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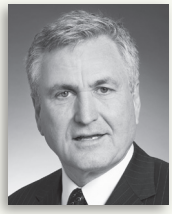

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Inside This Issue

United States: Say-on-Pay: The New World Order

By Jim Barrall, Alice Chung and Sam Greenberg

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank) was signed into law in the United States a little more than one year ago.

Out of the 850 pages of Dodd Frank, two pages made up Section 951 of the bill that provided shareholders of US public companies with the ability to provide a "yay" or "nay" vote on three types of votes on executive compensation: (i) an advisory vote to approve the compensation paid to named executive officers in the prior fiscal year (the say-on-pay or SOP vote); (ii) an advisory vote on how often this vote should be held (the frequency vote, sometimes referred to as the say-when-on-pay vote) and (iii) an advisory vote to approve so-called "golden parachute payments" made in connection with an acquisition, merger or other specified corporate transaction (the golden parachute vote).

From its origins in the United Kingdom, a form of say-on-pay now exists in at least six countries, with several others contemplating its addition into their corporate governance lexicon. While the exact mechanics of each country's say-on-pay regime differ, they all operate similarly to provide shareholders with a powerful new voice in an area once left to the corporate boardroom: a vital say in corporate compensation decisions.

In the US, early attention of companies and executive compensation professionals was on the frequency vote and what frequency companies would recommend and shareholders would support. However, in the last several months, the focus has been on SOP votes, proxy adviser recommendations, company responses and meeting results.

Frequency Vote

Early in the 2011 proxy season, public companies and their advisors spent much time and effort discussing whether companies should recommend annual, biennial or triennial say-on-pay votes to their shareholders. Institutional Shareholder Services (ISS) had published its 2011 voting policies and supported an annual SOP vote for all companies, without regard to individual company facts and circumstances. ISS reasoned that despite individual circumstances, annual votes would provide the most consistent channel of communication for shareholder concerns about executive compensation.

However, many boards of directors of early filers recommended triennial frequency to their shareholders, putting forth a litany of reasons against annual votes and for less frequent votes. Most noted that annual votes would exacerbate the tendency of shareholders to focus on short-term performance, and that less frequent votes would allow companies more time to thoughtfully prepare for and react to their shareholders' advisory votes.

Board recommendations for triennial say-on-pay votes enjoyed a comfortable lead early in the proxy season (with as much as 60 percent of boards recommending triennial say-on-pay vote). However, early shareholder meeting results showed overwhelming support for annual say-on-pay votes. Now, with a majority of companies with calendar fiscal years having had their shareholder meetings, it is evident that the annual say-on-pay advisory recommendation and votes have won this inaugural say-on-pay proxy season. Not surprisingly, small to mid-sized companies were more likely to receive shareholder votes favoring biennial or triennial frequency votes. Larger companies were more likely to receive shareholder votes favoring annual frequency votes.

Golden Parachute Vote

The golden parachute vote applies to any proxy filings that seek shareholder approval for certain transactions, such as acquisitions, mergers, asset sales and similar transactions for which SEC filings are required, and requires that shareholders be provided with a separate advisory vote on the golden parachute compensation arrangements covering named executive officers. Even in transactions that do not require a shareholder vote, companies were required to disclose golden parachute payments in filings, such as tender offers and going-private transactions.

Companies may avoid a separate golden parachute vote in their transactional proxy statements if the golden parachute arrangements were subjected to a prior say-on-pay vote; provided, however, that, if any golden parachute payments are adopted or enhanced after the prior say-on-pay vote, the new or enhanced golden parachute arrangements would need to be subjected to a vote in the transactional proxy statement.

It is not surprising that to date, because of the limited benefits of proactively subjecting executive golden parachute arrangements to an advanced say-on-pay vote, only a handful of companies have done so in advance of a transactional proxy statement.

To date, there has been no controversy with respect to the golden parachute vote. As of August 2, 2011, out of the approximately nine companies that have held shareholder meetings to approve transactions after the effective date of the golden parachute advisory vote rule, all nine companies have enjoyed passing votes from their shareholders for their executive golden parachute arrangements.

Say-on-Pay Vote

During the past few months, collective attention has shifted to the say-on-pay vote. For a while, executive compensation and governance experts were focused on the shareholder meeting voting statistics. From the beginning of the 2011 proxy season, the percentage of companies that did not receive a majority say-on-pay advisory vote from their shareholders remained at less than two percent, with more than 90 percent of companies receiving at least a 70 percent approval rate. But, behind the numbers were the real stories.

