CLIENT UPDATE

Summary of 2015 in Employment Law

Dear Clients and Friends,

The field of employment law and labour relations is characterized by frequent and challenging developments, whether in legislation, case law or within the framework of general and industry collective agreements. Equally, 2015, as before, was marked by many innovations requiring employers to recognize and act to implement them as necessary.

Accordingly, we have chosen to bring you a concise overview of ten innovations in labor law in 2015 that are important for you to know.

We would be happy to assist you in providing legal advice in relation to each of the issues below, their impact on the workplace and the steps proposed to be taken as a result.

1. January: Change of case law regarding the rights of independent contractors who are retroactively classified as employees

In January 2015, the **Amir**[1] case set new case law on a matter which greatly affects the labour market regarding the rights of independent contractors who have signed consultancy or services agreement and are then held retroactively to have been de facto employees.

In the **Amir** case, the National Labour Court held that in cases where it is **clear** to the employer that the individual who it chose to engage as a contractor, is in fact an employee, then the **deterrent approach** is accepted, in which the total monthly amount paid by the employer to the independent contractor forms the basis for calculating the social benefits claimed retroactively as an employee.

In contrast to this, in cases where it **has not been clear** from the outset whether there is an employment relationship, the court has adopted the "**calculative approach**" whereby the employee is not entitled to additional pay over the consideration that the contractor received, where the contractor's consideration is higher than the alternative salary plus the cost of

[1] National Appeal (National) 3575-10-11 Amir – News Company of Israel Ltd (published in Nevo, 21.1.2015).

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social benefits (the employer's cost). Therefore, the court abandoned **the "percentage gap" approach**, whereby the employer is entitled to set off the compensation awarded to the employee from the higher amount paid to him as a service provider, provided that the contractor's consideration was 50% higher than the alternative salary of the employee.

The court further held that **in any event**, where a service provider is recognized as an employee he is not required to return the difference created by the contractor's consideration.

- ✓ This is a good opportunity to examine whether any company consulting agreements need updating in light of the Labour Court decisions on this issue and the Company's practice in relation to contracting with consultants.

2. February: Firing and Re-hiring of an employee requires payment in respect of prior notice

In February 2015, the National Labour Court set new law in relation to the obligation to pay prior notice of termination where, incidentally to a transaction, employees were dismissed and immediately re-employed by the new business owner.

In **Yardeni Locks**[2], the National Labour Court held that the obligation to give prior notice is absolute, and the employee's decision to continue working at the same location under a new employer does not detract from the first employer's obligation to give prior notice.

The result of this decision is that if an employer wishes to avoid the obligation to pay for prior notice, it is required to give notice to the employees, whilst there is still time, of the intention to transfer the ownership of the business to another, and to allow the employee the free choice on whether to continue working at the workplace. An employer that chooses to keep such information to itself is therefore required to bear the cost of paying out prior notice of termination.

- ✓ It is now important to remember to take into account the prior notice period or its value in planning the process of a transfer of employees in an asset purchase transaction. The commercial arrangements should be made as necessary to allocate the cost of payment in lieu of notice where prior notice of termination is not actually given.

2 National Appeal (National) 28597-03-11 Davush – Yardeni Locks Maintenance (2005) Ltd. (published in Nevo, 11.2.2015).

3. March: The extension order in the import, export and wholesale trade industries also applies to the services industry (and specifically, to services in the computer industry)

In 2015, the question arose as to the scope of the extension order in the import, export and wholesale trade industries (the "**Extension Order**"): whether the Extension Order applies to these three areas only, or also to the services sector.

The Extension Order applies, as stipulated in the introduction to the Order, to all employees and employers: "**in the import, export and wholesale industries, in services and the industries listed in Appendix 1 of the Collective Agreement… except employees whose terms of employment were or will be settled by collective agreements, and their employers**.[3]"

In the **Nagar**[4] ruling, the National Labour Court held that it had to interpret the provisions regarding the scope of the Extension Order as applying to the import, export and wholesale industries **and services**, in accordance with the list of industries detailed in the Collective Agreement (as defined in the original provisions of the Collective Agreement that was extended). This is even though the category of "services" does not appear in the heading of the Extension Order.

- ✓ This ruling is a good opportunity to examine the various documents that govern the employment relations in the company (employment agreements, policies, etc.), and whether these documents should be updated in light of the many new rulings and legislative changes in the field.

