The employment law lifecycle: A view from the Nordics

A comparison of the key differences and similarities in Denmark, Sweden and Finland

Bird & Bird

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Welcome

Nordic complexity

With a shared history and tradition of working together on legislative issues, the Nordic countries of Denmark, Finland and Sweden have an international reputation for the quality of their welfare systems and the strength of employer/employee relationships.

It would be a mistake, however, to classify the Nordics as a single coherent region, where business practices in one country can be translated seamlessly across borders to neighbouring jurisdictions.

Despite any superficial similarities of legal structures and policies, there are significant differences between Denmark, Finland and Sweden in a number of vital areas throughout the employment lifecycle – differences which can often cause surprises, and problems, for the uninformed.

The Nordic region is an important aspect of our international focus at Bird & Bird. We are one of the few international law firms to have a presence in the three key Nordic markets of Denmark, Finland and Sweden, led by strong, personable and highly-experienced local teams supported by an international network of over 80 employment lawyers across Europe, Middle East and Asia.

This paper outlines some of the major differences in employment law in the region. It is the culmination of three employment law seminars we held in Copenhagen, Helsinki and Stockholm, attended by leading international and Nordic businesses. We hope you find it of interest and value.

If you would like more information on our Nordic capabilities or support on a particular employment issue in the region, please do not hesitate to contact one of our team.

Ian Hunter
Co-head of Employment
Bird & Bird LLP
ian.hunter@twobirds.com

Benjamine Fiedler
Co-head of Employment
Bird & Bird LLP
benjamine.fiedler@twobirds.com

Recruitment

Getting it right from the start

The increasing time and expense invested in recruiting new staff makes it ever more important for organisations operating in the Nordic countries to understand the nuances of the different legal frameworks governing recruitment.

Discrimination

Recruitment is probably the most similar area of employment law in Denmark, Finland and Sweden. All three countries have implemented non-discriminatory legislation around recruitment that covers the whole lifecycle of employment - and even beyond. Although there are differences around the underlying definition of discrimination and in certain categories of discrimination, the overarching legal framework is based on EU legislation.

Sweden's approach is arguably the strictest, in that if the type of discrimination being alleged is not explicitly referenced in the Swedish legislation, a claim cannot be made.

Finland, in contrast, has a wider definition of discrimination. As well as standard categories such as age, gender, ethnicity or religion, a key difference is that Finnish legislation also covers discrimination due to "other personal characteristics". Although as yet there is no case law on the definition of "other personal characteristics", it potentially widens the scope of the legislation considerably.

Finland also includes trade unionism among the categories for discrimination. Employers are forbidden from asking about membership of trade unions or making decisions based on such information. In Sweden, on the other hand, employers need to know this information, if not at recruitment then certainly during employment, to comply with their obligations to consult trade unions on certain decisions.

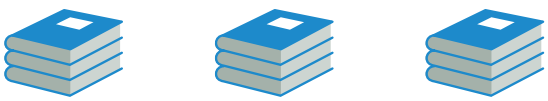
Requesting information

Although the grounds for filing a claim may be tighter in Sweden, the actual claim process is made significantly smoother for both employers and employees by a right for claimants to request information on the other candidate from the employer.

So, if a candidate believes they were discriminated against when applying for a job, they can ask the employer for information, including qualifications, on the person who was ultimately selected. This means they can see if they have strong grounds for a discrimination claim, or whether the other candidate was just more qualified, before they actually file a claim. This substantially reduces the overall number of claims filed, as the employer can show whether there were objective grounds for their decision.

"Although there are lot of similarities in employment law in the Nordics, it's inevitably the subtle differences that catch people out."

Maisa Nikkola, Partner and Head of Employment Group, Bird & Bird Finland



Finnish employers are forbidden from asking about membership of trade unions, or making decisions based on such information

In Finland, there is also a right to request information on recruits before making a claim. If the candidate believes they were the better qualified applicant, they may request a written report from the employer that details the selection criteria, education, work experience and any other aspects that influenced the choice of candidate. If, based on this information, the candidate can establish before a court that discrimination appeared to have taken place, the burden of proof falls on the employer to refute the claim.

It is a different situation in Denmark, where employers have no legal obligation to pass on information regarding the qualifications of the person getting the job before a claim is filed. The grounds for the claim will either be dealt with by the court, or by the Danish Board of Equal Treatment, depending on which claims pathway the applicant chooses.

