

## Key Features of the BVI's New Labour Code

### 1. INTRODUCTION

After over a decade, the British Virgin Islands' (the "BVI") has enacted the Labour Code, 2010 (the "**New Labour Code**") which is to come into force on a date to be set by proclamation of the Governor.

When the New Labour Code comes into effect it will become a single comprehensive piece of legislation governing labour relations in the BVI. The Labour Code (Cap. 293) (the "**Old Labour Code**") has governed the employment relationship since 24 June 1975 and after 35 years it was evident that it was inadequate to deal with the realities of modern employment issues.

To summarize, the New Labour Code provides for:

- Fairness in the practices in relation to the recruitment of employees, which addresses for the first time under BVI law, sexual harassment.
- The preferential treatment of qualified and disciplined Virgin Islanders and Belongers in the recruitment process and during terminations.
- The establishment of an Arbitration Tribunal and a Board of Inquiry for the settlement of disputes.
- The establishment of a system of tripartite consultation between the Minister, employers and employees on any matter, including the conditions of employment, and the establishment of advisory committees.
- Significant changes to the basic conditions of employment.
- A revised redundancy regime.
- A requirement for retirement benefits for employees.
- The prohibition of children under the age of 16 working, except in limited circumstances, and not below the age of 14.

- Conducting a risk assessment to inform the development of an emergency plan and safety and health policy where there are more than 20 employees.
- A revised work permit regime.
- A revised inspection regime.
- The repeal of the Labour Ordinance (Cap. 292), the Labour Code Ordinance (Cap. 293) and the Trade Disputes (Arbitration and Inquiry) Act (Cap. 299).

The purpose of this bulletin is to summarise certain key features of the New Labour Code which will have to be considered immediately when it comes into force.

## 2. RECRUITMENT PRACTICES

### (a) Medical Reports

Employers should not request a medical screening of potential employees<sup>1</sup> or make an offer of employment which is subject to medical fitness<sup>2</sup> or state in the advertisement for employment that employment is subject to medical fitness.<sup>3</sup> Unlike the United Kingdom where medical reports are regulated by the Access to Medical Reports Act 1988 and the Data Protection Act 1999, there are no similar statutory safeguards under BVI law providing for protection of information obtained from medical reports, except the constitutional guarantee of a right to privacy.<sup>4</sup> This rule is not caught by the general exception where a genuine occupational qualification exists,<sup>5</sup> so it cannot be argued that a person must not have any medical illness, or medical illness of a certain type, to obtain employment. However, the only exception to this rule is in relation to the employment of a person between the ages of 16 and 18, who can only be employed subject to a medical examination and if the young person is employed, must be done every 6 months until the employee reaches 18.<sup>6</sup> Failure to ensure that a person between the ages of 16 and 18 is medically fit for the job renders the employer liable on summary conviction to a fine not exceeding \$5,000.00 or \$7,000.00 on a second or subsequent offence.

### (b) Sex or Marital Status

It is now unlawful for an employer to discriminate on the grounds of sex,<sup>7</sup> and this also includes the concept of “sexual orientation” which may restrict an employer from discriminating against a person not merely on sex but where a person has undertaken a process of reassigning their sex by changing physiological or other characteristics of sex, whether under medical supervision or otherwise, which, unlike under United Kingdom law, may be construed to extend to transvestism, i.e., the wearing of, or desire to wear, the clothes of the opposite sex without undergoing gender reassignment surgery. Therefore, a potential employee who, if would

<sup>1</sup> Section 114(2)(a) and (3) of the New Labour Code. Unless otherwise indicated, references to sections in this Guide are to sections of the New Labour Code.

<sup>2</sup> Section 115(1)(d).

<sup>3</sup> Section 115(1)(a).

<sup>4</sup> Section 19, Virgin Islands Constitution Order 2007 (UK S.I. 2007 No. 1678) (the “2007 Constitution”), which is largely based on Article 8 of the European Convention on Human Rights (the “ECHR”).

<sup>5</sup> Section 116(1).

<sup>6</sup> Section 130(1).

<sup>7</sup> Section 114(2)(a).

otherwise be considered a male but prefers to wear feminine attire or acts effeminately cannot be refused employment for that reason if they otherwise qualify. However, this is subject to two (2) genuine occupational qualifications:

- (i) if a dramatic performance or other entertainment requires a certain gender role for authenticity;<sup>8</sup> and
- (ii) if, for example, the job involves physical touching of another person, then the constitutional guarantee of the right to privacy<sup>9</sup> would encourage a person of the same sex to be hired for purposes of conducting those physical examinations.<sup>10</sup> However, even beyond the constitutional guarantee which is subject to certain exceptions, the preservation of cultural practices is expressly preserved so that an employer may refuse to hire someone based on their gender role where a cultural practice exists that requires a particular gender role.

