



# EMPLOYMENT & HUMAN RESOURCES

MARCH 2012

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**Employment & Human Resources**

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# EMPLOYMENT & HUMAN RESOURCES

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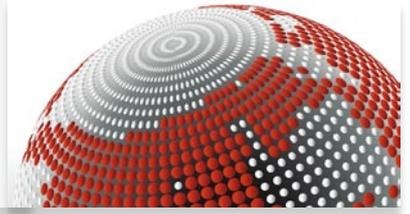
## UNITED STATES

L. Traywick Duffie, Littler Mendelson, P.C.

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### **What notable developments in employment law have you seen in the US over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

It has been a very long time since we have seen a regulatory and litigation environment like this for employers. Not since the 1960s and 1970s, when the civil rights movement was at its peak and union activity abounded, have employers been faced with such a swell of government enforcement activity and private litigation aimed at challenging an employer's adherence to US labour and employment laws. It is extremely important for employers to realise that this challenge has two distinct fronts. First, there is the regulatory side, where various federal and state government agencies armed with increased budgets and more investigators are performing audits and commencing litigation aimed at making sure employers are complying not only with the major employment law mandates, but the minor and less prominent obligations. Fair Labor Standards Act (FLSA) and state law wage and hour compliance is a key area where this is true, with enforcement agencies focusing not only on key statutory provisions but also on more nuanced compliance problems, such as whether employers have properly included all items of compensation in the overtime rate calculation. The motivation for these enforcement agencies is also significant: these legal challenges can lead to increased federal and state government revenues to support overburdened unemployment compensation funds and falling federal and state government tax revenues. Alongside this increase in regulatory enforcement activity, state and federal governments are enacting new statutes and enhancing pre-existing employment law regulations, increasing employer compliance obligations and addressing areas of perceived non-compliance. For example, the US Department of Labor has recently proposed or enacted new regulations interpreting key provisions of the FLSA, Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA). On the other side, plaintiff's firms across the country have started to identify weaknesses in various industries, have developed their own internal expertise about these industries, and are attacking these industry weaknesses in a wave of class and collective litigation focused more on major compliance obligations under federal and state employment and labour laws.



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**How would you describe labour relations in the US at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

The majority of the current members of the NLRB are solidly pro-union, and the NLRB has been more active in promoting rules favouring unionisation. As noted, the NLRB recently proposed new rules, due to take effect on 30 April 2012, which would overhaul election case procedures and make it easier for unions to organise.

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**Are you seeing any recurring themes in employment related disputes and litigation in the US?**

We continue to see an explosion of FLSA cases. Further, certain industries, such as hospitals and healthcare systems, are viewed by plaintiff's firms and state and federal enforcement agencies as 'low hanging fruit' for this type of litigation. Another ongoing trend is social media and its use in the workplace. The NLRB has been actively pursuing cases against employers arguing that online postings about an employer's practices constitute protected concerted activity when multiple employees are involved.

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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

In a tough economy, many businesses are consolidating and closing operating locations. Employers need to understand obligations and defences under the Worker Adjustment and Retraining Notification Act (WARN) and similar state law statutes, which often require employers to notify affected employees in advance. Employers are also looking for more ways to bring their pension obligations in line with economic realities, particularly if an employer maintains a defined benefit plan. However, the Employment Retirement Income Security Act (ERISA) limits an

## UNITED STATES

L. Traywick Duffie, Littler Mendelson, P.C.

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employer's ability to reduce certain pension obligations. There are changes employers can make, but they have to be made carefully.

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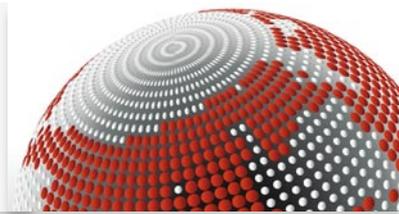
### **What general advice would you give to companies on managing their human capital and retaining key talent?**

Employees are more satisfied when they feel they have been treated fairly. The key management practice which can affect whether employees feel secure in their work environment, and thus less likely to seek assistance from an outside player such as a union, the EEOC or a plaintiff's firm, is consistency of treatment. When employees follow the rules and do well, they should be rewarded and recognised. When employees break the rules and cut corners, even if it is an employee with a long work history and who serves a key role in the organisation, they need to be disciplined and the incident must be addressed.

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### **In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

For public companies, federal regulation has made it more important than ever for companies to carefully consider executive compensation arrangements and the reasoning behind them. New regulations in this area abound. The Sarbanes-Oxley Act of 2002 provides that where there is an accounting restatement based on misconduct, public companies must recoup incentives paid to the CEO and CFO if they were paid in the 12 months preceding the restatement. The US Troubled Asset Relief Program also requires participating financial service companies to recover incentive bonuses paid to senior executives in certain circumstances even if there was no misconduct.



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**As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

One obvious challenge for multinational employers arises out of the interaction of employees from different cultures. What might be perfectly appropriate in one country may be considered deeply offensive in another. Putting in place global policies that attempt to take these cultural differences into account may help smooth over any tension and give employees guidance on how to behave appropriately in various employment settings. Ensuring compliance with employment-related laws and rules in different countries also can be a challenge. It is important for multinational companies to obtain advisers whose knowledge extends beyond the borders of their home country to guarantee that all relevant considerations have been taken into account.

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L. Traywick Duffie represents corporate clients in a broad range of employment and labour law, including employment litigation, union organising, wage and hour, and Employee Retirement Income Security Act matters. He has successfully defended numerous class and collective matters and countered union organising campaigns in more than 40 states. He has successfully defended single plaintiff, multiple plaintiff and class action litigation and has designed and implemented programs on compliance with, and the avoidance of, employment litigation and union organising. He regularly speaks before companies, trade associations, business groups, and universities. He represents clients in the healthcare, media, transportation and manufacturing industries.

