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Employer Update

Employers Beware: How a Recent High Profile Harassment Trial Illustrates the Differences between Federal and New York City Discrimination Law

*By Gary D. Friedman and Millie Warner**

In This Issue

Of the three major anti-discrimination laws that protect New York employees—Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law (the NYCHRL)—the city law provides the broadest protections to employees. The practical implications of the NYCHRL's comparatively expansive protections were starkly illustrated in February of this year when the jury rendered its verdict in the highly publicized sexual harassment case of *Marchuk v. Faruqi & Faruqi, LLP*. The *Faruqi* case concerned allegations by plaintiff Alexandra Marchuk, a former associate at the plaintiffs' class action boutique Faruqi & Faruqi, LLP, that a Faruqi partner, Juan Monteverde, subjected her to vulgar comments and unwanted sexual advances when she was a first year associate at the firm and sexually assaulted her on the night of the firm's holiday party. Marchuk sued the firm, Monteverde, and the firm's principals for sexual harassment, among other claims, under New York City, New York State, and federal law. The jury found the firm and Monteverde liable for sexual harassment under city law, but not under federal or state law.

This verdict left many wondering: how could the same conduct give rise to liability for sexual harassment under city law, but not under the parallel federal and state anti-discrimination laws? The answer lies in New York City's Local Civil Rights Restoration Act of 2005[1] (the Restoration Act), which amended the NYCHRL to provide that it should be "liberally" construed—and, specifically, more liberally than its federal and state counterparts[2]—and the case law that has developed interpreting the NYCHRL in light of that new statutory mandate.

In this article, we use the *Faruqi* trial as a prism through which to examine the distinctions that have developed post-Restoration Act between the NYCHRL and Title VII. We also offer some practical advice that New York City employers in particular should consider in light of these distinctions.

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Harassment Claims Under the NYCHRL and Title VII

The *Faruqi* case exemplifies two major differences between the NYCHRL and Title VII with respect to harassment claims: (i) a plaintiff's burden for establishing liability for harassment is less demanding under the NYCHRL than under Title VII, and (ii) the now-familiar *Faragher-Ellerth* defense, which allows employers to escape liability for harassment claims under Title VII if the employer took reasonable steps to prevent or correct the alleged harassment and the plaintiff unreasonably failed to take advantage of any such preventive or corrective opportunities, is not available to avoid liability under the NYCHRL.

Standard for Establishing Liability for Harassment

Nearly 30 years ago, the United States Supreme Court established that "[f]or sexual harassment to be actionable [under Title VII, the conduct] must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citation omitted).

Because of the lower threshold for determining liability for harassment under the NYCHRL, conduct that may pass muster under the "severe or pervasive" standard may run afoul of the NYCHRL.

For years, this was also the standard for establishing liability for harassment under the NYCHRL. In 2009, however, the New York Court of Appeals held that in light of the Restoration Act, Title VII's "severe or pervasive" standard is inapplicable under the NYCHRL, and lowered the bar for establishing liability under the NYCHRL from demonstrating that the conduct was "severe or pervasive" to showing that the plaintiff was treated "less well" than other employees. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 78 (2009). The Court found the "severe or pervasive" standard too restrictive for NYCHRL claims because it effectively "sanctioned a significant spectrum of conduct demeaning to women" and "reduce[d] the incentive for employers to create workplaces that have zero tolerance" for harassment and discrimination. *Id.* at 76. The severe or pervasive standard, the Court found, was inconsistent with the NYCHRL's "uniquely broad and remedial purposes," particularly after the Restoration Act, which made clear that the purpose of the NYCHRL is to "make sure that discrimination plays *no* role" in the workplace. *Id.* In light of the statute's broad remedial purpose, the Court concluded that "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability." *Id*. Instead of the trier of fact inquiring into the "severity" and "pervasiveness" of the conduct, the Court held that liability under the NYCHRL should turn on whether the plaintiff was "treated less well than other employees because of her" protected status. *Id*. at 78.