4. June: An Actual User is required to lead a hearing for the employee of a manpower company

The Regional Labour Court in Tel Aviv, heard the claim of a female employee who was stationed by a manpower company to work in an accounting firm for a period of four months. The employee's employment at the accounting firm was terminated the day after she notified her supervisors at the accounting firm that she was pregnant. The manpower company did not station the employee at an alternative workplace.

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3 As mentioned, in this regard, a number of collective agreements have been signed between the General Workers' Union (the "Histadrut") and the Tel Aviv and Central Commerce Association. The most recent, from 1987, was extended by an extension order to the Tel Aviv and Central region.

4 National Appeal (National) 2580-03-11 Nagar – Litos Computers Ltd. (published in Nevo, 1.3.2015).

Since the employee's employment was terminated without a hearing being held in advance of such termination, the court ruled that although the accounting firm was not the employee's employer, but rather the actual user, such actual user is still required to provide the employee with a right to make her case prior to terminating her employment therewith. The court ruled that both the accounting firm and the manpower company are required to compensate the employee for the failure to conduct a hearing. This ruling is pending appeal.

- ✓ It is recommended to examine the customary conduct in the company in relation to manpower and service contractor employees, while taking into consideration the growing involvement required by actual users with respect to the manpower employees stationed at their workplace.

5. July: An employee's recording of his/her employer may be considered a disciplinary offence

A disciplinary claim brought against a female employee was adjudicated in the State Employees' Disciplinary Tribunal. The proceedings progressed and reached the High Court of Justice, in the framework of a request to appeal the Regional Labour Court's decision on the matter[5].

In the decision of the High Court of Justice, Vice-President Judge Elyakim Rubinstein pointed out in his statement that the disciplinary law prohibits an employee from recording his/her colleague or supervisor, without their knowledge. This is the case even if the recording is not considered eavesdropping, according to the meaning of the term in law. In this context, the High Court of Justice confirmed the former ruling from the field of disciplinary law, whereby the recording of an employee or a supervisor may lead to mistrust and disrupt the system of working relationships in services of the State. Such a recording may therefore be considered as a disciplinary offence.

Later, the Regional Labour Court in Tel Aviv gave a ruling[6] that dealt with a candidate in a tender for civil service that recorded one of the members of the tender committee. The Labour Court stated that an employee's act of recording of his/her employer in the workplace is controversial. The Labour Court distinguished between a case in which the employee is involved in legal or disciplinary proceedings in which he/she must clear his/her name, and other cases, in which the recording of one's co-worker or superior is disagreeable. These

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5 Request for appeal 4550/15 **Shmueli – Prime Minister's Office** (published in Nevo on 6.7.2015).

6 Labour Dispute under Judge (Regional – Tel Aviv) 13961-01-14 **Agassi Mimun – the State Service Commission** (published in Nevo on 16.10.2015).

opinions expressed by the Labour Court were also mentioned incidentally. An appeal on this case is pending.

- ✓ We recommend that employers adopt an ethical code or disciplinary regulations, and insofar as the company already has such a policy, it should examine whether the policy requires any updates in light of the new court rulings in this field.

6. August: The classification of an engagement for the provision of services as an engagement for the provision of manpower services; the contractor's employees became the Actual User's employees following nine months of service

The Regional Labour Court in Tel Aviv conducted proceedings in the framework of which employees who were employed by two contracting companies, and stationed at the Ministry of Interior, demanded to be recognized as State employees.

The engagement between the State and the contracting companies was defined as an engagement for the provision of services. However, in its ruling, the Regional Labour Court determined that in practice, the engagement was for the provision of manpower services[7].

As a result of its determination that the engagement was for the provision of manpower services, the Labour Court ruled that following nine months of service, the plaintiffs became employees of the actual user – the State. However, it was determined that their status was not that of a regular ("*Teken*") State employee, but rather an employee of the State[8].

The Labour Court's ruling is another demonstration of the fact that, similarly to a situation in which the definition of a person as an independent contractor does not prevent his/her reclassification as a salaried employee, thus the definition of an engagement as a contract for the provision of services does not prevent the retroactive reclassification of the engagement as a contract for the provision of manpower services, with all that entails – the manpower employee becoming an employee of the actual user.