### **(c) Equal Employment Opportunity**

The constitutional guarantee against discrimination specifically allows for the regulation of employment relations in such a manner that allow for Virgin Islanders and Belongers to be afforded preferential treatment.<sup>11</sup> It is acceptable to grant more favourable treatment to a qualified and disciplined Virgin Islander or Belonger in the recruitment process.<sup>12</sup> Therefore, where 2 or more candidates apply for a job and one of the candidates is a Virgin Islander or Belonger, once the Virgin Islander or Belonger qualifies for the job and has no disciplinary issues, preferential treatment dictates that an offer be made to the Virgin Islander or Belonger over the other candidate(s).

An employer, however, can take special measures to promote equal employment opportunities for all categories of persons on a temporary basis. Therefore, employers should look at the composition of their staff against a backdrop of the various categories of discrimination and determine that in order not to be considered having discriminatory practices it would engage in active recruitment of categories of persons who are not adequately represented in its staff,<sup>13</sup> except that the overriding objective must be to employ Virgin Islanders and Belongers. Therefore, even during a temporary promotion of other categories of persons and a Virgin Islander or Belonger applies as against other persons, they must be given preferential treatment once they are qualified and disciplined. Similar considerations should be given by partnerships such as accounting firms, law firms and medical partnerships. Unlike the UK, there is no exception for smaller partnerships, and all firms are held to the same standard regardless of size.

---

<sup>8</sup> Section 116(2)(a).

<sup>9</sup> Section 19, 2007 Constitution, which is largely based on Article 8 of the ECHR.

<sup>10</sup> Section 116(2)(c).

<sup>11</sup> Section 26(4)(b), 2007 Constitution.

<sup>12</sup> Section 117.

<sup>13</sup> Section 118.

### 3. WORK PERMITS

A person who belongs to the Virgin Islands<sup>14</sup>, or otherwise called a Belonger, can work in the BVI without a work permit.<sup>15</sup> Similarly, the holder of a certificate of residence,<sup>16</sup> a regular member of the British armed forces,<sup>17</sup> a diplomat accredited to the Virgin Islands,<sup>18</sup> or any other person or class of persons to which an Order is made by the Cabinet<sup>19</sup> which includes any Order existing under the Old Labour Code until revoked by a subsequent Order, do not require a work permit.<sup>20</sup>

BVI law separates the immigration function of allowing entry into the BVI from the employment function of managing the labour force and therefore two separate systems operate independently of each other by two different departments. Therefore, a person must first obtain a permit from the Immigration Department to engage in gainful employment<sup>21</sup> before being granted a work permit under the New Labour Code. It should be noted that spouses of persons who are exempt from obtaining a work permit or persons already on work permit do not have an automatic right to live and work in the Virgin Islands, but the constitutional guarantee of a right to marry and found a family<sup>22</sup> requires as far as possible for spouses and families not to be broken up. That constitutional right, however, is subject only to the pre-eminent obligation of preferential treatment to qualified and disciplined Virgin islanders and Belongers. Additionally, persons requiring a Visa to enter the BVI are still required to obtain the permit to engage in gainful employment in addition to obtaining a work permit before starting work.

Applications for work permits should be made in triplicate by the intended employer accompanied by a statement in the prescribed form completed by the intended employer unless the person is self-employed.<sup>23</sup> The fees for work permit applications are to be made by Order of the Minister, with the approval of Cabinet.<sup>24</sup>

A person must obtain a separate work permit for each contract of employment, but the primary employer must consent to the grant of any part-time work permit by each secondary employer provided that the total working hours per day does not exceed 12 hours.<sup>25</sup> The only exception to this rule is where a person applies for a work permit to be employed by a person who is also a non-Belonger employee, the applicant cannot obtain a work permit for any other employment contract.<sup>26</sup> Therefore, where a business is seeking to employ someone who requires a work

---

<sup>14</sup> See, section 2(2), 2007 Constitution for a definition of the phrase a person who “belongs to the Virgin Islands”; and also, See section 65(2), 2007 Constitution which shows that a “Virgin Islander” is also a person who belongs to the Virgin Islands.

<sup>15</sup> Section 170.

<sup>16</sup> Section 172(a); See, section 18, Immigration and Passport Ordinance (Cap. 130) as that section was amended by the Immigration and Passport (Amendment) Act, 2000 (No. 12 of 200).