**CANADA**

Keith J. Murray, Harris &amp; Company LLP

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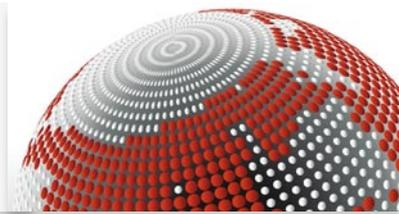
**What notable developments in employment law have you seen in Canada over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

Termination/severance obligations are becoming more onerous for employers. Where an employee is dismissed without 'just cause', the employee can normally pursue damages in court for wrongful dismissal. In order to establish just cause, an employer must prove the employee has engaged in significant misconduct, or has failed to perform adequately notwithstanding prior warnings and offers of assistance. Poor economic conditions resulting in termination do not provide an employer with just cause – and therefore do trigger severance pay obligations. Historically, blue collar workers were awarded significantly lower severance packages by the courts than managerial employees, based on the difference in the character of the employment between these types of positions. Recently, however, courts have begun to place much less emphasis on the nature of the employee's position when determining damages for wrongful dismissal. The result has been an increase in the damages awarded to non-managerial employees following termination without cause.

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**How would you describe labour relations in Canada at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Although trade unions remain a significant force in the resource, manufacturing and transportation sectors, their power and influence are in a slow but steady decline. Trade unions have had some difficulty penetrating the service sector and reaching the new generation of workers. Younger workers are more apt to want a merit-based promotion system rather than the traditional union seniority-driven system. Globalisation and the dismantling of trade barriers have reduced the power of trade unions in many industries. The ability of employers to move work across provincial or international boundaries has greatly diminished the ability of trade unions to make unreasonable demands, and to achieve those unreasonable demands through strike activity. As a result, we are seeing more realistic proposals at the bargaining table, and fewer strikes.



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**Are you seeing any recurring themes in employment related disputes and litigation in Canada?**

In recent times, the issue of 'mitigation' has been a recurring theme commented on extensively by courts. When an employee is terminated, he or she has an obligation to take reasonable steps to seek and obtain alternative employment in order to mitigate the loss occasioned by the termination. On this basis, any liability arising out of the termination by the former employer is reduced by income to the employee received from his or her new employer. Most recently, courts have been called upon to examine the employee's obligation to mitigate his or her liability by accepting work from their existing employer, who has just terminated the employment relationship. The Supreme Court of Canada has determined that, in some circumstances, it is reasonable to require the employee to return to work for the dismissing employer. The critical element is that an employee not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation.

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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

During the recession, many employers have sought to reduce costs through restructuring and reducing headcount and payroll costs. Many employers have also examined existing benefit plans and pension costs, in an effort to reduce the costs of these plans. Employers are moving away from providing defined benefit pension plans, and are replacing those plans with defined contribution alternatives in order to control costs and remove the unknown future liability that can accompany defined benefit plans. Where the hourly employees are unionised, the realignment of benefit plans and pension plans for an hourly workforce is an item that will normally need to be negotiated with the trade union. In restructuring, employers must find the balance between achieving meaningful cost savings, and being able to retain and attract the necessary talent to move the business forward. An employer engaged in a restructuring

**CANADA**

Keith J. Murray, Harris &amp; Company LLP

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process needs to ensure that remaining employees see a future in the business and have a reason to stay.

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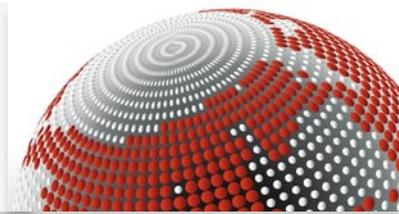
**What general advice would you give to companies on managing their human capital and retaining key talent?**

Prior to the recession, managerial talent was very focused on development opportunities and was prepared to move freely from one employer to the next in search of those opportunities. With the current economic uncertainty, employees are increasingly looking for stable and secure environments, even above development opportunities. Accordingly, in the current environment, employers need to convince their key talent that the company can and will provide a long term future for them. At the same time, employers must recognise that when the economy turns positive, employees will turn their focus back to development opportunities. Therefore, in order to retain key talent for the long term, companies must continue to provide appropriate development opportunities for employees, both locally and internationally.

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**In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

Undoubtedly, it has become more difficult for companies to reward their executives and employees, for several reasons. Obviously, difficult economic times have reduced the ability of many employers to offer wage increases, or even to maintain current salaries and benefits. With downsizing, many employers are asking the remaining executives and employees to do more, and need to find ways to motivate and compensate those individuals for their efforts. The financial sector meltdown has created greater scrutiny on executive pay, with shareholder activist groups increasingly demanding a say on pay for these individuals. The level of scrutiny on executive pay has never been higher than it is today. What shareholders are looking for are clear, balanced measures of performance that make fiscal sense.



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**As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

Canada will need to increasingly rely on immigration to meet future workforce requirements. Given current demographics, without immigration we will have substantially fewer people entering than leaving the workforce. Particularly when the economy turns, labour shortages will become acute in many areas, from low skill positions, to skilled trades, to executive talent. Successful employers will need to recruit internationally and ensure the mobility of its talent to meet future demands.

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**B R A Z I L**

Luiz Marcelo Figueiras de Góis, Barbosa, Müssnich &amp; Aragão

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**What notable developments in employment law have you seen in Brazil over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

Brazilian labour law, as in many other countries, is trying to deal with the impact of new technologies in the way services are provided by employees. The most recent example of this was the issuance in December 2011 of a law setting out regulations about remote ways of providing services. Another recent development in our law refers to the notice period that an employer must grant prior to termination of contracts. Under the new regulation, the prior notice period – which cannot be less than 30 days or greater than 90 days – must now be proportional to the employment's length.

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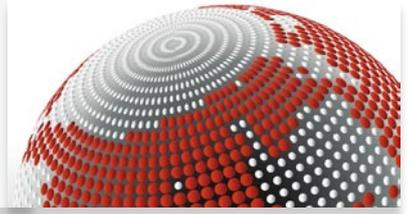
**How would you describe labour relations in Brazil at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Brazil's last president – who governed our country for eight years – was an important union leader. His successor and current president is also closely related to labour unions. This political scenario made the labour unions grow politically stronger in several fields of business, such as banking, civil construction and metallurgy.