"Sweden takes a stronger line on discrimination: if the type of discrimination alleged is not specifically referenced in legislation, then there is no claim."

Katarina Åhlberg, Managing Partner and Head of Employment Group, Bird & Bird Sweden

Positive discrimination

Sweden also takes a slightly different approach to positive discrimination, or 'positive action to create equality in the workplace' as it is known. Swedish employers have the right to choose a specific candidate based on their gender, if it is seeking to correct an existing gender imbalance in the workforce or in a specific position and the candidate has equal or almost equal merits compared to the other candidates. For example, if a firm already has nine male managers, it can positively discriminate in its selection process in order to recruit a female for the tenth position.

Denmark only permits positive discrimination in exceptional circumstances and employers need to apply for a permit to do it. In Finland, there is legislation around gender equality which largely protects the rights of women and in some circumstances positive discrimination is acceptable, but the legislation is strict. In order to address a gender imbalance in a workplace, the employer is allowed to choose the candidate whose gender is under-represented if, for example, both candidates are equally competent and it is stated in the obligatory equality plan of the workplace, or if there is another acceptable reason than gender.

Fact file

Discrimination claims in Denmark

In Denmark, if an employee believes they were discriminated against, there are two different claims pathways open to them. They can complain to the Danish Board of Equal Treatment, which then rules on the matter. If the Board rules in favour of the employee and the employer does not follow that ruling, the Board then sues the employer and bears the cost of the legal action. The other pathway is for the employee to sue the employer directly themselves, but they would then also bear the cost of the legal action themselves.

During employment

Consultation is crucial

In Sweden, Denmark and Finland, between 80% and 90% of the total workforce is employed in a business covered by a collective bargaining agreement (CBA), so it is understandably one of the biggest issues in employment law in all three countries.

Collective bargaining

Danish employers, on the whole, do not face such far-reaching obligations as their Swedish counterparts when it comes to consultation with employees. In Sweden, employers bound by a CBA have an extensive obligation to consult with the concerned trade unions before making certain decisions with respect to their business. Even if there is no agreement in place, Swedish employers are obliged to consult with the relevant trade union if they are considering redundancies, both individual and collective, or a transfer of an undertaking. Crucially, and this is perhaps the most notable difference with Denmark, the consultation has to take place before the actual decision is taken.

Danish employers face no such obligations, certainly not outside a CBA. Indeed, several Danish companies with operations in Sweden has been surprised to find itself in breach of the legislation when deciding to transfer a business without consulting the trade union first.

"Danish employers generally face a more liberal employment law regime than their counterparts in Sweden and Finland, but there are still a number of vital areas to be wary of."

Søren Narv Pedersen, Partner and Denmark Head of International HR Services Group, Bird & Bird

There are strict obligations to consult in Finland, but they are not directly related to a CBA. The obligations derive from The Co-operation Act, which contains strict regulations on the time limits and scope of the negotiations. For example, a company making redundancies is obliged to consult with employee representatives in the workplace before taking decisions on individual redundancies. Similarly, when transferring an undertaking, the employer has to provide information to employee representatives well before the transfer takes place.

The Danish situation is somewhere between the two. If the place of employment is covered by a CBA, then in most cases the employer has an obligation to undertake on-going consultation on matters of importance. But a specific obligation to consult only applies in the case of mass redundancies or transfers of undertakings, and then it applies to all workplaces, not only those covered by a CBA.

On the other hand, if the number of redundancies is fewer than ten, it is not classed as a mass redundancy in Denmark. In this situation there is no obligation to consult before or after taking the decision, at least not for employment outside a CBA.

A specific obligation to consult only applies in Denmark for mass redundancies or transfers of undertakings, and then it applies to all workplaces, not only those covered by a CBA

There is another interesting anomaly with the potential to trip up the unwary when operating in Finland: the rule of general applicability of CBAs. The rule in most Nordic countries is that a CBA applies if the employer is a member of an employers' association or has signed a CBA directly with a trade union. But in Finland, a company can still be obliged to follow the terms and conditions of a CBA if the agreement is seen as being representative of that particular industry. The employer not being a member of an employers' organisation does not prevent the applicability of a CBA, nor does the fact that the employees are not members of a trade union. The employees can be members of a totally different union and still a CBA in a specific industry can be generally binding.

For example, a multi-national chemicals company with a small number of employees in Finland would have to comply with the terms and conditions of the CBA for such an industry, because it is the norm for the sector. The fact that none of its employees are members of a trade union, or that the company is not a member of an employers' organisation, is irrelevant.

