ANNUAL EMPLOYMENT LAW CLE BRIEFING
GLOBAL DEVELOPMENTS

January 2017

*This presentation is offered for informational purposes only, and the content should not be construed as legal advice on any matter.
## Agenda

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HOW TO DEFINE AN EMPLOYEE IN TODAY’S MODERN WORKPLACE
Growth of the global contractor workforce

- In the US and EU-15, independent contractors make up 20-30% of the working age population – this is up to 162 million people.
- Half of the United Kingdom’s working population will be self-employed in the next five years, estimates say.
- Independent workers comprise the fastest growing group in the European Union labor market.
- India’s independent workforce, the second largest in the world at 15 million, fills about 40 percent of the world’s freelance jobs.
- More than one-third of Millennials are independent workers.
- 87 percent of Millennials say their smartphone never leaves their side, night or day.
The gig economy and collaborative business models

Exhibit 9

Independent workers who sell goods or lease assets are more likely to use digital platforms than those who provide labor services.

Responses from MGI Survey
United States and EU-15

<table>
<thead>
<tr>
<th></th>
<th>Population</th>
<th>Share that have earned income from a digital platform</th>
<th>Number of digital platform users</th>
</tr>
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<tbody>
<tr>
<td>All independent workers</td>
<td>162 million</td>
<td>15%</td>
<td>24 million</td>
</tr>
<tr>
<td>Workers who provide labor</td>
<td>150 million</td>
<td>6%</td>
<td>9 million</td>
</tr>
<tr>
<td>Workers who sell goods</td>
<td>21 million</td>
<td>63%</td>
<td>13 million</td>
</tr>
<tr>
<td>Workers who lease assets</td>
<td>8 million</td>
<td>36%</td>
<td>3 million</td>
</tr>
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Example platforms
- Freelance Physician
- Deliveroo
- TaskRabbit
- Uber
- Upwork
- Etsy
- eBay
- DaWanda
- Airbnb
- Boatbound
- Getaround
- BlaBlaCar

1 EU-15 based on population-weighted extrapolation from five countries surveyed: United Kingdom, Germany, France, Spain, Sweden.

SOURCE: McKinsey Global Institute analysis
General trends

- **Regulation**
  - challenges on independent contractors; limitations on agency model

- **Flexibility**
  - for instance, EU communication to support a collaborative economy
Country developments – employees vs. contractors

Canada
- British Colombia Supreme Court applied “substance over form” approach to define modern employment relationship without formal contract
- Ontario court certified class action of 7000 sales agents

Italy
- New legislation on freelancers anticipated

Korea
- Guidelines on fixed-term worker security effective April 1, 2016

Netherlands
- New self-employed regime delayed
Country developments – employees vs. contractors (continued)

Poland
- Effective January 1, 2017, minimum hourly rate applies to contractors (PLN 17)

United Kingdom
- Ruling re self-employed drivers
- Independent Workers Union of Great Britain seeking trade union recognition for drivers
Country developments – outsourcing and labor leasing

**Brazil**
- Significant decision on outsourcing anticipated

**France**
- Independent workers in the gig economy might be recognized as new category of employees, with rights to work accident/social security coverage and professional training rights

**Germany**
- Changes to labor leasing laws effective April 2017
Country developments – outsourcing and labor leasing (continued)

**Philippines**
- Increased enforcement of limitations on use of contingency workers

**Russia**
- New rules limiting use of manpower agencies effective January 2016
  - Agencies must be accredited
  - Time period limited to 9 months
  - Outsourcing arrangement as alternative?
HOW TO COMPLY WITH GENDER PAY REQUIREMENTS
How to comply with gender pay requirements

- Gender pay gap in the spotlight – what is it?
- Global approach to addressing disparities?
- What is required?
- Strategies to minimize pay gaps?
General trends

- Transparency key driver for social change
- Mandatory pay reporting already exists in a number of countries
- Proposed new rules in pipeline, e.g. UK, Germany and the Netherlands
Country developments

UK

- Gender pay gap regulations - new requirement to publish information about gender pay gap
- 250+ employees
- Regulations due to come into force April 6, 2017
- Pay data to be assessed as at April 5, 2017 and reported by April 2018
- No civil or criminal penalties
Example of a gender pay statement – it's that simple……

