Client Update | Labour & Employment

September 2018

Dear Clients and Friends,

With the summer holidays behind us, we would like to bring to your attention some recent legal updates and case law developments, which include:

- **Amendment to legislation, permitting all employees to refuse to work on the weekly rest day;**
- **New rules regarding the withdrawal of severance pay from pension arrangements;**
- **Updates to the model rules in the law for the prevention of sexual harassment, 1998;**
- **Extension of the Birth and Parenting period for the spouse of an employee who gave birth to more than one child;**
- **A continuing trend of "blurring" the distribution of responsibilities between service contractors and the actual users in relation to the employees of a contractor;**
- **An employer was criminally convicted for requiring the army profile of a candidate for employment;**
- **Case law that clarifies the protected period during fertility treatments;**
- **Employment law in the digital age: new and interesting case law in a variety of areas.**
- **Case law that determines an employee's right to choose a pension product without loss of earning capacity insurance.**

In addition, as a reminder, the following matters will affect the entire market:

- **October 30, 2018, the municipal election day, has been declared a sabbatical;**
- **New default funds will soon be determined.**

As usual, the following constitutes a general summary with general recommendations. Insofar as any doubts or questions may arise, we recommend reaching out to consult on the specific matters.

1. Amendment No. 18 to the Hours of Work and Rest Law: Refusal to work on the weekly rest day

On June 21, 2018, amendment No. 18 to the Hours of Work and Rest Law, 1951, was published.

In the scope of this amendment, the legislator cancelled the distinction between employees who observe the Jewish Shabbat and those who do not, and stated that any employee (indiscriminately) may choose not to work on the weekly rest day.

Under these circumstances, and going forward, employees who do not wish to work on the weekly rest days are not required to provide an affidavit regarding their religion or declare that they observe the Jewish religion.

According to the amendment, an employee whose employer requires that he/she work on the weekly rest days, or that intends to require such work, can inform the employer, no later than three days from the date of such requirement, that he/she do not agree to work on the weekly rest.

Likewise, employers within recruitment processes are forbidden from turning away candidates, for the sole reason that such candidates informed the employer upon their acceptance to work that they refuse to work on the weekly rest, and the employer cannot require such candidates to commit to work on the weekly rest days as a condition for acceptance to the position.

Please note that the amendment shall not apply to: 1) workplaces that are entrusted with maintaining public safety or related to public safety, hotel industry, production or flow of electricity, existence or provision of essential services; 2) workplaces that have received a general permit issued by a committee of governmental ministers, in accordance with section 12(B) of the law.

The amendment will enter into force on January 1, 2019 and will apply to all employees. Prior to its entry into force, employers are required to inform their employees (including their existing employees) of their intention that the employees will work on the weekly rest days.

The provisions regarding the committee of ministers entered into force on June 21, 2018.

In anticipation of the entry into force of the amendment, and in order to prepare for such, we recommend examining the company's needs in order to consider each employers' options.

2. Reminder: The municipal election day has been declared a sabbatical

In preparation of the municipal elections that are scheduled to take place on October 30, 2018, we would like to remind you that according to amendment No. 44 to the Municipalities Law (Elections), 1965 (from 2014), the municipal election day shall be regarded as a sabbatical.

The provisions are related to employees whose place of work is in a municipality or local council in which elections will take place, and in relation to employees who are listed in the voters registry of municipalities in which elections will take place (even if their place of work is not in the area of such municipalities / local councils in which elections will take place).

In terms of compensation: employees who have been employed by their employers for at least 14 consecutive days prior to the municipal elections, shall be entitled to the wages they would have received had they worked on such day. In accordance with the widespread approach in relation to the general national elections (which stem from Regional Labour Court decisions), an employer who works on the election day shall be entitled to double his/her wages.

We recommend that employers examine their needs in advance, and verify whether they will require employees to work on the municipal Election Day; if so, operational and compensation mechanisms should be put in place.

