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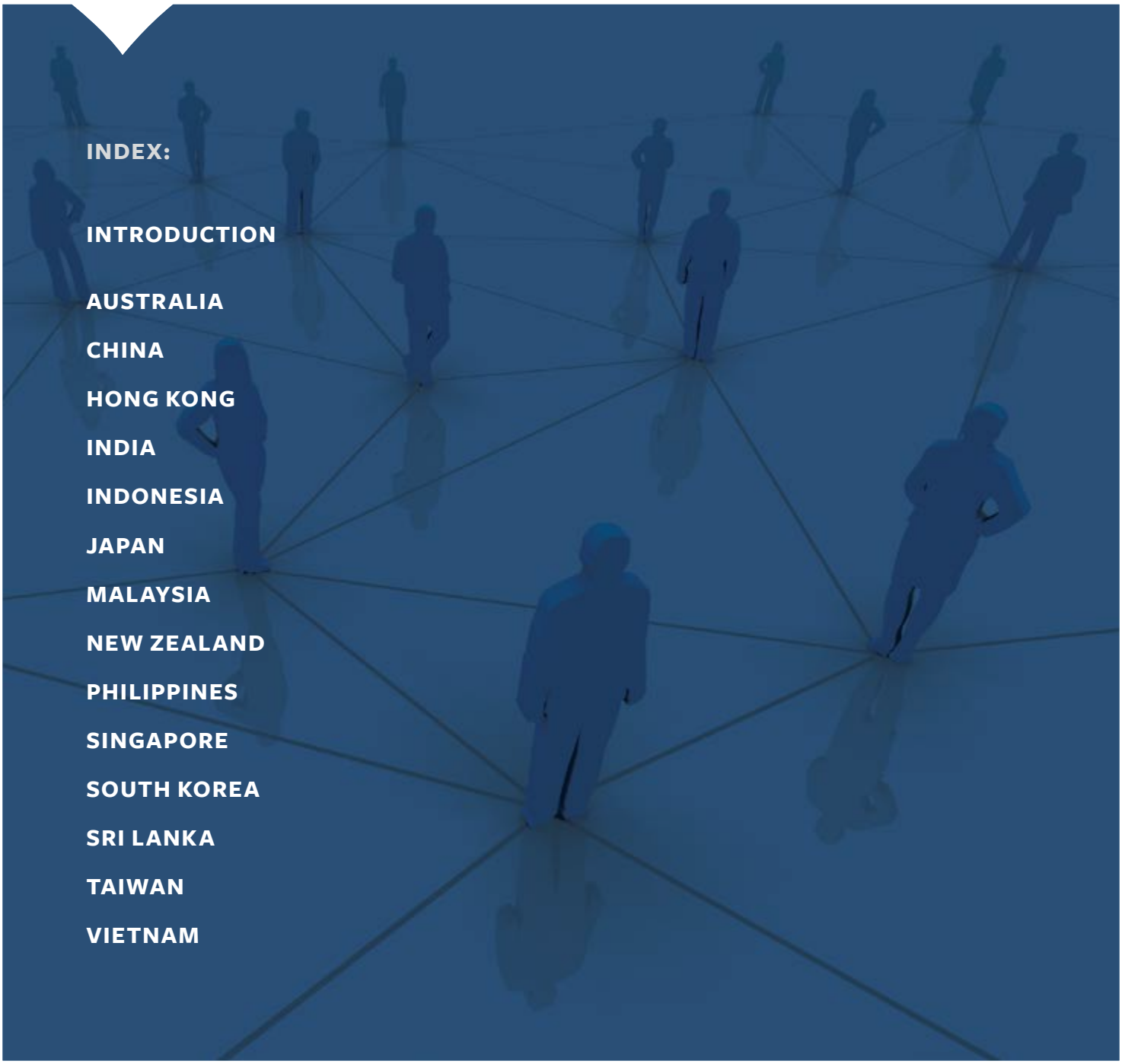

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INTRODUCTION

UPDATED AS AT JUNE 2018

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 twentieth edition, we flag and provide comment on anticipated employment law developments during the second quarter of 2018 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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AUSTRALIA
24 OCT 2017

Fair Work Commission constrains parties' use of 'shadow lawyers' in Fair Work Act ("FW Act") proceedings

In Fitzgerald v Woolworths Limited [2017] FWCFB 2797, a Full Bench of the Fair Work Commission ("FWC") determined that the requirement to obtain permission to appear as a legal representative in an unfair dismissal case applies not only to advocacy at the hearing stage, but also where a party obtains legal assistance with preparation of submissions and other pre-hearing steps. The Full Bench ruled that the reference in section 596 of the FW Act to representation 'in a matter' in the FWC means 'the whole of [the] justiciable controversy' brought before the tribunal for adjudication. In this case, a party's attempt to have a lawyer present to assist in the making of submissions at hearing was considered to be 'representation' for which permission under section 596 should have been sought and obtained.

AUSTRALIA
21 FEB 2018

However in *Stringfellow v Commonwealth Scientific and Industrial Research Organisation* [2018] FWC 1136, the FWC applied a further aspect of the *Fitzgerald v Woolworths* decision to confirm that the representational activity, subject to the requirement to obtain permission to appear as lawyer or paid agent, does not include the provision of legal advice to a party involved in proceedings before the tribunal.

AUSTRALIA
21 DEC 2017

FWC finds Uber driver is an independent contractor, not able to pursue unfair dismissal claim

In Kaseris v Rasier Pacific VOF [2017] FWC 6610, the FWC decided that an Uber driver whose account had been deactivated (following poor passenger ratings) was not an employee and therefore could not proceed with an unfair dismissal claim under the Fair Work Act 2009 (Cth) (FW Act). The conclusion that the driver was an independent contractor was reached on the application of the common law multi-factor test, which indicated that he had complete control over the way he provided driving services to Uber; bore the costs of running his vehicle; and was not obliged to perform the services, just as Uber was not required to provide him with work (the absence of the required 'work-wages' bargain.

This is the first determination of the employment status of 'gig economy' workers under Australian law, an issue which is increasingly attracting the attention of legislators (through federal Parliamentary inquiries), unions and regulators. However, no legislative changes are likely to emerge in this area under the current Coalition Government.

More...

AUSTRALIA
14 FEB 2018

High Court confirms power of federal courts to impose personal payment orders for civil remedy breaches

The High Court of Australia decided that when a federal court orders an individual to pay a pecuniary penalty under section 546 of the FW Act, it may also order that the penalty must be paid personally by the individual (*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* [2018] HCA 3). In this case, a union and one of its officials had been found in breach of the prohibition upon coercion in section 348 of the FW Act, when they organised a blockade of a building site. In enforcement proceedings brought by the construction industry regulator, the Federal Court of Australia ordered that the union could not indemnify its official in respect of a penalty it had imposed upon him for the breach.

In its decision on the union's appeal, the High Court found that section 546 does not support the making of the non-indemnification order imposed by the Federal Court, because a pecuniary penalty order may only be directed at the contravener (and not another party such as the union). However, the provision does authorise an order requiring the subject (in this case, the union official) to pay the penalty personally.

This ruling is expected to have important implications in the construction industry, where unlawful behaviour on the part of union officials has been the subject of widespread judicial criticism in recent years. It will also apply, though, to breaches of any civil remedy provisions of the FW Act, which include those relating to underpayments and other breaches of minimum employment standards by employers and their managers.

More...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA
26 MAR
2018

All Australian employees to obtain unpaid domestic violence leave, following FWC Full Bench decision

The Australian Government has announced that it will amend the FW Act to provide five days' unpaid domestic violence leave to all federal system employees. This follows a decision by an FWC Full Bench decision to extend the five day entitlement to award-covered workers (*4-Yearly Review of Modern Awards – Family and Domestic Violence* [2018] FWCFB 1691).

The new leave entitlement is intended to assist employees in dealing with abusive domestic relationships, and is available "in the event that the employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for them to do it outside their ordinary hours of work". The Full Bench decided that this non-cumulative leave entitlement should be available to employees at the start of each year of service, and would not be pro-rated for part-time or casual employees.

The commencement date for the award-based entitlement is yet to be determined by the FWC, while its extension to all federal system employees will be the subject of legislation yet to be introduced into Parliament

AUSTRALIA
29 MAR
2018

Victorian Government introduces legislation providing portable long service entitlements in certain sectors

The Victorian Government introduced the Long Service Benefits Portability Bill 2018 into State Parliament. The Bill proposes to establish a scheme through which service by workers in the contract cleaning, security and community services sectors is portable, with the result that workers who work for multiple employers can have their service recognised and qualify for long service entitlements. This would overcome the problem that in these sectors, contract/project-based work is common, so that workers regularly change employers. Instead, workers will be entitled to long service leave having completed seven years' service in the relevant industry (rather than seven years with one employer). Employers will be required to register under the scheme, and pay a levy (not more than 3% of ordinary pay payable to employees) to a government fund from which workers' long service entitlements will be paid.

AUSTRALIA
24 APR
2018

United Voice v Berkeley Challenge: Federal Court determines dismissed employees entitled to redundancy pay

In *United Voice v Berkeley Challenge Pty Ltd* [2018] FCA 224, the Federal Court of Australia determined that a contract services provider's dismissal of employees, following an unsuccessful tender for a new contract, did not fall within the 'ordinary and customary turnover of labour' exemption from the requirement to make redundancy payments.

Section 119 of the *Fair Work Act 2009* (Cth) establishes the right of an employee, whose employment is terminated because the employer no longer requires the employee's job to be done by anyone, to be paid an amount of redundancy pay determined in accordance with the employee's length of continuous service with the employer.