<table>
<thead>
<tr>
<th>Difference in mean pay</th>
<th>15%</th>
<th>Difference in mean bonus pay</th>
<th>22%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Difference in median pay</td>
<td>19%</td>
<td>Difference in median bonus pay</td>
<td>18%</td>
</tr>
<tr>
<td>Proportion of men / women who received bonus pay in the relevant period</td>
<td></td>
<td></td>
<td>5:1</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of men / women in the quartile pay bands: Upper, Upper Middle, Lower Middle, Lower</th>
<th>Women</th>
<th>Men</th>
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<tr>
<td>U</td>
<td>50</td>
<td>200</td>
</tr>
<tr>
<td>UM</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>LM</td>
<td>160</td>
<td>90</td>
</tr>
<tr>
<td>L</td>
<td>200</td>
<td>50</td>
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Narrative reporting

*E.g.*
- Reasons for any pay gaps
- Actions that the employer is taking to remedy any pay gaps
- etc.
Or is it?.....

But what are the tricky issues?

- What is the timeline?
- Employee – what does it mean?
- Pay – what does it mean?
- What do I mean?
- Employee – what does it mean?
- Pay – what does it mean?
- How do I get internal sign off?
- What if I have a gender pay gap?
- Language – what are my options?
- Narrative – what do I say?
- Quartiles – how do I work them out?
- Bonus – what does it mean? How is it calculated?
- Gross hourly rate – how do I work that out?
Country developments

Germany (proposed)

- Proposed duty for employers to assess and/or report on gender pay differences – currently no such duty exists
- 200+ headcount - employees will be entitled to request information regarding the salary structure
- 500+ headcount - plans to introduce law to report on gender pay differences and the promotion of women which gives employees the right to obtain information on the salary structure within the company
- Draft will be discussed in federal cabinet and is planned to come into force in 2017
Country developments

Netherlands (proposed)

- Proposed duty for employers to assess and/or report on gender pay differences – currently no such duty exists
- Legislative proposal on transparency is progressing through the Dutch parliamentary system. This would impose a legal duty on employers to report on equal pay in an annual report
- In addition, the works council would:
  - have a right of comment with respect to policies on equal treatment of men and women on all aspects of remuneration and
  - be allowed to conduct an inquiry into equality of payment in the company
- There is debate on the legislative proposal and it is uncertain if/when it will come into force
HOW TO MAINTAIN A FLEXIBLE WORKPLACE AND ATTRACT TALENT
General trends

- Right to disconnect
- Expanded leave entitlements
- Working from home
- France: some flexibility in labor law
Country developments – right to disconnect and homeworking

France

- Employees’ right to disconnect outside working time
- “Flexible” working contract for small and medium sized businesses – something between a fixed-term contract and a permanent contract

Netherlands

- New law allowing employees to request working from home or flexible schedule effective January 1, 2016

Italy

- The government is considering making it easier for employees to work from home and remotely from other locations. This is currently rare in practice
Country developments – expanded leaves entitlements

EMEA

- Austria
  - New paternity leave law effective March 2017

- Germany
  - Amended maternity protection law effective January 1, 2017

- Ireland
  - New paternity leave law effective September 1, 2016

- Italy
  - Mandatory paternity leave extended in 2016
  - Incentive for employers to hire young parents
Country developments – expanded leave entitlements (continued)

APAC

- **China**
  - New family leave rules following abolition of the “one child” policy: marriage, maternity and paternity leaves extended

**Reminder: Check local rules**

- **Japan**
  - More flexibility for taking family and child care leaves under revision of law effective January 2017
  - New law promoting women’s careers effective April 2016

- **Singapore**
  - More generous family leave law effective in 2017
Country developments – expanded leave entitlements (continued)

LATAM

Brazil

- Employers given tax incentive to extend paternity/adoption leave

Employer action items

- Update related policy to ensure compliance with changes in leave laws

Trend

- Global enhancement of parental leaves
- Global flexible vacation?
Country developments – France introducing more flexibility to labor law

