term contracts will change once again.
4. Material changes will be made to the rules for working with independent contractors; different 'categories' of independent contractors will be introduced.
5. Payrolling -a specific form of hiring or outsourcing staff- will be regulated more tightly.
6. The period during which salary continues to be paid during illness will be reduced for small businesses (up to 25 employees).

Changes to statutory termination grounds

One of the suggestions included in the coalition agreement is the introduction of a 'combination' or 'cocktail' of statutory dismissal grounds. Back in 2015, Dutch legislators materially changed the dismissal laws, providing for a fixed number of statutory dismissal grounds that had to be fulfilled in full before an employer could dismiss an employee. Under current law, a combination of the statutory dismissal grounds that have not 'fully materialised' cannot lead to a dismissal. For example, in the case of a 'partly' disrupted employment relationship with an employee who is also 'partially' underperforming and who has engaged in 'partially' culpable behaviour, the employer cannot terminate the employment agreement because neither of the three dismissal grounds has 'fully materialised'. In practice, this results in a relatively large number of court petitions for termination being denied.

The coalition agreement states that an additional statutory dismissal ground will be introduced, allowing for the termination of an employment agreement based on a combination of facts that by themselves are part of different statutory dismissal grounds. In the above example, a future court will have the freedom to allow the dissolution of the employment agreement. The coalition agreement further states that the employee may, in such cases, be eligible to receive a higher severance payment of up to 50% of the statutory transition payment that is currently due in individual cases. This contemplated change will affect one of the most leading arguments underpinning current legislation that 'not fully materialised' termination grounds cannot be compensated by granting a higher severance'.

Based on the intentions set out in the coalition agreement, we assume that the introduction of the 'combination' ground will result in easier, but also more expensive, dismissals.

Changes to the calculation of the transition payment

As of 2015, an employee with an employment record of at least 24 months is entitled to the statutory severance payment (transition payment) upon the termination of the employment agreement, save for specific circumstances. The calculation of the transition payment was rather extensive and included a higher accrual of severance entitlements after ten years of employment.

The coalition agreement proposes various changes to the calculation of the transition payment, the most important being.

1. All employees will be entitled to the transition payment from the first day of employment instead of only after two years of service.
2. The calculation of the transition payment will be simplified -and the outcome will be lower- as each year of employment will have the same value for the accrual of the transition payment. Currently, years of service after the tenth year have a higher value in the transition payment than the first ten years, as these subsequent years each count for half a gross monthly salary, while the first ten years of service each only count for one third of a gross monthly salary. It is proposed that in future, each year of service will accrue one third of the employee's gross monthly salary as a transition payment, including those after the tenth year. This change will make transition payments lower for employees who have accrued many years of service.
3. The employer will be able to deduct from the transition payment the costs of internal training and education incurred to prepare the employee move to another position within the company. Currently, the possibilities to do so are very limited.

Trial periods and fixed-term contracts

One of the pillars of the legislative changes in 2015 was making temporary contracts more unattractive to employers. For

example, under these new rules no more than three consecutive fixed-term contracts can be offered within two years. After two years, or when a fourth contract is entered into, the fixed-term contract automatically converts to a long-term contract, unless a minimum period of six months has lapsed between two contracts.

The coalition agreement proposes two important changes to these arrangements. First, the two-year term will change to a three-year term, allowing for three consecutive fixed-term contracts in three years. In addition, the possibilities to deviate from the six-month 'gap' in a collective labour agreement will be expanded. Currently, this deviation can only be used for certain seasonal work.

In addition to the rule changes for fixed-term contracts, the rules relating to trial periods will change. If an employer offers a long-term contract at the start of employment, a probationary period of up to five months may be agreed. Currently, the maximum trial period is two months. If an employer offers a long fixed-term contract (i.e. longer than two years) a trial period of three months may be agreed.

Independent contractors

Independent contractors have been the subject of debate for many years in The Netherlands. The question whether 'independent contractors' or 'self-employed workers' are indeed self-employed or should rather be seen as 'pseudo self-employed' workers who are in fact working under a contract of

employment in the sense of the Dutch Civil Code, has even led to various court cases.

In 2016, the Act on Deregulating Assessment Working Relationship was introduced. This was intended to resolve certain fundamental issues by requiring parties to work on the basis of template contracts published by the Dutch tax authorities to ensure the tax position of an independent contractor. In practice -as expected by many professionals- the use of pre-approved template contracts did not work and this legislation was never fully enforced.

The coalition agreement states that this legislation will be fully replaced by a new regime that effectively introduces three specific 'categories' of independent contractors, depending on the contractor's remuneration.

First category: independent contractors earning up to 125% of the applicable minimum wage (or in the case of a collective labour agreement, the lowest pay scale of that collective labour agreement).