3. Amendment No. 60 to the Employment of Women Law: extension of the Birth and Parenting Period for the spouse of an employee who gave birth to more than one child

According to Section 6(C) of the Employment of Women Law, 1954, an employee who gave birth to more than one child in the same birth, is entitled to extend the Birth and Parenting period by three extra weeks, for each additional child that was born in the same birth, as of the second child.

As you may recall, in the scope of Amendment No. 57 to the law, which was published in April 2017, a spouse was given the opportunity to utilise a week of the Birth and Parenting period, alongside his spouse who gave birth. According to amendment No. 60 to the law, an employee whose spouse gave birth to more than one child in a single birth, will be entitled to utilise, in addition to this week, one consecutive period of at least seven days, and two weeks at most – out of the said three weeks that are granted under such circumstances, to the employee who gave birth.

This entitlement will also be granted to an employee on account of each additional child that is born in the same birth, for the purpose of taking care of his child instead of his spouse, and with her consent.

Accordingly, Section 49 of the National Insurance Law [consolidated version], 1995, was also amended, in relation to the payment of birth allowance to the employee who gave birth and her spouse. According to the law, if the employee chooses to utilise his entitlement under this amendment, he will be entitled to the birth allowance from the National Insurance Institute for this period.

The amendment entered into force on August 1, 2018 and applies to births that took place as of this date. In light of the many amendments to this law, and their complexity, we recommend specifically checking the entitlements of spouses to a Birth and Parenting period and birth allowance, according to the circumstances of each and every case.

4. Amendment No. 21 to the Law for Supervision over Financial Services: Rules and new guidelines for withdrawal of accrued severance funds from pension arrangements by employers

An employer's ability to withdraw the severance amounts from a provident fund is limited and complex.

As such, and in accordance with Section 23(3)(A) of the Supervision of Financial Services Law (Provident Funds), 2005 (the "**Supervision Law**"), an employer is entitled to withdraw funds that it deposited into a personal provident fund for severance or into the severance component of an employee's provident fund, only subject to the provisions of Section 26 to the Severance Pay Law and Section 14 to that same law. These material provisions have not changed and continue to apply today.

However, amendment 21 to the Supervision Law, has determined a procedure which the employer must follow in order to withdraw the accrued severance. According to the amendment, the withdrawal of funds by an employer can only occur if the employment relations have ended, and the employer meets one of the following terms, within four months of the date on which the employment relations ended:

- The employer provides the provident fund with a declarative court ruling confirming that the employee has ceased his/her employment in circumstances which do not entitle the employee to severance pay, or a portion therefrom, and that the accrued severance, in whole or in part, belong to the employer, that is entitled to receive them.

- The employer provided the provident fund with written proof that it has initiated legal proceedings to receive a declarative court ruling, according to which the employer is entitled to withdraw the funds or that the employee is not entitled to such funds.

- The employer has provided the provident fund with: (1) a notification from the employer, with written proof that the accrued severance are refundable to the employer according to law or the employment agreement; and in addition (2) a notification from the employee, signed by the employee after the end of his/her employment, whereby the accrued severance is refundable to the employer.

In accordance with the amendment, if an employer fails to perform one of the above actions, within four months of the date of termination of the employee's employment, the employer will not have any claim against the provident fund, if said provident fund releases the accrued severance to the employee. This "default" demonstrates that the amendment is not merely procedural, and we assume that its significance will become clear as time goes by.

If the employer provides the provident fund with a declarative court ruling after the elapse of the said four months, and the employee has yet to withdraw the accrued severance by such time, the employer will be permitted to withdraw the accrued severance.

Please note that the amendment was published on July 8, 2018. For employment relationships that came to an end prior to such date, the four month period shall begin on the publish date (i.e. up to November 8, 2018).

We recommend that employers swiftly examine the need to take action in order to withdraw the accrued severance of employees whose employment ended without their severance funds being released. We would be happy to assist in examining the available options in this respect, in light of the amendment to the Supervision Law.

