EVERSHEDS SUTHERLAND

Tread carefully

Global pay and employee benefits traps for the unwary

This briefing highlights a number of international pay and employee benefits legal issues that carry potentially severe penalties. Each of these issues is well worth a review now to avoid future consequences.

01

International - *Globally mobile employees*

The tax treatment of globally mobile employees has always been complicated, and companies have needed to keep an eye on where employees are located at the time of grant, vesting and exercise of employee incentive awards. The COVID-19 pandemic has created particular issues whereby employees have been displaced in unusual locations or for an unusual, possibly unexpected, length of time. This may result in tax charges arising in countries where the company is not familiar with the tax withholding or reporting requirements, and it may also result in breaches of unfamiliar local laws – such as exchange controls or securities laws or data privacy requirements. A breach of securities laws can lead to inadvertent criminal offences and breaches of privacy rules can result in very significant fines, linked to global turnover.

In the new age of remote working, companies that offer incentive programmes need to understand exactly where their employees are working and consider the implications for any incentive arrangements if employees work across multiple jurisdictions, whether intentionally or as a consequence of unexpected circumstances.

02

Europe - *Visas for business travel*

As the pandemic eases, employees will slowly start to resume international travel for work. Following the exit of the UK from the European Union (**EU**) in 2020, many employers have not yet considered whether UK employees required to work in the EU or EU workers working in the UK (be it occasional business trips to multi-jurisdictional roles) need working visas. Some of these trips will be business visits and others may amount to work under local laws requiring a local working visa. The penalties for illegal working vary by jurisdiction and tend to range from criminal sanctions through to administrative fines. Penalties can also include business closures and sanctions affecting the ability of the local entity to sponsor individuals for work permits.

03

UK - *Criminal offences under the Data Protection Act 2018*

The Data Protection Act 2018 provides for a number of criminal offences, which can be committed by companies, directors and employees. For example, it is an offence to unlawfully obtain, disclose or retain personal data. Unless due care and attention is paid to UK data protection laws, a company or individual could repeatedly breach this provision without even being aware – as 'reckless' data processing is sufficient to cause a breach. All offences under the Data Protection Act 2018 are currently punishable by a (potentially very severe) fine. The maximum fine for companies is about £17 million or 4% of annual global turnover (whichever is greater). Directors can also be held personally responsible for breaches,and international data use presents some particular issues.

04

Germany - *"Crowdworking"*

An "evergreen" issue in German employment law is the wrongful classification of employees as freelancers or consultants. Freelancers do not enjoy employee protection rights, and are not subject to wage tax and mandatory social security. The correct classification depends on the "integration" of the individual into the employer's workplace and is fact-dependent. Non-payment of social security contributions can constitute a criminal offence, punishable by fines or up to five years in prison. This classic issue has taken on a modern twist in the form of "crowdworkers", often students who use an online platform to accept small "jobs" at their convenience. In the past, they were treated as freelancers but the Federal Labour Court has recently confirmed that crowdworkers could be classified as employees, and therefore subject to social security rules. Non-compliant crowdworking could pose significant liabilities for directors and companies.

Similar issues have arisen in the UK and other countries, particularly in relation to app-based delivery riders and taxi drivers.

05

Europe - *European Works Councils*

A European Works Council (**EWC**) involves consulting a forum of employee representatives from across the European Union member states about workplace change with cross-border implications. The number of employees within Europe and individual member states governs whether the obligations can be triggered. Not knowing where your employees are based can therefore cause difficulty. Enforcement varies across jurisdictions (in some jurisdiction an EWC can enforce consultation obligations by way of injunction) but in England and Wales a failure can lead to fines and industrial relations consequences.

06

Hong Kong - *Mandatory Provident Fund obligations*

Hong Kong employers are required to enrol their employees aged between 18-64 into a Mandatory Provident Fund within the first 60 days of their employment and to make mandatory contributions, unless the employee falls within one of the limited exemptions. A failure to comply with the statutory requirements may expose the employer, its officers and/or managers to criminal liability with a maximum fine of US $45,000 and three years' imprisonment. Employers convicted of related offences will have their name published on the website of the Mandatory Provident Fund Authority.

07

UK - *Criminal sanctions for pensions breaches*

The Pension Schemes Act 2021 introduces new criminal offences relating to defined benefit pension plans. The offences apply not only to trustees and sponsors of defined benefit plans but potentially also to directors, lenders, investors or professional advisers. Sanctions include unlimited fines and up to seven years' imprisonment. Some of the new offences are very widely drafted and could potentially capture M&A, dividends, lending and restructuring activity.

The government has said the intention of the new law is not to hinder normal corporate activity but it remains to be seen how this plays out in practice. The new rules are due to come into effect in autumn 2021. For more information, please see our **Guide to the Pension Schemes Act 2021**.

08

Russia - *Payment of salary and social security*

In Russia, there is criminal liability on the employer's general manager, head of branch/rep office/other subdivision for non-payment of salary and social security contributions. This includes partial non-payment of salary and benefits for more than three months and non-payment of a large amount ($200,000 upwards) of social security contributions, including contributions that fund state pensions. Penalties range from a fine of $1,200 to three years in prison to a three year ban from performing certain professional activities.

09

Netherlands - *Sectoral pension funds*

80% of Dutch employees are covered by sectoral pension funds. There are many of these for different industries and almost all of them have mandatory participation by law. When a company falls within the scope of the sector, it must participate. If the company fails to register and the fund discovers this, the company can be forced to participate retrospectively. The arrears period can be up to twenty years, which can involve very significant sums.

10

Germany - *Works council pay and treatment*

In Germany, works councils are elected employee representation bodies. Works council members represent employees' interests by "co-managing" the operations. This task is an honorary office for which the works council members must be released from their work duties without any pay cuts or other disadvantages. This not only covers the times when they are released but also guarantees them the same pay increase and promotion opportunities as comparable employees. The correct treatment of works council members' remuneration and professional development is fraught with difficulties. Discrimination, more favourable treatment and any attempt to hinder or disturb the works council's office and duties is a criminal offence punishable with fines or imprisonment for up to one year.

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