Proxy advisers, like ISS and Glass, Lewis & Co. (Glass Lewis) recommended against numerous companies' executive compensation policies. As of July 28, 2011, ISS had recommended against company say-on-pay advisory votes in approximately 13 percent of the Russell 3000 companies' proxies it reviewed. By some accounts, Glass Lewis' against recommendations numbered higher. Such negative recommendations have been triggered by a variety of pay policies and practices that the proxy advisers have labeled as "problematic" or "egregious." For example, ISS has recommended against company say-on-pay advisory votes for company executive compensation arrangements that included Internal Revenue Code Section 280G tax gross-up payments on golden parachute payments, single-trigger change-in-control payments or broad (so-called "liberal") change-in-control definitions, "excessive" severance pay and "excessive relocation payments," particularly including those with home-loss make-whole payments and related income tax gross-ups. However, the most prevalent and

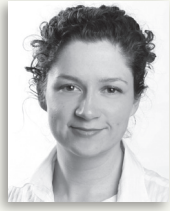
important basis for proxy adviser negative recommendations has been perceived "pay-for-performance" disconnects between the company's financial performance and its pay to its executive officers — most importantly, to its CEO.

Many companies addressed negative ISS and Glass Lewis recommendations head on, by filing additional proxy materials prior to shareholder meetings to dispute. While most companies disputed the negative recommendations by challenging their pay-for-performance judgments (noting factual errors, weaknesses in the stock option valuation method and disconnects in proxy adviser peer group determinations), some companies amended their existing employment and equity agreements to induce ISS to change its adverse recommendations. Still other companies made prospective pay-for-performance commitments to subject a certain percentage of shares underlying named executive officers' equity awards in future years to performance vesting.

Aside from the issues related to losing their say-on-pay advisory votes, companies that did not receive at least a majority say-on-pay vote, and even one company that received more than a majority say-on-pay vote, have also been subjected to shareholder derivative suits filed against their directors and executive officers, and in some cases, their independent compensation consultants firms. Although these shareholder derivative suits face substantial legal hurdles, these suits are distractions and may cause companies and their insurers to make settlement payments to the lawyers at relatively early stages in the proceedings to avoid the time and expense of trying them on the merits.

Conclusion

From its UK origins, say-on-pay is now a prominent fixture of the global corporate landscape. In the US, arguably the biggest say-on-pay scoop this proxy season has been the importance of proxy advisers' recommendations and how vocal companies have been in responding to adverse recommendations. Due to the importance of proxy advisers' say-on-pay recommendations and the difficulties companies had in engaging with shareholders on such matters between the short period of time from the proxy advisers' issuance of reports to the shareholder meetings, it is imperative that companies engage with their important shareholders much earlier in the proxy season. Given that most large public companies have adopted annual say-on-pay votes to follow their shareholders' advisory votes, companies will face these say-on-pay challenges annually, at least for the foreseeable future. Prior to the 2012 proxy season, public companies should review the outcome of their say-on-pay advisory votes and the reasons behind the outcome, evaluate whether executive pay at the company aligns with company performance, determine whether executive compensation policies should be revised in coming years and assess how to best explain the pay-for-performance alignment to shareholders in the upcoming proxy season. ■



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United Kingdom: Equal Rights for Agency Workers

By Kathryn Donovan

From October 1, 2011, new regulations will come into force in the UK providing parity for agency workers with directly-engaged workers of the hirer regarding pay, working time, vacation and overtime. For those hirers to whom the Agency Workers Regulations 2010 (the Regulations) apply, this could mean considerably increased costs, as well as the administrative burden of monitoring agency workers' service and of considering whether their work is comparable to work of individuals the hirer directly engages.

When Do the Regulations Apply?

The Regulations apply when one organization supplies labor to another organization in return for a fee based on the work performed by the agency worker for the "hirer." A typical example is an agency that supplies individuals to retailers during the holiday period to cope with seasonal shopping surges. The Regulations do not apply to organizations such as recruitment agents who provide an introductory service by matching job applicants to job vacancies.

The Regulations apply if:

- *The agency is engaged in the economic activity of supplying workers for temporary assignments (whether or not for profit), i.e., the agency supplies labor rather than an end product;* The Regulations would not apply, for example, to an architect who sub-contracts the task of building a wall to a building company. In this example, the supply is the wall, not the labor of the brick layers.
- *The workers supplied are under the supervision and direction of the end user; and* The Regulations do not apply where, for example, a consultancy firm introduces a firm of IT specialists to a business to audit the business's IT systems. In this case, the individuals performing the services will have a large degree of expert knowledge and independence in conducting that audit, and so will not be under the supervision and direction of the business being audited.
- *The workers must have a contract of employment with, or a contract to perform work and services personally for, the agency.* The Regulations do not apply where the agency is in fact a client of the individual worker.

The Regulations are not intended to apply to genuine secondment arrangements, or to managed service contracts where the hirer does not supervise those working on the services. However, the Regulations include wide anti-avoidance provisions. UK employment tribunals are likely to scrutinize any such arrangements carefully and issue penalties for anti-avoidance when they consider it appropriate to do so (these anti-avoidance provisions are described in more detail below).