If these contractors earn only between EUR 15 and 18 per hour, have a long-term contract, or perform work that may be considered to be part of the normal business activities, they will be deemed to be employees.

Second category: contractors that earn more than EUR 15 to 18 per hour, but less than EUR 75 per hour.

For this group, an 'independent contractor statement' is introduced. By completing an online questionnaire, companies can obtain certainty on the tax position of the contractor. This system is similar to that of the UK. To be able to successfully implement this system, the coalition agreement states that the existing requirement of a 'relationship of authority' when determining whether a contractor should be deemed an employee will be changed. There will be a stronger focus on material aspects of authority than on the formal aspects such as the requirement to be present at certain times. These changes may result in a change in the qualification of the relationship in certain professions.

Third category: contractors who are paid EUR 75 or more per hour and work for a short period of time (less than one year) or who perform tasks not considered to be part of normal business activities.

This group will have an opportunity to 'opt out' of applicability of wage taxed and social security premiums.

In addition, the coalition agreement states that the new government will explore the possibility of introducing a new specific type of agreement to the Dutch Civil Code known as the 'business owner agreement'.

Payrolling

Payrolling has been a growing form of employment over the last few years. Payroll companies hire employees directly and second these employees to the client, who is responsible for recruiting the candidate and will be the actual employer throughout the period of employment. Certain scholars raised serious concerns about this form of employment. However, the Dutch Supreme Court has ended all uncertainty as to how payrolling should be qualified, by qualifying it as a form of temporary agency work, and debate on the topic has died down as a result. As a type of temporary agency worker, a payroll employee has less protection in the case of a chain of contracts as mentioned above, and has less protection against dismissal.

The new government intends to propose a new law that excludes payrolling from the applicability of the 'flexible' legal regime for temporary agency workers. In addition, the new government is contemplating offering payroll workers the same terms of employment as regular employees.

Continued payment during illness

Currently, employers are required to continue to pay at least 70% of salary (up to a maximum amount) during an employee's first 104 weeks of illness. During this period, the employer may not (in principle) terminate the employment agreement. This continued payment requirement is considered to be very burdensome, especially for smaller businesses. The coalition

agreement now states that small companies (employing up to 25 employees) will only be required to continue salary payments during the first 52 weeks. The employee will continue to have protection against dismissal during the full 104 weeks, but the Employee Insurance Agency ('UWV') will take over the obligation to pay wages to the employee.

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Mr. Jason Lu, Founding & Managing Partner, is a renowned expert and a pioneer in labor & employment law in China. With over 20 years of practice, Mr. Lu acted as a perennial legal consultant for hundreds of public and private companies and has provided labor law trainings for thousands of enterprises. Mr. Lu established www.laodongfa.com in 2002, the first online platform for labor law services in China, and the magazine HR Legal. Mr. Lu has also provided professional opinions during legislative consultation for the Legislative Affairs Commission of the Standing Committee of the National People's Congress as well as Shanghai Municipality. Mr. Lu's outstanding performance in labor law has earned him an excellent reputation among his peers, and it has helped establish his status as a benchmark figure in the area of labor and employment law service throughout China.

Colleen Cleary
CC Solicitors, Ireland

Colleen Cleary is the principal of CC Solicitors, a market leading specialist employment law firm based in Dublin, providing advice to organisations, businesses and employees. The practice has a broad and in-depth knowledge of employment law ranging from day to day HR advice, restructuring and litigation. Colleen also has substantial experience in advising on industrial relations, equality issues, partnership disputes and executive termination. Colleen leads a team that provides fast paced advice that is practical and business focused. Colleen is also qualified in England and previously practised in London and is an accredited mediator. She is an experienced litigator and conducts her own advocacy. She is the Chair of the Employment Law Association of Ireland and was delighted to welcome the International Labour and Employment Law Committee of the ABA to Dublin in May 2017.

Anna Cozzi
Daverio & Florio, Italy

Anna Cozzi was born in Milan on 24 April 1974.
She graduated in Jurisprudence in 2000 from the University of Padova, and after a period as a trainee in a law firm specialized in civil law, she started her professional career as an employment lawyer with Barillari law firm in Padova.

She has been enrolled at the Bar Association of Padova until 2004 and at the Bar Association of Milano since 2004.

From September 2004 to May 2011 she collaborated with NCTM – Negri Clementi, Toffoletto e Montironi, and from May 2011 to March 2013 with Grande Stevens law firm in Milan.

On March 2013 she joined the law firm with which she is currently collaborating, Studio legale Daverio&Florio.

She has gained considerable experience in employment law, both judicial and extra-judicial, with a particular specialization in dismissals (both individual and collective), employment agreements, consultancy agreements, subcontracting and outsourcing contracts, transfers of business, disciplinary proceedings and Trade Union proceedings.

