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Asia Employment Law: Quarterly Review

2016-2017

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Asia's legal and human resources advisors are often required to function across multiple jurisdictions. Staying on top of employment-related legal developments is important but can be challenging.

To help keep you up to date, Mayer Brown JSM produces the **Asia Employment Law: Quarterly Review**, an e-publication covering 14 jurisdictions in Asia.

In this eighteenth edition, we flag and provide comment on anticipated employment law developments during the last quarter of 2017 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2018.

This publication is a result of ongoing cross-border collaboration between 14 law firms across Asia with whose lawyers Mayer Brown JSM has had the pleasure of working with closely for many years. For a list of contributing lawyers and law firms, please see the [contacts page](#).

We hope you find this edition useful.

With best regards,



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Building Code Changes Affecting Tenderers for Commonwealth-funded Building Work Take Effect

Changes to the federal legislation establishing the *Code for the Tendering and Performance of Building Work 2016* (the "**Code**") were rushed through Parliament early in the new year (*Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth)), followed by amendments to the Code itself.

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The changes implement new transitional rules for the requirements applicable to companies seeking to obtain work on federally-funded construction projects – in particular, the Code's imposition of limits on the content of enterprise agreements made between those companies and building industry unions. These limits are essentially aimed at removing union-friendly agreement clauses, or provisions which impede efficiency or productivity.

The effect of the transitional rules is to require tenderers for Commonwealth-funded work to have in place enterprise agreements compliant with the Code by 1 September 2017; and to require a Code-compliant agreement in order for a company to be awarded a tender before that date (subject to a number of exemptions which vary depending on when the relevant enterprise agreement was made and when the company submitted its tender).

[More...](#)

Fair Work Commission Reduces Penalty Rates in Retail and Hospitality Awards

In a highly controversial decision (*4-Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001), a Full Bench of the Fair Work Commission (**FWC**) determined that Sunday and public holiday penalty rates for employees covered by six modern awards should be reduced.

The relevant awards apply to industries including fast food, retail, hospitality and pharmacies. Employers in these industries will be able to apply the lower penalty rates once the applicable transitional and phase-in arrangements have been decided on by the FWC – unless an employer has entered into an enterprise agreement (in which case the relevant modern award does not apply).

Penalty rates for work on weekends and public holidays, and for working other anti-social hours, have long been a subject of contest and debate in the Australian workplace relations system. While they are an established feature of employment in certain industries, penalty rates have come under challenge in recent years with the shift to 24-7 operations in businesses and the service economy.

The FWC Full Bench's decision has triggered significant political debate with the Government essentially supporting the outcome as a positive one for business, and a decision of an independent arbiter that should be respected. Opposition parties and the union movement have strongly condemned the decision and are seeking to override it through legislation which is unlikely to be passed by Parliament.

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Federal Court Clarifies Interaction of Leave Entitlements and Public Holidays

In *Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Limited* [2017] FCAFC 35, the Federal Court of Australia confirmed that certain provisions contained in the National Employment Standards (**NES**) regarding the taking of annual and personal/carer's leave on public holidays are concerned only with employees' entitlements to such leave arising under the NES.

Specifically, the Court had to consider whether an employer has the right to make a deduction from an employee's annual or personal/carer's leave entitlement when the relevant leave occurs on a public holiday. An employer does not have such a right when the leave entitlement derives from the NES, which provides employees with a minimum of four weeks' paid annual leave and 10 days' personal/carer's leave per year.

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However, according to the majority judgment in *Glendell*, that restriction does not apply in respect of any additional leave the employer may provide (for example, under an applicable award or enterprise agreement). In this case, where the employer provided up to six weeks' annual leave and 15 days' personal carer's leave, it was entitled to make deductions from the additional period of leave where it coincided with a public holiday.

Legislation to Protect Vulnerable Workers Introduced into Federal Parliament

Revelations of systemic breaches of workplace laws in a number of major franchise businesses, including the widely reported investigation by the Fair Work Ombudsman (**FWO**) into the 7-Eleven franchise in 2016, generated significant public concern. They also prompted calls for Australia's workplace laws to be amended to increase the responsibility of franchisors to monitor and take action in relation to activities occurring within their business networks.

In response, the Coalition Government introduced into Parliament the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*. The Bill proposes to introduce a number of amendments to the *Fair Work Act 2009* (Cth) (**FW Act**), implementing the Coalition's 2016 election policy to address underpayments and other forms of exploitation identified in various inquiries by the FWO and federal and state parliamentary committees. The most significant changes proposed by the Bill include:

- The introduction of higher civil penalties for 'serious contraventions' of prescribed workplace laws (e.g. underpayment of award wages), to address concerns that civil penalties under the FW Act are currently too low to effectively deter employers who exploit vulnerable workers. The maximum penalties for serious contraventions will be A\$540,000 for a corporation.
- Clarifying and increasing the applicable penalties for provisions relating to the failure by employers to maintain accurate employee records and payslips.
- Expressly prohibiting 'cash-back' arrangements through which employers unreasonably require their employees to make certain payments.
- Strengthening the evidence-gathering powers of the FWO and introducing new offences for hindering or obstructing investigations, or providing false or misleading information to the regulator.
- Making franchisors and holding companies responsible for contraventions of certain workplace laws by their franchisees or subsidiaries, where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them.

Bill Introduced to Clarify Rules on Bargaining Notices and End 4-Yearly Reviews of Modern Awards

The Government has introduced into Parliament the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017*, which addresses two recommendations of the Productivity Commission's 2015 Workplace Relations Review. The Bill proposes to:

- Repeal, from 1 January 2018, the FW Act requirement that the FWC carry out reviews of all modern awards every four years. This is because the 4-yearly review process has placed substantial demands on all industrial relations parties, and has proven to be very resource-intensive for the FWC as well. Instead, new provisions would apply to enable changes to a modern award to be sought by parties and made by the FWC, based on social and economic necessity.
- Allowing the FWC to overlook minor procedural or technical errors when approving an enterprise agreement, where those errors are not likely to have resulted in any disadvantage to employees. For example, where technical errors have been made in the content of the Notice of Representational Rights which must be issued to employees at the commencement of bargaining, this should not prevent the ultimate approval of an agreement by the FWC (if the defect in the Notice had no relevant effect on the information being communicated to employees). This is intended to overcome the effect of numerous FWC and court decisions in which defective Notices, or other technical problems in the agreement-making process, have led to non-approval of agreements and the parties having to re-commence the bargaining process.

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New Queensland Industrial Relations Legislation Commences Operation

Extensive reforms to the state industrial laws in Queensland have taken effect. The *Industrial Relations Act 2016* (Qld) repeals and replaces previous legislation, introducing new rules relating to collective bargaining, minimum employment conditions and protections for employees against adverse treatment and workplace bullying.

Most provisions of the new legislation apply only to state government departments/agencies and local government authorities within Queensland. The new employment conditions include 10 days' paid domestic and family violence leave, a claim being sought by many unions in public sector bargaining and some parts of the private sector across Australia.

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Government Responds to Trade Unions Royal Commission with Legislation Banning Corrupt Payments

The *Fair Work Amendment (Corrupting Benefits) Bill 2017* seeks to implement a number of key recommendations of the 2015 Royal Commission into Trade Union Governance and Corruption. The Bill will create the following new criminal offences under the FW Act:

- Giving a registered organisation (i.e. trade union or employer association registered under federal law) or a person associated with a registered organisation a 'corrupting benefit' (e.g. a benefit intended to influence an individual improperly);
- Receiving or soliciting a corrupting benefit;
- An employer providing, offering or promising to provide any cash or in kind payment to a union or certain defined beneficiaries (other than legitimate payments, e.g. authorised deductions of union membership fees);
- Soliciting, receiving, obtaining or agreeing to obtain a prohibited payment.

The proposed maximum penalties for some of these offences are fines of up to A\$900,000 and/or 10 years' imprisonment for an individual, and fines of up to A\$4.5 million for an organisation. These very strong penalties are aimed at preventing situations, such as those considered by the Royal Commission, in which employers have secretly transferred large amounts of money to unions or their officials (in some instances to ensure 'industrial peace' for a period of time).

In addition, the Bill proposes to introduce new requirements that employers, employer organisations and unions must disclose any financial benefits that they would obtain under a proposed enterprise agreement (backed up by civil penalties). These requirements are intended to ensure that employees who will be covered by an agreement are aware of any financial transactions between the negotiating parties when they vote on the agreement.

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Fair Work Commission Overturns Approval of Enterprise Agreement

In *SDAEA v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery* [2017] FWCFB 1664, a Full Bench of the Fair Work Commission (**FWC**) upheld the union's appeal against approval of an enterprise agreement. The overturning of the decision centred on an undertaking given by the employer to ensure reconciliation of any shortfall in payment under the agreement compared with the underpinning award.

The Full Bench's concern was that the undertaking did not sufficiently address the failure of the agreement to comply with the 'better off overall test', which measures terms and conditions under a proposed agreement with those in the applicable award. In particular, the Full Bench considered that the undertaking relied upon by an employee taking issue with the employer about any potential discrepancy in payment, and sought to implement an uncertain and possibly lengthy process for resolving such a discrepancy.

The decision highlights the ongoing difficulties for employers in ensuring that enterprise agreements are approved by the FWC, in circumstances where pay rates and other terms and conditions are at or close to the relevant award.

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Labour Hire Licensing Legislation Introduced in Queensland

The Queensland Government introduced the Labour Hire Licensing Bill into state Parliament. This legislation would implement a licensing scheme for all labour hire providers in Queensland, requiring them to obtain a licence – subject to a rigorous ‘fit and proper person’ test and detailed licensing standards to ensure they comply with workplace, safety and other laws. Users of labour hire services would be required to engage only a licensed provider. Substantial fines would apply to non-compliance with these new legal obligations.

This initiative of the Queensland Government is a response to inquiries held in that state, Victoria and South Australia in 2016, which identified evidence of widespread underpayment and other forms of exploitation of vulnerable workers – especially migrant workers in the horticultural industry. It is expected that labour hire licensing schemes will also be introduced in Victoria and SA later this year.

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Full Federal Court Clarifies Union Right of Entry for Safety Purposes

In *ABCC v Powell* [2017] FCAFC 89, the Full Court of the Federal Court determined that a union official who was called onto a construction site to assist a health and safety representative, under Victorian OHS legislation, was required to comply with the conditions attaching to right of entry under federal law – in particular, the official needed to have and produce a federal right of entry permit. The Full Court found that attending the worksite to assist the safety representative was a form of ‘entry’ to which the strict requirements of Part 3-4 of the *Fair Work Act 2009* (Cth) attached.

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Penalty Rate Reductions – Transitional Phase-In Determined by Fair Work Commission

Following its 23 February decision to reduce award penalty rates in the retail, restaurant, hospitality and fast food sectors (see above), a Full Bench of the FWC has clarified the phase-in arrangements for reductions to Sunday penalty rates. These cuts will be implemented gradually over a four-year period from 1 July 2017: *4-Yearly Review of Modern Awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001.

For example, for a full-time employee covered by the retail award, the Sunday penalty rate will be reduced from 200% to 195% on 1 July 2017; then to 180% on 1 July 2018; then to 165% on 1 July 2019; and finally to 150% on 1 July 2020. For the full schedule of Sunday penalty rate reductions across all relevant awards, go to this link on the FWC website.

However, a judicial review application has been brought by two unions covering retail and hospitality workers, seeking to challenge the FWC Full Bench’s original February decision. The case will be heard in the Federal Court in coming months, and if successful would jeopardise the legality of any penalty rate reductions implemented by employers from 1 July 2017.

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Australian Minimum Wage Increased by 3.3%

The Full Bench of the FWC conducting the Annual Wage Review decided to increase the national minimum wage and award minimum wages by 3.3% from 1 July 2017: *Annual Wage Review 2016-17* [2017] FWCFB 3500. As a result, the minimum wage has risen from A\$17.70 to A\$18.29 per hour, or A\$672.70 to A\$694.90 per week (based on a 38-hour week for a full-time employee). The wage increases apply to approximately 2.3 million Australian employees.

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Increase to Unfair Dismissal High Income Threshold and Maximum Remedies

On 1 July 2017 the high income threshold increased to \$142,000 from \$138,900. This means that an employee who was dismissed after 1 July 2017 can only bring an unfair dismissal application if their annual income is less than \$142,000 (unless they are covered by a modern award or an enterprise agreement or other enterprise instrument). This figure is adjusted annually on 1 July.

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This change also affects the cap of compensation awarded for an unfair dismissal claim. This is because the compensation cap is the lesser of:

- The amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal; or
- Half the amount of the high income threshold immediately before the dismissal (\$71,000).

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Corrupting Benefits Legislation Amends the Fair Work Act

Federal Parliament passed the *Fair Work Amendment (Corrupting Benefits) Bill 2017 to amend the Fair Work Act 2009 (Cth)*. The amendments introduce a range of criminal offences relating to various types of ‘corrupting benefits’ under new Part 3-7 of the Fair Work Act. The new criminal offences include the dishonest giving, receiving or soliciting of a corrupt benefit. This includes a benefit with the intention of influencing an officer or employee of a registered organisation (i.e. union or employer association) in the exercise of their functions, or to gain an advantage for the person providing the benefit.

There is also a new requirement for employers and unions to disclose to employees any ‘beneficial terms’ (for a union) under a proposed enterprise agreement. The amendments implement recommendations of the Royal Commission into Trade Union Governance and Corruption aimed at prohibiting ‘sweetheart deals’ between unions and employers, including enterprise agreements under which some unions obtained organisational benefits while agreeing to outcomes that were detrimental to employees.

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Federal Parliament Passes Legislation to Protect Vulnerable Workers

Federal Parliament passed the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* to amend the *Fair Work Act 2009 (Cth)*. Amendments seek to protect vulnerable workers, such as migrant workers and those in the franchise sector. Key measures include higher penalties for ‘serious contraventions’ of workplace laws, with the maximum penalty increased by ten times to \$630,000 for contraventions by corporations. The Fair Work Ombudsman has additional powers to investigate contraventions and gather evidence. The amendments also specifically target ‘cash-back’ arrangements, which is where an employer directly or indirectly requires an employee to spend, or pay the employer or another person, an amount of money or part of the employee’s wage for the benefit of the employer.

Another key feature is that the amendments extend liability for franchisors and holding companies where they knew or could reasonably have been expected to know that a contravention was occurring. There is also increased penalties for record-keeping failures and a reverse onus of proof on employers when record-keeping requirements have not been met. This presumption will not apply where the employer provides a *reasonable excuse* as to why records had not been kept. The amendments respond to community concern about the exploitation of vulnerable workers and recent underpayments scandals.

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Government Introduces Legislation to Regulate Union “Worker Benefit” Funds

Forming part of the Coalition Government’s response to the 2015 Final Report of the Royal Commission into Trade Union Governance and Corruption, the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill* would implement governance and financial reporting requirements for worker entitlement funds such as redundancy, training and welfare funds.

Worker entitlement funds will have to be registered, subject to strict registration standards relating to equal treatment of members, independence and financial propriety/liquidity. Criminal offences will apply to the operation of unregistered funds in breach of the new requirements.

In addition, modern awards and enterprise agreements will be precluded from making provision for payments to unregistered worker entitlement funds.

The Bill responds to the Royal Commission’s findings that the operation of separate entities or ‘slush funds’ by many Australian unions is largely unregulated by existing federal, state and territory laws.

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Queensland became the second Australian jurisdiction to introduce legislation creating criminal offences relating to industrial manslaughter (following the Australian Capital Territory's 2004 industrial manslaughter statute).

Under the *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld), a person conducting a business or undertaking (PCBU) and/or a senior officer of a corporation may be liable for one of the new offences, when a worker dies (or is injured and later dies) in the course of carrying out work; and the PCBU/senior officer's conduct, by act or omission, causes the worker's death or they were negligent about causing that death.

The maximum penalties for breaches of the relevant offences are a fine of up to A\$10 million for a PCBU, and up to 20 years' imprisonment for a senior officer.

[More...](#)**Federal Court Places Limits on Employers' "Small Cohort" Bargaining Strategy**

Many Australian employers in recent years have entered into enterprise agreements with small numbers of employees, but which are expressed to apply subsequently to a much larger workforce in other parts of the relevant employer's business. This approach has been upheld as legitimate in many court and tribunal decisions.

However in *CFMEU v One Key Workforce Pty Ltd* [2017] HCA 1266, the Federal Court has imposed some limits on the "small cohort strategy" by finding that an agreement voted up by three employees – which was expressed to apply to any employees covered by one of 11 specified awards – should not have been approved by the Fair Work Commission (Commission).

The Court held that the Commission did not have jurisdiction under the *Fair Work Act 2009* (Cth) (FW Act) to approve the agreement because the employer had not obtained the 'genuine agreement' of employees who would be covered by it; and had not taken 'all reasonable steps' to explain the terms of the agreement to the employees who voted on it.

The employer had engaged more than 1000 additional workers under the agreement within six months of the vote. In these circumstances, the agreement of only the initial three employees could not be considered genuine. Rather, the employer's process was intended to preclude genuine bargaining.

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High Court Enables Employers to Make Enterprise Agreement for New Undertaking with Existing Employees

In *Aldi Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53, the High Court of Australia determined that an employer may make an agreement for a new part of its business with existing employees engaged in another part of the business.

The employer here had made an agreement to apply to a new distribution centre, with employees already working under another agreement in some of its other distribution centres. The Court found that the employees 'covered by the agreement', and therefore able to vote on it under the FW Act, were those employees who would ultimately work at the new centre after its construction.

The decision means that an employer can make an agreement for what might usually be considered a 'greenfields' site, without having to negotiate with a union or unions that may have coverage rights over the relevant employees (as would be required for a greenfields enterprise agreement under the FW Act).

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High Court Imposes Restriction on Protected Industrial Action

In *Eso Australia Pty Ltd v Australian Workers' Union* [2017] HCA 54, the High Court decided that a party to agreement negotiations may not lawfully engage in industrial action where it has previously breached a court or tribunal order relating to the bargaining (it was not necessary for the relevant order to be continuing in operation to make the party ineligible to take protected industrial action).

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Here, the union had breached an order made by the Commission under section 418 of the FW Act requiring industrial action (affecting the company's Longford gas plant and Bass Strait platforms) to stop. At a later stage of the negotiations, after the effect of the order had ceased, the union again sought to take protected industrial action. The employer sought a court declaration that the later industrial action was not protected due to section 413(5) of the FW Act, which provides that a person 'must not have contravened' any court/tribunal orders relating to the bargaining. The High Court upheld that interpretation, and also found that the relevant industrial action constituted unlawful coercion under the FW Act.

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Whistleblower Protection Bill Introduced into Federal Parliament

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill was introduced by the federal Government on 7 December 2017. It seeks to implement a new framework for the protection of persons making disclosures about misconduct within private sector organisations. The Government intends the new whistleblower protections to commence operation on 1 July 2018.

Eligible whistleblowers will not be made subject to civil, criminal or administrative liability where they have made disclosures in relation to various types of regulated entities (e.g. companies/entities regulated by federal corporations, banking, insurance and superannuation legislation).

Disclosures will have to be made to one of a defined list of eligible recipients (e.g. officers or auditors of a corporation), and 'emergency disclosures' may be made to politicians or the media in cases of imminent risk of serious danger to public health or safety or the financial system.

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Circular of the Ministry of Human Resources and Social Security and the Ministry of Finance on Matters Relating to the Transfer and Continuation of Basic Endowment Insurance Relations and Occupational Annuities of Organisations and Public Institutions

On January, 12 2017, the Ministry of Human Resources and Social Security and the Ministry of Finance issued the Circular on Matters Relating to the Transfer and Continuation of Basic Endowment Insurance Relations and Occupational Annuities of Organisations and Public Institutions (the "Circular"). Since commencement on October 1, 2014, the Circular makes arrangements with regard to matters such as the transfer and continuation of basic endowment insurance, parameters for calculation and payment of benefits, handling of multiple endowment insurance, and the transfer and continuation of occupational annuities. The Circular provides that, where an insured employee moves between organisations and public institutions within an area under the same planning zone for basic endowment insurance, only his or her endowment insurance needs to be transferred, funds do not need to be transferred. Where an insured employee moves from an organisation or public institution to an enterprise, the funds need to be transferred together with the basic endowment insurance. Where an insured employee moves between the organisations and public institutions within areas under different planning zone for basic endowment insurance, or from an organisation or public institution to an enterprise, the deposits of individual contributions included in his or her individual account for basic endowment insurance shall be transferred in full; and the contributions made by his or her employer shall be transferred at the rate of 12% of the total sum, using the actual annual wages for payment by individuals after annual review as the base, if the payment period is less than one year, the percentage of payment to be transferred shall be calculated according to the number of months contributions were made.

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Circular of the General Office of the Ministry of Human Resources and Social Security on Implementing the Agreement on Social Security between China And Finland

The Ministry of Human Resources and Social Security ("MOHRSS") has issued the Circular on Implementing the Agreement on Social Security between China and Finland (the "Circular"), clearly states that the Agreement on Social Security between the Government of the People's Republic of China and the Government of the Republic of Finland (the "Agreement") entered into force as of February 1, 2017. According to the Circular, the Agreement includes the scope of reciprocally exempted insurances, Chinese individuals eligible to relevant exempted social insurance contributions in Finland, Finland individuals eligible to relevant exempted social insurance contributions in China, the duration for the exemption of social insurance contributions, and other contents. In particular, the scope of reciprocally exempted insurances includes the basic endowment insurance and unemployment insurance for employees in China; and the annuity and unemployment insurance for the aged, the disabled and members of the deceased employees under the annuity plan relating to incomes in Finland, involving such personnel as follows: 1. dispatched personnel; 2. self-employed individuals; 3. employees working on sea-going vessels; 4. flight crew employed on board aircraft; 5. diplomatic personnel, consular officers and civil servants; and 6. exceptions. The duration, for the dispatched personnel and self-employed individuals who apply for an exemption for the first time, may last up to five years. In addition, the Circular also provides for administrative measures for exemption of relevant social insurance contributions permitted under the Agreement.

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The Ministry of Human Resources and Social Security and the Ministry of Finance issued the Circular on Issues concerning Reduction of Unemployment Insurance Premium Rate in

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phases (the "Circular") on February 16 2017. The Circular contains the following provisions. Firstly, provinces (autonomous regions or municipalities) where the overall unemployment insurance premium rate is 1.5%, are allowed to reduce such overall premium rate to 1% from January 1, 2017, and the premium rate reduction shall be in force until April 30, 2018. The respective premium rate applicable to entities and individuals shall be harmonized across the relevant province (autonomous region or municipality), and the rate at which the premium is paid by individuals shall not be higher than that paid by entities. Specific plans shall be researched and determined respectively by each province (autonomous region or municipality). Secondly, provinces where the overall unemployment insurance premium rate which has already been lowered to 1% shall still be subject to the Circular of the Ministry of Human Resources and Social Security and the Ministry of Finance on Periodically Reducing Social Insurance Payment Rates. Thirdly, all places are required to take into full account the impacts on the payment capacity of the fund exerted by certain factors, such as the payment of unemployment insurance benefits in full and on time, raised benefits of unemployment insurance, promotion of reemployment for the unemployed, implementation of the policy on the employment stabilizing subsidy from the unemployment insurance fund, and making specific plans which shall not be in force until approved by the provincial government. These are required to be submitted to the Ministry of Human Resources and Social Security and the Ministry of Finance for record.

[More...](#)

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Rules for Handling Arbitration Cases Involving Labor and Personnel Disputes

On 8 May 2017, the Ministry of Human Resources and Social Security ("MOHRSS") issued the Rules for Handling Arbitration Cases Involving Labor and Personnel Disputes (the "Rules"). The Rules shall enter into force as of July 1, 2017. The previous Rules for Handling Arbitration Cases Involving Labor and Personnel Disputes (Order of the MOHRSS No.2) released by the MOHRSS on January 1, 2009 shall be repealed at the same time.

The Rules, comprised of five chapters with a total of 81 articles, provide for applications for arbitral proceedings and acceptance thereof, hearing and rendering arbitration awards, summary adjudication, and procedures for handling cases involving collective labor disputes, and mediation procedures.

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Opinions of the Ministry of Human Resources and Social Security and the Supreme People's Court on Strengthening the Setting up of a Mechanism for Connecting the Arbitration and Litigations of Labor and Personnel Disputes

On November 8 2017, the Ministry of Human Resources and Social Security and the Supreme People's Court issued Opinions on Strengthening the Setting up of a Mechanism for Connecting the Arbitration and Litigations of Labor and Personnel Disputes (the "Opinions"). The Opinions call for gradually unifying the acceptance scope and standards on the governing law for arbitration and lawsuits, particularly, the acceptance scope for cases involving disputes over the social insurance and personnel affairs. Meanwhile, the Opinions set out the need to standardize the connection between the acceptance, property preservation, and execution in respect of cases involving labor and personnel disputes. Moreover, the Opinions clearly specify that, in case that the difficulty in executing an arbitration award is likely to arise as a result of the employer's efforts in transferring and hiding its property when the arbitration is under way, the arbitration committee shall notify the laborer of the opportunity of applying through the arbitral authority to the people's court for preserving the employer's property. Furthermore, the Opinions call for establishing and improving the system for access to case files and conducting effective administration of accessing case files for inspection; the people's courts are required to strengthen the execution of arbitration awards issued by arbitral authorities and mediation agreements, and to step up their efforts to execute decisions of cases involving disputes over labor remuneration and benefits under the work-related injury insurance, particularly collective disputes over labor and personnel affairs.

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Regulations on Unemployment Insurance (Revised Draft for Comment)

On November 10 2017, the Ministry of Human Resources and Social Security issued the Regulations on Unemployment Insurance (Revised Draft for Comment) (the "Draft for Comment") for public consultation by December 10, 2017. Encompassing 34 articles in six chapters, the Draft for Comment introduces amendments in eight respects, compared with the existing Regulations. To be specific, the Draft for Comment improves functions of the unemployment insurance regime, widens the scope of application, reduces the rate of unemployment insurance contributions, enables the fund to be paid for a larger scope of affairs, raises the level of unemployment protection, brings more beneficiaries under the unemployment insurance, unifies methods for migrant workers and urban employees to participate in such insurance, and betters the supervisory and administrative system. In particular, the entities and individuals eligible for the unemployment insurance will cover "enterprises, public institutions, social groups, private unincorporated entities, foundations, law firms, accounting firms, and other types of organizations as well as employees thereof", broader than the previous scope that only covers "urban enterprises and public institutions as well as employees thereof", according to the Draft for Comment; meanwhile, the 3 percent fixed rate is adjusted to be a floating rate of up to 2 percent.

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Promulgation of Code of Practice for Employment Agencies

The Labour Department (the “**LD**”) has promulgated the Code of Practice for Employment Agencies (the “**CoP**”) and launched an Employment Agencies Portal (the “**Portal**”) on 13 January 2017.

The CoP lists out the salient statutory requirements which all employment agencies must observe, in particular, the requirements under the Employment Ordinance (Cap. 57), the Employment Agency Regulations (Cap. 57A), the Immigration Ordinance (Cap. 115) and the Personal Data (Privacy) Ordinance (Cap. 486). It also sets out the minimum standards which the Commissioner for Labour (the “**Commissioner**”) expects from employment agency licensees, such as maintaining transparency in business operations, drawing up service agreements with job-seekers and employers and display of licences. When considering whether a person is a fit and proper person to operate an employment agency, the Commissioner will take into account whether a licensee has met or an applicant can meet these standards.

Compliance with the CoP is monitored by the Employment Agencies Administration of the LD, which has the power to issue warning letters to employment agencies for rectification of any irregularities. An unsatisfactory track record may also affect the Commissioner’s decision of revoking, or refusing to grant or renew employment agency licences.

Under the laws of Hong Kong, all employment agencies are required to obtain a licence or Certificate of Exemption from the Commissioner before undertaking any job placement business.

*Press Release
The CoP*

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Proposed Abolition of Mandatory Provident Fund (“MPF”) Offsetting in the 2017 Policy Address

At present, an employer who is liable to pay an employee severance payment (“**SP**”) or long service payment (“**LSP**”) under the Employment Ordinance, can offset the SP or LSP with the accrued benefits derived from the employer’s contributions made to an MPF scheme for the employee.

The Chief Executive has in the 2017 Policy Address proposed to progressively abolish the “offsetting” of SP or LSP systems with MPF contributions. The proposal contains 3 elements.

- The abolition will have no retrospective effect and employers will be allowed to offset before a specified implementation date;
- The amount of SP or LSP payable for an employment period from the implementation date will be adjusted downwards from two-thirds to half of an employee’s monthly pay; and
- The Government will share part of the expenditure of SP or LSP of employers in the 10 years after the implementation date.

Following the abolition, the Government’s next target is to develop an electronic system to facilitate the standardisation and automation of the MPF scheme administration.

No immediate action is required as it is unlikely that the MPF offsetting mechanism will be abolished this year, due to the time required for public consultation and legislative amendments. Nevertheless, employers should note the proposal and its subsequent developments.

