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Labour Law

NEWS

South Carolina Pregnancy Accommodations Act

and further information from the Labour Law environment

Newsletter
No. 05 | Autumn 2018

Diary

Upcoming GGI Labour Law Practice Group meetings:

- **11 May 2019´**
  Prague, Czech Republic
- **22 June 2019**
  Houston, TX, USA

Editorial

Dear Reader,

We are very happy to present the autumn edition of the GGI Labour Law Practice Group (PG) Newsletter.

Thanks once again to the great efforts of our members, this new edition is full of interesting articles from employment law experts all over the world. You will find various contributions on current topics, such as the recently adopted South Carolina Pregnancy Accommodations Act, new legislation in the Netherlands that compensates employers for the statutory severance that must be paid when employees with a long-term illness are dismissed, the Australian Ombudsman targeting employers who discriminate against foreign employees, and the need for employers in Brazil to implement an effective Labour Compliance programme that will ensure a safer and healthier work environment in order to avoid harassment claims, but also interesting articles about why kindness matters at work and what the effect of travelling time is on employee productivity.

Our Practice Group is still growing and we aim for further expansion. We welcome our new members who are cordially invited to make an active contribution, either by delivering articles for our newsletter, the Labour Law PG pages of GGI's Insider or the webinars and Practice Group meetings that are mostly held in Europe and North America. Contributing is an excellent way of promoting your firm and its professional services. Please do not hesitate to contact me for further information.

We would like to thank all the member firms that have kindly contributed to this edition and hope that you will enjoy and benefit from the worldwide updates.

Jeffrey L. R. Kenens
Global Chairperson of the
GGI Labour Law Practice Group

South Carolina Pregnancy Accommodations Act

By Chris Gantt-Sorenson

The South Carolina Pregnancy Accommodations Act was signed into law on Friday, 18 May 2018. The Act amends the South Carolina Human Affairs Law. In passing the legislation, the General Assembly stated that 'workplace laws are inadequate to protect pregnant women from being forced out or fired when they need a simple, reasonable accommodation in order to stay on the job… Many pregnant women are single mothers or the primary breadwinners for their families; if they lose their jobs then the whole family will suffer. This is not an outcome that families can afford in today's difficult economy'.

The Act defines the protected class of 'sex' to include pregnancy, childbirth, or related medical conditions, lactation and the women so affected. Most of the requirements already apply to employers under the federal Pregnancy Nondiscrimination Act, the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act as interpreted by the Equal Employment Opportunity Commission, and to those employers subject to the Patient Protection Affordable Care Act and the Family Medical Leave Act, but the Act does go beyond those bodies of law in detail and provide specific examples of what is required. However, the Act goes further than the ADA by listing specific accommodations employers should consider and South Carolina employers should therefore review the specific examples when faced with an accommodation request.

Some examples of the reasonable accommodations identified in the Act are as follows:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities and individuals with medical needs arising from pregnancy, childbirth or related medical conditions;
- job restructuring, part-time, light-duty or modified work schedules; reassignment to a vacant and less strenuous position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations; or
- more frequent or longer break periods, or seating options for those jobs requiring the employee to stand; or
- providing a private place other than a bathroom stall for the purpose of expressing milk; modifying food or drink policy; or
- providing assistance with manual labour and limits on lifting.

The Act does state that an employer is not required to offer the accommodations listed unless the employer does or would do so for other employees or classes of employees that need a reasonable accommodation.

It requires employers to post a notice of the right to be free from discrimination for medical needs arising from pregnancy, childbirth or related medical conditions, and also to provide written notice of this information to all new employees at the commencement of employment and to existing employees within one hundred twenty days of 18

…next page

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Haynsworth Sinkler Boyd, P.A. provides business, litigation and financial legal services to national and international clients. With a history dating back to 1887, it is one of the largest law firms in South Carolina with more than 115 attorneys.

Chris Gantt-Sorenson focuses her legal practice on helping employers, providing advice and counsel on all employment law issues that arise as well as defending them in litigation brought against them by their employees. Her practice areas include ACA, FLSA, FMLA, ADA, Title VII, ERISA, and SC employment-related laws.

Chris Gantt-Sorenson

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May 2018, specifically no later than 17 September 2018 (120 days is actually Saturday, 15 September).