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**Are you seeing any recurring themes in employment related disputes and litigation in Brazil?**

It is very common that companies are brought to court by former employees. This is because litigating in Brazil is usually cost-free for workers which, in a certain way, encourages them to file lawsuits in the Labour Justice Courts. The most recurring claims in labour court refer to overtime – any time worked in excess of eight per day must be paid with an additional cost to the employer that varies from 50 percent to 100 percent – and to liabilities arising out of outsourcing of services.



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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

Companies must be alert to the legal prohibition of implementing modifications in employment conditions that are directly or indirectly harmful to employees. This restriction minimises the employer's ability to, on its own, reduce its labour expenses in periods of crisis. However, negotiation with unions can ultimately offer the means for companies to cut costs with little risk to labour liabilities in such circumstances. Besides this, our legal system provides the employer with a few other alternatives to reduce costs, such as the negotiation of agreements to offset overtime with periods of rest and the distribution of profits and results – which are free of labour and social security burdens.

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**What general advice would you give to companies on managing their human capital and retaining key talent?**

Alignment between employee and employer is crucial for retaining talent. There are some legal tools to stimulate this alignment in Brazil such as the negotiation of a profits and results sharing plan in which each employee receives certain individual and/or corporate targets which, when met, trigger the payment of a certain amount as bonus. Another tool frequently used to retain key personnel is the creation of a stock option plan, by which such individuals are granted options to buy the company's shares after a certain vesting period.

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**In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

The Brazilian economy is currently heated, forcing companies to put in extra effort to keep competitive in the labour market. Structuring a compensation package in this scenario is certainly

## B R A Z I L

Luiz Marcelo Figueiras de Góis, Barbosa, Müssnich & Aragão

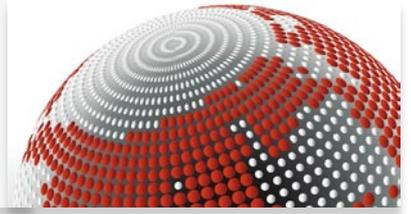
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challenging. It is common practice in our country to provide executives with more generous benefits than those offered to regular employees. Life insurance, bonuses linked to corporate targets, and fringe benefits, such as cars, paid mobile phones and notebooks, are some of the benefits that are normally offered to officers in addition to those commonly provided to regular employees who – besides the legally mandatory benefits and the benefits set forth in collective bargaining agreements – are usually granted with meal tickets and corporate medical plans.

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### **As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

The Consolidation of Labour Laws (CLT) – the main statute of Brazilian labour law – was enacted in 1943, and some of its provisions reflect the nationalist and protectionist policies of the government of the time. These characteristics can be found in the chapter entitled ‘Nationalization of the Workforce’, which imposes certain restrictions on the hiring of foreign nationals. For instance, under the CLT, at least two-thirds of the employees of any company that has three or more employees must be Brazilian, and this proportion applies not only to the number of workers but also to the payroll. Although this provision has been challenged in court, the fact is that immigration matters still involve a high degree of discretionary decision-making by the immigration authorities and are closely connected to questions of national sovereignty. They also reflect the government policy of the day, and are influenced by the reciprocal treatment among nations. For this reason, there is no guarantee that a visa will be granted to a foreign national, even if he or she meets the requirements for grant of the visa.



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## ARGENTINA

Javier E. Patron, Marval, O'Farrell & Mairal

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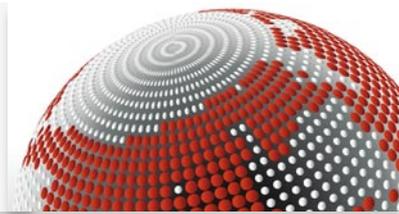
### **What notable developments in employment law have you seen in Argentina over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

While the main rights and obligations of parties involved in employment contracts have remained without significant changes in the last 12 months, we have observed a growing tendency in case law and regulation with respect to the registration of employment contracts before the administrative and tax authorities. Companies are now more restricted when it comes to the fulfilment of their employee's registration requirements. This affects the definition of 'remuneration', given that many benefits that companies grant to their employees as non-remunerative additional items are now falling under the broad concept of 'remuneration', and are subject to withholding and contributions to the social security system and tax authorities. A very recent resolution from the tax authority requires reporting prior to payment of non-remunerative amounts.

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### **How would you describe labour relations in Argentina at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Trade unions have a leading role and influence on the local economic scene. In fact, negotiation with companies concerning salary increases considerably affects the global internal economy due to its inflationary stage and the fact that the average of the salary increase in a particular negotiation is used as an index of reference to calculate the actual inflation of the economy. As a result of this situation, during 2011 we observed a notable increase in the execution of agreements and amendments to CBAs by the parties involved in a specific industry as a result of intense negotiation. In fact, collective labour law had a starring role in Argentina last year, since many conflicts and issues were solved with the intervention of the Labour Ministry.



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**Are you seeing any recurring themes in employment related disputes and litigation in Argentina?**

Many claims arise from alleged miscalculations of the employee's basic salary. Actually, employees usually challenge the remuneration collected and claim for the inclusion of non-remunerative items to their salary. Overtime and professional-category issues may also apply to these claims. It is noteworthy that these types of claim include an estimate for monetary sanctions covered by special laws for lack or wrongful registration of the employment contract. Moreover, accidents and work-related illness claims are widely spread in labour courts. Law No. 24,557 established the obligation for employers to hire Work Risk Insurance companies to reduce workplace risks and to indemnify employees who become ill or injured at work. As it turns out, Law No. 24,557 has been repeatedly challenged by employees who demand larger amounts for compensation from their employers due to the alleged illness or accident claimed, based on *in re "Aquino"*, 14 November 2004, a leading case of the Argentine Supreme Court of Justice.

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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

Probably the most characteristic feature of labour law regulation in Argentina is related to the protection of the employee's working conditions. Such protection is specifically guaranteed to the employees through the establishment of principles that are the basis of employer-employee relationships. Employers may not reduce the labour rights of employees, even with the latter's consent, unless employees consider themselves effectively dismissed or claim former labour conditions. However, no prohibition or limitation exists on reducing the workforce, provided appropriate severance, wherever applicable, is paid. When a significant number of employees are terminated, especially if some or all of them are represented by a union, an action plan is required, preferably with an agreement with the union, if any. Cases should be analysed individually as summons from the Labour Ministry or special administrative procedures may not be totally ruled out.