Because of the lower threshold for determining liability for harassment under the NYCHRL, conduct that may pass muster under the "severe or pervasive" standard may run afoul of the NYCHRL. Indeed, this appears to have been precisely what happened in *Faruqi*. At the close of the trial, the judge instructed the jury that "the key … difference" between harassment claims under Title VII and the NYCHRL is that under federal law, the plaintiff must establish that she suffered "verbal or physical abuse … [that was] sufficiently severe or pervasive as to change the terms and conditions of employment," whereas under the NYCHRL, the plaintiff need only establish that she was treated "less well than other employees, even if the hostile work environment was not severe or pervasive."[3]

After the trial, a *Faruqi* juror, who consented to be interviewed anonymously, explained that the NYCHRL's "more lenient" "treated less well" standard for establishing harassment accounted for the jury's decision to impose liability under city law, but not under federal law.[4] According to the juror, the jury

believed that the alleged sexual assault after the firm's holiday party was, in fact, "not unwelcome" by the plaintiff. *Id.* If, in fact, the jury believed that the alleged assault was consensual, that left only Monteverde's other inappropriate conduct—an instance in which he allegedly kissed the plaintiff and certain "inappropriate comments"—as the potentially harassing conduct. Presumably, the jury did not impose liability under Title VII because it concluded that this other conduct was not sufficiently "severe or pervasive" to warrant liability under federal law. But under the NYCHRL, the juror explained that the jury "ha[d] a debate about [what it means to be treated] 'less well'" than other employees because of gender, and decided that being "subject[ed] to inappropriate sexual conduct," such as "[t]he kiss" and Monteverde's "jokes," qualified under this "more lenient" standard. *Id.*

The Faragher-Ellerth Defense is Not Available Under the NYCHRL

The so-called "*Faragher-Ellerth* defense"—named for two opinions handed down by the Supreme Court on the same day—is an affirmative defense that employers may invoke to avoid vicarious liability under Title VII for sexual harassment committed by supervisory employees, notwithstanding the employer's efforts to prevent or correct such conduct. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). To establish this defense, the employer must show that (i) the plaintiff suffered no tangible employment action as a result of the harassment, (ii) the employer used reasonable care in trying to prevent and correct any harassing behavior, and (iii) the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided. *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2437 (2013).

Whether the *Faragher-Ellerth* defense was available under the NYCHRL for employers to avoid vicarious liability for supervisors' conduct remained an open question even after the Restoration Act. In 2010, the New York Court of Appeals—addressing a question that had been certified to it by the United States Court of Appeals for the Second Circuit—resolved that question in the negative. In *Zakrzewska v. The New School*, the New York Court of Appeals recognized that the employer had established the factual basis for the *Faragher-Ellerth* defense—the plaintiff suffered no tangible employment action, the employer had implemented and disseminated an anti-discrimination policy, the plaintiff waited approximately one year to complain, and the employer took reasonable steps to investigate and stop the alleged harassment after the plaintiff complained—but held that the defense is unavailable under the NYCHRL. 14 N.Y.3d 469, 478-79 (2010). But while an employer may not avoid liability under the NYCHRL for its supervisors' conduct based on the *Faragher-Ellerth* defense, an employer may nevertheless "mitigate liability for civil penalties and punitive damages by showing affirmative anti-discrimination steps it has taken." *Id*. at 480.

In accordance with these standards, the *Faruqi* judge instructed the jury that Faruqi & Faruqi's efforts to prevent and correct unlawful conduct could save the firm from liability under Title VII, but not under the NYCHRL. The judge instructed the jury that even if it found that Monteverde subjected the plaintiff to severe or pervasive verbal or physical abuse, it should find in Faruqi & Faruqi's favor on the Title VII harassment claim against the firm if the firm "had procedures that reasonably could have prevented the discriminatory behavior, and [the plaintiff] unreasonably failed to take advantage of the opportunities at the firm to fix her situation[.]"[5] Under the NYCHRL, however, the judge instructed the jury that if it concluded that Monteverde was the plaintiff's supervisor and that he treated her "less well … because of her gender," the jury must find the firm liable for harassment under the NYCHRL.[6]

