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Defending Employers Against Corporate Veil Piercing and Assisting Employers to Tiptoe Out of France

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Publication Date: April 21, 2011

U.S. employers with French operations must focus carefully on their investments or divestment operations. Through the "joint employer theory," employees of a French company can now pierce its corporate veil to hold the ultimate parent, even one based in the United States, liable for restructuring costs, including severance packages and damages for unfair dismissal.

The French Supreme Court has set forth three cumulative criteria for a foreign company to be judged a joint employer (Jungheinrich 18 January 2011), and as a result sentenced to pay French personnel liabilities:

- A common management (e.g., someone from the U.S. parent company board catapulted into the chairman position of the French subsidiary)
- A direct or indirect majority stake in the French subsidiary
- A common business carried out by the parent and the subsidiary (obvious notion in an industrial group, but that has been extended to portfolio management for holdings or private equity funds)

It creates a great concern for private equity funds where "top-down" and hands-on control on companies in portfolio is embedded in the business model. So it is for international group holdings. Alas, this is the new battlefield for French employees of U.S. companies.

"Better be a living rat than a dead lion" is the moral of the second breathtaking case (Dunlop Goodyear 1st February 2011): Shutting down a business in France will not be a legitimate reason for massive layoffs.

- First, when a parent company is deemed to be a joint employer - as in the Jungheinrich case - it must itself bring evidence that not only in France but also at the U.S. level, the criteria meriting a French layoff are met (i.e., economic difficulties, technological change, need to salvage the competitiveness of the business line which is threatened on its own market throughout the world).

— And second, because even without the joint employer situation, the Dunlop case tells us that even though the French facilities are incurring losses or seeing their profits decreasing, the judges will scrutinize the group's overall profitability, to bless or curse the concerned reorganization. Because a French company is undergoing huge losses does not mean anymore carte blanche for laying off everyone.

Anticipation will now - more than ever - be critically important. No step can be taken by the foreign parent company to please the banks (refinancing the subsidiary), or the French authorities or local works councils and unions (directly paying the layoffs costs), without a very careful analysis of the consequences. Tiptoeing out of France will be far more efficient and cheaper than roaring at judges and unions.