Berkeley sought to rely on the exception to this obligation set out in section 119(1)(a): that is, where the redundancy 'is due to the ordinary and customary turnover of labour' (**OCTL**). It argued that the loss and gain of client contracts were normal features of its business, with a consequent fluctuation of employee numbers.

Justice Reeves of the Federal Court did not accept this argument, taking the view that the OCTL exception is confined to a 'narrow set of circumstances'. The relevant redundancies in this case were, for Berkeley, 'uncommon and extraordinary and not a matter of long-continued practice'.

The decision has implications for businesses in that employers will now be exposed to making redundancy payments in a range of situations that may not previously have triggered this obligation. The legal and industrial landscape will remain unsettled for the next 6-12 months as we understand that Berkeley have appealed the decision to the Full Court of the Federal Court.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA

8 MAY 2018

Victorian Government introduces legislation providing for long-service leave portability for cleaning, security and community sector workers

The Victorian Parliament is currently considering the *Long Service Benefits Portability Bill 2018* (Vic) (**Bill**), which would entitle workers in traditionally transient sectors to be able to carry across their service entitlements between different employers.

Employers in the contract cleaning, security and community sectors will be required to register their business, and employees, as part of the scheme and pay a levy in order to fund it. There will be significant penalties for employers that fail to register within the three months of this Bill becoming law.

If passed, the law will bring the state of Victoria in line with Queensland, New South Wales and the Australian Capital Territory which have similar schemes.

Presently, under the *Long Service Leave Act 1992* (Vic), in order for a worker to be entitled to paid long service leave, they are required to be employed with an employer continuously for at least seven years.

Under the proposed scheme, workers in the covered industries will be entitled to long service leave entitlements after seven years' working in the *industry*, regardless of the number of employers they have worked for during that period. This would overcome the problem that in these sectors, contract/project-based work is common, so that workers regularly change employers.

More...

AUSTRALIA

18 MAY 2018

Victoria's long service leave legislation updated to increase flexibility and early access to long service leave

In May 2018 the Victorian Parliament enacted the *Long Service Leave Act 2018* (Vic) (**Act**). The Act repeals and replaces the *Long Service Leave Act 1992* (Vic). The Act was passed by Parliament on 8 May 2018, and made law on 15 May. It will come into effect on a date to be proclaimed or 1 November 2018.

The new regime allows employees to apply to take pro rata long service leave after seven years of continuous employment (rather than 10 years previously), and provides greater flexibility in how that leave can be taken. Employees can apply under the Act to take long service leave in increments of one day at a time. Previously employees could only take long service leave in longer blocks. This change is consistent with the way in which annual leave operates and is designed to encourage flexible work practices for carers or those transitioning into retirement.

The rate at which entitlements accrue (1/60th of the employee's total period of continuous employment, less any period of long service leave taken) is unchanged.

Long service leave entitlements depend on the employee's 'continuous employment'. Changes in the new Act have the greatest impact on parental leave, which is now treated consistently with other types of leave for purposes of determining long service leave entitlements. Previously continuity of employment would be broken after an employee took more than 12 months of parental leave. Under the Act, casual and seasonal workers are now afforded up to two years' parental leave (paid or unpaid) without breaking their continuity of employment for long service leave purposes.

Further, a person is entitled to long service leave after completing seven years of continuous employment with 'one employer'. The Act expands the definition of 'one employer' to capture all cases where a business is transferred by asset sale. Previously the concept of assets (for these purposes) was limited to 'land, plant and equipment' and did not capture intangible assets. This will mean that employee entitlements will transfer in a broader range of business transfer situations.

More...

LOOKING BACK

AUSTRALIA

1 JUN 2018

National Minimum Wage Annual Review 2017-18

The Minimum Wage Panel of the Fair Work Commission has handed down its decision in its annual review of the national minimum wage and wage rates under modern awards in the *Annual Wage Review 2017-18* [2018] FWCFB 3500. It has granted a 3.5% wage increase to Australia's lowest-paid workers.

The resulting wage rates are as follows:

- the minimum hourly wage has been increased by 64 cents to $18.93 per hour
- the minimum weekly wage has been increased by $24.30 to $719.29 per week (based on a 38 hour work week)

The number of employees whose pay is set by an award is estimated to be 2.3 million (or 22.7% of all employees). The proportion of employees paid at the adult minimum wage rate is estimated at 1.9%. The wage increase will affect all these employees. The decision will also affect employees paid close to the national minimum wage and modern award rates, and those whose pay is set by an enterprise agreement linked to the outcome of the Annual Wage Review.

The new wage rates will come into effect on 1 July 2018.

More...

AUSTRALIA

18 JUN 2018

Why 'Start Up' Enterprise Agreements Remain Under Intense Scrutiny

In recent years some employers have utilised the capacity to make an enterprise agreement with a small group of employees, but include a coverage clause that enables the agreement to apply to broader groups of workers in the future. This was originally legitimised in a series of cases involving John Holland and more recently endorsed by the High Court in the Aldi case.

In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2017] FCA 77, however, the Full Federal Court (**FFC**) largely upheld a decision made by Flick J at first instance, overturning the Fair Work Commission's approval of this kind of agreement.

The decision found that an agreement voted up by a small group of employees – which was not representative of the larger group of employees to whom the agreement would ultimately apply – was not genuinely agreed to in accordance with section 186(2)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**).

Despite 'yes' votes from each of the three employees who voted on it, the FFC found that the requirement for genuine agreement imposes a standard of authenticity on employee approval: that is, 'mere agreement will not suffice' and 'consent of a higher quality is required'. The FFC agreed with Flick J that One Key failed to comply with the requirements in section 180(5) of the FW Act to take all reasonable steps to ensure the terms of the agreement and their effect had been explained to the relevant employees.

The decision does not necessarily prohibit the 'start up' agreement model made with a small number of employees. Rather, it turned on the facts of the case: the agreement was made between three employees with very confined employment experience (and two of whom were casual), was underpinned by 11 modern awards, and was agreed to without any bargaining. It is not surprising that the FFC found the 'protective' agreement making provisions in the FW Act had been compromised by the employer.

More...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY: CORRS CHAMBERS WESTGARTH lawyers

LOOKING BACK

CHINA

28 APR

2018

Circular of the Ministry of Housing and Urban-rural Development, the Ministry of Finance and the People's Bank of China on Optimizing the Housing Provident Fund Payment Mechanism to Further Curtail Corporate Costs

The Ministry of Housing and Urban-rural Development, the Ministry of Finance and the People's Bank of China have jointly issued the Circular on optimizing the housing provident fund payment mechanism to further curtail corporate costs on 28 April 2018 which came into force as of the promulgation date. The Circular states that the validity of the phased policy, under which the ratio of housing provident fund payments made by enterprises is reduced to a proper extent, will be extended, adding that efforts shall be made to practically standardize the upper limit of the base on which the housing provident fund is contributed, widen the floating range of ratios of housing provident fund payments, and improve efficiency in assessing and approving applications for curtailing the rate of housing provident fund payments or delaying such payments. According to the Circular, the phased policy introduced in all regions in 2016, whereby enterprises are enabled to make contributions to the housing provident fund at an appropriately lower rate, will be extended to 30 April 2020, upon the expiry of its previous validity. Moreover, the Circular explicitly states that the monthly salary base on which the housing provident fund is paid, shall not exceed three times of the employees' average monthly salary announced by the department of statistics of the city with districts where these employees work. Furthermore, the Circular stipulates that the housing provident fund payment shall be made at a rate of no less than five percent, and the maximum rate shall be determined by each region under procedures set out in the Administrative Regulations for the Housing Provident Fund and shall be capped at 12 percent.

More...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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HONG KONG
9 FEB 2018

Hong Kong amends Employment Ordinance to tighten regulatory oversight of recruitment agencies

Hong Kong recently amended part 12 of the Employment Ordinance (Cap. 57) relating to employment agencies and the Employment Agency Regulations (Cap. 57A) to provide job-seekers with greater protection. The amendments came into force on 9 February 2018. The main changes are as follows:

a. To increase the maximum penalty for unlicensed operation of an employment agency and overcharging commission to job-seekers from a fine of HK$50,000 to HK$350,000 and imprisonment for three years;
b. To increase the time limit for lodging a complaint in respect of the two offences stated above in (a) to 12 months;
c. To broaden the scope of the offence of overcharging job-seekers to include not only the licensee, but also the recruitment agency's associates (which includes director, manager, secretary and employee of a licensee); and
d. To provide new grounds for the Commissioner for Labour to refuse to issue, renew or revoke a licence, including non-compliance of the Code of Practice for Employment Agencies.

The amended Ordinance...

HONG KONG
9 FEB 2018

Promulgation of Code of Practice for Employment Agencies

In light of the aforementioned amendments to the Employment Ordinance (Cap. 57), the Commissioner for Labour also promulgated a revised Code of Practice for Employment Agencies (the "**Code**") which supersedes the previous version dated January 2017. The Code mirrors legislative updates to the Employment Ordinance and specifies the following in detail:

- Statutory requirements in relation to operating employment agencies;
- Standards the Commissioner for Labour expects from employment agencies, including but not limited to the following aspects:
  - Outlining responsibilities of senior management;
  - Acting honestly and exercising due diligence;
  - Maintaining transparency in business operations;
  - Drawing up of service agreements with job-seekers and with employers; and
  - Adopting good record management practices;
- Emphasis on compliance with the Prevention of Bribery Ordinance (Cap. 201); and
- Sample forms for employment agencies.