- New Labor Law promulgated in August 2016
- Key points introducing flexibility:
  - Right to disconnect
  - Secured lump-sum annual working time scheme (forfait annuel)
  - OT increased hourly rates can be set in priority through company-side CBA (cannot be below 10%)
  - 10-week protection after end of maternity leave (compared to 4 weeks previously)
  - Holiday paid leave can now be taken from the start of employment
HOW TO HANDLE A GLOBALLY MOBILE WORKFORCE
How to handle a globally mobile workforce

- Some employment related risks/challenges:
  - Application of mandatory local laws
  - New rules on posted workers in a number of EU jurisdictions
  - Misclassification/joint employment
  - Payroll tax/social security compliance
  - Permanent establishment
  - Immigration

- Get paperwork right
Mobile and expat workforce – how does it work?

- **Alternative #1: Direct contract with host country employer (localization)**
  - Home Country, Inc.
  - Host Country, Inc.
  - Transfer employment relationship through termination & hire

- **Alternative #2: Secondment**
  - Home Country, Inc.
  - Host Country, Inc.
  - Second
  - Service Fee
  - Keep existing employment with home country employer and second or loan to host country employer

- **Alternative #3: Transfer followed by Secondment**
  - Home Country, Inc.
  - Global Employment Company (GEC)
  - Host Country, Inc.
  - Second
  - Service Fee
  - Transfer employment relationship through termination & hire and then second or loan to host country employer

- **Alternative #4: Transfer with dormant home country employment relationship or dual employment**
  - Home Country, Inc. (dormant)
  - Host Country, Inc.
  - Maintain dormant employment relationship with home country employer; enter into active employment relationship with host country employer
General trends

- Posted workers enforcement laws introduced across Europe during 2016
- New laws govern the treatment of employees posted to another EU member state temporarily, ensuring mandatory rights and to avoid social dumping
- Enforcement laws designed to strengthen the application of the EU Posted Workers Directive (PWD) and minimize fraud and avoidance of rules and improve exchange of information between member states
- Local implementation differs, watch out for:
  - requirement to register with/notify the local labor inspectorate (in some cases, in advance of the posting)
  - differing mandatory rights to be provided, depending on local position
- PWD is being further reviewed for fitness for purpose; that review is ongoing
Country developments

- **France**
  - SIPSI online declaration portal mandatory

- **Netherlands**
  - New law June 18 - applies to companies from other EU countries that have employees working in the Netherlands on a temporary basis; such employees will benefit from key Dutch employment protections

- **Poland**
  - New law June 18 – employees in Poland benefit from key Polish employment laws and posting company to (i) designate a contact for communication with the Polish National Labor Inspectorate; and (ii) store employment documentation

- **Italy**
  - New law July 22 – employees in Italy benefit from key Italian employment protections and labor inspectors assess if the secondment is genuine
HOW TO SUCCEED IN A GLOBAL TRANSACTION
Key things to remember

- Employee transfer mechanism in asset deals
  - EMEA: TUPE
  - APAC: Termination and rehire except for Korea and Singapore (EA employees)
  - LATAM: Employer substitution/termination and hire

- Allocation of liabilities in asset deals
  - Severance
  - Accrued vacation
  - Recognition of service years
  - Pension

- Integration: What if the buyer does not have local entities?
Key things to remember (continued)

- Data privacy issues receive and require more attention in deals involving EU jurisdictions
  - Employee information disclosure and impact on diligence and crafting offers
  - May require entering into data transfer agreement
  - Buyer’s current data transfer and protection scheme ready to take on EU employees?
  - Implementation of buyer policies/systems post close may require employee consent to data collection and use; may require filing with data protection authorities
Country developments – employee transfer/termination

- **Macron Law**
  - Internal redeployment overseas in redundancy situation
  - New rules define the "employment zone," the establishment/unit to which the social plan selection criteria will apply
  - Penalty for violating the Hamon Law has been relaxed

- Calculation of severance pay (for dismissal on economic grounds or personal grounds) shall consider variable remuneration

- El Khomri Law changed definitions of economic dismissal; dismissal before business transfer now permissible in limited circumstances
Country developments – employee transfer/termination (continued)

