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Quarter 4, 2021

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Geida D. Sanlate, Littler Editor

Australia

Common Law Term of Reasonable Notice Not Displaced by Statutory Minimum Notice Period

Precedential Decision by Judiciary or Regulatory Agency

Author: Naomi Seddon, Shareholder – Littler

In a recent decision, the Federal Circuit Court held that the common law term of reasonable notice, implied by law, is not displaced by the statutory minimum notice period under section 117 of the Fair Work Act 2009. The Court applied well-established considerations when determining the appropriate period of reasonable notice. This includes having regard to the specific circumstances, including the employee's length of service, professional standing, age, qualifications and experience, degree of job mobility, expected period of time for finding alternate employment, the likely period of continued employment but for the dismissal, anything the employee gave up when commencing employment with and her prospective pension or other rights. The case serves as a reminder that employment contracts must be updated when changes are made to employment terms and conditions, including when an employee moves into a new position.

Case Clarifies When Internships Must Be Paid

Precedential Decision by Judiciary or Regulatory Agency

Author: Naomi Seddon, Shareholder – Littler

In a recent decision, the Fair Work Commission stated that an employment relationship exists only if a contract of employment has been formed, clarifying that unpaid internships for work experience do not constitute employment when: (i) the placement is mainly for the benefit of the worker rather than the business; (ii) the periods of placement are relatively short; (iii) the person is not required to or expected to do productive work; and (iv) there is no significant

commercial gain or value for the business, derived out of the work performed by the person. It is good practice for companies to review their existing internship arrangements to ensure compliance.

Employer's Mandatory Vaccination Policy Fails to Meet "Lawful and Reasonable" Test Confirming Importance of Consultation

Precedential Decision by Judiciary or Regulatory Agency

Author: Naomi Seddon, Shareholder – Littler

On December 3, 2021, the Fair Work Commission handed down its first decision on employers mandating the COVID-19 vaccination ruling against the employer in finding that the deadlines for vaccination were not lawful and reasonable. Importantly, the decision did not focus on the validity of the mandate. Rather, the Commission focused on whether the employer had complied with its consultation obligations, serving as an important reminder to employers of the importance of consultation in this process.

With this decision, the Commission confirmed that employers are entitled to mandate vaccination in the absence of a public health order or express term in their employment contract, provided that the direction is lawful and reasonable. Whether a direction is lawful and reasonable will depend on several factors, including the nature of the workplace, whether industrial instruments apply and the employer's consultation obligations.

Fair Work Ombudsman Releases Further Guidance for Employers on COVID Vaccination Mandates

New Regulation or Official Guidance

Author: Naomi Seddon, Shareholder – Littler

The Fair Work Ombudsman has released further guidance for employers regarding the right to mandate vaccinations after the Prime Minister said that the test of "reasonableness" of such a direction to any employee extended to four tiers of employees: First tier covers employees who are at risk of acquiring the virus through direct contact (e.g., workers in quarantine facilities who are covered by public health orders, airline workers, etc.). Second tier covers those working with vulnerable population (*e.g.*, elder care). Third tier covers essential occupations with workers who face the public in their daily work (*e.g.*, retail, supermarkets, etc.). Fourth tier covers public servants or those who are not in often close contact with others in the course of their work.

Payroll Tax (NSW): Exemption for Maternity, Adoption and Paternity Leave Pay

New Regulation or Official Guidance

Author: Naomi Seddon, Shareholder – Littler

Revenue NSW has issued Revenue Ruling PTA 012B on the payroll tax exemptions for maternity, adoption and paternity leave pay. Certain wages paid to employees in relation to maternity or adoption leave are exempt from payroll tax under s 53 of the Payroll Tax Act 2007 (NSW). An exemption also applies to certain wages paid for paternity leave from July 1, 2010. Examples of payments made during a period of leave that are not exempt include: annual performance bonuses, payments of wages in excess of 14 weeks' pay, commissions, overtime for services performed prior to the period of leave, and advance payments for future periods of service after the period of leave.

Austria

Implementation of the "3G" Requirement at the Workplace, Effective November 1, 2021

New Order or Decree

Author: Markus Löscher, Partner – Gerlach | Littler

The "3G Rule," which entered into effect on November 1, 2021, requires all employees who have contact with other people to be vaccinated, recovered from COVID-19, or have been tested to be allowed to access the workplace. Exceptions apply only if the occupational activity requires no or very little contact with other people, such as lorry drivers or people who work from home. Compliance with this regulation must be monitored by the employer through random checks. If workers do not comply with the "3G Rule," they are not allowed to enter the company premises and lose their wage entitlement for that period. In case of noncompliance, administrative fines of up to 500 euros may be imposed on workers and up to 3,600 euros on employers.

Supreme Court: Use of Short-Time Work Does Not Lead to Individual Protection Against Dismissal

Precedential Decision by Judiciary or Regulatory Agency

Author: Michaela Gerlach, Partner – Gerlach | Littler

During the COVID-19 pandemic, a form of short-time work with strong financial support from the government has been introduced in Austria. The Supreme Court of Justice (*Oberster Gerichtshof*) has now ruled that labor market policy objectives are the decisive reasons behind the implementation and that there is no individual protection against dismissal for individual workers if the employer has agreed to short-time work with them. For employers this means that dismissals made during the short-time work period (or the subsequent retention period) are legally valid and can only be contested by means of an action for annulment on the grounds of unlawful motives or that it violates principles of social considerations.

ECJ: Annual Leave Payment Is Due Even In Unjustified Early Resignation

Precedential Decision by Judiciary or Regulatory Agency

Author: Paul Moosmann, Associate – Gerlach | Littler

On November 11, 2021, the European Court of Justice ruled that employees – contrary to the previous Austrian legal situation – are entitled to monetary compensation for unused annual leave if they terminate their employment without good cause and without observing the notice periods. This ruling is to be seen as a mandate to the legislature but must already be observed by Austrian courts. Employers must be prepared for additional claims if the resignation does not date back more than three years. It is advisable to review the collective bargaining agreement and employment contract, as these often provide for shorter expiry periods.

Proposed Law Would Impose Mandatory Vaccination for the General Public

Proposed Bill or Initiative

Author: Markus Löscher, Partner – Gerlach | Littler

A proposal currently under review seeks to make vaccination compulsory as of February 2022, which would make Austria the first country in Europe to pass such mandate. Not many details are known, but what is clear is that the mandatory vaccination will not be enforced by compulsory physical intervention but by means of administrative fines and that there will be exceptions for particularly vulnerable population groups. The constitutionality of this proposed law is still disputed even among leading legal scholars and practitioners.

Belgium

New Economic Migration Policy for Foreign Self-Employed Persons in Flanders

New Legislation Enacted

Authors: Edward Carlier, Partner, and Arnout Roosen, Associate – Reliance | Littler

The Flemish Decree of October 15, 2021, which becomes effective on January 1, 2022, provides a new economic migration policy for foreign self-employed persons with a professional activity in the Flemish Region. The intention of the new law is to attract talented and innovative foreign self-employed persons to the Flemish Region by means of, among other things, clear admission conditions for obtaining a professional card, a simplified (digital) application procedure and strict enforcement and control measures.

New Mobility Taxation

New Legislation Enacted

Authors: Edward Carlier, Partner, and Arnout Roosen, Associate – Reliance | Littler

The law of November 25, 2021, which became effective on January 1, 2022, seeks to make the company car fleet in Belgium greener. Under this new law, in order for employers (and employees) to benefit from the favorable tax and social security treatment of company cars, the new company car fleet must be carbon emission free as of 2026. In addition, employees who exchange their company car for a budget will have a wider range of spending options (e.g., the budget can also be used for costs related to electric scooters, parking costs related to the use of public transport or bicycle loans).

COVID-19 - Extension of CBA No. 149 Concerning Compulsory or Recommended Telework

New Legislation Enacted

Authors: Edward Carlier, Partner, and Arnout Roosen, Associate – Reliance | Littler

The new CBA no. 149/2 of December 7, 2021, extends the validity of the original CBA no. 149 concerning compulsory or recommended telework due to the COVID-19 crisis (which was valid until December 31, 2021) by three months (*i.e.*, until March 31, 2022). Like the previous one, this CBA, which covers the status of teleworkers and their wellbeing at work, only applies to companies who did not develop a telework scheme by January 1, 2021.

Extension of the Simplified "COVID-19 Temporary Unemployment" Regime

New Regulation or Official Guidance

Authors: Edward Carlier, Partner, and Arnout Roosen, Associate – Reliance | Littler

On December 10, 2021, the Belgian Government extended the more flexible regime of "COVID-19 Temporary Unemployment," which significantly simplifies the procedure for employers to apply for temporary unemployment for employees. The regime was extended until March 31, 2022.

Brazil

Ordinance that Restricted Employers' Ability to Impose Vaccination Mandates Is Partially Suspended

New Order or Decree

Authors: Marília Minicucci, Partner, and Pâmela Gordo, Associate – Chiode Minicucci | Littler

On November 1, 2021, Brazil's Ministry of Labor and Welfare (a body of the Federal Government) issued Ordinance # 620/2021, establishing rules and restrictions relating to the vaccination of employees against COVID-19. Among other provisions, said Ordinance established that it was considered a discriminatory practice (under Law # 9,029/95) to demand proof of vaccination in recruitment, as well as to terminate an employee for cause, due to their failure to present proof of vaccination.

On November 12, 2021, the Brazilian Supreme Court issued a preliminary injunction, partially suspending the ordinance's provisions that restricted employers from demanding proof of vaccination in recruitment and from terminating employees for cause due to lack of proof of vaccination. A full hearing on the merits of the case is pending; accordingly, the preliminary injunction is not final and a date for the ruling is not set yet.

