

Employment issues on a transfer of business    *A regional perspective*

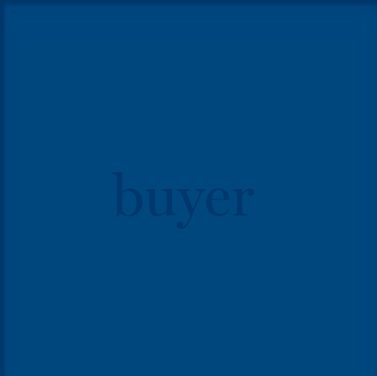
Mayer Brown JSM



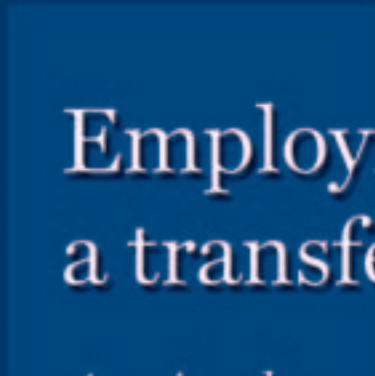
condition



employee



buyer



# Employment issues on a transfer of business

*A regional perspective*



information



benefits



liability

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*In this Report, each of the participating law firms has outlined some of the main legal issues relating to business transfers. This Report provides general advice only and should not be treated as a substitute for legal advice. While care has been taken by each participating law firm to ensure that details relating to their respective jurisdiction are correct, no responsibility can be taken by any of the participating law firms for losses arising from reliance upon the contents of this Report. Should you have any specific questions please contact the lawyer(s) in the relevant jurisdiction whose contact details appear at the end of this Report.*



## INTRODUCTION

An issue that arises in almost every transfer of business transaction is: how do we transfer the employees? With increasing globalisation the need to deal with employment issues on a transfer of business involving multiple jurisdictions is something that is sure to keep many HR and business managers awake at night.

For this reason, and on the back of the success of our *Pandemics and the Workplace: a regional analysis* publication, we have prepared this report hopefully to answer some of the more frequently asked questions that may arise on transferring employees with a business.

This report has been created by leading law firms in the region most of whom are members of the Employment Law Alliance.<sup>1</sup> Lawyers in each of the participating jurisdiction were asked to respond to the following questions:

1. Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?
2. Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.
3. What are the seller’s legal obligations on “transferring” its employees?
4. What documentation is required to effect the transfer of employees from the seller to buyer?
5. Are there any particular types of employees whose employment may not be transferred by the seller?
6. What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?
7. Does the seller’s employee have a right not to be transferred to the buyer?
8. What are the consequences if the seller gets it wrong?
9. What information should a buyer ask for from the seller in relation to the seller’s employees?
10. Does the buyer have to recognise continuity of service of the seller’s employees? If so for what purpose?
11. Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?

<sup>1</sup> The Employment Law Alliance (“ELA”) is an organisation comprising 2,000 of the leading employment and labour lawyers from more than 15 nations. Present in every US state and in over 300 cities worldwide the ELA can provide a quick response to any query a client may have on labour matters on a global basis.

The responses are set out by reference to jurisdiction. Where relevant, each jurisdiction also contains an appendix which sets out generally the statutory requirement regarding termination of employment. Appendix A at the end of the report contains a proforma buyer's checklist of questions to ask in relation to employees which may be used.

We do hope that you find this report useful. Should you wish to contact lawyers in any of the jurisdictions, their contact details are set out at the end of each section and also at the end of the report.

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# Australia



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale situation involves the termination of the employee’s employment by the seller and the commencement of fresh employment with the buyer. In contrast, in a share sale situation, the employer will not change.

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. Other than provisions requiring a buyer to recognise continuity of service (discussed in **Question 10** below), and transmission of certain industrial instruments, there is no statutory protection to an employee simply because he has been “transferred” from the seller to the buyer. Industrial instruments are awards or statutory agreements made by or registered with industrial tribunals or authorities (discussed in **Question 11** below). These instruments determine various employment conditions.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

The seller will need to terminate the contracts of employment of its employees (typically prior to or on completion of the asset transfer). This will involve the seller giving the required notice of termination or payment of wages in lieu to its employees and paying to them all their contractual and statutory entitlements. See **Appendix 1** for further details of the statutory obligations on termination of employment.

There is no statutory obligation on the seller to consult with its employees prior to terminating that employee’s employment. There is also no statutory obligation on an employer to consult with potentially affected employees who are being considered for termination or redundancy.

However, it is relatively common for industrial instruments to contain an obligation on an employer to notify and consult with relevant unions where a decision has been made that will lead to the redundancy of employees.



In the absence of an obligation under an industrial instrument, there is no statutory obligation to notify or consult with unions. However, where an employer decides to dismiss 15 or more employees for economic, technological, structural or similar reasons, and the employer does not notify and consult with the relevant unions, those unions have a right to apply for an order that places them in the same position had the employer actually notified and consulted with them. This provision does not apply if the employer could not reasonably be expected to have known that one or more of the employees were members of the trade union.

Where an employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, the employer must, as soon as practicable after so deciding (and before terminating any employee's employment because of the decision) give to the governmental body "Centrelink", a written notice (in a prescribed form) that sets out:

- the reasons for the terminations;
- the number and categories of employees likely to be affected; and
- the time when, or the period over which, the employer intends to carry out the terminations.

It should be noted that, if the intention is for employees to resign, this notice would not be required to be given.

In addition, the seller must consider its contractual obligations to see whether an obligation exists under the contract of employment, industrial instruments or any policy (such as redundancy or termination policy) that may be binding on the seller.

If there is insufficient time for the seller to give full notice of termination prior to completion, the options available to the seller to "transfer" the employees to the buyer on completion include the following:

- make it a condition of the offer of employment that the buyer makes to a "transferring" employee that the employee must resign from the employment of the seller (after the buyer and seller first having agreed that the seller will waive any notice the employee is required to give so as to enable the employee to commence employment with the buyer by the required date);
- make a part or full payment of wages in lieu of notice to shorten the notice period (obviously this is an expensive option); or
- enter into a secondment arrangement whereby the "transferring" employee will be seconded to work for the buyer for the period of the notice. Whether the seller can second an employee will depend on whether the particular contract of employment provides for it or the seller and employee can reach a specific agreement about this.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

Depending on the requirements of the contract of employment an employer may need to give written notice of termination to the transferring employees. Certainly, it is the usual (and best practice) to do so. The buyer should then make an offer of employment to the transferring employees. However, if the seller and buyer agree, they can issue a joint communication to smooth (as well as “sell”) the “transfer” from an employee relations perspective (rather than have a notice of termination from the seller and separately an offer of employment from the buyer).

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

No. However, the seller may be exposed to greater risk of claims against it from employees who are on sick leave, parental leave, workers compensation benefits, or other forms of leave at the time of the proposed transfer. Greater care needs to be taken and additional steps considered in these circumstances.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

**Annual leave**

Generally speaking, on termination of employment an employer must pay an employee all accrued annual leave entitlements.

Despite this (and although there is no requirement to do so) if a business is being sold and the buyer is going to take on existing employees, it is relatively common to enter arrangements whereby:

- the buyer agrees to be responsible for the annual leave entitlements of transferring employees;
- the seller, accordingly, does not pay out the annual leave entitlements for transferring employees;
- the employees agree that the seller will not pay out the leave and that their new employer (the buyer) will become responsible for the entitlement; and
- an adjustment is made for this liability in the purchase price.

With respect to annual leave accrued prior to 27 March 2006, the failure to pay out the annual leave may be unlawful in some circumstances. Whilst it is common practice to enter into transactions which simply “transfer” accrued annual leave with the transferring employee, the ability to do so lawfully will depend upon the industrial instrument that applies to the employee. These should be checked. Where there is doubt about the ability lawfully to transfer annual leave entitlements, it is important that, as a minimum, the seller obtains the employee’s consent to transfer (and not pay out) the leave and that the sale agreement contain provisions that (in the event the entitlement is claimed from the seller) either indemnify the seller or oblige the buyer to pay the “transferred entitlement” to the employee (on behalf of the seller). Industrial instruments will often require the buyer to recognise prior service and annual leave entitlements.



Annual leave accrued under the Australian Fair Pay and Conditions Standard may be transferred from the seller to the buyer if the buyer agrees in writing to assume liability for and to recognise continuity of service in relation to transferring employee's annual leave entitlement.

### **Long service leave**

Long service leave is regulated by state law and the rules with respect to it vary from state to state. Where an employee transfers from seller to buyer, their service with the seller may be regarded as continuous and will therefore accrue with the seller.

Again, it is relatively common to enter arrangements whereby:

- the buyer agrees to be responsible for the long service leave entitlements of transferring employees;
- the seller, accordingly, does not pay out long service leave entitlements for transferring employees;
- the employees agree that the seller will not pay out the leave and that their new employer (the buyer) will become responsible for the entitlement; and
- an adjustment is made for this liability in the purchase price.

Although such arrangements are to the advantage of employees (as the employee retains the benefit of the ability to take paid leave rather than just payment in lieu of leave), they may constitute a technical breach of the legislation of some states or territories. Again, it is important to refer to the rules regulating long service leave in the State or Territory in which the seller operates and where there is doubt, it is important that the seller obtains the employee's consent to transfer (and not pay out) the leave and that the sale agreement contain provisions that (in the event the money is claimed from the seller) either indemnify the seller or oblige the buyer to pay the "transferred entitlement" to the employee (on behalf of the seller).

### **7 Does the seller's employee have a right not to be transferred to the buyer?**

An employee of the seller is free to reject the buyer's offer of employment. If they refuse they will be entitled to the usual entitlements on termination of employment (see **Appendix 1**).

Usually an employee who refuses an offer of employment on terms and conditions no less favourable which is made by a buyer will not be entitled to redundancy payments. However, some industrial instruments will provide for redundancy payments to be made by the seller whether or not the employee transfers employment to the buyer or rejects an offer of employment. It is important therefore to understand how the obligations under an industrial instrument operate.

**8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong an employee may make a claim for unfair dismissal, breach of contract or prosecute for breach of Statute. This is explained in **Appendix 1**. The remedies for an unfair dismissal or other form of claim may not be significant if the employer has paid all statutory and contractual entitlements on termination of employment and has not terminated the employee for an unlawful reason.

Frequently asked questions by buyer

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

This may be required for the purpose of annual and long service leaves, as described at **Question 6**.

In addition, the buyer will be obliged to recognise the prior service of the employee with the seller for the purposes of parental leave and personal leave.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

If an industrial instrument applies to one or more of seller's employees and those employees commence employment with the buyer within two months of the time of the transfer of the business, then the buyer will be bound by the relevant industrial instrument with respect to those transferring employees. The industrial instrument will continue to bind the buyer with respect to the transferring employees until:

- a period of 12 months since the transmission of business has passed; or
- a formal workplace agreement is made that applies to the transferring employees.

With respect to any employee covered by an industrial instrument, the buyer must, within 28 days after a transferring employee starts employment with the buyer, take reasonable steps to give the transferring employee a written notice that sets out the industrial instrument that has transmitted to the buyer and certain other prescribed information. Once the notice has been given, the buyer must lodge a copy of the notice with a statutory body called the "Office of the Employment Advocate". The seller must transfer to the buyer all payroll related records concerning the transferring employees that the seller was required to keep under Australian law. This must occur at the time of the sale.

# Appendix 1 – Australia

## Statutory requirements regarding termination of employment

### 1 Jurisdictional issues

The statutory regime governing termination of employment may be state or federal law, depending on the circumstances of the employer and the employee. The obligations and rights of each party will differ if the employee is subject to state law or federal law.

An employer and employee will be governed by the federal law (*Workplace Relations Act 1996* (Cth)) if the employer is a corporation which engages in substantial trading or financial activities, or the employment relationship occurs in the state of Victoria or in a territory.

The jurisdictions are mutually exclusive; that is, if an employee is subject to the federal law, they have no rights under the relevant state law.

The rights of employees vary significantly from federal law to state law, and from state to state. Further, the majority of substantial businesses are governed by the federal law. Accordingly, this Appendix does not discuss state law and only deals with federal law. This Appendix does not cover other contractual entitlements or entitlements that may arise under specific awards or statutory agreements made pursuant to legislation.

### 2 Minimum notice requirements

#### 2.1 Probation

The services of an employee on probation may be terminated by the employer or employee during the probationary period with only the amount of notice specified in the contract of employment. This may be immediate, or one day or one week, depending on the contract.

#### 2.2 Notice of termination in other circumstances

In circumstances other than dismissal for serious misconduct, an employee is entitled to the following minimum notice:

Employee's period of continuous service with the employer	Period of notice
Not more than one year	At least one week
More than one year but not more than three years	At least two weeks
More than three years but not more than five years	At least three weeks
More than five years	At least four weeks

If the employee is over 45 years old and has completed at least two years' continuous service with the employer, the period of notice described above is increased by one week.

It is permissible to pay the employee in lieu of the statutory period of notice prescribed above provided the payment is equivalent to the amounts that would ordinarily have been payable to the employee had the employee worked during the notice period (including any allowances, penalties and loading) and any other amounts payable under the contract of employment.

The requirements to give notice and the ability to make payments in lieu of notice may be affected by the contract of employment and these obligations should be reviewed.

### **3 Employees' entitlements on termination**

Employees are entitled to be paid for wages or salary for all work performed up to the date of termination, and all accrued but unused annual leave.

Depending on the length of service of the employee and the state in which they are employed, they may be entitled to accrued but unused long service leave.

Industrial instruments will sometimes create rights to redundancy payments.

### **4 Remedies for unfair dismissal or unlawful termination**

#### **4.1 Unfair dismissal**

If an employee has been dismissed, they may, in certain circumstances, file a claim in the Australian Industrial Relations Commission (AIRC) of unfair dismissal. The AIRC will assess whether there is jurisdiction for such a claim to proceed. If there is jurisdiction, the AIRC will assess whether the employee was treated fairly in all respects. The AIRC will not focus on contractual and / or statutory entitlements, but rather will consider whether the employee was treated fairly according to community standards. This may mean that an employee was paid all their strict contractual and / or statutory entitlements, but is considered to have been treated unfairly by the AIRC.

In the event the AIRC finds the dismissal was unfair, the AIRC may:

- reinstate the employee to their previous employment with back-payment of all lost employment entitlements and salary / wages;
- order that the employee be re-employed in an similar or alternative role within the business; or
- order compensation of up to six months' remuneration.

#### 4.2 Exclusions from unfair dismissal

There are various exclusions and limitations in relation to which employees may pursue claims of unfair dismissal. These include the following:

- where a business employs 100 or less employees;
- where the employee is not under an award or workplace agreement and receives remuneration over the prescribed amount (which is subject to adjustment and is currently A\$101,300, though subject to review in July 2008);
- where the employee is dismissed for reasons that include operational reasons. This will typically arise where an employee is made redundant due to business restructuring, or purchases or disposals of business or assets; and
- where an employee is still working the qualifying period (which is the first six months of employment).

Dismissal does not occur where an employee resigns, or where they are engaged under a true fixed term or maximum term contract of employment and that contract simply comes to an end of its own terms.

#### 4.3 Unlawful termination

If an employee is dismissed for reasons that include unlawful discriminatory reasons, the employee may pursue a claim of unlawful termination before a court. This is an alternative to unfair dismissal. Unlawful discriminatory reasons include matters such as sex, religion, politics, race, union membership, political conviction, temporary absence due to illness or injury and similar matters. The court has the capacity to order the same remedies as the AIRC does in relation to unfair dismissal applications.

#### 4.4 Insufficient notice

If an employee has not been provided with sufficient notice (as described in **Section 2.2** above), they may prosecute the employer in a court claiming breach of the statutory provisions. In practice, they may also seek to combine this claim with other claims alleging breach of contract.



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## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale situation involves the termination of the employee’s employment by the seller and the commencement of fresh employment with the buyer. In contrast, in a share sale situation the employer will not change.

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. Hong Kong does not have legislation providing for the automatic transfer of the contract of employment of employees from the seller to buyer. Other than provisions requiring a buyer to recognise continuity of service (discussed in **Question 10** below) there is also no statutory protection to an employee simply because he has been “transferred” from the seller to the buyer.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

The seller will need to terminate the contracts of employment of its employees (typically prior to or on completion of the asset transfer). This will involve the seller giving the required notice of termination or payment of wages in lieu to its employees and paying to them all their contractual and statutory entitlements. Please see **Appendix 1** for further details of the statutory obligations on termination of employment.

There is no statutory obligation on the seller to consult with its employee prior to terminating that employee’s employment. There is also no obligation on an employee to consult potentially affected employees who are being considered for termination or redundancy.

However, the seller must consider its contractual obligations to see whether an obligation exists under the contract of employment or any policy (such as redundancy or termination policy) that may be binding on the seller.

If there is insufficient time for the seller to give full notice of termination prior to completion the options available to the seller to “transfer” the employees to the buyer on completion include the following:



- make it a condition of the offer of employment that the buyer makes to a “transferring” employee that:
  - the employee will waive the notice that the seller is required to give to terminate the employee’s contract of employment with the seller; or
  - the employee must resign from the employment of the seller (after the buyer and seller first having agreed that the seller will waive any notice the employee is required to give so as to enable the employee to commence employment with the buyer by the required date);
- make a part or full payment of wages in lieu of notice to shorten the notice period. Obviously this is an expensive option; or
- enter into a secondment arrangement whereby the “transferring” employee will be seconded to work for the buyer for the period of the notice. Whether the seller can second an employee will depend on whether the particular contract of employment provides for it.

#### **4 What documentation is required to effect the transfer of employees from the seller to buyer?**

Depending on the requirements of the contract of employment an employer may need to give written notice of termination to the transferring employees. Certainly, it is the usual (and best practice) to do so. The buyer should then make an offer of employment to the transferring employees. However, if the seller and buyer agree, they can issue a joint communication to smooth (as well as “sell”) the “transfer” from an employee relations perspective (rather than have a notice of termination from the seller and separately an offer of employment from the buyer).

#### **5 Are there any particular types of employees whose employment may not be transferred by the seller?**

The Hong Kong Employment Ordinance (“EO”) prohibits the termination of employment of an employee who is on maternity leave or who is receiving statutory sickness allowance. In addition, the Employees’ Compensation Ordinance (“ECO”) provides that an employer may not terminate the employment of an employee who is receiving compensation under the ECO until a particular certificate is issued. In respect of these employees, if their employment is to be “transferred” it is important either the transfer only takes place after their return from maternity leave, sick leave or the employee receives the relevant certificate. Alternatively, it is a condition of the offer of employment with the buyer that they resign from the seller.

## 6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?

The seller will need to pay to the transferring employee on termination of employment all accrued untaken annual leave accrued up to the termination date. This obligation cannot be waived by the employee. Therefore accrued untaken annual leave cannot be carried over and recognised by the buyer. Even if the employee agrees for the annual leave to be carried over, strictly speaking, there is a risk that the employee can claim his accrued untaken annual leave from the seller.

A liability that may arise on termination of employment is the obligation for the seller to pay statutory severance pay (assuming that the seller does not have a contractual severance pay (or similar) policy which provides for more generous entitlements than the severance pay entitlement under the EO). See paragraph 3(c) of **Appendix 1** for more details.

However, there are two relevant exemptions to the statutory severance pay provisions, namely:

- **Change of ownership exemption:** Section 31J of the EO provides that where there has been a change in ownership of a business, and “in connection with that change” a person’s employment is terminated and he is offered re-employment by the new owner of the business, the employee is not considered to have been dismissed and, therefore, **no severance pay is payable**; and
- **Associated companies exemption:** Insofar as there has been no change of ownership of business between two associated companies, section 31K of the EO provides that the re-engagement of employees by an associated company is to be treated as re-engagement by the employer so that the employee is not considered to have been dismissed and, therefore, **no severance pay is payable**.

In addition, the re-engagement of employees by the buyer must meet certain requirements of the EO in order to ensure that the employees’ entitlement to severance pay is not triggered. In essence, the buyer must:

- make an offer to the employees, at least 7 days prior to the date upon which the employees’ contracts of employment with the seller will terminate, which employment is to commence immediately upon the termination of their contracts with the seller; and
- the offer of employment must be “no less favourable” to the employees.

Any employee who “unreasonably” refuses to accept an offer from the buyer in compliance with these provisions will not be able to claim a severance payment (although if the employee has 5 years’ continuous employment, he or she may still be able to claim a long service payment).

Even if the above exemptions does not apply, the liability to pay statutory severance pay or long service pay may not be, relatively speaking, that substantial. This is because where an employee is entitled, pursuant to a contract of employment, to a gratuity based upon length of service or to a payment under a retirement scheme, the amount of such gratuity or payment may be deducted from the severance payment to which the employee would otherwise be entitled. In the case of a retirement scheme payment, only the employer's contributions may be deducted and not the employee's own contributions or any interest payable thereon.