5. Reminder: Default Funds – new funds to be chosen soon

As you may recall, in August 2016 the Supervisor of Capital Markets, Insurance and Savings Division completed a competitive process and chose two comprehensive pension funds (one managed by Meitav Dash Provident and Pension Ltd., and the second managed by Halman Aldubi Provident and Pension funds Ltd.), as the chosen default funds (the "**Current Default Funds**").

As a reminder, employers are generally permitted to make contributions into these pension funds on account of employees, when such employees did not choose an alternative pension arrangement, after they were given an opportunity to do so.

The Current Default Funds were selected to serve as such for a period of two years, beginning on November 2016, and ending on October 31, 2018.

We would like to draw your attention to the fact that as of November 2018, new chosen default funds shall apply, the identity of which shall be determined by the Supervisor of Capital Markets, Insurance and Savings Division in a competitive process that is currently being held. Therefore, employers who have chosen one of the Current Default Funds, as their default fund, will have to choose a new default fund, as shall be selected, or conduct their own competitive process for choosing a default fund (in accordance with the legal characteristics).

We emphasise that this change shall not alter the existing arrangement for employees who have already been added, or will be added by November 2018, to the Current Default Funds, as such (meaning – the obligations (and terms) of such funds towards the employees, as chosen default funds, shall continue to apply in relation to such employees, in accordance with the legal requirements).

We will further mention that an employee is still entitled, at any time, to select a pension arrangement of his/her choosing, in accordance with the law.

We will continue to follow the developments and provide updates when the new default funds are made public (and then begin to operate as of November 2018).

6. Amendments to the Model Rules within the Prevention of Sexual Harassment Law, 1998

According to Section 7(A) to the Prevention of Sexual Harassment Law, 1998, employers must take reasonable steps, under the circumstances, in order to prevent sexual harassment or retaliation in the scope of labour relations.

In this respect, the legislator has imposed upon employers (of 25 or more employees), the duty to set and publish model rules, which are required to detail the main provisions of the law regarding sexual harassment and retaliation in the scope of labour relations. The model rules must also detail the ways for submitting complaints regarding sexual harassment or retaliation, and the methods for handling such complaints. Model Rules were attached to the Prevention of Sexual Harassment (Employer Duties) Regulations, 1998, and detail the main provisions of the law and regulations.

However, over the years, and although many changes were made to the Prevention of Sexual Harassment Law and Regulations, the legislator did not amend the Model Rules, thus creating a large gap between the law and the Model Rules.

As a result, on July 26, 2018, an updated version of the Model Rules was published, which is in correlation to the legal provisions and the many changes that have been made to the law over the years.

This change creates a good opportunity to ensure that your existing Model Rules are updated, and, if required, an opportunity to update and publish new versions of the Model Rules among the employees.

7. Case Law: Engagement of services contractors – Turning a bling eye Vs. Being completely involved

In the matter of **Hapota**[1], which was recently heard in the Regional Labour Court in Haifa, the Regional Labour Court continued in the path of previous case law, according to which, under certain circumstances, the user of services should be involved in the employment terms (and termination of employment) of the service providers placed at such user's workplace.

This matter revolved around a service provider who had provided the user with various cleaning services for a period of approximately 20 years. Due to a suspicion of severe disciplinary violations, and after conducting a comprehensive investigation of the matter, the user informed the service contractor that it wished to end the service provider's placement at its workplace.

The Regional Labour court considered the length of the period of placement (approximately 20 years), the circumstances of the end of placement (which point to a fault of the plaintiff), and the fact that the service contractor (the employer) was not provided with sufficient details of the complaints that were raised against the service provider. The Court ruled that in light of the above, justice, as well as the objectives of the hearing process, require that a **joint hearing** is held by the employer and the user.

The Labour Court emphasised that in order to conduct a lawful hearing for the service provider, he must be provided with all of the relevant information, on account of which the user is considering the termination of his placement.

As previously mentioned, this ruling was made by the Regional Labour Court, under very specific and severe circumstances.