New Norms with Implications in the Workplace

New Order or Decree

Authors: Marília Minicucci, Partner, and Pâmela Gordo, Associate – Chiode Minicucci | Littler

On November 11, 2021, the Ministry of Labor and Welfare published two new norms, *i.e.,* Decree # 10,854/2021 and Ordinance # 671/2021. Two changes worth mentioning relate to the remote control of working hours (so-called REP-P) and the workers' food program (known as PAT). The latter has tax implications for companies as it pertains to the deductions for the meals provided to employees.

The decree becomes effective 30 days after its publication, *i.e.,* November 11, 2021. Various provisions under the ordinance become effective on December 10, 2021, whereas others become effective on February 10, 2022.

Brazilian Data Protection Authority (ANPD) Updates System for Filing Complaints

Important Action by Regulatory Agency

Author: Renata Neeser, Shareholder – Littler

On December 21, 2021, the Brazilian Data Protection Authority (ANPD) updated instructions on how and when data subjects can file a complaint against a data controller for possible violation of their rights under the General Data Protection Law (LGPD). The LGPD is Brazil's all-encompassing data protection law similar to the European Union's GDPR. The LGPD imposes certain requirements on data processing agents (which include controllers and processors of data) to safeguard the data privacy rights of individuals (data subjects). The ANPD has the authority to impose administrative sanctions for LGPD violations.

Under the updated instructions, the data subject must first formally contact the controller to try to get their request(s) answered or addressed. If the controller fails to resolve the issue, the data subject can petition the ANPD to intercede. The petition must be submitted online and the data subject must provide the data controller's or processor's contact information and a description of the situation, and submit proof that the data subject formally made a request to the controller and it was not addressed (or was not addressed timely). In exceptional circumstances the ANPD may accept anonymous petitions and/or a self-declaration that it was not possible to provide evidence, provided the identity of the complainant is not needed to investigate the facts and the information provided can be verified. The full article is available on Littler.com.

Canada

British Columbia: Eligible Workers Entitled to Five Days of Paid Sick Leave Beginning January 1, 2022

New Legislation Enacted

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

British Columbia announced that beginning January 1, 2022, workers covered by the province's Employment Standards Act (ESA), including part-time, temporary or casual workers, will be eligible to take up to five days of paid leave per year for any personal illness or injury (Paid Sick Leave), provided they have worked with their employer for at least 90 days. Employers must pay their employees their regular wages for these days, which do not have to be taken consecutively.

Ontario: Bill 27, Working for Workers Act, 2021 Receives Royal Assent

New Legislation Enacted

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

On December 2, 2021, Ontario's Bill 27, Working for Workers Act, 2021 (Act) received Royal Assent and came into force on that day. Among other things, Bill 27 requires specified employers to implement a Disconnecting-from-Work Policy, prohibits certain noncompete agreements, establishes a licensing regime for temporary help agencies and recruiters, and implements certain employment protections for foreign nationals.

Ontario: Court of Appeal Decides Employer Was Justified in Terminating Employee for Cause for Sexual Harassment

Precedential Decision by Judiciary or Regulatory Agency

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

In a recent decision, the Ontario Court of Appeal confirmed that if a properly conducted investigation concludes that an employee has engaged in sexual harassment in the workplace, the employer is entitled to take firm action, which may range in severity and, at its most forceful, include termination of employment for cause.

Supreme Court of Canada Finds Exclusive Arbitral Jurisdiction in Manitoba Human Rights Disputes

Precedential Decision by Judiciary or Regulatory Agency

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

The Supreme Court of Canada (SCC) recently decided that labor arbitrators have exclusive jurisdiction under labor relations legislation over disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This presumption of exclusivity will only be rebutted where a competing statutory scheme demonstrates the legislature's express intention to displace arbitrators' exclusive jurisdiction by carving into it *(e.g.,* by granting exclusive or concurrent jurisdiction over disputes of a specific nature to a competing tribunal). The SCC also held that because Manitoba's Human Rights Code does not expressly displace the exclusive jurisdiction of the labor arbitrator under the Manitoba Labour Relations Act over such disputes, the Manitoba Human Rights Commission has no jurisdiction over them.

Ontario: Arbitrator Upholds Mandatory COVID-19 Vaccination Policy

Precedential Decision by Judiciary or Regulatory Agency

Authors: Rhonda B. Levy, Knowledge Management Counsel, and Monty Verlint, Shareholder – Littler

In a recent case, an arbitrator in Ontario dismissed a union's policy grievance and upheld a mandatory COVID-19 vaccination policy on the grounds that it was reasonable and did not breach the collective agreement.

Colombia

New Law Establishes New Working Hours

New Legislation Enacted

Authors: Laura María Pacheco, Associate, and Daniela Silva, Associate – Godoy Córdoba | Littler

Law 2101 of 2021 was enacted to reduce the workweek in Colombia, to a maximum of 42 hours per week, which may be distributed by mutual agreement between the employer and the employee in five or six days per week, guaranteeing a day of rest. The Law will be implemented gradually, through five years, as follows: (i) After two years of the law coming into force, the work week will be reduced by one hour, resulting in 47 hours. After three years, the work week will be reduced by one hour, resulting in 46 hours. On the fourth year, two additional hours will be reduced, resulting in 44 hours per week. On the fifth year, the resulting number of weekly work hours will be 42.

Parental Leave, Shared Parental Leave and Extended Paternity Leave

New Legislation Enacted

Authors: Laura María Pacheco, Associate, and Daniela Silva, Associate – Godoy Córdoba | Littler

Law 2114 of 2021 established the "flexible part-time parental leave" and "shared parental leave," and extended the paternity leave in Colombia. Under the shared parental leave program, parents may freely distribute the last six weeks of maternity leave among themselves, as long as they comply with the conditions set forth in the law. Under the flexible part-time parental leave, the mother and/or father may opt for a flexible part-time parental leave, in which they may exchange a determined period of their maternity or paternity leave for a period of part-time work, equivalent to double the time corresponding to the selected period of time. The law also extended the paternity leave in Colombia from eight days to two weeks.

Remote Work Regime

New Legislation Enacted

Authors: Laura María Pacheco, Associate, and Daniela Silva, Associate – Godoy Córdoba | Littler

With Law 2121 of 2021, the Colombian congress legalized the remote work regime. The law, in part, establishes that the employment contract can be performed through remote work throughout the entire employment relationship by means of the use of telecommunication technologies.

Gender Equality in Employment

New Legislation Enacted

Authors: Laura María Pacheco, Associate, and Daniela Silva, Associate – Godoy Córdoba | Littler

Law 2117 of 2021 establishes policies to strengthen and promote women's equality regarding their access to employment and education in economic sectors where they have historically had low participation. Specifically, in order to promote and strengthen women´s access to work and income generation on equal terms, the Law charges the national government with the duty to develop programs that ensure the nondiscrimination of women in the workplace and the respect of the labor principle of "equal pay for equal work." Further, the government must promote

and design job training programs for women, and provide technological, organizational, and managerial support to micro, small, and medium-sized enterprises run by women and those that employ mostly female employees.

New Labor Stability for Parents

New Legislation Enacted

Authors: Laura María Pacheco, Associate, and Daniela Silva, Associate – Godoy Córdoba | Littler

Law 2141 of 2021 in part amended the Colombian Labor Code concerning labor stability for parents. Specifically, the law prohibits the termination of the employment contract of any employee whose spouse or partner is pregnant or within 18 weeks after childbirth and is not formally employed. Dismissal will only be allowed after being granted authorization by the labor inspector. The prohibition to terminate the contract is triggered by the employer being notified of the pregnancy status of the employee's spouse or partner. The employee will have up to one month to provide proof of his wife's or partner's pregnancy.

Denmark

New LGBTI Law

New Legislation Enacted

Author: Tina Reissmann, Partner – Labora Legal

The Danish Parliament has adopted the bill to amend the Anti-Discrimination Act, the Equal Treatment Act, among other laws, furthering the Government's proposal known as "Freedom to be different – strengthened rights and possibilities for LGBTI people." The new law, which becomes effective on January 1, 2022, aims to protect LGBTI persons and create equal protection within the labor market.

New Law on COVID-19 Corona Passport or Test

New Legislation Enacted

Author: Tina Reissmann, Partner – Labora Legal

The Act on employers' right to require employees to present a valid corona passport or to be tested for COVID-19 was adopted on November 26, 2021, and is expected to be in force as long as COVID-19 is considered a threat to society.

Earmarked Leave for Fathers

New Legislation Enacted

Author: Tina Reissmann, Partner – Labora Legal

The Danish Parliament has proposed a bill on implementation of the Work-Life Balance Directive providing earmarked parental leave for fathers, which is expected to come in effect from August 2, 2022.

Finland

New Rules Concerning Post-Termination Noncompetition Agreements

New Legislation Enacted

Authors: Samuel Kääriäinen, Partner, and Emma Mäkeläinen, Associate – Dottir Attorneys Ltd

The amendments of the Employment Contracts Act relating to post-termination noncompetition agreements entered into force January 1, 2022. However, to all noncompetition agreements entered into before the new legislation took effect, the new rules apply as of January 1, 2023.

The obligation to pay compensation is extended to all post-termination noncompetition agreements and the compensation is 40–60% of employee's regular salary, depending on the duration of the noncompete period. The compensation is paid throughout the noncompetition period, on the regular salary payment days. The employer can unilaterally terminate the noncompetition agreement but not after the notice of termination has been given. The notice period shall correspond one third of the duration of the noncompete period but shall always be at least two months.

Reform of Act on Co-operation Within Undertakings

New Legislation Enacted

Authors: Samuel Kääriäinen, Partner and Head of Employment, and Emma Mäkeläinen, Associate – Dottir Attorneys Ltd

The new Act on Co-operation within Undertakings entered into force on January 1, 2022.