**7 Does the seller's employee have a right not to be transferred to the buyer?**

An employee of the seller is free to reject the buyer's offer of re-employment. If they refuse where the offer fulfils the requirements set out in the answer to **Question 6** above then he will not be entitled to statutory severance pay. He will, however, be entitled to the other usual entitlements on termination of employment (see **Appendix 1**).

**8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong an employee may make a claim for unreasonable dismissal. This is explained in **Appendix 1**. However, the remedies for an unreasonable dismissal claim will not be significant if the employer has paid all statutory and contractual entitlements on termination of employment and has not terminated the employee for an unlawful reason.

The EO requires that any sum due to the employee on termination of employment must be paid as soon as is practicable and in any case not later than 7 days after the day of termination. An employer who willfully and without reasonable excuse fails to pay on time commits an offence and is liable to a fine of HK\$200,000 and to imprisonment for 1 year.

**Frequently asked questions by buyer**

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

Maybe. Paragraph 5 of the First Schedule to the EO provides that “if a trade, business or undertaking is transferred from one person to another, the period of employment of an employee in the trade, business or undertaking at the time of the transfer shall count as a period of employment with the transferee, and the transfer shall not break the continuity of the period of employment”. Whether the buyer will need to recognise continuity of service will turn on whether there has been a transfer of a “trade, business or undertaking”. Therefore, where a business is being transferred and employees are being “transferred” with that business to the buyer, the buyer will need to recognise continuity of employment of the employee while he was employed by the seller. What this means is that in calculating service related entitlements (e.g. statutory severance or long service pay and statutory annual leave) the buyer will need to take into account the period of service during which the employee was employed by the seller.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Because an employer may use contributions to a retirement scheme to off-set its liability to make statutory severance or long service pay, the buyer should consider whether it is possible to “transfer” or participate in the seller's retirement scheme. Whether it is possible to do so will depend on the particular type of scheme and the terms of the scheme.

## Appendix 1 — Hong Kong

### Statutory requirements regarding termination of employment

#### 1 Termination of contract by notice

The services of an employee on **probation** may be terminated by the employer or the employee without notice during the first month and by not less than seven days' notice thereafter.

In all other cases, the employee is entitled to:

- not less than one month's notice of termination where the contract is deemed to be for one month renewable from month to month under the Employment Ordinance ("EO") (i.e. where the employee has worked for 18 hours or more each week for a period of four weeks) and does not otherwise provide for the length of notice required to terminate the contract; or
- seven days or the agreed period, whichever is the longer, where the contract is for one month renewable from month to month and the length of notice of termination is provided for in the contract; or
- in every other case (e.g. a fixed term contract), the agreed period, but not less than seven days in the case of a continuous contract.

The length of notice for the termination of employment contract mentioned above does not include annual leave and maternity leave.

#### 2 Termination by payment in lieu of notice

Alternatively, an employment contract can be terminated without notice by either party agreeing to pay to the other a sum calculated by multiplying the number of days or months (as required by the contract of employment) in the period for which wages would normally be payable to the employee by the daily or monthly average (as the case may be) of the wages earned by the employee during the 12 months immediately before the date on which notice is given (or if the employee has been employed for less than 12 months such shorter period).

Wages are defined broadly in the EO to include (with certain exceptions) all remuneration, earnings and allowances, howsoever designated or calculated, capable of being expressed in terms of money and payable to an employee in respect of work done under his contract of employment.

### 3 Employees' entitlements on termination

#### (a) Accrued wages and unused annual leave

All outstanding wages and payments in respect of accrued but unused annual leave (only statutory leave, unless contract specifies otherwise) up to the time of termination are payable.

#### (b) End of year payments

Where the employees are contractually entitled to an annual bonus, they will be entitled to a proportional payment thereof in respect of the year in which they are dismissed, **unless** the bonus is payable solely at the discretion of the company or they have not been employed for a continuous period of 3 months or more in the payment period.

#### (c) Severance payments

An employee who has been employed under a continuous contract for **not less than 24 months** is entitled to severance payment if dismissed by reason of redundancy or if the employee is laid off (that is, where the remuneration of an employee depends on his / her being provided with a particular kind of work and he / she is no longer provided with a sufficient amount of such work).

"Dismissal" includes:

- termination by an employer with or without notice or payment in lieu other than by summary dismissal;
- the expiry of a fixed term contract which is not renewed with comparable terms; and
- constructive dismissal where an employee is entitled to terminate his / her contract without notice by reason of the employer's conduct.

Redundancy occurs where the employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed by him / her or in the place where the employee was so employed or where the requirements of that business for employees to carry out a particular kind of work or to carry out such work in the place where the employee was so employed have ceased or diminished or are expected to cease or diminish.

The amount of severance payment for a monthly-rated employee is, for each year (and pro rata as respects an incomplete year) in which the employee has been continuously employed, two-thirds of his / her last full month's wages, or two-thirds of HK\$22,500, whichever is less and, in any other case, 18 days' wages based on any 18 days chosen by the employee and occurring during his / her last 30 normal working days, or two-thirds of HK\$22,500, whichever is less. This entitlement is subject to a maximum payment of HK\$390,000.



*Set-off against gratuity and retirement scheme payments:* Where the employee is entitled, pursuant to a contract of employment, to a gratuity based upon length of service or to a payment under a retirement scheme, the amount of such gratuity or payment may be deducted from the severance payment to which the employee would otherwise be entitled. In the case of a retirement scheme payment, only the employer's contributions may be deducted and not the employee's own contributions or any interest payable thereon.

#### (d) Long service payments

An employee with at least **5 years of service** (other than an employee who retires) will be entitled to a long service payment if he / she is dismissed and his employer is not liable to pay him / her a severance payment. "Dismissal" has the same meaning as that under the provisions relating to severance payments described above.

The amount of the long service payment is calculated according to the same formulae used to calculate severance payments. The calculation is also subject to the same restrictions on maximum payments.

As with severance pay, long service payments may be reduced by the total amount of any contractual gratuities based on length of service and the employer contribution element of any retirement scheme benefits paid to the employee in respect of any or all of the years of service for which severance pay is due.

#### 4 Employment protection under Part VIA of the EO

- Requirement for valid reason

The EO enables any employee who has been under a continuous contract for a period of **not less than 24 months** and who is **dismissed** or whose contract is **varied without his or her consent** to make a claim of "unreasonable dismissal" to the Labour Tribunal. Once such a claim is made, the employer is required to produce a valid reason for the dismissal or variation. Valid reasons include:

- the conduct of the employee;
- the capability or qualifications of the employee for performing the work of the kind which he was employed by the employer to do; and
- redundancy of the employee or other genuine operational requirements (section 32K).

- Remedies

Even if an employee files a claim with the Labour Tribunal and his or her claim is upheld, the remedies available to the employee are not significant unless the employer has terminated the employee in contravention of certain sections in the EO prohibiting the termination of employees on the grounds of pregnancy, while they are on a paid sickness day or for participation in trade union activities (for which there are greater remedies).

Assuming here that any termination of employees is not for a prohibited ground, the Labour Tribunal can only make an order for re-instatement of conditions and / or re-engagement if the parties, including the employer agree. Otherwise, the Tribunal may only make an award of terminal payments.

Terminal payments are, in effect, unpaid statutory and contractual entitlements which the employer should already have paid upon termination of the employee's contract. Although the Labour Tribunal may also award pro-rata entitlements where the employee has not attained the qualifying length of service, this is really only relevant to severance and long service pays. Severance and long service pays awarded by the Labour Tribunal can be set off by the amount of any contractual gratuity based on length of service or the employer's contribution element of any retirement scheme payment paid to the employee upon termination of employment.



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## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes, under the Indian law there is a difference in treatment of employees in a share sale as opposed to business transfer. In a share sale situation there is a change of ownership and a change of control of the company. However, from an Indian labour law perspective, this situation does not have any legal implications on the employment of an employee as the transferor employer continues to be the employer and the employees will continue on their existing terms and conditions of employment unless the seller and buyer have agreed otherwise in the share transfer agreement.

However, in case of a sale of a business, there is a change in the identity of the employer. In such case, the seller and buyer would need to comply with requirements under certain labour legislations in India. The relevant enactments which need to be complied will be dealt with below.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

There is no statute that specifically provides for the automatic transfer of employees from the seller to buyer in an asset sale situation. However, there are certain provisions that indirectly achieve this objective which are discussed below.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

Indian law essentially differentiates between workmen and non-workmen.

With regard to non-workmen, a seller’s obligation will be in the context of contractual obligations. In certain states there could be additional local law obligations which are discussed below.

In respect of employees that are workmen, a seller’s obligation could be both under the employment contract and additional obligations under the (Indian) Industrial Disputes Act, 1947 (“ID Act”).

Under the ID Act, the seller is required to ensure that the workman is transferred under terms and conditions that are not less favourable than the existing terms and conditions of service or employment. This would include seniority benefits. Further, if the seller cannot ensure that the workmen are transferred on the same or more favourable terms, there is a legal assumption that the workman has been retrenched (i.e., employment has been terminated). In such an event the seller would have to comply with the statutory requirements that apply to retrenchments which briefly are as follows:

- **in an industry engaging less than 100 workmen**

An employer employing less than 100 workmen in an industry and who retrenches a workman who has been in continuous service for not less than one year is required to comply with three principal conditions:

- serving one month's notice on the workman being retrenched indicating the reasons for retrenchment or payment of wages in lieu of such notice;
- payment of retrenchment compensation equivalent to 15 days' average pay for each year of completed service to the workman; and
- service of notice on the appropriate government.

- **in an industrial establishment or undertaking with more than 100 workmen**

Services of a workman of an industrial establishment which is either a factory, mine or plantation having a continuous service of not less than one year can be terminated by the employer provided the conditions set out below are followed:

- the employer serves three months' notice on the workman indicating the reasons for retrenchment or gives wages in lieu of such notice; and
- the employer obtains prior permission of the appropriate State government.

Where the approval of the government has been given or is deemed to have been given, the employer is required to give retrenchment compensation equivalent to 15 days' average pay for each year of completed service to the retrenched workman.

Please see **Appendix 1** for further details of the statutory obligations in case of transfer of undertakings.

#### **4 What documentation is required to effect the transfer of employees from the seller to buyer?**

In the event the employment contract sets out specific documentation required to effect the transfer of an employee, then the seller and buyer have to comply with these (e.g. if consent of trade union has to be obtained, then this would need to be complied with). It is common for asset sale agreements to provide that the employees will be deemed to be transferred when they report to work on the day of the closing / following the closing. However, from an employee relations' perspective, unless there are practical or other commercial considerations to the contrary, an employer should inform the employees of the transfer, and wherever necessary in terms of the employment contract, obtain their consent to the transfer.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

No. India does not have legislation in this regard.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

India has very strict and generally employee friendly labour laws and thus care would have to be taken to ensure that all relevant legislations have been complied with in transferring employees to the buyer. For a smooth transition it is advisable that, as far as possible, the terms and conditions of employment with the buyer are not less favourable as compared to the terms and condition of employment with the seller. Steps should be taken to minimise any disruptions and continuity of employment of the employees. Further, adequate provision must be made for the transfer of provident fund, gratuity fund, superannuation or other retirement benefits.

**7 Does the seller’s employee have a right not to be transferred to the buyer?**

This will be subject to any prohibition contained in the relevant employment contracts. If the employment contract includes a provision which provides that the employee may indicate his / her consent to the transfer of employment, then the employees may decline to be transferred.

**8 What are the consequences if the seller gets it wrong?**

If there is a breach of contract, the seller will have to compensate the employee for breach of contract.

Under the ID Act, the employer will be liable for retrenchment compensation. In addition, there may be local law implications depending upon the geographical location of the employees.

**Frequently asked questions by buyer**

**9 What information should a buyer ask for from the seller in relation to the seller’s employees?**

Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

**10 Does the buyer have to recognise continuity of service of the seller’s employees? If so for what purpose?**

Not necessarily for a non-workman, but for a workman it is necessary.

## **11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Pitfalls in an asset transfer are as follows:

- The buyer must ensure that seller has complied with all requirements under employee beneficial legislation such as payments to provident funds, state insurance, etc.
- The buyer should carefully look at the employment contracts to see whether the employees can be transferred or if there are any contractual limitations for the transfer.
- Wherever practically feasible, it is advisable to obtain the consent of the employees prior to the transfer or at least inform the employees prior to the transfer.
- If the asset sale is by a state controlled employer, e.g. a public sector company, then the buyer must review the guidelines applicable to the employees prior to the acquisition.
- A further point is that the employees employed by government owned companies are generally reluctant to transfer to privately owned companies (generally for job security reasons). Any buyer should also be wary of trade union / employee initiated litigation to stall the proposed acquisition.



## Appendix 1 – India

### Statutory requirements regarding termination of employment

The procedures to be complied with and conditions to be fulfilled before retrenchment can be effected are contained in the Industrial Disputes Act, 1947 (“ID Act”).

#### 1 Applicability of the ID Act

The ID Act is applicable to an “industry” or “industrial establishment or undertaking” which engages “workmen” for the trade or business.

- Meaning of industry

The ID Act defines “Industry” to mean

*“any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen”.*

The definition of Industry under the ID Act is very wide and embraces all sorts of commercial activity. In light of judicial decisions, the absence of profit earning motive is not considered relevant in excluding activities from the scope of the definition of ‘industry’ under the ID Act.

- Meaning of industrial establishment or undertaking

The ID Act provides the conditions for retrenchment required to be met by an industrial establishment employing more than 100 workmen. Industrial establishment for the purposes has been defined to mean:

- a factory as defined in clause (m) of section 2 of the Factories Act, 1948;
- a mine as defined in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952; or
- a plantation as defined in clause (f) of Section 2 of the Plantations Labour Act, 1951.

Hence the provision will not apply to an establishment unless it can be classified as a factory, mine or plantation even though such establishment may employ more than 100 workmen.

- Meaning of workman

For an employee in an industry to be a “workman” under the Act, he must be employed to do (i) manual work; (ii) unskilled work; (iii) skilled work; (iv) technical work; (v) operational work; (vi) clerical work; or (vii) supervisory work. However, if a person is employed in a supervisory capacity drawing wages exceeding Rs.1,600 per month (approximately US\$35), or performs managerial or administrative functions, he does not qualify to be a workman under the ID Act.

- **Meaning of retrenchment**

Retrenchment as defined by the ID Act would mean the termination of service of the employee by the employer for any reason whatsoever, except when:

- the termination has been carried out as punishment for an act of indiscipline by the workman;
- the workman voluntarily retires;
- the termination comes about as a stipulation in the contract employment or non-renewal of such a contract on its expiry;
- the workman attains the age of superannuation, and the employment contract provides for termination of the employment at the attainment of such age of superannuation; or
- the services of the workman are terminated on the ground of continued ill-health.

## **2 Conditions precedent to retrenchment of workmen**

- **In an industry engaging less than 100 workmen**

Under the provisions of the ID Act, a workman who has been in continuous service for not less than one year cannot be retrenched unless:

- the workman has been given one month's notice in writing setting out the reasons for such retrenchment and the period of notice has expired, or by giving one months wages to the workman in lieu of such notice;
- the workman has been paid compensation, which shall be equivalent to fifteen days average salary for every completed year of continuous service or any part thereof in excess of six months; and
- notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the official Gazette.

- **In an industrial establishment engaging more than 100 workmen**

A workman who has been in continuous service for not less than one year cannot be retrenched unless:

- the workman has been given three months' notice in writing setting out the reasons for such retrenchment and the period of notice has expired, or by giving three months wages to the workman in lieu of such notice;
- the workman has been paid compensation, which shall be equivalent to fifteen days average salary for every completed year of continuous service or any part thereof in excess of six months; and
- appropriate Government approval has been obtained before terminating the employment besides paying compensation as provided in the ID Act.

### 3 Compensation to workmen in case of transfer of undertaking

Section 25 FF of the ID Act contains a presumption of retrenchment in cases of transfer of workmen in the course of a transfer of business. The section entitles a workman to notice or wages in lieu of notice and compensation in case of transfer of the ownership or management of an undertaking from one employer to another and is extracted as follows:

Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25F that sets forth the conditions precedent to retrenchment of workmen, described in **Section 2** of this **Appendix 1**, as if the workman had been retrenched.

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if:

- the service of the workman has not been interrupted by such transfer;
- the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- the new employer is under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

### 4 Wages

Wages have been defined under the ID Act to mean all remuneration capable of being expressed in terms of money, which would be payable to the workman in respect of his employment. This would include:

- allowances to which the employee is entitled for the time being;
- the value of any house accommodation like HRA (HRA is an acronym for 'house rent allowance'. However, the term has not been defined in the ID Act) or medical allowance;
- any travelling concession; and
- any commission payable on promotion of sales or business.

But this does not include:

- any bonus; and
- any gratuity payable on termination or any contribution paid or payable to any pension fund or provident fund.

For the purposes of calculating the one month wages of the employee to be paid to him in lieu of notice, the employer will have to pay him all the remuneration to which he is entitled at the time of retrenchment. The employee will be entitled to a compensation equivalent to fifteen days average pay for every completed year of continuous service or any part in excess of six months.

#### **5 Concept of continuous service**

A workman is said to have been in continuous service:

- For a period, if he has been in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman.
- For one year, if he has actually worked for at least 240 days during the preceding 12 months.
- For six months, if he has actually worked for at least 120 days during the preceding 12 months.



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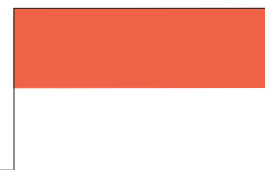
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# Indonesia



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale situation involves the termination of the employee’s employment by the seller and, upon agreement of buyer and selected employees, the commencement of fresh employment with the buyer. By contrast, the employer will not change in a share sale situation. However, in a share sale involving a change of majority control, each employee has the right to resign and receive an enhanced separation benefit. Ordinarily, a resigning employee is only entitled to compensation pay. In a share sale involving a change of control, a resigning employee is entitled to severance pay, service pay and compensation pay. Please see **Appendix 1** for further details of the statutory requirements regarding termination of employment.

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. Indonesia does not have legislation providing for the automatic transfer of employees from the seller to buyer. Rather, the terms of fresh employment with the buyer, including whether the buyer shall be treated as the successor employer, entirely depend upon the agreement between the employee and buyer.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

The seller will need to terminate the employment of its employees. This will involve the seller obtaining the required approval of the Labour Court, or obtaining the employees’ voluntary resignation, and paying all their contractual and statutory entitlements unless the employees waive those rights and expressly agree in writing to accept employment with the buyer as a successor employer. See **Appendix 1** for further details of the statutory requirements regarding termination of employment.

There is a statutory obligation on the seller to consult with its employee as to the contractual and statutory termination benefits upon the seller giving notice of termination and the termination is subject to Labour Court approval.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

The seller must obtain Labour Court approval of the termination or secure the employees' resignations. Certainly, it is the usual (and best practice) to seek the employees' resignation upon payment of contractual and statutory entitlements for termination. The buyer should then make an offer of employment to the transferring employees. However, if the seller and buyer agree, they can issue a joint communication in which the buyer would undertake to act as the successor employer for all purposes which would constitute an offer open for acceptance in writing by the employee.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

The seller and buyer have no right to impose the transfer of employment on any employee. Each employee may or may not accept such new employment after receiving his / her termination benefits or upon acceptance of the buyer as the successor employer.

**6 What steps can a seller take to reduce its obligations to an employee who "transfers" to the buyer?**

The seller will need to pay to the transferring employee on termination of employment all accrued contractual and statutory termination benefits up to the termination date. This obligation can be waived by the employee if he / she accepts the buyer as the successor employer.

However, there are no relevant exemptions to the statutory severance pay provisions. Specifically, there is no change of ownership exception regardless of whether the employee is offered re-employment by the buyer. Similarly, there is no associated companies exemption providing for the transfer of employee amongst affiliates.

**7 Does the seller's employee have a right not to be transferred to the buyer?**

Yes. An employee of the seller is free to reject the buyer's offer of re-employment for any reason. He will be entitled to all contractual and statutory entitlements on termination of employment by the seller.

**8 What are the consequences if the seller gets it wrong?**

The two viable options are to secure the buyer's and employee's agreement to treat the buyer as a successor employer, or for the seller to secure the employee's resignation upon payment of all contractual and statutory entitlements for termination. The undesirable alternative is for the seller to continue paying the employee's full salary pending approval of the termination by the Labour Court which is itself a costly and time consuming process whereupon all contractual and statutory termination entitlements must be paid in any event.



## Frequently asked questions by buyer

### **9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of information a buyer should ask for from a seller in respect of its employees.

### **10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

The buyer and employee may or may not agree that in calculating service related entitlements (e.g. statutory severance or long service pay and statutory annual leave) the buyer will need to take into account the period of service during which the employee was employed by the seller. Whether the buyer will need to recognize continuity of service will turn on whether the buyer and employee both expressly so agree in the fresh employment contract and does not depend on whether there has been a transfer of a trade, business or undertaking.

