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Employment

Denmark: Trends & Developments

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Trends and Developments

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There is no doubt that 2020 has been an unusual and challenging year. COVID-19 has had, and will continue to have, a significant impact on businesses. We have seen businesses thrive as a result of the markets they operate in, but, unfortunately, there are more companies which are facing turbulent times and are likely to continue to do so.

Denmark has attempted to mitigate the financial impact of the COVID-19 pandemic and has implemented a number of initiatives to support companies, workers, the self-employed, freelancers, etc. In this article we have set out the main initiatives taken by the Danish government and, in addition, we have also selected several other noteworthy employment law developments in Denmark for 2020 outside of COVID-19.

COVID-19

In an attempt to mitigate the financial impact of the COVID-19 pandemic the Danish government and its social partners concluded a tripartite agreement in March 2020 for a temporary wage compensation scheme for private sector employees.

The initiatives have been somewhat successful and – despite unemployment rates increasing in Denmark – results from Eurofound's Living, working and COVID-19 online survey provide early indications that people in Denmark have been some of the least impacted by the crisis. The pan-European survey reveals that respondents in Denmark report some of the lowest levels of job loss and financial insecurity in the EU. However, over a third of respondents have reported a decrease in working hours which follows the trend that we have seen in employers looking to reduce hours and salary in an attempt to mitigate the financial impact of COVID-19.

In Denmark, as a rule, changes in the terms of a salaried employee that may lead to a decrease in salary and/or hours, can only occur upon serving notice to which the salaried employee is entitled in the event of termination. As an alternative, such changes can be made with agreement from the salaried employee. Therefore, if the company cannot agree a reduction in hours and/or pay with the individual employee then the change can only take place if the employee is notified with the same notice period given for termination. Material adverse changes cannot be imposed unilaterally without risk of a constructive dismissal claim or breach of contract claim. In this regard, we understand that a number of employers have sought to agree a reduction in hours with employees in an attempt to avoid redundancies.

We consider that this trend is likely to continue given the economic uncertainty that still remains in respect of COVID-19. For employers that have agreed such temporary reductions, it is important that the reductions are kept under review to ensure that they are only kept in place for as long as necessary and that the reviews are clearly communicated to employees.

The payment of hourly paid workers and any reductions to such will be governed by the rules of the relevant collective bargaining agreement; some agreements will provide that workers can be sent home without salary. For employees covered by a collective bargaining agreement, there are limitations to the changes that can be agreed with the individual employee and therefore more restrictions on the flexibility employers have to make changes.

Eurofound's Living, working and COVID-19 online survey also shows an increase in home-working arrangements in Denmark, with over half of the respondents to the survey reporting working from home during COVID-19; this is the fifth-highest percentage in the EU and well above the EU27 average of 36.8%. These flexible working arrangements appear to have been a mainly positive experience for the majority of respondents in Denmark and this supports the evidence that we have observed.

Following COVID-19, there has been much more flexibility regarding working arrangements. Many organisations within Denmark are still operating a work-at-home policy with rotations in the office, with employees splitting time between the office and the workplace. We understand that many organisations are reviewing their office space and considering a reduction in this in order to save costs going forward.

Whilst these flexible working arrangements have generally worked well, there are a number of considerations for employers in the context of employees working from home. Firstly, consideration should be given to the employee's well-being. Employers have an obligation under the Working Environment Act to ensure employees' safety and well-being whilst at work. This obligation obviously extends to the working-from-home context and, in light of these obligations, employers will need to ensure employees have the necessary equipment to carry out their roles and that home workstations are set up are ergonomically correct. In addition, it is also important that employers working from home have regular check-ins and updates with their employees to ensure their mental well-being.

Another crucial issue is the security of information when employees work for home. Some employees working from home may be sharing their living space with other people who do not work for the same company – and may even work for a competitor. In this context, there is a risk that confidential information is accessible to third parties, the use of which could give rise to liability against the employer, particularly in the context of GDPR. Pursuant to Danish law, an employer will generally be liable for an employee's wrongdoing if it is closely connected to what the employee is required to do as part of their role. If there is no close connection with the employee's actions and their role, or if the employee has acted intentionally or with gross negligence, there will be no liability.

Employers wthat adopt such flexible working patterns need to explore ways in which this risk can be minimised, with guidelines being drawn up regarding how company information should be used and protected whilst working from home, and these should be clearly communicated to the employee.

Collective Bargaining

Industry sectors have traditionally been the area where social partners have first reached an agreement on employment terms – and the result of the negotiations in the industrial arena have often had a consequent disruptive effect on the remaining collective bargaining system. This has certainly been the case in 2020, where more than 600,000 employees' terms and conditions in the private labour market have been negotiated in addition to some major agreements.

On 9 February 2020, the Confederation of Danish Industry (*Dansk Industri*, DI) and CO Industri agreed on a three-year renewal of the Industry Agreements, which covers 230,000 employees in industry. Since then, Dansk Industri and 3F Transport have also reached an agreement to renew the agreements in the transport area, which applies to 40,000 truck drivers, storage workers and port workers. In addition to this, an agreement was signed between HK Handel and Dansk Erhverv on 25 February 2020 comprising 150,000 store employees.

While several of the major agreements have successful negotiations in place, collective bargaining between a number of employers' organisations and unions continues. However, from an analysis of the agreements already concluded in 2020, a number of trends within the agreements are clearly identifiable – notably, increases in the contribution to the "free choice account" and earmarked parental leave.

The free choice account is an account with the employer that the employee has at their disposal. The new agreements give the individual employee more flexibility in choosing how to use this free choice account. Employees will be able to choose between using the account for time off, pay or higher pension contributions. At the same time, the parties have agreed on ensuring modernisation and greater awareness in the individual businesses about the free choice account and the choices available. It is also the intention to use the terms of the collective agreement to make the free choice account easier to manage for employees and employers alike.