Most changes compared to the previous Act are technical or at least of lesser significance. The only significant change is the so-called obligation to have continuous dialogue. The purpose is to improve communication between employers and employees, advance personnel's possibilities to influence matters, and enhance the co-operation. Primarily parties would meet once, twice or four times a year, depending on the size of the company. More detailed procedures are to be agreed locally.

Supreme Court: Applied Practice Established a Binding Condition of Employment

Precedential Decision by Judiciary or Regulatory Agency

Authors: Samuel Kääriäinen, Partner and Head of Employment, and Emma Mäkeläinen, Associate – Dottir Attorneys Ltd

On October 15, 2021, the Supreme Court of Finland ruled on a case relating to a break practice being established as a binding condition of employment due to many years of application. The practice entitling the employees to take longer breaks than set out in the applicable collective agreement had been followed as of year 1995.The breaks were included in the working time. The employer unilaterally decided to amend the break practice in 2016.

The Supreme Court ruled in favor of the employees that the practice was a binding condition of employment at the same level as conditions set out in the employment agreement. The employer was not entitled to unilaterally amend the practice and thus was obliged to pay the employees remedy of unjust enrichment equalling 23 minutes' salary for each working day during which the breaks were not taken as of 2016.

Reform of Family Leave Legislation

Proposed Bill or Initiative

Authors: Samuel Kääriäinen, Partner and Head of Employment, and Emma Mäkeläinen, Associate – Dottir Attorneys Ltd

Parliament has accepted the proposed bill to reform the family leave legislation. The amendments are scheduled to enter into force August 1, 2022. Currently, the maternity leave is 105 days, paternity leave is 54 days, and the parental leave is 158, which the parents may use alternately. Maternity and paternity leaves will be replaced by pregnancy leave and quotas for parental leave and the special maternity leave is renamed as special pregnancy leave. The pregnancy leave will be 40 days and the quotas for parental leave will be 160 for both parents and 320 days in total. In addition, a new filial leave is introduced. Employees are entitled to a maximum of five calendar days of filial leave during a calendar year.

France

The Participation of Employee Representatives and Unions in the Ecological Transition

New Legislation Enacted

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

A new law focusing on combating climate change and strengthening resilience to its effects has been adopted. The law integrates "ecological transition" as a topic in the consultative attributions of the social and economic committee (formerly works council) of companies with at least 50 employees. With regard to specific consultations, the social and economic committee is now informed and consulted on the environmental consequences of measures from the employer affecting the organization, management and general operation of the company.

In the same way, during the recurrent consultations on the strategic orientations of the company, on the economic and financial policy and on the social, employment and working conditions policy, the social and economic committee must be informed of the environmental consequences of the activity of the company. The mission of the Chartered Accountant is extended to the environmental consequences of the company's activity within the framework of these consultations. For unions, periodic negotiations on the forward-looking management of jobs and skills will have to take into account the challenges of the ecological transition.

A New Definition of Sexual Harassment under French Law

New Order or Decree

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

The definition of sexual harassment has been amended in the Labor Code. The Labor Code's prohibition against sexual harassment now includes comments or behavior with a sexist connotation. Additionally, sexual harassment in the workplace now includes when an employee is subjected to such remarks or behaviors by several persons, in a concerted manner or after being instigated by one of them, even though not each of these persons has acted in a repeated manner. Alternatively, it is present when an employee is subject to such remarks or behaviors successively by several persons who, even in the absence of a concerted action, know that these remarks or behaviors characterize a repetition.

A bill currently being debated in Parliament seeks to improve the whistleblower protection for persons who have suffered or refused to suffer repeated acts of sexual harassment, or who have testified or reported such facts.

Approval of the Inflation Allowance

New Order or Decree

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

Because of the significant rise of fuel and energy costs, the government introduced an "inflation allowance," which is an exceptional financial aid of 100 euros for people living in France whose income does not exceed 2,000 euros net per month. The allowance is paid only once, as of December, and at the latest on February 28, 2022, and is exempted from social security charges and income tax.

For employees, the payment is made by the employer if the beneficiary meets the conditions set by the decree. The employee must be at least 16 years old as of October 31, 2021, and a legal resident of France. In order to check the condition relating to the level of remuneration, the employer must compare the gross remuneration due to the employee for the periods running from January 1 to October 31, 2021, with a ceiling of €26,000 as a gross amount.

Sanctioning Disloyalty during Consultation on Strategic Directions

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

In the case brought before the judicial Court of Paris, a social and economic committee admonished the employer for having proceeded to the compulsory annual consultation on strategic orientations while preparing a restructuring project without informing the social and economic committee about it. In France, employers with at least 50 employees must consult with the social and economic committee annually on the company's strategic orientations. The employer is also obliged to consult with the committee separately on specific restructuring projects.

The court held that the information and orientations given by the employer in the framework of the consultation procedure must be sincere and correspond exactly to the reality of the perspectives envisaged at the time of their communication with the trade unions. The court found that the employer concealed the restructuring project, which amounted to disloyalty towards the information/consultation procedure. The employer was therefore sentenced to pay each of the parties damages as compensation for the prejudice suffered.

Issue on Evidence and Purpose of a Video Surveillance System

Precedential Decision by Judiciary or Regulatory Agency

Author: Guillaume Desmoulin, Partner – Fromont Briens | Littler

An employee was dismissed for serious misconduct, after the employer obtained evidence of the misconduct through a video surveillance system installed in the employee's workplace. The video surveillance system had been installed for the protection and security of goods and persons on the company's premises. However, this system also enabled the employer to control and monitor employees' activities, even though such purpose had not been the subject of prior information and consultation with employee representatives.

The French Supreme Court ruled that the recordings could not be used as evidence in the case. However, the Court clarified that such evidence may be admissible in certain circumstances.

Germany

Infection Protection Act Amended

New Legislation Enacted

Author: Franziska Kahlbau, Associate – vangard | Littler

According to the amendments to the Infection Protection Act, which came into force on November 24, 2021, and apply until March 19, 2022, employers and employees are now only allowed to enter a workplace where there is physical contact with other persons with a so-called "3G" (vaccinated, recovered, or tested) certificate. The employer is obliged to check the vaccinated or recovered status or the negative test result of employees before they enter the workplace. Violations of this obligation are punishable by a fine both on the part of the employees and on the part of the employer; for employees, violations can also lead to consequences under labor law (warning up to and including dismissal).

In addition, according to the home office obligation reintroduced by the amendment of the Infection Protection Act, the employer must offer employees who perform office work or comparable activities to carry them out from home if there are no urgent operational reasons to the contrary. Employees must accept this offer, provided there are no personal reasons speaking against working from home.

Short-time Work Affecting Vacation Entitlements

Precedential Decision by Judiciary or Regulatory Agency

Author: Philipp Schulte, Associate – vangard | Littler

The Federal Labor Court has ruled that the vacation entitlement of employees whose working days are temporarily completely cancelled due to short-time work can be recalculated and, if necessary, reduced. The loss of entire working days due to short-time work justifies a recalculation of the vacation entitlement during the year. Days of work lost due to short-time work agreed in individual contracts are not to be equated with periods of compulsory work either under national law or under EU law. These principles also apply if short-time work has been effectively introduced on the basis of a works agreement. The judgement is in line with a previous decision by the Federal Labor Court regarding unpaid leave upon the employee's request as well as one regarding part-time retirement (*Altersteilzeit*).

Consequences of an Occupational Accident in the Mobile Office

Precedential Decision by Judiciary or Regulatory Agency

Authors: Dr. Sabine Vianden, Associate, and Luisa Rödemer, Senior Associate – vangard | Littler

According to the Federal Social Court, the decisive factor for the classification of an accident in the so-called home (mobile) office as an occupational accident, which entails special consequences under insurance law, is that there is an internal connection between the specific activity that led to the accident and the insured activity. If an activity serving the company was intended and this can be understood by objective circumstances, the accident is insured accordingly. Therefore, an accident on the way from the employee's bedroom to a desk downstairs can be an occupational accident if those requirements are met.

Bicycle Suppliers Entitled to Receive Essential Work Equipment

Precedential Decision by Judiciary or Regulatory Agency

Author: Dr. Sabine Vianden, Associate – vangard | Littler

Bicycle suppliers (so-called riders) who deliver food and beverages and receive their orders via a smartphone app are entitled to have their employer provide them with the work equipment essential for performing their job. This includes a roadworthy bicycle and a suitable internet-capable cell phone. The employee cannot be referred to statutory claims (*e.g.,* reimbursement of expenses, under Section 670 of the German Civil Code), but deviations from this principle can be contractually agreed. If this is done in the employer's general terms and conditions, they are effective only if the employee is granted appropriate financial compensation for the use of the employee's own bicycle and/or cell phone.

Proposed EU Directive on Gig Economy Workers

Proposed Bill or Initiative

Authors: Jan-Ove Becker, Shareholder, and Luisa Rödemer, Senior Associate – vangard | Littler

On December 9, 2021, the EU Commission presented a new legislative proposal for the classification of gig economy workers as employees using certain criteria. As the European trade commissioner, Valdis Dombrovskis, has highlighted, there have been more than 1,000 court judgments across the EU regarding gig economy workers' employment status in recent years. The proposal lists five criteria, according to which a dependent employment relationship is given if two criteria are met. The directive takes some of the flexibility away from employers, but also creates legal certainty for the cooperation with gig economy workers. But in the end we need to wait to see what will become law after the lengthy period of deliberation, voting, and implementation of the directive.

Hungary

Option of Obligatory COVID Vaccine for Employees

New Order or Decree

Author: Zoltan Csernus, Attorney-at-Law – VJT & Partners Law Firm

The government passed a decree which entitles the employer, as of November 1, 2021, to oblige its employees (considering the protection of health, nature and specifics of the working place and job position) to take the vaccine against COVID-19. The employer sets (even in an e-mail) the deadline of at least 45 days for the first vaccine shot. If the employee fails to comply, the employer is entitled to unilaterally send the employee to unpaid leave. (Exception: An exemption may apply if the employee presents a medical certificate that vaccination could be harmful for him/her.) If after one year of unpaid leave the employee is still unvaccinated, the employer is entitled to terminate the employment with immediate effect.