### **11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Employers routinely maintain a reserve for accrued severance, long service and related entitlements. Since the statutory minimum of such entitlements depends upon the circumstances of an employee's departure from the company, such reserves are maintained on an actuarial basis. In the asset sale context, it is quite common for the seller to secure the resignation of all employees in exchange for prompt payment of the employees' full contractual and statutory termination benefits in order to avoid the costly Labour Court approval process during which the employees would be entitled to full salary. Since the buyer has no obligation to hire the seller's employees, the buyer is in a position to offer fresh employment to the desired employees. In practice, if the buyer wishes to recognise the continuity of service of selected employees of seller, such employees would often seek a signing bonus to forego their right to immediate payment of accrued termination benefits by seller.

## Appendix 1 – Indonesia

### Statutory requirements regarding termination of employment

Termination of employment gives rise to termination entitlements which include (a) severance pay, (b) long service pay, (c) other compensation as described below, and (d) if applicable, separation pay (*uang pisah*). Article 156 of Law No. 13 of 2003 Regarding Labour (“Labour Law”) provides the following calculation of the minimum statutory termination benefits:

- Severance pay: The following table reflects “basic” severance pay. An employee is entitled to double severance pay where its employer closes its business without having proven financial losses during the past two years.

Completed years of service	Benefit
less than 1 year	1 month’s wages
1 year or more but less than 2 years	2 months’ wages
2 years or more but less than 3 years	3 months’ wages
3 years or more but less than 4 years	4 months’ wages
4 years or more but less than 5 years	5 months’ wages
5 years or more but less than 6 years	6 months’ wages
6 years or more but less than 7 years	7 months’ wages
7 years or more but less than 8 years	8 months’ wages
8 years or more	9 months’ wages

- Service pay:

Completed years of service	Benefit
3 years or more but less than 6 years	2 months’ wages
6 years or more but less than 9 years	3 months’ wages
9 years or more but less than 12 years	4 months’ wages
12 years or more but less than 15 years	5 months’ wages
15 years or more but less than 18 years	6 months’ wages
18 years or more but less than 21 years	7 months’ wages
21 years or more but less than 24 years	8 months’ wages
24 years or more	10 months’ wages

- Other compensation:

- Compensation for annual leave to which the employee is entitled but which has not been taken and which has not been forfeited;
- Any costs or expenses incurred in returning the employee and his family to the place where he was recruited;
- Compensation for housing, medical and hospitalisation (which is deemed to be 15 percent of the severance pay and / or service pay to which the employee is entitled);
- Other matters agreed in the employment agreement, company regulation or collective labour agreement.

- Separation pay (*Uang pisah*):

“Separation pay” is an undefined new concept in the Labour Law. In certain circumstances (including resignation, termination for serious cause and absence of the employee for a period of five or more consecutive workdays without notice), the Labour Law provides for a minimum mandatory entitlement (i.e., compensation only). It goes on to provide that a non-management employee may also be given “separation pay” (*uang pisah*) if so provided under the employment agreement, company regulation or collective labour agreement. In practice, the Department of Manpower and Transmigration (“DOM”) requires that some separation pay be included in the employment agreement, company regulation or collective labour agreement for resignation, termination for serious cause, and absence for five or more consecutive days. The DOM does not specify a minimum amount of such separation pay hence a nominal amount should suffice, subject to negotiations with any relevant union.



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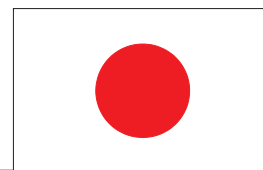
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# Japan



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. In a sale of shares, no particular legal requirements concerning employees will occur merely by the change in ownership of the same company from seller to buyer.

On the other hand, in an asset transfer, absent some arrangement, employees will remain employees of the same company and it will be necessary for the seller and buyer to arrange a scheme in order to transfer the employees. Two schemes are used in Japan for transfer of employees in an asset transfer, as follows:

#### **‘Scheme (a)’**

Termination of employment contracts by consent between seller and employees, concurrently with the conclusion of new employment contract between buyer and employees to re-employ them (This is the commonly used scheme in Japan); and

#### **‘Scheme (b)’**

Assignment of employment contracts from seller to buyer, subject to the consent of the employees, where the buyer shall stand in the shoes of seller as employer (This is rare).

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. In order to transfer employees, it is necessary for the seller and buyer to arrange one of the two schemes mentioned in **Question 1**.

However, in a case where the seller implements an “adjustment dismissal” (see **Appendix 1** for the concept of adjustment dismissal) simultaneously with the asset transfer, courts may protect the employees: (a) by finding that the seller and buyer have made an implied agreement to transfer all of the employees by considering the circumstances surrounding the asset transfer; or (b) by finding that the buyer shall succeed to the employment contracts through evaluating the substantial identity of both companies in a case where, for example, both companies have common shareholders, members of the board, and business content, etc.

**3 What are the seller's legal obligations on "transferring" its employees?**

In order to transfer seller's employees, it is necessary for the seller to get consent from the employees, in both Scheme (a) and Scheme (b). If the seller unilaterally terminates the employment contracts without obtaining the employees' consent, such termination would be "dismissals" subject to strict restrictions under the relevant labour laws and judicial precedents. See **Appendix 1** for further details of the statutory restrictions and case law regarding dismissal.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

The employee's written consent to the "transfer" suitable for the adopted scheme (discussed in **Question 1**).

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

No. Assuming that the seller, buyer and employees agree to the transfer, there are no legal provisions concerning particular types of employees who may not be transferred.

**6 What steps can a seller take to reduce its obligations to an employee who "transfers" to the buyer?**

Generally, in Scheme (a), the seller will need to pay a certain amount of retirement allowance (*Taishoku-kin*) to the transferring employee on termination of employment, but the seller and buyer can arrange for the buyer to take over the burden of retirement allowance (which will be paid when the employee leaves the buyer), subject to the employees' consent.

**7 Does the seller's employee have a right not to be transferred to the buyer?**

Yes. An employee of the seller is basically free to reject Scheme (a) or Scheme (b).

**8 What are the consequences if the seller gets it wrong?**

If the seller terminates the employee without obtaining his / her consent, the employee may make a claim for abusive dismissal and confirmation of continuing existence of the employment contract between seller and employee. Please see **Appendix 1** for the explanation about how the legality of dismissal is determined.

## Frequently asked questions by buyer

### **9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees. Under Japanese law, succession of terms and conditions of employment contracts does not automatically arise by virtue of transfer of employees in an asset transfer situation. Rather, if Scheme (a) is used, the terms and conditions will be newly agreed between the employees and buyer. Therefore, although the buyer should understand the level of treatment of employees (salary, other benefits, etc.) to hire those employees, the details of terms and conditions of the pre-existing employment contract are not required to be followed by the new employer and therefore take on less importance.

### **10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

In principle, the buyer does not have to recognise continuity of service of the seller's employees; rather it is a matter of the bargaining power of the respective parties (seller, buyer and employees).

### **11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

As discussed, in an asset transfer situation, "transfer" of employee does not arise automatically. Therefore, if the buyer desires to employ some or all of seller's employees, buyer should arrange with seller to obtain consent of the targeted employees (both in Scheme (a) and Scheme (b)). On the other hand, if the buyer does not want to hire some or all of seller's employees, the asset transfer agreement must clearly show that the asset transfer excludes transfer of employment contracts, in order to avoid unfavourable situation mentioned in answer to **Question 2**, item (a), above.

Also, there is a third method of employee transfer used in Japan, as follows:

Under Japanese law, the system of "corporate division" accomplishes basically the same purpose as transfer of assets. Corporate division is the system of succession of some or all, of rights and obligations concerning seller's business. If the seller and buyer choose transfer of employees by corporate division, the seller can transfer some or all of employees who are primarily engaged in the business ("Primarily Engaged Employees") to buyer without their consent. However, a Primarily Engaged Employee can also demand that his / her employment be transferred to the buyer even if the seller and buyer have not agreed to do so.

At the same time, the seller can also transfer some or all employees who are not primarily engaged in the transferred business (“Other Employees”) to buyer, without consent. Other Employees, however, can reject the transfer.

In addition, in the corporate division situation, the transfer of employee means succession to the terms and conditions of the employment contracts. Buyer then needs to standardise the terms and conditions of employment, if appropriate, where other employees may be hired under the buyer’s employment terms and conditions different than seller’s.



## Appendix 1 – Japan

### Statutory requirements regarding termination of employment

#### **1 General issues of termination of employment in Japan**

##### **Resignation**

An employee who is employed for an indefinite term, in principle, may resign at any time for any reason by giving at least 2 weeks advance notice (Civil Code, article 627). Whether employment is for an indefinite or fixed term, an employee may immediately resign when there is some unavoidable reason, subject to the possibility of liability for damages if such unavoidable reason can be attributed to the employee (Civil Code, article 628).

##### **Dismissal**

- Notice of dismissal

In the event that an employer wishes to dismiss an employee, in principle the employer must provide at least 30 days advance notice, or pay the employee's average salary for a period of not less than 30 days (Labour Standards Law, article 20). Notwithstanding this requirement to provide notice or pay in lieu of notice, employers are not required to provide severance pay to employees who are dismissed in addition to a retirement allowance or pension as provided in the employers' own rules of employment or collective bargaining agreement with the labour union.

- Restrictions on dismissal

Under the Labour Standards Law or other laws, employees in Japan are protected from dismissal, among other things, in the following situations or by reason of the following:

- dismissal during a period of leave for medical treatment with respect to injuries or illnesses suffered in the course of employment or within 30 days thereafter (Labour Standards Law, article 19, paragraph 1);
- dismissal during a period of leave before and after childbirth, as stipulated in article 65 of the Labour Standards Law, or within 30 days thereafter (Labour Standards Law, article 19, paragraph 1);
- dismissal by reason of the nationality, creed or social status of an employee (Labour Standards Law, article 3);

- dismissal by reason of an employee's having made a report of the fact that a violation of the Labour Standards Law, or of an ordinance issued pursuant to the same Law, exists at a workplace to the administrative office or to a labour standards inspector (Labour Standards Law, article 104);
  - dismissal by reason of a woman employee's being a woman, or her marriage, pregnancy or childbirth, or her having taken leave as stipulated in article 65 of the Labour Standards Law (Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment, article 8);
  - dismissal by reason of an employee's having applied for or taken childcare leave or nursing-care leave (Childcare and Nursing-Care Leave Law, articles 10 and 16); and
  - dismissal by reason of an employee's being a member of a labour union, having tried to join or organise a labour union, or having performed proper acts of a labour union (Labour Union Law, article 7, paragraph 1).
- **At-Will v. Just Cause**

In addition to these specific protections, an employer needs just cause in order to dismiss its employee. The courts have established a “doctrine of abusive dismissal”, which says that a dismissal will be invalid if there are no objectively rational reasons and the dismissal is not deemed to be in line with accepted social custom. As from January 1, 2004, the revision of the Labour Standards Law, which codifies the “doctrine of abusive dismissal”, went into effect (Labour Standards Law, article 18-2).

This provision may take the role of a “basket clause” to deny the validity of any dismissal violating any laws or ordinances, or an employer's own rules of employment or the collective bargaining agreement with a labour union, or contrary to good faith or public policy, in its motive, reason, process or course of facts.

Indeed, even before article 18-2 of the Labour Standards Law came into effect, the Japanese courts were pro-labour and when applying the theory of “doctrine of abusive dismissal,” they often tried to consider all facts and background advantageously to the dismissed employee. In general, dismissal by reason of the employee's lack of capability for the duties would be admitted only where such incapability is so extreme that it has not improved or been corrected after repeated education or training for a considerably long period of time.

Under the Japanese labour laws, there is no concept that corresponds directly to so-called “constructive dismissal.” However, an employee’s indication to resign caused by an employer’s action against such employee may be invalidated under the theory of duress, fraud or mistake (Civil Code articles, 95 and 96).

### **End of fixed-term employment**

In principle, employment for a fixed term will end at the end of such term, unless the employer and employee agree to renewal thereof. However, when the renewal of a fixed term employment agreement has been repeated several times and / or the employee has a reasonable expectation that the employment will be renewed by a course of conduct or oral or written representations that employment will continue after the expiration of the term, the courts will apply the “doctrine of abusive dismissal”, by which the employer needs a rational reason in order to end (i.e., not renew) the employment. Therefore, employers should take steps to train their supervisors and managers to ensure that an express or implied commitment to renew the employment not be created by an ill-chosen statement, such as those made while trying to entice applicants to accept a position.

## **2 Work force reductions / redundancies**

### **Adjustment dismissal**

Dismissals for the purpose of personnel reductions (“adjustment dismissals”) are also subject to the above-mentioned general restrictions on dismissal, including the “doctrine of abusive dismissal” codified in article 18-2 of the Labour Standards Law. The courts usually consider the following four elements in applying the doctrine of abusive dismissal to adjustment dismissals: (i) necessity of personnel reductions; (ii) whether other methods have been implemented, including a voluntary retirement programme; (iii) fair selection by reasonable criteria; and (iv) due procedures, including sincere discussion with the affected employees and the union, if any. The Japanese courts would not likely uphold adjustment dismissals unless they were implemented as the last resort in a situation where the enterprise experienced significant business difficulties. However, when employers implement lawful adjustment dismissals, the employers do not need to offer any severance pay in addition to the retirement allowance (if any) stipulated in the rules of employment and the requirement to provide 30 days notice or pay in lieu of such notice, nor do employers need to execute separation agreements with the targeted employees.

### **Voluntary retirement programme**

Since the employer is required to use best efforts to avoid adjustment dismissals under the above court theory, most employers implement a voluntary retirement programme, in advance of adjustment dismissals (in most cases, employers can achieve the desired level of personnel reduction without implementing adjustment dismissals).

In implementing the voluntary retirement programme, employers usually offer a package (including a special termination payment, payment for unused paid vacation, and outplacement services), in order to induce the targeted employees to consent to the retirement and execute the termination agreement.

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# Korea



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale situation may involve the termination of the employee’s employment by the seller and the commencement of fresh employment with the buyer. In contrast, in a share sale situation the employer will not change.

While the questions are made based on an “asset transfer” situation, since some questions here indicate “business transfer” from the labour law perspective of Korea, we provide our replies based on two situations if necessary: asset transfer and business transfer.

For labour law purposes in Korea, a business transfer may be deemed to have occurred even without the transfer of all assets, liabilities and employees, if: (i) the key assets of the business are transferred, (ii) the transferor ceases its business, (iii) the transferee is thereafter engaged in the same business in which the transferor was engaged in prior to the transfer.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

Asset transfer: No.

Business transfer: Yes, employees along with all existing working terms and conditions in the seller’s company will be automatically transferred to the buyer.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

Asset transfer: The seller needs to pay off any compensations and / or benefits the target employees are entitled to upon termination of employment.

The seller may terminate the contracts of employment of its employees with just cause or the target employees may resign voluntarily (typically prior to or on completion of the asset transfer). This will involve the seller giving the required notice of termination or payment of wages in lieu to its employees and paying to them all their contractual and statutory entitlements. Further, the seller may need to consider any obligations or duties defined under employment agreements executed with the target employees.

Business transfer: Regarding payments by the seller to the target employees for the period of their service to the seller, the buyer will be severally and jointly liable for such payments. Thus, if the seller fails to pay the required amounts, the target employees can claim from either the seller or the buyer later. For other working terms and conditions, the buyer is required to take over all relevant regulations of the seller regarding the transferred employees. For further details, please see **Appendix 1**, where we briefly explain (i) the difference between asset transfer and business transfer from the labour law perspective and (ii) provide further details about business transfer.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

Asset transfer: While there is no legal requirement to affect employee transfer as a part of an asset transfer, it is not uncommon for each target employee to give a resignation letter to the seller and to enter into a new employment agreement with the buyer.

Business transfer: For the business transfer purpose, an agreement regarding the business transfer made between the seller and the buyer would be sufficient since the buyer is required to take over all liabilities of the seller regarding the transferred employees (please see **Appendix 1**). However, as a matter of practice, it is not uncommon for companies in Korea to include measures on how to deal with any unpaid compensation to the target employees in the Business Transfer Agreement.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

Under the labour law, an employee has a right to choose his / her employer; thus the seller cannot force an employee to move from the seller to the buyer against the employee's will. In this regard, in the event of asset transfer, the seller needs to obtain consent for transfer and voluntary resignation from each target employee. However, for business transfer, the target employees will be transferred from the seller to the buyer unless the target employees express their objection against such a transfer decision.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

Asset transfer: Basically, there are no steps for a seller to reduce its obligations owed to the target employees regarding the transfer. The seller is required to pay off any unpaid compensation, including but not limited to salaries, statutory severance pay, and any benefits which the target employee is entitled, to the target employees.

Business transfer: Since all remaining liabilities and duties of the seller owed to the target employees will be automatically transferred to the buyer, basically, there are no steps for the seller to reduce its obligations. For details, please see **Sections 5 to 7 of Appendix 1**.

**7 Does the seller's employee have a right not to be transferred to the buyer?**

As explained in the answer to **Question 5** above, it is legally barred to force an employee to be transferred to another company against the employee's will. In this regard, in the event of an asset transfer, if an employee refuses to be transferred to buyer, the seller will be required to keep the employee with the seller.

**8 What are the consequences if the seller gets it wrong?**

In order to terminate the employment relationship, the seller is required to have just cause to do so. In principle, an employee's refusal to be transferred to another company itself should not be sufficient to be just cause under the Korean labour law. Therefore, if the seller terminates an employee only because of the employee's refusal to be transferred to the buyer, the employee may bring a claim against the seller for wrongful termination. If the authority finds in favour of the employee, the seller will be required to pay unpaid salaries after termination until reinstatement of the employee and to reinstate the employee to the same or similar position.

Frequently asked questions by buyer

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Asset transfer: In principle, the buyer needs little information on employees.

Business transfer: Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

Asset transfer: No, the target employees will start their employment with the buyer as new comers.

Business transfer: Yes, the buyer is required to take over all working terms and conditions related to the transferred employees, including their continuity of service for the purpose of severance pay. For details, please see **Sections 4 to 7 of Appendix 1**.



**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Asset transfer: Not specifically.

Business transfer: While the buyer is required to take over all relevant working terms and conditions including but not limited to the severance pay to the transferred employees, the buyer may change the working terms and conditions with majority consent of the target employees as a group. In other words, if the majority of the target employees agree to change their working terms and conditions, the buyer may do so. In order to obtain such majority consent from the target employees as a group, the buyer needs to hold a meeting to provide explanation about the change and give time to the employees to discuss and decide. As a matter of practice, it is always recommended to a company to keep all such proceedings in record in order to protect the company from any potential disputes raised in the future.

## Appendix 1 – Korea

### Statutory requirements regarding termination of employment

#### **1 Business transfer vs. Asset transfer**

Under Korean labour and employment laws, if a company is deemed to have selectively purchased specific assets, it is not deemed to have assumed any liabilities in connection with employee claims against the transferor except pursuant to an express agreement executed between the parties. If a company is deemed to have acquired the business of another entity, it will be bound by the terms of the existing employment agreements and other commitments to the employees of the transferor by operation of law (unless the employees voluntarily agree otherwise). In this respect, the result on terms of employment relationships of a business transfer is similar to the result of a merger.

Whether a transaction will be viewed as a business transfer depends upon the totality of the circumstances. As a general principle, the term “business transfer” means the transfer to the purchaser of all assets, liabilities and employees of the business. For labour law purposes, however, a business transfer may be deemed to have occurred even without the transfer of all assets, liabilities and employees, if (i) the key assets of the business are transferred, (ii) the transferor ceases its business, (iii) the transferee is thereafter engaged in the same business in which the transferor was engaged in prior to the transfer, and (iv) most or all employees are transferred as a result of the company’s decision to transfer such employees.

With respect to labour- and employment-related issues, the trend in the courts has been to broaden the scope of the definition of a “business transfer”, beyond that used for tax and other purposes. Even where the transfer relates only to a single department or division, such transfer may be deemed to be a “partial business transfer”. For labour law purposes, we note that a partial business transfer has virtually the same legal implications as an entire business transfer as far as the affected employees are concerned.

#### **2 Transfer of working conditions**

A business transfer binds the transferee with respect to the transferred employees to the terms of the existing employment relationship, employment contracts and other working condition commitments, as provided in the transferor’s rules of employment (“ROE”), collective bargaining agreement (“CBA”) and other labour-related policies of the transferor (e.g., the Target). Korean courts and the Ministry of Labour have held that in a business transfer, the employment relationship with the transferor is transferred without any change, unless the employee expresses an intent not to work for the transferee.