But while the firm's antidiscrimination policies and procedures could not shield it from liability for Monteverde's conduct under the NYCHRL, the judge instructed the jury that those policies and procedures were a mitigating factor that the jury could consider when determining the amount of punitive damages to award against the firm.[7] The jury appears to have done just that. Although the jury imposed punitive damages on Faruqi & Faruqi, it awarded only $5,000 in punitive damages against the firm.[8] The juror who consented to be interviewed after the trial explained

that the jury imposed punitive damages on the firm because the jury believed that the firm "did something wrong," but the jury limited the amount of punitive damages that it imposed to $5,000 because the plaintiff "never filed an official complaint," and when the firm's principals "found [out] about" Monteverde's inappropriate behavior, "they did do something" to address it, namely, reprimanding him.[9]

Retaliation Claims under the NYCHRL and Title VII

To establish a retaliation claim under Title VII, a plaintiff must prove that (i) she engaged in protected activity to oppose an unlawful discriminatory practice, (ii) she suffered a materially adverse employment action, and (iii) the protected activity was the but-for cause of the adverse action. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013).

"As with discrimination, the NYCHRL's protections against retaliation are intended to be broader than its federal and state counterparts." *Marchuk v. Faruqi & Faruqi, LLP*, 2015 WL 363625, at *6 (S.D.N.Y. Jan. 28, 2015) (citing *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 112 (2d Cir. 2013)). Unlike under Title VII, to establish actionable retaliation under the NYCHRL, a plaintiff need not show that her protected activity was the but-for cause of the employer's retaliatory action. Rather, a plaintiff need only show that retaliatory animus "played any part in the employer's decision." *Mihalik*, 715 F.3d at 112. Moreover, as amended by the Restoration Act, the NYCHRL provides that to establish a retaliation claim, a plaintiff need not show that she suffered "an ultimate [adverse] action with respect to employment, … or … a materially adverse change in the terms and conditions of employment" as a result of the alleged retaliation.[10] Instead, a plaintiff need only show that her employer engaged in conduct that was "reasonably likely to deter a person from engaging in protected activity." *Id.*; *see also Mihalik*, 715 F.3d at 112. Without Title VII's requirement that the plaintiff has suffered a "materially adverse" change in employment conditions, "no type of … conduct" that an employer may take in response to an employee's opposition to the employer's alleged discrimination "may be categorically rejected as non-actionable under the NYCHRL." *Williams v. Regus Mgmt. Grp., LLC*, 836 F. Supp. 2d 159, 171-72 (S.D.N.Y. 2011) (internal quotations admitted).

The NYCHRL's more lenient standards for establishing retaliation did not, however, save the plaintiff's retaliation claim in *Faruqi*. After the plaintiff filed her initial complaint and it garnered extensive press coverage, the *Faruqi* defendants asserted counterclaims for defamation and tortious interference with prospective business advantage. *Marchuk*, 2015 WL 363625, at *4. The plaintiff then amended her complaint to allege that the defendants asserted their counterclaims "in bad faith only to retaliate against [her for filing her lawsuit] and to deter other female employees at [the firm] from similarly asserting their rights."[11] At the close of the plaintiff's case, however, the Court granted judgment as a matter of law to the defendants on the plaintiff's retaliation claims under both Title VII and the NYCHRL. *Marchuk*, 2015 WL 363625, at *5-6. The Court found that the counterclaims "did not constitute adverse employment action under Title VII" because the plaintiff "had not been Defendants' employee for more than a year by the time the counterclaims were filed[,] … Defendants lacked control over any aspect of [the plaintiff's] working conditions," and the plaintiff failed to identify "any aspect of her working conditions [in her new job] that changed after the counterclaim[s] w[ere] filed." *Id.* at 5. Even under the NYCHRL, the Court found that the counterclaims did not amount to actionable retaliation because the plaintiff "ha[d] not presented credible evidence that the counterclaims in fact deterred [her] from maintaining her lawsuit or deterred anybody else from filing a lawsuit." *Id.* at 6.

Damages Under the NYCHRL and Title VII

Under Title VII, punitive damages may be awarded only when the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Kolstad v. American Dental Association*, 527 U.S. 526, 529-30 (1999).

