Current Employment Law Risks for the Retail and Restaurant Industry: A Global Perspective

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Accommodating Disabled Employees
Accommodating Employees – UK

• Protection against disability discrimination in Europe
  – European Treaty (1999)
  – Equal Treatment Directive
Protections in the UK

• Disability
  – Physical or mental impairment
  – Substantial and long-term adverse effect on ability to carry out normal day-to-day activities
Accommodating Employees – UK

• Forms of discrimination
  – Direct/indirect
  – Arising from a disability
  – Failing to make reasonable adjustments
  – Harassment
  – Victimisation
  – Association and perception
Accommodating Employees – UK

• Enforcing disability rights in the UK
  – Employment tribunal – uncapped compensation
  – Settlement
Accommodating Employees – UK

- Similarities and differences in Europe
  - Enforcement of discrimination rights and remedies
  - Criminal offence
  - Positive discrimination
Accommodating Employees – China

• Disabled employees protected from discrimination in recruitment, employment, promotion, compensation, and benefits – Not commonly enforced in practice
Accommodating Employees – China

• Employer must provide disabled employees with “appropriate physical conditions” for employment
  – No sanctions; not commonly enforced in practice

• Hiring requirements
  – National: At least 1.5% of workforce must be disabled
    • Sanctions subject to local rules
Accommodating Employees – China

• Hiring requirements (cont’d)
  – Shanghai: At least 1.6% of the workforce must be disabled
• If targets are not met, labor bureau may annually collect a bond equal to 1.6% of the annual payroll. The employer may get all or a pro-rata portion of the bond upon showing compliance.
Accommodating Employees – China

- Tax incentives
  - Employers may claim a business tax credit of RMB 35,000 for each disabled employee
  - Employers may deduct payroll to disabled employees twice from taxable income for income tax purposes
- Some incentives available to employers who hire disabled employees
Accommodating Employees – Canada

- Duty to accommodate disability
- Arises under provincial or federal human rights legislation
- If employer can do so without undue hardship, it must arrange employee’s workplace or duties to enable employee to do his or her work
Accommodating Employees – Canada

• Not a “free standing” duty
• Rights, responsibilities and duties of employer, employee (and union)
  – To provide/obtain information
  – To inquire, to cooperate
• Duty to accommodate as long as it does not impose undue hardship
Accommodating Employees – Canada

- Procedural and substantive elements of test
- Facts necessary to establish undue hardship
Accommodating Employees – U.S.

• A federal law that:
  – Prohibits discrimination on the basis of disability against a qualified individual; and
  – Requires employers to make a reasonable accommodation for an individual with a disability unless the accommodation would impose an undue hardship on the employer

• Many similar state laws
Accommodating Employees – U.S.

Examples – reasonable accommodation

• Stool at check out for disabled cashier
• Allowing disabled sales person to use a cart to return merchandise to the sales floor
• Lowering hostess stand to allow employee in a wheelchair reach seating chart and menus
Accommodating Employees – U.S.

Examples – reasonable accommodation

• Breaks to allow diabetic employee take insulin

• Assistance completing an online job application for disabled individual who cannot type on computer

• Time off/reduced schedule for medical treatments
Accommodating Employees – U.S.

Examples – undue hardship
• Store located in a historical building has its stock room on the second floor. Putting in an elevator to allow a disabled individual work as a stocker may result in an undue hardship on the employer.

• Convenience store clerk with a disability requests part-time schedule. Because only 2 clerks are scheduled for each shift, reduced schedule would leave only 1 clerk for half of the shift, a potential service and security issue
Accommodating Employees – Brazil

• Art. 7, XXX and XXXI of the Brazilian Federal Constitution: forbiddance of discrimination on the basis of sex, age, race, disability etc.

• Art. 93 of Law no. 8,213/91: Companies with 100 or more employees are required to fill two to five percent of its positions with rehabilitated beneficiaries or habilitated impaired persons
Accommodating Employees – Brazil

- In order to terminate the employment agreement of an impaired employee, the company must hire another impaired person in similar conditions before the dismissal (Art. 93, §1º of Law 8,213/91)
Background Checks and Privacy Issues
Background Checks and Privacy Issues – U.S.

• Constitutional
  – 4th Amendment
  – 9th and 14th Amendments
  – Requires state action
    • Only government employers
    • Not applicable to private sector retailers
Background Checks and Privacy Issues – U.S.

- Statutory
  - Electronic Communications Privacy Act
  - Password protection statutes
  - EEO Laws (e.g., Title VII, ADEA, ADA, etc.)
  - Fair Credit Reporting Act
  - Off-duty conduct statutes
Background Checks and Privacy Issues – U.S.