### **3 Selection of employees**

It is clear that the transferee should take over the employees who are engaged solely in the business subject to the transfer. In case where only a part of a business is transferred, an issue may arise with respect to selecting the employees to be transferred. If some employees are engaged in both the business to be transferred and the business not subject to the transfer, it is not entirely clear whether the transferee should take over such employees. In this regard, there is no regulation or precedent with respect to any standard to select which employees should be transferred among such employees involved in both transferred and non-transferred businesses. Generally speaking, we believe that a strong argument can be made that as long as the selection is based on criteria such as the number of employees to be transferred and the actual percentage of work dedicated to the transferring business, said selection would be deemed reasonable. However, in the event it is ambiguous to clarify which employees will be transferred, both parties may select such employees on a reasonable basis.

### **4 Effectiveness of the transfer of employment relationship and employees' consent**

There is a difference of opinion on the issue of whether the consent of the employees must be obtained with respect to the transfer of their employment. Hence, it would be prudent for the transferor, transferee and the employees to execute an employment transfer agreement. Neither the transferor nor the transferee may forcibly transfer the employment of the employees who object to the transfer of their employment.

### **5 Transfer of ROE and change thereof**

In principle, the ROE of the transferor is transferred without any changes thereto in a business transfer transaction. Under the Labour Standards Act ("LSA"), in order to effect changes in the ROE which would be disadvantageous to the employees, the employer should obtain the consent of the majority of the employees as a group or the consent of the labour union representing the majority of the employees, depending on the circumstances of a given case. The Supreme Court has held that in cases where changes of the ROE may result in both advantages and disadvantages to the employees, where it is difficult to determine whether the disadvantages outweigh the advantages and vice versa, the Court has ruled that the consent of the majority of the employees as a group is required for such changes. Therefore, if the acquirer intends to apply terms of the new ROE that are different from those of the Target, and the difference is both advantageous and disadvantageous to the employees, the acquirer should obtain the consent of the majority of the employees as a group for the changes.

## **6 Transfer of the CBA and the labour union**

If the entire business of the transferor is transferred and the transferor has a CBA with a labour union, the CBA and the labour union shall be transferred. Where a part of the business is being transferred, the prevailing view among Korean legal commentators is that only the provisions in the CBA pertaining to working conditions are transferred.

## **7 Severance payment**

In the case of a business transfer, the transferee will assume the liability of the transferor for severance payments of the transferred employees which have accrued during their employment with the transferor. As an alternative, the LSA provides that an interim settlement of the severance payment accrued during the term of the employment of the employees may be provided at the employee's option and with the employer's agreement; as a result, the employee's service period with the transferee would start anew for purposes of calculating the severance payment. However, the employer cannot force the employees to accept interim severance payments.

In sum, unless the employees agree to receive interim severance payment, the transferee must assume the severance liability, and the corresponding severance reserves from the transferor for the transferred employees.

## **8 Responsibility for unpaid wages**

When the transferor has not paid the wages of the employees who have been transferred, there are conflicting views on the issue of who bears the liability for the payment of such wages. With respect to the issue of such liability, however, the Supreme Court has ruled that both the transferor and the transferee are jointly and severally liable.



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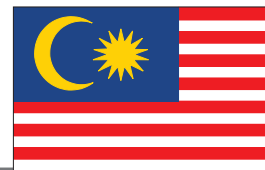
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# Malaysia



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale situation which would involve the transfer of assets, liabilities, goodwill and the business itself results in the termination of the employee’s employment by the seller and the commencement of fresh employment with the buyer. In contrast, in a share sale situation the employer will not change. In Malaysia the asset sale situation is normally termed as a change in ownership of the business or part of the business.

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. There is no automatic transfer of employment in Malaysia from the vendor to the purchaser. Other than provisions providing the buyer with the option of offering employment on terms and conditions no less favourable than what the employee is currently enjoying and to recognise continuity of service.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

The seller will need to terminate the contracts of employment of its employees (typically prior to or on completion of the asset transfer). This will involve the seller giving the required notice of termination or payment of salary in lieu to its employees and paying to them all their contractual and statutory entitlements. Please see **Appendix 1** for further details of the statutory obligations on termination of employment.

There is no statutory obligation on the seller to consult with its employee prior to terminating that employee’s employment. There is also no obligation on an employer to consult potentially affected employees who are being considered for termination or redundancy.

However, the seller must consider its contractual obligations to see whether an obligation exists under the contract of employment or any handbook (such as redundancy or termination policy) that may be binding on the seller. There may also be conditions imposed by way of a collective agreement.

If there is insufficient time for the seller to give full notice of termination prior to completion the options available to the seller to “transfer” the employees to the buyer on completion include the following:

- make it a condition of the offer of employment that the buyer makes to a “transferring” employee that:
  - the employee must resign from the employment of the seller (after the buyer and seller first having agreed that the seller will waive any notice the employee is required to give so as to enable the employee to commence employment with the buyer by the required date);
- make a part or full payment of wages in lieu of notice to shorten the notice period.

#### **4 What documentation is required to effect the transfer of employees from the seller to buyer?**

An employer will need to give written notice of termination to the transferring employees if the resignation method is not adopted. If the buyer is agreeable it would be prudent for the buyer to make the offers of employment before the change of ownership in the business takes place or in other words before the completion date. In Malaysia there are two categories of employees that would be affected in a change of ownership situation.

- Employees covered by the Employment Act 1955 (Act employees):

In the case of the Act employees, termination benefits would become payable unless the procedure prescribed in the Employment (Termination and Lay-Off Benefits) Regulations are complied with.
- The Employment Act does not cover all employees. There are several categories of employees covered by the Act as provided by the First Schedule of the Act. The 3 main categories are:
  - all employees, irrespective of their occupation, who earn less than RM1,500 per month;
  - all employees, irrespective of their wages, who are engaged in manual labour; and
  - all employees engaged in the supervision of manual labourers in and throughout the course of their employment, irrespective of their salaries.
- However where a change occurs in the ownership of a business for the purposes of which an employee is employed, the employee shall not be entitled to any termination benefits, if
  - within seven days of (after) the change of the ownership, the acquiring company (purchaser) makes offers of continued employment to the employees of the seller and the offers of continued employment are not less favourable than those that the employees were enjoying before the change; and

- the employees unreasonably refuse the offers.
- If any of the foregoing conditions are not met, the contract of service will be deemed to be terminated and termination benefits would be payable by the seller to the affected employees.
- In the event the employees accept the offers, then the period of service of the employees with the previous employer (seller) will, be deemed to be the period of service of the new employer (purchaser) with no break in the continuity.
- Employees not covered by the Act (non-Act employees):

In respect of these employees there is no statutory obligation to offer continued employment or any employment at all however as a measure of good industrial practice if the purchaser is agreeable then offers of employment should also be extended to such employees. If there is no offer of employment then the seller will have to provide the requisite contractual notice of termination and any other contractual dues.

- Notifying employees about any amendments to benefits.

In the event of a “transfer” of employees or with the offers of continued employment, the terms and conditions must not be less favourable. There may be some variance in the benefits accorded however as a whole the benefits must not result in a reduction to that enjoyed previously by the employees. Should the purchaser intend to depart from this, it is permitted however in such circumstances it is unlikely that employees of the seller would be willing to accept employment with the purchaser as there is no security in respect of the benefits they are entitled to receive.

Generally in a change of ownership in the business the principal obligations and duties vests in the seller. The seller is entrusted with the task of ensuring that the purchaser consents to employing the affected employees on terms and conditions of employment no less favourable than that they were enjoying previously. In the event the seller is unable to obtain the purchaser’s consent to this, then the vendor bears the responsibility of terminating the services of the affected employees and paying termination benefits if due.

#### **5 Are there any particular types of employees whose employment may not be transferred by the seller?**

No.



**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

If the “transfer is effected by way of a resignation then this reduces the obligations to an employee.

A liability that will however arise on termination of employment is the obligation for the seller to pay statutory severance pay assuming that the seller does not have a contractual severance pay (or similar) policy which provides for more generous entitlements than the severance pay entitlement under the Employment Act 1955, Termination and Lay-off Benefits Regulations 1980. Please see **Appendix 1** for more details.

However, where there has been a change in ownership of a business, and “in connection with that change” a person’s employment is terminated and he is offered re-employment by the new owner of the business on terms and conditions of employment no less favourable than what he was enjoying previously, and the employee unreasonably refuses the offer **no severance pay would be payable**. In addition, the employment of employees by the buyer must meet certain requirements of the Regulations in order to ensure that the employees’ entitlement to severance pay is not triggered. In essence, the buyer must:

- make an offer to the employees, at least seven days from the date upon which the change of ownership takes place which employment is to commence immediately upon the termination of their contracts with the seller; and
- the offer of employment must be “no less favourable” to the employees.

**7 Does the seller’s employee have a right not to be transferred to the buyer?**

Yes. An employee of the seller is free to reject the buyer’s offer of re-employment. If they refuse where the offer fulfils the requirements set out in the answers above then he will not be entitled to statutory severance pay. He will, however, be entitled to the notice payment and any other contractual payments.

**8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong an employee may make a claim for termination benefits or a claim for unlawful dismissal essentially contending that his termination was without cause.

The Employment Act 1955 requires that any sum due to the employee on termination of employment must be paid as soon as is practicable and in any case not later than seven days after the day of termination.

## Frequently asked questions by buyer

### **9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

### **10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

The buyer is not obligated to recognise continuity of service of the seller's employees however if there is no recognition of continuity in service then it would be regarded that the offer of employment has not been made in the context of Regulation 8 and the seller would be liable to pay termination benefits. It is always advisable for the seller to persuade the buyer to make the offer of employment with recognition of past years of service in order that the seller may avoid paying severance / termination benefits.

### **11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

The potential buyer must be aware whether there are existing collective agreements which may include certain conditions upon the seller prior to the disposal of the business or part of the business.

## Appendix 1 – Malaysia

### Statutory requirements regarding termination of employment

Regulation 8(1) of the Employment Act 1955 Termination and Lay-Off Benefits Regulations 1980 provides that:

“Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employees under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.”

- If the person by whom the business is to be taken over immediately after the change occurs does not offer to continue to employ the employee in accordance with Paragraph (1), the contract of service of the employee shall be deemed to have been terminated, and consequently the person by whom the employee was employed immediately before the change in ownership occurs and the person by whom the business is taken over immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under the Regulations.
- Where an offer by the person by whom the business is taken over immediately after the change occurs to continue to employ the employee is accepted by such employee the period of employment of the employee under the person by whom the employee was employed immediately before the change occurs, shall, for the purposes of these Regulations, be deemed to be a period of employment under the person by whom the business is taken over and the change of employer shall not constitute a break in the continuity of the period of his employment.

The payment of termination or lay off benefits are payable to the employee not later than seven days from the date of termination of employment.

The amount of benefits payable are regulated under Regulation 6 of the 1980 Regulations which provide as follows:

- 10 days wages for every year of employment for an employee employed for a period less than 2 years;
- 15 days wages for every year of employment for an employee employed for a period of 2 years or more but less than 5 years; and
- 20 days wages for every year of employment if he has been employed by the employer for 5 years or more.

The minimum notice pay required for those within the Employment Act 1955 is as follows however if the contractual provisions provide more favourable terms than that would take precedence:

- 4 weeks notice or salary in lieu if employed for less than 2 years;
- 6 weeks notice or salary in lieu if employed for 2 years or more but less than 5 years; and
- 8 weeks notice or salary in lieu if employed for 5 years or more.



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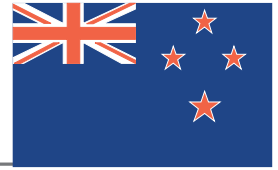
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# New Zealand



## Frequently asked questions by seller

**1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale situation involves the termination of the employee’s employment by the seller and the commencement of fresh employment with the buyer. In contrast, in a share sale situation the employer will not change.

**2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so, then please explain how it works.**

Yes. The “transfer” of employees is provided for by the Employment Relations Act 2000 (“ERA”), which distinguishes between two classes of employees:

### *Vulnerable employees*

The ERA provides employees who fall within the class of “vulnerable employees” with protection of their employment in the event of a “restructuring”, if such restructuring results in, or will result in, the employee no longer being required to perform their work for their current employer. An asset sale falls within the definition of “restructuring”, which includes the situation where an employer has entered into a contract or arrangement under which its business (or part of it) is to be undertaken by another person or entity, or where the employer’s business (or part of it) is to be sold or transferred to another person or entity.

Although vulnerable employees are not strictly transferred automatically to the buyer, they may elect to transfer on the same terms and conditions of employment as they enjoy with the seller in the event of an asset sale.

“Vulnerable employees” are statutorily defined to currently include only employees in the catering, cleaning, food service and caretaking sectors, although there are mechanisms in the ERA for additional classes of employees.

### *Non-vulnerable employees*

For all other employees that are not “vulnerable employees”, it is a requirement of the ERA that every employment agreement contain an “employee protection provision” (“EPP”), which requires certain minimum processes be in place to protect employees affected if their employer’s business is restructured (Please see **Question 3** below). An EPP must include:

- a process that the seller must follow in negotiating with a buyer about the transfer of undertaking to the extent that it relates to affected employees;
- the matters relating to the affected employees' employment that the seller will negotiate with the buyer, including whether the affected employees will transfer to the buyer on the same terms and conditions of employment; and
- the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the buyer.

Whether the other party offers employees of the seller ongoing employment, and on what terms and conditions, is ultimately the decision of that other party (subject to the contractual arrangements between seller and buyer).

### **3 What are the seller's legal obligations on "transferring" its employees?**

When proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees (vulnerable or non-vulnerable), the seller must provide these employees with:

- access to information, relevant to the continuation of the employees' employment, about the decision; and
- an opportunity to comment on the information to their employer before the decision is made.

#### *Vulnerable employees*

Before the transfer, the seller must provide the affected employee with a reasonable opportunity to consider transferring to the buyer, and also a date by which the right to make an election must be exercised.

If the vulnerable employee does not elect to transfer to the buyer, the seller must bargain with the employee for alternative employment arrangements with the seller. Any alternative arrangement agreed must be recorded in writing (although the ERA does not address the consequences of a failure to record an arrangement in writing).

The seller will need to terminate the employment agreements of its employees prior to or on the completion of the asset transfer. This will involve the seller giving the required notice of termination or payment of wages in lieu to its employees and paying them all their contractual and statutory entitlements.

### *Non-vulnerable employees*

As noted above, in this situation the ERA only requires that employment agreements contain a *process* of negotiating arrangements for redundancy situations.

The steps that a seller will need to take before the transfer of undertaking can proceed are detailed below.

- Prior to the transfer of undertaking, the seller will need to amend all employment agreements to include an EPP (see below). This will involve negotiation with any union(s) where appropriate.
- The seller will need to advise affected employee(s) (and the union(s), where appropriate) of its proposal to transfer the business, and it will need to provide information relating to the proposed sale (e.g. the rationale for the proposed sale, anticipated timeframes, and details of how many employees will be affected, including the number of positions / employees likely to be made redundant etc.). The seller does not have to provide access to confidential information if its disclosure would unreasonably prejudice the commercial position of the seller.
- The seller should obtain feedback from the affected employee(s) (and the union(s), where appropriate) regarding the proposed transfer to the extent that it affects them (e.g. employees may seek assurances about the possibility of employment by the buyer or redundancy).
- The seller will then need to consider and respond to the feedback.
- The seller will need to ensure that it works with the buyer so as to comply with employees' EPPs. For example, following a standard EPP clause, the seller will need to provide the buyer with information about employees who will be affected by the sale, and it must encourage the buyer to offer all affected employees employment on the terms set out in the EPP.
- Once the seller has received notification from the buyer as to which employees will be offered employment, and the terms that will be offered, it will need to determine which employees are entitled to redundancy compensation (if any such entitlements exist – there is no statutory requirement for redundancy compensation), which employees have / have not been offered jobs, and the terms on which they were offered employment.
- The seller will then need to write to employees giving them notice that their employment will terminate by reason of redundancy at the time that the sale takes effect. The letter should confirm whether the employee is being offered employment with the purchaser and employees' entitlements (if any) to notice and redundancy compensation. Please see **Appendix 1** for further details of the statutory obligations on termination of employment.



- The seller must then arrange for employees to be paid their final pay (including outstanding holiday pay, if this is not transferring to the buyer), plus any notice payments and / or redundancy compensation due to them (these liabilities are likely to be addressed in the sale and purchase agreement).

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

Depending on the requirements of the relevant employment agreement, the seller will need to give notice of termination to the transferring employees. The buyer should then make a written offer of employment to the transferring employees and provide a copy of the intended employment agreement allowing sufficient time for the offeree to seek independent advice on this. It is common for offer letters from the buyer to be sent in conjunction with termination letters from the seller.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

No.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

A seller could include a “technical redundancy” clause in vulnerable employees’ employment agreements stating that the employee’s entitlement to redundancy entitlements is excluded where the employee is offered employment with the buyer on “overall no less favourable” terms of employment (or similar). The ERA does not limit or affect such clauses.

If no such clauses exist, the seller could negotiate the inclusion of a term in the sale and purchase agreement whereby the buyer indemnifies the seller for the costs of any personal grievance claims and / or redundancy payments against it (although it would be unusual for the buyer to agree to such a clause).

**7 Does the seller’s employee have a right not to be transferred to the buyer?**

Yes. An employee of the seller (vulnerable or not) cannot be compelled to enter into an employment relationship with the buyer.

**8 What are the consequences if the seller gets it wrong?**

Where a redundancy is not genuine, or the correct procedures have not been followed, the seller may be at risk of employees raising personal grievances on the grounds that they have been unjustifiably dismissed.

If an employee is found to have a personal grievance the Employment Relations Authority or Employment Court has power to award a range of remedies. These include:

- reimbursement of lost wages; and / or
- reinstatement; and / or
- compensation for damages for humiliation, loss of dignity and injury to feelings; and / or
- costs.

If the seller fails to comply with any of its obligations outlined in **Section 3** above, the affected employee(s) / union(s) may seek an injunction to prevent the transfer of undertakings until the seller complies with its statutory obligations.

If the seller breaches an employment agreement in transferring undertakings, it is liable to a penalty under the ERA. It is worth noting that the ERA does not specifically prescribe a penalty for breach of an EPP.

#### Frequently asked questions by buyer

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** for a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so, for what purpose?**

The buyer is only required to recognise service for vulnerable employees. For other employees, this is a matter for negotiation between the parties. Some 'technical redundancy' clauses will not be triggered unless past service is recognised.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Where an employee who elects to transfer to the buyer is a member of a union and bound by a collective employment agreement, the buyer, if not a party to the collective agreement, will become a party to that collective agreement, but only in relation to that employee.

If a transferring vulnerable employee is made redundant by the buyer after the sale and that redundancy relates to the transfer, then redundancy compensation is to be a matter of agreement with the buyer (even if the employee had no defined entitlement to redundancy compensation with the seller). Where an agreement on the quantum of such compensation cannot be reached, it will be a matter for determination by the Employment Relations Authority.

# Appendix 1 – New Zealand

## Statutory requirements regarding termination of employment

### 1 Termination of contract by notice

There is no minimum defined notice period for termination, and this is a matter for negotiation in the applicable employment agreement.

### 2 Employees' entitlements on termination

- *Accrued wages and unused annual leave*

All outstanding wages and payments in respect of accrued but unused annual leave (only statutory leave, unless contract specifies otherwise) up to the time of termination are payable.

- *Long service payments*

There is no statutory right to long service leave payments, and this is a matter for negotiation in the applicable employment agreement.

- *Redundancy payments*

There is no statutory right to redundancy payments, and this is a matter for negotiation in the applicable employment agreement.

### 3 Substantive reasons for dismissal

The law requires that for an employer to lawfully dismiss an employee, it must have a valid reason, including:

- serious misconduct (summary dismissal);
- misconduct (on notice, after the requisite number of warnings);
- poor performance (on notice, after the requisite number of warnings);
- redundancy (on notice, after the requisite consultation process); and
- medical incapacity (on notice, after the requisite consultation process).

#### 4 Remedies

If an employee is found to have a personal grievance the Employment Relations Authority or Employment Court has power to award a range of remedies. These include:

- reimbursement of lost wages; and / or
- reinstatement; and / or
- compensation for damages for humiliation, loss of dignity and injury to feelings; and / or
- costs.



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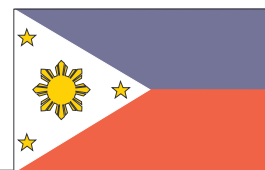
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# Philippines



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. Sale by the employer of all or substantially all of its assets is considered by law as equivalent to a cessation or termination of business. Accordingly, this will result in the cessation or termination of employment of the seller's employees and the provisions and requirements of law on termination of employment will apply. In contrast, a sale of equity or shares of stock by the employer will not result in the cessation of business and termination of employment but merely a change in the shareholding of the employer.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. Unless expressly assumed or stipulated, labour contracts are not enforceable against the transferee of an enterprise, labour contracts being in *personam*, and thus binding only upon the parties thereto. Where the sale or transfer of assets is made in good faith, the buyer has no obligation to absorb the employees of the transferor and to continue employing them.

However, the Supreme Court has held that although there is no legal requirement for automatic transfer of employees, the most that the buyer can do, for purposes of public policy and social justice, is to give preference to the qualified separated employees for hiring, subject to the usual probationary status and the employees' past services not recognised.