## ARGENTINA

Javier E. Patron, Marval, O'Farrell & Mairal

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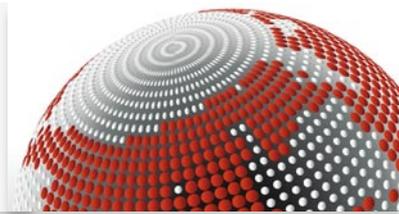
### **What general advice would you give to companies on managing their human capital and retaining key talent?**

It is common practice in Argentina to pay additional wages or awards to retain key employees. In fact, the most usual award for this purpose is the payment of periodical compensation – quarterly, semi annual or annual – in addition to the employee's normal monthly salary. Likewise, an improvement in the employee's daily working conditions is also valued by employees and has been successfully implemented by companies lately. This can range from working at home, working fewer hours, or even allowing employees to develop their own personal projects during work hours. Other benefits such as stock options, retention or deferred compensation plans are also a feasible approach to retain key talent. This type of benefits is generally limited to top management, though no restriction exists to involve other groups of employees.

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### **In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

One of the most relevant issues when structuring compensation packages, incentives and benefits is to consider the discussion about difficulties when eliminating or reducing any of them. Employers are permitted to structure fixed and variable compensation schemes, or a combination of both. When designing and implementing bonus programs, it is advisable to have clear objective parameters, as well as to subject earning and payment to performance evaluations. While certain complexities have been created as a result of employer-adverse regulations, case law and unions, this situation has not materially affected employers' ability to do business, and they have adapted their practices to the local environment.



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**As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

One of the most sensitive issues regarding the relocation of employees to foreign countries is related to the adaptation of the benefits and compensation schemes of the employee to the new work environment. This situation can create an imbalance in the working conditions between the expatriate and local employees who render the same services. Companies should take care to make a smooth transition between local requirements effective prior to and after relocation. In Argentina it is highly difficult to eliminate or reduce benefits.

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Javier Enrique Patrón joined Marval, O'Farrell & Mairal in 1992 and has been a partner since 1997. He is responsible for the firm's Labour and Social Security Law department, and offers comprehensive advice in all aspects related to his area of specialisation. He also represents clients in administrative proceedings related to labour matters. Mr Patrón has been an assistant professor in Labour and Social Security Law at the Universidad del Museo Social Argentino since 1996 and was assistant professor in Labour Law at the Universidad de Buenos Aires between 1989 and 1992. He has spoken at many conferences and seminars on his specialist subjects.

## UNITED KINGDOM

Daniel J. Wise, K&L Gates

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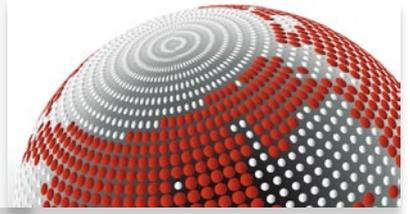
### **What notable developments in employment law have you seen in the UK over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

The first steps are being taken by the Coalition Government this year to introduce the biggest reform of employment law for many years. Included in these reforms are the abolition of lay members for simple unfair dismissal cases, and the government is also currently consulting on the introduction of a fee regime for litigants. From April 2012 new employees will need to complete two years' service before they gain the right to bring an unfair dismissal claim. These steps are designed to act as a spark plug for the market by reducing the number of claims businesses have to defend. However, whether the new regime will achieve this aim, or merely result in employers having to defend more discrimination and whistleblowing claims as an alternative to unfair dismissal claims, is yet to be determined.

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### **How would you describe labour relations in the UK at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Particularly given the recent increase in staff cuts and other measures taken by employers as a reaction to the economic downturn, there has been a significant rise of late in trade union activity both in the private and public sectors. Works councils have also taken on a more prominent position as a nexus between employer and employee. According to a recent survey of 400 employers by the Chartered Institute of Personnel Development, almost a third of those asked expected employees to strike and 71 percent were anticipating an increased level of industrial action within the near future. With the continued pressure on businesses to take further cost cutting measures and the shock waves of the ongoing government austerity measures rippling through the private sector, we anticipate that employers face a challenging time ahead.



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**Are you seeing any recurring themes in employment related disputes and litigation in the UK?**

Although last year saw an 8 percent decrease in the number of Employment Tribunal claims received compared to the previous year, this figure still remains 44 percent higher than the figures for 2008/2009. With businesses having to make further tough decisions going forward in order to survive these difficult market conditions, employers are likely to continue to receive a high level of claims from disgruntled employees as a reaction to these measures. It is, however, hoped by many employers that the tribunal reforms announced recently by the government will act to mitigate this anticipated increase in the number of claims lodged by tribunals.

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**For companies in the process a restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

Many companies are facing the need to restructure and save costs in order to maintain a reasonable level of profit in the current climate. Creative thinking and strong planning should be the first step in undertaking such a project. Does an organisation need to go through a costly redundancy programme with the attendant dip in staff morale? Or will alternative measures better achieve the organisation's commercial goals such as a reduction in working hours for certain staff members, the introduction of flexible working arrangements, or agreed pay reductions across teams or departments? Claims will usually arise from a failure to think through and justify the measures taken.

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**What general advice would you give to companies on managing their human capital and retaining key talent?**

It is always important commercially for a business to look after its stars. However care should be taken not to over-compensate certain key talent at the expense of others. To do so could

**UNITED KINGDOM**

Daniel J. Wise, K&amp;L Gates

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dramatically reduce the levels of collegiality a strong performing company looks to foster and cause a significant dip in overall staff morale. Taking the tough business decisions that any senior management team needs to, from time to time, is also important. Allowing staff members to continue to perform at a level below that required by the business can unnecessarily eat into staff costs which might be used more beneficially elsewhere. Failure to act in this regard can also have a negative effect on stronger performers who will reasonably expect action to be taken against those who are not contributing reasonably to the company's success.