Posters may be downloaded from the South Carolina Human Affairs Commission **here!**

The Act also states that employers may choose whether their healthcare plan will pay for abortions but that no employer shall be required to design its healthcare plan to include payment for an abortion absent situations where the mother would be endangered if the fetus was carried to term.

Australian Ombudsman targeting employers who discriminate against foreign employees

By Erin Kidd and Elisa Blakers

The Fair Work Ombudsman (FWO), Australia's industrial relations watchdog, is actively seeking to dispel the myth that it is acceptable to pay foreign workers below Australian minimum wage rates. This message was recently reinforced when the FWO successfully prosecuted an employer for racial discrimination for the first time.

The employer, a hotelier of Chinese extraction, employed a number of Australian staff, as well as two Malaysian nationals of Chinese descent. Relying on their shared cultural connection, the employer repeatedly referred to the Malaysian employees as 'family' to put pressure on them to work harder and longer hours than their Australian colleagues.

The Federal Circuit Court (FCC) found that the employer had breached

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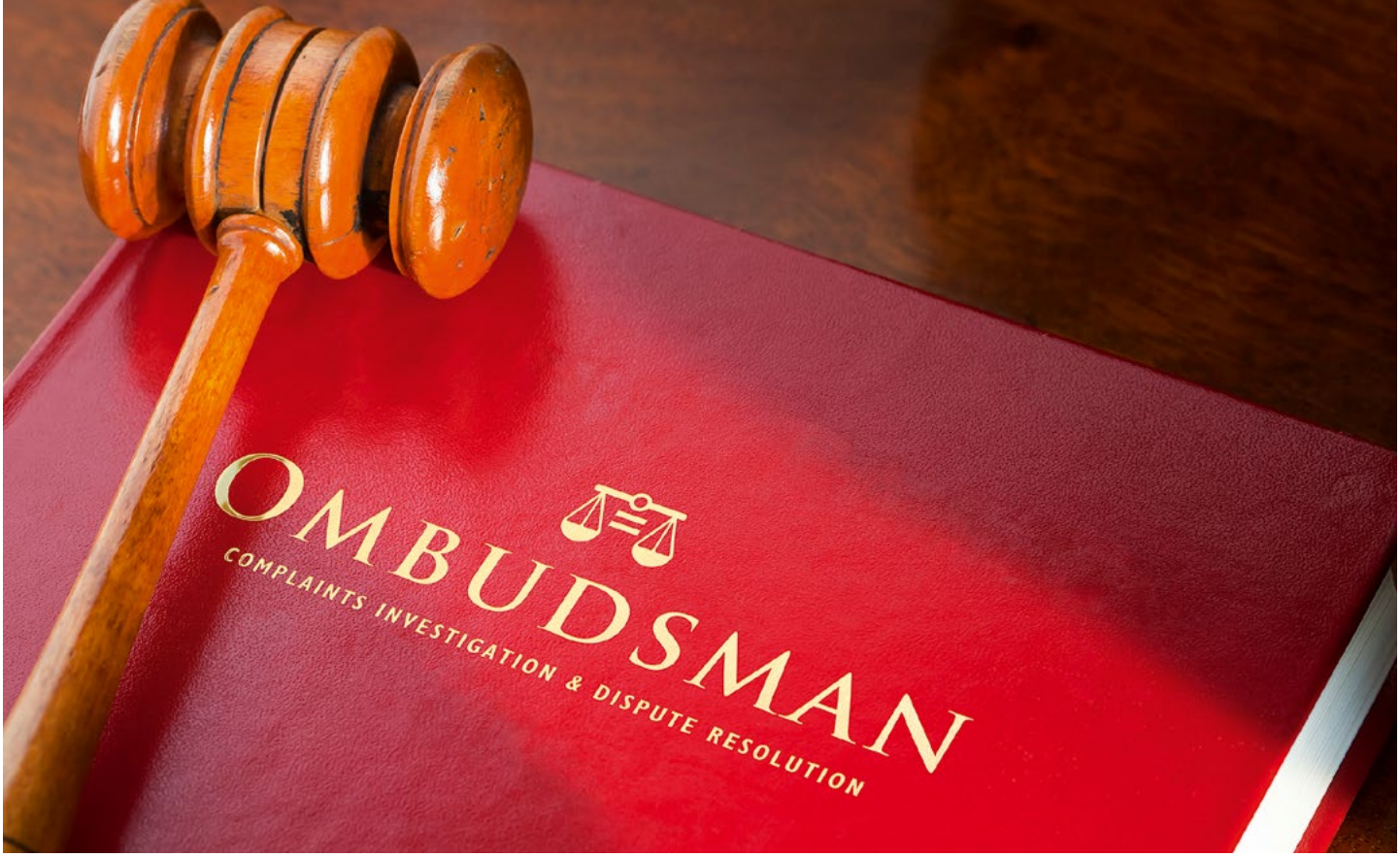