• Regulations
  – EEOC’s Arrests/Convictions Enforcement Guidance

• Common Law
  – Negligent Hiring/Retention
Background Checks and Privacy Issues – Brazil

• No specific law regarding data protection, or restricting the collection of an individual's personal data by the employer

• Brazilian Federal Constitution - art. 5, X: the privacy, private life, the person's honor and reputation are inviolable, whereas violation of said rights assure the right to the resulting pecuniary damages or pain and suffering.
Background Checks and Privacy Issues – Brazil

• Disclosure: violation of the individual's intimacy/privacy

• There is no specific regulation prohibiting the transfer of employees’ data to a foreign country, belonging to the same economic group of the employer

• Criminal and financial background checks may be construed as violation of the individual's intimacy/privacy
Background Checks and Privacy Issues – UK

• European principles
  – Right to privacy
  – Non-discrimination, proportionality, and transparency

• Employers must:
  – Balance business needs against individual privacy rights
  – Ensure background checks are necessary and not disproportionate
  – Use reliable sources
Background Checks and Privacy Issues – UK

• Types of checks
  – Criminal
  – Education
  – Employment
  – Credit reports
  – Social Media

• Differences in Europe
Background Checks and Privacy Issues – China

• Background checks generally permitted, but consent may be needed to obtain certain information
• Background checks not common
• Failure to complete background check should be listed as termination ground
Background Checks and Privacy Issues – China

- Employees have no expectation of privacy at the workplace
- Employee consent required for transfer of personal data to third parties
Background Checks and Privacy Issues – Canada

- PIPEDA – *Personal Information Protection and Electronic Documents Act*
  - Governs the use, collection and disclosure of personal information in the course of “commercial activity”
Background Checks and Privacy Issues – Canada

• **Personal information includes:**
  – Name, race, ethnic origin, religion, marital status, education
  – E-mail address and messages, IP address
  – Age, height, weight, medical records, blood type, fingerprints
  – Income, purchases, spending habits, banking information
  – SIN or other identification numbers
Background Checks and Privacy Issues – Canada

• Application of PIPEDA
  – Federally regulated private sector
  – Provincially regulated private sector unless "substantially similar" legislation exists, such as in:
    – British Columbia
    – Alberta
    – Quebec
Background Checks and Privacy Issues – Canada

• Private sector and public sector privacy legislation
• Governs use, collection and disclosure of personal information in employment context
• Notice and consent if not public domain
• Statutory authority to hear complaints, damages for breach
Background Checks and Privacy Issues – Canada

• Other relevant legislation
  – Human rights
  – *Privacy Act* - establishes a tort for violation of privacy
  – Actionable without proof of damage
Complying with Wage and Hour Laws
Wage and Hour Laws – Brazil

• Mandatory Annual Salary Adjustment (Law 10,192/2001)

• Impossibility of Salary Reduction (art. 7, VI of Brazilian Federal Constitution and art. 468 of Brazilian Labor Code)

• Tips spontaneously paid by the customer as well as those billed by the restaurant are part of the employee's salary
Wage and Hour Laws – Brazil

Limitations

• Art. 7, VIII of the Brazilian Federal Constitution
  – 8 hours per day; 44 hours per week*
  * Some collective bargaining agreements establish 40 hours per week as the maximum weekly schedule

• Art. 59 of the Brazilian Labor Code (CLT)
  – Maximum of 2 overtime hours per day
Wage and Hour Laws – Brazil

Flexible journey

• No legal provisions
• Valid when established through a collective bargaining agreement
Wage and Hour Laws – Brazil

Work on Sundays

• Articles 67-70 of the Brazilian Labor Code
• Law 605/1949
• Legal requirements:
  − Activity provided for in the Decree no. 27,048/49; or
Wage and Hour Laws – Brazil

• Legal requirements (cont’d)
  – Previous authorization by Regional Labor Office, which requires:
    • Technical opinion
    • Collective bargaining agreement
    • Schedule of shifts: rest on Sunday each 4/7 weeks

• Other requirements established under the collective bargaining agreement
Wage and Hour Laws – UK

- Wages normally covered by the employment contract
- No statutory right to be paid for overtime
- National Minimum Wage—failure to comply can lead to criminal sanctions
Wage and Hour Laws – UK

- Maternity, paternity, parental, adoption pay and statutory sick pay
- Different statutory pay rights across Europe
European working time legislation

- Minimum rest period
- Minimum breaks
- Minimum annual leave
- Maximum 48-hour week
- Night work
Wage and Hour Laws – UK

Working time legislation (cont’d)

• Sunday working in the UK
• Administrative burden
• Differences in Europe
Wage and Hour Laws – China

- Minimum wage requirements vary by city and province
- All employees entitled to overtime pay unless employer obtains exemptions
- Comprehensive working hour system allows hours to be calculated over a month or quarter
- Maximum 36 hours per month in overtime
Wage and Hour Laws – Canada

• Provincial and Federal Legislation
  – Each province has minimum employment standards legislation addressing minimum wage, hours of work, overtime, vacation, leaves, etc.
  – Part III of the Canada Labour Code sets out minimum standards and entitlements for workers in federally regulated industries (i.e. banking, shipping, inter-provincial transport)
Wage and Hour Laws – Canada

• Complaints and enforcement
  – Provincial government bodies – i.e. Ministry of Labour
  – Courts
Wage and Hour Laws – Canada

• Provincial differences
  – Minimum wage
    • Ontario: $10.25
    • Alberta: $9.75
  – Entitlement to overtime pay
    • Ontario: 44 hours
    • Manitoba: 40 hours
Wage and Hour Laws – U.S.