The Employment Agencies Administration of the Labour Department conducts regular inspections of Employment Agencies and issues warning letters to Employment Agencies for contraventions of the Code.

The Code...

HONG KONG
14 FEB 2018

District Court strikes out a sex discrimination claim

In *Tan, Shaun Zhi Ming v. Euromoney Institutional Investor (Jersey) Ltd* [2018] HKDC 185, an employee's sex discrimination claim was struck out as the employee failed to show his dismissal by his former employer was due to his gender.

Facts:

Tan, Shaun Zhi Ming ("**Tan**") was terminated by Euromoney Institutional Investor (Jersey) Ltd ("**Euromoney**"). Tan alleged the termination was due to a false, unsubstantiated and improbable sexual harassment allegation made against him by a colleague without proper investigation. Tan claimed the dismissal was a result of direct sex discrimination because of his gender and commenced the action against Euromoney based on sections 5(1)(a) and 11(2)(c) of the Sex Discrimination Ordinance (Cap. 480) ("**SDO**").

Euromoney denied the allegations and applied to strike out the claim by reason of Tan's lawful termination through payment in lieu of notice in accordance with the employment contract.

The Law and Discussion:

The legal principles in striking out applications are well established. Actions should only be struck out in plain and obvious cases, where the claim is incontestably bad and obviously unsustainable.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG

14 FEB

2018

The Court recited the "but for" test on sex discrimination, namely that there is unlawful sex discrimination if the relevant woman would have received the same treatment as men but for their sex. Neither the intention to discriminate nor the conduct of a hypothetical reasonable employer is relevant in determining whether there was discrimination. Instead, the Court should look at whether there was less favourable treatment on the ground of sex.

Tan contended he was not given a proper investigation to the sexual harassment allegation, such as an opportunity to face the accusers or to cross-examine witnesses. Euromoney has thus taken an easy way out to dismiss him, resulting in direct sex discrimination.

However, the Judge, quoting from a case authority, stated "all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory". Applying to the present scenario, the fact that Tan was treated unreasonably or unfairly in the investigation process did not mean Euromoney had committed any act of discrimination under the SDO.

In evaluating the strike-out application, the Judge considered various sources of information such as the (1) employment agreement, (2) transcript of a covert recording and (3) email correspondences. The Judge was of the view although the sexual harassment allegation was mentioned in the above sources of information provided to the Court, Tan's employment was terminated by payment in lieu of notice in accordance with the employment agreement.

The Court concluded there was simply no direct evidence to satisfy the "but for" test, and an inference of sex discrimination could not be drawn simply from the fact Tan was a male. Therefore, the strike out application was successful.

Takeaways for Employers:

This is good news for the employers. Although the strike out application by the employer in the present case was successful, this case serves as a reminder to employers to have proper processes in place for handling harassment and discrimination complaints.

Typically an employer may not include a reason for termination of employment and the basis is a letter of termination. However, where there can be potential arguments of discrimination, an employer may wish to pre-empt any potential discrimination complaint by including a (legitimate) reason

Judgment...

HONG KONG

15 FEB

2018

Senior employee liable for breach of fiduciary duties and non-solicitation covenant

In the decision of *South China Media Limited and others v. Kwok, Yee Ning and others* [2018] HKDC 194, the District Court (the "**Court**") held a senior employee liable as a de facto director for breach of her fiduciary duties and a non-solicitation covenant in a letter of undertaking. The employee's husband and his companies were also found to have dishonestly assisted and procured the breach.

Facts:

Kwok, Yee Ning ("**Kwok**") was employed by South China Media Management Limited ("**SCM Management**") as its advertising director, primarily responsible for the publishing of a magazine by Whiz Kids Express Weekly Limited ("**Whiz Kids**"). It was alleged that Kwok (1) allowed unauthorized use of the magazine's logo and name to be used in promotional materials free of charge, (2) diverted away maturing business opportunities and (3) solicited business to her husband's companies after termination of Kwok's employment.

Issues and Reasoning:

A. Whether Kwok owed and breached her fiduciary duties

The Court stated those who assume to act as directors and thereby exercise the powers and discharge the functions of a director must accept the responsibilities of the office. One must look at what the person actually did to determine whether there was an assumption of responsibilities. It is an objective test irrespective of the person's motivation or belief.

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Kwok held the title of and was held out to clients as the "advertising director". She also had the authority to negotiate the terms of and enter into contracts for and on behalf of Whiz Kids. The Court held that Kwok was a de facto director who assumed the responsibilities of a company director even though not formally appointed as one.

A *de facto* director, like any other director, owes fiduciary duties to the company. Such duty includes a duty not to divert to another associated person or company a maturing business opportunity which the employer is actively pursuing.

From the facts, the Court inferred that Kwok had provided her husband details of negotiations and a copy of a draft contract, such that her husband could subsequently make a similar offer to the target client on behalf of his company. Additionally, Kwok allowed her husband's company to use Whiz Kids' logo and name for a campaign free of charge. The Court held Kwok acted in breach of her fiduciary duties by (1) failing to act with single-minded loyalty to Whiz Kids, (2) acting for the benefit of a third person without the informed consent of Whiz Kids and (3) placing herself in a position of conflict by failing to act in the best interest of Whiz Kids.

B. Whether Kwok breached the non-solicitation covenant

Covenants in restraint of trade are generally unenforceable unless they can be shown to be reasonable in the interests of the parties and in the public interest. The party seeking to enforce the restrictive covenant must show the restrictions are no greater than are reasonably necessary for the protection of its business.

Kwok entered into a letter of undertaking and agreed she would not "... during a period of 12 months from the Termination Date, solicit any customer or client whether on [her] own account or on behalf of any other person, firm or corporation who or which was a customer or client of any one of the member companies of [the Group] at any time during the period when [she] was employed by one of the member companies of [the Group]" (the "**Non-Solicitation Clause**").

The Court was of the view the Non-Solicitation Clause was reasonable and enforceable as restrictive covenants were necessary to protect Whiz Kids' trade connections, especially when Whiz Kids has acquired substantial goodwill in the children event planning business. Upon assessment of the factual circumstances, the Court found Kwok breached the Non-Solicitation Clause by soliciting a potential customer of Whiz Kids to her husband's company.

C. Whether Kwok's husband and his companies (the "Accessories") dishonestly assist and procure Kwok to breach her contract

To establish dishonest assistance, the Court examined the following requirements:

(1) Breach of trust or fiduciary duty by someone other than Kwok;
(2) The Accessories' assistance;
(3) Dishonesty; and
(4) Resulting loss.

The Court was aware dishonesty is an objective standard judged according to the standards of an ordinary honest person, who would have the same knowledge of the circumstances and personal attributes as the Accessories. Taking into account the husband and wife relationship, the nature and timing of the business set up by the Accessories and the contemporaneous evidence showing transactions with clients or potential clients of Whiz Kids, the Court found the Accessories dishonestly assisted in Kwok's breaches of fiduciary duties. By being willing parties to Kwok's solicitation of businesses and turning a blind eye to existence of dealings between Whiz Kids and clients that were solicited, the Court also found the Accessories liable for procuring breach of Kwok's contract.

Takeaways for employers

This decision serves as a useful reminder that the court looks at substance over formality in establishing whether an employee has assumed directorship. The court will look at the overall circumstances of the case, including the role and job duties of the employee, to determine whether he or she is a *de facto* director.

Judgment

HONG KONG

20 FEB 2018

Labour Department rejects employment agency's licence renewal

The Labour Department announced through a press release its first refusal in 2018 in renewing the licence of an employment agency (the "**EA**"). The relevantEA had failed to meet the standards set out in the Code of Practice for Employment Agencies (the "**Code**") in many aspects, such as its failing to draw up service agreements with foreign domestic helpers and their employers. No rectification was made by the EA concerned after warning letters were repeatedly issued by the Employment Agencies Administration. The Commissioner for Labour hence refused to renew the EA's licence on the grounds that the licensee concerned was not a fit and proper person to operate an employment agency under section 53(1)(c)(v) of the Employment Ordinance (Cap. 57).

In addition, the Labour Department reminded employment agencies they must observe the Code since it sets out the legislative requirements which they must observe in operating their businesses, as well as the minimum standards which the Commissioner for Labour expects from employment agencies.

The Press Release...

HONG KONG

23 FEB 2018

Consideration required when varying the terms of a contract of employment

An employer may need to change the terms of employment, such as to introduce post-termination restrictions, to change contractual leave arrangements or other benefits, and less commonly, to demote an employee or reduce salary. Where the change is to improve an employee's benefits, the employee will readily accept the change without complaint. However, where the change seeks to reduce an employee's entitlements or impose additional obligations on the employee, it will be much trickier to get the employee to agree to the contractual change. Even if the employee agrees to the change, an important element in making a contractual change binding on both employer and employee is needed to ensure that there is legal consideration (or bargain) for the change.

In *Wu Kit Man (胡潔敏) v. Dragonway Group Holdings Limited (龍威集團控股有限公司)* [2018] HKCA107, the Court of Appeal provides a useful reminder for parties to think about whether legal consideration is provided when varying a contract of employment. The case also discusses what can amount to legal consideration in an employment context, particularly, where an employee does not seemingly provide any consideration for an employer's promise of an additional benefit.

The Law

The legal requirements to create a binding contract, including a contract of employment, is that there must be an offer, acceptance of that offer, and legal consideration. Consideration is something of value given by one party in return for the other party's promise. If there is no legal consideration, or real benefit, then the purported contract, even if signed by both parties, will be unenforceable. The same principles apply to a variation to a contract of employment.

