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GLOBAL WORKPLACE LAW PERSPECTIVES

Proposed Chilean Labor Law Would Strengthen Union Power

Proposed legislation before the Chilean Congress would significantly enhance unions' power to bargain collectively with employers. Among other things, the legislation would make unions the exclusive representative of employees, prohibit the use of replacement workers during strikes, and increase fines against employers who engage in anti-union practices. The proposed legislation is expected to be enacted by first quarter of 2016 and would become effective approximately nine months later.

An overview of the collective bargaining process in Chile and highlights of the proposed law are set forth below.

Collective Bargaining in Chile

Under Chilean labor law, there are two types of collective bargaining -- formal bargaining that is regulated by statute, with specific timeframes and dispute resolution procedures, and that may end in a strike, and informal bargaining, which the parties may conduct at any time. Successful regulated bargaining results in a "contrato colectivo" or a "collective contract." Successful informal bargaining results in "convenio colectivo" or "collective agreement" and has the same effect as a collective contract established through regulated bargaining.[1]

The key difference between the two is that, if the parties do not reach an agreement through regulated bargaining, the employees have the right to strike; whereas, in informal bargaining if an agreement is not reached, the employees may not lawfully strike.

Union as Exclusive Representative

The legislation would make unions the sole representative of employees for collective bargaining, as long as the union has the required minimum number of members,[2] and would bar employees from negotiating with the employer separately from the union.

Information to Unions

The legislation would require employers to provide unions with its financial statements annually, and depending on the size of the employer, an annual salary report by position for the entire company, including all managers. During collective bargaining, the employer

also would be required to provide certain information to the union including, the remuneration of all union members, the cost of the collective bargaining agreement in force, and total workforce costs.

Subjects of Bargaining

The legislation would increase the subjects of bargaining to include the number of consecutive workdays that can be required, overtime requirements, and remuneration for work preparation, among others. Significantly, the legislation would permit the parties to negotiate remuneration for non-working time, including time changing clothing, personal cleaning or commuting from a work campsite to operations, up to one hour per day, payable at a rate of no less than 1.5 times the employee's regular hourly rate.

Employers in Chile should be prepared for increased union activity as the proposed legislation will increase union membership and power in collective bargaining.

Duration of Agreement

The legislation would decrease the maximum duration of a collective bargaining agreement from four years to three years.

Extension of Benefits to Non-Union Employees Prohibited

Under current law, employers are permitted unilaterally to extend benefits under a collective bargaining agreement to any employee who, for any reason, did not participate in the collective bargaining process. The legislation would outlaw this practice and make an employer's unilateral extension of benefits an anti-union practice.

The legislation would permit the automatic extension of benefits only to those workers who become union members and would allow the union and employer to negotiate an agreement to extend benefits to workers who are not union members, but who agree to pay union dues.

The legislation would prohibit employees with "general powers of administration," such as managers and assistant managers, from participating in the collective bargaining process.

Replacement Workers During Strikes Prohibited

Under current law, employers can replace striking employees on the first day of a strike. The legislation would prohibit employers from using any replacement workers during a strike and from reassigning non-striking workers to cover the striking workers' duties.[3]

The fines for violations range from 1 UTM ($69) to 100 UTM ($6,900) per worker involved.

Emergency Team/Minimum Services During a Strike

The legislation would require that, during a strike, the union provide an "emergency team" to provide certain minimum services necessary to prevent serious damage to facilities or infrastructure, the environment, or the patient health. The emergency team must be determined in advance of collective bargaining. If the union fails to provide the emergency team, the company may take other measures to provide the services.

Fines

The legislation would increase fines for anti-union practices to a maximum of 300 UTM ($20,600); for repeat violators, the fines could increase to up to 900 UTM ($61,800).

Practice Note

The proposed legislation is a significant effort to increase union membership and power in collective bargaining with companies doing business in Chile. Multinational employers with significant operations in Chile should be prepared for increased union activity and reexamine their current collective bargaining strategies in light of the new law.

Attorneys in the Labor and Employment practice of Bahamondez, Álvarez & Zegers Ltda. and Jackson Lewis' International Employment Issues practice will continue to monitor and report on developments on this emerging legislation and to assist companies in their labor relations strategies.

For contact details, please see page 4.

1 Unless otherwise noted, "collective contracts" and "collective agreements" shall be referred to as "collective bargaining agreements."