"The rule of general applicability for collective bargaining agreements is unique to Finland among the Nordic countries, and often comes as a great surprise to overseas businesses operating here."

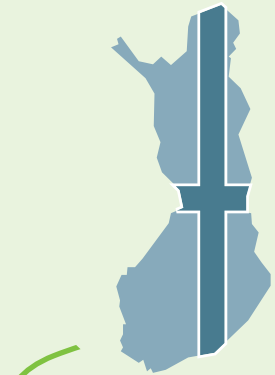
Maisa Nikkola, Partner and Head of Employment Group, Bird & Bird Finland

Fact file

The Co-operation Act obligations

Organisations operating in Finland need to comply with the strict obligations of The Co-operation Act. Breaching the provisions of the act may leave them liable for compensation of up to €34,140.

€34,140



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Terminating employment

Ensuring a happy ending

The rules around redundancy vary considerably between Sweden, Denmark and Finland. The substantial protection afforded employees in Sweden and Finland contrasts sharply with Denmark, where employers have significantly more freedom of action.

Rules around redundancy

Sweden is the only one of the three countries to operate a mandatory 'last in, first out' policy for redundancies, assuming that the longer serving employees have sufficient qualifications for the roles available.

There is no order of priority for redundancies to take place, stated in Finnish law. Some CBAs may provide an order of priority, but it is unlikely to be 'last in, first out'. It is more likely to be a provision whereby the last employees to be dismissed are those employees that are vital to the operations of the company and necessary for specialised functions. Orders of priority often also protect the most vulnerable members of the workforce, such as those who have been injured in the course of their work, for example.

Finland also has strict regulations around recruiting before and after a collective redundancy. The termination of employment can be claimed groundless if recruitment to the same or similar tasks takes place a few months before or after a collective redundancy. In that case, the employer can be ordered to pay a sum equivalent of up to two years' pay for unjustified termination of the employment contract.

In Finland, before redundancies, employers cannot recruit new staff for roles they know are being made redundant in a few months' time. Before redundancies and even during the employee's notice period (usually between two weeks and six months depending on the length of service), employers have to try and redeploy the affected staff to other roles within the business.

Sweden is the only one of the three countries to operate a mandatory 'last in, first out' policy for redundancies

Even after the redundancy has come into effect and the employment relationship is terminated, employers still have an obligation for nine months to try and re-employ their former staff in the same or similar roles, if these ex-employees are still listed as job-seekers in the employment office. So as an employer, if you implement a collective redundancy you are not allowed to recruit new workers for nine months afterwards to the same or similar positions that have been made redundant. If new positions become available and you need to expand your workforce, you must first consider if any of your redundant staff could be re-employed to fill the roles available.

The situation in Denmark is more straightforward, in that the only protection for employees against unjust termination, other than discriminatory grounds, is if they have at least one year's service, or nine months in most CBAs. If they don't have that, there is no protection against unjust termination. The employer is free to choose who to make redundant and who to retain, although under most CBAs, employees with more than 25 years' service should not be made redundant. Also, in stark contrast to Sweden, the 'last in, first out' principle is strictly illegal in Danish public sector jobs and is totally prohibited.

The decision on whether a termination was justified is judged on the specific circumstances at the time of the termination. So if an employer hired new employees knowing that by doing so he would create a situation where later redundancies were necessary, then the later terminations could be unjust due to the fact the employer created the situation that made them necessary. It would be up to the Court to decide whether the employer knew or ought to have known that this would happen.

In contrast to Finland, if circumstances change during the redundancy notice period and business improves, the employer is free to proceed with the redundancies and can in fact rehire new employees the day after the notice of termination of these employees.

Remuneration and rewards

Danish employees whose pay and rewards package includes a bonus or commission elements will find themselves in a stronger position than their Swedish or Finnish counterparts should they lose their jobs.

There have been some cases where employers have tried to avoid paying bonuses because the employee was no longer employed at the time they were due. However, Danish law states that if an employee leaves the business before the due date of a bonus, they are still entitled to that proportion of the bonus they earned while employed. Also, the employee will generally continue to earn commission during their notice period. Similarly, employers cannot take back discounted company shares if an employee subsequently leaves the company.

Finland has no hard and fast rule on bonuses and commissions. It depends largely on the specifics of the case and whether the commission or bonus is seen as a mandatory or discretionary part of the salary. In practice, it usually comes down to whatever the two parties agree between themselves.