Obligatory Third COVID Vaccine Shot for Medical Personnel

New Order or Decree

Author: Zoltan Csernus, Attorney-at-Law – VJT & Partners Law Firm

The government amended Decree No. 449/2021 on obligatory vaccination of health service providers' employees against COVID-19. According to the amendment (decree No. 637/2021) persons already employed and who were vaccinated before 180 days, are obliged to get their third vaccine by December 10, 2021. All employees must receive a third vaccine within 180 days as from the receipt of their second vaccine shot. Those who fail to get the vaccine within the deadline will be ordered by their employer to do so within an additional 15 days. If the employee fails to comply, then the employer is obliged to terminate the employment with immediate effect, and no severance payment will be paid.

Increase to the Statutory Minimum Wage

New Order or Decree

Author: Zoltan Csernus, Attorney-at-Law – VJT & Partners Law Firm

The government's new decree increased the statutory minimum wage by 19%. As of January 1, 2021, the statutory minimum wage for unskilled employees is HUF 200,000 (approximately EUR 554), while for the employees in job position requiring at least secondary school HUF 260,000 (approximately EUR 720).

Amendment of the Labor Code on Home Office Rules

New Order or Decree

Author: Zoltan Csernus, Attorney-at-Law – VJT & Partners Law Firm

The new statutory definition of home office includes the rule that the employee works a maximum 33% of the working time at the employer's office, but the parties can deviate from this rule in an agreement. The employer is entitled to calculate as cost the amount (equal to a maximum of 10% of the statutory minimum wage) paid to the employee as refund of home office costs.

Ireland

Increase in Minimum Wage

New Legislation Enacted

Author: Niall Pelly, Partner – GQ | Littler

With effect from January 1, 2022, the national minimum wage will increase from €10.20 to €10.50 per hour for employees aged 20 or over.

WFH Likely to Remain in Place for Q1 of 2022

New Regulation or Official Guidance

Author: Niall Pelly, Partner – GQ | Littler

It had been expected that a full return to offices would be permitted from October 22, 2021, with the lifting of all remaining statutory COVID-19 restrictions, but this has been postponed until February/March 2022 due to high case numbers and the emergence of the Omicron variant. Current public health directive is that employees should work from home unless it is necessary for them to attend their workplace in person.

Draft Legislation Providing Mandatory Sick Pay

Proposed Bill or Initiative

Author: Niall Pelly, Partner – GQ | Littler

The Government has published the Sick Leave Bill 2021 which will, when enacted, impose a mandatory obligation on the part of Irish employers to provide sick pay. No such obligation currently exists. The Bill provides for statutory sick leave payment (SSP) for an employee up to three days absence a year due to illness or injury. An employee becomes entitled to SSP after they have completed 13 weeks of continuous service with their employer and has provided a medical certificate confirming the employee's inability to work. SSP will be paid at the rate of 70% of regular earnings, up to €110 per day.

It is expected that this draft legislation will be enacted in the first six months of 2022. It is envisaged that SSP entitlements will gradually rise from three days per year when introduced, up to 10 days per year by 2025.

Italy

COVID-19: Green Pass Mandatory in Workplaces

New Legislation Enacted

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler

Effective October 15, 2021, Law Decree No. 127/2021 established that – until December 31, 2021 – a "Green Pass" will be required in order to access the workplace. The Green Pass is a certification issued by the health authorities certifying that the holder either completed the vaccination cycle, fully recovered from the virus, or received a negative result from a rapid diagnostic test.

The employer is responsible for carrying out checks on employees. These checks must be carried out in strict compliance with data protection legislation, which means that no data from the Green Pass can be retained. Employers who fail to comply may be fined. Employees who fail to produce a valid Green Pass cannot be allowed to enter the workplace and will be considered absent without leave until a Green Pass is presented. During this time, the employee will not receive any pay. Failure to abide by these rules can subject the employee to disciplinary sanctions and/or fines. Employees who have been excepted from the vaccination requirement are not required to present a Green Pass.

COVID-19: Salary Support Measures and Dismissal Ban Extension

New Legislation Enacted

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler

Law Decree No. 146/2021 of October 21, 2021, extended two social salary measures – "*Cassa integrazione straordinaria*" and "*Cassa integrazione ordinaria*" – until December 31, 2021. While both are extraordinary redundancy funds for salary payment support, the latter is for companies active in the textile, clothing, leather and fur industry and in the manufacture of leather and similar products. Employers who benefit from such support measures are subject to the ban on individual dismissal for objective reasons and collective dismissal, for the duration of the support.

COVID-19: Extension of Emergency Measures

New Legislation Enacted

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler

Decree Law No. 221/2021 of December 24, 2021, extended the state of national emergency until March 31, 2022, and extended until the same date various emergency measures, including concerning smart-working and parental leave. Smart-working is one of the two forms of remote working envisaged by Italian law and is hybrid in nature as the employee works partly outside company premises and partly inside. Ordinary smart-working requires a written agreement with the employee, but in the pandemic context - extended until March 31, 2022 - the employer is allowed to activate it even in the absence of an agreement. In addition, the employer, who must provide annual information on the general and specific risks related to smart-working, may do this also via online channels.

Concerning parental leave, an employee who is the parent of a cohabiting child under 14 years of age may, alternatively with the other parent, abstain from work during the following periods: (i) for the total or partial duration of the suspension of teaching or educational activities in attendance of their child; (ii) for the duration of the child's COVID-19 infection or quarantine. The same benefit is granted to parents of children with a certified severe disability. For such periods, parents are entitled to receive, instead of remuneration, an allowance equal to 50% of their normal remuneration. Parents of children aged between 14 and 16 are entitled to the same time off work without pay or allowance.

National Framework for Smart-Working

New Regulation or Official Guidance

Authors: Carlo Majer, Partner, and Caterina Colombano, Associate – Littler

On December 7, 2021, the Ministry of Labor and the social parties signed the national framework on smart-working, which sets out the guidelines to be followed in subsequent collective, company, and individual bargaining on the subject. The framework outlines the essential terms that are required for an enforceable smart-working agreement, and provides that in the event of a justified reason, either party may terminate the agreement before its expiration in the case of a fixed-term agreement, or without notice in the case of an agreement of indefinite duration.

Additionally, the framework sets forth various provisions, including the prohibition of overtime work on smart-working days, unless otherwise provided for in collective agreements, and the possibility for the employer to provide IT equipment for the performance of work, establishing minimum security criteria and requirements to be implemented and possible forms of compensation for expenses. Finally, the framework provides a public incentive to companies that regulate smart-working through a company agreement.

Japan

New Paternity Leave Law

New Legislation Enacted

Author: Aki Tanaka, Shareholder – Littler

The Child and Family Member Care Leave Act has been revised mainly to create more accessible leave for fathers. The revisions include: (i) a leave of four weeks that can be taken within eight weeks from child's birth; (ii) requiring employers to implement measures to make child care leave more accessible (*e.g.,* training) and provide necessary information to applicable employees; (iii) allowing employees to take the leave in two separate blocks of time; (iv) relaxing the requirement for fixed-term employees to take child care leave; and (v) obliging employers with at least 1,000 employees to promote the use of the child care leave through publicity.

Different provisions under the new law will take effect on April 1, 2022, October 1, 2022, and April 1, 2023. Employers are encouraged to work with counsel to be in full compliance of this law.

Malaysia

Occupational Safety and Health Law

New Legislation Enacted

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

On December 13, 2021, the Malaysian Parliament passed a legislative amendment (the Bill) to the Occupational Safety and Health Act 1994 (the Act). The amendment will become effective once it receives Royal Assent and is gazetted by the Government. The amendment will extend the application of the Act to all workplaces throughout Malaysia including in the public services and statutory authorities. The amendment will also make it mandatory for employers to formulate Occupational Safety and Health policies for their respective workplaces; for principal employers to ensure, as far as practicable, the safety of contractors and sub-contractors including those employed by them.

The amendment will also give employees the right to remove themselves from danger or the work in the event the employer fails to take action to remove such danger after being informed by the employee. Finally, the amendment also includes increased penalties and jail sentences for several offences under the Act.

Hiring Incentives by the Government

New Legislation Enacted

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

On December 21, 2021, Budget 2022 was passed by the Parliament and amongst others includes a hiring incentive for employers who hire Malaysians who have not been actively employed. The incentive will consist of 20% of the monthly salary for the first six months and 30% for the next six months, subject to jobs with a salary of RM1,500 and above. As an incentive for targeted groups, such as the disabled, Indigenous people, ex-convicts, single mothers, housewives, and women who have been unemployed for more than 365 days, the Government will provide an incentive of 30% of the monthly salary for the first six months and 40% for the next six months for hiring from these categories, subject to jobs with a salary of RM1,200 and above.

Federal Court on Justifying Dismissal Before Industrial Court

Precedential Decision by Judiciary or Regulatory Agency

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

On October 22, 2021, the Federal Court of Malaysia held that the Industrial Court does not have the right to inquire into reasons subsequently advanced by the employer to justify the dismissal via pleadings at the hearing stage of the inquiry before the Industrial Court. The employer is entitled to establish just cause or excuse in relation to the dismissal, but such cause or excuse is circumscribed to the time immediately prior to the dismissal. However, the employer may still adduce evidence and facts discovered post dismissal to counter the remedy afforded to the employee although it may not go to the basis or reason for the dismissal because it was not known at the particular time of dismissal.