Equal Rights

The Regulations afford agency workers two categories of equal treatment rights:

- Those that apply from the first day they are placed with the hirer (Day 1 Rights)
- Those that apply after they have accrued 12 weeks' continuous service with the hirer (Week 12 Rights)

Day 1 Rights

From the first day of an agency worker's assignment to the hirer, the hirer must provide the worker with (i) access to on-site collective facilities and amenities and (ii) information about all relevant vacancies in the hirer's organization.

In the example of an office with a discounted on-site staff canteen, agency workers are entitled to access the canteen and to purchase meals, but the Regulations do not entitle such workers to the discount provided to office employees. Similarly, if a company has an on-site gym, agency workers must be given access to it. If the company pays for its employees to use the gym next door, there

is no obligation on it to do likewise for its agency workers as the gym is not an on-site amenity.

Week 12 Rights

If an agency worker has worked for the same hirer for 12 calendar weeks, the agency worker qualifies for equal treatment with the individuals directly hired by the hirer with regard to pay, duration of working time, vacation and overtime. Some breaks within the 12-week period restart the clock for the accrual of these rights. For example, the 12-week period will restart if the worker moves to a substantively different role within the hirer's organization, or the worker is supplied to a different hirer. Other breaks merely suspend the clock, including any break shorter than six weeks and any planned shutdowns of the hirer's workplace such as over the holiday season. The clock will continue to run during breaks for maternity, adoption or paternity leave.

An agency worker who accrues the requisite 12 weeks' service may claim equal pay with a comparable individual who was directly hired by the hirer. For example, a retail assistant supplied by an agency for 14 continuous weeks may claim the same hourly rate of pay as a retail assistant employed by the hirer, but that right to equal pay only applies once that 12-week threshold has been passed. The definition of "pay" in the Regulations is wide, and includes bonuses that relate to performance or quality of work. These Week 12 Rights are enforceable by workers against the agency, not the hirer, and so agencies are likely to contractually oblige hirers to monitor the periods for which individuals are placed within their organizations, regardless of whether those individuals were supplied by that particular agency for the whole period of their work for the hirer. This also means that fees charged by agencies may increase to cover the risks to them of claims under the Regulations.

In order to aid agency workers in enforcing these rights, the Regulations impose obligations on both the agency and the hirer to supply information to the agency worker regarding pay, working time and certain other information regarding directly-hired workers in the hirer's organization whose work is comparable to that performed by the agency worker. The agency or the hirer are only required to supply this information if the agency worker requests it.

Anti-avoidance

The Regulations contain considerable anti-avoidance provisions to dissuade hirers from structuring assignments in ways designed to deprive agency workers of their rights, e.g., by artificially rotating them between jobs. If an agency worker is hired for 11 weeks by the hirer, hired again after a seven-week break and then, after another seven-week pause, hired for a third time, this could be regarded as an attempt to avoid equal treatment. Additional awards of compensation of up to £5,000 can be awarded where there has been an orchestrated avoidance of Week 12 Rights.

Liability

The hirer is liable for breaches of Day 1 Rights, and it has a defense if it can show that the difference in treatment was objectively justified. The agency is liable for breaches of Week 12 Rights, and it may defend this by challenging whether the comparator identified by the worker is appropriate, or showing that it took "reasonable steps" to obtain relevant information from the hirer about employment terms ordinarily included for the hirer's comparable, directly-engaged workers. In the latter case, the liability would then shift to the hirer.

Where Week 12 Rights have been breached, agency workers can choose to bring claims for damages in the employment tribunal against either their agency or the hirer, because they will not know whether the liability for these Week 12 Rights has shifted. In determining any award, the tribunal will consider matters such as the seriousness of the breach and any financial loss caused to the worker. Besides awarding compensation, the tribunal may also make declarations or recommendations for action to be taken.

Conclusion

The Regulations are likely to have a significant impact on certain UK employers such as retailers, manufacturers and others who engage agency workers on a regular basis. The key considerations for hirers and agencies will be the contractual provisions between them for (i) allocating the risk and cost of claims, (ii) designating responsibility for monitoring the periods of work and (iii) sharing information about the rights of comparable directly-hired employees. ■

France: Headcount Adjustments by Voluntary Departures

By Agnès Cloarec-Mérendon and Matthias Rubner

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Due to a combination of political and economic factors such as an overall fragile economic situation, a significant level of unemployment, protective legislation and a high level of scrutiny by politically active labor departments, headcount reductions in France are a complicated issue.

Mindful of these factors, General Counsels, Country Managers and HR professionals have increasingly turned to a less aggressive approach than straight redundancies — the voluntary departure. There were a number of voluntary departures in 2010, and this trend is expected to carry on through the remainder of 2011. Official statistics show that mutual termination procedures were up by more than 30 percent during the last year, while the number of redundancy plans (so called "social plans" or, by the exact terms of the law, "employment safeguard plans") was down by almost 50 percent during the same time period.