Finnish law is equally imprecise with regards to 'gardening leave' – where an employee is freed from the obligation to perform work during their notice period. Gardening leave in Finland is not regulated by law and there is little case law to refer to. The general expectation is that work is performed as usual during the notice period. If an employer chooses to put the employee on gardening leave, it does not free them from the obligation to remunerate the employee in the normal way, including benefits.

It is a similar situation in Sweden. During gardening leave, employees are also entitled to their full salary and the other rewards they received during their employment, including pension premiums, bonus and benefits. If their salary was a combination of base salary and commission, the general rule is that they receive the average salary they earned during the preceding 12 months.

"There is considerably less protection for employees claiming unjust termination in Denmark and employers have more freedom to act in the interests of the business."

Søren Narv Pedersen, Partner, International Employment Services Group, Bird & Bird Denmark

Fact file

Compensation for unjust termination

Figures in months pay per country

"There is sometimes a perception that the Nordic countries all take a similar approach to employment law, and what works in one country will also apply to the others, but that is not the case."

Katarina Åhlberg, Managing Partner and Head of Employment Group, Bird & Bird Sweden

The good news for employers in Sweden and Denmark is that if the employee finds a new job during their notice period, the previous employer can set-off the new income the employee earns against the salary they are still obliged to pay. In Sweden, this is valid for all employees covered by the Employment Protection Act. But for employees not covered by the Act, such as managing directors for example, this right must be explicitly noted in the employment contract. In Denmark, this deduction cannot be done during the first three months of gardening leave. In practice, Danish employers often use their set-off right as a bargaining tool with departing employees – the employer waives their right to set-off income from new employment in return for the employee waiving their right to bring any sort of discrimination claim.

"There is sometimes a perception that the Nordic countries all take a similar approach to employment law, and what works in one country will also apply to the others, but that is not the case. Employers need to research the specifics of each country to make sure they do not get caught out."

Katarina Åhlberg, Managing Partner and Head of Employment Group, Bird & Bird Sweden

Danish employees whose pay and rewards package includes a bonus or commission elements will find themselves in a stronger position than their Swedish or Finnish counterparts

Fact file

Notice period income set-off

The good news for employers in Sweden and Denmark is that if an employee finds a new job during their notice period, they can set-off the new income earned against the salary they are still obliged to pay.

Our Nordic employment capability

Regional knowledge, international network

With strong offices in Sweden, Finland and Denmark, no other international law firm is able to match Bird & Bird's range of experience across the Nordic region.

We are now the only truly international law firm with a presence in Denmark, Finland and Sweden, ideally positioning us to support Nordic companies, international organisations with operations in the Nordics and those looking to invest in the region.

In the over ten years of working in the Nordic region, we have supported many of the region's most prominent and successful companies, across all major industry sectors.

Employment expertise

The expertise of the Nordic Employment Group is acknowledged by our clients and peers and we have been ranked among the leading law firms in all three countries in a number of leading international legal directories including *The Legal 500 EMEA*, *Chambers and Partners* and *PLC Which Lawyer?*.

The Nordic Employment Group also works closely together with our other practice groups, including with our Commercial and Corporate Groups on work related to domestic and international transactions and outsourcings and with our Dispute Resolution Group on contentious employment matters.

We pride ourselves on our ability to provide regional insight on domestic matters, in addition to top level cross-border and international HR strategy advice. We collaborate seamlessly between our offices to offer clients a comprehensive range of employment law advice including:

- Board and senior level appointments
- Collective consultation
- Employment disputes
- Equality and diversity
- Outsourcing
- Policies, practice and in-house documentation and scoping
- Restrictive covenant and protecting business interests
- Restructuring

Getting in contact

Sweden

Katarina Åhlberg
Sweden Head of International HR Services Group and Stockholm Managing Partner, Bird & Bird
Tel: +46 (0)8 506 320 87
katarina.ahlberg@twobirds.com

Finland

Maisa Nikkola
Partner and Finland Head of International HR Services Group, Bird & Bird
Tel: +358 9 622 66730
maisa.nikkola@twobirds.com

Denmark

Soren Pedersen
Partner and Denmark Head of International HR Services Group, Bird & Bird
Tel: +453 9 141 612
soren.pedersen@twobirds.com

twobirds.com

Abu Dhabi & Beijing & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Düsseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & Shanghai & Singapore & Skanderborg & Stockholm & Warsaw