

International HR Best Practices Tip of the Month

July 2009

This Month's Challenge

Employees of manufacturers in developing countries have tried to hold U.S. companies liable in U.S. courts for failure to enforce their supplier codes of conduct.

Best Practice Tip of the Month

Although the courts have recently rejected efforts to hold U.S. companies liable for not forcing their suppliers to improve their labor conditions, further efforts can be expected, and prudence dictates that multinational companies maintain credible and effective enforcement mechanisms for their supplier codes of conduct.

EU: Global companies faced with an increasing role of the European Works Council

After four years of discussions and negotiation between the European labor and management stakeholders, the EU Parliament adopted an agreement on a revised European Works Council Directive, aimed at improving the role of the European Works Councils in representing employees of European-scale companies.

The original European Works Council Directive was passed in 1994 to enable the representation of the employees of transnational companies established in multiple European countries. It provides that a European-scale company or corporate group should negotiate with a group of employees' representatives, called the "*special negotiating body*," in order to establish a European Works Council with the purpose of improving the provision of information to, and consultation with, the employees' European representatives. European-scale enterprises or corporate groups are defined as those companies that employ at least 1,000 employees in the European Union and at least 150 employees in at least two member states.

European Works Councils currently operate in 820 major transnational companies located in Europe, including 130 U.S. companies, and cover about 15 million employees.

However, the application of the Directive has been subject to difficulties. Only one-third of the European-scale companies have set up European Works Councils, and, generally speaking, the information-sharing and consultation at the EWC level have been regarded as insufficient by the EU bureaucracy and trade unions.

The principle changes in the recast Directive are the following:

Information and consultation requirements

The 1994 EWC Directive did not define the information that had to be provided to the EWC and merely described the consultation requirement as *“the exchange of views and establishment of dialogue.”*

The recast Directive defines these requirements more precisely in order to increase the efficiency of the information and consultation process.

The information given to the employees’ representatives should enable them *“to acquaint themselves with the subject matter and to examine it,”* and must be provided sufficiently before the consultation step so that the employees’ representatives have time to review it and make an assessment of the possible impact and *“prepare consultations with the competent body of the Community-scale undertaking.”*

The concept of consultation is updated in accordance with recent European directives applicable to national works councils. The language of the recast Directive therefore states that the goal of the consultation is to allow the expression of an opinion that may be taken into account in the decision-making process, which means that such consultation should be made before a final decision is made by management.

Links between the transnational and national information and consultation processes

One of the main legal uncertainties in the implementation of the original EWC Directive is generated by the obligation to inform and consult employees’ representatives at both the European level and at the national level with regard to transnational issues.

The recast Directive provides that transnational issues are not only those which concern the European-scale company or corporate group as a whole but also those which concern at least two establishments or undertakings situated in two different Member States. Thus, when a decision of closure or restructuring is taken in one Member State but affects the workers in another, it must be considered transnational.

Until now, the EWC Directive did not specify whether the information and consultation process on transnational issues should start first at the national level or at the European level. This lack of guidance in the EWC Directive has been the source of disputes between European-scale companies and the employees' representatives because they disagreed on which representation body should be consulted first. These disputes ended up in court on various occasions, resulting in delay in the information and consultation process and, ultimately, in the decision-making process.

To avoid these difficulties, the recast Directive provides that the order of information-sharing and consultation should be determined by the agreement establishing the European Works Council. If no such determination has been agreed on by the parties, the information and consultation process should start in parallel at both the European level and the national level.

Enlarging the role and competencies of the employees' representatives

The employees' representatives were given the obligation under the original Directive to report to the employees they represented, but the Directive did not specify how this reporting was to be accomplished. The recast Directive therefore provides that employees' representatives will be provided sufficient training, without loss of wages, to enable them to fulfill their representative duties in an international environment.

Acknowledgment of the role of the trade unions and employers' organizations

The role of trade unions and employers' organizations in the establishment of future European Works Councils is formally recognized in the new Directive. The aim is to enable these organizations to "*monitor the establishment of New European Works Council and promote best practices.*" Therefore, the recast Directive provides that the European workers' and employers' organisations must be informed of the start of these negotiations.

Moreover, the special negotiating body may appoint trade union representatives to assist them in an expert capacity in the negotiating process. The language of the Directive indicates that the fees of the experts are to borne by the central management of the company.

Addition of new subsidiary requirements

The subsidiary requirements are the fallback provisions of the Directive that are applicable in situations where the central management and the special negotiating body fail to reach an agreement on the establishment of the European Works Council. They are also supposed to be used as guidelines in negotiating the establishment of the European Works Council.

To clarify the subsidiary requirements, the recast Directive creates a distinction between situations where *information* must be provided (such as the structure, economic and financial situation, probable development and production and sales of the European-scale enterprise or corporate group) and situations where the European Works Council must be *informed and consulted* (such as, the status and probable trend of employment, investments, substantial changes concerning organization, transfers of production, collective redundancies, etc.).

More importantly, the subsidiary requirements provide that the consultation process should include the possibility for the employees' representatives to obtain a reasoned response to the opinions they express. The introduction of this requirement, which is already existing in some of the local laws governing national works councils (France is an example), is likely to lengthen the information and consultation process and delay the decision-making process.

To promote the anticipation and management of change, the recast Directive provides that additional meetings should be held not only in case of exceptional external circumstances likely to materially affect employment and working conditions, but also where contemplated business decisions are likely to have the same effect. European-scale companies will be clearly bound to inform and consult their European Works Council prior to any restructuring with a transnational impact.

Adaptation to mergers and acquisitions

The 1994 Directive did not address the issue of the status of European Works Councils in mergers or takeovers. What happens if company A has a European Works Council and company B does not? What happens if both companies have a European Works Council?

The recast EWC Directive provides that future agreements establishing a European Works Council shall include provisions for amendments and renegotiation in cases where the structure of the European enterprise or group changes significantly.

Transition Issues

Last but not least, the recast Directive will not require the alteration of existing EWC agreements. Except in case of significant change in the structure of the company, existing agreements, and those negotiated within the two years following the adoption of the new Directive, will not need to be modified or renegotiated in accordance with the new text. Thus a transition period of two years is offered for companies to negotiate an agreement on the establishment of a European Works Council and avoid the provisions of the recast Directive.

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