<sup>17</sup> Section 172(b).

<sup>18</sup> Section 172(c); See, the Diplomatic Privileges (Extension) Act (Cap. 111).

<sup>19</sup> Section 172(d).

<sup>20</sup> Section 187(2)(a).

<sup>21</sup> Section 31(1), Immigration and Passport Ordinance (Cap. 130).

<sup>22</sup> Section 20, 2007 Constitution, which is largely based on Article 12 of the ECHR.

<sup>23</sup> Section 171(1), and note section 187(2)(b) provides for any direction given under the Old Labour Code to continue under the New Labour Code, so that directions given as to what should be included in an application along with the forms of the applications provided in the Schedules to the Old Labour Code may continue to be used if no forms are prescribed upon the coming into force of the New Labour Code.

<sup>24</sup> Section 177(1), but until the Minister makes any such Order the current table of fees are preserved by section 187(2)(b).

<sup>25</sup> Section 171(9).

<sup>26</sup> Section 171(5).

permit and the business is operated by a non-Belonger employee then the employee of that business must work exclusively for that business and would be prohibited from obtaining other employment. This is separate and apart from the express prohibition on an employee who is on work permit from seeking other employment while still employed by someone else.<sup>27</sup>

Although an employee can simultaneously hold two separate work permits, he cannot change jobs unless it is established, after an investigation by an inspector (which term can also include the Commissioner), that the employer's conduct has made it unreasonable for him to remain in that job, which is the same condition for constructive dismissal.<sup>28</sup> Therefore, although an employee on work permit can claim unfair dismissal if they have been constructively dismissed, they are prevented from seeking alternative employment unless an investigation took place and the Commissioner finds the state of affairs necessary for constructive dismissal was evident.

A work permit may be granted for a period not exceeding 3 years at a time,<sup>29</sup> but this is subject to the Minister, or, where this function is delegated, the Commissioner, attaching conditions to the work permit to promote the national policy under the New Labour Code, any work permit policy,<sup>30</sup> the preferential treatment of qualified and disciplined Virgin Islanders and Belongers and any man power development plan.<sup>31</sup> Therefore, the renewal of a work permit is not automatic or to be perceived as a right since it may be subject to conditions, and the Minister, or, where this function is delegated, the Commissioner, must consider whether any condition attached to a work permit was fulfilled before granting a renewal or extension of a work permit. This renewal is separate and apart from the permit to engage in gainful occupation granted by the Immigration Department, and failure to obtain the renewal of that permit would prevent the renewal or extension of the work permit.

#### 4. THE EMPLOYMENT CONTRACT

The employment contract<sup>32</sup> determines the relationship between the employer and the employee. However, whether there is an employment contract or a contract for services (i.e., with an independent contractor) depends on several factors, which include the degree of control that would be exercised over the worker.<sup>33</sup> The employment contract need not be in writing and may be oral,<sup>34</sup> but this is subject to any specific requirement of any other law, for example, the employment of a merchant seaman must be in writing,<sup>35</sup> and also an employment contract for an apprentice must at common law be in writing.<sup>36</sup>

---

<sup>27</sup> Section 171(11).

<sup>28</sup> Section 83(1).

<sup>29</sup> Section 173(5).

<sup>30</sup> See, section 178(1) which requires the Minister to cause to be prepared a comprehensive policy on international migration for employment, which must be reviewed annually, and submitted to Cabinet for approval then laid before the House of Assembly.

<sup>31</sup> Section 171(2).

<sup>32</sup> See, section 3 for definition of "employment contract".

<sup>33</sup> See, Market Investigations Ltd. v. Minister of Social Security [1968] 3 All ER 732 for a list of factors that the court may consider.

<sup>34</sup> Section 44(1).

<sup>35</sup> See, Merchant Shipping Act, 2001 (No. 13 of 2001) and the Merchant Shipping (Adoption of United Kingdom Enactments) Order, 2005 (S.I. No. 30 of 2005) which adopts section 25(1) of the United Kingdom Merchant Shipping Act 1995.

<sup>36</sup> See, Kirkby v. Taylor [1910] 1 KB 529.