However, there is no doubt that this ruling forms another brick in the path to "involving" the user in the employment relations between a service contractor and its employees; and, does not enable the user to turn a blind eye and completely avoid involvement in the termination of a service provider's placement. Due to the sensitivity of the matter and its implications, we recommend consulting with us on a case by case basis.

8. Case Law: criminal charges due to the requirement to provide a military profile during a recruitment process

As you may recall, according to Section 2A(A) of the Equal Opportunities in Employment Law, 1988, employers are not permitted to require candidates or employees to provide their military profile. Furthermore, employers are not permitted to make use of a candidate's military profile, if such has come to

[1] Declarative Ruling (Regional Haifa) Sami Hapota Vs. Israel Electric company Ltd., (published in Nevo, 22.5.2018). Please note that on June 20, 2018, the services contractor filed an appeal on the ruling, regarding the compensation it was required to pay on account of the hearing and the overtime hours.

its attention, for any purpose, including recruitment. According to Section 15(A) to the Equal Opportunities in Employment Law, a violation of this provision constitutes a criminal offense.

Please note that a recent Regional Labour Court ruling convicted an employer for violating Section 2A(A), by virtue of Section 15(A) to the Equal Opportunities in Employment Law.

In this matter, the employer demanded that candidates for employment provide their military profile, in violation of the law. **Although the request was demonstrated to have been merely technical, and not considered within the decision to accept the candidates, the employer was convicted of a criminal offense, since all the elements of the crime were met.**

Please note that the Statement of Claim was also submitted against the employer's management chairman, who attended the recruitment meetings, viewed the questionnaire and was aware of its contents. However, due to the special circumstances of this matter, the Labour Court deliberated whether to abstain from convicting the defendant, and permitted the State (as the accusing party), to send him for probation services prior to completing the sentencing in his respect.

Due to the severity of this matter, we recommend reiterating policies and instructions within recruitment processes and interviews, and the prohibitions therein. Furthermore, we recommend examining the various forms provided to candidates within recruitment processes.

9. Case Law: Protection from Termination during Fertility Treatments: Clarifications regarding the two year period

Last May, the Regional Labour Court in the matter of **Plonit**[2], provided clarifications in relation to the protected period afforded during fertility treatments.
Section 9(E) of the Employment of Women Law, 1954, states, among other things, that an employer shall not terminate the employment of an employee undergoing fertility treatments, during the dates of their absence from work, or during a period of 150 days thereafter. However, the legislator stated that this protection shall not apply upon the elapse of two years from the first day of the employee's absence while working for the same employer or at the same workplace.

In the above mentioned matter of Plonit, the Regional Labour Court held that an "examination process" between treatments does not constitute a break in the period of fertility treatments, and therefore, it does not reinitiate the "two year count", after which the employee's employment may be terminated. In this context, the Labour Court reiterated the ruling in the matter of **Telepharma**[3], whereby a birth reinitiates the counting of the two years.

The Labour Court also mentioned the matter of **Berman**[4], in which the court held that the protection from termination of employment due to fertility treatments begins from the initial stage of consultations and checks. In this matter, the court held that as consultation and checks constitute the beginning of the

[2] Legal Appeal (Tel-Aviv) 43324-09-17 Plonit V. State of Israel (published in Nevo, 9.5.2018)
[3] Legal Appeal (Tel Aviv) 23589-08-17 Levi V. State of Israel and others (published in Nevo, 16.8.2017)
[4] Legal Appeal (Tel Aviv) 9985-04-17 Y and A Berman Ltd., V. State of Israel Ministry of Labour, Welfare and Social Affairs (published in Nevo, 14.2.2018)

treatment, for the purpose of the protection under law, there is no justification in not seeing it as such, for the purpose of "completion of treatment".

The Employment of Women law bestows a wide range of protections on employees and their spouses in the context of birth and parenting. These rights may vary from case to case and therefore, we recommend consulting with us on any specific circumstances that may arise in this context.

10. Employment Law in the Digital Age – News and Updates

Case Law: Sending an email to employees regarding an employee's termination of employment may constitute slander

Many of our clients consider whether to notify employees of terminations or disciplinary actions that are taken within their organisation; either as a warning or merely an update.