Facts

Dragonway Group Holdings Limited ("**Dragonway**") employed Ms. Wu under a contract of employment made on 12 May 2015. The only provision in relation to bonus in the contract was a discretionary bonus payable in January if Ms. Wu was still employed and had not tendered her resignation before the payment date.

On 19 October 2015, Dragonway issued an addendum to the contract (the "**Addendum**"), offering a cash bonus of either (1) HK$1,500,000 after the completion of listing of Dragonway or its holding company on or before 31 December 2016, or (2) if those companies ceased the listing plan or the employee left Dragonway for whatever reason before 31 December 2016, HK$350,000 would be offered to the employee within 10 days after the cessation or termination and in any event no later than 31 December 2016.

Dragonway terminated Ms. Wu's employment in December 2015. Ms. Wu brought a claim for the cash bonus of HK$350,000 in the Labour Tribunal. The Presiding Officer in the Labour Tribunal found in favour of Ms. Wu. On appeal the Court of First Instance reversed the decision on the basis that the Addendum was not supported by consideration and thus Ms. Wu was not entitled to the cash bonus. Ms. Wu appealed to the Court of Appeal.

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Court Findings

The Court of Appeal confirmed that the ultimate test for consideration to a contract for the variation of the terms of employment is whether or not there is a "real benefit". In circumstances where the employee continues to be employed under the contract of employment and is already obliged to work under that contract, the question of legal consideration for a variation to that contract is whether the employer has secured a benefit and avoided a detriment.

Counsel for Ms. Wu relied on an earlier line of cases, including the Court of Appeal case of *Chong Cheng Lin Courtney v. Cathay Pacific Airways Ltd* [2010] HKCA 338 as authority for the proposition that the non-exercise by an employee of his/her right to terminate under the contract of employment is good consideration. However, the Court of Appeal in the present case was quick to say that it is important to look at the circumstances of the case and the context in which the variation took place. They said that the variation in the Chong case was in the context of a variation of standard terms across the board to all cabin attendants employed by the defendant when there was competition from other airlines offering similar packages. It was in such special contexts that the courts held that consideration for the variation was provided by the employee refraining from resigning. This was a real benefit to the employer.

The state of the law in this area is neatly summarised by the Court of Appeal citing an earlier English decision of *Williams v. Roffey Brothers & Nicholls (Contractors) Ltd* [1991] 1 QB 1 as follows:

"the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promisee will be legally binding"

The Court of Appeal held that as there was a lack of citation of the relevant legal authorities it considered that the Court of First Instance Judge did not focus on the issue of whether there was any "real benefit" provided in the context of the case. Given the way that the matter had developed, there was inadequate material before the Court of Appeal to make a determination of whether there was any consideration for the Addendum. The Court of Appeal remitted the matter to the Labour Tribunal for retrial on the question of consideration.

As a postscript, the approach in the *Williams* case was recently applied in *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2017] QB 604, which is on appeal to the UK Supreme Court. That appeal was heard on 1 February 2018. The judgment in that Supreme Court case (which will only be of persuasive value) should be taken into consideration.

Lessons for Employers

1. Consider what legal consideration is provided for a variation to the contract of employment. From the case discussed above, it can be seen that even in scenarios where the employer is offering "more for the same" in the change of employment terms, it may be necessary to show what consideration is provided by the employee. An agreement by the employee not to exercise his/her right to terminate the contract of employment may be good consideration. However, the context must be such that there is a real benefit to the employer. It will not apply in all circumstances.
2. Where the consideration being provided is not obvious, consider expressly stating the consideration is being provided in the variation agreement.
3. Depending on the variation, consider executing the variation of contract as a deed. A deed is a written form of binding promise or commitment of one party to perform a certain act. If only one party under an agreement is receiving a real benefit, it may be worth considering whether the benefit is one that can be conferred by way of executing the agreement in the form of a deed so that it is not void for the lack of consideration.

Judgment...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

Former employees liable for pocketing inflated prices in breach of their fiduciary duties

The Court of First Instance held in *Promo International Limited v. Chae Man Tock and Chow Ting Hei also known as Chow Shuk Mei* [2018] HKCFI 284 two former employees liable for inflated prices of suppliers' products and tooling costs they have pocketed in breach of their duties owed to the employer.

Facts:

Chae Man Tock ("**D1**") was initially employed by Promo International Limited ("**P**") as a merchandiser in the Shenzhen office. The Shenzhen office ceased its business operations in March 2007. Thereafter, D1 worked as Office Manager in the Hong Kong office set up in May 2007. Upon setting up of the Hong Kong office, D1 was paid in GBP. P did not make MPF contributions or file salaries tax return for D1. Chow Ting Hei also known as Chow Shuk Mei ("**D2**", together with D1, "**Ds**"), wife of D1, was then employed to work in the Hong Kong office. It was not disputed Ds' duties were to source products from suppliers in Mainland China for the benefit of P.

Ds were subsequently found to be involved in a fraudulent scheme, whereby invoices to P were inflated such that price differences were paid to Ds' personal bank accounts, and some payments were made to D2 by suppliers without P's knowledge and consent.

Ds were charged and convicted with multiple charges of fraud and accepting advantage in 2012 and were both sentenced to 3.5 years' imprisonment. Their applications for leave to appeal were dismissed in 2013.

In this action, P claimed against Ds for breach of express and implied terms of their employment contracts and sought recovery of price differences paid by P and the amounts quoted by the suppliers to Ds. On the other hand, D1 insisted he was an independent contractor in the Hong Kong office who employed D2 himself, and hence counter-claimed against P for agreed expenses of the Hong Kong office based on an oral agreement.

Issues and Court Findings:

1. **Whether Ds were P's employees**

   It is well established the approach to whether a person is an employee is to examine all the features of the relationship against the background to determine whether, as a matter of overall impression, the relationship is one of employment.

   The Court considered multiple sources of communication between P and Ds, such as alleged employment contracts, oral agreements, email correspondences and actions and drew the following inferences:

   a. Whether payments to D1 were made in HKD or GBP did not matter as it would still be salary payments to an employee;
   b. The change in description of payment to D1's Payroll Account from "salary" to "wages" made no difference as only an employee would receive salaries or wages;
   c. The email exchanges indicated D1 had:
      i. sought P's approval in relation to employment and sent employment contracts to P; and
      ii. written to Mr Townsend, managing director of P, when taking leave and requesting for bonuses;
   d. Though D1 was in charge of his own MPF contributions and tax obligations, these of itself would not be determinative factors in the overall assessment; and
   e. The fact that D2 reported to D1 as Office Manager over her work would not necessarily mean the manager was her employer.

   As Ds were previously convicted, section 62 of the Evidence Ordinance (Cap. 8) shifted the evidential burden from P to Ds to prove they were not employees of P. The Court held Ds were unable to discharge the burden and Ds were both held to be employees of P.

2. **Whether Ds were in breach of their duties owed towards P**

   It is recognized that an employee, during the course of employment, owes a duty of good faith to his employer, and such duty includes a duty not to make any secret profits. The Court observed while there were situations where an employee was allowed to earn profits using his employer's assets and not account for the said profits, it would depend on the facts of each case.

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG
28 FEB
2018

Applying to the present facts, the Court accepted it would be in the best interest of P to source goods of acceptable quality at the lowest price to maximize profits. Since Ds inflated prices of suppliers and pocketed the differences, the Court held Ds were clearly in breach of their duties.

3. **Assessment of Damages**

The Court took this opportunity to consider the grounds for awarding (1) exemplary and aggravated damages and (2) compound interest.

On the issue of exemplary and aggravated damages, P asserted D1's actions were deliberate and premeditated and sought for an additional of 20% of the sum claimed as an award of exemplary damages. The Court observed there has been no authority directly relevant to quantum of exemplary damages or application of a percentage of compensatory damages as exemplary damages. In applying the "if, but only if" test i.e. the Court can award some larger sum to mark disapproval of the defendant's conduct and to deter the defendant from repeating the conduct if, but only if, compensatory damages are inadequate, the Court was of the opinion it was inapplicable in this context as compensatory damages were adequate to punish and deter Ds for their conduct.

Additionally, on the issue of compound interest, the claim was only made at the closing submissions but not in the Statement of Claim. The Court emphasised though there was equitable jurisdiction to award compound interest in cases of fraud, since P did not specifically claim for compound interest, such claim was not allowed.

P's claim was successful and Ds were ordered to pay for damages arising out of their breach of duties as P's employees.

Takeaways for Employers:

Employers should document their employment of employees in writing to avoid dispute as to the employment and the terms of employment.

Employers should also ensure that it has adequate processes in place to control, monitor and detect breaches by employees of their duties.

Judgment

HONG KONG
1 MAR
2018

Launching of public consultation on fourth CEDAW report

The Government issued a draft outline of its fourth report under the United Nations Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**") to seek views from the public. The report will be submitted to the Central People's Government for incorporation into the ninth national periodic report.

The CEDAW is an international convention which defines what constitutes discrimination against women and outlines international standards in protecting the rights of women. The CEDAW was extended to Hong Kong in October 1996 and the Government has been implementing the CEDAW through provisions of the Basic Law, local legislation and other administrative measures.

In accordance with Article 18 of the CEDAW, Hong Kong is required to submit a report on measures taken to give effect to the provisions of the CEDAW. The fourth report mainly consists of the following:

- Updates on the legal, administrative and any other significant developments since the previous report in 2012;
- Progress of ongoing developments when the United Nations Committee on the Elimination of Discrimination against Women (the "**Committee**") considered the previous report in 2014; and
- Responses to concerns and recommendations made by the Committee's concluding observations on the previous report.