*Press Release
The 2017 Policy Address*

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Domestic Helper Wins Lawsuit against Employers for Sex Discrimination over Pregnancy Test

In the Hong Kong District Court decision of *Walayah v. Yip Hoi Sun Terence and Chan Man Hong* (DCEO 1/2015 & DCCJ 1041/2015), a domestic helper succeeded in her claim for sex and pregnancy discrimination against her former employer and his wife who had asked her
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to take a pregnancy test and then terminated her employment after her pregnancy was confirmed.

Facts

The two respondents, R1 and R2, were husband and wife. The claimant ("C") was employed by R1 as a live-in maid. In October 2013, R2 (i.e., the wife) asked C to urinate into a potty for the purpose of a home-pregnancy test as it was observed that C's tummy was growing big. C took part in the test voluntarily as she was eager to know whether she was in fact pregnant. The pregnancy test indicated a positive result. R2 then took C to the hospital where C's pregnancy was confirmed and they considered C should undergo an abortion.

A couple of days after the pregnancy was confirmed, R1 gave C one month's notice of termination of employment. C was subsequently asked to move out of R1's home before the expiry of the notice period.

Claim

C's claims against R1 and R2 were for damages arising from sex and pregnancy discrimination, breach of the implied term of mutual trust and confidence in her contract of employment, breach of the Employment Ordinance and unlawful dismissal.

Court Findings

Had R2 committed any unlawful discriminatory act?

It is well established that the intention or motive to discriminate is irrelevant to determining liability for unlawful sex discrimination. The consent or co-operation of the employee is, likewise, not determinative. The consent or compliance could have been the result of the employee's general servile or subservient character or (similar to the present case), ignorance of legal rights.

The Court accepted that whether a female employee is pregnant is a private matter about which the employer has no right to know. If an employee was asked to take a pregnancy test in a supervised manner but was not given an option whether or not to inform the employer the result, then such request is capable of constituting a less favourable treatment on the ground of gender. This is because a male employee would not be asked to disclose such private information to his employer.

The Court ruled that R2's request for C to take the home-pregnancy test, notwithstanding C's willingness to comply with the request, amounted to a direct sex discrimination.

The termination of C's employment

The Court ruled that R1, who did not appear for the trial, would not have terminated C's employment and/or demanded C to leave his house but for her pregnancy. Apart from constituting unlawful pregnancy discrimination, R1's conduct was also held to have amounted to a breach of the implied term of trust of confidence, a breach of the Employment Ordinance regarding pregnancy protection and unlawful dismissal.

There was no evidence suggesting that R2 had played a role in the termination of C's employment and/or demanding C to leave R1's house. Hence, R2 was not liable for R1's conduct.

Lessons for Employers

Employers should not direct an employee to take a pregnancy test and to disclose the result solely for the purpose for ascertaining whether or not the employee is pregnant. Generally, an employee has the right to choose whether or not and if so, when to inform her employer of her pregnancy. There is no requirement under the Employment Ordinance as to when notice of pregnancy must be given to the employer. However, some of the protection available to a pregnant employee under the Employment Ordinance may not come into play until notice of pregnancy is given.

This case also serves as an important reminder to employers that an act would not be prevented from being discriminatory simply because of the absence of subjective intention or motive to discriminate or because the employee does not object to the request of an employer.

Judgment

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Forward**Statutory Minimum Wage ("SMW") Likely to Rise to HK\$34.5 per hour in May 2017**HONG
KONG20
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On 20 January 2017, notice was gazetted to increase the SMW rate to HK\$34.50 per hour (up from the current HK\$32.50 per hour). Subject to approval by the Legislative Council, the new rate will come into effect on 1 May 2017. To reflect the change to the SMW rate, the current HK\$13,300 monthly cap (above which an employer is not required to keep a written record of the employee's hours worked) will be increased to HK\$14,100 per month.

Employers should take steps to update their payroll procedures to reflect this change.

[More...](#)

Standard Working Hours Report Submitted to the Chief Executive

The Standard Working Hours Committee submitted its report on working hours policy to the Chief Executive. The Government is recommended to:

- Adopt a legislative approach to mandate employers to enter into written employment contracts with the lower-income grass-roots employees, which shall include terms on working hours and overtime compensation arrangements.
- Adopt a legislative approach to specify that the lower-income grass-roots employees should be entitled to overtime compensation by way of overtime pay at a rate no less than the rate of the agreed wages (under) or the equivalent time-off in lieu, so as to further protect these lower-income employees
- Through the existing industry-based tripartite committees and setting up new ones for other sectors with relatively long working hours, to continuously engage in stakeholders from sectors, with a view to formulating sector-specific guidelines setting out suggested working hours standards, overtime compensation methods and good working hours management measures for employers' reference and adoption so as to improve employees' working hours arrangements; and
- Monitor the implementation of the above recommendations and review their effectiveness after two years of implementation, and continue to explore through an appropriate tripartite platform the need for Standard Working Hours legislation

No action is required at this stage, but employers should follow developments to see how the recommendations are addressed by the Government.

[Full Report](#)
[Press Release](#)

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Joint Statement Calling for Anti-Discrimination Laws Covering LGBTI RightsHONG
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The Equal Opportunities Commission ("EOC") has issued a joint statement with the Gender Research Centre and The Chinese University of Hong Kong, urging the Government to launch a public consultation and introduce legislation against discrimination on the grounds of sexual orientation, gender identity and intersex status as soon as possible. The statement was supported by 75 other organizations and academics across different sectors.

No action is required at this stage, but employers should note that the statement indicates increased public recognition of the LGBTI rights.

[Press Release](#)

Can Conduct at a Private Function Amount to a Conflict of Interest Disentitling the Employee to an End of Contract Gratuity?HONG
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The Hong Kong Court of First Instance held in *Chok Kin Ming v Equal Opportunities Commission* (HCLA 42/2015) that an employee's conduct during a private function could amount to a conflict of interest disentitling the employee to an end of contract gratuity under the terms of that contract of employment. The Court allowed the Equal Opportunity Commission's ("EOC") appeal and set aside the Labour Tribunal (the "Tribunal") order that it had wrongfully not paid the end of contract gratuity.

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The employee had been employed by the appellant, EOC, since 1996 under fixed term contracts of employment and was appointed as a Chief Equal Opportunities Officer subsequently. The employment contract provided for an end of contract gratuity if there is "satisfactory completion of the agreement in the opinion of the employer".

The EOC's Code of Conduct imposed obligations on every employee

- To avoid situations of conflicts with the EOC (including involvement in any activity outside which compromises his/her ability to act with total objectivity)
- To report actual or potential situations of conflicts and make full disclosure

From August to October 2014, the EOC conducted a public consultation on discrimination law review ("DLR") and the employee was a key member on the DLR taskforce. Some of the questions presented for consultation related to de facto and same-sex relationships. The EOC's role in the DLR consultation was to be impartial.

The employee attended to a church forum in a personal capacity to introduce and explain the DLR consultation. During the forum the employee had urged the audience to answer particular questions in a certain way, told them how to respond to maximize the number of responses so that it did not look like their letters were produced by "cut and paste", told the audience that he had objected to the EOC's proposal to include same-sex relationships within the protection of de facto marriage and encouraged them to oppose the proposal.

The forum was recorded without the employee's knowledge and was subsequently reported in the media. The employee and the EOC were criticized and the credibility of the DLR was put into doubt. In a subsequent internal investigation, the employee was found to have breached the Code of Conduct by placing himself in a position of conflict and his duty of fidelity and good faith. The EOC did not renew the employee's contract of employment and on expiry of the contract decided not to pay the end of contract gratuity as they did not consider that there had been "satisfactory completion" of the employment contract.

Tribunal Findings

The employee was successful in his claim for the end of contract gratuity in the Tribunal. The key findings by the Tribunal are, in summary:

- "Satisfactory completion" referred to temporal completion (ie. just finishing the three-year term) and the EOC could not take into account the employee's work performance.
- The employee had been invited to and attended the forum, which was a private function, in a personal capacity and his own time, and it had nothing to do with his work performance.
- The employee had the freedom to express his opinions in his personal capacity about the DLR consultation.
- On the balance of probabilities of what the employee said and did at the forum, there was no conflict of interest and nor did it impact on his work performance.

Court Findings

On appeal, the Court held that the expression "satisfactory completion" (as a matter of construction of the contract) did not only refer to the dimension of time, but also included the quality of the employee's performance. As such, the manner in which the contract of employment was completed was a condition for payment of the gratuity.

Next, the Court considered whether the Tribunal failed to apply the correct legal test in ruling that the EOC wrongfully failed to pay the gratuity. The Court held that where the employer has a discretionary power under the contract of employment such as payment of a bonus, a breach of contract is to be established by showing that the employer's decision was irrational or perverse. In other words, where no reasonable employer would have exercised the discretion in the same way. That discretion is not to be treated as wholly unfettered, but the court does not substitute its own opinion.

In this regard, the Court said

"It is one thing for an employee to criticise his employer during a private dinner

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with friends — and the employer may well be acting perversely if he withholds the gratuity for this reason — but it is in my opinion quite another thing for the employee (who has a key role in a supposedly impartial public consultation exercise and who is introduced to the forum as an insider) to denigrate the DLR in front of 50 or 200 seminar participants, to urge them to respond to a number of questions in a particular way, and to offer assistance to make their response appear independent and attract weight.”

The Court did not consider that the Code of Conduct sought to suppress the freedom of expression of the employee. It sought to avoid potential conflict situations between the employee’s outside activities and his work in the EOC.

The Court allowed the appeal and set aside the order of the Tribunal. It held that as it did not have jurisdiction to reverse findings of fact it remitted the matter back to the Tribunal for determination.

Lessons for Employers

End of contract gratuity payments can be made subject to the performance of the employee during the period of employment. An employer who wishes to impose this condition should be careful to make this clear in the contractual terms.

An employee’s conduct outside of work can give rise to a conflict of interest with those of his/her employer’s interest. Employers should clearly set out in their contract or policy the situations which may give rise to a conflict. This will help manage expectations of the employee and, should the need arise, breach by the employee.

Employers are reminded that where they have a discretion to exercise under a contract of employment, the exercise of that discretion is not unfettered and must be exercised not irrationally or perversely.

Judgment

Lawmaker’s Initial Assessment of Equal Opportunities Commission’s Recommendations to Reform Anti-Discrimination Legislation

Among the 27 issues which were highlighted by Hong Kong’s Equal Opportunities Commission (“**EOC**”) as higher priority for discrimination law reform, the lawmakers have identified 9 recommendations which are likely to drive consensus among stakeholders and society, with a view to taking forward necessary legislative amendments in a step-by-step manner. They can be summarised as follow:

1. To introduce express provisions in Family Status Discrimination Ordinance (“**FSDO**”) or Sex Discrimination Ordinance (“**SDO**”) prohibiting direct and indirect discrimination on grounds of breastfeeding and to include expressing milk in the definition of breastfeeding.
2. To amend provisions in the Race Discrimination Ordinance (“**RDO**”) that prohibit direct discrimination on the ground of race of a “near relative” by replacing the definition of “near relative” with “associate” which is wider in scope, and to include protection from direct discrimination by perception or imputation that a person is of a particular racial group.
3. To expand the scope of protection from sexual, disability and racial harassment, including
 - Protection from direct discrimination and harassment by perception or imputation that a person is of a particular racial group;
 - Protection from sexual, racial and disability harassment to persons in a common workplace;
 - Protection from racial and disability harassment of service providers by service users, including harassment that takes place on Hong Kong registered aircraft and ships;
 - Protection of tenants/subtenants from sexual, racial or disability harassment by another occupying the same premises; and
 - Protection from sexual, racial and disability harassment by management of clubs of members.

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4. To align the 4 anti-discrimination ordinances by repealing provisions under SDO, FSDO and RDO which require proof of intention to discriminate in order to obtain damages for indirect discrimination.

No action is required at this stage as it is likely that the Government will conduct further consultation on the prioritized recommendations before proposing any legislations. However, employers should note that these findings indicate a tendency towards more anti-discrimination protection in the society.

[EOC's submissions to LegCo](#)

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A Case on Contempt of Court in the Labour Tribunal

Under section 42 of the Labour Tribunal Ordinance ("**LTO**"), if any person engages in threatening or insulting behaviour or wilfully interrupts a hearing before the Labour Tribunal, the Presiding Officer may summarily sentence that person to a level 3 fine (which is currently HK\$10,000) and imprisonment for 6 months.

In *Mahesh J Roy* (CACV 226/2015), the appellant (who was not even involved in a Labour Tribunal claim, but who appears to have been present in court to support his girlfriend) had been found guilty of insulting behaviour by the Presiding Officer. Although details of the "insulting behaviour" are scarce, it would appear that the appellant was asked by the Presiding Officer to stop assisting his girlfriend in the courtroom and, presumably, responded to the Presiding Officer's request in such a manner as for the Presiding Officer to hold that it amounted to insulting behaviour worthy of summary sentencing. We can only guess at precisely what was said or done.

In any case, the appellant was sentenced by the Presiding Officer to a fine of HK\$5,000 under section 42 of the LTO. The appellant was appealing against that sentence to the Court of Appeal. While the Court of Appeal was primarily dealing with a procedural issue (with the substantive appeal set down to be heard on 22 September 2017), this case is a handy reminder that misbehaviour in the Labour Tribunal can be punished and the Presiding Officer does (occasionally) take action.

The person sentenced by the Presiding Officer was not a party to the Labour Tribunal proceedings, but was someone assisting the claimant in the Labour Tribunal. Therefore section 42 of the LTO will also apply to non-parties in the Labour Tribunal.

[Judgment...](#)

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Costs Awarded on an Indemnity Basis in Sex Discrimination Proceedings

Facts

The respondents are husband and wife who employed the claimant, a Filipino foreign domestic helper ("**FDH**"), to work in the respondents' household. The husband masturbated his genitals and exposed his penis behind the claimant when she was working at the respondents' residence on multiple occasions. The claimant videotaped the husband's acts without his knowledge and complained to the wife. The wife terminated the claimant's employment and refused to release her belongings or give any terminal compensations unless she signed a resignation letter, deleted the video and promised not to file a claim. The claimant reported the matter to the Police and the husband was eventually convicted of attempted indecent assault. The claimant also brought a separate action against the husband for harassment and the wife for victimization under the Sex Discrimination Ordinance ("**SDO**"). Both proceedings were consolidated and defended by the husband and wife. Despite their admission of liability, the husband and wife disputed their liability to pay for the claimant's costs.

Court Findings

The Court first considered the SDO as a no costs regime with safeguards. There is a need to offer costs protection to victims of sex offences which are always under pressure and may be too shy to lodge any complaint. On the other hand, there is a need to guard against frivolous and vexatious litigants. Therefore, each party shall bear its own costs and costs will only be ordered when the proceedings were brought maliciously or frivolously or in "special circumstances".

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Regarding what amounts to “special circumstances”, the Court held that it is not restricted to litigation conduct, but should take into account the overall circumstances, which would include the nature of the conduct being complained of, the pre and post-proceedings conducts. The Court considered that the respondents’ unwelcomed conducts and their deliberate attempts to prolong litigation would amount to special circumstances that warrant an award of costs against the respondents. Also, the Court awarded costs on indemnity basis because the pre and post-litigation conducts of the respondents are oppressive, unlawful and criminal.

Lessons for Employers

This case is a handy reminder to employers that employees (including FDHs) are protected under the SDO for sexual misconduct committed by employers (and household family members of employers). Employers can face victimization and unlawful dismissal claims if they act in an oppressive manner towards their employees who have suffered sexual harassment/misconduct in the course of their employment.

The case also illustrates that the court will take into account a wide range of factors, including the nature of discriminatory conduct, the pre and post-litigation conduct of discriminators when determining costs in discriminatory proceedings.

Judgment...

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Is a Same Sex Partner of an Employee a “Spouse” for Employment Benefits? A Closer Look at the Recent Judgment of *Leung Chun Kwong v. Secretary for the Civil Service and Another*

Facts

Mr. Leung, a Chinese national and Hong Kong permanent resident, had been employed by the Government as an immigration officer since 2003 under a contract of employment which was subject to the Civil Service Regulations (“**CSRs**”). Mr. Leung married Mr. Adams, a New Zealand national, in April 2014 in New Zealand. As Hong Kong law does not allow for same-sex marriage, Mr. Leung and Mr. Adams married in New Zealand where same-sex marriage is legally permissible.

When Mr. Leung sought to update his marital status with his employer to apply for spousal benefits under the CSRs, he was told by the Secretary for Civil Service (the “**Secretary**”) that his same-sex marriage in New Zealand was not consistent with Hong Kong’s Marriage Ordinance, under which a marriage is defined as “the voluntary union for life of one man and one woman”. As a result, the Secretary decided that the same-sex marriage of Mr. Leung and Mr. Adams did not constitute a change in marital status and they were denied access to spousal benefits which are available to spouses of heterosexual marriage (the “**Benefits Decision**”).

Meanwhile, Mr. Leung’s application for joint assessment of tax return was rejected on the ground that a same-sex marriage is not regarded as a valid marriage for the purposes of the Inland Revenue Ordinance (“**IRO**”). As a result, Mr. Leung was not allowed to have his tax liability jointly assessed with that of Mr. Adams as a married couple (the “**Tax Decision**”).

Mr. Leung applied for judicial review of the Benefits Decision and the Tax Decision against the Secretary and the Commissioner of Inland Revenue respectively. The primary ground for Mr. Leung’s application is based on the constitutional right to equality (or not to be discriminated against).

Court Findings

(a) *The Benefits Decision*

The Court first set out its approach for determining whether a person’s constitutional right to equality had been infringed. The Court adopted the test in previous Court of Final Appeal decisions that any difference in legal treatment must satisfy a proportionality test, which requires that the (i) difference in treatment to pursue a legitimate aim; (ii) difference in treatment be rationally connected to the legitimate aim; (iii) difference in treatment be no more than necessary to accomplish the legal aim; and (iv) a reasonable balance to be struck between the societal benefits and the constitutional rights of the individual.

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The Court observed that Hong Kong law does not recognize same-sex marriages and that due to his sexual orientation, Mr. Leung cannot (or cannot be expected to) enter into a heterosexual marriage. As such the Court concluded that the differential treatment accorded to Mr. Leung should be regarded as being based (at least indirectly) on his sexual orientation.

The Court then considered whether the differential treatment based on sexual orientation can be justified. The Secretary argued that the differential treatment is justifiable because (i) the Secretary is acting in line with the prevailing marriage law of Hong Kong (which does not recognize same-sex marriages) in the administration of the CSRs; (ii) any decision to the contrary would require the Secretary to indirectly recognize same-sex marriage as valid in Hong Kong; and (iii) it is reasonably necessary to achieve the legitimate aims of not undermining the integrity of the institution of marriage or protecting the institution of the traditional family as understood in Hong Kong.

These arguments were rejected by the Court. The Court held that there is nothing illegal or unlawful for the Secretary to accord the same spousal benefits to homosexual couples who are legally married under foreign laws, nor is there anything inherently wrong or impermissible for the Secretary to indirectly recognize a same-sex marriage which is legally contracted overseas. Further, the Court was unable to see how the denial of spousal benefits to homosexual couples who are legally married under foreign laws would serve the purpose of not undermining the integrity of the institution of marriage in Hong Kong, or protecting the institution of the traditional family in Hong Kong.

In the circumstances, the Court decided that the differential treatment could not be justified and allowed the application in respect of the Benefits Decision.

(b) *The Tax Decision*

The Court considered that the Tax Decision raises essentially a question of construction of statute of whether same-sex marriage legally entered into under foreign laws may also constitute “marriage” for the purposes of the IRO.

The Court held that the Tax Decision was correctly decided because to construe “marriage” under the IRO as including same-sex marriages would run counter to the meaning of this term under Hong Kong laws. The Court further noted that the refusal to assess the tax liability of Mr. Leung jointly with that Mr. Adams as a married couple did not cause any prejudice to them as the joint assessment would have made no difference to their total tax liability.

In the circumstances, the Court did not consider the Tax Decision engage the constitutional right to equality and dismissed the application in respect of the Tax Decision.

(c) *Outcome*

Although the application for judicial review in respect of the Benefits Decision was allowed, the Court directed such decision to only take effect on 1 September 2017. This was to allow the Secretary time to consider making any applications to the Court or making other interim arrangement as may be necessary, in particular given the far-reaching implications of the judgment on the administration of the CSRs which would affect many civil servants.

The Department of Justice announced on 25 May 2017 that it has applied to appeal the judgment to the Court of Appeal.

Lessons for Employers

A difference in treatment based, directly or indirectly, on a civil servant’s sexual orientation is amenable to judicial review and could amount to a breach of constitutional right to equality if it cannot be legally justified. The fact that Hong Kong matrimonial law does not recognise same-sex marriages and the need not to undermine integrity of the institution of marriage or to protect the institution of the traditional family in Hong Kong fall short of a legitimate justification for differential treatment based on sexual orientation.

The decision is confined to the administration of CSRs which apply to civil servants. It may have limited impact for non-Government employers, the decision of which may not be amendable to judicial review or subject to the same level of scrutiny of constitutional

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rights violation. There is currently no legislation in Hong Kong against discrimination on the ground of sexual orientation but the Government has been repeatedly urged to undertake public consultation in this regard as soon as possible. It remains to be seen how the decision (and the outcome of the appeal) may impact on the process in relation to sexual orientation discrimination legislation.

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Hong Kong Employment (Amendment) Bill 2017

The Employment (Amendment) Bill 2017 (the "**Bill**") was gazetted on 5 May 2017.

The Bill aims to give the court or Labour Tribunal power to order reinstatement or re-engagement without the consent of the employer if requested by an employee who has been unreasonably and unlawfully dismissed and the court or Labour Tribunal considers such order to be appropriate and practicable. A similar bill was introduced in 2016 but subsequently lapsed at the end of the last term of the Legislative Council of Hong Kong. See our In Brief dated **6 July 2016**.

The main difference between the Bill and the 2016 bill is that the Bill proposes that if an employer refuses to comply with an order to reinstate or re-engage the dismissed employee, it will need to pay to the employee a further sum (in addition to other monetary remedies awarded to the employee) of three times the employee's average monthly wages up to a maximum of HK\$72,500 (the "**Sum**"). The maximum amount of the further sum in the 2016 bill was HK\$50,000. It is proposed that it will be an offence for an employer to wilfully and without reasonable excuse fail to pay the further sum. The Bill was introduced into the Legislative Council for first reading on 17 May 2017 and is awaiting for second and third readings.

No action is required at this stage, but employers should keep track of any subsequent legislative development.

[Press Release](#)[The Bill](#)

LOOKING BACK

Hong Kong Moves Closer to the Introduction of Regulating Working Hours

After years of public debates and bickering among labour unionists and business owners, Hong Kong's Chief Executive recently announced a framework towards regulating standard working hours.

The proposals, which have been endorsed by the Chief Executive, were put forward by the Standard Working Hours Committee ("**SWHC**") established in 2013 to assess the impact of regulating standard working hours on the city's employment market and economy.

Highlights of the proposals endorsed by the Chief Executive include:

- Requiring employers of employee with a monthly wage of HK\$11,000 or below to put in place a written employment contract, which must include the employee's working hours and overtime remuneration arrangements, and
- Mandating the overtime remuneration rate for these employees must not be less than the rate of agreed wages or, as an alternative, an equivalent amount of time off in lieu.

Statistics from SWHC's research reports have estimated that the new measure would cost Hong Kong employers in excess of HK\$500 million per year, and is likely to benefit more than half a million workers in Hong Kong.

The full details of introducing a standard working hours regime are yet to be determined. It is unlikely that any change will come into force that would impact employers for at least another three or four years.

No action is required at this stage as it is likely that the Government will conduct further consultation on the introduction of this standard working hours regime. However, employers should note that these findings indicate a tendency towards standard working hours legislation.

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Hong Kong Employment (Amendment) (No. 2) Bill 2017

The Employment (Amendment) (No. 2) Bill 2017 (the “**Bill**”) was gazetted on 16 June 2017.

The Bill aims to afford greater protection to job-seekers through strengthening the enforcement against the malpractices of employment agencies (“**EAs**”). Major amendments of the Bill are:

- To raise the maximum penalty for overcharging job-seekers on commissions from the existing maximum fine of HK\$50,000 to the proposed maximum fine of HK\$350,000 and imprisonment of three years.
- To raise the maximum penalty for unlicensed operation of EAs from the existing maximum fine of HK\$50,000 to the proposed maximum fine of HK\$350,000 and imprisonment of three years.
- To expand the scope of the offence of overcharging job-seekers to associates (including the management and employees of licensees) in addition to the licensees
- To provide new grounds for the Commissioner for Labour to refuse to issue/renew or revoke a licence, including (i) where an associate has contravened any provision or regulation relevant to the operation of EAs; (ii) a related person was convicted of an offence against the person of a child, young person or woman, or an offence involving membership of a triad society, fraud, dishonesty or extortion in the past five years; and (iii) the non-compliance of the Code of Practice for EAs.

The Bill was introduced into the Legislative Council for first reading on 28 June 2017 and is awaiting for second and third readings.

No action is required at this stage, but employers should keep track of any subsequent legislative development.

Press Release
The Bill

A Labour Tribunal Order Being Aside as the Deputy Presiding Officer Failed to Discharge the Statutory Duty to Investigate

The case of *Fung Tsun Tong v A Link Network (HK) Ltd* serves as a good reminder to all that the Labour Tribunal (“**Tribunal**”) is duty bound to investigate into the relevant and material matters pursuant to section 20 of the Labour Tribunal Ordinance (Cap 25).

The Tribunal

Two cases were tried and heard together at the Tribunal. The first case concerns the Claimant’s claim against the First and Second Defendant for outstanding wages, payment in lieu of notice and other payment in the total sum of \$68,926.70 (“**the First Claim**”). The second case concerns the Second Defendant’s claim against the Claimant for overpayment in the sum of \$20,000 (“**the Second Claim**”).

Although the Deputy Presiding Officer (“**DPO**”) considered that parts of the evidence of the Claimant and the Second Defendant were unreasonable and unreliable, it was held that there was an employer-employee relationship between the parties. The DPO therefore ordered the Second Defendant to pay the Claimant \$68,926.70, whilst the Second Defendant’s claim for overpayment was dismissed (“**the DPO Order**”). The Second Defendant thereafter applied for review in respect of the DPO Order regarding the First Claim, but not the Second Claim. The DPO dismissed the review application and ordered that the DPO Order would remain effective (“**the DPO Review Order**”).

The Court of First Instance

In June 2016, the Second Defendant applied to the Court of First Instance (“**CFI**”) for leave to appeal the DPO Order and the DPO Review Order. The Judge considered that a Presiding Officer plays an inquisitorial role and has the duty to investigate relevant matters, but such statutory duty is not an absolute one. A presiding officer is only required to investigate matters that he or she may consider relevant. The Judge further pointed out that the Tribunal’s decision will only give rise to an appeal if a fair and proper determination of the claim cannot be attained by reason of the failure to investigate a relevant matter.

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Although the CFI rejected several grounds of appeal raised by the Second Defendant, the Judge granted him leave to appeal on the ground that the DPO had failed to discharge its statutory duty to investigate some relevant and material matters, including (i) fuel costs per trip; (ii) discount available to the Discount Card holder; (iii) tunnels and road tolls per trip and (iv) other costs and expenses per trip. The Court found that before concluding whether it was justified for the Second Defendant to dismiss the Claimant summarily the DPO failed to make proper inquiry in determining whether the Second Defendant had provided the Claimant with the Discount Cards and whether the Claimant had used fuel illegally. This lack of investigation gave rise to injustice in that a fair and proper determination of the claim could not be reached.

On appeal, the CFI adopted the same legal principles laid down in the Leave Judgment. The Judge considered that the DPO had not adequately fulfilled her duty to investigate the material evidence for the purposes of determining whether the Second Defendant's decision to dismiss the Claimant summarily was justified. The appeal was therefore allowed and the Claimant's claim for payment in lieu of notice was remitted to the Tribunal for further investigation.

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The Equal Opportunities Commission Takes Action Against an Employer for Alleged Contravention of the Sex Discrimination Ordinance

The Equal Opportunities Commission ("**EOC**") has commenced legal proceedings against an employer for alleged contravention of the Sex Discrimination Ordinance (Cap 480) ("**SDO**"). The employee was employed as an accounting clerk and became pregnant during the course of her employment. However, her employment was terminated before she returned work from her maternity leave.

EOC stressed that out of all the complaints they received from 2014 to 2016, 39% of them were employment-related pregnancy discrimination complaints, which highlighted the substantial legal risks associating with dismissing pregnant employees. Employers are therefore reminded that they should exercise due care in terminating the employment of a pregnant employee and must show valid grounds in doing so.

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Employee who Affirms Employer's Breach Cannot Claim Constructive Dismissal

Abstract

The Court of First Instance in *陈翔 v 中国大冶有色金属矿业有限公司* [2017] HKCFI 1547 dismissed the employee's claim for constructive dismissal as he had affirmed his contract of employment following a salary reduction of 52.5%.