Despite its increasing popularity, a voluntary departure under French law is significantly more complex than an employer and an employee simply signing an agreement to part ways. Legal rules and recent case law (*i.e.*, from the end of 2010 through the first quarter of 2011) detail a strict and formal framework that illustrates the genuine legal risks to an employer who agrees to, or implements, voluntary departure.

French law provides for two ways to implement voluntary termination of an employment contract: the mutual termination procedure and voluntary departure plans.

Mutual Termination Procedure

The mutual termination procedure is a strictly regulated option for terminating an employment contract, a "third way" alternative to either resignation or dismissal. French law provides for a specific procedure to be followed to ensure that the employee's consent to the termination of the employment contract is a product of free will, exempt from undue pressure and well informed. In addition, employees whose employment contracts are terminated through the mutual termination procedure are eligible for public unemployment insurance, which adds a degree of financial safety to this option.

To begin a mutual termination, the employer and the employee must agree on one or more formal meetings. The employee can be assisted during these meetings by a fellow employee or, if the company does not have employee representatives, by an accredited external advisor (not a lawyer, but generally a volunteer union member). When both parties agree on the terms of the mutual termination, which despite its mutual character, must include a severance payment to the employee in an amount not lower than the severance payment that would have been mandatory in case of a dismissal, the parties sign a state-provided form agreement. If required, the parties may add additional agreed-upon terms and conditions in an annex to the agreement. From the date of signature, each party has two-week period to cancel the agreement on a purely discretionary basis. Assuming the parties do not cancel the agreement, the local labor department must be notified of the agreement during a precisely defined time period (in practice, about three weeks) in order to question or even object to it. If the labor department objects to the agreement (for example due to apparent discrimination or a breach of the mandatory redundancy rules — see below), it is null and void. If the labor department does not object, the agreement is deemed approved and the employment contract effectively terminates. In addition to these procedures, specific additional requirements apply to "protected employees" (primarily employee representatives).

New Case Law on Mutual Terminations

Having been established mid-2008, the mutual termination procedure is a fairly new

method of terminating employee contracts. Given that lawsuits may take years to reach a court of appeal or the supreme court, it is not surprising that the first batch of significant cases in this area has only recently emerged. These court decisions provide some insight into the two major legal risks associated with mutual terminations.

The first risk is related to the employee's consent: several plaintiffs alleged that they were placed under undue pressure to accept a mutual termination. Courts have accepted this argument in cases where the employee was able to provide evidence that at the time the mutual termination agreement was signed, the employer and the employee were involved in a dispute, therefore diminishing the employee's ability to freely enter into the agreement. These disputes generally revolved around an employer subjecting the employee to disciplinary action. While the courts of appeal acknowledged that an employer-employee dispute impairs an employee's ability to freely enter into a mutual termination agreement, they will only accept this argument if the employee can prove that the dispute "was still present at the time of the formal meeting or at the time the mutual termination agreement [was] signed." In two notable decisions, the Court of Appeal of Rouen (Western France) rejected several employees' claims, stating that while a dispute likely existed, perhaps even as close as one month before the formal meeting, the employee failed to prove that the dispute was ongoing. Consequently, the validity and effectiveness of the mutual termination agreement was upheld.

The second risk is related to the tension between mutual terminations and French economic redundancy legislation. Can an employer sign five, 10 or even 100 mutual termination agreements as a way of reducing its headcount? The answer is: mutual termination procedures may validly occur in the context of headcount reductions. However, they are designed essentially as an individual and not as a collective approach. If numerous mutual terminations actually translate into a covert employer project to reduce its headcount, then the prior consultation of the works council (if present) on a headcount reduction project may be required. Further, if more than nine headcount reductions occur over certain legally defined periods of time, then a formal social plan may become mandatory as well. Mutual terminations are not a valid way of circumventing the protective legislation of social plans (Supreme Court, March 9, 2011).

The Collective Approach: Voluntary Departure Plans

Voluntary departure plans are the collective counterpart to individual mutual terminations. These plans can offer interested employees attractive payments and support for the pursuit of a career outside the company. Major French multinational firms have shown interest in this option: a recent publicly announced voluntary departure plan for one such firm is open to 600 employees, another firm implemented a plan for 4,000 employees to leave and there are many others. Voluntary departure plans generally meet with considerably less resistance from works councils and unions than straight redundancy plans and from time to time, employers have faced more employees interested in leaving than there were positions open for a voluntary departure! As such, with plans that are tailored to a collective headcount reduction, their implementation requires prior works council information and consultation. Additionally, some, but not all, provisions that apply to economic redundancy procedures will apply to voluntary departure plans. Voluntary departure plans, other than mutual termination agreements, do not have a clearly established legal basis. They were created in practice, tested in court and have over time reached a certain level of legal reliability which, however, is still not perfect.