- **Italy**
  - TUPE rules may apply to a change of contractor

- **UK**
  - Changes to tax treatment for payment in lieu of notice from April 2018 may make terminations more expensive for employers
Country developments – other developments

France

- French Supreme Court clarified when a judge may suspend an employer’s reorganization project for failure to consult

Denmark

- New law on restrictive covenants effective January 1, 2016
  - Non-compete only if employee holds a very special position of trust
  - Maximum restraint period: 12 months; but if non-compete and non-solicit combined, then 6 months
  - Compensation: 40% or 60%, minimum 2 months
  - Non-solicitation of employees is not allowed, except in connection with transfers of business
WHAT ELSE IS NEW AROUND THE GLOBE?
European developments

EU

- General Data Protection Regulation effective May 2018
- US/EU Privacy Shield

Austria

- Reminder of various changes effective 2016
  - Employment agreement must specify minimum wage under CBA
  - All-in agreement must specify base salary under CBA plus amount allocated to overtime
  - Reimbursement of training costs for maximum of 4 years and to be reduced pro rata
  - For valid non-compete employee must earn 20 time daily maximum and contractual penalty limited to 6 months
European developments (continued)

Belgium
- Changes in the pipeline for 2017
  - Potential that night work for e-commerce might be permissible even without conclusion of CBA
  - Proposes rules to increase flexible working time (e.g. floating days and annualization of working time)
  - Increased sanctions for violation of salary freeze
  - Simplify part-time employment

Finland
- Probationary period increased to six months

France
- New labor law (El Khomri); key changes:
  - Flexibility changes (see above)
  - Changes to employee medical examinations
- Reminder: complimentary health insurance (*mutuelle*) mandatory since January 1, 2016
European developments (continued)

- **Termination valid**
  - Truck driver arrested first time for DUI (Federal Labor Court)
  - Death threats towards employer (Labor Court Düsseldorf)
  - Termination of employee who failed to report bribery (but must give prior warning and act within two weeks) (Higher Labor Court Rheinland-Palatinate)

- **Termination invalid**
  - Gas station attendant consumed pastries without payment (Labor Court of Baden-Württemberg)
  - Works council member could not be terminated over suspicion that he wrote “you are next” on a sympathy card (Higher Labor Court of Hamm)
  - Termination of overweight engineer (settled) (Labor Court of Düsseldorf)
  - Offending superiors on Facebook with emoticon as fat pig (Labor Court of Baden-Württemberg)
  - Dismissal of employee by major financial institution due to consent order by New York Department of Financial Services (Labor Court of Frankfurt)
EU developments (continued)

Germany (continued)

- Employee out on sick leave cannot be asked to come to office for personnel meeting (Federal Labor Court)

Hungary

- Starting January 8, 2017, all companies with 20+ employees must elect worker representatives for occupational safety (previously 50)

Italy

- Reminder: since March 12, 2016, resignations and mutual consent terminations only in electronic form
EU developments (continued)

Netherlands
- New Act on Whistleblowing effective July 1, 2016
  - Legal protection for whistleblowers
  - "House for Whistleblowers" to investigate wrongdoing
  - Internal whistleblowing legislation required for companies with 50+ employees

Poland
- Revisions to Labor Code anticipated
  - Relaxed employment law requirements for companies with fewer than 50 employees
    (no work regulations, remuneration regulations, social benefits fund)
  - Extended period for employee to challenge termination in front of court (21 days instead of 7/14 days)

Russia
- October 2016 changes to salary payment requirements (second part of monthly salary to be paid no later than 15 calendar days after accrual)
EU developments (continued)

Sweden

- Psychosocial work environment responsibilities effective March 31, 2016
- Increased protection for whistleblowers proposed
- Annual sustainability report proposed to be required effective January 1, 2017

UK

- Brexit
  - At least 2 year negotiation period
  - Plan for changes to employment laws, impact on immigration/free movement
- Change to salary sacrifice arrangements
- Holiday pay must include results pay commission (*Lock v. British Gas*)
- Apprenticeship levy for employers with pay bill exceeding 3£ million starting May 2017
- 2017 legislation anticipated to make changes to rules on industrial action
Middle East developments