The NYCHRL, in contrast, contains no such means for a defendant to remove punitive damages from the case as a matter of law. Instead, the NYCHRL sets forth criteria for the jury to weigh "in mitigation of the amount of … punitive damages which may be imposed" after the plaintiff establishes liability. N.Y.C. Admin. Code § 8- 107(13)(e).[12] For example, as discussed above, after the *Faruqi* jury found the firm liable on the plaintiff's harassment claim under the NYCHRL, the judge instructed the jury that it may consider the firm's efforts to prevent and correct Monteverde's conduct as a mitigating factor when determining what punitive damages to award against the firm.[13] And, indeed, while the jury did impose punitive damages on the firm, it limited the amount of punitive damages to $5,000, evidently due at least in part to the plaintiff's failure to report Monteverde's conduct and the firm's efforts to stop his conduct once it learned of it.[14]

Suggestions for Employers

As the outcome of the *Faruqi* trial illustrates, employees have a greater chance of prevailing on civil rights claims under the NYCHRL than under federal law. What steps should employers take in light of the comparatively expansive scope of the NYCHRL?

For one, New York City employers, like employers anywhere, must continue to be vigilant in maintaining and disseminating anti-discrimination, anti-harassment and anti-retaliation policies, and must update their manager and supervisor training programs to incorporate the more expansive NYCHRL. For example, management employees must be made acutely aware that certain isolated and seemingly mild, but unwelcome conduct can give rise to harassment liability under the NYCHRL. Moreover, conduct that does not constitute materially adverse employment actions—such as less desirable assignments or less pleasant working conditions—may, under certain circumstances, be actionable under the NYCHRL. While the lack of the *Faragher-Ellerth* defense under the NYCHRL means that New York City employers may not use their reasonable care in implementing policies to prevent discrimination to avoid vicarious liability for supervisory employees' conduct, this does not make it any less important for New York City employers to have and enforce policies to prevent and correct discriminatory behavior. The best means of avoiding liability under the NYCHRL is, of course, to make sure that violations do not occur in the first instance, and anti-discrimination, anti-harassment and anti-retaliation policies are crucial to that purpose. Moreover, to the extent that violations occur notwithstanding an employer's preventive efforts, an employer's affirmative steps to prevent and correct any discriminatory conduct are mitigating factors when assessing damages under the NYCHRL. Thus, while an employer will not be able to avoid liability based on its preventive and corrective efforts, such efforts may decrease the employer's liability for the unlawful conduct.

In the same vein, employers should ensure that all employees have specific information about how to report suspected violations of their anti-discrimination, anti-harassment and anti-retaliation policies. Supervisors and managers should be trained not only on the policies themselves, but also on how to respond to complaints about suspected violations of the policies. In particular, supervisors and managers should know how to handle "informal" complaints of suspected violations. Employers should instruct supervisors and managers to take any complaint of suspected violations seriously—regardless of how informal the complaint may seem—and convey the

complaint to the appropriate personnel. In addition, supervisors and managers should know that if they observe conduct that may violate the anti-discrimination, anti-harassment or anti-retaliation policies, they must report that conduct to the appropriate personnel—even if victim of the conduct does not complain.

Overall, New York City employers should be aware that the NYCHRL is, in many respects, broader than its federal and state counterparts, and should remain attuned to any additional expansions that may develop.[15]