the racial discrimination provisions of Australia's primary piece of workplace legislation, the Fair Work Act, by underpaying them a total of more than AUD 28,000 and requiring them to work additional hours. By contrast, their Australian colleagues were afforded sufficient time off, and were paid largely in accordance with Australian law.

In penalising the employer AUD 211,104 for the breaches, the FCC found that the employer took adverse action against the Malaysian employees by discriminating between them and the company's Australian employees, resulting in injury. The Court concluded that the Malaysian employees' national extraction was a 'substantive and operative reason' for their employment and subsequent exploitation, with the employer showing a complete disregard for his duties as an employer.

The successful prosecution sends a powerful message to employers making decisions based on race: the FWO will actively prosecute employers who racially discriminate against employees. All employers operating in Australia must ensure that all employment decisions and practices are in accordance with Australian employment law and are non-discriminatory in nature.

An end to all inactive employment relationships?

Compensation in the case of dismissal after two years of illness

By Nadine van Pol

If an employee leaves service after two years of illness, the employer will owe the statutory transition payment. This rule has always been heavily criticised because employers already have a heavy financial obligation during the first two years of illness. Having to make a transition payment when the employee departs was often seen by employers as

unreasonable and too burdensome.

However, there is finally good news! From 2020, employers will be compensated for the transition payment that must be paid when employees with a long-term illness are dismissed. Earlier this month, the legislative proposal for this compensation was adopted. It will also apply with retroactive force to payments made from 1 July 2015.

Employees will retain their rights to the transition payment and employers can request compensation from the Employee Insurance Agency (UWV). The compensation will be paid from the Dutch General Unemployment Fund (Algemeen werkloosheidsfonds), as a result of which the premium will be increased.

Employers can note 1 April 2020 in their agendas now so that they can request compensation on time. There will probably be a period of six months in which to apply. The precise conditions have now been adopted in draft form and the final details will be announced shortly.

Tip: if you have inactive employees within your company, assess whether it is worth retaining them now that the compensation arrangement has been adopted.

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Nadine van Pol is Head of the legal department, advising clients on a wide range of matters concerning employment legislation, including various types of contracts, negotiations, illness and dismissal.