Payments into the free choice account will be increased from 4% to 7% over the term of the agreements; payments will increase by 1% per year, so that in 2023 the free choice account payment will be 7% of salary.

Another main point of the three agreements is the extension of the period in which the employer pays full salary during parental leave, which has increased from 13 to 16 weeks and which must be taken within 52 weeks after birth. Eight of the weeks are earmarked for the father and five of the weeks are earmarked for the mother. The remaining three weeks' leave is granted to either parent. If the leave reserved for the individual parent is not taken, the payment will lapse.

The collective agreements and agreements entered into in the private labour market often have an impact on organisations without such agreements, particularly in relation to pay and freedom and rights to parental leave. This is due, among other things, to the need for organisations to be competitive in relation to terms and conditions in both contracts and policies for the retention and recruitment of employees. Therefore, employers should be aware of these trends when considering employee terms and benefits.

Holiday Act

On 1 September 2020, the widely anticipated new Danish Holiday Act comes into force. The new Holiday Act is a result of the EU Commission concluding that the current Danish holiday rules did not comply with the working time directive. Under the old holiday provisions, a newly hired employee would have to wait up to 16 months before being able to take his or her paid holiday. If a newly hired employee was hired from 1 January, the holiday that the employee accrued would not be available to the employee until after 1 May the year after. The EU commission found that this was incompatible with the EU's Working Time Directive.

Under the new Holiday Act, the employee accrues and spends his or her holiday at the same time over a period of 12 months (the holiday year). The holidays are accrued from 1 September to 31 August the year after (12 months). This means that holidays accrued in June will be available to the employee in July the same year. However, the employee has the possibility of taking his or her holiday during an additional period of four months,

which provides the employee with 16 months to take his or her holiday (the vacationing period) – ie, until 31 December.

The two current types of holiday pay still apply: (i) paid holiday with holiday allowance, or (ii) holiday with holiday pay. As is the case under the old provisions with the new Holiday Act, an employee will accrue 2.08 days holidays per month.

GDPR

The GDPR continues to be a focus of debate in Denmark. The Danish Data Protection Authority (DPA) recommended its first fine in 2019 for a breach of the GDPR and this is an area where we expect to see more challenges, particularly in the employment context.

Already in 2020, the Danish DPA has made a decision on an employee's right to be forgotten.

The Danish DPA had to decide a matter regarding an ex-employee of a consulting firm whose image had been used in a number of promotional videos used on the firm's website and YouTube. During the course of employment, the image had been used with the employee's consent, but after he left he asked for his image to be removed from the promotional activity and the company confirmed that they would do this.

Subsequently, the employee was advised that he had been removed from the promotional video on YouTube but that the company would not be removing him from the other promotional videos as he had given his consent for the image to be used. The company continued to use images of the employee, following which the employee made a complaint to the Danish DPA.

The Danish DPA concluded that whilst the initial use of the employees image had been used with consent (a valid reason for using the image) they found that, at the point in time the employee asked to be removed from the footage, such consent had been effectively withdrawn.

The Data Protection Agency were highly critical of the consulting firm's failure to delete the footage of the employee without undue delay, as the employee was still appearing in the video three months after he requested the deletion.

The use of an employee's images in promotional content is not uncommon in Denmark and, whilst consent can be used for the processing of images in the employment relationship, employers should consider how they will deal with such consent being withdrawn. If an employer does not meet a request to have an image deleted, this could lead to further sanctions, particularly if an employer does not have another lawful reason for processing the data. In the context of the use of an image, an employer is unlikely to have a lawful reason without consent for the use.

We expect further challenges under the GDPR going forward.

Mette Klingsten Law Firm was established by Mette Klingsten, who was previously a partner in one of Denmark's largest law firms. The firm is a labour law boutique based in Copenhagen with a strong international network in relevant areas of expertise, including membership of ELLint, a network of international lawyers specialising in employment and labour law. The main focus is employment and labour law, including as pertains to recruitment, employment contracts, assistance in connection with the transfer of undertakings, dispute resolution and arbitration, collective bargaining agreements, bonus programmes, work permits, senior employee contracts, discrimination cases, and GDPR advisory. Mette Klingsten Law Firm has frequent experience in court and industrial tribunal representations and often deals with cases with an international dimension. The firm provides legal services primarily to medium-sized companies (with deviations in both upward and downward direction), public authorities and cultural institutions subject to government regulation.

Authors

Mette Klingsten has provided advice and council on labour and employment law for many years. As a specialist in the field, she advises on all aspects of labour and employment law. Mette has an eye for effective and solution-oriented advice. She assists Danish and foreign companies, institutions as well as managers and executives. Mette litigates in both industrial arbitration and private arbitration, as well as the labour court and the ordinary courts, including the Supreme Court. She is the author of Employment Aspects of Transfers of Undertakings (2nd edition, 2016) and co-author of several other publications.

Carley Wilson is a solicitor from the UK with 12 years of experience of advising on matters regarding employment law, including international terms of employment. Carley has extensive experience in hiring employees from abroad in Denmark, and with Danish companies' hiring of employees in other European countries as well as the USA and Asia, including in collaboration with the firm's international network, ELLint. Carley also advises on the consequences of Brexit for companies with employees in the UK.

Mads Bernstorn specialises in labour and employment law as well as data protection law. He provides advice to both Danish and foreign companies on employee and director relations and has special experience in advising companies in the financial sector. Among other things, Mads has assisted companies in connection with the preparation of incentive schemes, the preparation of data protection policies, and negotiations in connection with resignation. In addition, he provides advice on residence and work permits to foreign employees

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