Facts

The Appellant was employed by the Respondent on a salary of \$80,000. From March 2014 to May 2014, his salary was reduced by 52.5%. On 23 May 2014, the Appellant tendered a written notice of resignation ("**the Resignation Letter**") and he ceased employment a month later.

The employee lodged a claim against his employer for constructive dismissal at the Labour Tribunal. Although it was held that his salary reduction had unquestionably changed a fundamental term of his contract of employment ("**the Contract**"), the Labour Tribunal had to consider whether employee, by his conduct, had accepted his employer's repudiation of the Contract or elected to affirm the Contract.

The Labour Tribunal dismissed the employee's claim finding that the employee had affirmed the Contract and he had not been constructively dismissed. The employee appealed to the Court of First Instance.

The law

The key issue on appeal was whether the employee had elected to affirm the Contract.

The law in this area is quite clear. When one party repudiates the contract, the innocent

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party may choose either to accept the repudiation (and treat himself as discharged from any contractual obligations) or affirm the contract (and remain bound by the terms of the contract). An affirmation of the contract can be express or implied. Where the innocent party, who has knowledge of the breach and of his right to choose, acts in a way which may be inferred that he treats the contract as continuing, he will be found to have affirmed the contract impliedly.

Decision

The appeal was dismissed. The judge considered that before the employee tendered his resignation, it was unclear from his conduct that he had chosen to affirm the contract. However, given the way the employee expressed in the Resignation Letter that he “wishes” to quit 30 days after tendering his resignation even though the Contract provided for a four-month notice period (“**the Notice Period**”), this demonstrated that the employee had affirmed the contract. The employee was still abiding by the Notice Period as stipulated in his Contract and he was trying to come to an agreement with the Respondent for a (shorter) 30-day notice period instead. Furthermore, the Appellant had not sought to rely on the Respondent’s repudiation as a reason to resign.

Lessons for employers

Just as an employee can affirm a breach by his/her employer, an employer can also affirm a breach by an employee. As such, employers should be careful when dealing with an employee who has breached his/her contract of employment (eg, misconduct, breach of confidentiality, failing to follow lawful and reasonable instructions, etc) not to (inadvertently) affirm the breach.

Judgment

Can the New Apology Ordinance Make Saying “Sorry” Easier?

The Apology Ordinance (Cap 631) (“**Ordinance**”) was gazetted on 1 September 2017 and will come into force later this year on 1 December. The key objective of the Ordinance is to encourage the issuing of apologies with the view to preventing disputes from escalating into legal actions and facilitating speedy, cost-effective and amicable settlements at an earlier stage.

The Scope

Hong Kong one of the first jurisdictions in Asia to enact an apology legislation.

Under the Ordinance, an apology is defined broadly as “an expression of the person’s regret, sympathy or benevolence in connection with the matter”. It may be expressed orally, in writing or by conduct. The Ordinance seeks to embrace the international trend towards providing protection for full apology, such that an express or implied admission of fault or liability; or a statement of fact concerning the matter also falls within the ambit of apology. It is considered that the party on the receiving end of a full apology would often find it more sufficient than a partial apology where an admission of fault is not included. More importantly, research has shown that receiving a full apology increases the likelihood of settlements between the parties. This allows the Ordinance to achieve its key objective.

The Ordinance applies mainly in civil disputes, including judicial, arbitral, administrative, disciplinary and regulatory proceedings. Criminal proceedings and proceedings specified in the Schedule, such as those conducted under the Commissions of Inquiry Ordinance (Cap 86), the Control of Obscene and Indecent Articles Ordinance (Cap 390) and the Coroners Ordinance (Cap 504) are expressly excluded. It must be noted that the Ordinance only covers an apology issued on or after 1 December 2017, irrespective of when the matter arose or whether the applicable proceedings concerning the matter had already begun.

Effect

One of the most significant features implemented by the Ordinance is that an apology would not constitute an express or implied admission of the person’s fault or liability regarding the matter. It is also explicitly stipulated that in determining fault, liability or any other issues in connection with the matter, the apology given must not be taken into account to the prejudice of the party extending the apology. This will not only encourage

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the party not to withhold apologies as they would in the past, but also foster open and direct dialogue between the parties to minimise tension, anger and hostility.

Nevertheless, the protection offered by the Ordinance is not absolute. The court, tribunal or any other decision maker may exercise the discretion in exceptional circumstances and rule that the statement of fact that was included in the apology as admissible evidence, provided that it is just and equitable to do so. Although the Ordinance has provided an example of where exceptional circumstances may arise, i.e. where there is no other evidence available for determining the issues, it is not entirely clear whether there are any other circumstances where the decision maker will exercise its discretion.

Apart from the fear that an apology may be used against the party as an admission of fault or liability in the subsequent legal proceedings, the reluctance to convey an apology may also come from the long-held concerns that the insurance policy coverage may be rendered void or otherwise adversely affected. With the view to further removing the barrier to offers of apology, the Ordinance ensures that the contract of insurance or indemnity will not be affected by reason of the apology issued by a person in connection with the matter.

Notwithstanding that the limitation periods for certain actions may be extended by an acknowledgement of the claim under s 23 of the Limitation Ordinance (Cap 347) (“LO”), the Ordinance expressly precludes an apology from constituting an acknowledgement of a right of action for the purposes of LO. In any event, making an apology will not extend the limitation period.

Takeaway

Maintaining an amicable relationship with the employees is important to the sustainable success of the company. Before the enactment of the Ordinance, it is unsurprising that employers may opt to withhold apologies to their employees in the event of disputes, worrying that an apology may be used against them in legal proceedings or significantly affect their insurance policy coverage. However, with the enactment of the Ordinance, employers may soon make apologies to their employees without the concerns they once had. This can hopefully reduce tension and encourage expeditious resolutions of disputes between the parties. However, employers must bear in mind that the protection is not absolute.

Ordinance

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Employer Fined for Failure to Pay Wages and Default on Labour Tribunal Award

The Eastern Magistrates’ Court fined Poshtanga Limited (“**the Employer**”) HK\$57,000 for its failure to pay wages and the sum payable under an award of the Tribunal. Under the Employment Ordinance (Cap 57), wages must be paid no later than 7 days after the expiry of the last day of the wage period or in the event that the employee’s employment is terminated, no later than 7 days after the termination date.

The Employer failed to pay wages to one of its employees within the prescribed time frame and thereafter failed to pay the sum awarded by the Tribunal. The Employer was convicted and also ordered to clear the outstanding sum of \$27,500 to an employee.

Employers are reminded the importance of paying wages and the awarded sums to avoid committing a criminal offence.

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A Case on Summary Dismissal

In the recent case of *Cheung Chi Wah Patrick v Hong Kong Cement Co Ltd* [2017] HKEC 1957, the Court of First Instance dismissed the Appellant employer’s appeal against the Labour Tribunal’s determination that it was not entitled to summarily dismiss the Respondent employee.

Facts

On 27 September 2010, the Respondent commenced employment with the Appellant as its Financial Controller. The Employee was asked to seek legal advice about ensuring that
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the proposed acquisition of certain number of shares by the Appellant's holding company would not breach undertakings given by the holding company to its underwriters in its rights issue. The Respondent did seek legal advice. However, the lawyer giving the advice simply read out the undertaking and it was interpreted by the Respondent incorrectly. The holding company oversubscribed for the shares and breached its undertaking. The Respondent was summarily dismissed on the grounds that:

- The Respondent had committed gross negligence in carrying out his duties leading to serious consequences for the holding company; and
- The Respondent's breach of his duties were unacceptable given his senior position, qualification and past experience.

The Tribunal held that the Respondent's conduct did not amount to repudiation of the employment contract and the Appellant could not summarily dismiss him either under s 9 of the Employment Ordinance (Cap 57) or under the common law. The Presiding Officer considered that the Respondent had honestly misunderstood and erroneously believed the legal advice given by the Appellant's legal adviser, which constituted a reasonable and sufficient ground of defence to the dismissal. The Appellant thereafter appealed to the Court of First Instance.

The decision on appeal

The Appeal was dismissed.

The Judge rejected the Appellant's contention that no reasonable person with the Respondent's qualification and experience would have misunderstood the advice given by the Appellant's legal adviser. Although the Judge considered that it would have been reasonable for the Tribunal to come to different conclusion, it was not a case where the only reasonable conclusion on the facts found was inconsistent with the Presiding Officer's finding.

The Judge also held that the Respondent did not manifest any intention not to be bound by the essential terms of his employment contract. He had also acted faithfully in the discharge of his duties. He took legal advice as instructed and then acted in accordance with the advice. However, he misunderstood a poorly given legal advice and thus conducted himself wrongly. He did not neglect anything in seeking the legal advice and acting pursuant to it. A miscomprehension of a poorly given legal advice was not a serious neglect of duty.

Judgment

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Landmark Case Sends Rainbow-coloured Ripples Through Hong Kong's Community

The widely reported case of *QT v. Director of Immigration* has sent rainbow-coloured ripples through the Hong Kong community. It is a small but important step along a still lengthy road. Its biggest impact may be encouraging more challenges from the lesbian, gay, bisexual and transgender (LGBT) community against the conservative Hong Kong bureaucracy.

Case in Brief

This case involved a lady (known as QT) who had entered into a lawful marriage in the United Kingdom with another lady (known as SS). SS applied for and was granted a visa to work in Hong Kong. QT applied for a dependant's visa on the basis that she was SS's dependant. Such visa would, if it had been granted, permit her to live and work in Hong Kong.

QT's application for a dependant's visa was declined by the Director of Immigration on the basis that the enshrined policy, which sets out when such visas should be granted, states that they are only available to the "spouse" of a sponsor (i.e., SS is the sponsor in such situation). The view of the Director of Immigration (and all Directors of Immigration historically) was that the term "spouse" in the Hong Kong context (where same sex marriages are not lawfully permitted) must mean "husband" and "wife" in a heterosexual relationship. It could not mean "wife" and "wife" in a lesbian relationship.

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QT challenged the reasonableness of this interpretation and hence the refusal by the Director of Immigration to approve her application for the dependant's visa. She did this by making an application for a judicial review, which is a process by which the decision of a public authority (or a person exercising a public sector power) can be critically examined by the courts.

In defending his refusal of a dependant's visa for QT, the Director of Immigration argued (without much conviction) that the stated narrow interpretation of the term "spouse" was necessary in order to satisfy the aims of the immigration policy.

QT's original challenge failed in the High Court. She, therefore, appealed to the Court of Appeal.

In a heart-warmingly progressive judgement the three judges in the Court of Appeal found that, given the stated aims of the immigration policy (striking a balance between attracting talented people to come and work in Hong Kong and maintaining effective and stringent immigration control), it was irrational for the Director of Immigration to refuse to allow QT's application for a dependant's visa solely on the basis that she was the same sex spouse of the sponsor. As such, the Director should grant QT a dependant's visa.

What does this mean for Hong Kong?

Whilst this case has rightly been reported as a victory for sexual orientation equality, the legal impact of the case is limited. It does not impose any legal obligations on the private sector at all and will have limited immediate impact on the way in which the public sector operates.

The decision cannot be construed as a reinterpretation of the term "spouse" in Hong Kong legislation. The judges were clear that the decision focuses just on the specific interpretation by the Director of Immigration of this particular immigration policy. That said, if it encourages civil servants to examine how policies are applied and to be more forward looking, then this has to be good news. Similarly, it will inevitably increase the pressure on private sector employers to be more progressive.

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Court Upholds Labour Tribunal's Finding of Independent Contractor Arrangement

An employment relationship is more regulated than an independent contract. Some see the merits of less regulation and try to structure their engagement as one of independent contract and not employment. Whether an arrangement is an independent contract and not employment is a matter for the courts to assess and the parties' agreement as to the nature of their arrangement will not be determinative.

In *李偉基 v 寰宇家庭有限公司* [2017] HKEC 2109 English Judgment, the Court of First Instance dismissed the Plaintiff's appeal against the decision of the Labour Tribunal (the "LT") that the parties' arrangement was one of independent contract.

Facts

The Plaintiff joined the Defendant Company (the "**Company**") as an education consultant to promote the sales of English education materials in 1999. Under the "Agency Agreements" which the parties had entered into, the Plaintiff was not an employee of the Company and thus, was expressly precluded from receiving any benefits provided by the Company to its employees. Nevertheless, the Plaintiff enjoyed great freedom at work. Apart from the highly flexible working hours and sales targets, the Plaintiff could also adopt his desired promotion methods.

When the Plaintiff left the Company in 2014, he brought a claim against the Company in the LT claiming for compensations and various statutory payments as an employee. The Presiding Officer ("**PO**") held that the Plaintiff was not an employee of the Defendant and dismissed his claim. The Plaintiff then appealed to the Court of First Instance on the basis that the PO's decision was irrational and perverse.

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In determining whether the relationship is one of employment, the court will need to consider all the facts and circumstances and see whether as a matter of overall impression, an employment relationship existed between the parties.

The Court of First Instance

On appeal, the main challenge launched by the Plaintiff was that the PO had failed to accurately evaluate the various indicia of employment.

First, the Plaintiff argued that the Company had exercised a high degree of control over him. In particular, he was bound to act and observe any directions, rules or regulations that might be advanced by the Company. However, the PO found that the control put in place by the Company was for good commercial reasons, such as that of upholding the image and brand of the Company. Other than that, the Plaintiff enjoyed a high degree of flexibility and freedom in respect of his working hours, methods of promotion and sales target, it cannot therefore be said that the sort of control exercised by the Defendant was that of an employer over an employee. The Judge held that the observations and the conclusion reached by the PO were both correct and reasonable. Thus, he refused to attach a different weight to the findings of the PO.

Second, the Plaintiff sought to rely on the fact that he was not allowed to recruit his own helpers in attempting to convince the court that he was not an independent contractor of the Company. The PO found that such restriction was imposed merely to enable the Company to coordinate the publication of job advertisements. In any event, the Plaintiff had to shoulder the costs for the job advertisements. The performance of the Plaintiff's helpers would also directly affect his own profits. With these findings in mind, the Judge was satisfied that the PO had duly considered this important factor which indicated that the arrangement between the parties was one of independent contract.

Third, whilst the provision of office space, computer, photocopying and fax machine by the Company might point towards the existence of employment relationship between the parties, the PO held that this was only to provide convenience to the Plaintiff. Moreover, the Plaintiff had to pay for most of the costs in order to execute his job as an education consultant, including but not limited to, secretary salary, gifts for clients and uniforms etc. Again, the indicia pointed away from the existence of an employment relationship between the parties.

Fourth, as opposed to an employee in an ordinary employment relationship, the Plaintiff had assumed great financial risks and management responsibility. His earning of commission was directly reflected by the efforts he put in and how effectively he managed his subordinates' and his own work. In an extreme case where the Plaintiff was unproductive, the Plaintiff could end up earning nothing at all but still had to pay for the expenses.

Takeaways

This is one of few cases (relatively speaking) where a court has upheld an independent contractor arrangement.

A statement in a contract stating that an arrangement is not one of employment of itself will not be determinative of the nature of the relationship. Principals must consider carefully the facts and circumstances around their engagement of an independent contractor and ensure that they point to an independent contract arrangement.

*Judgment***Highlights of the Chief Executive's 2017 Policy Address**

In October 2017, the Hong Kong Chief Executive, Carrie Lam, delivered her maiden Policy Address at the Legislative Council. Here, we highlight three important points to note for employers in Hong Kong.

Enhancement of paternity leave and maternity leave

Employees in Hong Kong are currently entitled to statutory paternity and maternity paid leave of three days and ten weeks respectively. With a view to improving employees' benefits, the Government has proposed to increase statutory paternity leave to five days.

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The Chief Executive has also expressed an intention to launch a study exploring the possibility of extending statutory maternity leave beyond ten weeks.

Abolition of the MPF offsetting arrangement

At present, an employer may offset any severance payment (“**SP**”) or long service payment (“**LSP**”) payable under the Employment Ordinance with the accrued benefits derived from the employer’s contributions made to an MPF scheme for the employee. However, the Government has affirmed its intention to abolish such offsetting arrangement and regarded it as “one of its priority tasks”.

In light of the employers’ concerns over their inability to make SP or LSP following the abolition, the Government has indicated its willingness to increase its financial burden to reduce the potential impact upon enterprises. The Government is hoping to advance a proposal that takes into account the interests of both the labour sector and business sector in the coming months.

Amendments to the Anti-Discrimination Ordinances

On 29 March 2016, the Equal Opportunities Commission (“**EOC**”) submitted 73 recommendations to the Government with a view to modernising the four anti-discrimination ordinances in Hong Kong, which consist of the sex, family status, race and disability discrimination ordinances. Among those 27 recommendations which were considered by the EOC as having higher priority for reform, the lawmakers, in March 2017, further identified 9 recommendations which are likely to drive consensus among stakeholders and society at this point in time.

The Chief Executive has now confirmed in her Policy Address that, the Government aims to submit the proposed amendment bill covering the 9 recommendations to the Legislative Council in the 2017-18 legislative session.

[The 2017 Policy Address](#)

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Hong Kong Court of Appeal Quashes Labour Tribunal Contempt of Court Conviction

In *Re Mahesh J Roy* (CACV 226/2015), the Appellant was found guilty of insulting behaviour and disturbing proceedings by the Presiding Officer (“**PO**”) in the Labour Tribunal and was consequently fined HK\$5,000 pursuant to section 42 of the Labour Tribunal Ordinance (Cap 25) (“**LTO**”). The Court of Appeal has now allowed the Appellant’s appeal and set aside his conviction.

Facts

The Appellant was not involved in a Labour Tribunal claim, but was present in court to support his girlfriend. Before his girlfriend’s case was called upon, the Appellant was seen talking to his girlfriend in the public gallery. The Presiding Officer found the conversation disturbed the proceedings. The PO therefore reprimanded the Appellant and in response, the Appellant acted in a rather belligerent manner. However, the PO did not take the matter any further at that time.

As soon as the PO called upon his girlfriend’s case and invited the parties to take the seats at the bar table, the Appellant tried to talk to his friend once again. Although the PO directed that this course of action was not permitted, the Appellant insisted on talking to his girlfriend and threatened that he would make a complaint against the PO. Having considered the conduct of the Appellant, the PO took the view that the Appellant had acted contrary to section 42 of the LTO and adjourned the case to afford the Appellant the opportunity to obtain legal representation.

In the following hearing, the Appellant issued an apology to the Labour Tribunal for interrupting the proceedings but maintained that he did not do so wilfully. However, the PO still convicted him for wilfully interrupting the proceedings despite not having heard full submissions on the issue of wilfulness.

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On appeal, the Court ruled in favour of the Appellant for a number of reasons. First, the Court considered that the key issue before the PO was whether the Appellant had disrupted the proceedings wilfully. It was unfortunate that the PO had completely overlooked this crucial factor before reaching her conclusion to convict the Appellant.

Second, the PO failed to give the Appellant particulars of the charge against him even though he had made a request for a statement of allegations. The Court held that the Appellant was not given sufficient information of the charge to allow him to properly defend himself.

Third, the Court held that it was wrong in principle to commit the Appellant under the circumstances of the case. The Court stressed that committal in any event is a last resort and if more moderate alternatives (e.g. a demand for apology and a warning to the wrongdoer that he may be excluded from the courtroom) are available, they should be considered. Having considered the gravity of the matter, the Court took the view that the apology tendered by the Appellant should have been viewed as sufficient and the matter should have been settled at that time.

For these reasons, the appeal was allowed and the Appellant's conviction was quashed.

Takeaways

It is perhaps common sense that both parties and non-parties to proceedings in the Labour Tribunal should not engage in wilfully disruptive conduct in the Labour Tribunal. Otherwise, the Court could exercise its committal power and sentence the offender to a fine at level 3 (which is currently at \$10,000) and to imprisonment for 6 months.

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Hong Kong Labour Advisory Board Agrees to 5-Day Paternity Leave

In the Hong Kong Chief Executive's latest policy address, it was proposed that statutory paternity leave shall be extended from three days to five days. This proposal has now been given the green light by the Labour Advisory Board and will be discussed by the Legislative Council's Panel on Manpower next month. If adopted, male employees, who fulfilled certain statutory requirements, can start enjoying this enhanced benefit as early as next year.

*Further information on the current law on paternity leave***MPFA Launches Consultation to Overhaul Hong Kong Retirement Schemes Regime**

The Mandatory Provident Fund Schemes Authority ("MPFA"), the regulator of retirement scheme industry in Hong Kong, recently commenced a consultation process to overhaul the retirement scheme regulatory regime in Hong Kong.

The proposed reform will result in a major overhaul for most global employers in Hong Kong. In particular, every employer currently running any global retirement benefit arrangement (e.g. for its executives or internationally mobile staff) and with executives or staff under such arrangement stationed in Hong Kong will likely need to restructure its global arrangements or severely restrict the number of employees it places in Hong Kong.

The current position

The underlying legislation governing occupational retirement schemes in Hong Kong is the Occupational Retirement Schemes Ordinance ("ORSO"). ORSO was first enacted back in 1994 and introduced a framework for the registration, administration and funding of occupational retirement schemes.

In essence, ORSO is a requirement that any arrangement, which falls into the broad definition of "occupational retirement scheme", is obliged to be registered or exempted with the regulator (now the MPFA). Any employer who administers or contributes to an occupational retirement scheme that is not registered or exempted under ORSO commits a criminal offence.

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Schemes registered with the MPFA are subject to detailed restrictions concerning their structure, investment of their assets, as well as their solvency. Schemes that are able to apply for exemption from the MPFA (such exemption is not granted by default, it must be applied for) are subject to a materially reduced range of regulatory restrictions.

Broadly speaking, only schemes with a small number of Hong Kong permanent residents as members can obtain exempt status; all other schemes need to be registered.

By the end of last year, there were 4,709 registered schemes and 740 exempt schemes. ORSO schemes managed in excess of HK\$300 billion.

The proposed changes

The changes being proposed by the MPFA are as follows:

Change 1 A contract of employment between the employer and the members of the scheme must exist.

Change 2 All scheme members must be holders of Hong Kong identity cards.

Change 3 All exempted schemes will cease to exist in three years.

Change 1 should not be a problem. However, employers should ensure that “deferred members” (namely employees who have ceased to be employees, but have left their benefits in the scheme) can continue to be members of such scheme.

Changes 2 and 3 are where the position gets radical.

In a nutshell, Change 2 means that only persons living in Hong Kong can be members of an occupational retirement scheme. Currently, there is no restriction as to the type of employees who can become members of such scheme.

The proposed changes will materially impact a large number of employers. For instance, many global organisations have a retirement or pension scheme based in some countries other than Hong Kong. Typically, such scheme is set up in order to provide benefits for the group’s employees on a global scale. It may be that case that the scheme is focused on the most senior executives in the organisation (who are regularly transferred to various jurisdictions) or it could be for all employees over a certain seniority threshold. In any case, it would be typical that the number of Hong Kong employees only constitutes a small fraction of all the members of such scheme.

If Changes 2 and 3 were to become law, an international scheme of this type will not be able to be registered under ORSO, nor will it be able to apply for exemption. Such scheme cannot be registered since many of its members do not have Hong Kong identity cards (hence, they have no connection with Hong Kong). In addition, such scheme cannot apply for exemptions as the concept of “exempted schemes” will be scrapped.

As such, employers would not be able to continue the scheme for its Hong Kong employees without facing criminal sanctions.

Although no data indicates the number of schemes of this nature that are put in place in Hong Kong, they do exist. Such schemes are typically set up by the largest international employers, with the flexibility to invest their resources in various places in Asia. There is an argument that the proposed changes could reduce the attractiveness of Hong Kong as a regional hub for global companies.

Conclusion

The MPFA has unfortunately failed to explain the rationale for the proposed changes. It merely states that “*certain areas of [ORSO] that should be improved in order to make the policy intention, particularly the intended coverage of the ORSO regime, unequivocally clear*”. We hope the MPFA can clarify the mischief it is attempting to cure, so that the industry is able to propose changes to the legislation, making it less invasive and potentially less damaging for Hong Kong.

Finally, the fact that the MPFA is proposing “briefing sessions”, which will be held just seven days before Christmas Day and with a six-day notice is, perhaps, an indication that it intends to quell the attention these changes may attract.

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MPFA Begins Review of the Minimum and Maximum Relevant Income Levels

Under the Mandatory Provident Fund Schemes Ordinance (Cap 485) (MPFSO), employers and employees in Hong Kong are each required to make a monthly contribution of 5 percent of the employees' relevant income to a MPF Scheme. However, this is subject to the minimum and maximum levels of relevant income, which currently stand at HK\$7,100 and HK\$30,000 respectively.

An employee whose relevant monthly income is less than the minimum level is not required to make any contribution, even though his employer remains obliged to do so. Meanwhile, where the employee's relevant income exceeds the maximum level, the employee, together with his employer, will not be required to contribute for the portion in excess of HK\$30,000. Therefore, they will each be required to pay the maximum monthly contribution, i.e., HK\$1,500.

Pursuant to section 10A of the MPFSO, the Mandatory Provident Fund Schemes Authority (the "MPFA") is required to conduct a review of both the Minimum and Maximum Relevant Income every four years. The MPFA has kick-started the said review and will submit its proposal to the Government for consideration by July 2018.

In considering whether the relevant income levels should be adjusted, the MPFA must observe the following factors under section 10A:

- in respect of the Minimum Relevant Income, 50 percent of the monthly median employment earnings prevailing at the time of review; and
- in respect of the Maximum Relevant Income, monthly employment earnings at 90th percentile of the monthly employment earnings distribution prevailing at the time of the review.

The MPFA now proposes to increase both the Minimum Relevant Income and Maximum Relevant Income to HK\$8,000 and HK\$45,000 respectively. If the proposal is adopted by the Government, an employee whose monthly relevant income exceeds HK\$45,000 (together with his employer) would need to pay up to HK\$750 more mandatory contributions per month to the MPF scheme.

The MPFA is currently seeking views from the stakeholders on the implementation arrangement of the Maximum Relevant Income, in particular whether it should be adjusted upwards in one go, or progressively in two or three phases.

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2016**Payment of Bonus Amendment Rules, 2016 (the "PB Amendment Rules")**

The Ministry of Labour and Employment has published the PB Amendment Rules, which omit the proviso to rule 5(1) of the Payment of Bonus Rules, 1975. Rule 5 requires every employer to upload annual returns on or before 1 February each year. The proviso to rule 5(1) states that an annual return shall be filed by an employer within the timeline specified under section 19 of the Payment of Bonus Act, 1965 (the "**PB Act**"). Section 19 of the PB Act prescribes the timeline only for making bonus payments, whereas the proviso to rule 5(1) discusses the timeline for filing annual returns under the PB Act. Accordingly, the said proviso has been omitted to eliminate the inconsistency, since these two timelines are for different purposes.

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2016**Draft Child Labour (Prohibition and Regulation) Amendment Rules, 2016 (the "Draft Amendment Rules")**

Consequent to the enactment of the Child Labour (Prohibition and Regulation) Amendment Act, 2016 (the "**Amendment Act**"), the Ministry of Labour and Employment has released the corresponding Draft Amendment Rules. The Draft Amendment Rules inter alia prescribe the measures to be taken by the government for preventing child labour, specify the conditions subject to which a child may be allowed to work, includes conditions around working hours and payment of remuneration, etc.

The Draft Amendment Rules are published with a consultation period of 30 days from 14 December 2016 during which stakeholders can submit their objections and suggestions, for consideration by the government.

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2016**The Contract Labour [Regulation and Abolition] [Karnataka] [Amendment] Rules, 2016 (the "CLRA Karnataka Amendment Rules")**

The Government of Karnataka has introduced the CLRA Karnataka Amendment Rules to amend the Karnataka Contract Labour [Regulation and Abolition] [Karnataka] Rules, 1974 (the "**Karnataka CLRA Rules**"). The Rule 25(2) (ix) of the Karnataka CLRA Rules provided that no female contract labourer shall be employed by any contractor before 6.00 am or after 7.00 pm. The CLRA Karnataka Amendment Rules omit Rule 25(2) (ix) and entries relating thereto and lift the prohibition on employing female contract labourers at night, subject to certain conditions such as that the woman employee(s) is willing to work, there is more than one woman employee during the night, transport facilities from the residence to workplace and back are provided free of cost and with adequate security, adequate number of security guards are posted during the night shift, etc.

The CLRA Karnataka Rules shall come into force from the date of their publication in the Official Gazette.

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2016**Employees State Insurance Scheme to Promote Registration of Employers/Employees (the "SPREE")**

The Employees State Insurance Corporation has announced the SPREE to encourage registration of establishments, factories and employees coverable under the Employee's State Insurance Act, 1948 (the "**ESI Act**"). An establishment that obtains an ESI Act registration under the SPREE will be treated as being covered from the date declared/date of registration. As a result, it would be able to avoid penalties for any past period of liability (potential penalties range from fines to imprisonment for up to one year), unless the ESI authorities have already initiated proceedings prior to 20 December 2016 for irregularities/non-compliance under the ESI Act. The SPREE ends on 31 March, 2017.

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2016**Employees' State Insurance (Central) Third Amendment Rules, 2016 (the "ESI Third Amendment")**

The ESI Third Amendment has increased the wage threshold for coverage under the Employee's State Insurance Act, 1948 from INR 15,000 to INR 21000, with effect from 1 January 2017.