New Developments on Voluntary Departure Plans

A November 2010 French Supreme Court decision approved one major French multinational firm's voluntary departure plan, bringing such plans closer to a more satisfactory level of legal certainty. It is now also clear that equal treatment principles apply: employers must provide for objective and non-discriminatory reasons when refusing the "benefit" of a voluntary departure to an interested employee.

While such plans have met approval by employers and employees alike, the December 20, 2010 law fixing social security funding for 2011, significantly cut the ability to exempt termination payments from social security contributions. The result of this law is that either employers will need to significantly increase their budget to keep voluntary termination payments at a sufficiently attractive level, or employees will need to think twice about whether they are willing to leave their employment with considerably less in-the-pocket value than in the past. ■

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United States: *Wal-Mart Stores, Inc. v. Dukes*: US Supreme Court Toughens the Requirements for Certification of Employment Discrimination Class Actions

By Joe Farrell and Linda Inscoe

On June 20, 2011, the United States Supreme Court issued a landmark decision in *Wal-Mart Stores, Inc. v. Dukes, et al*, that limits the ability of employees to pursue class action employment discrimination claims against their employers.

In *Wal-Mart*, three current or former female employees sought to represent a nationwide class of some 1.5 million female employees of Wal-Mart in an action alleging gender discrimination in pay and promotions. The plaintiffs did not allege an express practice of discrimination against women by Wal-Mart, or that Wal-Mart was using a screening or testing method resulting in a disparate impact against female employees. Instead, plaintiffs alleged that Wal-Mart had granted discretion to thousands of managers to make pay and promotion decisions in a largely subjective manner, and that Wal-Mart's corporate culture and personnel practices left the company "vulnerable" to gender discrimination. Plaintiffs' claimed that the exercise of discretion by Wal-Mart's overwhelmingly male population of managers, and bias in the corporate culture, resulted in all female employees falling victim to a common discriminatory practice. The Supreme Court rejected the plaintiffs' theories.

In doing so, the Supreme Court decided several important and frequently contested issues:

- The Court made clear that the requirement for class certification that there be at least one common question of law or fact means that there must a common contention the determination of the truth or falsity of which will resolve an issue central to the validity of each class member's claims in "one stroke." The Court also made clear that such an inquiry will often require that the district court analyze the merits of the plaintiffs' claims and indicated in dicta that it believes that a district court should apply the *Daubert* standard to expert testimony offered in support of class certification.
- The Court reaffirmed that granting broad discretion to decision makers is not sufficient, by itself, to raise as a common question an inference of discrimination on a class wide basis; there must be a specific — common — employment policy or practice in addition to the grant of discretion that is challenged.
- The Court rejected the use of national and regional statistical studies of pay and promotion disparity as evidence that decisions made at the store level were discriminatory.
- The Court rejected a "social framework" study that could not determine the percentage of pay and promotional decisions affected, or identity of individuals impacted, by the risk of gender bias found in the study.
- The Court rejected determination of individual damages by statistical sampling and reaffirmed the defendant's right to raise affirmative defenses to each class member's damage claims.
- The Court rejected the use of a mandatory class under Federal Rule of Civil Procedure 23(b)(2) where there are individual claims for back pay or damages that are not incidental, and ruled that a class including such claims must satisfy the more stringent requirements of Rule 23(b)(3), including the requirements that common issues of fact or law

predominate over individual issues and that a class action be superior to other means of adjudication.

The Court Requires a Rigorous Review of the Existence of a Common Issue of Law or Fact

The decision of the Court addresses two major issues. In the first part of its opinion, the Court addressed the standards under Federal Rule of Civil Procedure 23(a)(2) for establishing whether a common question of law or fact exists, one of the preliminary inquiries necessary in determining if a case can be certified as a class action. The Court clarified the meaning of common questions of law or fact. Citing its 1982 decision, *General Telephone Co. of the Southwest vs. Falcon*, 457 US 147, 157 (1982), the majority explained that commonality requires the class members "have suffered the same injury." Specifically, to demonstrate a common question of law or fact, the "claims must depend upon a common contention of such a nature that it is capable of class-wide resolution…which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." The court cited as an example of a legitimate common question the assertion of discriminatory bias against the entire class by a single supervisor. By contrast, the Court held that the plaintiffs in Wal-Mart were attempting to resolve in one action the reasons for millions of individual pay and promotional decisions made by numerous supervisors, and concluded that no common question existed.