Double-Deduction for Expenses Incurred in 2021 for COVID-19 Tests for Employees

New Regulation or Official Guidance

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

On October 20, 2021, the Income Tax (Deduction for Expenses in relation to the Cost of Detection Test of Coronavirus Disease 2019 (COVID-19) for Employees) Rules 2021 (the Rules) came into force. The Rules allow for the cost of detection test of COVID-19 for employees within the period from January 1, 2021 to December 31, 2021 incurred by an employer who is resident in Malaysia to be claimed as a deduction for the purpose of ascertaining the adjusted income of that employer from its business in a basis period for a year of assessment.

The Rules further provide that the amount of deduction allowed under the Rules is an addition to any deduction allowed for cost of the COVID-19 Detection Test under section 33 of the Income Tax Act 1967. This means that a double deduction will be allowed for expenses incurred by an employer in COVID-19 Detection Tests carried out on its employees.

New Anti-Sexual Harassment Law and Establishment of the Tribunal for Anti-Sexual Harassment

Proposed Bill or Initiative

Authors: Selvamalar Alagaratnam, Partner, and Teng Wei Hun, Associate – Skrine

On December 15, 2021, a bill titled, Anti-Sexual Harassment Bill 2021 (the Bill) was tabled in the lower house of the Malaysian Parliament. The Bill seeks to set up the Tribunal for Anti-Sexual Harassment (Tribunal) and the office of Administrator of Anti-Sexual Harassment. The Bill, if passed, will see the Tribunal vested with the jurisdiction to hear and determine any complaint of sexual harassment made by any person, including an employee, and to make an award which includes an order for compensation or damages. The Bill also proposes that any non-compliance with the award will be punishable with a fine and/or imprisonment.

The second reading of the Bill will take place during the parliamentary session in 2022 where the Bill will be debated by members of Parliament.

Mexico

Mexico Increases the General Minimum Wage

New Order or Decree

Authors: Mónica Schiaffino, Shareholder, and Valeria Cutipa – Littler

On December 1, 2021, the National Minimum Wage Commission (CONASAMI for its acronym in Spanish) agreed to increase Mexico's general minimum wage to $172.87 Mexican pesos per day, and $260.34 Mexican pesos per day in the Free Economic Zone of the Northern Border, effective January 1, 2022. According to CONASAMI's press release, $16.90 Mexican pesos were added to the current minimum wage through the so-called Independent Recovery Amount (MIR) and an increase of 9% was applied. Therefore, the minimum wage in force for 2022 implies a global increase of 22%.

Employers should review and adjust their payroll practices to comply with this new increase to the minimum wage, which may also potentially impact benefits like savings funds and food coupons depending on how these benefits have been agreed to with employees and unions. This increase was published in the *Official Gazette of the Federation* on December 8, 2021.

Netherlands

Paid Parental Leave as of August 2, 2022

New Legislation Enacted

Authors: Eric van Dam, Partner, and Dennis Veldhuizen, Partner – Clint | Littler

On October 12, 2021, the Dutch Senate approved the Act on Paid Parental Leave, which is introduced as implementation of EU Directive 2019/1158. Currently, employees are statutorily entitled to unpaid parental leave of 26 times the amount of working hours a week, to be taken during the first eight years of the child's life. As of August 2, 2022 employers can apply to the Employee Insurance Agency for a benefit for employees taking parental leave. This benefit is now set at 50% of the employee's average daily wage per leave day, but the Senate passed a motion to raise this to 70%. The House of Representatives still has to discuss this motion.

Quicker Gain of Participation Rights for Employees

New Order or Decree

Authors: Eric van Dam, Partner, and Dennis Veldhuizen, Partner – Clint | Littler

On December 14, 2021, the Dutch Senate approved an act that makes some important changes to the Works Councils Act. As of January 1, 2022 employees gain the right to vote for the works council after three months of working in the company instead of after six months. The right to be a candidate for the works council will be obtained after three months, instead of 12 months, of working in the company. Temporary agency workers will be eligible to vote and be chosen after 18 months of working in the company.

Bill on the Temporary Broadening of the Use of COVID Entry Passes

Proposed Bill or Initiative

Authors: Eric van Dam, Partner, and Dennis Veldhuizen, Partner – Clint | Littler

On November 22, 2021, the Dutch government submitted a bill to the House of Representatives proposing the broadening of the use of COVID entry passes. Based on this bill, employees would need a COVID entry pass to enter workplaces in sectors in which entry passes are already required for visitors. Furthermore, the bill would make it possible to implement the COVID entry pass as a condition for entering the workplace in other sectors, provided that

there are no other sufficient alternatives to reach the same level of protection. The proposal is under consideration of the House of Representatives. Trade unions have called on parliamentarians to not adopt the bill and the Council for the Judiciary issued a critical advice to the minister.

Peru

Extension of the Remote Work

New Legislation Enacted

Author: César Gonzáles Hunt, Partner – Philippi Prietocarrizosa Ferrero DU & Uría

Emergency Decree 115-2021, which was published on December 30, 2021, among other things modified Emergency Decree 026-2020 that regulates the "remote work regime," which allows employees to work from home or their place of isolation by using any type of mechanisms for the provision of services, as long as the physical presence of the employee in the workplace is not linked. The new decree in part extends the remote work regime until December 31, 2022, for both the public and private sectors.

Requirement of Full Vaccination for Work

New Order or Decree

Author: César Gonzáles Hunt, Partner – Philippi Prietocarrizosa Ferrero DU & Uría

On December 9, 2021, Supreme Decree 179-2021-PCM was published, which modified in part a previous decree that declared the National State of Emergency and set forth measures to follow during the new social coexistence. As of December 10, 2021, under the new decree, any person that performs in-person work must present proof of their full vaccination status; otherwise, they must provide services through remote work. If the job is not compatible with remote work, they will be subject to a "perfect suspension of work," which means the employee can no longer perform the job and the employer is not required to pay a remuneration, though the employment relationship will continue to be valid.

New Rules to Elect Employee Representatives for Workplace Safety and Health Committees

New Regulation or Official Guidance

Author: César Gonzáles Hunt, Partner – Philippi Prietocarrizosa Ferrero DU & Uría

Ministerial Resolution 245-2021-TR, published on December 11, 2021, approved a procedure to elect employee representatives for the Workplace Safety and Health committees and subcommittees and supervisory roles. It also repealed a previous resolution. The new resolution regulates the scope of application, details the procedure to undertake and the various duties to elect employee representatives.

New Guidelines on Monitoring, Prevention, and Control of Employees' Health

New Regulation or Official Guidance

Author: César Gonzáles Hunt, Partner – Philippi Prietocarrizosa Ferrero DU & Uría

Ministerial Resolution 1275-2021-MINSA, which was published on December 3, 2021, modified various previous resolutions, directives and guidelines relating to the monitoring, prevention and control of employees' health. Among other things, the new resolution provides that the taking of temperature is no longer required. It also provides that employers should verify employees' full vaccination status.

Philippines

Labor Inspections for 2022

New Order or Decree

Authors: Emerico O. De Guzman, Partner, and Franchesca Abigail C. Gesmundo, Senior Associate – Angara Abello Concepcion Regala & Cruz

Through Department of Labor and Employment (DOLE) Administrative Order No. 269, the DOLE directed the temporary suspension of all labor inspection activities starting December 1, 2021. Exempted from this suspension are Occupational Safety and Health (OSH) COVID-19 Monitoring under Joint Memorandum Circular No. 20-04A of the Department of Labor and Employment (DOLE) and Department of Trade and Industry (DTI); complaint inspections; OSH standards investigations; technical safety inspections, such as inspection of boilers, pressure vessels, and mechanical and electrical wiring installation; and inspection of any establishment or industry as directed by the DOLE Secretary. The suspension of inspection activities was implemented to enable the DOLE to dispose of all pending inspection cases and to prepare for the 2022 inspection program.

Further Guidelines on Vaccination of Employees in the Private Sector

New Regulation or Official Guidance

Authors: Emerico O. De Guzman, Partner, and Franchesca Abigail C. Gesmundo, Senior Associate – Angara Abello Concepcion Regala & Cruz

IATF Resolution No. 148 -B, promulgated on November 11, 2021 mandates COVID-19 vaccination for employees who are tasked to do on-site work in areas where there are sufficient supplies of COVID-19 vaccines as determined by the National Vaccines Operation Center (NVOC). Eligible employees who remain unvaccinated may not be terminated solely by reason thereof. However, they shall be required to undergo RT-PCR tests regularly at their own expense at least once every two weeks for purposes of on-site work. Antigen tests may be resorted to when RT-PCR capacity is insufficient or not immediately available.

Portugal

COVID-19 Updates (the Past and the New Future)

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

The major concern has been focused on COVID-19 – which is why it has claimed the top spot. It is "safe" to say that the workplace is not immune to the virus. Therefore, some measures have been applied, since October, to this day and are still in force, in order to protect public health, including employees and other third (contracting) parties or partners. Some examples of "never-ending updates" may be provided in the workplace, such as (i) the mandatory usage of masks in public places, (ii) the adoption of a specific COVID-19 plan (preventive and repressive internal methods for contamination/infection outbursts, namely social distancing), and (iii) obligation to create de-phased schedules of work time and to reorganize work and minimize transmission risks.

From our perspective, the best prevention and repression of the virus is the almost-daily monitoring of the various enforcement and temporary measures that seem to have become part of our daily lives.

Telework and Duty to Refrain Contacts

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

Newly enacted Law No. 83/2021, which becomes effective on January 1, 2022, provides for a new and broader concept of "teleworker" (*e.g.,* remote workers). Among other things, the new regime provides for the reimbursement of expenses related to telework by the employer, and creates a "new" duty to refrain from contact with the employees during their rest periods. This new duty to refrain contact might not have the effect of limiting or eliminating existing contractual or regulatory situations (exemption from working hours, overtime work, work on-call, among others), in which employees have the obligation to remain available, outside the workplace and working hours, to be contacted for situations in which this is deemed necessary. On the other hand, the lawmaker does not seem to use the notion of work schedule to delimit the duty to refrain, having delimited this duty to rest periods, namely rest breaks, daily and weekly rests.