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The EPFO has issued a circular providing the following information about the unified portal that it is in the process of developing:

- Filing of online returns for exempted establishments is currently integrated in the ECR portal, however this portal was to be stopped from December 2016.
- Filing of online returns will be deployed on the Unified Portal being developed by CDAC once development and testing is completed.
- Therefore, exempted return and MIS Dashboard will not be available in the interim until it is deployed on the Unified Portal.

Since exempted and relaxed establishments are required to file monthly online returns in a sequential manner, such establishments must keep the data ready for months where the online filing portal is not functional, and must make filings for the pending months once the online portal is deployed.

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Guidelines for Processing Cases of Surrender of Employees' Provident Fund Exemption (the "EPF Exemption Surrender Guidelines")

The Employees' Provident Fund Organisation has issued the EPF Exemption Surrender Guidelines to set out the process followed for surrender of Employees' Provident Fund exemption by employers. The procedure to be followed is set out below:

- The employer must address an application to the Regional Provident Fund Commissioner ('RPFC') and the appropriate government.
- The application should be supported by the central board of trustees and a copy of the notification or order must be issued by the appropriate government granting an exemption in favour of the establishment.
- In case the exempted establishment is unable to maintain the provident fund trust and intends to surrender its exemption, the RPFC will then facilitate transfer of funds from the employer's trust to the statutory fund and ensure compliance of the establishment as un-exempted from the date specified in the application. The RPFC will also get the trust fund audited by a third party auditor to obtain an assessment report pertaining to such fund and furnish a certificate as to whether the establishment has violated any term or condition of grant of exemption.

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The Rights of Persons with Disabilities Act, 2016 (the "Disabilities Act")

The Disabilities Act has been enacted to give effect to the United Nations Convention on the Rights of Persons with Disabilities. In relation to private employers, the Disabilities Act imposes the following obligations:

- Every establishment should notify an equal opportunity policy, detailing the measures proposed to be taken by such establishment in pursuance of the provisions of the Disabilities Act around skill development and employment;
- Every establishment is required to register a copy of its equal opportunity policy with the authority appointed under the Disabilities Act; and
- Every establishment is required to maintain records of persons with disabilities in relation to the matter of employment, facilities provided and other necessary information as prescribed.

The Disabilities Act will come into force on a date that is appointed by the Central Government by notification in the Official Gazette.

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2016

Employees' Provident Funds (Seventh Amendment) Scheme, 2016 (the "EPF Seventh Amendment Scheme")

The Ministry of Labour and Employment has notified the EPF Seventh Amendment Scheme, which inserts paragraph 82A in the Employee's Provident Funds Scheme, 1952

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("EPF Scheme"). Paragraph 82A makes a special provision for the Employee's Enrolment Campaign, 2017, which will be in force between 1 January 2017 and 31 March 2017. The important points are as follows:

- Every employer who has failed to comply with the provisions of the EPF Scheme in relation to membership of employees and contribution thereto to the EPF Scheme shall furnish a declaration in the prescribed form ("Declaration") to the Regional Provident Fund Commissioner ("RPFC") in respect of membership of the employees who were required or entitled to become members of the EPF Scheme in the period beginning 1 April 2009 and ending 31 December 2016 but were not enrolled as members for any reason. Within 15 days from making such Declaration, the employer shall remit the employer's contribution payable in accordance with the provisions of the EPF Scheme and the employee's contribution (where deducted from the employee's wages) along with interest payable. The employer shall file a return of compliance with this provision to the RPFC.
- If the employer fails to remit the contribution, interest and damages payable by him within the 15 day window, the Declaration sent by the employer shall be deemed to have not been made under the EPF Seventh Amendment Scheme.
- Where a Declaration has been made by misrepresentation or suppression of facts, it shall be void and shall be deemed to have not been made under this EPF Seventh Amendment Scheme and the person making such Declaration shall be liable to punishment.
- A proviso has been inserted, which provides for the waiver of the employee's contribution under the Employees' Enrolment Campaign, 2017 between 1 April 2009 and 31 December 2016.
- For any period of default between 1 April 2009 and 31 December 2016 for any remittances in respect of valid declarations under Employees' Enrolment Campaign, 2017, the rate of damages will be one rupee per annum.
- The administrative charges payable under Employees' Enrolment Campaign, 2017 for the period of 1 April 2009 to 31 December 2016 shall be nil.

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2016

Employees' Deposit Linked Insurance (Second Amendment) Scheme, 2016 (the "EDLI Second Amendment")

The Ministry of Labour and Employment has notified the EDLI Second Amendment which inserts paragraph 28A in the Employees' Deposit Linked Insurance Scheme, 1976. The paragraph specifies the rate of damages to be recovered for default in payment of any contribution in relation to employees who have become members under the Employees' Enrolment Campaign, 2017 and to whom the Employees' Deposit Linked Insurance Scheme applies. The rate of damages specified is one rupee per annum.

The EDLI Second Amendment shall be in effect from 1 January 2017 to 31 March 2017.

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Employees' Pension (Seventh Amendment) Scheme, 2016 (the "Pension Seventh Amendment")

The Ministry of Labour and Employment has notified the Pension Seventh Amendment which inserts paragraph 43B in the Employees' Pension Scheme, 1995. The paragraph specifies the rate of damages to be recovered for default in payment of any contribution in relation to employees who have become members under the Employees' Enrolment Campaign, 2017 and to whom the Employees' Deposit Linked Insurance Scheme applies. The rate of damages specified is one rupee per annum. The Pension Seventh Amendment shall be in effect from 1 January 2017 to 31 March 2017.

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Amendment to Notification No. SO 324(E) issued by the Ministry of Labour and Employment

The Ministry of Labour and Employment has made the amendment to the Ministry of Labour and Employment notification number S.O. 324(E), dated 2 February 2015 ("**Notification**").

- The Notification earlier provided that the administrative charges payable by the employer for the purposes of paragraph 30 and Paragraph 38(1) of the Employees' Provident Fund Scheme shall be 0.85% of the pay, subject to a minimum of INR 75 per month for establishments with no contributory number and INR 500 per month for other establishments.
- The amendment to the Notification inserts a second proviso setting out that for any employees whose membership has been declared as per the Employees' Enrolment Campaign, 2017, the employer would not be required to pay any additional sums to the Deposit-linked Insurance Fund other than expenses towards the cost of benefits provided.

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Employees' Provident Funds (Amendment) Scheme, 2017

The Ministry of Labour and Employment has notified the Employees' Provident Funds (Amendment) Scheme, 2017 which amends paragraph 38 and paragraph 48 of Employees' Provident Funds Scheme, 1952. As per the amendment to paragraph 38, an employer can now also pay the contributions to the provident fund through scheduled banks in India including private sector banks. As per the amendment to paragraph 48, the commissioner can now also deposit the bank drafts and cheques received from the employers through scheduled banks in India including private sector banks

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Use of Aadhaar as Identity Document for Delivery of Services or Benefits or Subsidies Under the Employees' Pension Scheme, 1995

The Ministry of Labour and Employment has issued a notification setting out the following information in relation to use of Aadhaar documentation:

- Members and pensioners of the Employees' Pension Scheme have to furnish proof of the possession of the Aadhaar number or undergo Aadhaar authentication as per the procedure laid down by the Employees Provident Fund Organisation in order to avail the benefits under the scheme such as Central Government's contribution and subsidy.
- Members or pensioners who are currently not enrolled for Aadhaar will have to make an application for Aadhaar enrolment by 31 January 2017. Till the time Aadhaar is assigned, benefits shall be given based on the alternate and viable means of identification.

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Contract Labour (Regulation and Abolition) (Maharashtra Amendment) Act, 2016 (the "**CLRA Maharashtra Amendment Act**")

The CLRA Maharashtra Amendment Act amended the Contract Labour (Regulation and Abolition) Act, 1970 (the "**CLRA Act**") and increased the threshold for applicability of the CLRA Act within the state of Maharashtra. The threshold has been increased from 20 or more contract workers to 50 or more contract workers. After the amendment, the provisions of the CLRA Act, including the requirement to obtain a registration or license will not apply to establishments in Maharashtra that engage less than 50 contract workers, or to contractors in Maharashtra who employ less than 50 contract workers.

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Employees' State Insurance (Central) (Amendment) Rules, 2016 (the "**ESI Amendment Rules**") to extend maternity benefits under the ESI Act to adoption and surrogacy

The ESI Amendment Rules modified the Employees' State Insurance Rules in the following
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- Extends the period of maternity benefit from the existing 12 weeks (of which not more than 6 weeks shall be before the expected date of confinement) to 26 weeks (of which not more than 8 weeks shall be before the expected date of confinement). However, a woman having 2 or more surviving children would be entitled to 12 weeks of maternity benefit (of which not more than 6 weeks shall be before the expected date of confinement).
- Introduces maternity benefit for a period of up to 12 weeks for commissioning mothers and adopting mothers.

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Delhi Factories (Amendment) Rules, 2017 (the "Draft Delhi Factories Amendment Rules")

The Government of the National Capital Territory of Delhi has notified the Draft Delhi Factories Amendment Rules to amend Rule 5 and Rule 7 of the Delhi Factories Rules, 1950 (**Delhi Factories Rules**). Rule 5 provides for the Grant of License which includes provisions relating to the fees applicable and the periods for which the renewal license for a factory can be granted and Rule 7 provides for the renewal of license. The Draft Delhi Factories Amendment Rules seek to extend the maximum time period for the grant and renewal of the license from 5 years to 10 years, and update the provision relating to fees accordingly.

The Draft Delhi Factories Amendment Rules are published with a consultation period of 45 days from the date of publication i.e. 31 January 2016 and stakeholders can submit their objections or suggestions, for consideration by the government.

[More...](#)

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2017

Rationalisation of Forms and Reports under Certain Labour Laws Rules, 2017 (the "Draft Rationalisation of Forms Rules")

The Ministry of Labour and Employment has notified the Draft Rationalisation of Forms Rules, which provides for combined and simplified forms and reports required to be maintained for compliance under the following labour laws:

- Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996;
- Contract Labour (Regulation and Abolition) Act, 1970;
- Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979;

Under these rules, the combined forms and reports can be maintained electronically or otherwise. The Schedule of the Draft Rationalisation of Forms Rules provides formats for 12 forms and reports, including for the licence/renewal of license application, Form of Certification by Principal Employer, Service Certificate, Certificate of Medical Examination and Employment Card.

The Draft Rationalisation of Forms Rules are published with a consultation period of 30 days from the date of publication i.e. 9 February 2016 and stakeholders can submit their objections or suggestions, for consideration by the government.

[More...](#)

INDIA

10
FEB

2017

Industrial Employment (Standing Orders) Central (Amendment) Rules, 2017 (the "Draft SO Amendment Rules")

The Ministry of Labour and Employment has notified the Draft SO Amendment Rules, which seeks to amend the Industrial Employment (Standing Orders) Central Rules, 1946 (**SO Rules**). The Draft SO Amendment Rules propose to:

- Amend Rule 5 of the SO rules, in order to add an obligation to disclose the number of fixed term employment workmen in the made-up sector, in addition to the other prescribed particulars while submitting the draft standing orders to the Certifying

[Cont'd...](#)

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Officer as per Section 3 of the Industrial Employment (Standing Orders) Act, 1946;

- Amend the Model Standing Orders set out in Schedule I, in order to:
- Add "fixed term employment workmen in the made-up sector" to the classification of workmen in paragraph 2A;
- Include the fixed term employment workmen in the made-up sector, within the provision for the "fixed term employment workmen in apparel manufacturing sector" in paragraph 2(b)(h). By this inclusion, a fixed term employment workmen in the made-up sector is a workman who has been engaged on the basis of contract of employment for a fixed period. However, his working hours, wages, allowances and other benefits shall not be less than that of a permanent workman. He shall also be eligible for all statutory benefits available to a permanent workman proportionately according to the period of service rendered by him even though his period of employment does not extend to the qualifying period of employment required in the statute.
- Add "fixed term employment workmen in the made-up sector" to the category of temporary workmen specified in paragraph 13, who would not be entitled to any notice or pay in lieu of notice if his services are terminated as a result of nonrenewal of contract or employment or on its expiry.

The Draft SO Amendment Rules are published with a consultation period of 30 days from the date of publication i.e., 10 February 2016 and stakeholders can submit their objections or suggestions, for consideration by the government.

[More...](#)

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2017

Payment of Wages (Amendment) Act, 2017 (the "Payment of Wages Amendment Act")

The Payment of Wages Amendment Act has amended section 6 of the Payment of Wages Act, 1936 (**PW Act**) so as to permit the crediting of wages to the bank account of the employees or payment through cheque in addition to the existing provisions of payment in current coin or currency notes. The amendment also provides that the appropriate government can notify specific industrial or other establishment, the employer of which has to pay the wages only through cheque or crediting to the bank account.

* (deemed to have come into force from 28 December 2016)

[More...](#)

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FEB

2017

Ease of Compliance to Maintain Registers under Various Labour Laws, 2017 (the "Ease of Compliance Rules")

The Ministry of Labour and Employment has notified the Ease of Compliance Rules, which provides for a combined register for ease of compliance with the requirements around maintaining registers under the following labour laws:

- Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996;
- Contract Labour (Regulation and Abolition) Act, 1970;
- Equal Remuneration Act, 1976;
- Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979;
- Mines Act, 1952;
- Minimum Wages Act, 1948;
- Payment of Wages Act, 1936;
- Sales Promotion Employees (Conditions of Service) Act, 1976; and
- Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955.

The combined register can be maintained electronically or otherwise. Schedule A of the Ease of Compliance Rules provides formats for employee register, wage register, loan recoveries register, attendance register and a register of rest/leave/leave wages.

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BackLooking
Forward**Contract Labour (Regulation & Abolition) Central (Amendment) Rules, 2017 (the **Draft CLRA Amendment Rules**)**

The Ministry of Labour and Employment has notified the Draft CLRA Amendment Rules. The Draft CLRA Amendment Rules propose to make the following changes to the Contract Labour (Regulation & Abolition) Central Rules, 1971:

- Amend Rule 82, so as to provide for online filing of annual returns by the contractor and the principal employer in the Unified Annual Return in the new Form XXIV.
- Substitute the current "return to be sent by the contractor to the licensing officer" (Form XXIV) and the "annual return of the principal employer to be sent to the registering officer" (Form XIV) with the Unified Annual Return (Form XXIV).

The Draft CLRA Amendment Rules are published with a consultation period of 30 days from the date of publication i.e. 7 March 2016 and stakeholders can submit their objections or suggestions, for consideration by the government.

[More...](#)

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MAR

2017

Maternity Benefit (Amendment) Bill, 2016 (the "MB Bill**")**

The Lok Sabha passed the MB Amendment Bill on 9 March 2017. The MB Bill seeks to amend the Maternity Benefit Act, 1961 (the "MB Act"). The changes proposed by the MB Bill include the following:

- Increasing maternity leave from 12 to 26 weeks (of which not more than 6 weeks shall precede the expected date of delivery), provided that a woman with 2 or more surviving children is to be entitled to 12 weeks' maternity leave (of which not more than 6 weeks shall precede the expected date of her delivery).
- With respect to surrogacy, a commissioning mother (who uses her egg to create an embryo to be implanted in another woman) will receive 12 weeks' leave from the date when the child is transferred to her care.
- Paid adoption leave of 12 weeks from the date when the child is transferred to the adoptive mother's care, provided the child is less than 3 months old.
- Work from home benefits after the period of maternity leave, on such terms as may be agreed between the employer and the mother.
- Every establishment with 50 or more employees to provide crèche facilities within a prescribed distance. The mother will be allowed 4 visits to the crèche in a day, which will include her statutory interval for rest.

The MB Bill has already been passed by the Rajya Sabha and requires the President's assent in order to become a law.

[More...](#)

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MAR

2017

Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Central (Amendment) Rules, 2015 (the "Draft ISMW Amendment Rules**")**

The Draft ISMW Amendment Rules propose to introduce the Unified Annual Return Form and modify the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Central Rules, 1980 to make a provision for uploading a Uniform Annual Return online, as well as manually, by the contractor and the principal employer in the new Form XXIII, on or before 1st day of February following the end of the year to which it relates. The Draft ISMW Amendment Rules are published for a consultation period of 30 days from the date of publication (9 March 2017).

[More...](#)

INDIA

9
MAR

2017

Revision of administrative charges under the Employees' Provident Fund Scheme, 1952

Under the Employees' Provident Funds Scheme, 1952, the Central Government consults the Central Board and fixes the percentage of administrative charges. The Ministry of Labour and Employment has fixed the administrative charges payable by the employer at 0.65 per

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cent of the pay, subject to a minimum sum of (a) INR 75 per month for every non-functional establishment having no contributory member, and (b) INR 500 per month per establishment for other establishments.

The notification is in effect from 1 April 2017. Administrative charges up to 31 March 2017 are as per the previous rates.

[More...](#)

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15
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2017

Removal of Administrative Charges Under the Employees Deposit-Linked Insurance Scheme, 1976

The Ministry of Labour and Employment has notified that no administrative charges must be paid by the employer towards the Employees' Deposit Linked Scheme.

The notification is in effect from 1 April 2017. Administrative charges up to 31 March 2017 are as per the previous rates.

[More...](#)

The Draft Labour Code on Social Security and Welfare (the "Draft Code on Social Security")

The Ministry and Labour and Employment has published the Draft Code on Social Security. The Draft Code on Social Security proposes to combine a total of 15 labour laws relating to social security including, the following:

- Employees' Provident Fund and Miscellaneous Provisions Act, 1952;
- Employees' State Insurance Act, 1948;
- Maternity Benefit Act, 1961;
- Payment of Gratuity Act, 1972;
- Employees Compensation Act, 1923;
- Unorganised Workers' Social Security Act, 2008.

The Draft of the Code on Social Security is published with a consultation period up to 16 May 2017.

[More...](#)

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The Contract Labour (Regulation and Abolition) Central Amendment Rules, 2017 (the "Draft CLRA Payment Amendment Rules")

The Draft CLRA Payment Amendment Rules propose to amend the Contract Labour (Regulation and Abolition) Central Rules, 1971 to permit payment of wages to employees' bank accounts and by cheque in addition to the existing provision for payment in current coin or currency notes. The Draft CLRA Payment Amendment Rules also provide that the appropriate government can notify that the employer of certain establishments must pay wages only through cheque or credit to bank account. The Draft CLRA Payment Amendment Rules have been published for a consultation period of 30 days from the date of publication (17 March 2017) and stakeholders can submit their objections or suggestions, for consideration by the government during this period.

[More...](#)

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2017

Exemption under the Tamil Nadu Shops and Establishments Act, 1947 ("TN S&E Act")

Section 6 of the TN S&E Act empowers the state government to exempt establishments from any provisions of the TN S&E Act. In exercise of these powers, the government has exempted all shops and establishments from the requirement to remain entirely closed on one day of the week, for a period of three years from 23 March 2017. This means that the shops and establishments in Tamil Nadu can now remain open on all 365 days of a year subject to certain prescribed conditions. The conditions to be fulfilled for availing this exemption include:

- Every employee should get one holiday in a week;
- Wages (including overtime wages) must be credited to the employees' savings bank accounts;

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- An employer shall not require or allow any person employed to work for more than eight hours in a day and 48 hours in a week, and the period of work including overtime shall not exceed 10 hours in a day and 54 hours in a week.
- Women employees cannot work beyond 8 pm on any day in normal circumstances, and transport arrangements must be provided to women employees who work in shifts. An employer employing woman employees must constitute an Internal Complaints Committee under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- The employees shall be provided with restroom, wash room, safety lockers and other basic amenities.

[More...](#)

Payment of Provident Fund and Withdrawal Benefit Under Pension Scheme to International Workers ("IW") on the Date of Leaving Service ("Circular On Payments to IWS").

The Employee's Provident Fund Organisation ("EPFO") had previously issued instructions to the effect that provident fund and the pension payments to members would be made on the date on retirement. To facilitate such payments to International Workers on the date of leaving service in India, the EPFO has issued the Circular on Payments to IWS. The Circular on Payments to IWS sets out the following instructions:

- The employer should be requested to make payment of contribution of the retiring IW within first three days of the month in which the said member is retiring.
- The employer should submit the claim forms in respect of such IWS complete in all respects to the concerned provident fund office by the 5th of the month in which such member is leaving service.
- The concerned authorities shall ensure settlement of such retirement claims and credit of the settlement amount to the member's bank account maintained in India on the date of the member leaving service in India.
- If the IW wants to get interest on the settlement amount for the month of retirement as well, the settlement amount should be credited to the member's account on the first day of the next month.

[More...](#)

Rationalisation of Forms and Reports under Certain Labour Laws Rules, 2017 (the "Rationalisation of Forms Rules")

The Ministry of Labour and Employment has notified the Rationalisation of Forms Rules, which provide for combined and simplified forms and reports required to be maintained, for compliance under the Central rules under the following labour laws:

- Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996;
- Contract Labour (Regulation and Abolition) Act, 1970;
- Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979;

Under these rules, the combined forms and reports can be maintained electronically or otherwise. The Schedule of the Rationalisation of Forms Rules provides formats for 12 forms and reports, including for the licence/renewal of license application, certification by principal employer, service certificate, certificate of medical examination and employment card.

[More...](#)

Employees' Provident Funds (Seventh Amendment) Scheme, 2017; and Employees' Provident Funds (Third Amendment) Scheme, 2017

Through the Employees' Provident Fund (EPF) Seventh Amendment Scheme, 2016 paragraph 82A has been inserted in the EPF Scheme. Paragraph 82A makes a special

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provision for the Employee's Enrolment Campaign, 2017, which was originally supposed to be in force between 1 January 2017 and 31 March 2017. By way of the Employees' Provident Fund (Seventh Amendment) Scheme, 2017, the last date has been extended from 31 March 2017 to 30 June 2017. The important points are as follows:

- Every employer who has failed to comply with the provisions of the EPF Scheme in relation to membership of employees and contributions thereto to the EPF Scheme shall furnish a declaration in the prescribed form ("Declaration") to the Regional Provident Fund Commissioner ("RPFC") in respect of membership of the employees who were required or entitled to become members of the EPF Scheme in the period beginning 1 April 2009 and ending 31 December 2016 but were not enrolled as members for any reason. Within 15 days from making such Declaration, the employer shall remit the employer's contribution payable in accordance with the provisions of the EPF Scheme and the employee's contribution (where deducted from the employee's wages) along with interest payable. The employer shall file a return of compliance with this provision to the RPFC.
- If the employer fails to remit the contribution, interest and damages payable by him within the 15-day window, the Declaration sent by the employer shall be deemed to have not been made under the EPF Seventh Amendment Scheme.
- Where a Declaration contains misrepresentations or omits facts, it shall be void and shall be deemed to have not been made under this EPF Seventh Amendment Scheme and the person making such Declaration shall be liable to punishment.
- A proviso has been inserted, which provides for the waiver of the employee's contribution under the Employees' Enrolment Campaign, 2017 between 1 April 2009 and 31 December 2016.
- For any period of default between 1 April 2009 and 31 December 2016 for any remittances in respect of valid declarations under the Employees' Enrolment Campaign, 2017, the rate of damages will be one rupee per annum.
- The administrative charges payable under the Employees' Enrolment Campaign, 2017 for the period of 1 April 2009 to 31 December 2016 will be nil.

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Employees' Deposit Linked Insurance (Second Amendment) Scheme, 2017

Through the Employees' Deposit Linked Insurance (Second Amendment) Scheme, 2016 paragraph 28A has been inserted in the Employees' Deposit Linked Insurance Scheme, 1976. The paragraph specifies the rate of damages to be recovered for default in payment of any contribution in relation to employees who have become members under the Employees' Enrolment Campaign, 2017 and to whom the Employees' Deposit Linked Insurance Scheme applies. The rate of damages specified is one rupee per annum. The Employees' Deposit Linked Insurance (Second Amendment) Scheme, 2016 was originally in effect from 1 January 2017 to 31 March 2017. By way of the Employees' Deposit Linked Insurance (Second Amendment) Scheme, 2017, the last date has been extended from 31 March 2017 to 30 June 2017.

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2017

Employees' Pension (Seventh Amendment) Scheme, 2017

Through the Employee's Pension (Seventh Amendment) Scheme, 2016 paragraph 43B was inserted in the Employees' Pension Scheme, 1995. The paragraph specifies the rate of damages to be recovered for default in payment of any contribution in relation to employees who have become members under the Employees' Enrolment Campaign, 2017 and to whom the Employees' Deposit Linked Insurance Scheme applies. The rate of damages specified is one rupee per annum. The Employees' Pension (Seventh Amendment) Scheme, 2016 was originally in effect from 1 January 2017 to 31 March 2017. By way of the Employees' Pension (Seventh Amendment) Scheme, 2017, the last date has been extended from 31 March 2017 to 30 June 2017.

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Forward**The Maternity Benefit (Amendment) Act, 2017 (the "MB Amendment Act")**

The Ministry of Labour and Employment has notified the dates on which the MB Amendment Act would come into effect. The MB Amendment Act will be in effect from 1 April, 2017 except crèche provision which is in effect from 1 July 2017. The MB Amendment Act amends the Maternity Benefit Act, 1961 (the "MB Act"). The changes made by the MB Amendment Act include the following:

- Increasing maternity leave from 12 to 26 weeks (with not more than 8 weeks preceding the expected delivery date), except for a woman with 2 or more surviving children - who is entitled to 12 weeks' maternity leave (with not more than 6 weeks preceding the expected delivery date).
- Introduction of paid surrogacy leave for a commissioning mother (who uses her egg to create an embryo to be implanted in another woman) for a period of 12 weeks from the date when the child is handed over to her.
- Introduction of paid adoption leave of 12 weeks from the date when the child is handed over to the adoptive mother, provided the child is less than 3 months old at the time of adoption.
- Provision for work from home arrangements after the period of maternity leave, on such terms as may be agreed between the employer and the woman.
- Every establishment with 50 or more employees must have a crèche facility within a prescribed distance. The mother will be allowed 4 visits to the crèche in a day, which will include her statutory interval for rest. (The provision relating to crèche facilities will come into effect from 1 July 2017.)
- Employers are required to inform every newly appointed woman of the benefits available under the MB Act (in writing and electronically).

[More...](#)

INDIA

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MAR

2017

Draft notification to amend the Schedule to the Child Labour (Prohibition and Regulation), 1986 (the "Draft Child Labour Amendment Schedule")

The Ministry of Labour and Employment has notified the Draft Child Labour Amendment Schedule, which proposes to bring about the following changes in the schedule to the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986:

- Set out the hazardous occupation and processes in which adolescents are prohibited to work and children are prohibited to help.
- Provide the list of occupations and processes where children are prohibited from helping family or family enterprises.

The Draft Child Labour Amendment Schedule has been published for a consultation period of 3 months from the date of publication (31 March 2017).

[More...](#)

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MAR

2017

Apprenticeship (Third Amendment) Rules, 2017 ("Apprenticeship Amendment Rules")

The Ministry of Skill Development and Entrepreneurship Labour and Employment has amended the Apprenticeship Rules, 1992. Rule 7A(2) of the Apprenticeship Rules, 1992 prescribes the minimum educational qualification required for a person to undergo apprenticeship training in operational trade. The Apprenticeship Amendment Rules reduce this requirement from "eight class pass" to "fifth class pass".

[More...](#)

INDIA

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2017

Karnataka Labour Welfare Fund (Amendment) Act, 2017 ("Karnataka LWF Amendment Act")

Section 7A of the Karnataka Labour Welfare Fund Act, 1965 has been amended by the Karnataka LWF Amendment Act. Pursuant to the Amendment, the employee contribution

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has increased from INR 6 to INR 20, the employer contribution has increased from INR 12 to INR 40 and the contribution by the State Government has increased from INR 6 to INR 20.

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APR**

2017

Notice to Employers Regarding Approval of Extension of Employees State Insurance Scheme to Promote Registration of Employers/Employees (SPREE).

The Employees State Insurance Corporation has announced the SPREE on 20th December 2016, to encourage registration of establishments, factories and employees coverable under the Employees State Insurance Act (**ESI Act**) – an establishment that obtains an ESI Act registration under the SPREE will be treated as being covered from the date declared/ date of registration. As a result, it would be able to avoid penalties for any past period of liability (potential penalties range from fines to imprisonment for up to one year), unless the ESI authorities have already initiated proceedings prior to 20 December 2016 for irregularities/non-compliance under the ESI Act.

The SPREE was originally meant to be open from 20 December 2016 to 31 March 2017. By a notice dated 11 April 2017, the last date has been extended from 31 March 2017 to 30 June 2017. The features of SPREE include:

- Employers registered during this period will be treated as covered from the date of registration or as declared by them.
- Newly registered employees will be treated as covered from the date of their registration.