Juan José Hita Fernandez
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Juan José advises in all employment law topics, industrial relations and employment litigation. He specializes in large restructurings, complex negotiations of collective bargaining agreements, litigation implementation of remuneration schemes, pension plans and expatriates. He has a solid reputation in the analysis of employment issues arising from local or international complex corporate transactions with particular emphasis on transfers and/or reorganizations of workforce, substantial amendment on terms of employment and geographical mobility, etc.

Juan José holds a Law Degree from the University of Barcelona (1994) and a Master on Human Resources Management at "Centro de Estudios Financieros".

Juan José started his professional career as labour advisor at the U.G.T. Trade Union in February 1994. He was lawyer at the Employment Department in the law firm Gide & Loef until joining Clifford Chance in June 1999 where he took responsibility for the labour department, as counsel, until September 2010. At present, he is partner of Fornesa Abogados.

Publications & Conferences

- Mediator at the Catalonian Labour Tribunal (TLC)
- EELA Member (European Employment Lawyers Association)
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- Frequent Speaker at the main senior executive's association in Spain ("AED") on employment matters

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Sarah Chilton
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Sarah Chilton is a Partner at CM Murray LLP, specialising in employment and partnership law. Starting her career in Scotland and now based in London, she is dual qualified to practice in England & Wales and Scotland and provides advice to employers across the UK on employment law and HR issues.

Sarah is an experienced employment adviser and litigator and uses her experience to guide her clients through difficult and challenging situations, providing commercial and practical solutions and support. She has been praised in the legal directories for her commercial nous and client handling skills.

Sarah provides advice to employers on a wide range of issues, including setting up a business in the UK and the employment law requirements of doing so; performance, absence and conduct management; reorganisation and redundancy; grievance procedures; the employment law implications of buying or selling a business; protection of confidential information; defending whistleblowing and discrimination claims and drafting and enforcing restrictive covenants.

Sarah is experienced at representing clients in the Employment Tribunal and Courts throughout the United Kingdom. She also provides training to employers on all employment law issues,

including equality and diversity, managing performance and termination of employment.

A regular speaker and contributor, she has spoken at conferences in the UK and abroad on UK employment and partnership issues and is often asked to give a comparative view as between England and Scotland in view of her experience across both jurisdictions.

Mathilde Houet Weil
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Mathilde Houet-Weil is leading the labor and employment law department with Weil & Associés in Paris, an independent boutique law firm that offers full service in various areas of business law.

Mathilde has 20 years of experience representing American and German-speaking clients in a broad range of employment and labor-related litigation matters. She regularly counsels HR managers of global companies concerning their most important and sensitive employment issues. She has extensive experience advising employers with respect to matters arising out of re-organizations (down-sizing, closing of plants, business transfers, international and national mobility) as well as matters involving corporate policies, employment discrimination, whistleblower claims, breach of contract and wrongful termination claims, internal investigations, and matters concerning mandatory working hours. Mathilde represents clients in labor courts, civil courts, criminal courts and administrative courts.

Mathilde's clients come from all sectors of the global economy, including the automotive, pharmaceutical, chemical, mining, advertising, e-commerce, and luxury goods industries.

Mathilde's dual French-American education enables her to represent Anglo-Saxon companies in a global environment,

thanks to a pragmatic approach focused on the economic stakes at hand and on solutions that fit into the social strategy of the company.

Her excellent knowledge of the German language and German culture also led her to deal with French-German cross-border cases.

Mathilde earned a Master Degree in Paris, an LL.M. from Duke University, N.C., U.S.A., and is admitted to practice in Paris and New York.

Mathilde is a recognized labor and employment law specialist and regularly speaks at conferences hosted by the American Bar Association, the International Bar Association, the International Employers Forum and the Canadian Bar Association.

Mathilde is the author or co-author of numerous publications, including “International Labor and Employment Laws” and “Social Networking”, published by the Labor and Employment Law Section of the American Bar Association.

Who’s Who Legal describes Mathilde as *"an excellent lawyer" who is exceedingly well known and "incredibly active" in the market, particularly on an international level.*

Martijn van Hall,
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Martijn is a highly motivated, client-focused attorney, with a keen ability to determine the right strategy. In doing so, he does not lose sight of either the legal aspects nor the commercial interests of his client. Decisively, he works towards his goal – bringing a case to a conclusion with an outcome as favourable as possible for his client.

Martijn has many years' experience of employment law at the highest level. His client base consists mainly of medium-sized and larger (international) companies, but he also assists middle and high-ranking employees. Martijn puts particular focus on directors under the articles of association, acting on behalf of both the company and the director himself. Martijn also advises partnerships and other types of professional collaborations, as well as their (future) members on all relevant (legal) aspects.

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