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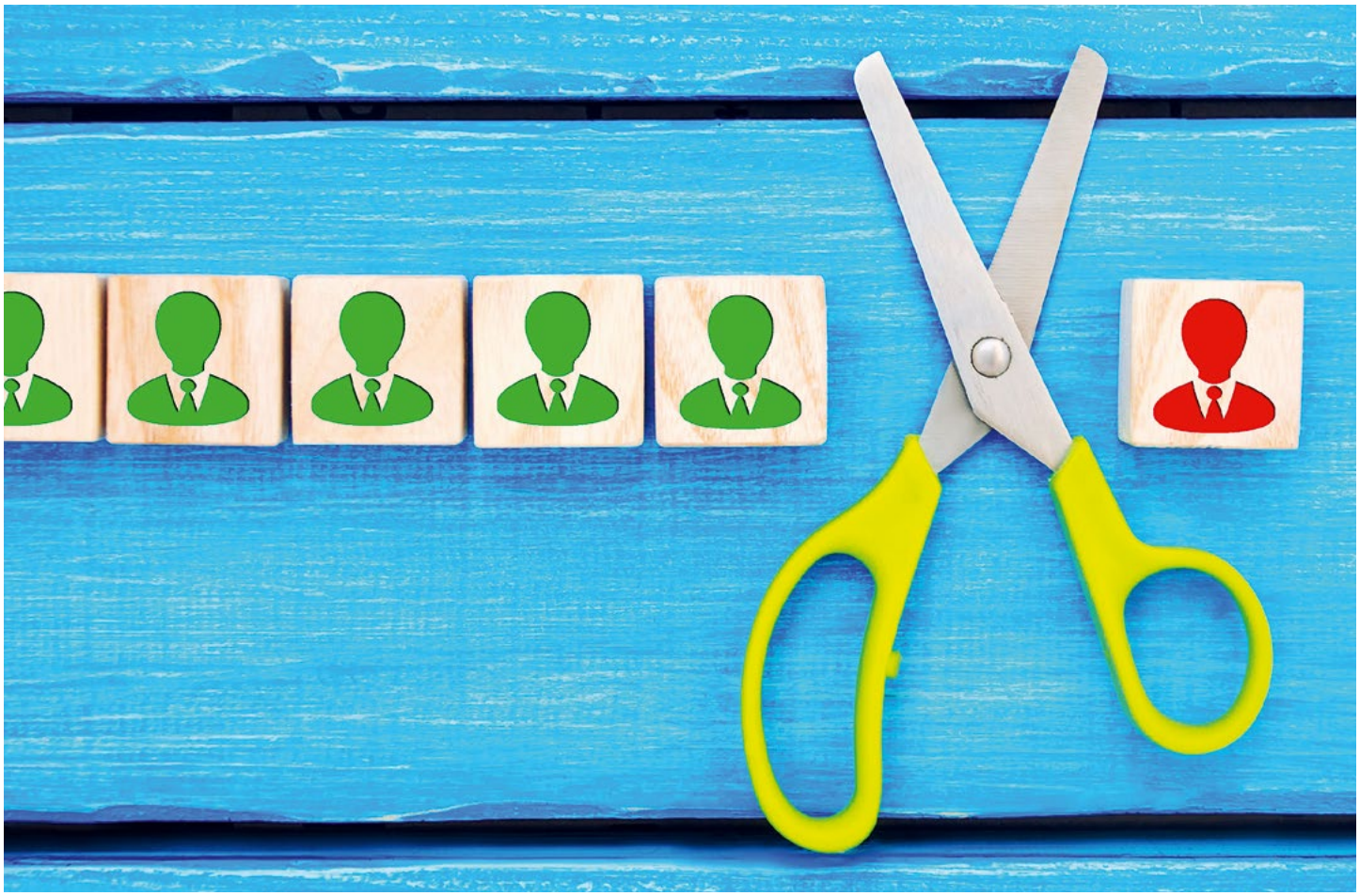

‘Love Contracts’– Can Employers Prohibit Relationships Between Employees?

By Howard K. Kurman

According to a published 2017 survey by Career Builder, 41% of employees surveyed admitted to dating a work colleague or a peer within the past year. Many employers choose to prohibit relationships between employees, but there are ‘love’ or relationship contracts that can be used to mitigate any issues that may arise from relationships between employees.

Relationship contracts require employees in a consensual relationship to acknowledge that, pursuant to their employer’s anti-harassment and retaliation policies and procedures, if the consensual relationship ever becomes nonconsensual either of the employees will be required to notify the company. These types of contracts can be particularly useful to ward off complaints of workplace harassment in a quid pro quo situation, where a superior and subordinate are involved.

Howard Kurman has discussed what employers can do to prohibit or mitigate relationships between employees, in the recording of this Telebrief. The Telebriefs® are 30-minute phone calls geared towards executives, HR directors, and supervisors, where Howard discusses employment law developments occurring over the past two weeks that will most significantly impact employers nationwide.

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the most effective employment policies that will minimise their legal exposure in today’s litigious workplace. As a skilled litigator, he has also successfully represented employers in a myriad of administrative, judicial and commercial litigations before the NLRB, EEOC, federal and state courts as well as other administrative agencies such as the Department of Labour and OFCCP.

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Harassment at work: risk assessment and mitigation

By Alessandra Marcondes D'Elia and Pedro Ackel

In the past few years, in Brazil, companies of the most varied sizes and segments have suffered severe financial and reputational losses due to judicial decisions that have granted huge damage compensation arising from moral and sexual harassment.

Recently, Law No. 13,467 of 2017 limited the value of compensation for moral damages to up to 50 times the value of the harassed employee's salary, depending on the severity of the damage. In the case of public civil actions filed to repair collective damages, this amount can be much higher, in values that are close to or even exceed BRL 1,000,000.00 (one million Brazilian Reais).