The National Labour Court has recently ruled[5] that an email sent by an employer to its employees regarding the termination of employment of an employee, constituted slander. In this matter, the employer sent an email to a number of company employees, following the termination of an employee's employment, which included the employee's name and a description of the disciplinary violations due to which her employment had been terminated.

The Court held that the message constituted slander, due to its personal nature, the exaggerated and inaccurate nature in which it was drafted, and the potential distribution of the message. Due to the circumstances, the Court ruled that the employer was required to pay compensation in an amount of NIS 27,000 due to the violation of the Prohibition of Defamation Law.

According to the National Labour Court's ruling, even if the message had been accurate, the email would have been considered slander, since its contents included information that could humiliate the employee. The National Labour Court emphasised that there is no public interest in publishing the information and therefore, the legal protection does not apply to the message.

As emphasised in the National Labour Court's ruling, despite the employer's desire to warn other employees and condemn the unwanted behavior, in this digital age, in which every written message has the potential to reach far and wide, employers must be careful when sending written messages by email or other applications, which attribute disciplinary or criminal actions to employees.

Case Law: mobile phone location: distinguishing between a period of employment, and managing legal proceedings

The rules that were laid down by the National Labour Court in the matter of Issakov, regarding the privacy of employees in the workplace, have long become the leading rule on the matter, and have even been clarified by later National Labour Court rulings, regarding different aspects of employment law.

[5] Labour Appeal (National) 36064-09-16 Israir Airlines and Tourism Ltd., V. Sigal Shimon (published in Nevo, 03.06.2018)

In the matter of **Fischer Pharmaceutical Industries**[6], which was recently heard by the National Labour Court, the Court deliberated an employer's request to obtain location reports of an employee's mobile phone, which was given to the employee by the employer, for the performance of his position. This request was submitted as part of discovery, within a claim filed by the employee against the employer for various social benefits, including overtime hours.

The National Labour Court ruled in favor of the employer and accepted the request to obtain the mobile phone location report. In doing so, the Court distinguished between this matter and the Issakov ruling (on which the Regional Labour court mainly based its decision to reject the employer's request). According to the Court, the Issakov ruling is relevant when the employer is interested in putting in place a practice that involves infringing the privacy of employees. However, in the scope of a discovery process, the employer's right to discovery should be specifically weighed against the employee's right to privacy.

Accordingly, and in the interest of balance, the Labour Court ruled that the location reports should first be provided to the employee, who may redact surplus information (i.e. information regarding his whereabouts for private matters). Thereafter, following the redaction of private information, the data should be provided to the employer.

The matter of privacy is a sensitive and complicated matter, which stretches out to many topics within employment law. Therefore, and in light of the sensitivity, we recommend consulting with us immediately when questions arise in relation to privacy issues, in order to enable us to examine the possible modes of actions, taking into account the limitations.

Case Law: Ownership of a Company's Facebook page – not always afforded to the Company

Nowadays, many companies manage active Facebook pages. Such pages are usually managed by employees, and in some cases, by just one employee. When an employee is given complete independence and when matters aren't clarified within a clear agreement, legal questions may arise, revolving around the ownership of the Facebook page; whether it belongs to the employer or the employee.

This very question was brought before the Regional Labour Court in Tel Aviv in the matter of Guy Lerer and the "Zinor"[7] (a local TV show, which broadcasts and commentates on internet clips). In order to determine the right of ownership, the Labour Court set down a number of guiding questions which should be examined, such as:

Who initiated the activation of the account and what was the purpose for its activation; the degree of correlation between the account and the workplace; who bears the cost of managing the account; who participated in the management of the account in practice; was the account managed and operated in accordance with the employer's instructions and supervision; does the employment agreement include instructions as to the account; does the workplace have a policy regarding the use of social media accounts.