Employers must be aware of several implications of teleworking/remote working. Mainly on the terms and conditions established in formal teleworking agreements. This referred formal agreement could determine the most disparate interpretations.

New Statute for Employees in the Cultural Area

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

Decree-Law no. 105/2021 – which was published on October 29, 2021, and entered into force on January 1, 2022 – provides a new framework for professionals inserted in the cultural area. The main implications are with regard to (i) the new regime for fixed-term contracts, (ii) the broader concept of worktime and workplace (with seemingly a narrowed definition of the concept of mere travels), (iii) a rule of preference to choose an employment contract model instead of a contract for the provision of services, (iv) a new social protection regime based on registration, and (v) a new regime on professional requalification.

Employers ought to compare the different regimes (old vs. new law) since hiring processes have changed in this new framework based on restriction and less flexibility.

Whistleblowing Transposition and Employment Relations

New Legislation Enacted

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

Law no. 93 /2021 – which was published on December 20, 2021, and becomes effective 180 days after publication – provides the general framework for the protection of whistleblowers. The referred law has several employment implications, such as (i) mandatory adoption of internal reporting channels, and (ii) nonretaliation rules towards employee-whistleblowers. The main concerns are centered on the short time provided by the Portuguese legislator in order to comply with all formal obligations. Right now, less than 180 days and still counting.

Employers should become aware of their obligations under the regimes of whistleblowing and the protection of trade secrets in order to mitigate future contingencies.

New Regime on Justified Absences and Parental Grief

Proposed Bill or Initiative

Authors: David Carvalho Martins, Partner and Head of Employment, and Tiago Sequeira Mousinho – DCM | Littler

The Law 1/2022 was approved on November 26, 2021 and will be published in January 2022. The present law extends the number of days for the period of mourning the death of a descendant or relative in the first degree of the direct

line from five days to 20. In these situations, both parents are entitled to request psychological counseling, provided by the National Health Service, which must begin within five days after the death.

This has been a long-term initiative that took the shape of legislative proposals. It is important to provide this information to HR Departments. This has been a theme raised regarding the mental health of workers and its impact on the workplace. A felt demand that has been delayed over time.

Puerto Rico

Governor Issues New Executive Order Providing for New Vaccination Mandates

New Order or Decree

Authors: Anabel Rodriguez-Alonso, Capital Member, and Irene Viera Matta, Associate – Schuster Aguiló | LLC Littler

On November 15, 2021, Puerto Rico's Governor issued Executive Order No. 2021-075 (EO 2021-075), which integrates prior COVID-19-related orders still in effect and, notably, includes vaccine/testing requirements for employers with over 50 employees. EO 2021-075 took effect immediately, and per its terms, will continue until the Emergency Declaration for COVID-19 has ended or another executive order renders it null.

The EO acknowledges that it does not intend to conflict with any guidance or order issued by any federal agency and states that it is to be interpreted in harmony with the federal provisions and their applicable jurisprudence, regarding vaccination for employees of the public and private sectors. In other words, at this time employers covered by the Healthcare Requirements issued by the Centers for Medicare and Medicaid Services of the Department of Health and Human Services or President's Biden Executive Order 14042 applicable to federal contractors, still need to comply with such federal requirements.

Tis the Season for Back-to-Back COVID-19 Related Executive Orders

New Order or Decree

Authors: Anabel Rodriguez-Alonso, Capital Member, and José Maymí Gonzalez, Associate – Schuster Aguiló | LLC Littler

In two days, Puerto Rico's Governor issued back-to-back executive orders (EO) establishing greater restrictions on mass activities, food and drink establishments, and air passengers arriving on the Island. The first, EO-2021-080, in essence, requires that all closed- or open-air establishments that promote the accumulation of people must require the following: (1) proof of vaccination; and (2) a negative COVID-19 test result, or a positive COVID-19 result from the last three months. The second, EO-2021-081, in its first section focuses on passengers arriving to the Island. In its second section, EO-2021-081 turns its attention to a wide swath of businesses and places where foods and drinks are provided.

These businesses must require all visitors to: (a) provide proof of vaccination; (b) a negative COVID-19 result; or (c) a positive COVID-19 result from the last three months. The restrictions in both EOs attempt to stem the growing wave of COVID-19 cases caused, in part, by the arrival of the Omicron variant to Puerto Rico and are already in effect.

New Executive Order Mandates Booster Shots for Health and Education Sectors

New Order or Decree

Authors: Anabel Rodriguez-Alonso, Capital Member, and José Maymí Gonzalez, Associate – Schuster Aguiló | LLC Littler

On December 22, 2021, Puerto Rico's Governor signed EO-2021-082, effective as of December 27, 2021. This EO breaks new ground by requiring for the first time a booster shot for certain segments of the populace. EO-2021-082 requires that any person older than age 18 who is fully vaccinated and meets the following criteria, must receive a

booster shot: (1) people who work in health facilities, regardless of their job functions; and (2) people who work in schools, educational centers, and universities, regardless of whether the same are public or private. This latter portion includes contractors.

Notably, students are not required to receive a booster under this EO. Covered personnel have until January 15, 2022, to receive their booster shot; failure to meet this deadline will impede such employees from working in person.

Implicit Consent for Arbitration Agreements in the Employment Context

Precedential Decision by Judiciary or Regulatory Agency

Authors: Lourdes C. Hernández-Venegas, Capital Member, and Ana B. Rosado-Frontanés, Capital Member – Schuster Aguiló | LLC Littler

In a recent decision, the Puerto Rico Supreme Court (PRSC) reinforced the strong public policy favoring arbitration agreements in Puerto Rico, validating continued employment as implicit consent for such agreements. The PRSC recognized that the Federal Arbitration Act (FAA) applies in the employment context, that its provisions are triggered when there is an interstate transaction implicated and that it preempts state laws on the subject. Given contract law concepts, the FAA requires only that arbitration agreements be in writing; thus, sending the agreement through electronic means satisfies this requirement and the parties' physical signatures are not required to validate the Agreement.

Importantly, the PRSC noted that the Agreement was clear in that it was deemed accepted if the employee continued to work for the company for 60 days after the receipt of the Agreement. Thus, written approval was not required. This case represents further certainty for employers that have adopted or are planning to adopt arbitration agreements in connection with employment claims, especially those covered by the FAA.

Damages Calculations Involving Double Penalties and Alternate Income Streams

Precedential Decision by Judiciary or Regulatory Agency

Authors: Anabel Rodriguez-Alonso, Capital Member, and Irene Viera Matta, Associate – Schuster Aguiló | LLC Littler

In a recent case, the Puerto Rico Supreme Court (PRSC) determined that when a plaintiff prevails in a discrimination lawsuit, any award of back pay (lost wages) to be granted must be reduced by any income earned from other means before applying the double penalty provided by local anti-discrimination laws. After considering the restorative and non-punitive nature of the applicable labor statutes, as well as the court's precedent, the PRSC determined that any interim earnings obtained by a plaintiff by other means had to be deducted from the total amount of assets plaintiff did not receive (that is, back pay or front pay) prior to imposing the double penalty provided by law.

The PRSC further noted that deducting the injured party's alternate income after imposing the double penalty would improperly inflate the award by failing to account for actual income received from other sources. Consequently, the PRSC ruled that the previous calculation made by the appellate court was incorrect, insofar as it deducted the income obtained by the plaintiff after applying the double penalty.

Saudi Arabia

Penalties for Dealing with Illegal Expatriates

New Legislation Enacted

Authors: Sara Khoja, Partner, and Sarit Thomas, Knowledge Management Counsel – Clyde & Co.

Ministerial Decision No. 3329/1435 has been updated to provide that in instances where an individual employer permits their employees to work for third parties or for their own account they shall face a maximum penalty for a third violation, of SR100,000, deportation (where an expatriate), six months custodial sentence, and a recruitment ban of five years.

New Table of Fines and Penalties

New Legislation Enacted

Authors: Sara Khoja, Partner, and Sarit Thomas, Knowledge Management Counsel – Clyde & Co.

The Ministry of Human Resources and Social Development (MHRSD) on December 17, 2021, published an amended set of penalties for noncompliance with the Saudi employment regulations by employers, with immediate effect. The new law provides a revised list of penalties for violations of various employment regulations, including sanctions for noncompliance with Saudization requirements, work authorisation obligations, and payment of wages. It also provides a separate list of sanctions applicable to recruitment companies.

The level of penalties depends on the employer's headcount and, in some instances, the penalties are multiplied by the number of workers affected by the employer's non-compliance. Employers must settle (or appeal) all penalties within 60 days of being served by the MHRSD, and failure to do so will result in the suspension of all services provided by MHRSD.

Saudization Requirements for Select Professions

New Regulation or Official Guidance

Authors: Sara Khoja, Partner, and Sarit Thomas, Knowledge Management Counsel – Clyde & Co.

The Ministry of Human Resources and Social Development (MHRSD) has issued several decisions relating to requirements under the Saudi Nationalization Scheme *(Nitaqat* or Saudization) for select professions in marketing, healthcare, medical appliances, dentistry, and pharmaceutical sectors. Effective April 11, (i) for dentistry professions, companies with a minimum of three employees are required to employ Saudi nationals and pay a monthly minimum salary of SAR7,000; (ii) pharmaceuticals companies with a minimum of five employees are required to employ Saudi nationals and pay a monthly minimum salary of SAR7,000 for specialists and SAR 5,000 for technicians; (iii) healthcare companies are required to meet a Saudization quota of 60% and pay a monthly minimum salary of SAR7,000 for specialists and SAR 5,000 for technicians; and (iv) companies with employees working in professions related to sales, promotion, and introduction of medical appliances, engineering and technical professions must pay their Saudi national employees a monthly minimum salary of SAR7,000 for specialists and SAR 5,000 for technicians and other diploma holders.