The consultation period will last for two months until 30 April 2018.

An outline of the report

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG

2 MAR 2018

Equal Opportunities Commission announced its comparison study on sexual harassment against Mainland Chinese immigrants and locally-born women

The Equal Opportunities Commission ("**EOC**") published its report "A Study on knowledge of sexual harassment and experience of being sexually harassed in the service industries: Comparing recent female Mainland Chinese immigrants with locally-born women".

In this study, a total of 603 questionnaires were completed by 302 recent female Mainland Chinese immigrants and 301 locally-born women. Seven focus group interviews comprising 36 participants were additionally conducted.

Findings from the study revealed locally-born women were significantly more able to identify sexual harassment behaviours than recent female Mainland Chinese immigrants. Among the respondents, 14.6% of locally-born women and 9.6% of recent female Mainland Chinese immigrants have been sexually harassed in the service workplace. These figures are likely an under-estimation because of the small proportion of employers (17.9% of the respondents) who have developed workplace sexual harassment policy and/or provided training to their workers. Most respondents who experienced workplace sexual harassment also indicated they were dismissive of official channels of complaint and did not take actions towards the harassers.

In light of the above findings, the following non-exhaustive recommendations were made:

a. Provide more resources to small to medium sized organizations to increase their willingness to establish anti-sexual harassment policies and training;
b. Enhance greater collaboration between the Government, the EOC and non-governmental organizations to provide sexual harassment education programmes;
c. Educate recent female Mainland Chinese immigrants and their families;
d. Educate the public on workplace sexual harassment to change sub-cultures which normalize and justify such behaviours; and
e. Publicize and streamline procedures for reporting workplace sexual harassment.

Sexual harassment is a civil offence under the Sex Discrimination Ordinance (Cap. 480). A person sexually harasses a woman if the person makes an unwelcome sexual advance or an unwelcome request for sexual favours to her or engages in other unwelcome conduct of a sexual nature in relation to the woman.

The Press Release
The Report

HONG KONG

21 MAR 2018

Action plan to tackle trafficking in persons and enhance protection of foreign domestic helpers

An inter-bureau/departmental steering committee set up by the Government has endorsed an action plan ("**Action Plan**") to tackle trafficking in persons ("**TIP**") and enhance the protection of foreign domestic helpers ("**FDH**") working in Hong Kong. TIP includes the recruitment, transportation, transfer, harbouring or receipt of persons by illegitimate means for the purpose of exploitation. Conducts of TIP, such as physical abuse, illegal employment, child abduction and various sexual related offences etc., are prohibited by local legislation.

To further combat TIP and protect FDHs, the Action Plan comprises, but is not limited to, the following major initiatives:

a. Extending the victim screening mechanism to the Labour Department;
b. Setting up a new FDH division in the Labour Department to ensure the effective implementation of measures;
c. Strengthening support for the designated co-ordinator of human exploitation cases in the Department of Justice; and
d. Setting up a dedicated hotline with interpretation services to provide support services to FDHs.

The Press Release
The Action Plan

HONG KONG
9 APR
2018

Competition Commission publishes Advisory Bulletin for employers

In its recent advisory bulletin, the Competition Commission (the "**Commission**") advises on potential competition risks with regard to employment practices, particularly in the determination of employment terms and conditions and the hiring of employees.

The Commission considers the following practices between undertakings are at risk of contravening the First Conduct Rule of the Competition Ordinance (Cap. 619) (the "**Ordinance**"):

- Wage-fixing agreements: Undertakings that reach an agreement between themselves on any element of compensation are in effect fixing the price of labour. Compensation includes salaries and other allowances such as insurance benefits, housing allowances, relocation support, severance payments or long service payments.
- Non-poaching agreements: Undertakings that reach an agreement or exchange information for the purposes of solicitation, recruitment or hiring of each other's employees.
- Exchange of sensitive information: Sharing of competitively sensitive information between undertakings about their intentions in employees' compensation or hiring, whether done directly or through a third party.

Employers should keep details regarding the compensation they pay to employees confidential. They should not be disclosed to a competitor.

Employers who wish to participate in salary surveys should ensure that adequate measures are in place so that the person conducting the survey complies with the Ordinance, including ensuring that they do not disclose the results of the survey in such a way that may give rise to concerns of breaching the Ordinance.

The bulletin

HONG KONG
12 APR
2018

Hong Kong court decision dismisses claim to enforce non-solicitation clause

In *Winta Investment (Hong Kong) Limited v. Ng Kam Chit* [2018] HKDC 342, the District Court (the "**Court**") took the opportunity to recapitulate the principles on enforcement of restrictive covenants. In this case the Court determined that found the employer failed to prove solicitation of customers by the former employee.

Facts

Winta Investment (Hong Kong) Limited ("**Winta**") is a company with its main business in the sale of edible ice cubes under the brand of "Shiu Pong Ice". Ng Kam Chit ("**Ng**") was employed by Winta as a delivery worker from October 2007 to November 2010 and from January 2011 to January 2012 to mainly deliver edible ice cubes to restaurants and cafes.

The employment contract contained the following clause translated from Chinese (the "**Clause**"):

"... employee is willing and guarantees that during the employment with the company or after leaving employment, within ten months he cannot use company's commercial customers information within Hong Kong area for similar ice cube and manufacture company to engage (including joining others, sole trading, being employed, selling, and delivering goods etc.); or cause harm, betray, or steal or leak the company's customer list etc. being confidential information, interfere and solicit the company's existing customers from acquiring goods etc., if in breach of agreement agrees to compensate company all losses, and responsible for legal compensation responsibility under the employment agreement signed by both parties."

Ng subsequently resigned and was employed by Noble Gainer Ltd ("**Noble Gainer**"), an affiliate company of The Hong Kong Ice & Cold Storage Company Ltd, as a "Helper & Sales". It is Winta's case that when employed by Noble Gainer, Ng had been soliciting Winta's customers to purchase ice cubes at a reduced price from Ng instead of purchasing from Winta. Hence, Winta commenced an action against Ng for breach of the Clause which purported to prevent Ng from soliciting or interfering with Winta's existing customers within 10 months after Ng's employment ceased.

Continued on Next Page

HONG KONG

12 APR

2018

The Court considered the following issues:

1. Whether Ng had been working all along as a substitute worker and it was part of his job to promote sale in addition to making deliveries; and
2. Whether Ng had in fact solicited business from 13 customers after he joined Noble Gainer.

Legal Principles and Decision

A covenant in restraint of trade between an employer and an employee is on its face unenforceable unless the employer seeking to rely on it can show that the clause is reasonable with reference to the legitimate interests to be protected and to the public interest. The protection must not be excessive whether in terms of duration, scope or geographical restriction. It is also generally recognized that an employer is entitled to protect its trade secrets and customer connections as they are assets of the business and form part of the employer's property.

The Court first assessed the factual disputes. In particular, the Court considered (1) factual inconsistencies within Winta's evidence which undermined credibility and reliability, (2) Winta's assertion that the major responsibility of Ng was to sell ice as opposed to mere delivery was not reflected in the employment documents and (3) the commission simply reflected the number of bags of ice delivered by Ng rather than to promote business. The Court came to the view there was no need to contemplate on the enforceability of the Clause as Winta failed to prove the act of solicitation factually in the first place.

Even if the enforceability of the Clause were to be considered, the Court recognized the position of delivery workers would not assist Ng to gain any meaningful influence over customers or cultivate loyalty among them. This was further supported by the fact that Ng would only have very brief and limited contact with the customers. Therefore, no protectable interest in the form of customer connections arose and Winta's claim was dismissed.

Takeaways for Employers

To enhance the prospect of enforceability of restrictive covenants in employment contracts, employers should ensure that they can demonstrate a legitimate interest to protect and that the clause is reasonable in doing so. Employers should also review individual employment contracts regularly to prevent discrepancies should the title or job duties change for employees.

The judgment

HONG KONG

24 MAY

2018

Working-hour guidelines for 11 sectors to be drawn up by 2020

The Hong Kong Government has decided not to proceed with any legislation to regulate working hours and overtime compensation in employment contracts. Instead, non-binding guidelines for 11 industries set by working groups comprising government officials and representatives from the business and labour sectors will be drawn up by 2020.

It is reported that on top of the existing committees for nine industries, including catering, construction, theater, warehouse and cargo transport, property management, printing, hotels and tourism, cement and concrete and retail, the Government will also set up committees for cleaning services and elderly homes. Such guidelines will specify policies for proper working time management, including the recommended working hours for selected occupations in different industries, the definition of overtime work and guidance on overtime work compensation.

With the guidelines having no legal effect, labour unions urged the Government to set the standard working hours at 44 hours per week and an overtime rate of 1.5 times regular wages as compensation. However, the effectiveness of such guidelines will be reviewed in 2023, upon which the Government will reassess the policy direction.

The press release (Chinese version only)

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

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Looking Forward

HONG KONG

25 MAY 2018

Privacy Commissioner for Personal Data issues booklet on how Hong Kong businesses should prepare for GDPR

The European Union ("**EU**") General Data Protection Regulation 2016 ("**GDPR**") came into force on 25 May 2018. A brief summary of the GDPR can be found here.

Organizations in Hong Kong may need to comply with the GDPR if it (1) has an establishment in the EU, where personal data is processed in the context of the activities of the establishment, regardless of whether the data is actually processed in the EU, or (2) does not have an establishment in the EU, but offers goods or services to or monitors the behaviour of individuals in the EU.

As some requirements in the GDPR are not found in the existing Personal Data (Privacy) Ordinance (Cap. 486), the Privacy Commissioner for Personal Data issued a booklet (the "**Booklet**") to outline the possible impact of the new regulatory framework on organizations or businesses in Hong Kong.