[More...](#)

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APR**

2017

Draft Child Labour (Prohibition and Regulation) Amendment Rules, 2017 (Draft Child Labour Amendment Rules)

The Ministry of Labour and Employment has notified the Draft Child Labour Amendment Rules. The changes proposed by the Draft Child Labour Amendment Rules include the following:

- Conditions subject to which a child may help his family in his family enterprise, such as the maximum working hours, non-interference with education, etc.
- Conditions subject to which a child may be allowed to work as an artist, such as the maximum working hours, ensuring appropriate facilities for education, etc.
- The maximum working hours for an adolescent.
- Details of persons who may file a complaint under the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986.

The Draft Child Labour Amendment Rules are published for a consultation period of 30 days from the date of publication (20 April 2017).

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2017

The Employees' Provident Fund (Fifth Amendment) Scheme, 2017

The Employees' Provident Fund (Fifth Amendment) Scheme, 2017 amends Paragraph 68J and 68N of the EPF Scheme. Paragraph 68J provides for allowing a member to take a non-refundable advance from the EPF for illness in cases of (a) hospitalisation for at least a month, (b) major surgical operation, or (c) in cases where the member or his family is suffering from tuberculosis, leprosy, paralysis, cancer and heart ailments. Previously the paragraph provided that the advance shall be granted only if (a) the employer certifies that the Employees' State Insurance Scheme facility is not provided to the member, and (b) a doctor certifies that any of the three situations mentioned above have been satisfied. This requirement is now done away with and the advance can be taken upon self-declaration from the member.

Paragraph 68N provides for allowing a physically handicapped member to take a non-refundable advance from the EPF for purchasing equipment required to minimise the

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hardship on account of his/her handicap. Previously, this advance could be withdrawn only after providing a doctor's certificate which states that the member is physically handicapped. The advance can now be taken upon self-declaration by the member.

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APR

2017

Industries Notified as per Section 6 of the Payment of Wages Act, 1936

Section 6 of the Payment of Wages Act, 1936 provides that the government can notify specific establishments or industries for which the payment of wages have to be made through cheque or bank transfer. In exercise of these powers, the Ministry of Labour and Employment has notified the following establishments:

1. Railway;
2. Air transport services;
3. Mines;
4. Oil fields.

After the notification, the employees in these establishments can only be paid through cheque or bank transfer.

[More...](#)

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MAY

2017

The Employee's Compensation (Amendment) Act, 2017 (the "EC Amendment Act")

The Ministry of Labour and Employment has notified 15 May, 2017 as the day on which the EC Amendment Act will come into force. The EC Amendment Act amends the Employee's Compensation Act, 1923 (the "EC Act"). The changes made by the EC Amendment Act are as follows:

- Introducing a requirement for the employer to inform the employee of his/her right to compensation under the EC Act in writing (in English, Hindi or the relevant official language) at the time of employing the individual. Failure to do so would attract a penalty between INR 50,000 and INR 100,000.
- Increasing the threshold of disputed amount for filing an appeal from INR 300 to INR 10,000, and empowering the Central Government to increase this threshold further.
- Deleting the provision in the EC Act which stated that if an employer has appealed against an order by the commissioner under the EC Act, any payments to the employee can be temporarily withheld.

[More...](#)

INDIA

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MAY

2017

Draft Maternity Benefit (Mines and Circus) Amendment Rules, 2017

The Ministry of Labour and Employment has notified the draft Maternity Benefit (Mines and Circus) Amendment Rules, 2017, which seeks to insert Rule 6A in the Maternity Benefit (Mines and Circus) Rules, 1963. The proposed rule provides that every establishment having 50 or more employees (in a mine or a circus) should have a crèche facility within 500 meters from the entrance of the establishment, either separately or along with the common facilities of the establishment.

The Draft Maternity Benefit (Mines and Circus) Amendment Rules, 2017 have been published for a consultation period of 30 days from the date of publication (18 May 2017).

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2017

Delhi Factories (Amendment) Rules, 2017

The Delhi Factories (Amendment) Rules, 2017 amend the Delhi Factories Rules, 1950 ("Delhi Factories Rules") to increase the maximum period for the grant and renewal of a license under the Delhi Factories from 5 years to 10 years, and modify the fees payable accordingly.

[More...](#)

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Clarification on the definition of "International Worker" under the Employees' Provident Fund Scheme.

Paragraph 83(2) (ja) of the Employees' Provident Fund Scheme, 1952 defines an "international worker" as an Indian employee having worked or going to work in a foreign country with which India has entered into social security agreement and being eligible to avail the benefit under a social security programme of that country, by virtue of the eligibility gained or going to gain, under the said agreement. This definition had previously led to a confusion on whether an Indian employee who has travelled abroad and come back to India would be considered as an international worker. The Employees' Provident Fund Organisation has now issued a clarification that such an employee who has returned to India would not come under the definition of an international worker if he is not eligible to avail any benefit under the social security programme of the county that he travelled to.

[More...](#)

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8
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2017

The Rights of Persons with Disabilities Rules, 2017 (the "RPD Rules")

The Rights of Persons with Disabilities Act, 2016 ("RPD Act") has been enacted to give effect to the United Nations Convention on the Rights of Persons with Disabilities. It has come into effect on 1 April 2017. On 15 June 2017, the central government notified the RPD Rules under the RPD Act. In relation to private employers, the RPD Act and RPD Rules imposes the following obligations:

- Every establishment should notify an equal opportunity policy, which sets out the amenities to be provided to Persons with Disabilities ("PwD") to enable them to discharge their duties effectively. If there are 20 or more employees, the policy should also set out the job roles within the establishment that are identified as suitable for PwD, the recruitment process for such roles, training provided for these roles, preference in transfer and posting, special leave that PwD can avail, assistive devices provided for PwD and measures taken to ensure barrier-free accessibility.
- The policy should be registered with the authority appointed under the Act and should also be displayed on the establishment's website. If it is not feasible to display the policy on the website, it must be displayed at a conspicuous place in the office premises.
- If the establishment has 20 or more employees, a liaison officer must be appointed in order to supervise recruitment of PwD and provision of requisite facilities. The details of the liaison officer should be included in the policy as well.
- Every establishment is required to maintain records of persons with disabilities in relation to the number of PwD employed, their date of joining, names, gender and addresses, nature of their disabilities, nature of work performed by them, and the facilities provided to them.
- Every establishment must ensure compliance with specified standards of accessibility relating to physical environment, transport and information and communication technology. These include ensuring that the building has elevators/ramps for the benefit of wheel chair users, adhering to a minimum width of walkways, ensuring that documents on the website are in optical character reader (OCR) PDF based format, etc. The RPD Act further provides that no establishment should be issued a certificate of completion unless it has adhered to the accessibility norms formulated by the government. For existing buildings, the obligation is to adhere to these standards within 5 years from the notification of the RPD Rules.

Non-compliance with respect to any of the above obligations could result in the imposition of a fine of up to INR 10,000 in the first instance and up to INR 500,000 for subsequent non-compliances.

[More...](#)[More...](#)

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2017

Revised Application form for Certificate of Coverage ("COC")

The Employees' Provident Fund Organisation ("EPFO") previously had different applications forms for the COC in respect of Indian workers (having Indian passport) going to work in a country with which India has a social security agreement. This has been revised to a single form through a web circular issued by the EPFO.

[More...](#)

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Employees' State Insurance (General) Amendment Regulation, 2017

Regulation 31 of the Employees' State Insurance (General) Regulations, 1950 provides for when contributions must be paid by the employer. This Regulation has been amended so that the contributions in respect of any employee must be paid within 15 days of the last day of the calendar month in which the contributions fall due. The previous position was that contributions had to be paid within 21 days of the last calendar month.

[More...](#)

INDIA

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JUL

2017

Apprenticeship (Fourth Amendment) Rules, 2017 ("Apprenticeship Amendment Rules")

The Ministry of Skill Development and Entrepreneurship has notified the Apprenticeship Amendment Rules, which amends Schedule I of the Apprenticeship Rules, 1992. Schedule I provides for the details in relation to the apprentices, such as the period of training and rebate allowed in the apprenticeship training etc. for a designated trade.

[More...](#)

INDIA

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JUL

2017

Employees' Provident Funds Appellate Tribunal (Procedure) Amendment Rules, 2017 ("EPFAT Amendment Rules")

The Ministry of Labour and Employment has notified the EPFAT Amendment Rules, to amend the Employees' Provident Funds Appellate Tribunal (Procedure) Rules, 1997 ("EPFAT Rules"). The EPFAT Amendment Rules, amends the definition of 'tribunal' to mean the Industrial Tribunal referred to in section 7D of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("EPF Act"). Hence, all appeals under the EPF Act and its schemes will be dealt in the Industrial Tribunal instead of the EPF Appellate Tribunal.

[More...](#)

INDIA

21
JUL

2017

Launch of Transfer Claims under Unified Portal

With effect from 27 March 2017, the Employees' Provident Fund Organisation ("EPFO") has launched a new facility to apply online for the transfer of members from one employer to another. Through its circular, the EPFO has now detailed the process through which the employers and employees could use this interface to transfer the employee's provident fund account to a new employer.

[More...](#)

INDIA

21
JUL

2017

Details for Using the Unified Portal to Furnish Location-Wise Employees' Details

Under the Employees' Provident Fund Act, employers make the payments under a single PF code number for all the employees working in different locations and branches. In order to make it easier for the authorities in each location to review the contribution details for employees in a specific location (for checking compliance), the Employees' Provident Fund Organisation has now made it mandatory for multiple location establishments to fill the location-specific details for employees.

[More...](#)

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2017

Code on Wages Bill, 2017 ("Code")

The Ministry of Labour and Employment has introduced the Code in the lower house of the Parliament on 10 August 2017. The Code aims to consolidate and amalgamate the existing labour laws relating to wages. Amongst others, the Code proposes the following changes:

- *Introduction of National Minimum Wage ("NMW")* - The Code empowers the Central Government to fix a general NMW with additional powers to fix different NMWs for any state or geographical area. The state governments may fix a higher minimum rate of wages than the prescribed NMW.
- *Enlarged coverage of payment of wages* - While the applicability of the Payment of Wages Act, 1936 is currently limited to employees earning wages less than INR 24,000, the Code does not prescribe any wage ceiling for applicability of the chapter on payment of wages. Thus, under the Code, this chapter would apply to all employees and establishments, except those establishments that have been explicitly excluded, i.e., Government establishments.

[Cont'd...](#)

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- *Definition of "wages"* - While the term "wages" has been defined uniformly for the rest of the Code, a separate definition has been prescribed for the chapter on payment of statutory bonus. This separate definition, which is similar to the definition of wages under the Payment of Bonus Act, 1965 also specifies that if the exclusions to the definition exceed 50% of "all the remuneration" upon which a bonus is to be paid, then such amount in excess of 50% will be considered for the purpose of calculating the bonus.
- *Penal provisions* - The Code allows compounding of offenses punishable with fines, subject to the payment of a sum of 50% of the maximum prescribed fine. The Code also affords defaulters (except where the default relates to non-payment of dues to employees) an opportunity to comply with the obligations under the Code within the time specified by the relevant authority before any prosecution proceedings are initiated. Further, with the increase in amount of penalties for offences, the Code has also removed the punishment of imprisonment for first time offenders.
- *No corresponding provision to prevent discrimination in conditions of service* - The Equal Remuneration Act, 1976, which is currently in force provides that the employer shouldn't discriminate based on gender in respect of (a) remuneration, and (b) recruitment, or in any condition of service such as promotions, training, transfer etc. The Code only provides that the employer shouldn't discriminate based on gender in respect of remuneration.

[More...](#)

INDIA

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2017

The Minimum Wages (Karnataka Amendment) Act, 2017

The Karnataka government has notified the Minimum Wages (Karnataka Amendment) Act, 2017 on 17 August 2017 to mainly amend the penalty provisions in the Minimum Wages Act, 1948, in its application to the state of Karnataka. These amendments include an increase in the penalty amounts for employer's failure to pay statutory minimum wages to their employees and for other violations under the Act.

[More...](#)

INDIA

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2017

Letter on the Strict Implementation of the Maternity Benefit (Amendment) Act, 2017 ("MB Amendment Act")

The Ministry of Labour and Employment has issued a letter to the secretaries of the labour departments in all the state governments and union territories, urging them to effectively enforce the provisions of the Maternity Benefit Act, 1961 ("MB Act"). The letter has been issued in the light of MB Amendment Act and the clarifications thereunder. As per the MB Amendment Act, employers with 50 or more employees should provide crèche facilities to the employees in accordance with the rules under the MB Act. However, the rules are yet to be notified.

[More...](#)

INDIA

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AUG

2017

Increase of Wage Threshold under the Payment of Wages Act, 1936 ("PW Act")

Section 1, sub-section 6 of the PW Act provides for the wage limit of the employee to whom the PW Act would be applicable. It also provides that the Central Government may change this wage limit, after every five years through a notification in the Official Gazette. The wage limit for the applicability of the PW Act was previously INR 18,000 and the Ministry of Labour and Employment has notified in the Official Gazette that the wage limit would be increased from INR 18,000 to INR 24,000. Hence, the current wage limit for the applicability of the PW Act is INR 24,000.

[More...](#)

INDIA

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AUG

2017

Amendment to the Schedule to the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

The Ministry of Labour and Employment has notified the Amendment to the Schedule to the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986. The amendment brings about the following changes in the schedule to the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986:

[Cont'd](#)

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- Sets out the hazardous occupation and processes in which adolescents are prohibited to work and children are prohibited to help. This includes natural gas and other related products, coal industry, power industry, pulp and paper industry, cement industry, petroleum industry, pharmaceutical industry, etc.
- Provides the list of occupations and processes where children are prohibited from helping family or family enterprises. This includes domestic workers or servants, restaurants, building and construction industry, food processing, printing etc.

[More...](#)

INDIA

5
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2017

Contract Labour (Regulation and Abolition) Central Amendment Rules, 2017 ("CLRA Central Amendment Rules")

The Ministry of Labour and Employment has notified the CLRA Central Amendment Rules by which, Rule 69 of the Contract Labour (Regulation and Abolition) Central Rules, 1971 ("CLRA Central Rules") has been amended. Rule 69 previously provided that all the wages have to be paid in currency coin or currency notes. The Rule has now been amended to provide that the wages can be paid in currency coin or currency notes or by cheque or by crediting the wages in the bank account of the workman. It is pertinent to note that the CLRA Central Rules are applicable only to a limited number of industries such as the air transport service, banking, insurance company, mine, oil field etc.

[More...](#)

INDIA

7
SEP

2017

Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 ("Maharashtra S&E Act")

The Maharashtra government has published the Maharashtra S&E Act on 7 September 2017 to replace the existing shops and establishment legislation. This new law has received the governor's assent and has not yet come into force. Some of the key changes in the new Maharashtra S&E Act are increase in the overtime limit, increase in number of leaves that may be accumulated from 42 to 45 and requirement to have creche facilities for establishments having 50 or more employees.

[More...](#)

INDIA

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2017

Cabinet Approves Introduction of Payment of Gratuity (Amendment) Bill, 2017 ("Gratuity Amendment").

The union cabinet has given its approval for introduction of the Gratuity amendment in the parliament. This Gratuity amendment aims to increase the limit on maximum gratuity amount payable from INR 10,00,000 (USD 15,520) to INR 20,00,000 (USD 31,039) for private sector employees who have completed at least 5 years of continuous employment with the employer. The Bill will have to be passed by both houses of parliament and get President's assent before it becomes law.

[More...](#)

INDIA

28
SEP

2017

Contract Labour (Regulation and Abolition) Amendment Bill, 2017 ("CLRA Amendment")

The Ministry of Labour and Employment has published the preliminary draft of the CLRA Amendment on 28 September 2017 for comments and suggestions from the general public. Some of the key proposed amendments include changes to the definition of 'contract labour', recognition of payment of wages by electronic means, ability to compound offences, etc.

[More...](#)

INDIA

11
OCT

2017

Karnataka Factories (Amendment) Rules, 2016

The Karnataka government has notified the Karnataka Factories (Amendment) Rules, 2016 on 11 October 2017 to amend the provisions of the Karnataka Factories Rules, 1969. One of the key initiatives introduced through this amendment is the move from manual filings to online filings through the 'e-surakshate' online portal. Other important amendments include increase in validity of license granted to the factory from three years to ten years, increase in fee for amendment and transfer of the license, and also additional compliances on the factory owner with respect to appointment of safety officer, etc.

[More...](#)

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BackLooking
Forward**The Contract Labour (Regulation and Abolition) Haryana Amendment Act, 2016 ("CLRA Haryana Amendment")**

INDIA

17
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2017

The Haryana government has notified the CLRA Haryana Amendment on 17 October 2017 to mainly amend the applicability provision in the Contract Labour (Regulation and Abolition) Act, 1970 ("CLRA"), in its application to the state of Haryana. The amendment increases the threshold limit for applicability of the CLRA in Haryana. The CLRA is normally applicable to establishments with 20 or more contract workers. The CLRA Haryana Amendment (applicable to Haryana) now makes the CLRA applicable only to establishments with 50 or more contract workers.

[More...](#)**The Minimum Wages (Kerala Amendment) Act, 2017**

INDIA

20
OCT

2017

The Kerala government has notified the Minimum Wages (Kerala Amendment) Act, 2017 on 20 October 2017 to mainly amend the penalty provisions in the Minimum Wages Act, 1948, in its application to the state of Kerala. These amendments include significant increase in the penalty amounts for employer's failure to pay statutory minimum wages to their employees and for other violations under the Act.

[More...](#)**No Inspection Required Prior to Registration of Shops and Commercial Establishments under the Rajasthan Shops and Establishments Act, 1958 ("Rajasthan S&E Act").**

INDIA

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2017

As part of the central government's 'Ease of Doing Business' initiative, the government of Rajasthan has issued a circular on 24 October 2017 clarifying that the earlier requirement of inspection by government authorities of shops and establishments intending to get registered under the Rajasthan S&E Act, is no longer required.

[More...](#)**Manual Application Filings under the Punjab Shops and Commercial Establishments, 1958, as Applicable to Punjab, is Now Moved Online.**

INDIA

27
OCT

2017

The government of Punjab has issued an order on 27 October 2017 whereby all applications for registration, renewal or for any other purpose under the Punjab S&E Act will now be made through online system in the electronic form. With respect to application for registration and renewal of establishments, the grant of provisional registration certificate and renewal will also be done through the online system.

[More...](#)**Amendments to the Rationalisation of Forms and Reports under Certain Labour Laws (Amendment) Rules, 2017 ("Rules") are proposed.**

INDIA

27
OCT

2017

The Ministry of Labour and Employment on 27 October 2017 has published the proposed amendments to the Rules for comments and suggestions from the general public. The key amendments proposed, aim to digitise the submission of forms as prescribed under the principal rules and also introduce combined forms for filing the registration and annual returns of establishments employing contract labour, migrant workmen and building workers.

[More...](#)**SHe-Box, A Government Initiative Facilitating Female Employees to Lodge Complaints Online.**

INDIA

7
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2017

The Ministry of Women and Child Development ("MWCD") has launched an online complaint management system on 7 November 2017, called 'SHe-Box' to ensure effective implementation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The SHe-Box allows all woman employees working in the private and public sector to file complaints of sexual harassment at workplace online, irrespective of whether the complaints have already been filed with the Internal Committee ("IC") or the Local Complaints Committee ("LCC"). Some of the salient features of SHe-Box are -

- SHe-Box portal will directly send the employee's complaint to the IC/LCC of the concerned employer.

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- MWCD can monitor progress of the inquiry conducted by the respective IC/LCC.
- SHe-Box provides information on 112 institutions empanelled by the MWCD to conduct trainings on the issues relating to sexual harassment at workplace.

[More...](#)

INDIA

**27
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2017

Coal Mines Regulations, 2017

The Coal Mines Regulations, 2017 has come into force on 27 November 2017 replacing the Coal Mines Regulations, 1957 and is applicable to every coal mine in India. The new legislation largely covers the notice requirements in the event of accidents, dangerous occurrences and contraction of diseases, standards required around qualifications of inspectors, mine officials, duties and responsibilities of the mine owners, contractors, manufacturers, officials, competent persons and workmen, specifications on mine plans, means of access and egress and other such coal mine specific technical standards.

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Back****Looking
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INDONESIA

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2016

MOM Regulation No.33 of 2016 regarding Procedures for Labor Inspection was issued on November 16, 2016 (“MOM 33”).

Under MOM 33, the employer and the employee will understand the mechanism of Labor Inspection in the company. MOM 33 also provides sample of forms on planning, execution and reporting mechanism during labor inspection in the company by the Labor Inspector.

MOM 33 is the implementation of Article 22 (2) of Presidential Regulation No.21 of 2010 regarding Labor Inspection.

Ministry of Manpower Regulation regarding Health and Safety for Pressurized Equipment

INDONESIA

**27
DEC**

2016

MOM has issued Regulation No. 37 of 2016 dated December 27, 2016 regarding Health and Safety for Pressurized Equipment (“Reg.37”).

Under Reg.37 regulates the implementation of health and safety in the workplace from potential hazardous from Pressurized Equipment. Reg.37 also provides sample of application forms related to Health and Safety for Pressurized Equipment that will be used by the company and MOM.

Reg.No.37 revokes (i) the previous MOM Reg No.01/Men/1985 regarding the same; (ii) the Circular Letter of MOM No.SE.No.06/1990 regarding Coloration of Steel Bottle or Pressurized Equipment, and (iii) the Decision of Director General for Guidance and Supervision of Labor Inspector No.Kep/75/PPK/XII/2013 regarding Technical Guidance for Health and Safety Expert Candidate in the field of Steam, Production, Lifting and Transport Equipment specifically for Expert Candidate in the field of Steam, Production, Lifting and Transport Equipment.

Ministry of Manpower Regulation regarding Health and Safety for Power and Production Equipment

INDONESIA

**27
DEC**

2016

MOM has issued Regulation No. 38 of 2016 dated December 27, 2016 regarding Health and Safety for Power and Production Equipment (“Reg.38”).

Under Reg.38 regulates the implementation of health and safety in the workplace from potential hazardous of power and production equipment. Reg.38 provides sample of forms on Health and Safety for Power and Production Equipment related documents that will be used by the company and MOM.

Reg.No.38 revokes (i) the previous MOM Reg No.04/Men/1985 regarding the same; (ii) the Circular Letter of Director General for Guidance and Supervision of Labor Inspector No.SE.No.01/DJPKK/VI/2009 regarding Technical Guidance on Implementation of Guidance and Examination of Health and Safety License to Officers and Operators of Steam, Production, Lifting and Transport Equipment; and (iii) the Decision of Director General for Guidance and Supervision of Labor Inspector No.Kep/75/PPK/XII/2013 regarding Technical Guidance for Health and Safety Expert Candidate in the field of Steam, Production, Lifting and Transport Equipment specifically for Expert Candidate in the field of Steam, Production, Lifting and Transport Equipment .

Wage Structure Requirement for Companies

INDONESIA

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Ministry of Manpower Regulation No. 1 of 2017, dated March 21, 2017, regarding Wage Structure and Scale (“Regulation 1”) implements Article 92(3) of Law No. 13 of 2003 regarding Manpower and Article 14(5) of Government Regulation No. 78 of 2015 regarding Payment of Wages, which require companies to formulate and implement a wage structure and scale. A company’s wage structure and scale shall take into account employees’ work categories and positions, period of service, education and skills.

Regulation 1 revokes Minister of Manpower and Transmigration Decree No. KEP.49/MEN/IV/2004 regarding the Provision of Wage Structure and Scale.

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Payment of Religious Holiday Allowances

Ministry of Manpower Circular Letter No. 3 of 2017, dated May 31, 2017, regarding the Payment of Religious Holiday Allowances for 2017 provides governors, regents and mayors across Indonesia a summary of the applicable rules for the proper payment of such allowances to employees in 2017.

INDONESIA

**19
JUN**

2017

Guidelines for Joint Leave in the Private Sector

The Ministry of Manpower has issued Decree No. 184 of 2017, dated June 19, 2017, regarding Guidelines for the Implementation of Joint Leave in the Private Sector. This decree provides guidance for private sector employers and employees with regard to the taking of joint leave days on selected dates around the Idul Fitri and Christmas holidays in 2017.

INDONESIA

**6
JUL**

2017

Elevator and Escalator Health and Safety

Ministry of Manpower Regulation No. 6 of 2017, dated July 6, 2017, regarding Elevator and Escalator Health and Safety (“MOM 6”) provides safety instructions and guidance for elevator and escalator operators and technicians, including manpower supervisors charged with carrying out elevator and escalator safety inspections.

MOM 6 revokes the following regulations: (i) Ministry of Manpower and Transmigration Regulation No. Per.03/MEN/1999 regarding Health and Safety Requirements for Passenger and Freight Elevators; (ii) Ministry of Manpower Regulation No. 32 of 2015 regarding the Amendment of Ministry of Manpower and Transmigration Regulation No. Per.03/MEN/1999 regarding Health and Safety Requirements for Passenger and Freight Elevators; (iii) Ministry of Manpower Regulation No. Per.05/MEN/1985 regarding Elevators and Escalators; and (iv) Director General of Industrial Relations Development and Labor Inspection Regulation No. Kep.407/BW/1999 regarding the Qualifications and Appointment of Elevator Technicians.

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AUG**

2017

Standards for Work Training Centers

The Ministry of Manpower (“MOM”) has issued MOM Regulation No. 8 of 2017, dated August 8, 2017, regarding Standard Requirements for Work Training Centers to provide guidance on the establishment and development of work training centers in Indonesia.

MOM 8 regulates the minimum requirements for work training centers based on the specific skills and training they provide.

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**6
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2017

Online Mandatory Reporting of Employment by Companies

The Ministry of Manpower (“MOM”) has issued MOM Regulation No. 18 of 2017 regarding Procedures for the Online Mandatory Reporting of Employment by Companies, dated November 6, 2017 (“MOM 18”). The new regulation provides guidelines for companies submitting mandatory employment reports online.

MOM 18 covers a number of topics including (a) online reporting, (b) reporting procedures, (c) utilization and management of submitted data, and (d) MOM supervision of companies’ compliance with mandatory manpower reporting rules.

MOM 18 revokes MOM Regulation No. 14 of 2006 regarding Procedures for the Mandatory Reporting of Employment by Companies.

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Constitutional Court Strikes Down Provision of the Manpower Law

The Constitutional Court, on the basis of claims filed by the relevant parties, routinely reviews provisions in various laws and rules on their constitutionality. It recently issued a decision concerning a sentence in Article 153(1)(f) of Law No. 13 of 2003 regarding Manpower (the “Manpower Law”), which allowed companies to stipulate in employment contracts, company regulations or collective labor agreements that they reserved the right to terminate employees of the company who were married to each other. The Constitution Court found that the sentence in question was in violation of the 1945 Constitution and thus had no binding legal force.

By striking down the above sentence, the Constitutional Court has made it clear that Article 153(1)(f) of the Manpower Law now prohibits without exception an employer to terminate an employee on the above basis.

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Amendments Regarding Child Care Leave and Family Care Leave

Amendments to the Employment Insurance Act and other relevant acts were enacted on 29 March 2016. The purpose of these amendments is to enable employees to achieve a balance between their work and personal life (i.e., their need for childcare and family care) and to realize the “Promoting Dynamic Engagement of All Citizens” policy, which is one of the policy goals of Shinzo Abe Cabinet.

In this regard, the following amendments regarding child care Leave and family care leave have become effective from 1 January 2017:

- To enable employees to take family care leave separately on multiple occasions (up to 3 times and 93 days in total);
- Besides taking family care leave, to enable employees to apply for shorter working hours more than 2 times during a three-year period in order to care for their family members;
- To enable employees to be exempted from overtime work in order to care for their family members;
- To enable employees to take childcare leave and family care leave in a half-day unit;
- To broaden the scope of children for whom employees can take childcare leave;
- To broaden the scope of fixed-term employees who are eligible to take childcare leave; and
- To require employers to take necessary measures to prevent employees from harassing or bullying their colleagues on account of their pregnancy, delivery or taking childcare leave or family care leave.

[More...](#)

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**1
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2017

Amendments regarding Child Care Leave and Family Care Leave

Amendments to the Child Care Leave and Family Care Leave and other relevant acts were enacted on 31 March 2017.

The following amendments regarding child care leave will become effective from 1 October 2017:

- An employee may take childcare leave until their child reaches the age of 2 years old if the employee is willing to have their child entered a nursery but is not able to do so;
- employers are encouraged to proactively inform their child care leave system to employees who or whose spouse have become pregnant or have a new born baby; and
- employers are encouraged to establish a new leave system which supports employees who raise a child of preschool age.

JAPAN

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MAR**

2017

Amendments to Personal Information Protection Act

The long awaited amendments to the Personal Information Protection Act of Japan (“PIPA”) will become fully effective on 30 May this year (the “Amendment”). PIPA is the primary privacy regulation in Japan, and regulates the collection, use and protection of personal information. It imposes obligations on information handlers, whether acting in their capacity as seller, supplier or employer. The Amendment generally expands the application in terms of both subject matter and geographical reach.