[6] Labour Appeal (National) 40111-04-17 Fischer Pharmaceutical Industries Limited V. Avraham Shateter (published in Nevo, 04.03.2018)
[7] Judge Labour Dispute (Regional Tel Aviv) 46976-09-17 The New Channel 10 Ltd., V. Guy Lerer (Published in Nevo, 22.04.2018)

The Labour Court further held that neither of the above referenced tests stands alone, and the results of one test does not necessarily indicate a final result; rather the results of all the tests together will provide a full picture.

After examining the above considerations in relation to the specific case, the Regional Labour Court reached the conclusion that the Facebook page should remain under Guy Lerer's management.

As with other actions taken by employees on social media, both within and outside of the workplace, we recommend adopting a clear policy on the matter, which should be brought to the employees' attention. In particular, we recommend resolving issues relating to the use of social media accounts, used by employees both for personal and professional use, in order to prevent disputes down the road.

11. An employees right to choose a pension product that does not include loss of earning capacity insurance

In this matter[8], the employee was diagnosed with cancer during her employment with the employer and she was found to have a temporary measure of disability of 100%. When the employee turned to the insurance company "Migdal" (with whom the worker was insured with a managers' insurance policy), she discovered that her insurance policy did not include a compensation component for incapacity for work.

The employee filed a claim with the Regional Labour Court against the Company, demanding that it compensate her for her incapacity for work. The employee claimed, amongst other things, that the Company was required to insure her with loss of earning capacity insurance in accordance with the provisions of the Extension Order for Pension Insurance in the Market, and even if she apparently waived this insurance, it is a mandatory right that cannot be waived. The Regional Labour Court rejected the employee's claim, and as a result, the case reached the National Labour Court.

The National Labor Court held a long and reasoned discussion in the appeal, in which the National Labour Court was presented with positions on behalf of the Attorney General, the General Workers' Union, the Presidium of Business Organisations and the insurance company. After considering the matter, and in a ruling that was consistent with the Attorney General's position, the National Labour Court rejected the employee's appeal.

In its judgement, the National Labour Court determined the following important matters:

- Section 20 of the Supervision Law, expresses a fundamental principle in the world of pension savings, which is the full freedom of choice given to an employee to determine the type of pension product he/she prefers, the company that will manage the funds and the investment track in which the funds will be managed, without the employer being able to intervene in these decisions.

[8] National Labour Court Appeal 7243-10-15 Lilian Landsberg V. Gal Rob Consultants Ltd.,

- The employee is entitled to choose the manner in which his pension savings will be carried out, in accordance with, first and foremost, the Supervision Law. According to the National Labour Court, the freedom of choice set out in section 20 of the Supervision Law overrides the provisions of the Extension Order for Comprehensive Pension Insurance in the Market (the "**Extension Order**").

- Just as the employer does not have to check what the employee does with his/her salary, so too, the employer is not allowed to interfere with what is done with the funds that it transfers to the employee's chosen pension arrangement, and from the employer's perspective, this matter should be **as good as done**.

- Where the employer is involved in the choice of insurance coverage, it may harm not only the employee's autonomy but also his/her privacy. Thus, for example, it is possible that as a result of a health matter (not known to the employer), the pension insurer may refuse to provide cover to the employee or agree to do so only in return for very high premiums. The employee has no reason to provide an explanation to the employer about this and the employer has no right to block the employee's choice as a result.

The National Labour Court further clarified that according to the provisions of the Supervision Law, not only is the employer not required to intervene in the employee's choice, but the employer's involvement in choosing the employee's pension insurance (even where the employee requests not to be insured under a loss of earning capacity policy), harms freedom of choice and may amount to a criminal offence punishable by a year's imprisonment or a fine.

As noted by the National Labour Court, it seems that the ruling constitutes another chapter in the trend towards eliminating, as far as possible, the employer's involvement in the employee's choices with respect to pension savings. This is the case even after the recent amendment to the Supervision Law with respect to the withdrawal of severance pay by the employer as detailed above.

We would be happy to provide any further information and address any questions you may have.

Sincerely,

The Labour & Employment Department
Herzog Fox & Neeman