- ✓ In light of the frequent developments in this field, we recommend examining the practice of engagements with service contractors and manpower contractors, as well as the engagement agreements with them, and their adaptation to the changes in legislation and case law in this field.

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7 Labour Dispute under Judge (Regional – Tel Aviv) 25296-12-14 **Ohana – the Ministry of Interior** (published in Nevo on 6.8.2015).

8 The difference being that they would not be entitled to certain privileges awarded to employees who were originally accepted to work as State employees, after going through the regular tender process.

7. August: Amendment 12 to the Control of Financial Services (Provident Fund), 2005

This past year has brought with it material changes in the field of pension savings, some of which were anchored in legislation and others in various communications published by the Ministry of Finance Capital Market, Insurance and Savings Department. The provisions are in relation to the interface between employees, employers, institutional bodies, arrangements managers and agents, and sharpen the employee's freedom of choice regarding the pension products and agent that he/she may choose from. In addition, the provisions refer to the regulation of employer contributions to provident funds.

In this context, Amendment 12 to the Control of Financial Services (Provident Fund), 2005 (the "**Provident Law**") was enacted in August. The Amendment adds another layer to the employees' freedom of choice regarding the pension product within which he/she will save and be insured, as anchored in Section 20 of the Provident Law. The amendment severs the connection between the employee's choice of a certain pension product and the employer's contribution rates on his/her behalf, and as a result, may directly affect the pension budget that each employer provides to its employees.

Please see our client update which was published earlier this year, on the implementation of the provisions of Amendment 12 in practice.

As stated, Amendment 12 constitutes only one layer in a comprehensive reform in the field of pension savings, which was also affixed in the pension chapter of the Economic Plan Law (Legislative Amendments for Implementation of the Economic Policy for Budget Years 2015 and 2016), 2015, and the communications issued by the Capital Market Division with respect thereto. These include material amendments to the provisions of the Control of Financial Services (Pension Counselling, Marketing and Pension Clearing System) Law, 2005, and the Provident Law, which constitute a significant change in the world of pension savings in Israel. This change is especially evident in the various interfaces between the "players" in the field: the insurance agents, employers, employees and institutional bodies.

Please see our previous client updates on this matter:

- Client update – Innovations in the pension field – the pension chapter in the Arrangements Law| click here.
- Client update – Updates in the pension field: Payments to provident funds, operation services for employers and choosing a default fund | click here.
- Client update – memo regarding Amendment 12. | click here.

- ✓ The comprehensive reform in the pension field requires employers to make preparations, from an employment relations perspective, specifically ensuring that the employer meets the requirements of Amendment 12, and from an operational perspective, specifically examining the engagements and agreements with the various agents and ensuring that they meet the legal requirements.

8. October: The definition of a "Person with Disability" for the purpose of implementing the provisions of the Extension Order for the integration of persons with disabilities in the workforce.

The Follow-Up Committee, which was established pursuant to the Collective Agreement signed in 2014, regarding the fair representation of people with disabilities in the workplace, the provisions of which were extended in an extension order, published instructions regarding the implementation of the Collective Agreement in October 2015.

In this context, it was determined that a "Person with Disabilities" is anyone who: has a disability of 40% and above, which is recognized by the National Insurance Institute, the Ministry of Defense, the Income Tax Authorities or the Ministry of Health; has undergone a professional rehabilitation process for the purpose of placement at work by the National Insurance Institute, Ministry of Welfare or the Ministry of Health; or, a handicapped veteran of the Israeli Defense Forces who has undergone a professional rehabilitation process for the purpose of placement at work by the Ministry of Defense.

In addition, the Follow-Up Committee defined certain actions that an employer may take with respect to available or new positions, and as a result of which, the employer will be considered as having acted for the advancement of fair representation, even if the employer ultimately fails to meet the required quota for employment of people with disabilities, as set out in the Collective Agreement. Such actions include: the appointment of an employee to be responsible, and in charge of the employment of people with disabilities; the adoption of an annual plan for the advancement of employment of people with disabilities; the employer approaching various sources that specialize in the placement of employees with disabilities, for the advancement of hiring of persons with disabilities; the written documentation of the reasons for not accepting a person with disabilities who applied for a position, and was rejected.