The Amendment will expand the scope of “Personal Information” regulated under PIPA, notably, to include information containing an individual identification code, for example passport numbers, and fingerprint and face recognition data. The Amendment also introduces the concept of Personal Information requiring Special Consideration (*yohairyokojinjoho*), which must be treated with special care. Personal Information requiring Special Consideration includes race, criminal records, medical history and any other information that may cause social discrimination. The Amendment also introduces the concept of “de-identified information” (*tokumei-kako-joho*), where anonymised information that is irreversibly processed as to prevent the identification of a specific individual is subject to more lenient regulations.

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The current PIPA does not generally apply to entities outside Japan. The Amendment will expand the reach of PIPA to apply to foreign entities providing goods of services to people in Japan. Further, the current PIPA does not place any restrictions on the extraterritorial transfer of personal information. The Amendment will introduce additional protection obligations on information handlers transferring personal information to third parties overseas. The additional requirements for extraterritorial transfers will not apply where personal information is transferred to a place that has been certified by the Personal Information Protection Commission as having protection standards equivalent to those of Japan and where the foreign transferee has personal information protection standards which are equivalent to the standards specified by the Personal Information Protection Commission. There is currently no guidance on which countries are likely to fall within this category.

From 30 May this year, the Personal Information Protection Commission will oversee the enforcement of PIPA in addition to the individual identification number system for Japanese residents: the “My Number System”. The Commission also has the power to provide information to foreign enforcement authorities to assist enforcement.

[More...](#)

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2018

Conversion Right from Fixed-term Employment to Indefinite-term Employment

Under the Labor Contract Act (“LCA”), if the aggregate employment period of a fixed-term employee working with the same employer exceeds 5 years as a result of renewal of fixed-term employment contracts, such fixed-term employee has a right to unilaterally convert his/her fixed-term employment contract to an indefinite-term employment contract (“Conversion Right”) if he/she requests the employer to do so before the expiration of the term of the existing fixed-term employment contract (LCA, Art. 18). If an employment term is 1 year, 6 months or 3 months, these Conversion Rights can be exercised on or after April 1, 2018.

If such Conversion Right is duly exercised by a fixed-term employee, the employer and the fixed-term employee are deemed to execute a new indefinite-term employment contract starting from the date immediately after the expiration date of the existing fixed-term employment contract. Its terms and conditions are the same as those of the current fixed-term employment contract (other than the contract period) unless otherwise agreed or stipulated in the Rules of Employment.

Employers need to be well prepared in advance for the exercise of Conversion Right by, for example, reviewing and revising the rules of employment.

[More...](#)

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Self Employment Social Security Bill 2017

It has been reported that self-employed cabbies as well as Uber and Grab drivers will be covered under the Employment Injury Scheme (EIS) when the Self Employment Social Security Bill 2017 becomes law this year.

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2017

Social Security Organisation (SOCSCO) Chief Executive Mohammed Azman Aziz Mohammed said that it will be compulsory for all self-employed taxi drivers to register with SOCSCO under the scheme. The cabbies will make a contribution of 1.25% of their insured monthly income and their payment will range from RM157.20 (RM13.10 a month) to RM592.80 (RM49.40 a month).

Self-employed taxi drivers, who are exposed to accidents or occupational diseases while at work, will be covered under the EIS and their dependants will have social security protection in the event of death. Medical, temporary and permanent disablement, funeral and dependent's benefits (pensions) were among the areas covered under the scheme. Other benefits include constant-attendance allowance, education loan, physical and vocational rehabilitation facilities and the Return to Work Programme.

[More...](#)

MALAYSIA

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2017

Introduction of Employment Insurance Scheme

Cabinet has approved for this Scheme to start in January 2018. This Scheme is to act as a safety net for workers who have just been laid off. The newly drafted law will be read in Cabinet in June.

[More...](#)

[More...](#)

MALAYSIA

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2017

Employment Insurance System Bill Tabled

The Employment Insurance System Bill 2017 which provides certain benefits such as employment search allowances and reduced earnings allowances to insured persons who have lost their jobs, was tabled for the first reading in Parliament.

[More...](#)

MALAYSIA

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DEC**

2017

Retrenched workers to receive cash allowance starting 2018

Retrenched workers will qualify for an interim benefit in the form of cash allowance of RM600 per month for a maximum of three months under the Employment Insurance System.

[More...](#)

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2016

New Zealand Basing Ltd v Brown [2016] NZCA 525, [2017] 2 NZLR 93

In *New Zealand Basing Ltd v Brown*, the Court of Appeal confirmed that overseas law (in this case Hong Kong) may apply to a New Zealand employment agreement. Mr Brown and Mr Sycamore were pilots employed by New Zealand Basing Ltd (a wholly owned Hong Kong subsidiary of Cathay Pacific). The employment agreement stipulated that the law of Hong Kong applied and there was a compulsory retirement age of 55 (which was lawful under Hong Kong law but unlawful under New Zealand law). Messrs Brown and Sycamore claimed that the agreement was governed by New Zealand law and so the compulsory retirement age was discriminatory under New Zealand's Employment Relations Act 2000 (ERA) and the Human Rights Act 1993. They alternatively argued the choice of Hong Kong law should not apply to the contract because of public policy grounds.

The Court of Appeal held that there is nothing in the ERA which would imply that its provisions would apply regardless of the parties' choice of law in their employment agreement. Accordingly, Hong Kong law was the proper law of the contract, so the ERA did not apply. The Court also held that there were no grounds for a public policy exception to the choice of law on the basis that the contract discriminated on the grounds of age. The Court considered that the right to be free from age discrimination was not absolute. The provision at issue would not "shock the conscience of a reasonable New Zealander's view of basic morality or violate an essential principle of justice or moral interests". The Court further held that there was no foundation for applying the public policy exception to defeat the private bargaining intentions of the parties, as the pilots had gained substantial financial benefits by choosing Hong Kong law.

The Supreme Court gave leave to appeal this decision in February 2017, and will hear the case in June 2017.

Court of Appeal Decision
Supreme Court Leave Decision

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NOV**

2016

Pay Equity Legislation

The Government announced it has plans to update the Equal Pay Act 1972 and the Employment Relations Act 2000 to implement the recommendations of the Joint Working Group on Pay Equity. The Government plans to introduce a Bill in 2017 that will make it easier for women to file pay equity claims with their employers and guide employers in responding to those claims. The government agreed to the recommendations with only one additional principle added.

The Joint Working Group was initiated following the Court of Appeal's decision in *Terranova Home Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437. In this case, the Court held that in female-dominated work, the Equal Pay Act 1972 required equal pay for work of equal value, not merely equal pay for the same work. This was a shift in how the Act had previously been understood. The Government responded to the decision by setting up the Joint Working Group to recommend principles for pay equity.

Government Announcement
Joint Working Group Recommendations

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2017

Domestic Violence – Victims' Protection Bill

The Domestic Violence – Victims' Protection Bill was introduced to Parliament in December 2016 and had its first reading on 8 March 2017. The Bill seeks to enhance legal protections for domestic violence victims, specifically in relation to the workplace. The proposed Bill amends multiple Acts relating to employment:

Domestic Violence Act 1995

- Defines a "victim of domestic violence" for the purposes of other enactments. To qualify, a victim must be able to produce a "domestic violence document" because they have suffered domestic violence or provide care and support to particular victims of domestic violence.
- A "domestic violence document" includes a variety of police and criminal records relating to domestic violence, as well as reports from medical practitioners or support organisations.

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Employment Relations Act 2000

- Provides a statutory right for an employee to make a request to vary their working arrangements if they are a victim of domestic violence. Sets out employers' duties in relation to an employee's request.
- Allows an employer to refuse an employee's request for a variation on particular grounds. These grounds relate to the staffing needs, productivity of the employer's business and cost to the business. An employer is obliged to refuse a request for variation if the employee is bound by a collective agreement and the working arrangements would be inconsistent with the collective agreement.
- Sets out a dispute resolution process if the employer declines the employee's request.
- Prohibits being a victim of domestic violence as a ground for discrimination.

Health and Safety at Work Act 2015

- Provides that person conducting a business or undertaking who manages or controls a workplace must have a policy for dealing with situations where a person's behavior stems from being either a victim or instigator of domestic violence, and is an actual or potential cause of harm to someone inside or outside a workplace.

Holidays Act 2003

- Allows an employee to take up to 10 days' leave if they are a victim of domestic violence, and they submit a request for leave according to the provides process

Domestic Violence – Victims' Protection Bill

Progress of Domestic Violence – Victims' Protection Bill

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2017

Draft Employment (Pay Equity and Equal Pay) Bill

The Ministry for Business Innovation and Employment released the Draft Employment (Pay Equity and Equal Pay) Bill ("the Draft Bill") on 20 April 2017. This was a commentary document for public consultation, which follows on from the Joint Working Group's recommendations on pay equity.

Seeking to "promote the enduring settlement of pay equity claims", the Draft Bill prohibits an employer from discriminating on the basis of gender and enables employees to make claims relating to gender discrimination. The Draft Bill sets out three possible claims – equal pay, unlawful discrimination on matters other than remuneration, and pay equity. A pay equity claim is defined as a situation where there is work predominantly performed by women and there are reasonable grounds to believe that the work has been historically undervalued and continues to be undervalued. The Draft Bill sets out a bargaining and dispute resolution process for these claims.

Submissions on the Draft Bill closed on 11 May 2017. Legislation is due to be released shortly.

[More...](#)

NEW
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2017

Final Decision on ASG v Hayne

ASG v Harlene Hayne, Vice-Chancellor of the University of Otago, is a case about a security guard at the University of Otago. He pleaded guilty to one charge of wilful damage and one charge of assault in the District Court. He was discharged without conviction and granted name suppression. The University Deputy Proctor saw the sentencing and, after seeking legal advice, told the Vice-Chancellor about the case. The Vice-Chancellor started an investigation and ultimately issued a final written warning. ASG raised personal grievances with the Vice-Chancellor for suspension during the investigation and the warning.

The Supreme Court upheld the Court of Appeal's decision and held that:

- Suppression orders under section 200 of the Criminal Procedure Act do prohibit "word of mouth" communications, as well as publication by the media, but this does not encompass dissemination of information to persons that have an objectively established genuine need to know the information. In this case, given the nature of the charges and ASG's role, the University had a genuine interest in knowing that ASG had pleaded guilty to an offence of violence against his spouse.

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- If criminal charges against an employee are relevant to their employment, employers may have the right to know and communicate details that are otherwise subject to non-publication orders. For example, this may be the case where an employee in a position of trust pleads guilty to a charge involving dishonesty. Further, where criminal charges exist that are relevant to an employee's role, an employee could be in breach of their good faith obligation by failing to disclose these to their employer in a timely way.

[More...](#)NEW
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2017

Changes to Parental Leave

Changes to the Parental Leave and Employment Protection Act 1987 that came into force on 1 June 2017 mean that employees who want to receive parental leave payments can now use their paid leave (e.g. annual leave and alternative days) first. In that situation, their parental leave payment periods can start at the end of their paid leave periods, even if they are later than the child's arrival or due date. Before 1 June 2017, the parental leave payment period could not start later than the child's arrival.

A further change is that a parent with a preterm baby now has more flexibility around returning to work and parental leave payments. If a person has a preterm baby, they can now return to work after the birth of the preterm baby and not lose the right to any remaining parental leave payment if they later go back on parental leave again (as long as they go back on parental leave before the original expected date of birth, if the baby had not been born prematurely).

[More...](#)NEW
ZEALAND**4
AUG**

2017

First Case on Availability Provisions

A recent case, *Fraser v McDonald's Restaurants (New Zealand) Limited*, was the first to consider the new "availability provisions" that were introduced as part of the Employment Standards package in April 2016.

McDonald's had a rostering system that provided flexibility to both McDonald's and to its employees. The employees were required to indicate their work availability and Mr Fraser brought a claim, claiming that his Employment agreement contained availability provisions.

The Employment Court (as a full court) held that the individual employment agreements did not contain availability provisions because:

- The flexibility in the rostering system was a benefit to both McDonald's and its employees, as they initially chose their agreed availability. They were not forced to be available for hours that did not suit them;
- Employees could indicate they were unavailable to work hours within their agreed availability. They were just asked to notify McDonald's of this within the stipulated timeframe (24 hours after the roster came out);
- Employees could be offered hours over and above their minimum hours, but again, they were not required to work them;
- The way the parties actually behaved was important – not just the wording of the employment agreements. The evidence at the hearing did not provide a single example of a time when the two employees involved had been compelled to work; and
- The overall relationship between the parties was one where there was a mutuality of obligations – the employer did not unilaterally impose hours of work on the employees.

[More...](#)NEW
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2017

Supreme Court Decides Case on Homecare Workers

In *Lowe v Director-General of Health, Ministry of Health and Chief Executive, Capital and Coast District Health Board* the Supreme Court confirmed that a relief carer was not a 'homeworker' engaged by the Ministry or District Health Board and, therefore, not an 'employee' of either entity.

Ms Lowe was engaged as a relief carer for three elderly/disabled people by their primary carers as part of a carer support scheme operated by the Ministry and DHB. The Ministry and DHB would fund the care (either by paying Ms Lowe directly or by reimbursing the

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primary carer for the amount paid by them to Ms Lowe). Ms Lowe claimed that she was a 'homeworker' engaged by the Ministry and/or DHB.

Relevantly, section 6 of the Employment Relations Act 2000 provides that the definition of an 'employee' include 'homeworkers'. Homeworkers are defined as being persons who are engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwellinghouse.

The majority of the Supreme Court found that Ms Lowe was not a 'homeworker', meaning that she was not an employee of the Ministry or the DHB because:

- The Ministry/DHB had no role in arranging for Ms Lowe to care for clients and did not even know that she was providing relief care until it received claim forms; and
- No instructions or guidance were provided to Ms Lowe about the manner in which the relief care services were to be performed.

[More...](#)NEW
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2017

First HSWA Judgment Released

WorkSafe New Zealand v Budget Plastics (New Zealand) Ltd is the first judgment under the Health & Safety at Work Act 2015 (**HSWA**). Budget Plastics Limited was fined \$100,000 and ordered reparation of \$37,000 after it was found guilty of breaching its primary duty of care to ensure, so far as is reasonably practical, the health and safety of workers who work for the PCBU, while the workers are at work. The company had identified issues with the guarding of a machine six weeks before a worker was injured operating the machine. At the time of the incident, nothing had been done to guard or isolate the machine.

The fine imposed in this case signals a significant increase in the fines the Court will be handing down under the HSWA. Under the old legislation, fines for machine guarding cases had an average of \$30,000 - \$40,000.

[More...](#)NEW
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2017

Employment (Pay Equity and Equal Pay) Bill

The Bill has had its first reading and is currently being considered by the select committee. Submissions are being accepted until 1 November and the report from the committee is due back to Parliament on 10 February 2018.

This Bill may be heavily amended or rewritten if the government changes at the pending General Election on 23 September 2017.

[More...](#)NEW
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2017

Conflict of Laws and Discrimination Issues

A full bench of the Supreme Court has recently dealt with important conflict of laws and discrimination issues in *Brown v New Zealand Basing Limited* [2017] NZSC 139.

The appellants were airline pilots based in Auckland. They were employed by New Zealand Basing Limited, the respondent. The employment agreement between the parties provided that the governing law was that of Hong Kong and as a result required them to retire at the age of 55. Both appellants reached the age of 55 and NZ Basing Ltd sought to enforce their retirement. The appellants brought a personal grievance claim under the Employment Relations Act 2000 (**ERA**) on the basis that this enforced retirement was prohibited by the right not to be discriminated against because of age.

This case confirmed that the discrimination provisions of the ERA will apply to any employees who work in New Zealand or who are based in New Zealand, but may work offshore in the course of their employment. This will be the case irrespective of any provision in the employment agreement that may state overseas law governs the employment.

The Supreme Court held that the prohibition against discrimination in the ERA applied, regardless of the law of the governing contract. The Supreme Court affirmed that the right not to be discriminated against was a free-standing right, not contractual, and independent of the employment agreement. The contractual choice of law clause was therefore irrelevant.

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Should 'High Earning' Employees be Excluded from Bringing Personal Grievances

The Transport and Industrial Relations Committee recently recommended (by a majority) that the Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill be passed.

This Bill would allow 'higher earners' (with an annual gross salary of more than \$150,000) to contract out of the personal grievance provisions in the Employment Relations Act 2000 (Act).

The Committee has narrowed the scope of the Bill so that employees would only be contracting out of section 103(1)(a) of the Act, which deals with unjustified dismissals, rather than contracting out of all potential claims. In doing so, the Committee has acknowledged that provisions such as those relating to discrimination, harassment and health and safety are important for all employees, regardless of their earnings.

The Bill is expected to progress to a second reading. However, it was opposed by the Labour and New Zealand First representatives on the Committee. Therefore, the result of the General Election on 23 September 2017 may have an impact on the Bill's progression.

[More...](#)

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2017

SafePlus

SafePlus is a new Government-endorsed health and safety toolkit that is now available for all New Zealand businesses, and is set to help lift the health and safety performance in workplaces across the country. SafePlus is a voluntary performance improvement toolkit that defines what health and safety should look like in the workplace, and sits above minimum legal compliance. It is a joint harm prevention initiative developed by WorkSafe New Zealand, ACC and the Ministry of Business, Innovation and Employment.

SafePlus has been developed in direct response to the Independent Taskforce into Health and Safety and the Working Safer Reforms. Working Safer is aimed at reducing New Zealand's workplace injury and death toll by 25 per cent by 2020. SafePlus currently consists of three products: Resources and Guidance, the market delivered Onsite Assessment and Advisory Service and the Online Self-Assessment tool.

[Visit the SafePlus Website](#)

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2017

Employment (Pay Equity and Equal Pay) Bill

This Bill is very unlikely to go through in its current state. The Minister for Workplace Relations and Safety Iain Lees-Galloway and the Minister for Women Julie Anne Genter released a statement on 1 November 2017 in which they reaffirmed the new Government's commitment to halting the Employment (Pay Equity and Equal Pay) Bill that was introduced by the previous Government.

Iain Lees-Galloway made it clear in the statement that the "Government will stop progress on the Employment (Equal Pay and Pay Equity) Bill and start work on new legislation that adheres to all the principles of the Joint Working Group on Pay Equity".

The Bill is currently in the Select Committee Stage, with a report due on 10 February 2017. Submissions are due on 1 November 2017.

[Follow the Bill's progress](#)

NEW
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2017

Parental Leave and Employment Protection Amendment Bill

Parliament has passed the Government's paid parental leave bill. From July next year the number of weeks of parental leave payments eligible employees are entitled to will rise from 18 weeks to 22. From 1 July 2020, that will increase to 26 weeks.

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Health and Safety at Work (Hazardous Substances) Regulations

On 1 December 2017, most of the provisions under the Health and Safety at Work (Hazardous Substances) Regulations come into force. The rules around managing hazardous substances that affect human health and safety in the workplace have been transferred from the Hazardous Substances and New Organisms Act 1996 (**HSNO**) to the Hazardous Substances Regulations under the Health and Safety at Work Act 2015 (**HSWA**).

The rules and duties to mitigate risks posed by hazardous substances now sit under:

- HSNO for non-work, public health and environmental risks; and specific requirements on importers and manufacturers of hazardous substances.
- HSWA (including the Hazardous Substances Regulations) for work risks.

[Find the Regulations](#)

NEW
ZEALAND

2017

Waikato District Health Board v Archibald [2017] NZEmpC 132

In a recent Employment Court decision the Court considered appropriate amounts to award when considering distress compensation awards after Ms Archibald was unjustifiably dismissed by reason of redundancy. In fixing the award, the Chief Judge found it helpful to consider awards as falling into three bands:

- Band 1 for low level loss/damage;
- Band 2 for medium level loss/damage; and
- Band 3 for high level loss/damage.

In terms of the range of awards for each band, the Chief Judge referred to her and Liz Coat's Paper, where it was suggested awards could be:

- Band one - nil to \$10,000;
- Band two - \$10,000 to \$50,000; and
- Band three - \$50,000.

In this instance the Court awarded Ms Archibald \$20,000 distress compensation, which was described as being around the middle of the mid-range of distress compensation awards. It remains to be seen whether this banded approach will be adopted by the Courts, however it may be something that we see more regularly in compensation awards.

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Department of Labor and Employment (DOLE) Department Order (DO) No. 167-16 -- Implementing Rules and Regulations of Republic Act (RA) No. 10757 entitled "An Act Reducing the Retirement Age of Surface Mine Workers from Sixty (60) to fifty (50) years"

Mandates the payment of retirement benefits to surface mines workers who retire upon reaching 50 years of age with at least five (5) years of service

[More...](#)

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2017

DO No. 149 A -17 – Guidelines In Assessing and Determining Hazardous Work in the Employment of Persons Below 18 Years of Age

Prohibiting the employment of persons below 18 years of age in slaughter houses and abattoirs, among others.

[More...](#)

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2017

DO No. 169-17 -- Implementing Rules and Regulations of RA No. 10789, otherwise known as "The Racehorse Jockeys Retirement Act"

Providing retirement benefits to racehorse jockeys upon reaching the mandatory retirement age of fifty (50) years provided he/she has served for at least five (5) years as racehorse jockey.

[More...](#)

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2017

DO No. 170-17 – Implementing Rules and Regulations of RA No. 10911 entitled "Anti-Age Discrimination in Employment Act"

Prohibits, among others, publishers to print or publish any advertisement relating to employment suggesting preferences, limitations, specifications, and discrimination based on age.

[More...](#)

PHILIPPINES

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2017

Labor Advisory (LA) No. 02-17 – Right to Self-Organization Relative to the Implementation of the K-12 Program

Recognizing the right to self-organization of all personnel in the Higher Educational Institution during the transition period to the implementation of the K-12 Program

[More...](#)

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2017

Philippines Overseas Employment Administration (POEA) Memorandum Circular No. 03, Series of 2017

Revising Section 2, Rule I, Part II of the 2016 POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Filipino Workers/Seafarers by requiring All Land-based and Sea-based Recruitment Agencies to increase their Capitalization/Paid-In Capital to Five Million Pesos (PhP5,000,000.00) within four (4) years from the effectivity of their license at the rate of Seven Hundred Fifty Thousand Pesos (PhP750,000.00) every year.

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2017

Department of Labor and Employment (DOLE) Labor Advisory No. 06, Series of 2017

Guidelines issued by the DOLE to encourage voluntary regularization of contractual/contractors' employees and to ensure the right of employees to labor standards benefits, self-organization and security of tenure.

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DOLE Department Circular No. 01, Series of 2017

The Circular clarifies the non-applicability of DOLE Department Order No.174, Series of 2017 to information technology-enabled services involving an entire specific business such as: Business Process Outsourcing; Knowledge Process Outsourcing; Legal Process Outsourcing; IT Infrastructure Outsourcing; Application Development; Hardware and/or Software Support; Medical Transcription; Animation Services and Back Office Operations/ Support. The Circular likewise exempt from the coverage of DO 174 contracting and subcontracting arrangements in the construction industry and with private security agencies. *(DO 174 [https://www.dole.gov.ph/issuances/view367] governs trilateral relationship which characterizes contracting or subcontracting arrangements. It provides for the requirements of permissible job contracting and prohibits the practice of labor-only contracting.)*

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2017

Department of Labor and Employment Department Order No. 178, Series of 2017 [Safety and Health Measures for Workers Who By the Nature of their Work have to Stand at Work]

The Order covers employers or establishments such as retail and/or service employees, assembly line workers, teachers, and security personnel, to address the occupational health and safety issues and concerns related to the wearing of high heeled female shoes and/or standing at work for long periods or frequent walking, such as strain on the lower limbs, aching muscles, hazardous pressure on hip, knee and ankle joints and sore feet.

The Order directs all employers and/or establishments to institute appropriate control measures, such as implementing rest periods to break or cut the time spent standing or walking; implementing the use of footwear which is practical and comfortable, i.e. not pinching the feet or toes, are well fitted and non slipping, either flat or with low heels that must be wide-based or wedge type and no higher than one inch, etc.

[More...](#)

PHILIPPINES

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2017

Department of Labor and Employment Department Order No. 183, Series of 2017 [Revised Rules In The Administration And Enforcement Of Labor Laws Pursuant To Article 128 Of The Labor Code, As Renumbered]

The Order is aimed to further strengthen the implementation of the visitorial and enforcement powers of the Secretary of Labor and Employment under the Labor Code through routine inspection, complaint inspection or occupational safety and health standards investigation on establishments and workplaces.

Under the Order, all establishments, principals, contractors/subcontractors, unless expressly exempted, must comply with the prescribed labor standards, Occupational Health and Safety Standards (OSHS), and social welfare benefits for their employees including compliance with the regulations on contracting/subcontracting arrangements, termination of employment requirements, security of tenure, right to self-organization and other labor rights.

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PHILIPPINES

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2017

Department of Labor and Employment Department Order No. 184, Series of 2017 [Safety And Health Measures For Workers Who, By The Nature Of Their Work, Have To Spend Long Hours Sitting]

The Order aims to set and enforce mandatory occupational safety and health standards in all workplaces in order to eliminate health risks, and to ensure safe and healthful working conditions in places of employment.

Under the Order, employers or establishments are required to address the occupational safety and health and safety issues and concerns related to sedentary work or sitting while working for long periods, such as those involved in computer, administrative, and clerical works, those working in highly-mechanized establishments, those working in the fields of transportation, toll booths, information technology and business process management, and all other processes and industries where sedentary work is observed.

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Department of Labor and Employment Department Circular No. 2, Series of 2017 [Guideline On The Issuance Of Work Permit For Children Below 15 Years Of Age Engaged In Public Entertainment Or Information]

The Circular provides the guidelines on the issuance of Working Child Permit pursuant to Republic Act No. 9231 providing for the elimination of the worst forms of child labor and affording stronger protection for the working child.

Under the Circular, a Working Child Permit is required if a child below 15 years of age (a) will be engaged in public entertainment or information, whether local or overseas, regardless of his/her role in a project such as lead, supporting guest, or regular extra. This includes projects which are non-profit, advocacy materials or political advertisements; or (b) is a foreign national; and will be engaged in public entertainment or information in the Philippines; or (c) will be featured in a documentary material unless it is a school-related requirement or project; or (d) will be engaged as regular extra or as part of a crowd and is included in the script or storyboard; or (e) has been selected for a project after undergoing auditions, workshops or VTR screening; or (f) has been selected as semi-finalist in a singing, dance or talent contest for a television show.

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2017

Department of Labor and Employment Department Order No. 186, Series of 2017 [Revised Rules For The Issuance Of Employment Permits For Foreign Nationals]

The Order requires certain foreign nationals to obtain, aside from an Alien Employment Permit (AEP), a Special Temporary Permit if they intend to engage in gainful employment in the Philippines.

Under the Order, a foreign national must obtain the required Special Temporary Permit (STP) from the Professional Regulation Commission (PRC) in case the employment involves practice of profession and Authority to Employ Alien from the Department of Justice (DOJ) where the employment is in a nationalized or partially nationalized industry and the Department of Environment and Natural Resources (DENR) in case of mining.

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2017

Amendments to Retirement and Re-employment Act Passed

The amendments to the Retirement and Re-employment Act were passed by Parliament on 9 January 2017. With this, with effect from 1 July 2017, the re-employment age will be raised from 65 to 67, i.e. companies will be required to offer re-employment to employees until they reach 67 if the statutory conditions are met. If companies are unable to do so, they will need to provide an Employment Assistance Payment to the employees.

In addition to raising to re-employment age, the amendments also removes the option provided to companies to cut the wages of employees who reach 60 years of age.

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FEB**

2017

SMRT Trains Ltd Convicted for Workplace Safety Lapses

SMRT Trains Ltd, one of the major public transport service providers in Singapore, was fined S\$400,000 on 28 February 2017 after it pleaded guilty to a charge of failing to take measures as are necessary to ensure the safety and health of his employees at work. This was the highest fine ever imposed under the Workplace Safety and Health Act, and arose out of an incident in March 2016 where 2 maintenance workers were killed after being struck by an oncoming train while they were investigating an incident on the tracks. In the press release, the courts found that there had been a long history of deviations from the approved operating procedures by staff members of SMRT Trains Ltd and more importantly, SMRT Trains Ltd had failed to ensure compliance with such procedures over a long period of time.

[More...](#)

SINGAPORE

**6
MAR**

2017

New Employment Initiatives for 2017

The Committee of Supply speeches for the Ministry of Manpower (“**MOM**”), which highlighted the key initiatives of the MOM in 2017, were made in Parliament on 6 March 2017. This comes at a time of global economic uncertainty and as the employment landscape in Singapore is in a state of transition. The key points to note from the speeches are that the MOM will continue to ensure that the Singaporean Core is being developed while ensuring that there remains a mix of foreign workers, the increment in minimum wage for employment of mid-skilled and low-skilled foreign workers, and the measures put in place to encourage mid-level career conversions and to assist the long term unemployed.

In addition to the above, the MOM also announced that it will soon form a Tripartite Workgroup for Freelancers given the increasing number of freelancers in Singapore. This is an area to note moving forward.