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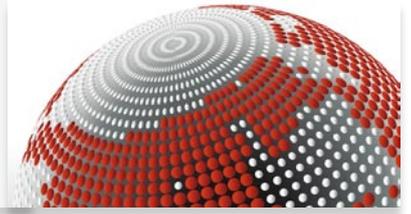
**In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

One of the primary consequences of the financial crisis was an increased level of regulation, certainly within the banking sector, in terms of the methods of remunerating high achievers. This has spilled over to other market areas as public opinion has hardened against perceived 'fat cats' within all industries. The lynch pin to this reform has been a focus away from rewarding short term individual success and encouraging a higher level of long term collective responsibility within organisations. As such, the eye-watering one-off cash bonuses of pre-2008 are slowly being replaced by share options and other similar mechanisms where the rewards are paid out over a longer time frame. There is also a trend towards a higher level of public scrutiny of compensation packages for those perceived industry 'names'.

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**As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

The UK Border Agency overhauled the UK's immigration system in April 2011 limiting the number of routes open to migrants to come to the UK to work. With the closure of one of the simplest routes for highly skilled migrants to enter the UK, many employers are being forced to apply for certificates of sponsorship in order to employ migrants from outside the UK, which



can be a lengthy and expensive process. Although there were initial concerns surrounding the annual limit of 20,700 that was placed on the number of certificates the UK Border Agency would issue, with the anniversary of the changes approaching, employers' concerns are now focused on whether this limit will be decreased further by the UK Border Agency given that the annual limit for 2011/2012 is unlikely to be met. Despite the tightening of the routes open to businesses and their staff to come to the UK to work, a number of options do remain open to businesses, including sole representative and investor visas and intercompany transfers.

## **DANIEL J. WISE**

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Daniel Wise is a partner in the Employment, Pensions and Incentives team of K&L Gates' London office. His practice includes advising on the broad range of UK employment law issues spanning both contentious and corporate advisory work. Mr Wise's advice on transactional issues includes negotiating indemnities and warranties as well as dealing with the appointment and termination of senior executives, board room disputes, foreign assignments and secondment issues. His contentious experience includes complex discrimination disputes, team moves and unlawful business competition issues, and advice on restrictive covenants. Mr Wise's practice has given him substantial sector experience in financial services as well as the technology and manufacturing industries.

## UKRAINE

Svitlana Kheda, Sayenko Kharenko

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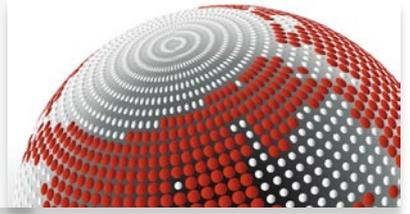
### **What notable developments in employment law have you seen in Ukraine over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

Over the last 12 months several notable laws in the labour law area were enacted, including the Law on the Legal Status of Foreign Nationals and Stateless Persons, which came into force on 25 December 2011. This Law established clearer rules for entering Ukraine with foreign employees and experts providing technical assistance to the state and municipal agencies, and other foreigners. On 2 June 2011 the Law on Amending Certain Laws of Ukraine Regarding Increasing Liability for Violating the Personal Data Protection Legislation was adopted, which will become effective as of 1 July 2012. The Law provides for serious penalties – including criminal liability of the responsible officers – for companies found in breach of the Law on Personal Data Protection, which became effective on 1 January 2011. The Cabinet of Ministers passed its regulation approving the Rules for Issuing Entry and Transit Visas, which directly affects foreign employees. The regulation establishes a new simplified approach to regulating the visa issues, including by eliminating certain types of visa.

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### **How would you describe labour relations in Ukraine at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Ukrainian labour law is extremely employee protective as a significant number of concepts and approaches have been inherited from Soviet times. Moreover, an employee is considered as the weak party of the employment relationship and this position is often abused by Ukrainian employees while suing their employers. The influence of trade unions has always been strong in Ukraine. They are vested with great powers and can even initiate dismissal of the company's CEO for the alleged violation of the labour legislation. One of the guarantees of trade union activity is its right to demand and obtain from the company's CEO and other officers any documents, information, and explanation related to the terms of the employee compensation, performance of the collective agreements, and compliance with the labour legislation. Therefore, it is more



correct to say that in the present challenging economic environment employees more frequently use trade unions as an additional tool for protecting their rights.

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**Are you seeing any recurring themes in employment related disputes and litigation in Ukraine?**

Due to the increased number of redundancies throughout the country, Ukrainian courts have been hearing more wrongful dismissal cases. In general, considering that Ukrainian law provides a very limited list of grounds for employee dismissal, wrongful dismissal cases have always been leaders in employment litigation.

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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

Employers must notify all of their employees on their pending dismissal due to redundancy, no later than two months prior to their dismissal. Redundancy can be performed only after prior trade union consent. Pregnant women and some other categories of employees are protected by law from dismissal. Dismissed employees are entitled to one month's average salary as a severance payment and compensation for unused vacation. Any additional compensation/benefits specified in an employment agreement/contract and the collective agreement must also be paid to a dismissed employee. Reducing the company's staff must be legally justified and properly documented in strict compliance with provisions of employment legislation. Otherwise there is a risk that a court will oblige the employer to reinstate the employee and pay out the employee's average salary for the period starting from the date of dismissal until the reinstatement date. Reducing payroll costs and adjusting benefits will have to be negotiated with the trade union and affected employees will have to be notified in writing of the new terms at least two months in advance.

## UKRAINE

Svitlana Kheda, Sayenko Kharenko

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### **What general advice would you give to companies on managing their human capital and retaining key talent?**

Considering that under Ukrainian law it is very difficult to dismiss a non-performing employee, it is recommended that companies negotiate market average base salaries and introduce sophisticated incentives schemes for the employer to be able to influence employee performance by rewarding employees depending on their performance level.

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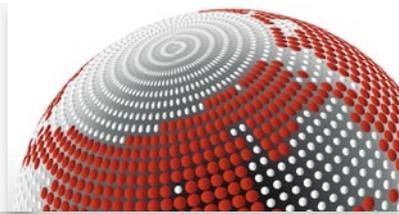
### **In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

Considering that all cases of worsening employee remuneration terms must be agreed with trade unions and communicated to employees two months prior to their introduction, companies should be more careful while negotiating remuneration packages and introducing employee incentives and benefits schemes. Foreign parent companies should also take into account the fact that not all employee benefit schemes that work under foreign laws will be available/enforceable as a matter of Ukrainian law. Special attention should be given to the tax aspects of foreign employees' remuneration.