A number of features of the GDPR are highlighted in the Booklet, including the following:

- Extra-territorial application
- Personal data covered
- New data privacy governance, data mapping and impact assessment
- Sensitive personal data
- Consent
- Mandatory breach notification
- Data processors' obligations
- New and enhanced rights for individuals
- Data protection seals, codes of conduct and cross-jurisdiction data transfer
- Sanctions

The press release of PCPD and the Booklet

HONG KONG

25 MAY 2018

Hong Kong amends Employment Ordinance to empower the Labour Tribunal to make compulsory reinstatement or reengagement orders

The Employment (Amendment) (No.2) Ordinance 2018 (the "**Amendment Ordinance**") was passed by the Legislative Council on 17 May 2018 and gazetted on 25 May 2018. The Amendment Ordinance provides for the Labour Tribunal to order compulsory reinstatement or reengagement of an employee in the event of unlawful termination and it is reasonably practicable to do so. The Amendment Ordinance will come into operation on 19 October 2018.

Under the Employment Ordinance ("**EO**"), unreasonable and unlawful dismissal refers to the situation where an employee is dismissed other than for a valid reason and is in contravention of the EO. Valid reasons for dismissal include the conduct of the employee, the capability or qualifications of the employee for performing his or her work, redundancy or other genuine operational requirements of the business, compliance with statutory requirements, or other substantial reasons. On the other hand, dismissals in the following circumstances contravenes the law:

(i) dismissal of a female employee who has been confirmed pregnant and has served a notice of pregnancy to her employer;
(ii) dismissal whilst the employee is on paid sick leave;
(iii) dismissal by reason of an employee giving evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation;
(iv) dismissal of an employee for trade union membership and activities; or
(v) dismissal of an employee entitled to compensation under the Employees' Compensation Ordinance (Cap. 282) before having entered into an agreement with the employee for employee's compensation or before the issue of a certificate of assessment.

Before making order for reinstatement or reengagement, both the employer and the employee must be given an opportunity to present each of their cases in respect of

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HONG KONG
25 MAY 2018

the making of an order for reinstatement or reengagement. The court or the Labour Tribunal must take into account the circumstances of the claim before making such order, including:-

(i) the circumstances of the employer and the employee;
(ii) the circumstances surrounding the dismissal;
(iii) any difficulty that the employer might face in the reinstatement or reengagement of the employee; and
(iv) the relationship between the employer and the employee, and between the employee and other persons with whom the employee has connection in relation to the employment.

The court or Labour Tribunal may also, upon the agreement of both the employer and the employee, request the Commissioner to provide a report containing information that (1) relates to the circumstances of the claim and (2) was obtained in connection with conciliation held under the Labour Tribunal Ordinance (Cap. 25).

Upon an application by the employer, an order for reengagement may be varied such that engagement of the employee by a successor or associated company of the original employer is to be treated as reengagement by the original employer in compliance with the order. An order of variation will only be made if the court or the Labour Tribunal is satisfied that the terms on which the alternative employer is to engage the employee are comparable to the terms of the original employer.

If the employee is reinstated, the continuity of the period of employment between the date of the employee's absence from work and the date of reengagement is not broken and the employee's existing and future entitlements under the EO and the employment contract will continue to be recognized. The court or the Labour Tribunal may also, if it considers just and appropriate, order the employer to pay the employee any arrears of pay and statutory entitlements under the EO which the employee would have accrued if he has not been dismissed or the employment contract has not been varied. Conversely, the employee may be ordered to pay the employer any amount that the employer has paid him because of the dismissal or the variation of the employment contract.

If the employee is not reinstated on the terms specified in the order, the employer is required to, on top of the usual terminal payments and compensation, pay the employee a further sum set at three times the employee's average monthly wages subject to a maximum of $72,500. This amount is on top of the usual terminal payments and compensation payable to the employee as currently provided under the EO. An employer who wilfully and without reasonable excuse fails to make such further payment also commits a criminal offence and is liable on conviction to a fine of $350,000 and to imprisonment for 3 years.

The Amendment Ordinance

HONG KONG
15 JUN 2018

Employment (Amendment) Bill 2018 gazetted to increase paternity leave from 3 days to 5 days

The Employment (Amendment) Bill 2018 (the "**Bill**") was gazetted on 15 June 2018.

Currently, a male employee will be entitled to three days' paid paternity leave in accordance with the Employment Ordinance (Cap. 57) (the "**EO**") for each confinement of his spouse or partner if he (i) is the child's father, (ii) has been employed under a continuous contract immediately before taking the leave and (iii) has given the required notification to the employer.

The Bill aims to amend the EO by increasing the paternity leave from 3 days to 5 days. The Bill was introduced into the Legislative Council for debate on 20 June 2018.

The Bill

LOOKING BACK

INDIA

19 DEC 2017

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

The Maharashtra S&E Act came into force on 19 December 2017 replacing the existing shops and establishment legislation. 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 crèche facilities for establishments having 50 or more employees. In light of this, the Maharashtra government also notified the local regulatory body responsible for enforcement of the Maharashtra S&E Act and hours of opening and closing of specific establishments under separate notifications on 19 December 2017.

More...

INDIA

29 DEC 2017

The Rationalization of Forms and Reports under Certain Labour Laws (Amendment) Rules, 2017

The Ministry of Labour and Employment has notified the Rationalization of Forms and Reports under Certain Labour Laws (Amendment) Rules, 2017 on 29 December 2017, introducing digitization of forms submissions as prescribed under the principal rules and also introducing combined forms for filing the registration and annual returns of establishments employing contract labour, migrant workmen and building workers.

More...

INDIA

8 JAN 2018

Draft Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 proposed. ("**SO Amendment Rules**")

The central government has notified the draft SO Amendment Rules on 8 January 2018 for comments and suggestions from the general public. These draft SO Amendment Rules aim to amend the provisions of the Industrial Employment (Standing Orders) Central Rules, 1946 to allow all sectors to hire fixed term employment workmen under the Industrial Employment (Standing Orders) Act, 1946 and the Rules made thereunder. Currently, the central government permits fixed-term employment only for the apparel manufacturing industry.

More...

INDIA

24 JAN 2018

Haryana Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Amendment Rules, 2018 ("**Haryana BOCW Amendment**")

The Haryana Government has notified the Haryana BOCW Amendment on 24 January 2018 to mainly amend the provisions relating to registration of building workers, disability pension, payment of death benefit and medical assistance. These amendments include a revised list of government bodies who's certificates can be considered in the absence of a certificate from the employer at the stage of registration of the building workers, increase in the amount of disability pension and ex-gratia payment to those workers who are permanently disabled, increase in the financial assistance provided in the instance of death of a worker and financial assistance to those workers who are hospitalized due to illness cause by accident or any disease.

More...

INDIA

29 JAN 2018

Draft of the Rajasthan Rationalization of Forms and Reports under Certain Labour Laws Rules, 2018 ("Rules") are proposed.

The Rajasthan government on 29 January 2018 has published the draft Rajasthan Rationalization of Forms and Reports under Certain Labour Laws Rules, 2018 for comments and suggestions from the general public. These draft rules aim to simplify, consolidate all the forms required to be maintained or filed by establishments employing contract labour, migrant workmen and building workers, and also allow the forms to be maintained in the electronic form.

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

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INDIA
2 FEB 2018

Draft of The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 ("**Rules**") are proposed.

The Industries, Energy and Labour department of the Maharashtra Government on 2 February 2018 has published the draft Rules under the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 for comments and suggestions from the general public. Some of the key introductions in the draft Rules include definition of 'Managerial Functions', consent form to be used to obtain consent from woman employees before allowing them to work in the night, menstrual leave for those woman employees working in the night shift, filing a prescribed form with details of persons in managerial position with the relevant facilitator, compliances to be moved online, requirement for small establishments to only intimate commencement of business, establishments allowed to remain open 24/7 and requirement to set up a health and safety committee.

More...

INDIA
9 FEB 2018

The Apprentices (Maharashtra Amendment) Act, 2017

The Maharashtra Government has notified the Apprentices (Maharashtra Amendment) Act, 2017 on 9 February 2018 to mainly amend the termination of apprenticeship contract provisions, number of apprentices for a designated trade, payment provision, grant of certificate provisions in the Apprentices Act, 1961, in its application to the state of Maharashtra. These amendments introduce payment of one-month stipend to the apprentices in the event of termination of their contracts by the employer. Similarly, where the apprentice terminates the contract he/she is obligated to pay one-month stipend. The amendment also provides for minimum and maximum of threshold on the number of apprentices that establishments must engage, a list of minimum rates of stipend payable to an apprentice per month and eligibility of the apprentices to appear for tests conducted by the relevant state government agency and grant of certificate of proficiency upon passing the relevant tests.

INDIA
12 FEB 2018

Draft of the Maternity Benefit (Crèche in the Mine Establishments) Rules, 2018 are proposed.

The Ministry of Labour and Employment on 12 February 2018 has published the draft Maternity Benefit (Creche in the Mine Establishments) Rules, 2018 for comments and suggestions from the general public. As per the proposed rules the Mines Crèche Rules, 1966 issued under the Mines Act, 1952 shall mutatis mutandis be the rules made under Maternity Benefit Act, 1961 with a few modifications. These modifications include a threshold on the number of employees working in the establishment that would trigger the requirement of providing crèche facilities, categories of workers who will have access to the crèche facilities, and a minimum distance of crèche facility from the entrance gate of the establishment, which is 500 metres.