In reaching that conclusion, the Court made several rulings that may be as instructive for the defense of pending and future discrimination class actions as is the overall holding of the case. The Court noted that the only general policy cited by plaintiffs was the policy of allowing supervisors to exercise broad discretion in making pay and promotional decisions, and stated that, on its face, such a policy was the "opposite of a uniform employment practice." The Court further noted that demonstrating one manager's misuse of this discretion would not demonstrate the same misuse by another. The Court explained that it was necessary not only to show delegated discretion, but a "specific employment practice" that affects the entire class.

The Court rejected a sociologist's "social framework" analysis that concluded that Wal-Mart had a "strong corporate culture" that made it "vulnerable" to gender bias. The Court did so because the sociologist could not estimate what percentage of Wal-Mart employment decisions might be determined by stereotypical thinking. The Court found this failure made the evidence "worlds away" from the "significant proof" of a general policy of discrimination that is required.

Similarly, the Court rejected statistical analyses that did not address the bias of the decision makers at individual stores, but only demonstrated disparities in gender representation at regional and greater levels. The Court noted that evidence of regional and national disparities did not establish the uniform, store-by-store disparity that was necessary to the plaintiffs' theory of commonality.

Finally, the Court held anecdotal reports of discrimination from 120 female employees in a class of over 1 million employees to be insignificant. Noting that the reports were concentrated in only six states, half of all states had only one or two anecdotes, and 14 states had none, the Court found the evidence insufficient to demonstrate a "general policy of discrimination" on a nationwide basis.

Common Issues of Fact or Law Must Predominate in Class Actions Seeking Individual Monetary Relief

The second major portion of the decision addresses the question of whether claims for backpay (or other substantial individual monetary relief) can be certified as a class under Rule 23(b)(2). In rejecting the certification of the Wal-Mart class, the Court made clear that it was not completely foreclosing certification of a class action

in which backpay or other individualized monetary relief is sought on behalf of a broad class. However, the Court's decision does mean that plaintiffs seeking substantial individual monetary relief must comply with the more rigorous certification requirements of Rule 23(b)(3).

The Court held that the monetary damages must merely be incidental to the requested injunctive relief and declaratory relief for a class to be certified under Rule 23(b)(2). Certification under Rule 23(b)(2), which allows for mandatory classes, with no right to notice and no opportunity to opt out, is not appropriate in a case in which monetary relief is more than incidental. The Court held that back pay is not incidental monetary relief, and that due process requires where back pay is sought that class certification be evaluated under Rule 23(b)(3), which, among other things requires the plaintiffs to prove not only that there are common questions of law or fact, but that the common questions predominate over individual issues.

Significantly, the Court also rejected the Ninth Circuit's statistical sampling method of determining back pay awards, which the Ninth Circuit relied upon, in part, to conclude that application of Rule 23(b)(2) was appropriate. The Court held that "Wal-Mart is entitled to individualized determinations of each employees' eligibility for back pay." The Court further held that "when the plaintiff seeks individual relief, such as reinstatement or back pay, after establishing a pattern or practice of discrimination, 'a district court must usually conduct additional proceedings…to determine the scope of individual relief.'" At that point, the burden would shift to the company, but the company would have the right to raise any individual affirmative defenses it may have the individual claim.

What Employers Should Take Away From the *Wal-Mart* Decision

Wal-Mart v. Dukes is an important decision for employers. It requires a much more rigorous review of employment class actions at the class certification stage and gives substantial guidance on the questions of what evidence and procedures are appropriate for determining class certification. The key lessons of the decision for employers are:

- A class action discrimination claim that is based upon numerous decisions of multiple decision makers will be difficult to certify without substantial evidence of a policy or practice that forms the common underlying reason for those decisions.
- Granting individual managers substantial decision making discretion with respect to pay and promotions is an acceptable employment practice when combined with a clear policy prohibiting discrimination, and the absence of evidence of a specific employment practice that can be challenged as discriminatory.
- Certification of class actions seeking individual monetary relief will be more difficult to obtain. Plaintiffs seeking individual monetary awards cannot short-cut the class certification process by asserting that claims for injunctive or declaratory relief predominate over the claims for individual monetary relief, but must demonstrate that common issues of law or fact predominate over the individual issues.
- Certification of class actions where the individual claims for monetary relief are subject to individual affirmative defenses will be more difficult to obtain. Statistical analysis of damages cannot substitute for individual damage determinations where there are statutory affirmative defenses that vary in application from one class member to the next.
- Very large, geographically disbursed employers are far less vulnerable to nationwide class actions challenging individual employment decisions that are not driven by a common screening mechanism or decision-maker. ■

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California Supreme Court Rules That California's Overtime Rules Apply to Out of State Employees Performing Work in California for California Employers

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On June 30, 2011, the California Supreme Court issued a decision in *Sullivan et al. v. Oracle Corporation* that may result in a flurry of class-action claims against large California-based employers and requires them to immediately examine their practices with respect to paying out-of-state non-exempt employees for work performed in California on a short-term or temporary basis.