The Follow-Up Committee's decisions apply only to employers to whom the Collective Agreement is applicable; however, it is inevitable that the Follow-Up Committee's decisions will constitute a source for interpretation of the extension order, to determine the norm as to the actions that should be taken by employers to achieve fair representation for persons with disabilities in the workplace.

- ✓ We recommend examining whether your Company meets the provisions of the extension order regarding the fair representation of persons with disabilities in the workplace, including the number of disabled employees in relation to the entire workforce; we further recommend considering taking the actions mentioned in the Follow-Up Committee's decision, regarding the advancement of achieving such fair representation, as detailed above, and specifically adopting an annual plan for the advancement of employment of people with disabilities.

- ✓ We recommend considering adopting a general plan for the advancement of equality in the workplace (a diversity program).

9. November: The internal committee at Amdocs is not an employee organization, since it did not have a goal of establishing collective relations

In 2015, the Labour Courts were required to examine the establishment of "Internal Committees" of company employees, asking to be recognized as a representative employee organization, as part of a movement to organize the employees in the workplace.

In the matter of **Menorah**[9], an internal committee of the company's employees was established, simultaneously to the Histadrut's organization attempts. The company's management recognized the Internal Committee as the representative employee organization. The Histadrut turned to the Regional Labour Court in Tel Aviv demanding, *inter alia*, that the court determine that the Internal Committee cannot be considered a representative employee organization, since it is operating on behalf of the management, whose whole purpose is to thwart the employees' attempts to unionize in the framework of the Histadrut. The Internal Committee asked that the Labour Court recognize it as the representative employee organization in the company.

The Regional Labour Court rejected the Histadrut's claim, whereby management was behind the establishment of the Internal Committee, as part of an effort to thwart the employee's employees' attempts to unionize in the framework of the Histadrut. On the other hand, the Regional Labour Court ruled that the Internal Committee cannot be considered the representative employee organization. The court stated that the fact that the Internal Committee was established to stop the process of unionization in the framework of the Histadrut is not in itself a reason not to recognize the Internal Committee as a representative

[9] Collective Dispute (Regional – Tel Aviv) 34304-05-15 **The New General Histadrut – Menorah Mivtahim Insurance Ltd.,** (published in Nevo on 29.9.2015).

employee organization. However, under the circumstances, the Internal Committee was opposed from the outset to signing a collective agreement, and therefore, cannot be considered an authentic representative employee organization[10].

The Histadrut appealed the Regional Labour Court's decision, and on January 31, 2016, a decision was made in its appeal, which was partially accepted.

The National Labour Court ruled that when the evidence points to the fact that the employer is "sympathetic" or lacks indifference, and thus raise a suspicion for bias treatment in favor of the Internal Committee as an alternative to the existing employee organization, this will lead to an increased burden on the Internal Committee to show that it is a "real employee organization"; and, transfer the burden of proof to the employer to prove that the Internal Committee is not an organization of behalf of the employer, being used by the employer to thwart the organization. In this context the National Labour Court did not ultimately decide whether the management of Menorah harmed the unionization, but also did not affirm the Regional Labour Court's determination that this was not the case.

As to the question whether the Internal Committee constitutes an "employee organization" according to law, the National Labour Court cancelled the Regional court's decision according to which Menorah's management did not interfere in the Histadrut's unionization attempts, thus not accepting the Regional Court's distinction between the "reason for establishment" of the organization and the "organization's purpose". The National Labour Court stated that the reason behind the organization usually points to the real purpose of such organization, and the aim for its establishment; however, it is not possible to artificially differentiate between the two. Even if there were a theoretical option that an organization that was established in a certain way would change its nature and purpose – such a change would have to be very material, and not merely technical or cosmetic.

The National Labour Court ruled that when it comes to an Internal Committee that initiated its activities as a reaction against the Histadrut, and not as a result of an authentic wish to conduct collective negotiations, any claimed change in such Internal Committee's purposes must be examined, to determine whether the change is real, and reflects an obligation to stable, consistent and clear collective activity, for the long run. Otherwise, the "employee organization" may fall apart shortly following the obtainment of its main purposes (thwarting the organization by way of an existing employee organization), at a stage when the previous organization can no longer be revived.

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[10] Collective Dispute Appeal (National) 7731-10-15 **The New General Histadrut – Menorah Mivtahim Insurance Ltd.,** (published in Nevo on 31.1.2016).