### **3 What are the seller's legal obligations on “transferring” its employees?**

Where the buyer agrees to hire the employees of the seller in an asset sale situation, the seller must terminate the employment of its employees. The buyer may then employ the seller's employees by entering into an employment contract with the employees.

Termination of employment by the seller is subject to the provisions of law on termination of employment (details of which are discussed in **Question 6**) and the particular provisions of the contract of employment entered by it with the employee. In the event that the seller has entered into a collective bargaining agreement with its employees and there are provisions on the agreement with respect to termination of employment, such provisions should be complied with by the seller.

Sale of assets by the employer is a recognised as a legitimate exercise of management prerogative and thus no previous consultation with the employees is required unless stipulated in the collective bargaining agreement between the employers and the recognised employee union.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

In an asset sale situation, the seller is required to serve a written notice of termination of employment to its employees and to the Department of Labour and Employment at least one month prior to the intended date of termination. If the buyer intends to subsequently hire the employees of the seller, the buyer may prepare a written contract of employment for acceptance and conformity by the employee.

Where the buyer and seller agree, a joint document may be prepared for the acceptance and conformity of the employee indicating terms relating to the termination of the contract of employment between the seller and the employee and the commencement of employment between the buyer and the employee.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

There are no prohibitions against or restrictions on the transfer of employees in transactions involving a sale of assets of a business or undertaking.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

The seller must comply with the requirements of law and its obligations under the contract of employment with the employee and under the collective bargaining agreement, if any, relating to the termination of employment.

For termination of employment due to a *bona fide* sale of assets of the employer, Philippine law requires the seller to:

- serve a written notice of termination of employment to its employees and the appropriate Regional Office of the Department of Labour and Employment at least 30 days prior to the intended date of termination, specifying the reasons for termination; and
- pay the employees termination pay amounting to a least one-half month pay for each year of service or one month pay whichever is higher. A fraction of at least six months shall be considered a whole year. Termination pay shall in no case be less than the employee's one (1) month pay.

The basis for computing the employee's termination pay shall be the employee's latest salary rate unless the same was intentionally reduced by the employer to circumvent the provisions of law. The salary base also includes allowances regularly received by the employee.

**7 Does the seller's employee have a right not to be transferred to the buyer?**

Yes. An employee is free to accept or reject employment with the buyer. There is no law compelling him to continue his employment in the enterprise. Neither will his rejection prejudice his right to separation pay.

However, when the sale of the enterprise is merely a sale of shares, there is no real transfer or ownership but a mere continuity of business. Hence, there is no termination to speak of and as such, the employee must continue his employment. Refusal to continue his services may be tantamount to a resignation in which case he will generally not be entitled to separation pay, unless there is stipulation for payment in the employment contract or collective bargaining agreement, or payment of the amount is sanctioned by established employer practice or policy.

**8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong, an employee may make claim for illegal dismissal and payment of damages.

If the dismissal was for a cause authorised by law such as cessation of a business due to sale of assets but effected without the requisite notice requirement to the employee or the Department of Labour and Employment (DOLE), the employer will be liable for non-compliance with the notification requirements of law. While the dismissal will be upheld, the seller may be ordered to pay an indemnity in the form of damages, the amount of which will depend on the degree of gravity of the seller's disregard of the notification requirements. A recent Supreme Court ruling on the matter ordered the non-compliant employer to pay PhP50,000 (approximately US\$1,000) to each dismissed employee as indemnity for failure to comply with the notification requirement. Where the seller fails to pay the correct amount of separation pay, the seller will be required to pay the correct amount to the employee plus interest.

Frequently asked questions by buyer

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** which provides a checklist of legally related information a buyer should ask for from a seller in respect to its employees.

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

No. In a *bona fide* sale of assets, there is no law which requires the buyer to absorb the employees of the selling corporation or recognise the continuity of service of the seller's employees in the event that the employees are hired by the buyer. In an asset sale situation, the seller terminates employment with its employees and the buyer may, if it desires to hire the seller's employees, enter into a new



employment agreement with the employees. As stated earlier, labour contracts are not enforceable against the transferee of an enterprise, labour contracts being *in personam*, thus binding only between the parties.

Although the transferee / buyer is not legally bound to absorb or employ the employees of the seller, the seller and the buyer will be liable to the employees if the transaction between them is clothed with bad faith or with the intention to circumvent the provisions of law. Moreover, if the transferee contractually committed itself to retain the employees of the transferor, such contractual commitment must be honoured.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Aside from the above-discussed, there are no specific pitfalls unique in our jurisdiction.



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# People's Republic of China



*For certain labour issues in relation to a transfer of undertaking, minor discrepancies might exist between the PRC laws and regulations at the State level and at the local level. Unless otherwise indicated in the context, the analysis below is based on the State laws and regulations of the PRC. We also selectively listed some differences in major localities in the PRC (e.g. Beijing, Guangzhou, Shanghai and Shenzhen).*

Frequently asked questions by seller

**1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes. The “transfer” of employees in an asset sale involves the termination of the employment between the seller and its relevant employees, and the commencement of fresh employment between the seller’s ex-employees and the buyer. In contrast, in a share sale situation the employer will not change.

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

**2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No. There is no current legislation providing that the employees should be automatically transferred to be the employees of buyer in an assets acquisition. All transfer of employees needs the consent of the seller, the buyer (or its operating subsidiary if the buyer is not the operating entity) and the relevant employees of the seller.

The PRC legislation classifies the PRC incorporated enterprises into domestic enterprises (“DEs”) and foreign investment enterprises (“FIEs”), to which different managements systems are applied. The transfer of employees in an assets sale where the party involved is either a DE or FIE is briefly discussed below.

- The principle mentioned in **Question 1** above will govern the transfer of undertaking between two DEs.
- Generally speaking, the transfer of assets (i.e. undertaking) of a PRC incorporated enterprise to a FIE newly established for the purpose of such acquisition shall be examined and approved by the relevant PRC authority. In addition to the principle of **Question 1** above, in the sale of assets from FIEs / DEs to foreign investors for further operation by the latter’s PRC subsidiaries, or in a

transaction whereby a foreign investor(s) establishes an FIE for the purpose of acquiring and operating the assets of an existing DE / FIE, an **allocation plan of employees** is required to be submitted to the governmental authorities for approval, together with the assets purchase agreement and other application documents. Similar requirement for the approval of the allocation plan of employees can also be found in the legislation in relation to mergers and spin-offs involving FIEs. Such allocation plan of employees is not a clearly defined document. According to the relevant authorities, it shall be a proposal based mainly on the negotiation between the seller and the buyer, and shall reasonably consider the opinion of the relevant employees.

- The State-owned enterprises (“SOEs”) are a kind of DEs specially protected by the PRC legislation. The allocation plan of employees seems clearer in the legislation on the acquisition of the assets of SOEs. Pursuant to the ***Interim Regulations of Using Foreign Investment to Reorganise State-owned Enterprises*** effective since 1 January 2003, if the controlling interest in the enterprise is to be transferred, or if all or the main assets are to be sold to a foreign investor, the buyer and the seller shall make a suitable allocation plan of the employees, which shall be reviewed and passed by the employees’ congress of the seller. In the same article, however, the new company of the buyer (i.e. the PRC incorporated vehicle operating such assets) still has the right to decide whether it will accept the ex-employees of the seller.

It should also be noted that under the *PRC Labour Contract Law*, if there is a merger or spin-off, etc. of an employer, the existing contract of employment shall remain effective and continue to be performed by the entity which succeeds to the rights and obligations of the original employer after the relevant merger or spin-off, etc.

### **3 What are the seller’s legal obligations on “transferring” its employees?**

For the transfer of employees, the seller needs to terminate the contracts of employment of its employees (typically prior to or on completion of the asset transfer), and then the relevant ex-employees could establish their employment relationship with the buyer according to the new contracts of employment.

- **The termination of employment between the seller and its employees**  
Generally speaking, the PRC legislation strictly limits the rights of an employer to terminate a contract of employment. In the case of an assets sale, if the seller wishes to terminate the employment of certain employees for the purpose of transferring them to the buyer, consultation with the employees involved is necessary. Two possibilities might follow such consultation:

- As the most ideal scenario, if an agreement for the termination of employment can be reached between the seller and the employees after the consultation, the relevant contracts of employment can be terminated at any time as agreed by both the seller and its employees; or
- If any employee does not wish to be “transferred” to the buyer, and the seller would not like to continue the employment with such employee after the assets transfer, the seller could terminate the contract of employment under certain circumstances. However, there are strict preconditions for such unilateral termination by the employer. Please see **Appendix 1** for further details.

- **The obligations of the seller arising from the termination of employment**

After the termination has been agreed by the relevant employees, the seller’s monetary obligations to the employee for the termination of employment will include:

- the full payment of the due salary and bonus (if any) calculated up to the date of termination to the employees according to the contracts of employment and laws and regulations;
- the full payment of all public housing funds (if applicable), social insurance funds and the individual income taxes that shall be deducted by the employer and calculated up to the termination of employment;
- the payment of the severance payments according to the laws and regulations, or in line with the agreement between the seller and the employee, which shall not be lower than the above legal standard;

The seller shall pay to the transferring employee certain economic compensation (i.e. severance payment) in accordance with the relevant laws and regulations even when the employment relationship is terminated by mutual agreement of the seller and the relevant employee.

The legislation at State level provides certain standards to calculate such severance payment, while local regulations vary in some details. In short, for a termination by mutual agreement of an employer and an employee, such compensation will be the employee’s monthly average salary during the 12 months prior to the termination multiplied by the figure of years for which he has worked for the employer but generally subject to a maximum of 12 months salary.

The local regulations further allow an employer and an employee to separately agree on a higher amount of severance payment.

- the payment for any annual leave not used by the employees.

This is not a mandatory requirement in the legislation at State level.

In practice in **Beijing** and **Shanghai**, there is no mandatory requirement either, and if there are no contrary provisions in the internal regulations of the seller or the relevant contract of employment, it seems the courts have the discretion to decide in the manner it considers equitable to both parties.

The **Guangzhou** labour administrative authority takes the view that if the termination of the employment is proposed by the employer, the employer shall make corresponding compensation to the employee for the untaken annual leave. However, if the termination of the employment is proposed by the employee, he / she has no right to require any compensation for the untaken annual leave, except where he / she has applied for such untaken annual leave before the termination of employment and such application was rejected.

The **Shenzhen** labour administrative authority agrees that the employer bears no obligation to the leaving employees to make any compensation for the untaken annual leave. At the same time, the Shenzhen authority thinks that in practice the employer shall, if possible, arrange the employee to utilise the untaken annual leave before his last working day.

#### **4 What documentation is required to effect the transfer of employees from the seller to buyer?**

On the basis that the employee agrees with the seller to terminate their employment relationship and accept the job offered by the buyer:

- For the termination of the old employment

A contract of employment is required by both the PRC Labour Law and the PRC Labour Contract Law to be made in writing. In addition, any variation to such contract shall be in writing.

However such “in writing” requirement is not imposed for termination. For avoiding any dispute, when the seller and an employee both agree to terminate their employment relationship, an agreement in writing should be signed to clarify such termination and other related issues.

As a requirement under a State-level legislation and also reflected in some local regulations, the employer shall issue a written certificate to the leaving employee proving the termination of his / her employment.

- For the commencement of the new employment with the buyer

The offer letter issued by the buyer is not a mandatory requirement for an employer to employ an individual. As mentioned, a new contract of employment is required to be signed in writing by and between the buyer and the relevant ex-employee of the seller.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

As mentioned above, an employment can be terminated by the mutual agreement of the seller and its relevant employees. As to the types of employees whom the employer may not unilaterally terminate the employment with, please see **Appendix 1** for more details.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

In an assets sale, the seller can consult with the employees whom the buyer wants for terminating the employment by mutual agreement for their transfer to the buyer. If the agreements of termination can be concluded, the obligations of the seller to a transferring employee mentioned in **Question 3** would apply.

The monetary obligations of the seller to the employee to be transferred could, as a matter of negotiation between the seller and the buyer, be reimbursed by the buyer, or calculated into the price for the transfer of assets. In practice, an agreement could be reached among the seller, the buyer and relevant employees that the seller does not have to pay the severance payments to the transferring employees, while the buyer agrees to recognise the continuity of service of such employees. (Please see **Question 3** and **Question 10** for more details)

**7 Does the seller’s employee have a right not to be transferred to the buyer?**

An employee of the seller is free to reject the proposal of seller to terminate the existing employment and the buyer’s offer of re-employment. If the seller would not like to continue the employment with such employees, the termination by unilateral notice could be applied, subject to the relevant preconditions and limitations for such unilateral termination by an employer listed in **Appendix 1**.

As mentioned under **Question 2** above, the statement in the PRC Labour Contract Law is still not clear enough on whether an employee would have the right not to be transferred to the buyer. While arguments for and against can be raised on this issue, there is currently no guidance as to how a court would decide the issue.

**8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong in the termination of employment with its employees, the employees may make claims for wrongful dismissal. The employee who thinks that his / her interests has been infringed and has the right to bring his / her claims to the competent labour arbitration organisation for labour arbitration against the seller in due time. If the award of labour arbitration is not satisfactory to the seller or the employee, either of them has the right to bring a suit against the other before the relevant court. Thereafter, there is only one further appeal to a higher court allowed.

Unlike in many Western jurisdictions where a contract of employment is never specifically enforced but damages awarded in lieu, PRC laws currently do not prohibit a court from ordering an employer to take an employee back for work. If the employee does not so request or the contract is no longer capable of being performed, the employer shall pay twice the usual severance payment amount as damages to the employee.

#### Frequently asked questions by buyer

##### **9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of legal-related information a buyer should ask for from a seller in respect of its employees.

##### **10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

No such requirement is found in the legislations at the State level, while some local regulations have a similar requirement for the buyer to recognise continuity of service of the seller's employees.

For example, according to the local regulations of *Beijing* in relation to the reform of SOEs, the buyer in some assets transfer transactions might have to recognise the continuity of service of the seller's employee when one of preconditions is met:

- if an employer is reorganised to become a SOE or a State-owned holding company, the original contracts of employment shall continue to be performed, the period of service of the employee with the original employer shall be counted as his period of service with the new employer; or
- if an employer is reorganised to become a partially State-owned company or a State-owned joint-stock cooperative company, the original contracts of employment may continue to be performed and the period of service of the employee with the original employer shall be counted into his period of service with the new employer, or the original labour contract may be terminated by the original employer who shall pay the employee economic compensation (i.e. severance payment), in which case the period of service of the employee with the new employer shall start a fresh.

However, in *Shanghai*, no such provision exists. According to the local authority, the buyer of an assets sale is not obliged to recognise the continuity of service of the seller's employees unless there is other arrangement between the buyer and relevant employees. Situations in *Guangzhou* and *Shenzhen* are similar to that in Shanghai. According to the authorities in these two cities, for the purpose of protecting the rights of employees, an agreement on the calculation of severance payment for the leaving employee shall be concluded by the employee, the buyer and the seller in an asset sale. After such severance payment has been agreed, the buyer shall have no obligation to recognise continuity of service. Otherwise, the years of the relevant employee's service for the seller shall be regarded as the years of service for the buyer after the "transfer" of employee.



Such requirement for the continuity of service requirement in local practice is mainly for the purpose of protecting the rights and interests of the employees. When an employee of seller has been transferred to the buyer and later both such employee and the buyer wish to terminate their employment relationship, for calculating the severance payment as mentioned in **Question 3**, such employee could have his period of service include the period when he worked for the ex-employer (i.e. the seller) before the assets sale completed.

At the same time, the PRC Labour Contract Law requires the following :

- where an employee has worked for an employer continuously for 10 years or more, an indefinite labour contract shall be signed, except where the employee has requested for a fixed term labour contract;
- in case an employer and an employee have entered into a fixed term labour contract twice successively and the parties intend to renew such contract upon its expiry, an indefinite term labour contract shall be signed except where the employee has requested for a fixed term labour contract; and
- where an oral contract has subsisted for one year or more, an employee is entitled to have his contract considered as being one with an indefinite term.

Therefore, if the buyer does not recognise the continuity of service of the seller's employees after the assets sale, the above-mentioned "severance payment" or "contract for an indefinite term of service" would be impacted.

#### **11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Potential buyers should be extremely cautious if the seller (i.e. existing employer) is a collective, State-owned, or partly State-owned entity as there may be many employees, particularly older ones, who are employed not entirely on the usual contractual basis. The precise rights and obligations of the existing employer with respect to such employees should be ascertained and a satisfactory resolution arrived at.



## Appendix 1 – People's Republic of China

### Statutory requirements regarding termination of employment

*Unless otherwise indicated in the context, the analysis below is based on the State laws and regulations of the PRC. We also selectively list some differences in major localities in the PRC (e.g. Beijing, Guangzhou, Shanghai and Shenzhen).*

#### **1** Termination upon expiry

The service of an employee may be automatically terminated upon expiry.

According to the PRC Labour Contract Law, a labour contract shall be considered as expired where:

- the date of expiry stated in the contract arrives;
- the employee begins to enjoy the treatment of the fundamental pension plan in accordance with the law and regulations;
- the employee is dead or is declared dead or disappeared by the court;
- the employer is declared bankrupt;
- the employer has its business license cancelled, is ordered to close down, or the employer decides on early liquidation; or
- other circumstances of expiry as stipulated by the law or regulations apply.

Some local regulations further supplement such automatic / immediate termination grounds:

- The local regulations of **Shanghai** supplement the following situations where the employment shall be automatically terminated:
  - when the parties to the contract have not implemented the contract for three months or more; or
  - when the employer pays the compensation to the disabled employees according to the regulations after the relevant employees have totally or in great part lost their working ability due to occupational diseases or work-related injuries, and the employee agrees so.

- The local regulations of *Guangzhou* supplement the following situations where the employment shall be automatically terminated:
  - the task stipulated by the employment contract has been completed;
  - the employment contract is terminated by an award issued by the labour arbitration committee; or
  - other conditions provided by the laws and regulations occur.

## **2 Termination by mutual agreement**

On the basis of the mutual agreement of the employer and employee, the contract of employment may be terminated.

## **3 Unilateral termination by employer with immediate effect**

The employer may terminate the contract of employment with the employee under any of the following circumstances:

- the employee is proved to not have met the requirements for recruitment during the probation period;
- the employee seriously violates the labour disciplines or the internal rules and regulations of the employer;
- the employee causes substantial loss to the employer due to serious breach of duty or fraud;
- the employee is prosecuted for crimes in accordance with the law;
- the employee has entered with an employment relationship with another employer which materially affects the completion of his / her tasks with the first-mentioned employer or the employee refuses to rectify the matter after the same is brought to his / her attention by the employer; or
- the employee has concluded the labour contract by means of fraud, threat, force or exploitation.

## **4 Unilateral termination by employer by 30 days advance notice or payment in lieu thereof**

Under any of the following circumstances, the employer may terminate a contract of employment with a notice in writing given to the employee 30 days in advance or with an additional month's salary paid to the employee in lieu of the 30-day prior notice:

- if the employee is unable to take up his original work and any new work arranged by the employer after the completion of his medical treatment for non-work-caused illness or injury;

- if the employee is unqualified for his work and remains unqualified even after receiving training or being moved to another working position; or
- no agreement on amending the contract of employment can be reached through consultation by the parties involved when the objective conditions taken as the basis for the conclusion of the contract of employment have substantially changed so that the original contract of employment cannot be performed any more.

In **Beijing**, if the employer cannot supply another job position due to the inconformity of the employee, the employment can also be terminated in the same manner.

The local regulations of **Guangzhou** supplement that the employer may terminate an employment contract subject to a notice 30 days in advance, when:

- the employer goes out of business, stops operation, declares bankruptcy in accordance with laws or is within the prescribed period of rectification on the brink of bankruptcy;
- subject to the verification of the labour administrative authorities, the employer cannot employ the surplus employees due to the change of business operations or technology conditions; or
- other conditions of termination provided by the employment contracts occur.

## **5 Reduction of staff by the employer**

- Personnel who has priority to be retained

Only if it is necessary to lay off 20 or more employees, or less than 20 employees but which account for more than 10% of the total number of its employee, shall the employer resort to economic retrenchment.

Furthermore, when the employer decides the personnel to be laid off, the following employees shall have priority to be retained:

- who have entered into a comparatively longer fixed term labour contract with the employer
- who have entered into an indefinite term labour contract with the employer, or
- who are the only ones employed in their family, and have to support the elderly or minor family member(s).

If the employer has early terminated labour contracts with its employees on the ground of redundancy, and recruits again within six months, such employer shall give notice to those laid-off employees, and hire them on a preferential basis.

- Applicable conditions

Under the following circumstances, the employer may resort to the retrenchment procedure for early termination of the labour contract:

- the employer undergoes reorganisation pursuant to the PRC Enterprise Bankruptcy Law;
- encounters serious difficulties in production or business operations;

The description of this circumstance is quite ambiguous for enforcement. As a result, local governments mostly establish measures for application of this circumstance.