2 To represent employees, a union must have at least 25 members representing 10% of the employer's workforce.

3 The possibility of internal reassignment of workers remains under continued discussion in the Chilean Congress. On December 9, 2015, the Chilean Government decided to change the Bill to allow a limited internal reassignment during a strike, but as of the date of this publication, the Senate has not yet voted on the Government's proposal.

U.S. and EU Negotiating New Data Transfer Agreement to Replace Invalid Safe Harbor

The United States and the European Union are negotiating a new data transfer agreement to replace the "Safe Harbor" agreement that the European Court of Justice invalidated in *Schrems v. Data Protection Commissioner*. The Article 29 Working Party (comprised of representatives of European Data Protection Authorities (DPAs) and the European Commission) has given negotiators until January 31, 2016 to create a new cross-border data sharing framework, after which the DPA's may begin to take enforcement action against companies who do not have a transfer mechanism in place that complies with the EU's privacy laws and regulations.

Background

In *Schrems v. Data Protection Commissioner*, Maximillian Schrems, an Austrian national, filed a complaint with the Irish Data Protection Commissioner ("Irish DPC") asking it to prohibit Facebook Ireland Ltd. from transferring his personal data to Facebook, Inc. in the U.S. Mr. Schrems asserted that U.S. law and practice did not ensure "adequate protection" -- the key measure of privacy protection under the EU Directive 95/46 -- of his personal data, based in part on the revelations made by Edward Snowden regarding surveillance activities by U.S. intelligence services. The Irish DPC rejected Mr. Schrems' complaint as unfounded because there was no evidence that his personal data had been accessed. Further, the Irish DPC determined that the Safe Harbor agreement provided that an adequate level of protection existed for any personal data transferred to the US. Mr. Schrems challenged the ruling before the European Court of Justice.

The European high court struck down the Safe Harbor agreement, in part, because the U.S. government retains the right to access data in the U.S. for national security and law enforcement purposes and does not permit EU citizens to make complaints regarding the misuse of their personal data. The decision authorizes each DPA to consider individual claims asserting that the transfer of personal data from the EU to other countries violates EU privacy laws.

Negotiations for New Safe Harbor Agreement

Prior to, and now with increased urgency following the decision, U.S. and EU negotiators have been negotiating to develop solutions enabling data transfers to the U.S., while protecting the personal data of European citizens from perceived "massive and indiscriminate surveillance." To address the high court's concerns that EU citizens have no avenues for redress regarding any misuse of personal data, the negotiators are examining ways to provide mechanisms for EU citizens to make complaints directly to the national DPAs. Under the Safe Harbor, a similar procedure existed for complaints regarding human resources data, and U.S. companies handling such data were required to cooperate with DPAs regarding any complaints.

However, there are currently no complaint mechanisms in the U.S. to address claims by EU citizens regarding the misuse of their personal data. While the U.S. Federal Trade Commission monitors companies' compliance with the Safe Harbor, it does not address individual complaints. The U.S. and EU negotiators have not yet reached an agreement regarding cooperation between the European privacy regulators and the FTC in the U.S. that would avoid giving the EU extraterritorial powers. Further, legislation passed by the U.S. House of Representatives, the "Judicial Redress Act of 2015" (H.R. 1428), which would provide citizens of certain foreign countries with the ability to bring suit in federal court for Privacy Act violations, has not been passed by the Senate.

If no agreement is reached between the U.S. and the EU, companies that previously relied on the Safe Harbor will need to develop alternate methods for complying with EU's data privacy laws or be exposed to hefty non-compliance fines.

Next Steps for Companies

For those companies reliant on Safe Harbor as a mechanism to transfer employee data out of the EU, it is difficult to determine the path forward before the outcome of the current negotiations. In the meantime, it is prudent to assess the feasibility of other transfer mechanisms such as Standard Contractual Clauses or Binding Corporate Rules, as well as other means of handling data which reduce the need to transfer out of the EU.

While negotiators continue to work toward an agreement, companies should consider the feasibility of using other data transfer mechanisms or taking steps to reduce the need to transfer data from the EU.

Jackson Lewis attorneys in our Privacy, e-Communication and Data Security and our International Employment Issues practices will continue to monitor and report on developments in this area and are available to assist companies in responding to these challenging issues.

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