• Each U.S. state has enacted wage and hour laws that address many/all of the following topics:
  – Minimum wage
  – Overtime pay
  – Employee classifications:
    • Employee vs. independent contractor
    • Exempt vs. non-exempt
Wage and Hour Laws – U.S.

• (Cont’d)
  – Child labor
  – Wage deductions and garnishments
  – Meal and rest periods
  – Breastfeeding breaks
  – Wage payments
  • During employment (e.g., frequency, acceptable methods, pay stubs, etc.)
Wage and Hour Laws – U.S.

- Wage payments (cont’d)
  - Upon separation of employment (e.g., timing of final paycheck, payment of commissions/bonuses after termination, payout of unused vacation and sick time, severance pay, etc.)
  - When state and federal law intersect, the law most beneficial to the employee applies.
Wage and Hour Laws – U.S.

- Meal and rest periods
- Breastfeeding breaks

When state and federal law intersect, the law most beneficial to the employee applies.
Wage and Hour Laws – U.S.

- Meal and rest periods – California
  - 30-minute meal periods must be “provided” to employees who work more than 5 hours/day
- Employee must be relieved of all duties
  - 10-minute rest period allowed for every 4 hours worked
Wage and Hour Laws – U.S.

• Suitable seating – California
  – Wage Orders require employers to provide employees with “suitable seats when the nature of the work reasonably permits the use of seats”

• Vacation time – California
  – No “use it or lose it”
  – Must be paid on termination
Wage and Hour Laws – U.S.

• Commission agreements – California
  – Must be in writing
  – No forfeiture of “earned” commissions
  – No arbitrary conditions on earning commissions (unless additional work needed, cannot require employee to be current at time of payment)
Avoiding and Managing Union Organizing
Union Organizing – Canada

Why is the retail sector a target?

• A shrinking manufacturing base
• Non-exportable industry that is growing
• Natural vulnerabilities
  – Public access, public image, demographics, hiring blitzes
• Larger numbers of workers under one roof
Union Organizing – Canada

• Federally regulated industries
  – *Canada Labour Code*
  – Could be applicable to retailers if self transport merchandise

• Provincially regulated industries
  – Each province has its own legislation governing labour relations
  – Applicable to retail stores and distribution centres
Union Organizing – Canada

- Differences in provincial legislation
  - Certification processes (card-based v. vote)
  - Length of time a signed card is valid for
  - Length of time between application being filed and vote
  - Length of statutory bar
  - Remedial powers
Union Organizing – Canada

Employer free speech – what’s permissible?

• Educate, inform, and persuade
• Inform employees of the facts, without implying threats
  – Union dues > how much?
  – “Us vs. them” atmosphere
  – Respond to union propaganda
• Prohibit professional organizers from trespassing on our property
Union Organizing – Canada

• Was Target a successor employer to a Zellers store in B.C.?  
  – Would inherit the collective agreement

• Did takeover of physical space (location), pharmacy records (which it sold back) and right to one brand constitute a successorship?
Union Organizing – Canada

• Was “locational goodwill” an asset transferred from Zellers to Target?
• Importance of Target brand being distinguishable from Zellers brand
• Consumer recognition of Target brand
Union Organizing – Canada

• Transfers made did not mean there was a discernible continuity of Zellers’ business
• Analysis is highly fact specific
• Variations in successorship legislation across Canada
Union Organizing – U.S.

- National Labor Relations Act
  - Section 7
  - Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
Union Organizing – U.S.

• National Labor Relations Act
  – Concerted activity – collective or group activity
  – Mutual aid or protection – re: wages, benefits, terms or conditions of employment
In Brazil, employees and employers are automatically represented by Unions, regardless of any affiliation to any such entity.

Union representation is defined according to the main activity of the employer.
Union Organizing – Brazil

• The classification will also take into consideration the location where services are rendered.
• Differentiated categories
Union Organizing – UK

• Unions’ diminishing influence in the UK?

• Overview of Trade Union Law in the UK
  – Recognition
  – Employers’ duties to trade unions (of disclosure and consultation)
UK – Union Organizing

- Overview (cont’d)
  - Employees’ trade union rights
  - Influence and industrial action
  - Works Councils

- European Trade Union law
Union Organizing – China

• Government-initiated unionization efforts
• Unions traditionally are management dominated
• Unions may be necessary for compliance and employee consultation requirements
Union Organizing – China

• Becoming more common
  – Direct election of union officials
  – Active union representation of employees
  – Collective bargaining
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