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### **As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

Ukrainian law does not recognise the legal personality of the corporate group. Therefore, the global employment policies are not enforceable in Ukraine *per se*, and must be incorporated into the document system of a Ukrainian subsidiary as local policies. Personal data processing of Ukrainian employees', including cross-border transfer, should be treated with great care and it is recommended that a sophisticated personal data protection policy is implemented by the company. Each foreign employee – other than permanent residents – intending to work in



Ukraine for Ukrainian companies must obtain a work permit and apply for a D-type visa prior to entering Ukraine with the purpose of employment. Violation of the work permit regulations may result in liability for a company, its executives, and the foreign employee. Violation of the visa regime by a foreign employee – that is, entering Ukraine using a business or tourist visa after obtaining a work permit – may result in a ban on entering Ukraine for up to five years.

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Svitlana Kheda heads Sayenko Kharenko's labour/employment law practice. She has over 14 years of experience in advising clients on a wide range of complex issues in the area of labour and employment law, personal data protection, public-private partnerships (PPP), and anti-corruption legislation. Ms Kheda is responsible for developing local corporate personal data protection (PDP) legislation compliance programs and preparing PDP policies and template PDP contract provisions and other PDP documentation. She also specialises in bringing global employment policies and procedures of transnational companies into compliance with Ukrainian law. Her areas of practice include corporate law and M&A, international commercial transactions, alternative dispute resolution and foreign investment matters.

**INDIA**

Ajay Raghavan, Trilegal

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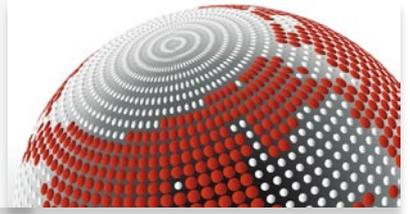
**What notable developments in employment law have you seen in India over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

Indian employment laws have seen a fair number of changes since mid-2010. In the Industrial Disputes Act, 1947, the definition of 'workman' has been updated to exclude supervisory staff earning wages of INR 10,000 or above, as compared to the previous limit of INR 1600. Further, establishments with 20 or more workmen are now required to set up internal grievance redressal committees for the resolution of disputes arising out of individual grievances. With regards to Provident Funds (PF), international workers can only withdraw their PF accumulations after the age of 58 years, even if they cease working in India much earlier. Further, the PF organisation has issued clarifications prohibiting the splitting of minimum wages into various components for the purpose of computing PF contributions. The latter issue is however *sub judice* and the position hangs on what the courts determine.

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**How would you describe labour relations in India at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Although industrial relations in India are largely peaceful and mutually beneficial, with incidents of violent protest being few and far between, trade unions and their activities continue to play a very important role in shaping employer-employee relationships. While, from a statistical perspective, it can be said that the number of employee protests and strikes have reduced over the years, there have been several high profile incidents in recent months where employees and unions from large MNC's have gone on strike to further their interests, especially in the automotive sector. Many of these strikes cost these companies several hundreds of millions in losses, and have assumed greater significance on account of the general economic slowdown.



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**Are you seeing any recurring themes in employment related disputes and litigation in India?**

One of the most common areas of litigation in India currently is the employment of 'contract labourers' to carry out the activities of an organisation. Such contract workers are engaged through third party contractors/manpower agencies, and often they are engaged to carry out the same or similar work as full time employees of the company. In such situations, the contract labourers approach courts to seek 'regularisation' of their employment with the company since, more often than not, the wages and benefits given to full time employees of the company are much better than what the contract workers receive from their contractor/manpower agency. In most cases, courts are unable to grant such a remedy to the workers since the arrangement between the company and the contractor tends to be well documented and recognised under the Contract Labour (Regulation and Abolition) Act, 1970.

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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

Employers must bear in mind certain key points when restructuring operations that lead to a reduction of workforce. Employment in India can only be terminated for reasonable cause, redundancy being one such cause. Any termination of a 'workman' – this term usually covers most non-managerial staff – has to follow the 'last-in-first-out' (LIFO) rule: in other words, the junior-most employee must be terminated first in a restructuring. Every terminated workman is entitled to notice of one month or longer, depending on the nature of the industry, and payment of 'retrenchment compensation' on or before the termination, which is calculated as 15 days wages for every completed year of service. Failure to follow the LIFO rule or pay retrenchment compensation can invalidate the termination.

**INDIA**

Ajay Raghavan, Trilegal

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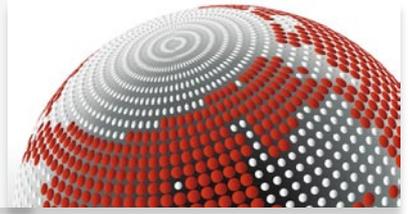
**What general advice would you give to companies on managing their human capital and retaining key talent?**

Indian employees are keen workers and positive feedback and friendly HR policies can go a long way in retaining key talent. Some of this can be achieved by ensuring that employees' personal needs – such as time to care for family, bereavement, festival holidays, and so on – are acknowledged and addressed in policies, and companies show due sensitivity and flexibility in relation to the same. While job hopping has become more prevalent today and some industries, such as IT/ITeS, see high attrition rates, this is not a natural tendency for most individuals and employees would prefer working for a single employer for long durations if other circumstances are appropriate.

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**In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

A key challenge faced by companies in India is to ensure that employee remuneration packages remain attractive in comparison to competitors. With the growing number of foreign educated/experienced managers, executive level employees do expect a lot more in terms of reward. Most companies follow a fairly standard pay structure with a split between fully taxable basic components and optional components, which enjoy certain tax benefits, for most employees. At the executive level the key differentiating factor becomes the perks and perquisites that the company offers – with items such as company vehicles, phones, health insurance and housing costs being fairly standard, and benefits such as payments towards children education, financed vacations and so on being less common. Stock options are also very popular in India.