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MAR**

2017

Construction Company Charged for Housing Offences

On 15 March 2017, the Ministry of Manpower (“**MOM**”) announced that a construction company has been charged in the State Courts for failing to provide hygienic conditions in accommodation for its foreign workers and for abetting 9 other companies to house their foreign workers in the same unhygienic accommodation. If convicted, the construction company faces a fine of S\$10,000 and/or up to 12 months imprisonment for each offence. More importantly, the MOM has taken to opportunity to emphasise that it is a regulatory condition that all employers must house their foreign workers in acceptable housing conditions.

[More...](#)

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2017

Administrative Penalties Framework for Less Severe Breaches of the Employment Act (Cap. 91)

From 1 April 2017, the Ministry of Manpower (“**MOM**”) set up a new framework which treats less severe breaches of the Employment Act (“**EA**”) as civil contraventions which attract administrative penalties. Such breaches include:

1. Failure to make or keep complete and accurate employee records;
2. Failure to provide complete and accurate key employment terms (“**KETs**”) in writing to employees;
3. Failure to issue itemised pay slips to employees on time; and

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4. Providing inaccurate information to the Commissioner for Labour or inspecting officers without the intent to defraud and mislead.

Employers issued with an administrative penalty for failing to provide written KETs and payment records to employees can apply for an internal reconsideration by the MOM within 14 days from receiving the contravention notice.

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SINGAPORE

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Employment Claims Act 2016 (No. 21 of 2016)

On 1 April 2017, the Employment Claims Tribunals (“**ECT**”) and the Tripartite Alliance for Dispute Management (“**TADM**”), which were established under the Employment Claims Act 2016 (No. 21 of 2016) commenced operations. The ECT will replace the Labour Court in adjudicating statutory and contractual salary-related claims, while the TADM will provide advisory and mediation services.

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Employment (Prescribed Disputes) Regulations 2017

From 1 April 2017, the following disputes are considered prescribed disputes for the purposes of s 115(1A)(a) of the Employment Act (“**EA**”) (Cap. 91) (which gives the Commissioner the power to inquire into and decide the types of disputes prescribed under regulations):

1. Any dispute or disagreement mentioned in section 18A(9) of the Act between the transferor of an undertaking and an employee, or between the transferee of an undertaking and an employee, arising from a transfer of the undertaking under section 18A(1) of the Act;
2. Any dispute mentioned in section 54(1)(a) of the Industrial Relations Act (Cap. 136) between an employee and an employer bound by an award as to the employee’s entitlement to any payment by way of wages or otherwise in accordance with the award;
3. Any dispute arising from a complaint under section 54(6) of the Industrial Relations Act that an order made under section 54(1) of that Act has not been complied with;
4. Any dispute arising from a complaint under section 54(7)(a) of the Industrial Relations Act that a trade union or person bound by an award has committed a breach or non observance of any term of the award;
5. Any dispute mentioned in section 54(7)(c) of the Industrial Relations Act as to any matter for which provision is made by an award.

Where a dispute falls within any of the above category, the Commissioner has the power to inquire into and decide the dispute pursuant to Section 115 of the EA.

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Failure to Pay Salaries to Employees

On 4 April 2017, the Ministry of Manpower (“**MOM**”) released a list of employers charged for failing to pay salaries to their employees. The charges included non-payment of salary, including additional salary for work done on holidays, and failure to upon dismissal or termination due to breach of contract by the employer. Payment of salary should be made within 7 days after the last day of the employee’s salary period. Repeat offenders may face hefty fines and longer imprisonment terms.

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2017

False Declarations and Forgery of Documents for Work Pass Applications

In April 2017, the Ministry of Manpower (“**MOM**”) charged 4 work pass holders for submitting forged academic certificates in their applications to obtain or renew the work pass. Those who pleaded guilty were each sentenced to 10 weeks’ imprisonment. The Director of Employment Inspectorate at MOM’s Foreign Manpower Management Division warned that such forgery is a serious offence, and the foreigners involved will be

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prosecuted and permanently barred from working in Singapore. In the last 2 years, 73 foreigners have been so barred.

It should be noted that MOM verifies educational certificates through various means, such as using an internal education database system, engaging specialised third-party screening agencies, and checking directly with the issuing educational institution. MOM reminds that the onus is on the employers to check the authenticity of the work pass holders' academic qualifications, and that employers or employment agencies abetting forgeries will be severely dealt with.

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2017

Employment Agencies Without Valid Licenses

In April 2017, the Ministry of Manpower (“**MOM**”) charged a woman under the Employment Agencies Act for running an employment agency (“**EA**”) without a valid licence. Engaging the services of an unlicensed EA is also an offence. Hence, MOM advises employers to first verify that the EA they wish to engage has a valid licence, by using the online EA directory at www.mom.gov.sg/eadirectory.

[More...](#)

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MAY**

2017

Workplace Safety And Health (Major Hazard Installations) Regulations 2017

On 2 May 2017, the Minister for Manpower issued the Workplace Safety And Health (Major Hazard Installations) Regulations 2017 (“**the Regulations**”). Under the Regulations, with effect from 1 September 2017, major hazard installations (“**MHIs**”), which include petroleum refining facilities, petrochemical manufacturing facilities, chemical processing plants and installations where large quantities of toxic and flammable substances are stored or used, need to be registered and need to submit a Safety Case (i.e. a structured set of documents that focuses on how major accidents are prevented at MHIs, and how the consequences to people and the vicinity are limited) to the Commissioner for Workplace Safety and Health.

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MAY**

2017

Ensuring Safety at the Workplace

In May 2017, the Ministry of Manpower (“**MOM**”) imposed fines of \$270,000 on a subcontractor and \$40,000 on its managing director, for failing to take, so far as is reasonably practicable, measures necessary to ensure the safety and health of employees at work. This is in contravention of Section 12(1) of the Workplace Safety and Health Act (Cap. 354A) (“**WSHA**”). The following were identified as specific failures by the subcontractor:-

1. Having untrained workers perform formwork dismantling;
2. Not disseminating risk assessment (“**RA**”) and safe work procedure (“**SWP**”) to those carrying out relevant works;
3. Not having RA and SWP for catch platform dismantling at height (31st storey);
4. Not properly coordinating works and ensuring installation of safety netting;
5. Not addressing risk of falling from height;

It should be noted that officers of a corporation are open to personal liability if they do not exercise all diligence to prevent safety failures, and that MOM has expressed intention to probe deeper into the role of senior management in ensuring compliance with the WSHA.

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2017

Government Accepts National Wage Council’s Recommendations

On 31 May 2017, the Government accepted the National Wage Council’s (“**NWC**”) recommendations as set out in the NWC Wage Guidelines for 2017/2018, which relate to the following areas:

1. Deepen skills and transform jobs to enhance productivity and stay future-ready;
2. Wage recommendations for low-wage workers;
3. Low-wage workers in outsourced work;

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4. Progressive Wage Model;
5. Re-employment of older workers; and
6. Responsible retrenchment.

The NWC Guidelines cover the period from 1 July 2017 to 30 June 2018, and the aforesaid recommendations are applicable to all employees, including management, executives, professionals and rank-and-file employees, unionised and non-unionised companies in both public and private sectors.

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2017

Illegal Employment of Foreign Workers Without Valid Work Passes

In June 2016, the Ministry of Manpower (“**MOM**”) charged a night market operator for hiring 19 foreigners without valid work passes as stall assistants, in contravention of the Employment of Foreign Manpower Act (“**EFMA**”). In a separate case, a former director and a current director of a logistics company were also convicted for conspiring to hire 10 foreign workers without valid work passes. Each were fined (in lieu of imprisonment) and banned from employing foreign workers.

MOM advises strict compliance with the EFMA, and it takes a tough stance against employment of foreign workers without valid work passes. Abetment to commit the offence will also invite criminal liability under the EFMA. Earlier in March 2017, the manager of a company was convicted for abetting a sole proprietor to employ foreign workers without valid work passes, and before the issue of their employment passes.

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2017

S\$635.1 Million in CPF Arrears Recovered by the CPF Board in 2016

The Central Provident Fund Board (“**CPF Board**”) announced that it has recovered about S\$635.1 million in CPF arrears from cases closed in 2016, benefitting over 380,000 employees. Out of the recovered CPF arrears, S\$19.7 million was recovered from cases of underpayment or non-payment from 1,608 employers, and among these cases, 32 employers voluntarily approached the CPF Board when they realised that they were not compliant with the CPF Act. The remaining S\$615.4 million recovered were late CPF contributions from an average of about 5,440 employers each month in 2016. Employers are reminded to ensure that CPF payments are paid promptly to avoid facing penal and administrative consequences.

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2017

Failure to Purchase Work Injury Compensation Insurance

On 20 June 2017, the Ministry of Manpower (“**MOM**”) charged 2 employers for failing to purchase the compulsory work injury compensation insurance for 25 of their employees. It is mandatory to purchase work injury compensation insurance for manual workers and workers earning less than \$1,600 a month.

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Increase of Age Ceiling for Re-Employment

Pursuant to the amendments made to the Retirement and Re-employment Act (Cap. 274A), from 1 July 2017, employers must offer re-employment for employees, who are Singapore citizens, who reach the retirement age of 62 up to the age of 67. In the alternative, employers may offer such employees an Employment Assistance Payment (“**EAP**”). Under the new rules, if the employer is unable to re-employ such employees, it can transfer its re-employment obligations to another employer instead of paying an EAP, provided the following conditions are satisfied:-

1. The employee is willing to accept re-employment with the other employer;
2. The other employer must be willing to take on the existing re-employment obligations, including:-
 - a. Offering re-employment to the employee up to age 67; and
 - b. Offering EAP should the employer be unable to offer re-employment to the employee.

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Amendments to the Child Development Co-Savings Act (Cap. 38A)

From 1 July 2017, shared parental leave (“SPL”) will be increased from 1 to 4 weeks. Mothers can elect to share their maternity leave with the fathers of their children in blocks of weeks. This one-time election can be made any time before the child turns 12 months old, and cannot be changed once it is made. SPL must be consumed within 12 months from the birth of the child. Adoptive fathers may also enjoy SPL from their spouse’s adoption leave.

Also from 1 July 2017, adoption leave (“AL”) will be increased from 4 to 12 weeks. The first 4 weeks of AL will be paid for by the employer (for the 1st and 2nd child), and the last 8 weeks by the Government. For the 3rd and subsequent child, all 12 weeks of leave will be funded by the Government.

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**10
JUL**

2017

Plans to Reform the Human Resource Industry in Singapore

On 10 July 2017, the Singapore government launched the Human Resource Industry Manpower Plan (“**HRIMP**”). The HRIMP aims to transform the HR industry in order to realise the potential of people and businesses in Singapore to facilitate future growth, by strengthening the HR profession, providing enhanced HR support for employers and nurturing a vibrant HR services sector. HR professionals, HR industry players, employers as well as employees are expected to benefit from the various initiatives and support provided under the HRIMP.

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2017

Launch of the Tripartite Standard on Employment of Term Contract Employees

The new Tripartite Standard on Employment of Term Contract Employees (“**the Tripartite Standards**”) was launched on 31 July 2017. The Tripartite Standards were jointly developed by the Ministry of Manpower, the National Trades Union Congress, and the Singapore National Employers Federation, and sets out a set of employment practices which employers can commit to adopt. The Tripartite Standards, which provides for leave benefits for employees under term contract arrangements, i.e. those who are on fixed-term contracts of employment that will terminate upon the expiry of a specific term unless they are renewed, will help to ensure better employment conditions for such employees.

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**3
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2017

Enhancements to EntrePass Scheme to Attract Startup Talent in Singapore

The EntrePass scheme was enhanced with effect from 3 August 2017 to facilitate the entry and stay of foreign startup talents who are intending to set up innovative businesses in Singapore. The key changes to the scheme are as follows:

1. New EntrePass applicants are no longer required to have a paid-up capital of at least S\$50,000 in their startup businesses in Singapore;
2. The evaluation criteria for EntrePass applications are now broadened such that applicants only need to have (or intend to start) a private limited company registered with the Accounting and Corporate Regulatory Authority and meet any of the minimum eligibility criteria for application as an entrepreneur, innovator and/or investor;
3. The validity period of each EntrePass is extended from one to two years;
4. Other than SPRING Singapore, the Infocomm Media Development Authority and the National Research Foundation, supported by SGInnovate, will also participate in the enhanced EntrePass scheme and work with the Ministry of Manpower to evaluate the applications in their respective sectors.

[More...](#)

SINGAPORE

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2017

Requirements Under the New Workplace Safety and Health (Major Hazard Installations) Regulations 2017

The Workplace Safety And Health (Major Hazard Installations) Regulations 2017 (“**MHI Regulations**”) and the corresponding amendments to the Workplace Safety and Health

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(Registration of Factories) Regulations 2008 (“**Factories Regulations**”) came into effect on 1 September 2017. Businesses should take note of the new requirements under the MHI Regulations and the Factories Regulations, as follows:

1. Workplaces which carry out specific trade activities and possess dangerous substances at or above a specified threshold quantity will need to be registered as MHIs prior to commencing operations. MHIs are to be registered under the MHI Regulations as opposed to under the Factories Regulations;
2. MHIs will need to prepare and maintain safety cases to facilitate safe and sustainable operations;
3. MHIs are required to provide information on off-site risks which may affect other workplaces in the same area; and
4. MHIs are to notify and report any process-related incidents which have led to explosion, fire or release of dangerous substances, including those which do not result in any injury or fatality.

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SEP**

2017

New Work Pass Cards and New SGWorkPass App Launched by the Ministry of Manpower

The Ministry of Manpower (“**MOM**”) announced the introduction of a new Work Pass (“**WP**”) card with a QR code and a free mobile application called the “SGWorkPass”. The new app will enable employers, pass holders and other interested parties to check the status of work passes on the go. The new WP card will be issued in phases, starting with work permit holders in the Marine Shipyard and Construction sector from 15 September 2017. Do note that existing WP cards will remain valid and pass holders will receive new WP cards upon the renewal of their work passes.

[More...](#)

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**6
OCT**

2017

Tripartite Standards on Flexible Work Arrangements

On 6 October 2017, the MOM launched the Tripartite Standard on Flexible Work Arrangements (“**FWA Standards**”). The FWA Standards were jointly developed by the MOM, the National Trades Union Congress and the Singapore National Employers Federation.

The FWA Standards are as follows:

- a. A member of the senior management is appointed to champion FWAs.
- b. Employers offer FWAs to employees.
- c. Employees can request for FWAs offered by the company. They are informed about the FWAs offered, the process to request for FWAs, and the expectations on the responsible use of FWAs.
- d. Outcomes of FWA applications are documented and communicated to employees in a timely manner. Reasons are provided by supervisors for the rejection of a request for FWA and where possible, suitable alternatives that better meet the needs of both employer and employee are explored.
- e. Supervisors are trained to objectively evaluate applications for FWA and set work expectations, manage and appraise employees on FWAs fairly based on work outcomes.

The Tripartite Alliance for Fair and Progressive Employment Practices will work with employers to help them adopt the FWA Standards, by conducting workshops and providing funding for the same.

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This case involved a claim by an employee against his employer for, *inter alia*, shortfall in the payment of the employee's salary. In particular, the employer and the employee were in dispute as to the agreed basic monthly salary of the employee. The employer argued that the salary was SGD 680 based on oral agreement, while the employee argued that it was SGD 1,100, as stated in the In-Principal Approval ("**IPA**") letter issued by the MOM. The problem was that there was no written contract of employment between the parties. The court found that the only objective evidence available was the IPA. The court considered the legislative intent behind the IPA, which is:

- a. To ensure that foreign workers are kept informed of their employment terms, including their salary components; and
- b. To shift more responsibilities of employing foreign workers onto employers.

According to the court, the aforesaid policy concerns manifest themselves in three requirements for IPAs under the applicable legislation:

- a. Basic monthly salary is defined in a very specific way i.e. the remuneration payable every month that does not vary from month to month and excludes allowances and payment for working outside the employee's normal working hours;
- b. Before an employer can reduce the employee's basic monthly salary to an amount that is less than that stated in the IPA, the employer must (a) obtain the employee's prior written consent, and (b) inform the Controller of Work Passes in writing; and
- c. Foreign workers must in fact be paid the sum stated on the IPA.

Hence, the court gave judgment for the employee, holding that the amount stated in the IPA would constitute prima facie evidence of the basic monthly salary of the employee, and the burden was on the employer to prove otherwise. This case shows the importance of making accurate declarations when applying for work permits for foreign workers.

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Central Provident Fund (Amendment) Bill 2017

The Second Reading of the Central Provident Fund ("**CPF**") (Amendment) Bill 2017 ("**the Bill**") was held on 6 November 2017. The key changes to the Central Provident Fund Act (Cap. 36) under the Bill are as follows:

- a. The CPF balance threshold for CPF transfers to be made to parents and grandparents will be lowered.
- b. Currently, a CPF member can apply to be exempted from setting aside a Retirement Sum if his private annuity or pension is equivalent to the monthly payout he can receive after setting aside the applicable Full Retirement Sum ("**FRS**") under the Retirement Sum Scheme ("**RSS**"). This payout benchmark has been changed to the monthly payout that a CPF member is expected to receive under CPF LIFE, which has replaced the RSS as the default scheme for CPF retirement payouts.
- c. The CPF Act will also be amended to provide greater clarity and efficiency in the administration of the CPF, for example, simplification of the CPF Act by moving all the computational details for limits on voluntary top-up to CPF accounts to the regulations under the CPF Act.

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Government Accepts Recommendations to Progressive Wage Model for Security Industry

On 23 November 2017, the Government accepted the recommendations made by the Security Tripartite Cluster ("**STC**") in relation to the security industry, in a report which was released on the same day ("**the Report**"). The recommendations made by the STC in the Report are as follows:

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- a. Annual quantum increments to each wage point of the Progressive Wage Model (“**PWM**”) from 1 January 2019 to 2021: The PWM is a wage model which The PWM benefits workers by mapping out a clear career path for wages to rise along with training and improvements in productivity and standards, and it is mandatory for Singapore citizens and Singapore permanent residents in the cleaning, security and landscape sectors. The STC recommends a total increase of SGD 300 and SGD 285 to the PWM basic wage floors for Security Officers (“**SO**”) and Senior Security Officers (“**SSO**”) and above ranks, respectively, from 2019 to 2021.
- b. For 2022 to 2024, the STC recommends an annual increment of at least 3% to the PWM basic wage floor across all ranks, subject to review by the STC. The STC’s recommendation to encourage employers to adopt the min-max ratios to reward deserving employees, will also motivate security officers to upgrade their skills and enhance their performance.
- c. With effect from 1 January 2021, the STC recommends the removal of the overtime exemption (an exemption from the maximum number hours of overtime stipulated in the Employment Act (Cap. 91)). Subsequently, all overtime exemptions will be granted on a case-by-case basis solely for the purpose of meeting short-term needs, subject to assessment by the MOM.

The STC also strongly encouraged security agencies to adopt the proposed minimum-maximum wage ratios in the Report for the different PWM ranks, so as to reward deserving employees.

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Mandatory Settling in Programme for Foreign Workers in Second Half of 2018

On 26 November 2017, the Ministry of Manpower (“**MOM**”) announced plans to introduce a mandatory Settling-In Programme (“**SIP**”) for all first-time non-Malaysian work permit holders, to enhance existing efforts to educate foreign workers. The SIP will be a formal, structured one-day programme, conducted in the foreign workers’ native languages, targeted at foreign workers working in Singapore for the first time. The aim of the SIP is to equip foreign workers with knowledge about their employment rights and obligations and the laws of Singapore. It also seeks to help foreign workers understand local practices and social norms, for them to adapt to living and working in Singapore. The SIP will be rolled out in phases from the second half of 2018, beginning with the construction sector, followed by other sectors, such as marine, process, manufacturing and services. Employers are required to register their foreign workers for the SIP and pay for the course fees.

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Implementation of Minimum Retirement Age to Companies with Less than 300 Employees

- On May 22, 2013, to better reflect the change in demographics (e.g., the aging workforce) and the social and economic circumstances in Korea, the Act on Prohibition of Age Discrimination in Employment and Elderly Employment Promotion was amended to establish a minimum retirement age of 60.
- While this minimum retirement age previously applied only to companies with 300 or more employees, as of January 1, 2017, it applies to all companies in Korea.

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Requirement to Maintain and Return Job Applicants' Application Documents

- Pursuant to the Fair Hiring Procedure Act (which came into effect on January 1, 2015), a company is required (i) to maintain an applicant's application documents for a certain period of time and (ii) when a job applicant (who has been turned down) requests the return of his/her application documents, the company must return said documents. Failure to do so may result in the company being issued a corrective order by the Ministry of Employment and Labor ("MOEL") or an administrative fine of up to KRW 3,000,000.
- While the above requirement previously applied only to companies with 100 or more employees, as of January 1, 2017, it applies to companies with 30 or more employees.

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Increase in the Maximum Amount of Maternity Leave Compensation

- Under the Labor Standards Act, a pregnant employee is entitled to 90 days (or 120 days, in case of multiple births during the same pregnancy) of maternity leave before or after childbirth. Furthermore, the pregnant employee is entitled to receive from the Employment Insurance Agency 90 days' ordinary wage (or 120 days' ordinary wage, in case of multiple births during the same pregnancy) if she works at a "priority company" (which generally refers to small to mid size companies meeting certain employee headcount requirements) or the equivalent of 30 days' ordinary wage (or 45 days' ordinary wage, in case of multiple births during the same pregnancy) if she does not work at a "priority company" up to the maximum limit further described below.
- Until 2016, the maximum amount for maternity leave compensation was KRW 1,350,000 per month; however, as of January 1, 2017, the maximum amount has been increased to KRW 1,500,000 per month.
- To receive the maternity leave compensation, the employee must apply for compensation after 60 days (or after one month, if she works for a "priority company") of maternity leave, but before 12 months have passed since the end of the maternity leave.

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Increase in Minimum Wage

- The minimum wage for 2017 has increased by 7.3% (by KRW 440) to KRW 6,470 per hour.

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Unfair Labor Practice Eradication Initiative

On June 29, 2017, the Ministry of Employment and Labor ("MOEL") announced its "Unfair Labor Practice Eradication Initiative" which aims to root out unfair labor practices through stricter labor audits and investigations. According to the MOEL, this "Unfair Labor Practice Eradication Initiative" will include the following:

- Heightened supervision and strengthening of the investigation of unfair labor practices
- Improvement of methods to investigate unfair labor practice
- Establishment of an unfair labor practice task forces and relevant infrastructure

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Government Guideline on Transferring Public Sector Non-Regular Workers to Regular Workers

The Guideline consists of two main parts: (1) how and when to transfer non-regular workers (including fixed-term, dispatch, and contract workers) to regular worker status; and (2) how to reduce discriminatory practices against indefinite term workers (including workers who were shifted from non-regular to regular worker status) and improve their treatment.

With respect to the first part, the transfer of non-regular workers to regular worker status, the Guideline provides that non-regular workers who are working on a continuous basis at all times must, in principle, be transferred to regular worker status. The Guideline further defines work performed “on a continuous basis at all times” as: (1) work that is performed for at least nine consecutive months in any given year, and (2) work that is expected to continue for the next two years. There are exceptions to this rule and the following categories are exempt from the above rule: (a) workers who are 60 years of age or older and workers who perform work only for a specific period of time (e.g., athletes); (b) workers hired to replace other workers on leave; (c) workers engaged in professional and highly skilled functions; and (d) work that indispensably requires equipment and facilities that can only be provided by the private sector.

The second part of the Guideline discusses improving the treatment of workers under indefinite terms of employment. More specifically, the Guideline discusses, among other matters, establishing a more structured, official personnel system under relevant regulations, ordinances, or other rules, eliminating discriminatory treatment in providing monetary employee benefit programs, and setting up an established practice hiring, from the beginning, full-time, regular workers in positions that require continuous work at all times.

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Minimum Wage

The minimum wage for 2018 has been set at KRW 7,530 per hour, which is a 16.4% increase from this year (2017).

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A Resolution Approving the “Measures for Preventing Serious Workplace Accidents”

On August 17, 2017, the National Policy Coordination Committee adopted a resolution approving the “Measures for Preventing Serious Workplace Accidents” (the “Preventive Measures”) which is designed to identify the party liable for preventing workplace accidents, to expand the scope of protected workers, and to make improvements on the structural issues and practices in order to prevent recurrence of serious workplace accidents.

The following are the relevant details concerning the Preventive Measures:

1. Stricter safety management responsibility on employers (amendments to the Occupational Safety and Health Act and the Act on the Promotion of Construction Technologies)
2. Protect all individuals exposed to danger (amendments to the Occupational Safety and Health Act and the Workers’ Compensation Act)
3. Stronger measures to prevent the recurrence of serious workplace accidents
4. Improve workplace safety and health management system (amendment to the Occupational Safety and Health Act)

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Increased Annual Leave for Employees Who have Worked for Less Than One Year

Currently, the LSA provides that employees who have worked for a company for less than one year accrue one day of paid leave per month within the first year of continuous employment. However, if an employee uses these paid leave days within the first year of employment, then the number of used paid leave days is offset against the number of paid annual leave days which the employee is awarded in the second year of employment (i.e., 15 days for employees who have recorded 80 percent or better attendance in the first year of employment) (Article 60 (3) of the LSA). Therefore, as a result, employees only receive a maximum of 15 days of paid annual leave in total for the first two (2) years of employment.

As a result of this revision of the LSA, Article 60 (3) of the LSA has been deleted (which provides for the deduction of used days of leave in the first year of employment). Therefore, even where employees who have worked for less than one year use their paid leave days, there will be no offset against the paid annual leave days (i.e., 15 days) provided to the employees after one year of continuous service with the company. As a result, employees are eligible to receive up to 26 days of paid annual leave during the first two (2) years of employment (up to 11 days in the first year of employment and 15 days in the second year of employment).

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Change to Calculation of Annual Leave Days During Childcare Leave and Guarantee of Annual Leave for Employees Reinstated After Childcare Leave

Under the current version of the LSA, the childcare leave period is treated as a leave of absence, and is not counted as attendance at work for purposes of the calculation of the number of an employee's paid annual leave entitlement. However, when this revision of the LSA becomes effective, the childcare leave period will be included for the purposes of calculating the employee's paid annual leave entitlement, and the paid annual leave days for employees reinstated after childcare leaves will also be fully-guaranteed (Article 60 (6) (iii) of the revised LSA will be applicable to employees who apply to take childcare leaves after Article 60 (6) (iii) of the revised LSA becomes effective).

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Strengthening Employers' Obligation to Take Appropriate Measures when Sexual Harassment Occurs in the Workplace (Article 14, Etc. of the Gender Equality Employment and Work-Family Balance Support Act (the "GEEA"))

Under the revised GEEA, anybody can report to an employer an occurrence of sexual harassment in the workplace. The employer then has the obligation to conduct an investigation and take necessary measures to protect the victim, such as changing the place of work, placing the victim on paid leave, etc. An employer that violates these obligations may be subject to an administrative fine of up to KRW 5 million.

The revised GEEA prohibits an employer from dismissing, or taking any other disadvantageous measures against, an employee who reports the occurrence of sexual harassment in the workplace and/or the victim. The revised law also increases the criminal fine (from KRW 20 million to KRW 30 million) against an employer in violation of the aforementioned restriction. Further, under the revised GEEA, even where the acts of sexual harassment are committed by a client, customer, etc., an employer is obligated to take the necessary measures to protect the victim, such as changing the place of work, placing the victim on paid leave, etc. (a violation of these obligations may subject the employer to an administrative fine of up to KRW 3 million).

The contents of the sexual harassment prevention training conducted every year should be posted. An employer in violation of this obligation may be subject to an administrative fine of up to KRW 5 million.

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2018

Leave for Fertility Treatment ("Fertility Treatment Leave"): 3 Days of Leave per Year

The revised GEEA now requires an employer to provide Fertility Treatment Leave (3 days per year) to help employees receive medical fertility treatments, such as artificial insemination and IVF (in vitro fertilization). An employer is required to provide the first day of the three days of Fertility Treatment Leave as paid leave (the other two days are unpaid leave days).

The revised GEEA also prohibits employers from taking disadvantageous measures (such as dismissal or disciplinary action) against an employee on account of Fertility Treatment Leave. An employer that violates this obligation may be subject to an administrative fine of up to KRW 5 million.

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Employer's Obligation to Conduct Training to Improve Employees' Awareness of Disabled Persons (Article 5-2 of the Act on Employment Promotion and Vocational Rehabilitation for Disabled Persons)

An employer is required to conduct training to improve employees' awareness of disabled persons to eliminate bias in the workplace towards disabled persons, with the intent of creating stable working conditions and expanding the employment of disabled workers in the workplace. An employer that violates this obligation may be subject to an administrative fine of up to KRW 3 million. The Ministry of Employment and Labor may also identify companies as good employers in the employment of disabled persons. Such companies would then enjoy favorable treatment when entering into contracts with the state, local governments, and public institutions for the provision of goods or services such as construction work.

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SC Appeal 88/2010

The Applicant-Appellant filed an application in the Labour Tribunal alleging that his services were unjustifiably and wrongfully terminated by the Respondent-Respondent. The Labour Tribunal, ordered compensation equivalent to two years salary of the Applicant-Appellant. Being aggrieved by the order of the Labour Tribunal, the Applicant-Appellant (the former employee) appealed to the High Court. The learned High Court Judge by his order, reduced the said amount to 12 months salary.