Although not encompassed by the decision, it is likely that employees of businesses based outside of California who perform work in California on a short-term or temporary basis will seek to expand on this decision by asserting claims against their employers under California's overtime laws, especially if the employers have facilities in California.

California employers are subject to more stringent overtime laws, including the daily overtime requirement, than are employers based in most other states in the US. In *Sullivan*, three former employees of Oracle Corporation, who worked as "instructors" and traveled from their residences outside of California to perform periodic work inside California, brought a claim against Oracle in the United States District Court for the Central District of California asserting, among other claims, that they were: not exempt from California and federal overtime laws, and were entitled to overtime pay in accordance with California law while performing work in California..

The District Court rejected the plaintiffs' claims. The plaintiffs appealed to the United States Ninth Circuit Court of Appeals, which affirmed in part and reversed in part. Subsequently, however, the Ninth Circuit withdrew its opinion and certified the question of the application of California law to the California Supreme Court.

The California Supreme Court held that California's Labor Code overtime provisions do apply to out-of-state employees of California-based employers when they perform work in California. In reaching that conclusion, the court stated that it was neither improper nor capricious for California to regulate all non-exempt overtime work performed within the state's borders. The court also stated that the overtime laws served the important public policy goals of protecting the health and safety of workers and the general public, protecting employees in relatively weak bargaining positions, and expanding the job market by giving economic incentives to spread employment throughout the work force.

The court did not address a number of other important questions. First, the court did not address whether other provisions of the California Labor Code, such as meal and rest-period requirements, also apply to out-of-state employees performing work in California. Second, the court did not address whether an out-of-state business sending out-of-state non-exempt employees into California would be subject to California's overtime laws. Finally, the court did not address the application of California's overtime laws to an employee who spends part of a work day in California. It addressed only those who spend an entire work day or work week in California.

The *Sullivan* decision is a very important decision for any California-based employer who has non-exempt employees travel to the state to perform work. A California-

based employer bringing non-exempt employees into the State of California to perform work for an entire day or work week must pay in accordance with California's overtime laws for the time worked in California. Employers who have not done so in the past — especially if they routinely sent particular non-exempt employees and/or large numbers of non-exempt employees to California without complying with that State's overtime rules, need to consider whether to voluntarily remedy past failures to pay, or to risk class action litigation.

For employers located outside of the State of California sending non-exempt employees into the State of California, the question remains open as to whether employees who spend entire work days or work weeks in California are subject to California's overtime requirements. Given the California Supreme Court's rationale in this case, there is a meaningful risk that Sullivan will be expanded to reach out-of-state employers. However, until that question is answered, out-of-state employers face the risk of being the subject of class action litigation if they send substantial numbers of employees into California. ■

Click here to view the full *Client Alert* with endnotes.

French "Dividend Bonus" Law Adopted

By Matthias Rubner

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On July 13, 2011, the French Parliament adopted legislation requiring French companies regularly employing at least 50 employees to pay a so-called "dividend bonus" to their employees. A government circular dated July 29, 2011, provides companies with further guidance. Specifically:

If such companies pay dividends to their shareholder(s), the amount of which, per share, is higher than the average amount of dividend payments per share made during the previous two fiscal years, then the company is obligated, no later than three months after the shareholders approved the dividend, to start collective bargaining with its unions or with the works council, or to submit a draft dividend bonus agreement to an employee referendum.

The same obligation also applies to members of a controlled group of companies (subject to certain conditions) if the French parent company of the group paid dividends in an amount higher than the average amount of the two previous fiscal years.

If the parties fail to agree on the amount of the dividend-bonus, the employer may determine the amount unilaterally. The legislation does not provide for a mandatory minimum amount, but states that the amount of any dividend bonus is exempt from social security contributions up to €1,200 per year, per employee. Given this tax preference, employees are likely to demand payments around this figure unless their employer can justify an alternative (likely lower) amount. An employer may escape the dividend-bonus obligation altogether if it can demonstrate that a discretionary financial benefit has already been granted to all employees in the current year on the basis of an agreement entered into with the unions and that either all or part of the payment was granted in consideration for the increase of dividend payments to shareholders.

French President Sarkozy's government proposed the law in a move designed to redistribute shareholder value to employees so as to improve their purchasing power. The French Government expects that approximately four million French employees, *i.e.,* around a quarter of the employees in the private sector, will be eligible for dividend-bonus payments. The draft law has been strongly criticized by employer's federations and employee unions alike, the former arguing that the law is inappropriate and counterproductive and the latter arguing that the legislation does not go far enough to improve employee purchasing power.

Remuneration Plans in France: Parlez-vous français?

On June 29, 2011, the Employment Chamber of the French Supreme Court held that the metrics that determine an employee's variable remuneration must be written in French. If they are written in another language (English, in the case of the court decision), they are deemed unenforceable against the employee, even if the employee is proficient in the other language.