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**As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

Tax and social security related issues will likely become the primary challenges for Indian companies dealing with foreign workers, followed by visa related issues. Employees spending over 182 days in India become subject to Indian tax laws and this can pose interesting questions in terms of withholding tax obligations, double taxation and equalisation, especially where the foreign workers continue to be paid in their home country outside India. For the last few years, the Indian government has also imposed stringent social security norms for foreign passport holders working in India. Indian companies are obliged to contribute social security payments on the entire global salary of such individuals, unlike Indian nationals for whom contributions can be limited to a certain portion of the salary.

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Ajay Raghavan is a partner at Trilegal's Bangalore office and heads the Employment Law practice. Mr Raghavan has worked extensively on drafting and modifying local and international employment manuals and has advised clients on issues such as structuring employee stock option schemes as well as structuring and negotiating senior management contracts in different sectors. He has also been involved in drafting and reviewing confidentiality, non-solicit and non-compete agreements. Mr Raghavan has assisted many domestic and international employers through reorganisation, lay-offs and closure of their businesses in India. He has also advised on voluntary retirement schemes and obtaining registrations under the various employee legislations in India.

## HONG KONG

Eric A. Szweda, Troutman Sanders

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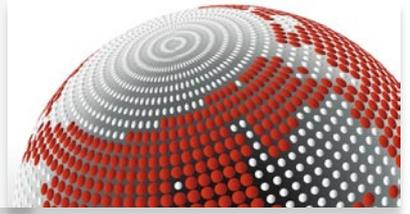
**What notable developments in employment law have you seen in Hong Kong over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

The panoply of employment regulation in Hong Kong is expanding with the enactment of minimum wage legislation, which took effect on 1 May 2011. The new ordinance sets the minimum wage rate at HK\$28 per hour (US\$3.59) and imposes certain mandatory record keeping requirements. On 3 June 2011, the Equal Opportunities Commission adopted its revised Code of Practice on Employment under the Disability Discrimination Ordinance (DDO). While it does not have the force of binding law, courts are empowered to utilise the Code in deciding cases under the DDO. During the consultation process, the proposed code was heavily criticised by some for, in effect, substantially changing the DDO outside of the legislative process. Most recently, in January 2012, proposed amendments to the Employment Ordinance were submitted to the Legislative Council by the current administration. The stated purpose is “to empower the Labour Tribunal (LT) to make a compulsory order for reinstatement or re-engagement of an employee who has been dismissed unreasonably and unlawfully, and to require the employer to pay a further sum to the employee for failing to comply with such an order.” The remedies for unreasonable or unlawful dismissals have been criticised as lacking in many situations. The likely practical effect of this amendment, if adopted, will be to increase the statutory penalties.

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**How would you describe labour relations in Hong Kong at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

In its Employment Fact Sheet, published in January 2012, the Hong Kong Government states “Hong Kong has an outstanding record of industrial peace.” Some in the trade unions may argue that this has less to do with harmony, and more to do with insufficient protection of collective labour rights. In any event, industrial actions in Hong Kong are relatively uncommon and nearly always short lived. Despite the global recession, Hong Kong enjoys very low unemployment levels. More of an issue is that pay can also be very low for some, and inflation is eating away



at wage gains for others. The trade unions were instrumental in securing enactment in 2011 of minimum wage legislation, although the new minimum wage rate was a disappointment to them. The next objective for the trade unions is overtime legislation.

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**Are you seeing any recurring themes in employment related disputes and litigation in Hong Kong?**

Most of the cases before the Labour Tribunal and the courts can be grouped into a handful of categories. For example, there are always a number of claims over compensation and benefits, both statutory and contractual, with the financial crises bringing an increase in the number of disputes over the calculation of bonuses and other performance pay, especially upon terminations. With Hong Kong sitting at the intersection of an accelerating level of economic activity moving across the region, the recruitment of talent including entire teams from competitors continues, resulting in cases over the enforcement of restrictive covenants and confidentiality provisions. Hong Kong judges tend to be antagonistic towards restraints on trade. This is made plain in a 29 February 2012 decision from the Court of First Instance, rejecting Cantor Fitzgerald's attempt to claim damages against its Hong Kong core team, which was recruited by a Hong Kong start-up brokerage firm.

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**For companies in the process of restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

The two primary considerations are, first, that material terms of employment contracts cannot be changed unilaterally by employers and, second, that statutory requirements set out in Employment Ordinance cannot be altered, even if the employer and employee agree terms and conditions at variance with the Employment Ordinance. However, at present, for most employers in Hong Kong, the primary issue remains retention while dealing with inflation.

## HONG KONG

Eric A. Szweda, Troutman Sanders

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### **What general advice would you give to companies on managing their human capital and retaining key talent?**

Compensation continues to be the most important factor in terms of retention and motivation. Training and advancement opportunities are also critical. The use of deferred compensation and other forms of performance based pay have particular relevance to the Hong Kong market. One retention tool widely used in Hong Kong across sectors is the discretionary bonus, which can be freely ratcheted up or down, depending on factors ranging from economic performance of the organisation to the performance of the individual employee.

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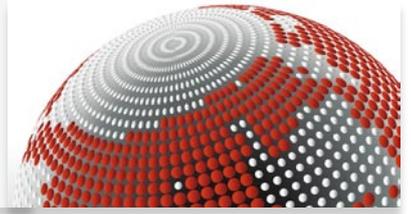
### **In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

It has become more complicated as firms seek to better align performance based compensation with actual, earned returns to the organisation.

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### **As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

With the ever increasing movement of personnel across multiple jurisdictions, the age old problem of what law governs the employment relationship and how best to manage this issue has become more pronounced. We are seeing more situations, including with sophisticated multinational companies, in which little or no attempt has been made with employment contracts and secondment agreements, nor in connection with planning terminations, to manage this issue. Another recurring issue becoming more pronounced as globalisation accelerates is taking the organisation's employment terms and policies and ensuring that they are not only adapted to comply with local laws, but also assessed as to whether the level and nature of benefits will be appreciated or rejected by foreign workers. The latter creates a recruiting and



retention issue. At the same time, ensuring as much consistency as possible across jurisdictions is necessary to limit the burden of administering employment terms and policies. With respect to American companies, the loss of flexibility when operating in jurisdictions without an employment at will system must be understood. More generally, better planning or analysis at the time of hiring should be conducted, to better manage the risks, including costs, upon a termination.