For instance, in **Shanghai**, only if an enterprise is running under deficit, and has taken the following 4 measures for at least 6 months, while still operating under deficit and no sign of recovery has appeared, could such enterprise call for staff reduction on the ground of serious difficulties in production or business operation:

- (a) stopping recruitment;
  - (b) discharging all contracted employees or personnel who have entered into a special employment relationship which is excluded from the employment as prescribed in the PRC Labour Law and Labour Contract Law, if applicable. Such name list shall be agreed by representatives from both the enterprise and the union;
  - (c) stopping arrangement of overtime; and
  - (d) reducing salary at a rate agreed by representatives from the enterprise and the union; however, if at that time, the average monthly salary of the concerned enterprise has been lower than 60% of the local employees' average monthly salary level of last year which was published by local labour authority, this measure is not necessarily required.
- change of production, introduction of a major technological innovation or a major adjustment of its business operation, and, after amendment of labour contract, the employer still needs to reduce staff; or
  - other material changes of the objective economic circumstances which were relied upon at the time of conclusion of such labour contract, rendering it no longer performable.

- Procedure

The employer is required to explain such circumstances 30 days in advance to the union or all of the employees (in **Shanghai**, such explanation shall be accompanied with a retrenchment plan), and take the opinion or suggestion from the union or any employee into consideration. After that, a retrenchment plan with all necessary documents which could approve the employer's due performance according to the relevant regulations shall be submitted to the local labour authority.

Additionally, the employers in **Beijing** is allowed to reduce their number of employees if the enterprises have to be moved to other sites for prevention and control of industrial pollution.

#### **6 Unilateral termination by employee by notice 30 days in advance (i.e. resignation)**

The employee can freely terminate his contract of employment as long as he gives a notice in writing to the employer 30 days in advance. In case such employee is in probation period, a 3-day prior notice period is required.

The **Beijing** local regulations allow the employer and employee to separately agree upon the advance-notice period for the resignation of employee in their contract of employment, which could be even shorter than the 30 days provided by the law at State level.

#### **7 Unilateral termination by employee with immediate effect**

The employee may notify at any time the employer of the termination of the contract of employment if the employer:

- (a) does not provide labour protection or other conditions as agreed in the labour contract;
- (b) does not pay the employee in full and on time;
- (c) does not pay social insurance premium as required by law ;
- (d) implements work rules and regulations which violates law and regulations, leading to violation of the employee's interest;
- (e) concludes the labour contract by means of fraud, threat, force or exploitation; or
- (f) forces the employee to work by means of violence, threat, force, or illegal detention; issues illegal directions, or compels risky operations, which endangers the safety of the employee.

Under the local regulations of *Guangzhou*, in addition to the situation (c) listed above in this Section, the employee may terminate a contract of employment with immediate effect in the following situations:

- the work conditions, safety and sanitation are very bad, which have seriously impaired the health of the employee as confirmed by the relevant authorities; or
- the employer fails to perform the contractual obligations provided by the contract of employment or violates the provisions of the laws and regulations, which has infringed the legitimate rights of the employee.

### Remarks

- For the termination of employment under **Sections 2, 4, 5 and 7** above, the employer is required by the PRC Labour Law to pay to the relevant leaving employees economic compensation (i.e. severance payment) according to the relevant laws and regulations. In addition, severance payment shall be payable for termination under **Section 1** unless it is the employee who did not wish to extend his service and the employer had offered no worse terms than those in his last contract.
- The severance payment shall be calculated on the basis of the length of period worked, which is equivalent to one month's salary for every year the employee has worked for the employer. Any period of six months or more but less than one year shall be counted as one year. Half a month's salary shall be paid to the employee for a period of less than six months. The PRC Labour Contract Law caps the monthly rate of severance payment at 300% of the relevant locality's average monthly salary, and for employees in this category, it further caps the total number of months at 12 months.
- The employment of the following employees *cannot* be terminated by the employer under **Sections 4 and 5**, if the employee:
  - is engaged in occupational disease-prone work who has not had a medical examination to determine he is free from such disease, or is in any diagnostic or observation period pending such determination;
  - has been confirmed as having lost or partially lost his capacity to work due to an occupational disease contracted or a work-related injury sustained with the employer;
  - has contracted an illness or sustained a non-work-related injury, and the set period of medical care therefore has not expired;
  - is a female employee in pregnant, in confinement or in nursing period; or
  - has worked continuously for the employer for at least 15 years and is within 5 years of legal retirement age.

At the same time, the Trade Union Law provides that the employment of the chairman, vice chairman and committee members of the labour union cannot be terminated during their terms of office, except they have committed serious misconduct or reached the age of retirement.

- Under the PRC Labour Contract Law, the union is endowed with the following power and rights:
  - in case of the early termination of labour contract initiated by the employer, the union shall be notified of the reason in advance. If such termination has been in violation of the laws, regulations or any provision under the labour contract, the union may request the employer to rectify such violation and the employer shall take the union's opinion into consideration and notify the union in writing of its final decision thereon;
  - in case of breach of a collective contract by the employer, the union may request the employer to undertake responsibilities for such breach. If any dispute arising from the implementation of the collective contract cannot be resolved through negotiation, the union is entitled to apply for arbitration or commence litigation against the employer in its own name; and
  - in the formulation of internal work rules and regulations, the union is entitled to participate in negotiations with the employer, and enjoy rights of requesting the employer to amend any inappropriate decision as discussed above. Unfortunately, as to what constitutes an "inappropriate" decision, the law does not provide any guidance, but any illegal or unreasonable decision would probably be included.



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# Singapore



## Frequently asked questions by seller

### **1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

In the context of asset transfer or transfer of undertaking, the employees of the transferor are deemed to be employees of the transferee after the transaction is completed. As will be discussed below, there is an automatic transfer of employees from the transferor to the transferee in a transfer of undertaking.

In sale of shares, no particular legal requirements concerning employees will occur merely by the change of ownership of shares in the company from a seller to a buyer.

The remainder of this FAQ deals with the “transfer” of employees in the asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

Singapore has legislation providing for the automatic transfer of the contract of employment of employees from the seller to buyer. Under section 18A of the Employment Act (“Act”), a transfer of an undertaking does not operate to terminate the contract of employment between the employee of the transferor, but such contract of employment has the effect after the transfer as if originally made between the employee and the transferee. Essentially, section 18A provides a legal framework whereby the employment contracts of the employees of the seller are transferred together with the seller’s business so that the transferee, i.e. the new employer, taking over the business is now legally recognised as the new employer.

The term ‘transfer’ under section 18A includes the disposition of a business as a going concern and a transfer effected by sale, amalgamation, merger, reconstruction or operation of law.

It must be stated at the onset that this provision of the Act only applies to ‘employees’ subject to the Act. Employees subject to the Act refer to persons who have entered into or work under a contract of service with an employer and include a workman. However, the definition expressly excludes seamen, domestic workers, or persons employed in a managerial, executive or confidential position or persons declared by the Minister to be an employee for the purposes of the Act.



The rationale behind the enactment of section 18A is to enable companies which restructure to cope with changes in the business conditions to do so expeditiously without protracted negotiations between these companies and their employees. The legal framework contemplated in section 18A has the following features:

- Continuity of employment

Pursuant to section 18A when an employer's trade or business is transferred to another person, the employees' period of service is deemed to continue as if it had been made between the employee and the transferee from day one. In other words, the transfer will not break the continuity of the period of employment. There is no termination of contracts as the contracts of employment are, by statutory provision, preserved.

- Terms and conditions of employment preserved

Since there is no break in the contract of employment, the existing terms and conditions of employment of these employees of the transferor remain unchanged when so transferred to the new employer, i.e. the buyer, including sick and annual leave entitlements and public holiday. This means that the terms and conditions of employment shall be the same as those enjoyed by them immediately prior to the transfer.

- Transfer of rights and liabilities

By virtue of section 18A, all the transferor's rights, powers, duties and liabilities under or in connection with the employees' contracts of employment shall be transferred to the transferee. Additionally, any act or omission done before the transfer by the transferor in respect of that contract shall be deemed to have been done in relation to the transferee. Similarly, any act or omission done before the transfer by an employee in relation to the transferor shall be deemed to have been done in relation to the transferee.

There is one exception to the transfer of rights and liabilities. The transfer does not affect the criminal liability of parties for acts or omissions committed by them for which they are responsible.

- Union recognition

If the affected employees are represented by a trade union, such trade union shall be deemed to be recognised by the transferee for the purposes of the Industrial Relations Act if the majority of the 'transferred' employees are members of the trade union.

In any other case, the trade union shall be deemed to be recognised by the transferee only for the purpose of representing the employee on any dispute arising from the following:

- any collective agreement that was entered into between the transferor and the trade union while the collective agreement remains in force; or
  - the transfer of the employee's employment from the transferor to the transferee.
- Powers of the commissioner for labour

Any dispute between the transferor and an employee or the transferee and an employee arising from the transfer, whether before or after the transfer, may be referred by a concerned party to the Commissioner for Labour ("Commissioner"). The Commissioner is conferred the following powers in relation to the transfer:

- delay or prohibit the transfer of employment of the employee to the dispute from the transferor to the transferee; and
- order that the transfer of employment of the employee to the dispute from the transferor to the transferee be subject to such terms as the Commissioner considers just.

Note that the transferee of an undertaking and the employees whose contracts are preserved may negotiate for terms and conditions of employment which are different from those contained in the employment contracts that are preserved. This feature of section 18A creates flexibility for both parties, i.e. the transferred employees and the transferee, to come to an agreement when there is a reason for varying the terms and conditions of the employment contracts which are being transferred, or of the collective agreement which takes effect in the transferee.

It must be stressed that in order for section 18A to apply, there must be a genuine business restructuring. In other words, there must be actual sale of the business or part of the business as a going concern and that the transferee, the new employer, will be taking over both the business and the employee.

### **3 What are the seller's legal obligations on "transferring" its employees?**

The transferor's legal obligations may be broadly categorised into two: (i) consultation with affected employees and trade unions under section 18A; and (ii) the general statutory obligations of an employer under the Act.

- Consultation with affected employees and trade unions

Section 18A requires the transferor to inform and share with the affected employees and the trade union of the affected employees (if any) relevant information in relation to the transfer which could affect these employees. It is essential that unions and employees be properly informed of the reasons behind the corporate restructuring and the possible consequences of this management decision in so far as the affected employees are concerned. This will help to allay any possible fears and ensure that the process of corporate restructuring is smooth and not long drawn.

To this end, the transferor should conduct consultations with the affected employees and the latter's trade union (if any) as soon as it is reasonable and before the transfer takes place. The Act does not provide any specific time within which the affected employees are required to be notified, only that they be notified 'as soon as it is reasonable and before the transfer take place'. The transferor must issue a notice to such affected employees and their trade union (if any) setting out the following information:

- (a) the fact the transfer is to take place;
- (b) the approximate date on which the transfer is to take place and the reasons for it;
- (c) the implications of the transfer;
- (d) the measures that the transferor envisages it will take in relation to the affected employees or, if it envisages that no measures will be so taken, that fact; and
- (e) the measures that the transferee envisages it will take in relation to such of those employees who will become its employees after the transfer or, if he envisages that no measures will be so taken, that fact.

In connection item (e), the transferee is under obligation to give the transferor such information as may be needed to enable the latter to convey to the affected employees the measures that the transferee intends to take in relation to the transfer.

If there is an inordinate delay by the transferor in notifying the affected employees and their trade union (if any) of the information enumerated above, or by the transferee in notifying the transferor of the measures it intends to take in relation to the transfer, the Commissioner may, by notice, direct either of them to comply with their legal obligations within such time as maybe specified in the notice.

- General statutory obligations of an employer

Although it is specifically stated in section 18A that the rights and obligations of the transferor are deemed transferred to the transferee in a transfer of undertaking, good business practice dictates that the current employer comply with its statutory obligations to the affected employees prior to the transfer. The transferor must not abuse section 18A so as to evade its obligations under the employees' contracts of employment. Thus, the transferor must not deny them leaves and benefits, amongst others, for which these employees would normally be eligible, for example.

#### **4 What documentation is required to effect the transfer of employees from the seller to buyer?**

As discussed, the transferor must give notice to its affected employees stating therein the date of transfer and the rationale for the transfer, amongst others. Section 18A provides that they must be notified as soon as it is reasonable and before the transfer takes place.

For employees not subject to the Act, while there may be no statutory obligation to give such notice of the proposed transfer it is suggested that employees whom the transferee would like to offer continuing employment to be similarly notified. Depending on the requirements of the contracts of employment of these employees, the transferor may need to give written notice of termination to them. The transferor should then make an offer of employment to them. However, if the transferor and the transferee agree, they can issue a joint communication to smooth the 'transfer' from an employee relations perspective (rather than have a notice of termination from the seller and separately an offer of employment from the buyer).

#### **5 Are there any particular types of employees whose employment may not be transferred by the seller?**

As noted above, the automatic transfer of employees in a transfer of undertaking only applies to those who are subject to the Act. The employees of the transferor in managerial, executive and confidential position are not covered by the Act. Their consent must be obtained first before they can be transferred to the transferee. If they reject the offer of continuing employment with the transferee, their employment may be terminated by notice or by payment of salary in lieu thereof, and in any event, in accordance with their employment contracts. They may also be entitled to payment of retrenchment benefits if their contracts provide for such payment.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

**Annual leave**

In so far as the employees subject to the Act are concerned, the transferor must comply faithfully with such obligations as contained in the employment contracts of service prior to the transfer of undertaking, including payment of salary and grant of benefits. The transferee will assume the former employer's obligations to the transferred employees once the transfer is effected.

If the employees not covered by the Act accept the offer of continuing employment with the transferee, it is usual for the previous employer, i.e. the transferor, to require these employees to sign a quitclaim releasing the employer from all claims in connection with the termination of their employment.

**7 Does the seller's employee have a right not to be transferred to the buyer?**

The transferor's employees subject to the Act have the right to not to transfer to the transferee.

**8 What the consequences if the seller gets it wrong?**

If the transferor terminates an employee as a result of the transfer of undertaking, the employee may make a claim for wrongful dismissal, and confirmation of continuing existence of the employment contract between the transferor and the employee. As a consequence of this, the transferee must recognise the continuity of period of employment of the affected employee. Termination of employment is discussed in more detail in **Appendix 1**.

**Frequently asked questions by buyer**

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of legal information a transferee should ask for from a transferor in respect of its employees.

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

The transferee has a statutory obligation to recognise continuity of service of the transferor's employees who are subject to the Act. By virtue of section 18A, the transfer of undertaking operates as a statutory novation of the employment contracts of these employees and the transferee ought to recognise the continuity of service of such employees. Along with this, the terms and conditions of employment of the transferred employees are preserved and must thus be respected by the transferee unless both parties subsequently agree to different terms and conditions of employment.

The period of employment of the transferred employees in the previous employer (i.e. transferor) will be counted as part of the total number of years of service for purposes of calculating service-related entitlements such as annual leave, severance pay or retirement benefits (if any).

## **11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Not all transactions alleged to be ‘transfers of undertaking’ will fall under the contemplation of section 18A. The decisive criterion whether there is a transfer is whether the business in question retains its identity. Consequently, a transfer of an undertaking does not occur merely because its assets are disposed of. Instead, it is necessary to consider whether the business operations was actually continued or resumed by the transferee, with the same or similar activities. It is therefore necessary to consider all the facts characterising the transaction in question, including the following:

- the type of undertaking or business;
- whether or not the business’ tangible or intangible assets are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of its employees are taken over by the new employer;
- whether or not its client base or customers are transferred; and
- the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended.

A transfer of undertaking may occur even though there has been no transfer of the ownership of assets, tangible or intangible. What matters is the transfer of responsibility for the operation of the undertaking in which the employees were employed. It is necessary to view the situation from an employment perspective, not from a perspective conditioned by principles of property, company or insolvency law. The crucial question is whether, taking a realistic view of the activities in which the employees are employed, there exists an economic entity which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer.

## Appendix 1 – Singapore

### Statutory requirements regarding termination of employment

#### **1 Termination of contract by notice**

Under the Employment Act ('Act'), notice of intention to terminate a contract of service must be in writing, whether given by the employer or the employee. It may be given at any time of the day and the day on which the notice is given will be included in the period of notice.

The notice period may be agreed between employer and employee, but the Act requires the period to be the same for both parties. In the absence of any provision in the contract of service, the minimum notice which must be given under the Act by either party is as follows:

- one (1) day's notice if the employee has been employed for less than twenty-six (26) weeks;
- one (1) week's notice if he has been employed for twenty-six (26) weeks or more but less than two (2) years;
- two (2) week's notice if he has been employed for two (2) years or more but less than five (5) years; and
- four (4) weeks' notice if he has been employed for five (5) years or more.

Where an employee does not fall within the provisions of the Act, the notice period is determined in accordance with the terms of the employment contract. If the employment contract is silent, then reasonable notice must be provided for any termination. What is reasonable will have to be determined on the specific facts of the case.

Either party may waive his right to notice on any occasion.

#### **2 Termination by payment in lieu of notice**

Alternatively, an employment contract can be terminated without notice by either party or, if notice has been given, without waiting for the expiry of the notice period, by paying to the other party a sum equal to the salary at the gross rate of pay which would have been due to the employee during the notice period or the unexpired portion thereof, i.e. payment of salary in lieu of notice.

'Gross rate of pay' refers to the total amount of money including allowances to which an employee is entitled under his contract of service either for working for a period of time, i.e. for one hour, one day, one week, one month or for such other period as may be stated or implied in his contract of service, or for each completed piece or task of work but does not include the following:

- additional payments by way of overtime payments;
- additional payments by way of bonus payments or annual wage supplements;



- any sum paid to the employee to reimburse him for special expenses incurred by him in the course of his employment;
- productivity incentive payments; and
- travelling, food or housing allowances.

The Act also provides that either party to a contract of service may terminate the contract without notice in the event of a willful breach of a condition of the contract by the other party. An employer is deemed to have broken the contract of service if he fails to pay the employee his salary in accordance with the terms of the Act. Conversely, an employee is deemed to have broken his contract of service if he has been continuously absent from his work for more than two days without prior leave from his employer or without reasonable excuse or without informing or attempting to inform his employer of the excuse for his absence. The party in default is obliged to pay to the other a sum equal to the amount he would have had to pay if he had terminated the contract of service without notice.

### **3 Prohibited termination**

The termination of employment by the employer is not permitted on account of the following:

- (a) trade union participation;
- (b) maternity leave;
- (c) national service;
- (d) age; and
- (e) whistle-blowing in workplace safety and health matters.

- Trade union participation

An employer must not dismiss or injure an employee in his employment, or alter the employee's position to his prejudice for trade union-related reasons, including the following:

- the employee's participation and involvement with his trade union;
- the employee's entitlement to benefits of a collective agreement or an award;
- the employee's participation as a witness in proceedings under the Industrial Relations Act; and
- the employee's participation as a member of a panel of an Industrial Arbitration Court.

- Maternity leave

An employer is prohibited from dismissing an employee while she is on maternity leave or giving her notice of dismissal on such a day that the notice will expire while she is on maternity leave.



An employee who is given notice of dismissal within three months prior to her confinement without sufficient cause is still entitled to be paid maternity leave.

- National service

The Enlistment Act prohibits an employer from dismissing an employee solely or mainly for the reason that the employee has been called up, or is liable to be called up, for national service, reserve service, mobilised service in the Police Force, or voluntary service in the People's Defence Force. Exceptions to this provision include the situation where the employee is called up for full-time service and the employee was only employed for an agreed definite period.

- Age

The Retirement Age Act prohibits employers from dismissing employees below the prescribed retirement age, which is 62, on the ground merely of age regardless of any other written law, contract of service or collective agreement.

The Retirement Age Act, however, does not take away an employer's right to dismiss his employees for poor performance, ill health, or misconduct. Section 5(5) of the Retirement Age Act also allows employers to reduce the wages of their employees after the latter attain 60 years of age based on reasonable factors other than age (including but not limited to the employee's productivity, performance, duties and responsibilities, and the wage system such as the seniority system applicable to the employee) unless age is a bona fide occupational qualification reasonably necessary to the ordinary performance of the older employee's job. The reduction in wages must not exceed 10 per cent of the wages of the employee when that employee attains 60 years of age.