Israel

- Monthly minimum wage ILS5,000 (effective January 2017)
- Annual leave increases by 1 day to 12 days for employees with up to 5 years of seniority (effective January 2017)
- Increased pension contributions (employer’s rate up to 6.5%, employee’s rate up to 6%)

Qatar

- Work-sponsorship system (Kefala) amended so that foreign workers don’t require employer consent to travel abroad or switch work
- Employees now permitted to switch jobs at end of fixed-term contract
Middle East developments (continued)

Saudi Arabia

- Nitigat in Saudi Arabia overhauled
- Balanced Nitiqat:
  - Overall Saudization %
  - Average salaries of Saudis
  - % of Saudi females
  - Length of service of Saudi employees
  - % of Saudis in management role with high salaries

United Arab Emirates

- Medical insurance for all employees required (since June 30, 2016)
- Changes to Labor Law since January 1, 2016:
  - Standard MOL contract
  - Maximum notice of 3 months and fixed-term contracts must contain notice of 1-3 months and termination indemnity of up to 3 months
  - Increased freedom of movement
- US$1.5 million award to terminated employee in Dubai International Finance Centre
**APAC developments**

**China**
- Measures to strengthen enforcement of labor laws
  - “Name and shame” scheme for severe violations of labor laws (e.g. substantive deductions/delay in pay; failure to pay social charges; child labor; severance violation of hours, rests, leaves)
  - Rating (A-C) of companies’ compliance with labor laws
  - Increased random checks (anticipate database of entities subject to inspection by end of June 2017)

**Hong Kong**
- Working hour provisions under negotiation
- Minimum wage increased to HK$34.50 effective May 1, 2017
APAC developments (continued)

**India**
- Streamlining of 44 labor laws into 5 comprehensive laws proposed
- Changes anticipated to maternity leave: 25 weeks (instead of 12); new adoption/surrogacy leave; possibility to work from home; crèche facilities for companies with 50+ employees
- Wage ceiling for ESI coverage increased to INR21,000 (from INR15,000 effective January 1, 2017)
- Reminder: changes to bonus regime effective January 1, 2016

**Singapore**
- Mandatory notification if 5+ employees made redundant
- New family-related employee benefits
- July 1, 2017 measures to promote employment opportunities for older workers
  - Mandatory re-employment age raised to 67
APAC developments (continued)

South Korea

- Minimum retirement age of 60 applicable to all companies (previously 300+ employees)
- Requirement to maintain and return a job applicant’s hiring documents now applicable to smaller companies as well
- Increase in maximum amount of maternity leave compensation
- Increase in minimum wage (by 7.3% to KRW6,470/hour)
- Proposed amendment to Invention Promotion Act
Taiwan

- Significant amendments to Taiwan Labor Laws
  - Implementation of five day working week with one fixed day off and one day of rest
  - Annual leave change
    - 3 days leave for employee with 6-12 months employment (new)
    - 7 days leave for employee with 1-2 years employment (same)
    - 10 days leave for employee with 2-3 years employment (+ 3 days)
    - 14 days leave for employee with 3-5 years employment (+ 4 days)
    - 15 days leave for employee with 5+ years of employment (+1 day)
    - 1 additional day for each year of service over 10 years (same)
  - New protection for whistleblowers
  - Maximum fine for violation of LSA increased
Americas developments

Brazil
- E-social program delayed through 2018
- Pending ruling on effective period of CBAs
- Releases might be valid in voluntary redundancy programs

Canada
- AODA obligations apply effective January 1, 2017 to small organizations with 1-49 employees in Ontario
- BC Human Rights Code Amendment now includes “gender identity or expression”
Americas developments (continued)

Colombia

- 7% increase in minimum wage to COP$737,717 and mandatory transportation allowance (for employees earning up to 2x minimum wage) of COP$83,140
- New minimum monthly integrated salary of COP$9,590,321 (US$3,200)
- Maternity leave increased from 14 weeks to 18 weeks
- Payroll tax auditing anticipated

Mexico

- Proposed changes to labor laws:
  - Conciliation proceedings to be mandatory
- Minimum wage increased to MX$80.4