## **ERIC A. SZWEDA**

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Eric A. Szweda is the managing partner of Troutman Sanders' Hong Kong office. He also leads the firm's International Arbitration and Dispute Resolution Team. He is admitted to practice in Hong Kong and the US, and Chambers recognises him as one of the leading lawyers in Asia Pacific for arbitration and litigation. Mr Szweda is a graduate of Cornell University's School of Industrial and Labor Relations, and Vanderbilt University School of Law, where he was editor in chief of the Vanderbilt Journal of Transnational Law.

## SINGAPORE

Mario Ferraro, Deloitte

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### **What notable developments in employment law have you seen in Singapore over the last 12 months or so? Have there been any changes to employee rights or company obligations, for example?**

The major developments have been around the criteria for Employment Pass and S-Pass eligibility, which allow skilled and semi-skilled foreign workers, respectively, to work in Singapore. The minimum salary thresholds to qualify for these passes have been raised in an effort to level the playing field between local and foreign workers, with a view to reducing the dependency on foreign labour in the long-term. The renewal of existing passes is also subject to closer scrutiny.

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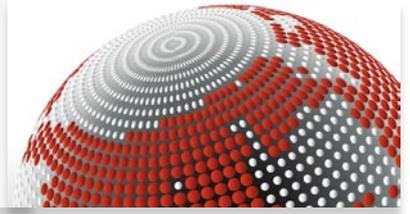
### **How would you describe labour relations in Singapore at present? Has the influence of trade unions and/or works councils grown in this challenging economic climate?**

Singapore enjoys good collaboration between the government, the unions and employers, under a system called 'Tripartite', composed of the Ministry of Manpower, the National Trade Union Congress (NTUC), and the Singapore National Employers Federation (SNEF). This harmonious relationship is considered to give Singapore a competitive advantage over neighbouring countries, as a location conducive to foreign investment, a regional or global hub for multinational organisations, an attractive location for both employers and talent, and a highly productive workforce. The Tripartite deals with a wide array of issues, including retirement age, fair employment practices, wages, work-life strategies, job creation and job re-creation for older workers.

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### **Are you seeing any recurring themes in employment related disputes and litigation in Singapore?**

In general, Singapore does not have a high incidence of workforce litigations. Disputes revolve predominantly around claims of unfair dismissals or withheld or delayed payments.



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**For companies in the process a restructuring, what employment issues do they need to evaluate when resizing the workforce, reducing payroll costs and adjusting pensions and benefits? What kinds of risks and liabilities might arise in such circumstances?**

In Singapore, not every employee is covered by the Employment Act, although this is usually taken to reflect basic entitlements applicable to all workers. For employees who are not covered by the Employment Act, the employment contract will specify what terms and conditions, and any changes thereof, need to be agreed in writing between employer and employees through negotiation. For employees who are covered by the Employment Act, the applicable clauses will specify the minimum entitlements. If the employees are members of a union, the employer should inform the union of the proposed changes and a negotiation between the employer and the union may ensue. In cases of restructuring that involve terminations, mergers or acquisitions, there are specific sections of the Employment Act regulating the rights and obligations of employers, employees and unions, in respect of employees covered by the Act. Employees can refer their concerns to a labour court for adjudication.

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**What general advice would you give to companies on managing their human capital and retaining key talent?**

As the world's economic centre of gravity shifts more decisively towards the East, competition for leadership skills and specialist expertise is likely to intensify. Competition for talent will increasingly reach across borders, with the best employees being offered attractive career opportunities both domestically and internationally. Organisations should prepare for this and start working on strategic talent initiatives to protect their efficiency, productivity and competitiveness. The key strategic areas likely to require attention are workforce planning, recruitment and retention strategies, leadership development, training, performance management and rewards.

## SINGAPORE

Mario Ferraro, Deloitte

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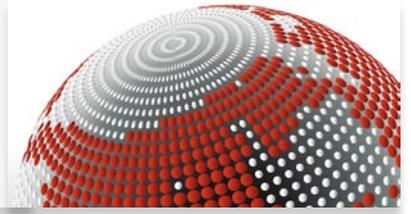
### **In your opinion, has it become more difficult for companies to reward their executives and employees? What do companies need to take into account when structuring compensation packages, incentives and benefits?**

In general, companies face greater challenges to reward today's executives and employees, especially for positions that are highly specialised or in great demand. Very often companies are under pressure to reduce cost in order to remain competitive, but competition for talent tends to put upward pressure on compensation packages. In addition to competitive drivers, demographic shifts are also influencing the way companies look at rewards, resulting in the adoption of more creative approaches. In fact, the concept of rewards is becoming increasingly broad, going beyond the traditional compensation and benefits elements. Many companies today think of rewards as being but an element of a comprehensive employee value proposition.

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### **As globalisation continues, what additional challenges face multinational companies in terms of cross-border employment and dealing with foreign workers?**

The number of international assignments has been growing steadily over the last 20 years, and this trend will continue. Organisations will need to enhance their HR function's ability to manage complex cross-border issues, including remuneration, taxation, immigration and cost management, to mention a few. Furthermore, leaders, managers and employees will need to learn how to manage and communicate effectively across cultures. But despite these challenges, cross-border employment also brings some interesting opportunities, including the ability to source the best talent globally, and to leverage diversity to gain competitive advantages.



## MARIO FERRARO

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Mario Ferraro is the director of Deloitte's Human Capital consulting team in South East Asia. He is a dynamic and innovative leader with over 20 years of experience in the design and implementation of solid and effective HR solutions in the areas of international talent management, organisational change and HR transformation across a variety of industry sectors. Mr Ferraro's experience includes leadership positions in PwC, covering EMEA and Asia Pacific. Prior to joining Deloitte, Mr Ferraro was the group general manager of International HR in the global headquarters of International SOS, where he was responsible for business-critical HR issues across 70 countries.



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