More...

INDIA
15 MAR 2018

Payment of Gratuity (Amendment) Bill, 2017 ("**Gratuity Amendment**") passed by the Lok Sabha.

The Lok Sabha (lower house of the Indian parliament), on 15 March 2018, has passed the Gratuity Amendment. 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 the Rajya Sabha (upper house of the Indian parliament) and get President's assent before it becomes the law.

More...

LOOKING BACK

INDIA

16 MAR 2018

Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 ("**SO Amendment Rules**") are in force.

Under the SO Amendment Rules, the Central Government has recognised 'fixed term employment' for all types of employment. The SO Amendment Rules provide that existing permanent workmen cannot be converted to fixed term employment. Further, the amendments also introduce certain changes to the model standing orders contained in the schedule to the rules. These amendments include provisions that the fixed-term workmen will be entitled to the same benefits, allowances, and conditions of work as the permanent workmen; and that fixed-term employees are not entitled to notice or payment in lieu in case of non-renewal or expiry of the contract. The model standing orders have also been amended to contain provisions relevant to temporary workmen. While temporary workmen are ordinarily not entitled to notice or payment in lieu during termination, temporary workmen who have been in service for more than 3 months would be entitled to the same. Further, temporary workmen who have been terminated prior to three months must also be given reasons for the same. However, these changes are applicable only to establishments for which the Central Government is the appropriate government, which include establishments under the control of the Central Government or railway administrations and establishments in major ports, mines and oil fields. It does not ordinarily apply to establishments in the private sector.

More...

INDIA

23 MAR 2018

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 ("**Maharashtra S&E Rules**") are in force

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017, came into force in December 2017. Under this law, the Maharashtra government has drafted and implemented the Maharashtra S&E Rules, which have now come into force. The Maharashtra S&E Rules provide for the definition of 'managerial functions'. It also sets out general conditions for employing women, issuing of ID cards in soft-copy, and an obligation to display information such as hours of work, rest intervals etc. on the company website. The Maharashtra S&E Rules further provide for setting up a Health, Safety and Welfare Committee.

More...

INDIA

29 MAR 2018

Notifications under the Payment of Gratuity (Amendment) Act, 2018 ("**Gratuity Amendment**")

The Central Government, through a notification under the Gratuity Amendment has increased the cap on gratuity payable to INR 2,000,000 from INR 1,000,000. It has also increased the period of maternity benefit that will be considered as continuous service from 12 weeks to 26 weeks (which is in line with the provisions of the Maternity Benefit Act, 1961).

More...

INDIA

23 APR 2018

Delhi amendments to the Minimum Wages Act, 1948 ("**MW Act**")

The Government of Delhi has amended the MW Act. The amendment provides that employees would be entitled to overtime wages at the rate of at least twice the amount of normal wages. Further, penalties for offences relating to paying less than the statutory minimum wages to an employee or a contravention of obligations such as fixing hours of work, providing a rest day etc., have been raised to INR 50,000 and/or imprisonment for 3 years. For general non-compliances under the MW Act, the penalty has been raised to a fine of INR 20,000 and/or imprisonment for 1 year.

More...

LOOKING BACK

INDIA
24 APR 2018

Amendment to the Pradhan Mantri Rojgar Protsahan Yojana Scheme

Under the Pradhan Mantri Rojgar Protsahan Yojana Scheme, the Government of India has decided to pay the entire employer's share (12% of the employees' basic wages) of provident fund contribution (as set out in the Employees' Provident Fund and Miscellaneous Provisions Act, 1952) for new employees in all sectors. Prior to the amendment, the government was contributing 8.33% of the basic wages of new employees (in all sectors) on behalf of the employers. For new employees in the apparel and textile manufacturing sectors, the government was contributing the entire 12% on behalf of the employer. New employees are those who joined the Employees' Provident Fund Organisation ("OPFO") after 1 April 2016 and are earning up to INR 15,000 per month. A circular issued by the EPFO on 12 April 2018 indicates that the government will pay the entire portion of the employer's contributions with effect from 1 April 2018 for a period of 3 years for new employees in all sectors.

More...

INDIA
7 MAY 2018

Punjab introduces professional tax

The Government of Punjab has notified the Punjab State Development Tax Act, 2018, which provides for the payment of professional tax in the state of Punjab. Under this law, all persons engaged in any profession, calling or employment who earn income under the head of 'salary and/or wages' or 'business and/or profession' as per the Income Tax Act, 1961, are liable to pay professional tax. This tax is chargeable at INR 200 per month and is payable by income-tax payees. Employers have an obligation to deduct the relevant amount from the employees' wages/salary and pay the same.

More...

INDIA
21 MAY 2018

Fixing administrative charges under Employee Provident Fund Scheme, 1952

With effect from 1 June 2018, the administrative charges payable by the employer under the Employees' Provident Fund Scheme, 1952, has been reduced to 0.50% of the basic pay being paid to employees. This has been changed from 0.65%. The charges are subject to a minimum of INR 75 per month for every non-functional establishment having no contributory member and INR 500 per month per establishment for other establishments.

More...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDONESIA
19 DEC 2017

Supreme Court Issues New Guidelines on Expatriate Employees

On 19 December 2017, the Supreme Court issued Circular Letter No. 1 Year 2017 regarding the Implementation of the 2017 Supreme Court Meeting as a Guideline for the Indonesian Courts ("SEMA No.1"). SEMA No. 1 is a 41-page document that contains new policies to be applied by courts in Indonesia when handling criminal, civil, religious and military matters.

Of particular interest here is the section on labor court policies, found on page 13 of SEMA No. 1. Here, the Supreme Court has issued new labor court guidelines as follows:

1. Foreign employees can be employed in Indonesia only for certain positions and for a certain period of time under a fixed-term employment agreement (*Perjanjian Kerja Waktu Tertentu* or PKWT).
2. Legal protections for foreign employees only apply if such foreign employees have obtained a work permit (*Izin Mempekerjakan Tenaga Kerja Asing* or IMTA).
3. If the work permit of a foreign employee has expired but their fixed-term employment agreement is still valid, the remaining period of the fixed-term employment agreement will not be protected by law.

INDONESIA
29 MAR 2018

Rules on Recruitment of Foreign Workers Amended

Presidential Regulation No. 20 of 2018 regarding the Use of Foreign Workers was issued on 29 March, 2018, introducing several changes related to the employment of foreign workers. These changes include:

1. A Foreign Worker Utilization Plan ("RPTKA") is now considered a valid work permit that functions similar to an Expatriate Work Permit ("IMTA"). Employers were previously required to submit a RPTKA as the basis to obtain an IMTA.
2. Expands the scope of employers allowed to employ foreign workers by adding other businesses as long as such businesses are not prohibited to employ expatriates under the prevailing laws and regulations.
3. Employers in some business sectors can now hire an expatriate who is already employed by another company in a similar position. The second employer can hire such expatriate for a duration until the employment contract of the expatriate with the initial employer expires.
4. For work that is considered urgent and of an emergency nature an employer can immediately recruit a foreign worker and then seek approval of the RPTKA no later than two working days after the foreign worker has been hired.

INDONESIA
11 APR 2018

Scope of Administrative Sanctions for Employers Consistently Failing to Comply with Social Security Obligations has been Expanded

The Minister of Manpower ("MOM") on 11 April, 2018, issued MOM Regulation No. 4 of 2018 regarding Procedures for the Imposition and Revocation of Administrative Sanctions in the Form of Certain Public Access Restrictions for Employers other than State Administrators. This new regulation contains references to the Social Security Law, which includes the previously omitted Health Social Security Program (BPJS Kesehatan). It is therefore clear that administrative sanctions will now also apply in circumstances where employers do not comply with their obligations under the Health Social Security Program.

INDONESIA
27 APR 2018

New Rules on Work Health and Safety

Minister of Manpower Regulation No. 5 of 2018 regarding Health and Safety in the Work Environment was issued on 27 April, 2018, to revise several regulations related to occupational safety and health. The changes were said to be in response to technological and legal developments. The main thrust of this regulation is that employers and/or company management are obligated to comply with and implement occupational health and safety requirements to create a safe, healthy and comfortable work environment, and to prevent work accidents and work-related illness.

LOOKING BACK

INDONESIA

16 MAY 2018

New Task Force Established to Supervise Foreign Workers

As the name suggests, Minister of Manpower Decree No. 73 of 2018 regarding Task Force for the Supervision of Foreign Workers, dated 16 May, 2018, provides for the establishment of a task force to supervise foreign workers in Indonesia. Task force members will be drawn from different government ministries and will supervise and enforce the various laws and regulations related to the employment of expatriates.

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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LOOKING BACK

JAPAN
1 APR 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 1 April, 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...

JAPAN
1 APR 2018

Amendments to the Act on the Promotion of the Employment of Disabled Persons

The Act on the Promotion of the Employment of Disabled Persons (the "APEDP") was amended in 2013, for the purpose of prohibiting discrimination on the basis of disability, ensuring comfort and convenience for disabled persons in the workplace, and creating employment opportunities for disabled persons, and the following reforms will take effect on 1 April, 2018.

a. All employers are required to employ disabled persons in numbers equal to or above the disabled persons' employment quota. The quota applicable to private employers, which is expressed as a percentage of the total number of employees of a given employer, has been increased from 2.0% to 2.2% on 1 April, 2018, meaning for example, that employers must employ at least one disabled person per 45.5 employees whom they employ. The quota will be increased from 2.2% to 2.3% on or before April 2021.

b. The number of persons with a specified mental illness is also incorporated into the calculation of the quota.

More...