1. Local Law No. 85 of City of New York (2005).
2. N.Y.C. Admin. Code § 8-130.
3. Trial Tr. at 1924:24-1925:2, 1931:11-14, *Marchuk v. Faruqi & Faruqi, LLP*, No. 13 Civ. 01669 (S.D.N.Y. Feb. 3, 2015).
4. David Lat, *Alexandra Marchuk v. Faruqi & Faruqi: A Juror Speaks*, Feb. 9, 2015, http://abovethelaw.com/2015/02/alexandra-marchuk-v-faruqi-faruqi-a-juror-speaks.
5. Trial Tr. at 1927:8-16, *Marchuk v. Faruqi & Faruqi, LLP*, No. 13 Civ. 01669 (S.D.N.Y. Feb. 3, 2015).
6. Trial Tr. at 1932:18-1933:1, *Marchuk v. Faruqi & Faruqi, LLP*, No. 13 Civ. 01669 (S.D.N.Y. Feb. 3, 2015).
7. Trial Tr. at 2078:6-13, *Marchuk v. Faruqi & Faruqi, LLP*, No. 13 Civ. 01669 (S.D.N.Y. Feb. 5, 2015).
8. *Id*. at 2086:2-9.
9. David Lat, *Alexandra Marchuk v. Faruqi & Faruqi: A Juror Speaks*, Feb. 9, 2015, http://abovethelaw.com/2015/02/alexandra-marchuk-v-faruqi-faruqi-a-juror-speaks.
10. Restoration Act § 3 (amending N.Y.C. Admin. Code § 8-107(7)).
11. First Amended Complaint at ¶ 91, *Marchuk v. Faruqi & Faruqi, LLP*, No. 13 Civ. 01669 (S.D.N.Y. Apr. 23, 2013), ECF No. 9.
12. *See also Thompson v. Am. Eagle Airlines, Inc.*, 2000 WL 1505972, at * 11 (S.D.N.Y. Oct. 6, 2000) ("In view of the explicit language [in the NYCHRL] that these factors are only to be considered as factors in mitigating punitive damages, they are not a complete defense sufficient to strike the claim for punitive damages on a motion for summary judgment.").
13. Trial Tr. at 2078:6-13, *Marchuk v. Faruqi & Faruqi, LLP*, No. 13 Civ. 01669 (S.D.N.Y. Feb. 5, 2015).
14. David Lat, *Alexandra Marchuk v. Faruqi & Faruqi: A Juror Speaks*, Feb. 9, 2015, http://abovethelaw.com/2015/02/alexandra-marchuk-v-faruqi-faruqi-a-juror-speaks.
15. For example, the NYCHRL was amended effective January 30, 2014, to require New York City employers to provide reasonable accommodations to employees affected by conditions associated with pregnancy and childbirth, even if the condition would not rise to the level of a "disability" under existing anti-discrimination law. *See* N.Y.C. Admin. Code § 8-107. While the statute itself does not require employers to provide any particular accommodations, the "Legislative Findings and Intent" section accompanying the statute provides examples of potential reasonable accommodations, such as "bathroom breaks, breaks to facilitate increased water intake, periodic rest if an employee stands for prolonged periods of time, assistance with manual labor, changes to an employee's work environment and *unpaid leave*." (emphasis added).

The Introduction of a Statutory Minimum Wage in Germany

By Stephan Grauke, Mareike Pfeiffer and Johannes Allmendinger

Following the example of many other European countries including France and the UK, Germany introduced a general statutory minimum wage effective as of January 1, 2015. According to the Minimum Wage Act (*Mindestlohngesetz*, the Act), any employer, irrespective of whether domestic or foreign, is committed to pay to each employee employed within the territory of Germany a salary of currently at least EUR 8.50 gross per hour. Depending on the industry, employers are additionally subject to extensive recording and disclosure obligations. Furthermore, employers are in general liable for any of their subcontractors not complying with the provisions of the Act. Non-compliance with the provisions of the Minimum Wage Act generally constitutes an administrative offense which, subject to the circumstances of the individual case, may trigger a fine of up to EUR 500,000. In addition, employers who do not pay the statutory minimum wage may be excluded from public tenders for some time.

Background and Scope of the Act

The Act was implemented to take action against the spreading of low wages in certain sectors of the German economy. The Act generally applies to all individuals who are employed in Germany, irrespective of their nationality, residence, and branch of industry. Only trainees, volunteers, certain previously long-term unemployed individuals, as well as certain individuals who have not completed professional training, are exempt from the Act. In certain industries (*e.g.*, building cleaning industry, mining industry, postal services), transitional rules established by generally applicable collective bargaining agreements apply until December 31, 2017.

Companies having their seat outside Germany are, however, liable under the Act to the extent they employ individuals in Germany, even if the respective employment agreements expressly provide for another governing law. The German Ministry of Labor and Social Affairs indicated that the Minimum Wage Act shall also apply to employees regularly employed abroad with respect to any time he/she crosses the German border to perform employment services within the Germany territory. It remains to be seen whether this position will ultimately be upheld.

The Act generally only establishes a liability of the employer as a legal entity. There is an exposure, however, that under the German Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz*) regulatory fines can be imposed on managers in case they failed to take adequate measures to prevent non-compliance with the Act. There is, however, no direct liability of shareholders as regards the implementation of the Act.

Since January 1, 2015, a minimum wage of EUR 8.50 gross per hour is to be paid in Germany. The failure to comply could result in considerable administrative fines and the exclusion from public tenders.