The Applicant-Appellant submitted that orders of the Labour Tribunal are based on the principle “just and equitable” and as such the learned High Court Judge had not observed the said principle when he reduced the quantum of damages ordered by the Labour Tribunal.

The main question that arose for consideration in this matter was whether the High Court in the exercise of its appellate jurisdiction has the power, in an appeal filed by the employee, to reduce compensation when there is no appeal by the employer.

The Supreme Court held that the High Court in the exercise of its appellate jurisdiction considers an appeal filed against an order or judgment of Labour Tribunal, and that it has the power to affirm, reverse, correct or modify an order or the judgment of a Labour Tribunal. Further, it was held that the High Court in the exercise of its appellate powers has the right to reduce compensation awarded by the Labour Tribunal when it considers an appeal filed by a employee or trade union although there is no appeal by his employer and that the High Court also has the power to enhance the compensation awarded by the Labour Tribunal when it considers an appeal filed by the employer although there is no appeal by the employee or the trade union.

The Supreme Court affirmed the judgment of the High Court and dismissed the appeal without costs.

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S.C Appeal 161/2012

The Applicant Appellant-Appellant-Appellant had been employed as a Senior Manager by the Employer. The parent company of the Employer had decided to remove the CEO and replace him with another. The Applicant along with 14 other Managers had sent a memorandum to the parent company protesting against the removal of the CEO and stating inter alia that if he was removed, the business of the company would break down in ten months. The Applicant was the first signatory to the memorandum. His services were terminated on account of his having sent this memorandum without making any representations to the local company which was his employer.

Before the Labour Tribunal the Employer asserted certain other reasons as well to justify the termination – but these matters did not figure prominently in the decision of the Supreme Court. The Labour Tribunal dismissed the Applicant’s application and on appeal to the High Court, the Tribunal’s order was affirmed and the appeal dismissed.

The Supreme Court affirmed the decision of the Tribunal and the High Court and dismissed the Applicant’s appeal. It held that the sending of the memorandum constituted just cause for the employer to lose confidence in the Applicant and that the termination was therefore justified.

The Applicant had also complained that there had been no ‘show-cause’ letter or charge sheet or due opportunity given to him to produce any witnesses or refute the allegations against him.

In this regard, the Supreme Court observed that there is no requirement in law that a domestic inquiry should be held prior to the termination of services of an employee and that the Labour Tribunal functions as an original Court or Tribunal.

While noting one of its previous decisions which held that although a domestic inquiry is not statutorily required, an inquiry helps to establish the bona fides of the employer, and a dismissal without an inquiry may sometimes be indicative that the Employer had acted arbitrarily, it accepted the stance of the employer that an inquiry (though not a formal domestic inquiry) had been conducted in the best manner possible given the volatile situation at the time.

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SC Appeal 99/2010

The Applicant Respondent-Respondent performed services as a motor assessor for the Sri Lanka Insurance Corporation, the Respondent-Appellant-Appellant.

When his contract was terminated, the Applicant made an application to the Labour Tribunal seeking relief alleging that he had been on a contract of service with the Corporation and was an employee whose services had been unjustifiably terminated.

The Corporation contended that the contract on which the Applicant had been engaged was one with an independent contractor and was a contract for services.

The Supreme Court held that the work of a Motor Assessor – whose functions including inspections assessments and investigations connected with motor insurance claims made by the customers to the corporation, were an integral part of the Corporation's business and held that the Applicant was an employee of the Corporation on a contract of service.

The Court also noted that the Corporation had exercised a considerable measure of control over the Applicant regarding the performance of his duties and that such control was inconsistent with the relationship with an independent contractor engaged on a contract for services.

In this connection, the Court noted that the letter by which the Applicant had been engaged, specifically provided that that the Applicant was required to safeguard the interests of the Corporation at all times and observed that the Applicant (Assessor) could not favour the owner of the vehicle and/or assess damage at his own discretion and that if his recommendation was against the interests of the Corporation, his services could be terminated for that reason.

It also noted, among other things, that the Applicant had been required to arrive for work at 9.30 a.m. every day, had to provide reasons to explain late attendance and further that Assessors were not given assignments if they arrived late.

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SC Appeal 152/2014

Parties – Asiri Hospitals PLC – Respondent – Appellant – Appellant and

R.H.S.C. Soyza – Applicant – Respondent – Respondent

Date of Judgment – 19.09.2017

The applicant employee was employed by Asha Central Hospitals PLC. on 27/12/1999 as a Lab Technician. The company subsequently changed its name to Asiri Central Hospitals PLC.

The letter of appointment by which the applicant was employed provided, *inter alia*, that during the tenure of his employment by the Appellant he could not be employed in any other institution without obtaining prior approval (from the Appellant). The applicant had contravened this provision by being employed during the day time by the Family Planning Association and in the night by the Appellant.

His services were subsequently terminated – after issuance of a charge sheet and a disciplinary inquiry - and he applied for relief to the Labour Tribunal, which held that the termination of his employment was unreasonable and unjustifiable and awarded him 3 years' salary, amounting to Rs. 635,760/-, as compensation. An appeal by the Appellant to the High Court was dismissed and the order of the Labour Tribunal was affirmed.

In an appeal to the Supreme court, it noted, *inter alia*, that the High Court had stated that even though the applicant was bound by the contract of employment R1 it had mentioned in document R3 that the employee had acted against the regulations of service (A2) and that his services were terminated for breach of the regulations and not for breach of the terms of the contract. The High Court had also found that, according to the regulations laid down by the Appellant, when an employee had violated them, the employer had to comply with the action laid down therein – namely, he had to be first verbally warned, secondly he should be warned in writing and thirdly, had to be warned again in writing and that it was only then that his services could be terminated. The High Court had held that since this procedure was not followed by the employer, the termination was unjust and unreasonable.

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In this connection, the Supreme Court held as follows -

“... the learned High Court Judges have totally failed to see that when any person is employed by any institution the first and foremost document signed by the parties is the “contract of employment”. The parties are totally bound by the contract. The regulations regarding how the place of employment should be run by the employer with regard to the conduct of employees are totally in the hands of the employer and regulations are made to lay down the set of rules by which the employer’s administration division could be guided, with regard to other employees of the institution. The employer cannot be pointed to as not having done any step of the disciplinary steps tabulated in their system for handling their own employees and neither can the employer be found fault with for having terminated the services of the employee due to that reason. The employee in this instance is found to be in breach of the contract of employment. The contract of employment is the primary document and all other documents are ancillary.”

The Court also noted that it was an admitted fact that the applicant employee was in breach of the contract of employment.

Having observed, *inter alia*, as above, the Supreme Court – allowing the appeal of the Appellant - set aside the judgment of the High Court and the award of the Labour Tribunal.

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Ceylon Bank Employees Union (on behalf of S.M. Ranbanda) v. Peoples’ Bank – SC Appeal 227/2014, decided on 22.11.2017

The employee (“the Applicant”) was employed in the Bank for 33 years having begun his career in 1970 as a grade iv clerk. He had been regularly promoted and at the time of the termination of his services in 2003, was a Branch Manager. The alleged misconduct in consequence of which his services were terminated related to a period of 9 months when he was a manager of one of the Bank’s branches. The allegations against him which led to the termination of his services were, briefly, that he had granted temporary overdrafts (TODs) to customers without complying with circular instructions – including having failed to seek or obtain approval from the Regional Manager. It was alleged that, as a result of the unauthorised grant of the overdrafts, the Bank had suffered a loss of Rs. 8,554,826.94.

The Applicant made an application to the Labour Tribunal, under section 31B(1) of the Industrial Disputes Act, in respect of the termination of his services, seeking relief by way of reinstatement, or compensation in the alternative and, at the conclusion of inquiry, the Tribunal held that the Bank had failed to prove, on a balance of probabilities, that the termination of the Applicant’s services was just and equitable. At the time the order of the Tribunal was made, the Applicant had passed the age of 61 years and hence order was made that the Applicant should be ‘made to retire’ from the day he completed 55 years of age with pension rights and all other benefits which accrued to him at retirement.

The Bank appealed to the Civil Appellate High Court which overturned the order of the Labour Tribunal and held that the dismissal of the Applicant by the Bank was justified. The High Court held that, in terms of section 31C of the Industrial Disputes Act, the Tribunal had jurisdiction to inquire only into the matter stated in the application and had no jurisdiction to determine matters that had not been pleaded or sought in the application and that the order granting pension rights had been made without jurisdiction and could not be allowed to stand.

The Applicant appealed to the Supreme Court, which noted the following matters:-

The Applicant had contended that a sum of Rs. 3,740,812.60 had been recovered by the Bank from some 40 customers to whom overdrafts had been given and that the sum alleged to have been lost could not be accepted as correct. He had further urged that he had acted in good faith in order to promote the Bank in the area - which was an agricultural one.

The Bank had produced only 7 current account ledger sheets out of the 39 accounts listed in the charge sheet and there had been a serious lapse on the part of the Bank in not having produced evidence of the correct and actual loss allegedly caused by the Applicant.

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The grave misconduct alleged was noncompliance with circulars but it had not been alleged in the charge sheet that due to the Applicant's conduct, the Bank had lost confidence in him; nor had it been contended that the Applicant had gained any personal benefit by granting the overdrafts.

Further, many of the temporary overdrafts granted at the Branch had been granted by the Second Officer. This officer had also been dismissed from service for having granted the overdrafts irregularly. However, (in this case) *"the finger is pointed at only this Applicant regarding the grant of TODs for the whole amount with regard to 40 customers whereas the Second Officer had also done so but the loss to the Bank has not been proved as regards the amount which was granted by the Applicant"*

As regards the Bank's contention that the Applicant had failed to submit the relevant forms to the Regional Manager and/or to obtain prior or post approval for the grant of overdrafts, the Court noted that the Bank's witness had admitted in cross examination that on many occasions he had seen the relevant forms sent by the Applicant at the Regional Office. It had also transpired in evidence that it was the duty of Regional Managers to visit the Branches every month and record their observations in the log book. The Court observed that if the forms had not been submitted for several months, the Regional Office would have summoned the Applicant and called for his explanation. In this connection the Court further noted that despite having been noticed to produce a number of documents – including the log book of the Branch and the TOD Approval Register for the relevant period, the Bank had failed to produce these documents which, if produced, would have thrown light on the facts in a more detailed manner and the Bank could not now argue that the Applicant had failed to prove that he had submitted the forms to the Regional Manager.

With regard to whether the Labour Tribunal had jurisdiction to grant the Applicant pension rights etc. though he had not sought them by his application, the Supreme Court held that

- a. At the time the Applicant made his application he had one month left before reaching retirement age (55 years) and he would have had the hope of being reinstated and then would have been eligible to apply for yearly extensions after the age of 55 and *"It may well be that he had not specifically prayed for the pension rights as he wanted to be reinstated."*
- b. The Court also observed that in the Applicant's evidence in chief (tendered by affidavit), he had prayed for pension rights. The Court took the view that the Applicant had *"begged fervently that he be granted his pension rights as it had long passed the time of six months within which the LT should, in law, have concluded the inquiry."*
- c. With regard to the above time limit, the Supreme Court further stated that though practically it is next to impossible to conclude inquiry within this stipulated time, yet the clear message was that inquiry into applications should be concluded as soon as possible.
- d. Further, the Court proceeded to refer to section 33(1) (e) which expressly empowered the Labour Tribunal – without prejudice to the generality of matters specified in its order - to, *inter alia*, award payment of pension to an applicant and cited with approval an earlier decision of the Supreme Court which stated that *"the statements filed by parties in applications before a Labour Tribunal are not pleadings in a civil action and it is the duty of the President to consider all the facts relative to the dispute placed in evidence before him at the inquiry even though those facts may not be expressly referred to in the statements."*

Having considered the above mentioned matters, the Supreme Court set aside the judgment of the High Court and restored the order of the Labour Tribunal.

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**21
DEC**

2016

Presidential Order to Amend Certain Provisions of the Labor Standards Act

The Presidential Order with Ref. No. Hua-Zhong-Yi-Yi-Zi 10500157731 dated December 21, 2016 announced the amendment of Articles 23, 24, 30-1, 34, 36, 37, 38, 39, 74 and 79 of the Labor Standards Act.

Main Points of the Amendment:

- When paying wages, employer must disclose the formulas used for each item of remuneration (Article 23, Paragraph 1)
- Increased wages for working on rest days, and those working hours are included into the monthly extended working hours total (Article 24)
- Work shifts should allow at least 11 hours of rest for an employee (Article 34, Paragraph 2)
- Established clear legal basis for two days of rest – employees should get 2 days of rest every 7 days, one as a day off, and the other as a rest day. (Articles 30-1 and 36)
- National holidays shall revert to be uniformly regulated by the relevant rules of the Ministry of the Interior. (Article 37)
- Increased the rights of junior employees regarding annual leaves. Several other rules, such as “annual leaves shall in principle be taken at the request of the employee”, “employer shall inform employees to arrange the annual leaves when the employee meets the conditions under the law”, “employer shall pay compensation for annual leaves not taken”, and “employer shall clearly record in its payroll records the annual leave days taken and the amount of compensation paid for annual leave not taken, as well as regularly notify the employee of such in writing” were added, and the burden of proof will be on the employer in the event of a labor dispute on such points so as to ensure that the employee leave scheme is properly implemented (Article 38).
- To more effectively handle complaints and strengthen the protection of rights of complainant employees, an employer’s decision to terminate, reduce in rank, reduce in salary or take any other unfavorable action against a complainant employee shall be void and invalid. The competent authority or inspection institution must, within 60 days of receipt of the complaint, resolve the situation and notify the complainant employee in writing. The identity of the complainant employee shall also remain strictly in confidence. (Article 74)
- Increased the cap on fines for violation of provisions relating to wages and working hours to NT\$1 million. To further increase the employer’s duty and obligation on such issues, the competent authority may decide to further increase the fine by one half of the maximum amount stipulated under law depending on the size of the business, the number of individuals affected or the seriousness of the violation. (Article 79)

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**30
DEC**

2016

The Ministry of Labor announced that certain provisions of the Enforcement Rules of the Labor Standards Act shall no longer be effective after January 1, 2017

Due to the promulgation of the amendments to Articles 37 and 38 of the Labor Standards Act on December 21, 2016 and their implementation after January 1, 2017, the Ministry of Labor announced in its Lao-Dong-Tiao-3-Zi-1050133033 Circular dated December 30, 2016 that the current Article 23 (definition of certain national holidays), Paragraphs 2 and 3 of Article 24 (annual leaves) of the Enforcement Rules of the Labor Standards Act will no longer be in effect for conflict with the aforementioned amendments.

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**7
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2017

The Ministry of Labor announced its interpretation that if an employee agreed to work on a rest day but subsequently was unable to perform for cause, compensation for the time the employee is deemed to be on leave shall be calculated based on the increased standards for rest days

The Lao-Dong-Tiao-2-Zi-1050133150 Circular published by the Ministry of Labor on February 7, 2017 states that if an employee has agreed to work on a rest day but could not perform for the agreed amount of time for cause, then in addition to the compensation due under Article 39 of the Labor Standards Act, compensation for work hours that day shall be calculated according to Article 24 of the Labor Standards Act, and for the time deemed as on leave, compensation shall be then calculated in accordance with the increased rates for rest days and regulations of leave-taking by employees.

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**7
FEB**

2017

The Ministry of Labor announced its explanation regarding how an employer shall handle occupational hazard compensation and employee pension per Article 61 of the Labor Standards Act if an employee suffered disability, injury, sickness or death as a result of an occupation hazard

In the event an employee suffers a disability, injury, sickness or death as a result of an occupational hazard, the Ministry of Labor stated in its Lao-Dong-Tiao-2-Zi-1050133076 Circular dated February 7, 2017 that under Article 61, Paragraph 2 of the Labor Standards Act, the occupational hazard compensation due will not be affected by the employee's departure; accordingly, if an employee dies after leaving his employment in the same occupational hazard event, the employer must still provide compensation, and the amount may not be offset by the pension that the employee had collected.

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**3
MAY**

2017

The Ministry of Labor announced its interpretation regarding whether an employee may choose to take a make-up rest day after agreeing to work on a rest day per Article 36 of the Labor Standards Act ("LSA") and other make-up rest day related regulations.

1. The LSA imposes a basic duty on the employer to provide an employee rest day wages per Article 24, Paragraph 2 of the LSA after an employee has agreed to work on a rest day per Article 36 of the LSA.
2. As for whether an employee can choose to take a make-up rest day after he/she has worked on the rest day, the law does not prohibit such an arrangement, so it is up to the employer and the employee to negotiate and settle on the terms as to the rules for taking make-up rest days, how many make-up rest days are allowed in a year, how unused make-up rest days may be paid, etc. while not infringing on the rights of the employee or affect the employer's human resources planning.
3. If the employee does not express the intent to take a make-up rest day after working on a rest day, the employer should still pay the rest day wages for the work done. It is only when the employer restricts an employee to only being able to choose to take a make-up day off after working on a rest day would it be deemed as a violation of the LSA. In disputes regarding the wages paid for work on a rest day, the employer shall have the burden of proof.

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**3
MAY**

2017

The Ministry of Labor announced its interpretation regarding a question over an employee who has agreed to work on a rest day but cannot do so on that day for personal reasons.

If an employee has reached an agreement with an employer to work on a rest day, but could not arrive at work or provide the agreed-upon work hours on that day for personal reasons, then the original extended work hours calculated under Article 32, Paragraph 2 of the LSA may be based on the "actual hours of work provided" (e.g., if the employee agreed to work for 8 hours but could only actually work for 5 hours due to personal matters or illness, 5 hours of extended work hours shall be counted). To avoid disputes, it is best if the above circumstance is provided for in the group agreement, the employment agreement, or the

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work rules so that the parties may follow the agreed-upon rules for the relevant matters, such as the notification procedure for being unable to work the agreed-upon hours and whether those hours shall be counted as personal leave, etc.

[More...](#)

The Ministry of Labor amended certain provisions of the “Enforcement Rules of the Labor Standards Act”.

- To protect the employee’s interests, a new provision which excludes taking reduced wages due to taking ordinary sick leave pursuant to the Regulations on the Leave-Taking of Employees, or taking menstruation leave, maternity leave, family caretaking leave, or recuperation leave pursuant to the Act of Gender Equality in Employment, and the unpaid work suspension leave into the calculation of the average wages (amending Article 2)
- In accordance with the new rules on rest days under Article 36 of the LSA, adjustments are made as to the items that should be set out in an employment contract, the composition of the minimum wage, as well as the situations under which the employer is required to provide notice (amending Articles 7, 11 and 20).
- To establish the principle of same pay for the same work and to improve the labor terms for child employees so as to cover them under the minimum wage rules, the current Article 14 is deleted.
- In accordance with the amendments to Article 23 of the LSA regarding the list of employee wages paid, it is specified that the employer must provide the detailed calculation formula and method for each wage item (amending Article 14-1).
- Adjustments are made to the definition of extended work hours under the law, including (i) hours worked beyond the regular 40-hour work week stipulated under Article 30, Paragraph 1 of the LSA, and (ii) hours worked on the rest days stipulated under Article 36 (amending Article 20-1).
- In accordance with the attendance record rules under Article 30, Paragraphs 5 and 6 of the LSA, it is clearly specified that the method of recording attendance include a sign-in book, attendance card, card-swipe machine, front door access card, biometric recognition system, electronic attendance record system or any other tool that allows recording of work hours. If an employer is in need of such records due to a labor inspection or if the employee requests a copy of such records, they shall be presented in writing (amending Article 21).
- In accordance with the revisions made to types of leave as defined under Article 37 of the LSA, the memorial days and holidays on which employees are entitled to rest will all return to the jurisdiction of the Ministry of the Interior, thus the current Article 23 is deleted.
- To prevent the employees from losing memorial days and holidays due to overlapping with days off or rest days, the make-up holiday rules under Article 37 of the LSA are inserted (new Article 23-1).
- In accordance with the amendments to Article 38, Paragraphs 1 and 3 of the LSA, clarifications regarding the implementation of annual paid leave are inserted amending Article 24):
 - The employer shall inform the employee of annual leave arrangements within 30 days after the employee becomes eligible for annual paid leave.
 - The employer and the employee may negotiate on the provision of the annual paid leave granted by the law to the employee based on the year calculated from the employment start date, the calendar year, the academic year, the business unit’s fiscal year or any other year period that the parties have agreed upon.
- In accordance with the amendment to Article 38, Paragraph 4 of the LSA, a new definition of wages for untaken leave and the payment date for that amount are inserted (new Article 24-1):

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- (i) The employer is required to pay a day's wage for each untaken leave day on the agreed year period between the employee and the employer upon the end of the agreed year period, or upon the termination of employment;
 - (ii) One day's wage is defined as the wage earned for one business day during regular business hours in the day just prior to the end of the agreed year period or the termination of employment. For those paid by month, one day's wage shall be the wage earned during regular business hours in the last month and divided by 30.
 - (iii) The employer must make payment for untaken leave either on the agreed payday or 30 days after the end of the agreed year period. If the employment is terminated, the employer shall settle wage payment as soon as possible in accordance with Article 9.
11. In accordance with the amendment to Article 38, Paragraph 5 of the LSA, a supplemental clarification on the required written notice that the employers shall provide to employees periodically during the year (new Article 24-2).
 12. An additional definition of leave days is inserted to include the leave days and annual paid leave days under Article 37 and Article 38 of the LSA respectively so as to clarify the questions concerning working on leave days under Article 39 of the LSA.
 13. Provisions on the time period for the competent authority and other inspection institution to handle complaints, and the provisions on prohibiting employers from retaliatory measures against whistleblower employees are moved to Article 74, Paragraph 2 and Paragraph 4 of the LSA. The current Articles 48 and 49 are thus deleted.

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JUL**

2017

The Ministry of Labor announced its interpretation that the amount of compensation to be paid by the employer in consideration of untaken annual leave by the employee shall be included into the calculation of the average wage of the employee if such compensation was paid during the period used to calculate the average wage of the employee.

According to Article 2, Paragraph 4 of the Labor Standards Act (the "LSA"), average wage is defined as "the figure reached by taking the total wages for the six months preceding the day on which an event requiring that a computation be made occurs, divided by the total number of days in that period", and Article 38, Paragraphs 2 and 4 further provide that "annual paid leaves from the preceding paragraph are to be arranged by employees. The employer, however, in the light of urgent needs of the business operation or personal factors of employees, may consult and make adjustments with employees", and "wages must be paid for annual paid leaves not used by employees because of the termination of annual or termination of contracts." In a case where the employer pays out wages for any annual leave not arranged by the employee at the end of the fiscal year, since those wages are considered compensation for the employee's work provided throughout the year during annual leave days not taken, the law does not clearly specify how much of that amount falls under the aforementioned period for determining the average wage, thus it must be separately negotiated between the employer and the employee. If the employee had arranged beforehand for taking annual leave but later gave consent to work at the employer's request in accordance with Article 39 of the LSA, and if the date of the additional work took place within the aforementioned period for calculating the average wage, the additional amount must be included in the calculation.

On the other hand, if the employee did not take all available annual leave due to the termination of the employment agreement, the compensation paid by the employer for the annual leave not taken is considered to have occurred after the termination of the employment agreement, thus it should not be included in the calculation of the average wage.

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**6
SEP**

2017

The Ministry of Labor announced that the minimum wage shall be NT\$140 per hour and NT\$22,000 per month, effective 1 January 2018.

The Ministry of Labor announced on 6 September 2017 to amend the minimum wage to NT\$140 per hour and NT\$22,000 per month. This shall enter into effect on 1 January 2018. The Ministry of Labor advises all businesses to make preparations in advance to timely and smoothly make the change in accordance with the law.

The Ministry of Labor announced the amendment of the "Regulations of the Labor Health Protection"

Issued by: The Ministry of Labor

Ref. No.: Lao-Zhi-Shou-Zi-1060204871

Issue Date: November 13, 2017

On 13 November, 2017, the Ministry of Labor issued the Lao-Zhi-Shou-Zi-1060204871 Circular to announce the 26 amended articles. All shall be effective on the date of promulgation save for the followings: For Article 4, Paragraph 1, the provision shall be implemented on 1 July 2018 for a business with between 200 and 299 workers; 1 January 2020 for a business with between 100 and 199 workers; 1 January 2022 for a business between 50 and 99 workers. For Article 5, Paragraph 3, Article 6, Paragraph 3, Article 7, Paragraph 2, Article 8, Paragraphs 4 and 5, Article 11, Paragraph 1, they shall be implemented on 1 July 2018; for Nos. 16, 24, 30 and 31 in Table 9 attached to Article 16, they shall be implemented on 1 January 2019.

The amendments are intended for alignment with the Occupational Safety and Health Act and in response to the prevention of and spread of musculoskeletal diseases and emotional stress in the workplace. Further, to strengthen the protection of the health of laborers and to better fit the practical requirements of onsite health services, in consideration of the different sizes of companies and the nature of their work, relevant opinions were collected from the administrative agencies, organizations, experts and industry persons in drafting the amendments to the Regulations of the Labor Health Protection. The key points of the amendments are as below:

1. Pursuant to the new rules on worker health services related personnel, definitions for terms used in the Regulations are clearly specified. (Amending Article 2)
2. Pursuant to Article 22 of the Occupational Safety and Health Act on the staggering promotion of worker health protection matters for units with 50 workers or more, it is stipulated that a business unit, depending on the particular needs of the industry that it is in, shall hire or retain worker health service-related personnel and for units with 300 workers or more, shall hire or retain worker health service-related personnel to provide onsite health care services in response to the prevention of new occupational diseases arising from health hazards such as emotional stress in the workplace. (Amending Articles 3 to 5)
3. Regarding the substitution mechanism for when the hired or retained worker health service personnel is unable to provide services, the employer is required to only substitute, through contracting other qualified individuals (i.e. medical professionals). (Amending Articles 6 and 7)
4. On-job continued education rules for the health service personnel to keep up to date with the latest occupational safety and health regulations. (Amending Article 8)
5. Changes to the distribution and setup of health service personnel onsite in response to difficulties to equip with emergency medical assistance personnel in isolated onsite working conditions. (Amending Article 9)
6. Changes to the services to be provided by the health service personnel onsite and the duration for the records to be retained pursuant to the Occupational Safety and Health Act with respect to guidance provided to health issues discovered in physical examinations, the preservation of physical examination records, the prevention of new occupational diseases, the assessment of high-risk groups and others. (Amending Articles 10 to 13).

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7. Changes to the special health examination items for those working with chromic acid and its salts, potassium dichromate and its salts, benzene, formaldehyde and indium; employers are also now required to provide the latest environmental monitoring records to the medical professional examining workers handling such substances. (Amending Article 16)
8. Specifying separate implementation dates due to the need for a grace period for business units and administrative agencies to comply with the newly added regulations. (Amending Article 26)

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2016

Decree 166/2016/ND-CP dated 24 December 2016 of the Government

Decree 166 provides an online method to carry out administrative procedures in the field of social insurance, in particular social, health and unemployment insurance. Under this Decree, documents for electronic social insurance comprise of: (i) Application for e-social insurance; (ii) Accounting documents in compliance with e-accounting system of Vietnam Social Insurance; (iii) Other documents, notifications of organizations, persons conducting e-social insurance transactions.

The Decree also specifies conditions which must be satisfied to be eligible to use this online administrative procedure.

This Decree takes effect as from 1 March 2017.

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APR

2017

A New Decree Regulating on Statutory Pay Rate for Public Officials, Public Employees and Armed Forces' Personnel

On 24 April 2017, the Government of Vietnam issued Decree No. 47/2017/ND-CP on statutory pay rate for public officials, public employees and armed forces' personnel. Notably, the monthly basic salary is adjusted from VND 1,210,000 per month to VND 1,300,000 per month (an increase of 7.5%) which is used for social insurance calculation. The cap for calculating the maximum social insurance contribution therefore increases from VND 24,200,000 per month to 26,000,000 per month.

Decree 47 takes effect as from 1 July 2017

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Resolution No. 49/2017/QH14

Article 3.7 of Resolution No. 49/2017/QH14 provided for statutory pay rates of public officials/public employees. Notably, the monthly basic salary is adjusted from VND 1,300,000 per month to VND 1,390,000 per month (an increase of 7%) which is used for social insurance calculation. The cap for calculating the maximum social insurance contribution therefore increases from VND 26,000,000 per month to 27,800,000 per month.

This Resolution takes effect as from 13 November 2017

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7
DEC

2017

Decree No. 141/2017/ND-CP

The Decree provided for region-based minimum wage (ranging from VND 2.76 million (US\$122) to VND 3.98 million (US\$176)) applied for contracted employees as prescribed by the Labor Code 2012 in four different regions in Vietnam. Such rates are the lowest rates used as the basis for any salary arrangement between employers and employees who perform simplest tasks. Any trained employees must be paid at least 7% higher than the above regional minimum wage rates.

This Decree takes effect as from 25 January 2018 and its regulations take effect as from 1 January 2018

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