The National Labour Court essentially affirmed the Regional Court's decision, and ruled that the Internal Committee at Menorah did not meet the required burden of proof to demonstrate the change in the purpose of the organization, and therefore, it is not an "employee organization" for the purpose of the collective agreements law, according to the tests that were laid down in case law. The National Labour Court cancelled the conclusion that this was an interim decision, and ruled that, the internal committee would not, also in the future, achieve recognition of a representative employee organization.

The National Labour Court did not decide the basic general question of whether an Internal Committee can be recognized as an "employee organization".

Following this ruling, the management of Menorah recognized the Histadrut as the employee representative organization.

The Histadrut simultaneously tried to become the representative employee organization at **Amdocs**. An Internal Committee was established in this case too, and asked for recognition as a representative employee organization. The Regional Labour Court in Tel Aviv ruled[11] that the Internal Committee did not act on behalf of management to thwart the unionization attempts in the framework of the Histadrut. On the other hand, the court ruled that the Internal Committee cannot be considered a representative employee organization, since its goal was not to establish collective relations, but rather to thwart the unionization attempts in the framework of the Histadrut.

The Internal Committee's appeal of the decision was rejected by the National Labour Court[12], which ruled that the possibility of recognizing an Internal Committee as a representative employee organization should not necessarily be denied. However, in order for an Internal Committee to be recognized as a representative employee organization it must fulfill the conditions determined by case law, including having an authentic intention to undergo collective negotiations and sign a collective agreement. On February 2, 2016, the Regional Labour Court rejected the internal committee's request[13], and ruled that it could not be recognized as a representative employee organization. The Regional Labour Court ruled that the company may negotiate with the internal committee, but this will not be a collective negotiation, and the company is not required to do so. The Histadrut has appealed this decision to the National Labour Court.

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11 Collective Dispute (Regional Tel Aviv) 42367-05-15 **The New General Histadrut – Amdocs Israel Ltd.** (Published in Nevo, 16.8.2015)

12 Collective Dispute Appeal (National) 52823-08-15 **Organization of Amdocs Employees - The New General Histadrut** (Published in Nevo, 2.11.2015)

13 Collective Dispute (Tel Aviv) 28033-09-15 **Organization of Amdocs Employees, Registered association – Histadrut** (Published in Nevo)

- ✓ During this past year, the Labour Courts have continued to outline additional boundaries regarding the do's and don'ts of employee unionization. We will continue to update you regarding any developments in this dynamic field.

10. November: A ruling on the question whether flight hours are considered working hours.

In November 2015, the National Labour Court was faced with the question whether an employee's flight hours on business trips were considered hours of work, which entitle the employee to payment of his salary, and overtime hours[14]. This followed a claim that was submitted to the Regional Labour Court in Tel Aviv by an employee who was required to fly overseas for business meetings. The court ruled that the flight hours should be recognized as work hours, including for the calculation of the employee's entitlement to payment for work performed during overtime hours.

The Hours of Work and Rest Law defines hours of work as "time during which an employee is available to the workplace". As a rule, the time during which an employee travels to the workplace is not considered working time. The National Labour Court, accepted the company's appeal, and chose not to deviate from this general rule, especially given the circumstances, whereby the employee was not required to perform many overseas business trips, and the scope of his hours of flight was low in relation to the overall scope of his hours of work. However, the court noted that there may be cases in which it would be appropriate to deviate from the general rule, and recognize flight hours as hours of work.

In the matter of **Zloski**, the National Labour Court further referred to the exemption listed in Section 30(A)(6) to the Hours of Work and Rest Law, 1951, according to which the law shall not apply to "employees whose terms of work and circumstances thereof do not enable the employer to supervise their hours of work or rest". The court interpreted the exception literally, and limited its application solely to those cases in which there is no possibility to supervise the hours of work.

- ✓ This ruling is a good opportunity to examine the company's overtime policy, and its policies regarding hours of flight and "in between" hours in general (hours of sleep, on call work, etc.) and adapt them to the evolving legal requirements.

[14] Labour Appeal (National) 15233-09-13 **Advantech Technologies (alpat) Ltd., - Zloski** (Published in Nevo, 5.11.2015)

We would be happy to be of any assistance, and provide legal advice regarding any of the issues reviewed above; their implications on the workplace and the steps that we recommend are taken as a result.

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