Additionally, like all contracts the parties must have capacity to enter into the employment contract, and a person under the age of 16 cannot enter into an employment contract. The employer and employee working for the employer who permits the child to work commits an offence and is liable on summary conviction to a fine not exceeding \$8,000.00 or \$10,000.00 on a second or subsequent offence.<sup>37</sup>

## 5. THE WRITTEN STATEMENT

Every employer must provide each employee who is engaged for more than 4 months with a written statement within 10 days of the start of the relationship.<sup>38</sup> Certain particulars must be included in the written statement such as the identities of the employer and the employee, the term of employment, if other than indefinite,<sup>39</sup> particulars of remuneration, hours of work and rest periods, a job description, the leave and vacation entitlements, and if the employee is to be on probation, the period of probation.

This written statement can be included in the employment contract, if it is in writing, but if the employment contract is oral, then a written statement is necessary. It should be noted that the written statement in and of itself is not an employment contract, but may be evidence of the terms of that contract, especially where the employee merely signs the written statement in acknowledgement of it and not as an agreement. Therefore, an employer who applies for a temporary work permit for an employee to work for a single period not exceeding 3 months does not have to issue a written employment contract or a written statement.<sup>40</sup> However, an employer who applies for a periodic work permit for an employee to work for short periods within a one year period may have to issue a written statement if one of those short periods, or the cumulative effect of those short periods, would amount to 4 months in the year.<sup>41</sup> With respect to persons who were employed for more than 4 months at the time of the coming into force of the New Labour Code their employer, if they have not given written statements, must provide them with written statements within 20 days of the coming into force of the New Labour Code.

Although the written statement should contain the general responsibilities and related duties of the employee, the use of the qualification “general” suggests that a definitive list of duties attaching to the job is not necessary. There should be scope in the written statement for the employer to request that the employee undertake additional or other duties closely related to the job. Equally, where the name of the employer is included, there is nothing prohibiting some flexibility in requiring the employee to work for other group companies once that is expressly stated. Where new methods and techniques for doing a particular job are developed, that does not prohibit the employee from adopting to the new role created as a result of the

---

<sup>37</sup> Section 128(1), but See, section 128(2) for the exceptions which involve light work approved by the Minister for children between the ages of 14-16, artistic performances approved by the Minister and manual labour in a detention center.

<sup>38</sup> Section 45(1).

<sup>39</sup> See, section 44(2) which shows an indefinite term is one exceeding 12 months.

<sup>40</sup> See, section 171(6).

<sup>41</sup> See, section 171(7).

technological or methodological development<sup>42</sup> without making the employee redundant.<sup>43</sup>

## 6. WORKPLACE

Although there is no requirement for the workplace to be expressed in the contract of employment, every employer, or the operator of a workplace, must file a notice with the Commissioner including such information about hazardous materials and other particulars to be prescribed by Regulations.<sup>44</sup> Existing employers on the commencement of the New Labour Code have 6 months to file the notice in compliance with those Regulations. Persons who start to operate a new workplace after the commencement of the New Labour Code have 3 months from the date they start operating their new workplace to file the notice.<sup>45</sup> After filing the notice, if there has been any material change to any of the particulars in the notice, the employer or operator of the workplace must file a statement setting out the details of the change within 1 month of the change of particulars.<sup>46</sup>

From the employer's perspective, if location of the workplace is included in the employment contract then some mobility clause should be provided in the event the employee has to move to an alternative workplace. In this situation, the employment contract may contain provisions covering the obligations for relocation costs, whether to be borne by the employer or the employee, or if by the employer who has reorganized or relocated its business to improve efficiency<sup>47</sup> would have made the employee redundant, and where the employee was employed for more than 12 months would be entitled to severance payment.<sup>48</sup> Therefore, the contract of employment, if carefully drafted on the place of employment can anticipate an employer's relocation without creating a redundancy.

August 2010

---

<sup>42</sup> See, Cresswell v. Inland Revenue Board [1984] 2 All ER 713.

<sup>43</sup> Section 89(3).

<sup>44</sup> Section 136(1).

<sup>45</sup> Section 136(1).

<sup>46</sup> The New Labour Code does not say that this statement has to be in a prescribed form, but the Regulations to be made under the New Labour Code may provide a form for change of particulars.

<sup>47</sup> Section 89(3)(c).

<sup>48</sup> Section 104(1).

## **FURTHER INFORMATION**

For more information about the Labour Code, 2010 please contact:

### **British Virgin Islands**

**Richard A Peters**  
Managing Partner  
Richard.peters@harneys.com  
+1 284 494 3687

### **British Virgin Islands**

**Sheila George**  
Partner  
sheila.george@harneys.com  
+1 284 494 6461

*The foregoing discussion and analysis is for general information purposes only and not intended to be relied upon for legal advice in any specific or individual situation.*

**[www.harneys.com](http://www.harneys.com)**