The Retirement Age Act affords protection to all employees with the exception of certain categories of persons who are listed in the Retirement Age (Exemption) Notification. The exempted groups of employees include the following:

- a person employed to work on any specific project for a fixed term;
- a person employed as a medical practitioner or dentist in any hospital under any contract for a fixed term;
- a person employed under any contract, made before 1 July 1993, for a fixed term of five years or less and the contract is not renewed upon its expiry after that date;
- a person who, not being a permanent resident of Singapore, is working in Singapore by virtue of a work permit issued by the Controller of Work Permits or by virtue of an Employment Pass or other pass issued by the Controller of Immigration;
- a person who, immediately before becoming a permanent resident in Singapore held an Employment Pass and was employed on a fixed term contract of service, and immediately after becoming a permanent resident, continues to be employed by the same employer on the same fixed term contract of service and any renewal thereof;

- a person employed in any employment for not more than 20 hours per week; and
- a student employed under any contract for a temporary term.
- Whistle-blowing in safety and health matters

The Workplace Safety and Health Act ('WSHA') is the primary legislation that governs workplace safety and health. It sets out, amongst others, the legal obligations of an employer insofar as the health and safety of its employees are concerned. The WSHA provides that an employer must not dismiss an employee on account of the following:

- the employee's assistance in safety and health-related matters and in the conduct of an inspection or investigation in relation to violations of the WSHA;
- the employee has sought assistance in relation to a safety and health matter;
- the employee's participation as a member of a safety and health committee; and
- the employee's compliance with remedial work order or stop-work order.

#### **4 Employees' entitlements on termination**

- Accrued wages and unused annual leave

All outstanding wages and payments in respect of accrued but unused annual leave (only statutory leave, unless contract specifies otherwise) up to the time of termination are payable.

- End of year payments

Where the employees are contractually entitled to an annual bonus, they will be entitled to a proportional payment thereof in respect of the year in which they are dismissed, **unless** the bonus is payable solely at the discretion of the company.

- Retirement benefit

The Act provides that any employee who has not been continuously employed by his employer for more than five years is not entitled to any retirement benefit. The Act does not, however, prescribe any retirement benefits which must be accorded to an employee. Hence, the provision of retirement benefits in the contract of service or collective agreement is a matter to be negotiated between the employee or the trade union and the employer.

- Retrenchment benefit

An employee who has been employed by for at least three years maybe paid a retrenchment benefit on the termination of his service on the grounds of redundancy or by reason of any reorganisation of the employer's profession, business or trade. The Act does not, however, create a legal obligation for any employer in Singapore to pay retrenchment benefits.

In *Bethlehem Singapore Pte Ltd v Ler Hock Seng* [1995], the Singapore Court of Appeal held that the Act's provision on payment of retrenchment benefit could not be read to imply that in the case of employees with more than three years' continuous service with an employer, there was legal compulsion on the employer to pay retrenchment benefits.

The ruling in the *Bethlehem* case was followed in *Loh Siok Wah v American International Co Ltd* [1999] where the Singapore High Court unequivocally stated that 'retrenchment benefits are usually given on a *ex-gratia* basis'. The Court further stressed that '[n]o matter how many times an employer may have given *ex-gratia* retrenchment benefits in previous retrenchment exercises, that per se does not give rise to any legal obligation to pay retrenchment benefits for the next exercise'.

Where a collective agreement or award makes provision for the payment of retirement benefits but does not make provision for the payment of benefits on the termination of the employee's contract if the employer ceases to carry on business, then the collective agreement or award will be deemed to include a provision that in the event the employer ceases to carry on business or transfers the whole or part of his undertaking or property, the employee if he ceases to be employed by reason of the above, shall be entitled to such sum of money as he would have been entitled to under the terms of the collective agreement or award.

As to non-unionised employees, the practice of some Singapore companies has been to pay non-unionised employees at the same rate as unionised employees.



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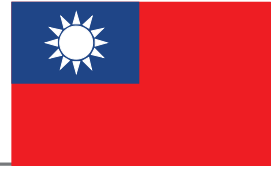
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# Taiwan



## Frequently asked questions by seller

**1 Is there a difference in treatment of employees in an asset transfer as opposed to sale of shares in the employing company?**

Yes, the employer may legally terminate employees in the case of an asset sale leading to a major business change; but may not in the case of a share transfer.

**2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so then please explain how it works.**

No, buyer will need to make separate arrangements with the employees it wishes to hire from the seller.

**3 What are the seller’s legal obligations on “transferring” its employees?**

Seller has no legal obligation to transfer its employees. Further, seller has no right to unilaterally transfer its employee against their wills. To transfer the employees, an employee transfer agreement to be entered into by the seller, buyer and employees themselves.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

No documentation is required, provided that the seller should timely transfer all labour / health insurance documents to the buyer for insurance transfer purposes.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

Yes, those employees who refuse to be transferred. The Taiwan Labour Standards Law (“LSL”) forbids unilateral transfer of employees by the seller, so that a transfer must be consummated through a three party employment transfer agreement.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

The seller has two options in the case of an asset sale leading to a major business change:

- terminate the employees pursuant to the LSL by giving prior notice and paying severance pay accordingly (the buyer will need to decide on whether it will employ them as newly hired employees or as employees with seniority carried over); or
- sign up an employee transfer agreement with the employees. In these circumstances will be the buyer who will bear the ultimate responsibilities for the employees.

**7 Does the seller’s employee have a right not to be transferred to the buyer?**

Yes, provided that in the case of an asset sale, the seller may terminate the employees pursuant to causes specified under the LSL, e.g. a major business change.

**8 What are the consequences if the seller gets it wrong?**

LSL forbids wrongful termination of employees and imposes administrative sanctions on an employer who terminates in violation of the law. Under the circumstances, the termination will not only be void but also the wronged employee may claim damages against the employer.

Frequently asked questions by buyer

**9 What information should a buyer ask for from the seller in relation to the seller’s employees?**

In the case of a share transfer no questions generally (as it will not change employees’ status), but in the case of an asset transfer, the buyer may need to consider the following:

- whether the seller may legally terminate the employees as a matter of law (because if it cannot, buyer then is not able to hire them);
- whether the seller, buyer and employees can agree on an employee transfer agreement (if they can, then they can effect a smooth employee transfer); and
- whether there are key employees who do not wish to continue employment with the buyer (if there are, buyer may not be able to continue the business due to loss of those key employee).

**10 Does the buyer have to recognise continuity of service of the seller's employees? If so for what purpose?**

Yes, in the case of a share transfer (because the LSL forbids termination under the circumstances); but No in all other cases unless it agrees to do so.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

- Buyer of a company shares is not able to terminate the seller's employees against their will.
- Seller of a company assets may not able to terminate the employees unless the sale leads to a major business change.
- Buyer may not be able to keep those valuable key employees unless an employee transfer agreement is entered into in the first place.



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# Thailand



## Frequently asked questions by seller

### **1 Is there a difference in the treatment of employees in an asset transfer as oppose to sale of shares in the employing company?**

Yes. In the case of share acquisition, the status of the employer and the employee still stays the same and only the shareholding structure will be changed. But, for asset transfer, in most cases the transfer of employees is one of the main issues for discussion. As a result, the condition of employment may change or this might involve the termination of employment with the seller and commencement of employment with the buyer.

The remainder of this FAQ deals with the “transfer” of employees in an asset transfer context.

### **2 Is there any legislation providing for the automatic “transfer” of employees from the seller to buyer in an asset sale situation? If so, please explain how it works.**

Yes. Section 13 of the Labour Protection Act B.E. 2541 (A.D. 1998) provides for the automatic transfer of the employment contract of employees from the seller to the buyer.

#### **Section 13** of the Labour Protection Act B.E. 2541 (A.D. 1998)

*“In case the employer of the business is changed due to a transfer, transmission by way of inheritance, or any other causes, or in the case where the employer is a juristic person and amends the registration, transfers, or merges with another juristic person, all rights belonging to the employee with the previous employer shall still continue to belong to the employee, and the new employer shall be liable for all the rights and duties relating to such employee.”*

The purpose of this Section is to protect the rights of employees who may not be in the position to know that they are being transferred from one company to another as part of the arrangement under an asset transfer.

Please note that according to Section 13, a buyer shall also be required to recognise an employees’ period of service.

**3 What are the seller's legal obligations on "transferring" its employees?**

There is no statutory obligation on the seller to consult with its employee prior to the transfer. If the employee agrees to continue its employment with the buyer, then the seller has no further obligations to the employee. However, if the employee objects to the transfer, then the seller has to pay severance pay, the amount of which will depend on the years of employment and other legal entitlements as it is deemed to be a termination of employment.

**4 What documentation is required to effect the transfer of employees from the seller to buyer?**

No documentation is required to effect the transfer of employees. In practice, it is unlikely that all benefits provided by the former employer will be exactly the same as provided by the new employer and, in order to avoid any future dispute after the transfer of employment, the employees who are selected for transfer will need to sign a letter of acceptance of the new terms and conditions of employment

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

The Act does not stipulate any particular type of employee whose employment may not be transferred, provided such employee may have specific conditions of employment with the former employer.

**6 What steps can a seller take to reduce its obligations to an employee who "transfers" to the buyer?**

Ordinarily, a seller has no obligations to an employee who transfers to the buyer if the employee accepts the transfer of employment. In case the employee rejects the transfer of employment then the seller has to pay severance pay. In order to avoid severance payment, the seller will try to negotiate with the buyer to offer better terms of employment so that the employee will accept the transfer.

**7 Does the seller's employee have a right to object to a transfer to the buyer?**

For an employee who refuses to join the buyer, it is unavoidable for the seller to terminate their employment. As a result, the seller shall be obliged to pay all legal entitlements provided by the Act which include severance pay, payment in lieu of unspent annual leave, payment in lieu of advance notice or any other benefits stated in each employment agreement in relation to the effect after termination.



**8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong, an employee may make a claim for unreasonable dismissal. This is explained in **Appendix 1**.

Frequently asked questions by buyer

**9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** which is a checklist of (related legal) information in relation to what a buyer should ask for from a seller in respect of its employees.

**10 Is the buyer required to recognise the continuity of service of the seller's employees and if so, for what purpose?**

By interpretation of Section 13 of the Act, once employees agree to the transfer of their employment, normally the buyer is required to recognise the continuity of the service of the seller's employees. According to the concept of a transfer of employment under the Thai labour law, their employment does not cease because of such transfer.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

A buyer needs to be aware of the provisions regarding severance payment. As the transferred employees will continue their employment with the buyer, their years of employment with the seller will continue to count. In case the buyer terminates the employment agreement with the transferred employee, this could trigger severance payment which could be quite high depending on the years of employment.

# Appendix 1 – Thailand

## Statutory requirements regarding termination of employment

### 1 Termination of a contract by giving notice

Under Section 17 of the Labour Protection Act B.E. 2541 (A.D. 1998) (the “Act”) for a contract with an indefinite period, either an employer or an employee may terminate the contract by sending a notice to the other party one month in advance.

The length of the notice period may vary depending upon the terms and conditions agreed between an employer and an employee. However, such period shall not be less than one month as referred to above.

### 2 Termination by giving payment in lieu of notice

Under the same Section 17 of the Act, should an employer want to avoid having to serve one month advance notice, the law allows the employer to give payment in lieu of advance notice of termination equivalent to the period of notice.

### 3 Employee's entitlement upon termination

- Accrued wages and unused annual leave  
All outstanding wages and payments in respect of accrued but unused annual leave (only leave, unless the contract specifies otherwise) up to the time of termination are payable.
- End of year payments  
Where the employees are contractually entitled to an annual bonus, they will be entitled to a proportional payment thereof in respect of the year in which they are dismissed, **unless** the bonus is payable solely at the discretion of the company.

- Severance payments

Except for cases in which the termination is “for cause”, an employee who is dismissed by an employer must be paid severance pay as follows:

Period of service	Benefit
At least 120 days, but less than one year	30 days of wages or salary
At least one year, but less than three years	90 days of wages or salary
At least three years, but less than six years	180 days of wages or salary
At least six years, but less than 10 years	240 days of wages or salary
At least 10 years or more	300 days of wages or salary

Those employed for a fixed period of not more than two years, particularly for a particular project that is not regular work; for occasional work with a definite end of project or achievement of work; or for seasonable work, do not qualify for severance pay.

- Long service payments

Long service payments are not covered by Thai law. However, some employers agree contractually to provide long service payments to employees.

#### 4 Employment protection under the Labour Relations Act B.E. 2518 (1975)

Labour disputes in connection with the conditions of employment issues are governed by the Labour Relations Act B.E. 2518 (1975) which establishes procedures for labour negotiations, mediation by the Department of Labour Protection and Welfare officials, or arbitration by the Labour Relations Committee.

Where the labour dispute arose for the condition of employment, the complaining party must serve written notice on the other. The disputed issues first go for amicable settlement through direct negotiation by duly authorised representatives of the employer and employee. If the settlement fails, then the dispute is referred to the Conciliation Officer who will mediate the dispute. If mediation fails, then the case will be arbitrated by one or more arbitrators. During such period the employer may effect a lockout or the employees may go on strike, subject to restrictions on some businesses, as mentioned in the Labour Relations Act.

## 5 Compensation for unfair dismissal

An employee may claim compensation for unfair dismissal. There is no provision to specify the formula for calculating such compensation. It is subject to the facts on a case by case basis.

The employee needs to prove that the ground for termination is unfair. The court shall determine all evidence and facts when judging whether such ground is reasonable. Thereafter, the court will consider various factors to decide the amount of compensation. The factors include age, occupation, length of service, etc.



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# United Arab Emirates



## Frequently asked questions by seller

### **1 Is there a difference in the treatment of employees in an asset transfer as oppose to sale of shares in the employing company?**

Yes. Subject to any express provisions to the contrary, an employee's employment contract would not have to be terminated in the event of a share sale, as effectively, the employer will remain the same (i.e. the same corporate entity will still be a party to the employment contract).

If an asset sale occurs, the contract of employment, in most cases, would have to be terminated, any benefits legally owing to the employee paid out / accrued (see below) and a new contract of employment would be entered into between the new owner and the employee. The arrangements for sponsorship of the employees for residence purposes will also need to be changed to reflect the transfer of the employee to the new entity. However, as explained below, it may be possible to obtain a "block exemption" to the transfer in certain circumstances that alleviates the practical steps involved in such process.

The remainder of this FAQ deals with the "transfer" of employees in an asset transfer context.

### **2 Is there any legislation providing for the automatic "transfer" of employees from the seller to buyer in an asset sale situation? If so, please explain how it works.**

No. By way of background, the employment of labour within the UAE is governed by UAE Law No. 8 of 1980 (as amended) (the "UAE Labour Law"). The UAE Labour Law does not provide for the automatic transfer of a contract of employment from a vendor to a purchaser in an asset sale situation.

### **3 What are the seller's legal obligations on "transferring" its employees?**

There are no such legal obligations on the seller in terms of "transferring" its employees. However, as set out in **Question 1** above, in the event of an asset sale, the seller could terminate the employees employment contract by giving the contractual notice period required (or a payment in lieu of notice) and paying the employees their contractual and statutory entitlements. See **Appendix 1** for further details of statutory obligations on termination of employment.

There is no statutory obligation on the seller to consult with its employee prior to terminating that employee's employment. The seller should, however, consider its contractual obligations in terms of internal policies on redundancy and termination, etc.

#### **4 What documentation is required to effect the transfer of employees from the seller to buyer?**

As mentioned above, there are no provisions in the UAE providing for an “automatic transfer” of employees. Depending on the employer’s obligations in the employment contract, the employer could serve written notice of termination of the employment contract on the employee, setting an effective date of termination. At the same time, the buyer could make an offer of employment to employee who will be transferred to the buyer (with the start date of the contract of employment with the buyer being the effective date of termination with the seller).

In the case of employees who are currently employed by an entity established in one of the free zones in Dubai (such as TECOM) the relevant free zone authority should be notified of the termination and the employee will be required to sign a form issued by the relevant free zone authority, which acknowledges that the employee has received all of his or her termination entitlements. The free zone authority will then arrange for the residence visa of the employee to be cancelled. Once this is effected the employee will have 30 days in which to leave the UAE.

In the case of an employee who is employed “onshore” in Dubai, the UAE Ministry of Labour (the “Labour Department”) will need to be notified and the employee will need to sign a similar acknowledgment to that described above, but issued by the Labour Department. The employer (rather than the free zone authority) will then arrange for the cancellation of the employee’s residence visa and the employee will have 30 days in which to leave the country after this has been cancelled.

In the case of employees transferring to a new employer established in the UAE, the employer (or in the case of a free zone company, the free zone authority) will need to obtain a new residence visa under the sponsorship of the new employer. This may be arranged so as to be completed before the 30 day period referred to above has expired, so that a transferring employee does not have to leave the UAE.

It should be noted in the case of employees who are transferring from an entity established onshore in Dubai to another entity established onshore in Dubai, that the default position is that the Labour Department will impose a six month ban on the employee being re-employed by another onshore entity for a period of six months. This will not apply if the employee is transferring to or from a free zone employer. Where the employee has been employed by the onshore entity for more than a period of one year and where the existing employer is willing to issue a letter of no objection, it is generally possible to avoid such a ban. An application can be made to the Dubai Immigration Department to obtain a block exemption to the ban, to take into account the fact that the business and assets of the seller are being transferred to the purchaser. Alternatively the seller could apply for the transfer of sponsorship to take place between the seller’s employees and the buyer’s employees on the grounds that the company’s assets are being sold, in which case the ban will not apply.

**5 Are there any particular types of employees whose employment may not be transferred by the seller?**

As mentioned above there are no provisions in the UAE Labour Law providing for the “automatic” transfer of employees. It should, however, be noted that an employee’s contract of employment cannot be terminated where the employee is on maternity leave, or who is off work on the grounds of deficient health. However, the UAE Labour Law allows an employer to terminate an employee’s employment contract if an employee is unable to resume his / her work after 90 days of being sick.

**6 What steps can a seller take to reduce its obligations to an employee who “transfers” to the buyer?**

All existing employees (other than UAE Nationals), whose contracts of employment are terminated, will have accrued rights to statutory severance pay if they have completed one year’s continuous service with their current employer (subject to the employment contract, unless the seller has a retirement or insurance scheme which is more to the employees’ advantage and the employee has opted to take this in lieu of their statutory gratuity payment). It may be possible, with the consent of each employee, to “roll over” their accrued benefits so that these will be paid by the new employer at the end of their period of service with that new employer as if the employee had been employed for the entire period by the new employer. We would normally recommend that the transferring employees sign an acknowledgment and waiver of their rights to claim severance pay at the time of the transfer in order to effect this roll-over. In the case of any employees who are not transferred, any accrued rights to statutory severance pay will be immediately payable on termination.

The seller should also consider whether or not the employee’s contract is for fixed terms or for an unlimited duration. If the employee’s contract is for a fixed term and the seller terminates the employee’s contract for the purposes of the transfer, the employer must compensate the worker in the amount of the residual period of the contract, up to three months of remuneration, whichever is the shorter.

Any employee who is an UAE national in the Emirate of Dubai, will be subject to UAE Federal Law No. 7 of 1999 for Pension and Social Security (the “Pension Law”). The Pension Law provides that an employer who employs an UAE national employee must participate in a pension scheme established by the General Pension and Social Security Authority and must register its UAE national employees in that scheme. These issues may need to be considered on an asset sale where it is proposed to transfer employees. The contribution levels are:

- the employer is obliged to pay 12.5% of the basic salary into the statutory scheme;
- the employee is obliged to pay 5% of the basic salary; and
- the government adds a further 2.5% contribution.



## **7 Does the seller's employee have a right to object to a transfer to the buyer?**

Yes. Where the employees do not wish to transfer to the buyer their contracts can be terminated in accordance with their contracts of employment and the minimum statutory requirements will apply. Dependant on the length of the employee's service, he / she will be entitled to statutory severance pay and any other entitlements under their contract of employment, for example, in addition, an employee may be entitled to:

- compensation for accrued annual leave not taken;
- salary, benefits and allowances up to and including the termination date; and
- repatriation costs.

## **8 What are the consequences if the seller gets it wrong?**

If the seller gets it wrong an employee may make a claim with the Labour Department who might order or direct the seller to make a payment. Such an action could result in the seller having difficulties with the Labour Department in terms of employing future employees.

### **Frequently asked questions by buyer**

## **9 What information should a buyer ask for from the seller in relation to the seller's employees?**

Please see **Appendix A** being a checklist of (legal related) information a buyer should ask for from a seller in respect of its employees.

The Labour Department requires that any expatriate employee seeking to obtain a work permit and residence visa must sign an employment contract in the prescribed form and register that contract with the Labour Department (the "Labour Department Contract"). However, it is common practice in cases of higher paid or managerial staff for the parties to enter into a separate, more detailed, contract. To an extent, the Labour Department permits any such additional terms to be added to the Labour Department Contract by way of an addendum. Any terms of a second or additional contract not incorporated in the Labour Department Contract by way of an addendum will only be enforced by a court in the UAE in so far as the additional terms and benefits are more favourable to the employee.

In December 2005, two pieces of legislation (UAE Law No. 1215 of 2005 and UAE Law No. 1216 of 2005) were passed, which introduced a standard form employment contract for use in the UAE by Employers who employ UAE nationals and other nationals of states forming the Gulf Cooperation Council.

**10 Is the buyer required to recognise the continuity of service of the seller's employees and if so, for what purpose?**

No.