Harassment at work represents a risk factor and has a large impact on business reality. A simple

remediation of the episodes that occur is insufficient to contain their consequences. This is because, in addition to harming harassed workers' health, the harassment episodes affect the whole work environment, making it disheartening, uninspiring to all workers and unsuitable for business development. The even greater risk is the damage it may cause to the company's image before its clients.

In order to mitigate such losses and reputational damage, it is imperative that companies seek preventive solutions, such as the implementation of compliance programmes focused on labour issues.

Therefore, we highly recommend that companies in Brazil draft and implement an effective labour compliance programme that will ensure a safer and healthier work environment, with more satisfied and committed employees, enhancing quality, productivity and the success of the enterprise. In this way, companies are likely to spend less on compensation, court costs and attorney fees. Most of all, it will protect the company brand image and reputation, ensuring the maintenance and the development of its business.

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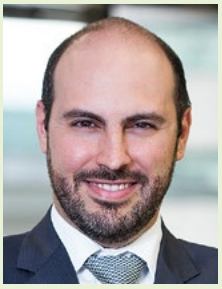

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Why Kindness Matters at Work

By Kelly Schoening Holden

Most employees who are dissatisfied at work feel that way because of a manager, not because of the company. Culture is created by the managers and when it is good, employees are happy and productive. When the culture is poor, turnover is higher. Unemployment is at one of its lowest rates and jobs are plentiful. In fact, there are not enough workers to fill openings. Turnover causes consistent re-training and lost productivity. The cost of turnover is estimated to be 2.5 times an employee's salary.

It seems to be common sense that anyone would rather work for a manager who is considerate, respectful, kind and understanding rather than someone who is rude, abrupt and disrespectful. Being the heavy hand and ruling with an iron fist does not usually generate the best results. In fact, that behaviour generally leads to litigation.

Kindness and respect are universally better attributes than the opposite. The American Film Institute did a survey of the greatest movie hero. Surprisingly, it was not Indiana Jones, James Bond or Superman; it was Atticus Finch from To Kill a Mockingbird: a gentleman who was kind, widely respected and chose right from wrong even when it was not popular. Atticus treated everyone with kindness and respect regardless of who the person was.

Another benefit from kindness is the decreased chance of legal liability. Managers who are highly respected and well-liked are less likely to be sued. The manager who is constantly critical and disrespectful infuriates employees, causing them to seek legal advice.

Mark Twain stated that 'Kindness is a language which the deaf can hear and the blind can see'. Kindness will improve the bottom line and as jobs are more competitive, being creative on how to attract quality employees and retain them is becoming more crucial. Start with kindness and respect and the rest will fall into line.

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When does an employer's course of conduct become an acquired right?

By Jeffrey L. R. Kenens

Imagine that an employer by custom increases the salary of his employees by means of wage indexation for years on end. Is the employer allowed to stop the wage indexation? Or is the employee entitled to the annual wage indexation? In such cases, the question arises whether this indexation has become an acquired right.

The Dutch Supreme Court has judged in its decision of 22 June 2018 that this question cannot be answered with a simple 'yes' or 'no'. In short, the Court has ruled that the answer depends on the legitimate expectation on both sides. In this regard, the Court ruled that the following viewpoints are relevant:

i. the content of the course of conduct;
ii. the nature of the agreement and the positions the employee and the employer take;
iii. the duration of the period during which the employer has followed the course of conduct;
iv. the statements (or lack thereof) of the employer and the employee with regards to the course of conduct;
v. the nature of the (dis) advantages that result from the course of conduct; and
vi. the categories and amount of employees that are affected by the course of conduct.

This ruling has provided useful insights for answering the aforementioned question. It will be interesting to see how lower courts interpret these viewpoints.

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Travelling Time and the Problem of Productivity

By Liam A. Entwistle

The law in Europe on paying for travelling time has become clearer over the years. The Thue[1] and Tyco[2] cases provide that travelling to and from work assignments at the beginning and end of the day where there is no 'base' (Tyco), or where the first or last assignment does not require travel to the 'base' (Thue) is Working Time, and therefore should be paid for, and count towards the working hours total.

What has not been made clear is the relationship between 'travelling' working time and contractual hours. Say an employee has core hours of 8.30am to 5pm. They may say 'If travelling is working, then I don't have to set off for my first assignment until 8.30am, and have to make sure that I am home by 5pm'.