This decision conflicts with an earlier decision of the same Chamber of the Supreme Court that held that the provisions of a stock option plan, written in English, were enforceable against a French employee if it could be shown that the employee was proficient in English (decision of May 16, 2007).

The consequences of the June 29, 2011, decision have yet to be determined. Nonetheless, companies and groups of companies implementing remunerations plans or other similar employee-benefit plans in France without French translations should exercise caution. Further, companies and groups of companies are reminded that employment contracts (including any amendments), codes of business ethics, compliance rules, health and safety instructions and technical information or manuals necessary for an employee to perform his or her job must be provided to employees in French. ■

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UK Prospectus Regulations Implemented July 31, 2011

By Sarah Dunkley

Following our update on page 18 of the December 2010 issue of *The Working World* regarding the amendment to the Prospectus Directive to extend certain exemptions applicable to employee share schemes, the UK government has now enacted regulations essentially "fast-tracking" two of the amendments into English law, with effect from July 31, 2011.

As a result of the new regulations, with effect from July 31, 2011, no prospectus will be required when employees in the UK are offered transferable securities and either:

- Fewer than 150 UK employees are offered the securities; or
- The total consideration paid in any 12-month period for the securities across the whole of the EU is less than €5 million.

Previously these limits were 100 employees and €2.5 million, respectively. These amendments should therefore make it easier to grant equity based incentives to employees in the UK without triggering compliance with the European Prospectus Directive.

Employee Plans and the Prospectus Directive – A Recap

By way of a recap, certain employee share incentive plans must comply with the European Prospectus Directive (the PD). This means that, unless any of the exemptions apply, introduction of certain share plans to European employees can trigger a requirement for the company to produce a full PD-compliant prospectus which is approved by the home member state's regulator. This can be a time consuming and expensive exercise for employers.

Fortunately, the PD only applies to share incentive plans where an "offer" of "transferable securities" is deemed to be made under the plan. Generally non-transferable option plans and plans which provide free shares to employees will not comprise offers of transferable securities and will fall outside the scope of the PD. The PD can however apply to other share incentive plans where Europe based employees pay consideration to receive shares such as an ESPP. It is therefore important for employers operating share incentive plans to be familiar with the various exemptions under the PD.

On January 1, 2011, an amendment to the Prospectus Directive was approved that expands certain exemptions. Each European member state has until July 1, 2012 to enact local legislation to implement these amendments.

What Are the Exemptions?

There are currently three main exemptions to the requirement to produce a prospectus. Two of these exemptions are expanded by the amended Prospectus Directive, and in the UK this will take effect from July 31, 2011 under the new regulations:

- No prospectus is required where an offer of securities is made to fewer than 100 persons in any one member state — under the new UK regulations, this threshold will increase to 150 persons per member state from July 31, 2011;

- No prospectus is required where the aggregate consideration paid in any 12-month period across the EU for an offer of securities is less than €2.5 million — under the new regulations, this threshold will increase to €5 million from July 31, 2011;
- No prospectus is required for an offer of securities where the total consideration throughout the EU of less than €100,000 (when aggregated with offers made in the EU in the previous 12 months). Technically, offers falling in this category will already be exempt under the exemption above in the UK.

What About the "Employee Share Scheme Exemption"?

There is also the so-called "employee share scheme exemption," which is a partial exemption that, to date, has been of limited use. This exemption currently allows eligible companies whose share incentive plans are caught by the PD to make available to their employees a shorter "information document" rather than a full, PD-compliant prospectus. Currently only companies that have securities already traded on a "regulated market" (that is, a market which is regulated and authorised in accordance with the European Markets in Financial Instruments Directive) can avail themselves of the employee share scheme exemption. This means that the exemption is not currently available to unlisted companies, or companies that are listed on markets such as AIM and NASDAQ which are not "regulated markets."

Once the amended directive is fully implemented in each EU member state (*i.e.*, by July 1, 2012):

- All companies with their head office or registered office in the European Union will benefit from the employee share scheme exemption
- All other companies (*i.e.*, companies whose head office is based outside the EU) will benefit from the employee share scheme exemption if:

  (1) They have securities traded on a "regulated market;" or

  (2) They have securities traded on a market in a country outside the EU and (a) the EU commission has issued a formal decision that the country's legal and supervisory framework is equivalent to that which is applied to the EU regulated markets under certain EU directives; and (b) adequate information is available in a language "customarily used in the sphere of international finance."

This is good news for both European and non-European companies as the risk of having to produce a full PD-compliant prospectus in relation to a share incentive plan will be significantly lower — at least from July 1, 2012 — when we expect the amended Prospectus Directive to be fully implemented by all EU member states.

In the meantime, at least in the UK, the risk of tripping up over Prospectus Directive compliance in relation to equity based share schemes should be slightly reduced by the new regulations. ■

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