Article 126 of the UAE Labour Law stipulates that the new employer must recognise an employee's continuous service where the form of the company changes (e.g. a company changes its form from a limited liability company to a public joint stock company). The purpose of this is so that calculation of an employee's end of service gratuity (and any other entitlements) will not be prejudiced.

**11 Are there any pitfalls specific to your jurisdiction that the buyer will need to be aware of?**

Given the absence of any equivalent "automatic" transfer of employee provisions in the UAE and the provisions of the UAE Labour Law in general there are a number of pitfalls that the buyer should be aware of. These are set out above and it is particularly important that the buyer carries out due diligence and includes specific contractual protections in the sale and purchase agreement such as appropriate warranties, indemnities and even the requirement for the seller to hold money in escrow to meet any potential liabilities.

# Appendix 1 – United Arab Emirates

## Statutory requirements regarding termination of employment

### **1 Termination of contract by notice**

During the probationary period (generally first 6 months of employment), the employer may terminate the employment contract with immediate effect without providing a valid reason or notice. In such cases, the employer will not be liable to pay the end of service benefits or compensation. When completed, the probation period is counted towards the employee's overall continuous period of service for the purpose of calculating end of service gratuity.

Under the UAE Labour Law the statutory notice period to terminate a worker's contract of employment, for a valid reason, is 30 days, in the case of unlimited term contracts. The statutory notice periods to terminate a contract of employment are:

- one week if the worker's length of service is more than six months but less than one year;
- two weeks if the worker's length of service is not less than one year; and
- one month if the worker's length of service is not less than five years.

### **2 Termination by payment in lieu of notice**

Alternatively, an employment contract can be terminated without notice by either party agreeing to pay to the other a sum equal to the amount of remuneration last received by the employee.

Remuneration is defined by the UAE Labour Law to include all payments made to the worker on a yearly, monthly, weekly, daily, hourly, piece work, or production or commission basis, in return for the work he performs under the contract of employment, whether such payments are made in cash or kind. Remuneration shall include the cost of living allowance. It shall also include any grant given to the worker as a reward for his honesty or efficiency if such amounts are provided for in the contract of employment or internal regulations of the establishment or have been granted by custom or common practice to such and extent that the workers of the establishment regard them as part of their remuneration and not as donations.

### 3 Employees' entitlements on termination

- *Accrued wages and unused annual leave*

All outstanding wages and payments in respect of accrued but unused annual leave (only statutory leave, unless contract specifies otherwise) up to the time of termination are payable.

- *Severance payments*

An employee who has been employed under a continuous contract for a period of continuous service that exceeds one year, the employee is entitled to gratuity of up to 21 days' basic wages for every year of the first five years of service and 30 days' basic wages for every year thereafter (provided the gratuity does not exceed two years' wages in total). The gratuity is calculated according to the last basic wage paid to the employee and is payable on the termination or expiry of the contract of employment.

Various factors can determine the amount of the gratuity. For example, an employee is not entitled to claim gratuity if: (i) the employee leaves in circumstance where there were grounds under the Labour Law for dismissal without notice, or (ii) the employee leaves before the expiry of a limited term contract (unless the employee has completed more than 5 years of continuous service). Further, if an employee terminates an unlimited term contract and has given the prescribed period of notice, he will be entitled to claim either one-third of the gratuity (if he / she has been working for that employer between one to three years), two-thirds of the gratuity (if he / she has been working for that employer between three and five years), or full gratuity (if he / she has been working for that employer over five years).

*Set-off against gratuity and retirement scheme payments:* Where the employee is entitled, pursuant to a clause in the contract of employment, to a gratuity under a retirement scheme / pension or savings scheme, which is in lieu of severance pay, the employee cannot claim both the gratuity under such a scheme and severance pay.

Because an employer may use contributions to a retirement scheme to off-set its liability to make statutory severance or long service pay, the buyer should consider whether it is possible to "transfer" or participate in the seller's retirement scheme. Whether it is possible to do so will depend on the particular type of scheme and the terms of the scheme. In addition the employer should ensure that the employment contract expressly states that the retirement / savings scheme is in lieu of any statutory gratuity entitlement that the employee might be entitled to (dependant on length of service).

- *Repatriation costs*

Article 131 of the UAE Labour Law makes it compulsory for an employer, upon terminating an employee's employment contract, to repatriate the employee to the place that he / she was recruited from, unless the employee is employed in the UAE



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## Appendix A – All Countries (excluding Taiwan)

Buyer's checklist of questions to ask in relation to employees

(Note: some questions may not be applicable to a particular country)

1. Employment arrangements		Comments
1.1	Obtain copies of recent organisation charts and a description of the management structure, including principal functional areas, headcount by area and reporting relationships. Identify the different arrangements (e.g. employment and independent contractors).	
1.2	[For UAE only] Ascertain whether the company is in a Dubai Free Zone or “onshore”, note that each Free Zone has its own laws (although most will comply with the UAE Labour Law).	
1.3	Check / confirm that the organisation is as stated.	
1.4	<p>List current personnel (including lists of officers and directors) with:</p> <ul style="list-style-type: none"> <li>• nationality;</li> <li>• position;</li> <li>• hire dates (if there have been previous transfers, dating back to the first day from which continuous service is considered to begin);</li> <li>• current monthly or annual salaries;</li> <li>• bonus and / or targets / payments (if applicable);</li> <li>• any other benefits / payments paid or to which the employee is entitled;</li> <li>• years of service with the company;</li> <li>• length of notice required to terminate the contract of employment (if applicable);</li> <li>• residency status;</li> <li>• location of work;</li> <li>• location of recruitment.</li> </ul>	

1.5	Obtain a copy of all employment (including any contracts registered with the Labour Department or any other relevant department) or employment-related contracts with current employees. Need to understand all employment-related commitments (e.g. including promises to employees whether verbal or written). Please be sure to include any severance agreements as a result of change in control issues.	
1.6	Obtain a copy of any industrial instrument (such as an award or workplace agreement) that applies (or may apply) to the employment of some or all of the employees.	
1.7	<p>Identify key individuals including directors, commissioners and senior management and obtain all relevant details such as:</p> <ul style="list-style-type: none"> <li>• nationality;</li> <li>• position;</li> <li>• personal details, e.g. name, age, qualification;</li> <li>• length of service;</li> <li>• current position and history or career with the firm;</li> <li>• terms of employment, current remuneration, participation in profit sharing, and other schemes or benefits;</li> <li>• restraint of trade and confidentiality obligations;</li> <li>• residency status;</li> <li>• pension / superannuation scheme details (if applicable).</li> </ul> <p>Obtain details of any material dependence of the company on key individuals and the likelihood and effect of their departure.</p>	
1.8	Ascertain whether there are any deferred compensation schemes in place for executives, triggered by change of employer, attaining a certain age or both. If so, obtain details.	



1.9	<p>Are there current and accurate personnel files on each employee including the following information:</p> <ul style="list-style-type: none"> <li>• contract of employment;</li> <li>• bank details;</li> <li>• addresses and contact details?</li> </ul>	
1.10	<p>What programmes exist for apprenticeships and trainees? Who administers the programmes? Does the company or a third party hire them? Who administers the training? Do the training / apprenticeship agreements or plans need to be registered? Have they been registered? Are any periodic training reports required?</p>	
2. Remuneration and benefits		Comments
2.1	<p>Detail how remuneration is set and adjusted for all level of management and staff. How are bonuses (if any) calculated? Are they truly discretionary?</p>	
2.2	<p>Are there are any anticipated remuneration increases for managers and staff (whether written or verbal) and if there are whether these are included in the cost of acquisition?</p>	
2.3	<p>How are benefits packaged? Is there a taxation component on such benefits? Is there any other benefit to the employees, or obligations of the employer not covered by Section 1.3 above?</p>	
2.4	<p>How are salaries / wages reviewed / increased? When / what is the process? Is it linked to performance of the individual or business?</p>	
2.5	<p>For International employees, please obtain a copy of the employment contracts. If contracts are not in English, please have translated. Again, are there any special severance agreements that might be triggered as the result of change in control issues?</p>	

2.6	<p>Are there any employees who are:</p> <ul style="list-style-type: none"> <li>• on long term sick leave;</li> <li>• pregnant;</li> <li>• on (paid or unpaid) leave of absence or sabbatical;</li> <li>• away for any other reason;</li> <li>• scheduled to or likely to be absent (e.g. because of pregnancy)?</li> </ul> <p>Obtain a list of all employees who are currently away on leave. Include leave reason, beginning date of leave, anticipated return date, and any other pertinent detail.</p>	
2.7	<p>Determine the total number of employees and total payroll costs. For each business line determine:</p> <ul style="list-style-type: none"> <li>• number of employees in each business line;</li> <li>• classifications of employees, salary, wages, age, length of service and estimated total payroll cost for each business line;</li> <li>• location of all employees; and</li> <li>• effective policies and procedures.</li> </ul>	
2.8	<p>Describe the payroll process including who processes (obtain company name if payroll processed externally) and frequency of paycheck (or cash?) distribution (list timeframes; i.e., monthly, every two weeks, on the 1st and 16th, etc.). Indicate the frequency and timing of same.</p>	

3. Policies and procedures		Comments
3.1	<p>Obtain copies of all existing employee policies, pay plans, employee handbooks or manuals including:</p> <ul style="list-style-type: none"> <li>• equal employment opportunity / anti-harassment and anti-discrimination;</li> <li>• performance review processes;</li> <li>• salary reviews;</li> <li>• employee assistance programmes;</li> </ul>	

- employee records and administration;
- work rules and regulations;
- education assistance policies;
- leave and entitlements;
- apprenticeships and traineeships;
- contractors;
- employee termination and resignation, including severance / redundancy policies;
- graduate programmes;
- grievance and discipline procedures; and
- any other internal announcements (if relevant).

4. Pensions / superannuation	Comments
<p>4.1 Outline what provisions are made for employees who may retire or leave the workforce which extend a liability to the employer. For example obtain copies of qualified retirement plans or provident fund regulation (if applicable) and to the extent relevant:</p> <ul style="list-style-type: none"> <li>• for <b>pension plans</b>, the most recent actuarial report showing assumptions; copies of all reports, applications or information filed with any government agency or distributed to plan participants and their beneficiaries, with respect to the welfare plans, pension plans, and the other foregoing plans;</li> <li>• <b>defined contribution plans and benefits</b>. Obtain details of its funded status and a copy of the trust deed or similar; and</li> <li>• <b>superannuation plans</b>. Obtain copies of deeds policies. Is there a legislated employer contribution?</li> <li>• [For UAE only] <b>UAE National Compulsory Pension Funds</b>. Obtain dates of subscription into the relevant Fund for each UAE National and the amount of contribution.</li> </ul>	

4.2	(If applicable) For defined contribution plans, indicate if the plan has any employer matching of contributions and the history of any “employer match” to date. If highly compensated employees have their contributions restricted, please indicate. Obtain the latest statements and financial reports.	
4.3	(If applicable) If there is a loan provision for employees to invest in pensions / superannuation, please indicate. Identify any employee or past employee who may have an outstanding loan.	
4.4	(If applicable) Obtain up-to-date actuarial reports on all pension / superannuation funds.	
4.5	<p>[For UAE only] Check the contracts of employment of expatriate employees and ensure that there are provisions that state that the pension scheme is in lieu of any statutory severance payment, so that the employee is not entitled to double claim.</p> <p>Note that an UAE National is not entitled to payments under the Compulsory Pension Fund as well as severance payment under the UAE Labour Law.</p>	

5. Insurances and health care plans		Comments
5.1	<p>Ascertain whether there are <b>employee welfare benefit plans</b> including:</p> <ul style="list-style-type: none"> <li>• medical, dental, optical;</li> <li>• dependent and elder care;</li> <li>• life insurance;</li> <li>• short and long-term disability;</li> <li>• business travel accident policy; and</li> <li>• social statutory insurance plans (National Health Insurance, National Pension Insurance, Workman’s Accident Insurance, and Unemployment Insurance).</li> </ul>	

	Obtain details, including plan documentation. Obtain underlying insurance policies. Is there adequate insurance coverage for the employee welfare benefit plans?	
5.2	Indicate when each of these welfare insurance plans is up for renewal.	
5.3	Obtain documentation relating to actual financial experience (claims experience, premiums paid, etc.) under the welfare benefit plans described above. If there are international locations, please obtain financial experience as appropriate.	
5.4	Identify any employee or plan beneficiary hospitalised on a long-term basis, receiving disability, workers compensation or similar payments and any outstanding issues. Obtain name, disability status, beginning of disability, anticipated end date, any outstanding liabilities / actions.	
5.5	Describe any unusual arrangements with employees including any health maintenance or preferred organisation participation or affirmative action plans. ([For UAE only] In the Emirate of Abu Dhabi health care for expatriates is compulsory. The Draft Labour Law, which should be implemented in December 2007, has provisions within it which will make health care compulsory for all expatriate workers in the UAE)	
5.6	Is there (compulsory) workers' or employees' compensation policies in place? Are there premiums associated with workers compensation (if applicable)? How are these calculated and who bears responsibility for payment? (Or in respect of New Zealand details of the Accident Compensation Corporation levies / discounts and any information that may indicate whether these will significantly alter when next reviewed.)	

6. Incentives and share plans		Comments
6.1	Obtain details of any incentive plan. If the incentive plan is for a select group of employees, indicate who is eligible. If there are multiple plans, list each separately and identify if an employee is eligible for more than one plan.	
6.2	If there is a profit-sharing plan, obtain details. Include a copy of the actual policy detailing eligibility, pay out requirements, pay out amounts, etc.	
6.3	If there is a stock option plan, indicate when options are granted (new hire, review time, promotions, discretionary, etc.). If you use a matrix for granting stock, please obtain. If it is a difference for international employees, please include details of eligibility / differences.	
6.4	With regard to executive stock options what happens to them post sale i.e. do they immediately vest, do they continue on foot, etc.?	
6.5	Is there a company-wide Stock Purchase Programme ("SPP")? If so, obtain the SPP plan document and indicate the purchase period time frames, cost to employee, etc.	
6.6	Is there a loan provision for stock option exercises? If so, indicate who is eligible.	
6.7	Is a specific broker used to process stock transactions and, if so, what are the commission rates charged? Is the same broker for international transactions? Does anything differ internationally?	

6.8	Obtain a description of any of the following programmes not indicated above, e.g. bonus, company car, housing and relocation, incentive plans, deferred compensation arrangements, jury duty, bereavement leave, personal time off, educational assistance policies.	
6.9	How are benefits funded?	
7. Leave, entitlements and liabilities		Comments
7.1	<p>Describe all vacation, sick pay, paid time off, holiday, sabbaticals, and other employment policies (to the extent relevant). For each, discuss eligibility and accrual rates, days accrued, and how they are monitored. If carry-over is allowed, please discuss and indicate maximum amounts allowed. Specifically consider (to the extent applicable):</p> <ul style="list-style-type: none"> <li>• annual / recreational leave and loadings?</li> <li>• sick leave?</li> <li>• personal or carers leave?</li> <li>• bereavement leave?</li> <li>• long service or sabbatical leave?</li> <li>• religious leave and holidays?</li> <li>• public holidays and entitlements?</li> <li>• parental leave (including paternal and adoption leave)?</li> <li>• rostered days off?</li> <li>• statutory leave plans (e.g. monthly leave, annual leave, maternity leave, weekly day-off and menstruation leave)?</li> <li>• other leave?</li> </ul>	
7.2	Obtain details on the provisions for such leave and their funding.	



8. Legislative environment		Comments
8.1	<p>Are there legislative requirements within the country in regard (but not limited) to:</p> <ul style="list-style-type: none"> <li>• superannuation or pension contributions and management?</li> <li>• contract of employment forms and processes?</li> <li>• employee details and privacy?</li> <li>• taxation obligations for employers?</li> <li>• fringe benefits / goods and services tax or similar taxes?</li> <li>• payroll tax / revenue taxes?</li> <li>• withholding tax?</li> <li>• workers compensation taxes / contributions?</li> <li>• taxation requirements for expats?</li> <li>• related reporting requirements?</li> </ul>	
8.2	<p>Are there legislative requirements within the country in regard (but not limited) to:</p> <ul style="list-style-type: none"> <li>• unions / collective labour relations? unions? right of entry / right to organise or collectively bargain? / political organisations?</li> <li>• are there specific registration requirements for employee / collective organisations? Are they to be registered? Endorsed by employees?</li> <li>• what are the jurisdiction or demarcation issues for such organisations?</li> <li>• are there obligations on an employer to deal with such organisations?</li> <li>• are there preference or right to work provisions?</li> <li>• disputes resolution and conciliation and arbitration? Are there binding / compulsory boards or tribunals? What precedence do they have? What judicial processes do they follow? Are they 'lay' or professional tribunals?</li> </ul>	

	<ul style="list-style-type: none"> <li>• are there laws on Equal Employment Opportunity, Anti-Discrimination or similar? What obligations do they extend?</li> <li>• what “right to strike” exists? What remedies are available to an employer?</li> <li>• what is the interplay between workplace health and safety and labour relations / industrial relations or similar rules?</li> <li>• are there employer associations / employer unions?</li> <li>• what underpinning of terms and conditions? Are there legal minimums? How are they set and / or enforced?</li> <li>• are there any specific compliance requirements for labour relations?</li> <li>• are there any transfer of employment / successor employer laws and requirements?</li> </ul> <p>Please outline and summarise / describe.</p>	
9. Labour relations / unions		Comments
9.1	Breakdown of union involvement and union membership in each business line.	
9.2	Identify what unions are represented in the industry and the general area and if there is any special organising effort going on in the area.	
9.3	Examine all union affiliations and relationships with unions generally.	
9.4	Obtain reports filed with any governmental agency relating to occupational safety and health issues for the prior two years.	
9.5	Can new industrial agreements be struck with unions as part of the purchaser’s acquisition strategy?	

9.6	Is there a likelihood of another union seeking coverage of the work? (If relevant) Have employees voted (do they wish) to join a union? When was the last election held?	
9.7	Identify any union contracts or agreements to which the company is a party and state whether the company is now, or in the past three years, a party to or a target for any collective bargaining agreement or organising activity.	
9.8	Review the industrial relations history for the past five years (e.g. dates, issues, duration and settlement terms).	
9.9	Collect details of any dispute, claim or litigation relating to the employment relationship made against the company in the last 6 years. In particular have there been any claims of unfair or unlawful dismissal, underpayments of wages, discrimination etc.	
9.10	Is there any litigation with regard to the above that is currently outstanding?	
9.11	With regard any outstanding grievances, claims, and litigation, collect details with regards to the type of remedies sought. E.g. Compensation claimed and their current status i.e. mediation etc.	
9.12	Collect details of any lost time, bans or limitations arising from industrial disputes including reasons and locations for the last 6 years.	
9.13	Collect details of any matters, which may shortly lead to industrial action or industrial dispute with any trade union, including complete details and copies of all relevant documents (for example, letters of demand from trade unions and copies of minutes of meetings with trade unions).	

10. Termination processes		Comments
10.1	What legal / agreement obligations exist in terms of severing employment contracts?	
10.2	Is there a formal discipline / discharge policy or practice in place?	
10.3	Are there notice periods or specific compensation required?	
10.4	What remedies, avenues or processes of appeal do employees have for termination?	
10.5	What exit interview processes are in place? What happens to this data?	
11. Redundancy / bulk terminations		Comments
11.1	What laws apply when terminating more than one individual? Are there minimum notice periods or compensation?	
11.2	Has there been any redundancies or reduction in numbers in the prior year? If so, how many employees were involved, their locations, and the benefits paid under each termination.	
11.3	Is there a redundancy agreement / scheme / policy? Has there been a precedent?	
12. Complaints, claims, etc.		Comments
12.1	List all complaints claims, lawsuits, arbitration's or other proceedings (including administrative and arbitrage proceedings and government agency investigations) which have been made, are pending or threatened against the company, any predecessor or any employee of the these companies (past and present) during the last 5 years. Show date of claims, persons involved and actual or expected outcome.	

12.2	List all employees who have left the company's employment in the last 2 years. List last position, length of service with the company prior to termination, any severance payments or liabilities incurred. Obtain it, including and excluding employees that have been terminated. If known, indicate whether or not employee took a position with a competitor.	
12.3	Identify any pending local, state or federal legislation or regulatory process, which might have a material adverse impact on the company's business, assets or customer relationships.	
13. Liabilities for entitlements to be carried over		Comments
13.1	How will employee entitlements be calculated and expressed for inclusion in purchase price discussions?	
13.2	What warranties or guarantees will be provided for incorrect or missing information?	
13.3	What is the cost impact to the Purchaser on offering terms 'no less favourable', to the acquired employees?	
13.4	Assess the financial impact, additional warranties, modified clauses etc. arising as a result of the due diligence.	
13.5	Have all business transition issues been resolved from previous business changes e.g. were employees paid out statutory severance pay and annual leave?	

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