This reduces the number of daily assignments, and therefore productivity. Given the legal position, peripatetic workers are entitled to count travelling time as working time, and therefore as part of their contracted hours. This time must be paid for (unless an employer insists on checking in at a 'base' to collect assignments), so how does an employer avoid paying for travelling and reduced productivity?

In order to fix this problem, employers should set clear distinctions in their employment contracts. A clause requiring employees to work other hours as reasonably requested is a start, but may not be enough. Making it clear that the contractual hours – or better still 'core hours' – have to be

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1) Thorbjorn Selstad Thue supported by the Norwegian Police Federation (Politiets Fellesforbund) v The Norwegian Government (Directive 2003/88 EC Case E-19/16). 2) Federacion de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security SL (Case C-266/14) [2015] IRLR 935.

spent performing assignments, or travelling from one assignment to another, would be good. Better still to make it clear that travelling to the first and from the last assignment of the day must be outside 'core' hours.

This clarity has implications. Overtime rules will need to be monitered, and overtime applied – perhaps by reference to travelling at antisocial hours – to ensure that travelling time does not automatically become overtime. The 48-hour weekly limit (which most employees contract out of) may become an issue. However, managing these issues should be preferable than having your clients pay more for less.

A Dutch investor's residence permit for US nationals for only EUR 4,500

By Huub Kapel and Wytske Wijnnobel

In a globalizing world, increasing numbers of both businesses and individuals venture across borders to establish themselves on a global marketplace and discover new markets. However, starting a business abroad often proves to be a difficult, lengthy and costly experience. The same holds true for the Netherlands. There is, however, one notable but not well-known exception for US nationals to the Dutch entrepreneurial visa landscape: the Dutch-American Friendship Treaty (DAFT).

The DAFT application is a relatively uncomplicated procedure through which American nationals can obtain a Dutch work and residence permit as an independent entrepreneur. Contrary to most other non-EU nationalities, American nationals have to meet fewer requirements and have to submit fewer documents to obtain this permit. They are exempt from both the difficult point-based scoring system and the condition that the business serve an 'essential interest for the Dutch economy'. The permit is, at first instance, issued for a maximum of two years but can be renewed for another five years. Moreover, DAFT exempts American nationals from the Dutch civic integration exam

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('inburgeringscursus') for the duration of the permit and family members (spouses and unmarried minor children) may join the main applicant.

The most important elements for the DAFT permit application are an American passport, proof of registration of the business with the Dutch Chamber of Commerce, a minimum business investment of EUR 4,500 (this amount must be maintained for the entire duration of the DAFT residence permit) and a balance sheet or forecast of the business.

The success of an international business opportunity abroad depends greatly on local immigration law. For this reason DAFT, the purpose of which is to lower boundaries hindering commercial activities between the two countries, is finally getting the attention it deserves.

Supreme Court Approves Arbitration Agreement Class Action Bar

By William P. H. Cary and Sarah M. Saint

Many US companies use arbitration agreements requiring employees to arbitrate employment claims instead of bringing them before a state or federal court. Many of these agreements are required by the employer as a condition of employment.

Recently, the US Supreme Court significantly broadened the protections available to employers

...next page

under these agreements. In the consolidated cases of *Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris and National Labor Relations Board v. Murphy Oil USA, Inc.*, the Court approved agreements requiring employees to arbitrate wage and hour claims against their employer on an individual basis, and not a class or collective action basis.

In light of this decision, companies should (re)evaluate the potential benefits of an employer-mandated arbitration programme, particularly companies large enough to be exposed to class/collective actions. In doing so, companies and their attorneys should consider the advantages (expediency, predictability of outcomes, confidentiality and possibly reduced damages) and disadvantages (rare wins on dispositive motions, limited appellate rights and lower costs for employees) typically associated with arbitration, and assess the individual needs of the company before installing an employer-mandated arbitration programme for workplace disputes. While the benefits of protection from the burdens and risks of class litigation are readily apparent, the relative ease with which arbitration claims can be brought may be seen by some as an inducement to increased employment litigation.

In drafting the terms of an arbitration programme, even though the *Epic* Court re-emphasised that courts must 'enforce arbitration agreements according to their terms', it is wise to be aware that earlier decisions have crafted numerous requirements to ensure that the system is implemented is fair.

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