Effective May 8, 2022, (i) for marketing, companies with a minimum of five employees are required to meet a minimum rate of 30% Saudization requirements within their marketing roles and pay a monthly minimum salary of SAR5,000; and (ii) positions for secretarial, translation, storekeeping, and data entry jobs are restricted only to Saudi nationals, employees must be paid a minimum salary of SAR 5,000 per month.

COVID-19 Update

Important Action by Regulatory Agency

Authors: Sara Khoja, Partner, and Sarit Thomas, Knowledge Management Counsel – Clyde & Co.

The KSA Ministry of Interior announced on October 17, 2021, that wearing masks is no longer mandatory in open places. Furthermore, those who have received both doses of the COVID-19 vaccine are not subject to social distancing measures at social gatherings, public places, public transport, restaurants, and cinemas. These spaces will be permitted to operate at full capacity.

Singapore

Retrenchment Notification

New Regulation or Official Guidance

Authors: Trent Sutton, Shareholder, and Isha Malhotra, Of Counsel – Littler

Effective November 1, 2021, an employer is required to notify the Ministry of Manpower if it retrenches even a single employee. Prior to November 1, the notification requirement was triggered only if five or more employees were retrenched. The reason for the notification is so that the tripartite partners and relevant agencies are able to support retrenched employees.

New Workplace Anti-Discrimination Law in Singapore

Proposed Bill or Initiative

Authors: Trent Sutton, Shareholder, and Isha Malhotra, Of Counsel – Littler

Singapore currently does not have specific legislation governing employment discrimination and equal opportunity. While there are some limited protections (such as protection against wrongful dismissal or pregnancy dismissal, entitlement to retirement and re-employment, etc.), other workplace-related discrimination issues are dealt through nonbinding guidelines issued by the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) and the Fair Consideration Framework (FCF). It is expected that Singapore will enact new workplace anti-discrimination law that will impose stricter enforcements on anti-discrimination issues.

Spain

Labor Reform

New Legislation Enacted

Authors: Sonia Cortés García, Partner, and Ariadna Arriola Cabello, Associate – Abdón Pedrajas | Littler

Law 32/2021 of December 28, published on December 30, 2021, provides urgency measures for labor reform, the guarantee of employment stability, and the transformation of the labor market. Among other things, the law simplifies contracts (to reduce the temporary employment rate and encourage permanent contracts); promotes training contracts (to encourage hiring of young people); modifies the rules for temporary contracts; and updates outsourcing procedures.

The law further promotes flexibility in the employment; updates the rules for collective bargaining; modifies obligations concerning contribution to Social Security; increases the employer's financial credit for training individuals affected by a furlough; among other provisions.

Pension Scheme

New Legislation Enacted

Authors: Sonia Cortés García, Partner, and Ariadna Arriola Cabello, Associate – Abdón Pedrajas | Littler

Law 21/2021 of December 28, published on December 29, 2021, guarantees the purchasing power of pensions and other measures to strengthen the financial and social sustainability of the public pension system. Mainly, this law provides the revaluation of pensions and guarantees the purchasing power is recovered through the updating of pensions according to the inflation of the previous year.

The law also modifies the requirements for access to the retirement pension system, especially for early retirement, introduces new incentives for people who decide to delay the access to the pension benefit, and introduces a new system to make the pension system more sustainable by means of the so-called "intergenerational equity mechanism." Furthermore, the law also provides a new regulation on access to widowhood benefits for unmarried couples (parejas de hecho), among other provisions.

Supreme Court Ruling on Return to Office-Based Work

Precedential Decision by Judiciary or Regulatory Agency

Authors: Sonia Cortés García, Partner, and Ariadna Arriola Cabello, Associate – Abdón Pedrajas | Littler

The Supreme Court on its judgment 4130/21 of October 20, 2021 examines (i) whether or not the plans to resume office-based work after COVID-19 must be negotiated with the employees' representatives, and (ii) whether this may or may not in itself involve a breach of employees' right to physical integrity. The Supreme Court has held that employers are allowed to unilaterally implement plans to return to office-based work without entering into a prior consultation period with the employees' representatives and that this consequently does not violate their right to freedom of association.

The decision does not pursue anything other than to resume the usual working conditions. Remote work was adopted exceptionally on the occasion of the COVID-19 pandemic. So, in the same way that employers were compelled to unilaterally modify the usual face-to-face system to provisionally implement remote work due to COVID-19 without arguing the need to previously negotiate that decision with the employees' representatives, the Supreme Courts understands that it is not required now neither to do so in the other way around. Furthermore, in the event that the return to the offices is made in compliance with health and safety provisions and considering the necessary COVID-19 preventive measures, requiring employees to return to office-based work will not be considered itself as a breach of employees' right to physical integrity.

Increase in the Amount of Employment Sanctions

New Regulation or Official Guidance

Authors: Sonia Cortés García, Partner, and Ariadna Arriola Cabello, Associate – Abdón Pedrajas | Littler

As of October 1, 2021, employment sanctions are increased by 20%, without retroactive effect. Consequently, minor employment infringements will lead to fines ranging from € 70 to 750 euros (instead of from € 60 to 625); serious infringements, such as breaches of contractual regulations or failure to comply with working hours and/or overtime, between others, will lead to fines ranging from € 751 to 7,500 (instead of from € 626 to 6,250).

Very serious infringements, such as the illegal assignment of employees, decisions detrimental to the employees' right to strike, or failure to draw up an equality plan, will be sanctioned with fines ranging from € 7,501 to 225,018 euros (instead of from € 6,251 to 187,515). Furthermore, new infringements and sanctions have been introduced by art.5 of the new Law 32/2021, of December 28 on the labor reform.

Startup Proposed Bill

Proposed Bill or Initiative

Authors: Sonia Cortés García, Partner, and Ariadna Arriola Cabello, Associate – Abdón Pedrajas | Littler

On December 10, 2021, the Council of Ministers approved the referral to the Spanish Parliament of the Bill for the promotion of the startup ecosystem (the Startup Law) in support of the ecosystem of innovative technology-based companies, attracting investment and talent. With this Bill, the Government adapts the applicable framework to the specificities of startups, in the administrative, tax, civil and commercial fields, in order to support them throughout their life cycle, particularly in their early stages. To this end, it promotes the creation and growth of innovative digital-based high-growth startups and reinforces measures to attract international talent and investors. The Proposed Bill will be in line with the EU Startups Nations Standard declaration.

The main relevant aspects of this law are: definition of the concept of startup; ENISA will be in charge of granting the innovative nature of the startup; administrative agility (*e.g.,* free of notaries and registrars fees with respect to the incorporation of certain companies); digital set up and registration; tax benefits for entrepreneurs and for investors (*e.g.,* tax reduction, debt deferral, tax exemption for stock options); collaboration between public administrations, universities, public research organizations and technology centers; uses of regulatory sandboxes, among others.

Sweden

New Act on Protection of Whistleblowers

New Legislation Enacted

Author: Anna Jerndorf, Partner and Head of Employment – TM & Partners

On December 17, 2021, the new Whistleblowing Act (2021:890) entered into force, implementing the EU Whistleblowing Directive (2019/1937). The new act provides protection of persons who, in a work-related context, have received or obtained information about breach of EU legislation or misconduct and reports it. The protection will also apply to other individuals (other than the reporting person) who assist the reporting person, as well as legal entities connected to the reporting person. The protection consists of discharge from liability and a ban on obstructive measures and retaliation.

As of July 17, 2022, public sector employers with at least 50 employees and private employers with at least 250 employees must have an internal whistleblower function. From December 17, 2023, the requirement also applies to private employers with at least 50 employees.

Digital Labour Platform Not Deemed to Be an Employer in Recent Ruling

Precedential Decision by Judiciary or Regulatory Agency

Author: Anna Jerndorf, Partner and Head of Employment – TM & Partners

The Administrative Court of Appeal in Gothenburg has in a recent ruling confirmed the Administrative Court's previous ruling that a digital labour platform is not responsible for the work environment as it cannot not be deemed to be an employer and the company is therefore not obligated to take the measures to improve the work environment which the Swedish Work Environment Authority had requested.

The company provides a mobile application where a range of everyday services are mediated between persons who offer to provide the services (contractors) and persons who hire them (customers) and charges a brokerage fee based on the compensation agreed between the contractor and customer. The court found that the company merely seems to help the users by providing a payment system, insurance, service and opportunities to rate. Since the company cannot be deemed to be an employer, no work environment liability can be imposed. Accordingly, the Work Environment Authority's decision must be revoked.

Switzerland

New Economy Workers

Precedential Decision by Judiciary or Regulatory Agency

Author: Ueli Sommer, Partner and Head of Employment – Walder Wyss AG

The High Court of the Canton of Vaude recently decided that the couriers of an online food ordering and delivery service are in fact employees. Very interestingly, the Court concluded that the digital platform leases them out to the clients (*e.g.,* restaurants) and therefore the couriers fall under the mandatory collective bargaining agreement of the staff leasing industry. An appeal of the decision is now pending before the Federal Court.

United Kingdom

Striking Workers Are Protected from Suffering Detriment

Precedential Decision by Judiciary or Regulatory Agency

Authors: Chris Coombes, Associate, and Raoul Parekh, Partner – GQ | Littler

On November 18, 2021, the Employment Appeal Tribunal (EAT) confirmed that workers who take part in industrial action (*e.g.,* by going on strike) are protected from being subjected to detriment by their employer. UK legislation provides protection from detriment for workers who have taken part in "trade union activities", but the scope of those "activities" has historically been interpreted as excluding strike action. This effectively meant that there was no ban on subjecting workers to detriments short of dismissal for having taken strike action. Now the EAT has made clear that workers who go on strike are protected from all detriments, up to and including dismissal.