Amount and Calculation of the Minimum Wage

The minimum wage amounts to EUR 8.50 gross per hour. As of January 1, 2017, increases will be possible upon the recommendation of a Minimum Wage Commission which will be established for this purpose. The minimum wage is to be paid to the employee on the agreed date of payment, however, no later than on the last working day of the following month.

The requirement to pay a minimum wage at an hourly rate does not mean that employees must be compensated on an hourly basis. Weekly, monthly or yearly salaries are permissible to the extent the respective salary divided by the number of hours worked equals at least the statutory minimum wage.

Therefore, certain hours of overtime work, for example, do not have to be compensated to the extent the employee still earns a minimum of EUR 8.50 gross per hour on average.

In addition, the following payments must generally not be considered when calculating the statutory minimum wage:

- special premiums which are paid to the employee in return for additional efforts (*e.g.*, premiums for overtime work, for work on Sundays or public holidays, for night shift or for work under harsh or dangerous working conditions);
- payments made to reimburse the employee for expenses in connection with his/her work (irrespective of whether such payments are made on the basis of specific invoices or on a lump sum basis);
- payments made to acknowledge an employee's loyalty or length of service; and
- vacation allowance.

Recording and Disclosure Obligations

To effectively control compliance with the Act, employers in certain industries, including in particular the construction, freight forwarding, transportation, logistics, and building cleaning industries, are required to record with respect to each employee the commencement, end and length of the daily working time and to keep such records for a period of at least two years. In addition, such employers are required to keep for the period of employment, however, at least until completion of the services rendered, any and all documents necessary to monitor compliance of the employer with the Minimum Wage Act (*e.g.*, employment contracts, payroll statements, statements of account). These documents must not only be kept in the German language, but also within the Germany territory. As a consequence, foreign employers may be required to translate such documents into German and, in the absence of any own offices or plants in Germany, determine an authorized representative who stores such documents on their behalf.

Affected employers resident abroad are additionally required to disclose to the German customs authorities, prior to the commencement of each service rendered within Germany, various details concerning in particular the employees who are subject to the Act, including the name of such employees as well as the place and length of their employment. In addition, such foreign employers must submit a written affirmation, stating that the statutory minimum wage will be paid.

Any act of non-compliance with the recording and/or disclosure obligations under the Minimum Wage Act will trigger fines in the amount of up to EUR 30,000, depending on the individual case.

Liability for Subcontractors

Under the German Minimum Wage Act, companies that operate with subcontractors are liable for the payment of the statutory minimum wage by their subcontractors. The principal and any subcontractor are jointly and severally liable, meaning that the subcontractor's employees are entitled to claim the minimum wage directly from the principal. While in such a case the company may still take recourse against the contractor, this shifts the risk of recovery to the former. In addition, in case the subcontractor does not pay the statutory minimum wage, a fine in the amount of up to EUR 500,000 cannot only be imposed upon the subcontractor, but also on the contracting company, and both entities can be excluded from public tenders for a certain period of time.

As a consequence, employers should carefully select their subcontractors. Service agreements with subcontractors should provide for the obligation of the subcontractor to comply with the German Minimum Wage Act and to indemnify the principal against, and hold him harmless with respect to, any damages or fines resulting from a violation of the Act. In addition, service agreements should expressly provide for an extraordinary termination right of the principal with respect to each case of non-compliance, as well as for the right of the principal to carry out occasional controls with its subcontractor to monitor the implementation of the Act.

Practical Implications

Given the increased costs of employment associated with the implementation of the Act, many employers are expected to make employees redundant or at least to stop recruiting additional staff. According to a survey conducted by the research institute *Ifo*, every fourth company impacted by the Act planned either lay-offs or an increase in prices. Various goods, including fruit and vegetables, as well as certain services such as hair-dressing or transportation by cabs are expected to become more expensive for customers.

Conclusion

To avoid significant fines and the exclusion from public tenders, domestic and foreign employers in Germany should make sure that their employees in Germany receive at least the minimum wage of EUR 8.50 gross per hour and that, depending on the industry in which they are active, the applicable recording and disclosure requirements are met. Given the liability for compliance of subcontractors, companies which contract out work should not only carefully select their contractors, but should also make sure that the agreements entered into with such subcontractor provide for the obligation of the contractor to indemnify the company against any damages resulting from a violation of the Act.

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