Relevance of Rights to Substitute Performance on Employment Status

Precedential Decision by Judiciary or Regulatory Agency

Authors: Ben Smith, Associate, and Raoul Parekh, Partner – GQ | Littler

On October 19, 2021, the UK Court of Appeal further clarified when limits on a right to substitute performance will be consistent with an individual being a self-employed contractor. A delivery courier engaged as a self-employed contractor, with a limited right to allow a substitute to perform his work. He (and other couriers) could book a time slot where he would be available but could release that slot for other couriers to book. If no other courier took the slot, he was still expected to perform work during that time.

The Court of Appeal found that this limit on the right to substitute performance was sufficient to mean that the courier was required to personally perform work and therefore was a worker, not a self-employed contractor, entitling him to rights such as the minimum wage and paid sick leave. The decision is a useful reminder for employers that UK courts will look at all the facts of a working relationship to determine the true status of purported self-employed contractors.

Administrator Personally Liable for Criminal Offense of Failing to Notify Government of Redundancies

Precedential Decision by Judiciary or Regulatory Agency

Authors: Josephine Rendall-Neal, Associate, and Raoul Parekh, Partner – GQ | Littler

On November 12, 2021, the High Court of England and Wales held that administrators in an insolvency could be personally liable for the insolvent company's failure to notify the Secretary of State of proposed collective redundancies. The notification requirement applies when a company proposes to dismiss 20 or more employees as redundant within a 90-day period. Failure to notify is a criminal offense punishable with a potentially unlimited fine.

Directors, managers, or other similar company officers can be personally liable if they consented to or connived in the failure, or if the failure is attributable to their neglect. The Court here clarified that this extends to administrators.

This is only a preliminary decision on the meaning of UK law and the case will now go to the criminal courts to determine liability, so the full ramifications are not yet clear. It is likely however that the decision will put administrators in a difficult position as they may be forced to choose between breaching their statutory duties to creditors (who would be prejudiced by the delay in redundancies) or potentially committing a criminal offense.

Supreme Court Clarifies When Direct Offers to Employees Covered by Collective Bargaining Agreement Permitted

Precedential Decision by Judiciary or Regulatory Agency

Authors: Asher Iduoze, Associate, and Philip Cameron, Partner – GQ | Littler

On October 27, 2021, the Supreme Court clarified when employers are permitted to make direct offers to employees in relation to terms that are or may be covered by collective bargaining. UK legislation prevents employers making direct offers to union members in relation to terms that would otherwise be determined through collective bargaining this has long created concerns that trade unions would effectively have a veto in collective bargaining. The Supreme Court clarified that employers are free to make direct offers to employees where collective bargaining has been exhausted (or the employer genuinely believes the process has been exhausted).

On the facts the employer did not succeed because they had agreed to refer the matter to ACAS for conciliation after negotiations with the union broke down, indicating the collective bargaining process had not been exhausted and therefore direct offers made to employees breached the law. Employers should ensure collective bargaining agreements include clear, codified dispute resolution mechanisms, with time limits, that can be tracked so it is clear when the process has been exhausted and direct offers can be made without risk of breaching the law.

Changes to Guidance in Response to COVID-19 Omicron Variant

New Regulation or Official Guidance

Authors: Deborah Margolis, Senior Associate, and Raoul Parekh, Partner – GQ | Littler

In response to the Omicron variant, the Government made several changes to COVID-19 regulations. From December 13, 2021, those that could work from home were advised to do so and in Wales, a legal duty was placed on employees to work from home where reasonably practical to do so. The requirement to wear face coverings was also extended to further indoor settings including shops and public transport. On December 14, 2021, the requirement to self-isolate if a close contact of a positive COVID-19 case was removed in England for fully vaccinated people.

Further, from December 17, 2021, the time limit before an employer in England can ask an employee for proof of sickness was temporarily extended from seven to 28 days. In Scotland, employers have been required to take reasonably practicable measures to minimize the risk of exposure to COVID-19 in their businesses from December 17, 2021. From December 22, 2021, the mandatory self-isolation period for positive COVID-19 cases was reduced from 10 to 7 days, provided the person has two negative lateral flow/rapid antigen test results on days six and seven of self-isolation.

United States

Fourth Circuit Requires Parity in Each Component of Compensation, Not Only in Total Compensation, Under Federal Equal Pay Act

Precedential Decision by Judiciary or Regulatory Agency

Author: Alice H. Wang, Associate – Littler

On December 3, 2021, the U.S. Court of Appeals for the Fourth Circuit rejected the notion that under the federal Equal Pay Act (EPA), equality should be assessed based on total compensation, holding instead that equality must be satisfied regarding each component of compensation. The Fourth Circuit hears appeals from the nine federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. This case has significant implications for how employers in the Fourth Circuit structure compensation.

Employers in the Fourth Circuit should ensure parity in each component of pay between similarly situated male and female employees performing similar work, unless the discrepancy (if any) can be explained by one of the EPA's four affirmative defenses. Merely equalizing total compensation between genders may no longer be sufficient to prevent an EPA claim if inequities exist regarding particular components of pay. Employers that distribute bonuses or equity as a means of closing or "remediating" inequities in base pay may be vulnerable to lawsuits for both the initial inequity in base pay, as well as the subsequent inequity in the compensatory component.

Quarantine Period, Vaccine Mandates, and Other COVID-19 Updates

New Regulation or Official Guidance

Author: Geida D. Sanlate, Knowledge Management Counsel – Littler

On December 27, 2021, the CDC (the U.S. Centers for Disease Control and Prevention) announced that it has modified its recommendation for quarantine and isolation: Individuals who test positive and remain asymptomatic must isolate for five days followed by a strict, five-day mask-use period. The mask must be a well-fitting mask to be worn around all others for at least 10 days after exposure.

Further, federal, state, and local authorities have announced that they are requiring certain categories of workers to be vaccinated. Generally, under these types of mandates, workers who decline vaccination must comply with measures that do not apply to their vaccinated counterparts, such as weekly COVID-19 testing and/or mask wearing. Depending on the jurisdiction and the sector involved, however, unvaccinated workers might not have such alternatives. Littler's Knowledge Management keeps various charts with up-to-date information on government-mandated requirements for employee vaccines, reopening and mitigation steps, mask wearing, temperature and health screening, among other duties, at the federal and state level, affecting private and/or public employers.

Bargaining Obligations Over OSHA's COVID-19 Emergency Temporary Standard

New Regulation or Official Guidance

Authors: Adam Tuzzo, Shareholder, and Paul Newendyke, Associate – Littler

On November 10, 2021, the National Labor Relations Board released Operations Management Memorandum 22-03 concerning bargaining obligations under the Department of Labor's Emergency Temporary Standard to Protect Workers from Coronavirus (ETS) (OSHA's vaccinate or test mandate). The guidance contained in OM 22-03 suggests that while the NLRB will not impede the ETS, it will ensure that unions have a role in determining how the ETS is implemented in unionized workplaces.

As a practical matter, the extent of the bargaining obligation will be determined, in part, by the terms of the relevant collective bargaining agreement and the scope and terms of pre-existing COVID-19 policies. Other considerations that are likely to go into the drafting of ETS-related COVID-19 policies include operational and staffing needs, the

resources required to maintain a testing and/or vaccination program, and the individual employer's labor relations climate. The guidance does not speak to whether the regions should apply the "contract coverage" standard or the general counsel's preferred "clear and unmistakable waiver" standard when determining if the parties' collective bargaining agreement gives management the right to unilaterally implement "shot-or-test" terms.

DOL Publishes Final Rule to Resurrect 80/20 Rule for Tipped Employees

New Regulation or Official Guidance

Author: Daniel B. Boatright, Shareholder – Littler

On October 28, 2021, the U.S. Department of Labor (DOL) announced publication of a final "dual jobs" rule, which reverses course from a December 2020 final rule and resurrects the so-called "80/20 Rule" that governs how tipped employees must be paid under the Fair Labor Standards Act (FLSA). In the October 28, 2021 final rule, the DOL has declared that a tipped employee's work duties must be divided into three categories: (1) tip-producing work; (2) directly supporting work; and (3) work that is not part of a tipped occupation. According to the preamble to the final rule, this categorization of work duties is part of a "functional test to determine when a tipped employee is engaged in their tipped occupation because they are performing work of the tipped occupation, and therefore the employer may take a tip credit against its minimum wage obligations."

The final rule becomes effective December 28, 2021, but may be subject to legal challenge before then. A comprehensive article explaining the practical implications for employers can be found on Littler.com, under the same title.

EEOC Increases Focus on Artificial Intelligence and Algorithmic Fairness

Proposed Bill or Initiative

Authors: Marko J. Mrkonich, Shareholder, and Michael A. Chichester, Jr., Shareholder – Littler

On Thursday, October 28, 2021, the U.S. Equal Employment Opportunity Commission announced the launch of an initiative aimed at ensuring that the use of artificial intelligence (AI) and other technology-driven tools utilized in hiring and other employment decisions complies with anti-discrimination laws. While acknowledging that AI and algorithmic tools have potential to improve our lives and employment, EEOC Chair Charlotte A. Burrows noted, "the EEOC is keenly aware that these tools may mask and perpetuate bias or create new discriminatory barriers to jobs. We must work to ensure that these new technologies do not become a high-tech pathway to discrimination."

At this point, according to the EEOC's press release, the initiative is focused on, "how technology is fundamentally changing the way employment decisions are made." In this regard, the initiative seeks to guide stakeholders, including employers and vendors, in making sure emerging decision-making tools are being employed fairly and consistent with anti-discrimination laws. It remains to be seen how U.S. regulators may utilize the tenets set forth in the EU's proposed regulation. Nevertheless, the EEOC's initiative further underscores the interest in such systems, and that care must be taken when deploying such systems to avoid running afoul of anti-discrimination laws.