JAPAN
6 APR 2018

Bill of so-called Work-style Reform Legislation

On 6 Apri 2018, a package of the bills of so-called Work-style Reform Legislation was submitted to the Diet. This package of bills intends to reform the current working hours regulations to prevent from working long hours and to enable flexible working styles. In this regard, employers will be obliged to implement certain additional measures to keep working environment healthy (collectively "Reformation of Working Hour Regulations"). Further, in order to correct unreasonable differences between employment conditions of regular employees and those of non-regular employees (i.e. non-full-time employees, fixed-term employees and dispatched employees), their employers will be obliged to keep a balance between employment conditions of regular employees and those of non-regular employees ("Balancing of Employment Conditions"). It is expected that this package of the bills will be passed soon and in principle, the Reformation of Working Hour Regulations part will be enforced on 1 April 2019 and the Balancing of Employment Conditions part will be enforced on 1 April 2020.

LOOKING BACK

MALAYSIA
1 FEB 2018

Wholesale changes to Private Employment Agencies Act

The Private Employment Agencies (Amendment) Act 2017 came into force with effect from 1st February 2018. Apart from expanding enforcement provisions on private employment agencies in recruiting foreign workers including foreign domestic maids, the new amendments also cover recruitment and job placements of local job seekers. The amendments also involved the classification of licenses. Agencies are given a six month transition period until 30th July 2018 to enable private employment agencies currently in operation to continue to recruit and conduct job placements until the expiry of their licences without being subjected to the revised guarantee bond imposed.

More...

MALAYSIA
7 JUN 2018

Spouses of Business owners to be covered under Social Security and Employment Insurance System

Malaysia's Social Security Organisation (SOCSO) functions as a form of an insurance organisation which is responsible in providing financial protection to all registered contributors in the event of emergencies, injuries or death in the course of discharging their duties under the Employees' Social Security Act 1969. The Employment Insurance System (EIS), also under the purview of SOCSO, is a system set out to financially assist employees who were made redundant pursuant to a retrenchment exercise. As it stands, the spouses of employers, who may be under the employment with their partners, are exempt from both plans.

Recently, the Minister of Human Resource is looking to expand the scope of SOCSO and EIS to allow spouses who work for their partners to be included into the coverage of SOCSO and EIS. The Minister of Human Resource has expressly said that the amendments are expected to come into force with effect from 1st July 2018.

More...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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LOOKING BACK

NEW ZEALAND **1 DEC** 2017

Minimum Wage Order 2017

The Government has enacted a new order raising the minimum wage to $16.50 NZD an hour, from 1 April 2018. The Government has signalled that the minimum wage will be lifted further, to $20 an hour, by 2021 as part of Labour's coalition agreement with NZ First.

Find the order here

NEW ZEALAND **4 DEC** 2017

Parental Leave and Employment Protection Amendment Bill

Parliament has passed the Government's paid parental leave bill. It has given royal assent on 4 December 2017. From 1 July 2018 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.

More...

NEW ZEALAND **1 FEB** 2018

Employment Relations Amendment Bill

This Bill is very likely to be passed later in the year, amending the Employment Relations Act 2000. The stated purpose of the Bill is to restore key minimum standards and protections for employees, and to implement a suite of changes to promote and strengthen collective bargaining and union rights in the workplace. The Minister in charge, Ian Lees-Galloway, has stated that "the changes are intended to introduce greater fairness in the workplace... and promote productive employment relationships."

This Bill proposes to change the Employment Relations Act (**ERA**) in a range of important areas. Some of these include:

- Reinstatement becoming the primary remedy in unjustifiable dismissal cases;
- A new duty of good faith for parties in collective bargaining, to conclude a collective agreement unless there is a "genuine reason" not to (a return to a pre-2011 state of the ERA);
- Reinstating the ability of unions to initiate collective bargaining 20 days before an employer in certain circumstances (also a return to pre-2011 state of the ERA);
- Employers may no longer be able to opt out of multi-employer collective bargaining, or to deduct pay as a response to partial strikes;
- Union representatives may no longer need consent from an employer before entering a workplace;
- A restoration of statutory prescription for rest breaks and meal breaks, with a limited exemption for "essential services";
- Unions may gain the ability to provide an employer with information about the role and functions of the union that the employer must then pass on to new employees, with only narrow exceptions; and
- New grounds for discrimination to include an employee's union membership status or involvement in union activities.

The proposed change that has garnered the most media attention, and criticism from opposition parties, is to 90-day trial periods.

- The Bill proposes to limit the use of 90-day trial periods to only those employers who employ fewer than 20 employees
- Employers with more than 20 employees will be able to use probationary periods instead

The Bill passed its first reading on 1 February 2018 and has been referred to the Education and Workforce Select Committee. The Select Committee is due to report back on the Bill by 1 August 2018. Submissions are being accepted currently, with a closing date of 30 March 2018 (NZ time). The Bill is likely to be implemented in September 2018.

Follow the Bill's progress here

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

NEW ZEALAND **1 FEB** 2018

Employment Relations (Triangular Employment) Amendment Bill

This Bill is likely to be passed later in the year, amending the Employment Relations Act. The stated purpose of the Bill is to ensure that employees employed by one employer, but working under the control and direction of another business and organisation, are "not deprived of the right to coverage of a collective agreement, and to ensure that such employees [are able] to allege a personal grievance."

This Bill will largely affect labour hire companies. In particular, it changes the interpretation section of the Employment Relations Act to include "primary employers" and "secondary employers" and delineates between the two later in the Act in terms of collective agreements and personal grievances.

The Bill is currently at first reading, with no set dates for the select committee process as this stage.

Follow the Bill's progress

NEW ZEALAND **22 FEB** 2018

Employment (Pay Equity and Equal Pay) Bill

This Bill is unlikely to be passed. It is a Member's Bill from Denise Lee of the National Party, essentially re-introducing the previous Government's pay equity legislation which was withdrawn from Parliament in November last year by the Labour Government.

The Minister for Women Julie Anne Genter released a statement saying that "the changes in Lee's bill had already been rejected by unions and other stakeholders". The Government is preferring their own working group process, which has advised amending the existing Equal Pay Act 1972 (see below).

The Bill is currently at first reading.

Follow the Bill's progress

NEW ZEALAND **22 FEB** 2018

Joint Working Group on Pay Equity principles

The Minister for Workplace Relations and Safety, Iain Lees-Galloway, and Minister for Women Julie Anne Genter, reconvened a Joint Working Group on Pay Equity Principles to develop a set of principles to guide the implementation of pay equity. The group included Government representatives, unions, and employers. The key issues the working group was asked to consider are:

1. Determining the merit of a claim as a pay equity claim
2. How to select appropriate mail comparators when assessing the work subject to a pay equity claim

The group has now reported back to the ministers with a set of recommendations, which include a clarification and simplification of the process for initiating a pay equity claim, retaining the principles of comparators, and amending the Equal Pay Act to implement the principles.

Julia Anne Genter has suggested that the Government aims to introduce legislation "mid-year".

See recent coverage

NEW ZEALAND **22 FEB** 2018

Health and Safety at Work (Volunteer Associations) Amendment Bill

This Bill amends the Health and Safety at Work Act 2015 to allow volunteer associations that employ a person or persons for not greater than 100 hours per week to be excluded from the definition of a person conducting a business or undertaking (PCBU).

The Bill underwent its first reading on 2 May 2018 and submissions are due to the select committee on 29 June 2018.

Find a copy of the Bill here

NEW ZEALAND

20 MAR 2018

Privacy Bill

This Bill is very likely to be passed later in the year, and will repeal and replace the Privacy Act 1993, as recommended by the Law Commission's review of the Act in 2011. Its key purpose is to promote people's confidence that their personal information is secure and will be treated properly.

Fundamental aspects of the Privacy Act, such as the information privacy principles which regulate the collection, use and disclosure of personal information, are retained, but the Bill introduces new ways to enforce those principles, including more substantive fines and greater powers for the Privacy Commissioner.

The key changes include:

- Mandatory reporting of privacy breaches;
- Ability for the Privacy Commissioner to issue compliance notices that require an agency to do something, or stop doing something, in order to comply with privacy laws;
- Strengthening of cross-border data flow protection;
- New criminal offences introduced under the Bill;
- Ability for the Privacy Commissioner to make binding decisions on access requests; and
- Strengthening of the Privacy Commissioner's information gathering power.

Follow the Bill's progress here

NEW ZEALAND

20 APR 2018

First sentencing under the Health and Safety at Work Act 2015 for fatigue related failings

The first sentencing under the Health and Safety at Work Act 2015 for fatigue related failings has been handed down by Judge Denise Saunders in the Huntly District Court in *WorkSafe New Zealand v Michael Vining Contracting Limited* [2018] NZDC 6971.

Agricultural Contractor, Michael Vining Contracting Limited (**MVCL**) was charged in relation to the death of a young farmer, Joshua David Parker, after he crashed the tractor he was driving home at 2.45am, having logged a 16.75 hour day and having worked 197.25 hours in the two weeks leading up to the incident.

In handing down the sentence, Judge Denise Saunders found that the culpability of MVCL fell into the medium band of culpability, attracting a fine of between $400,000 and $800,000. The Judge set a starting point of $650,000 as the least restrictive outcome. In doing this, the Judge accepted that the type of work was weather dependent and added to demands for work to be completed on a tight timeframe. However, ultimately the Judge found that:

[30] *MVCL ought to have done more to protect Mr Park from the dangers of excessive working hour's fatigue.*

Had MCVL had the financial capacity to pay a fine; this fine would have been set at $325,000. An adjustment on a proportionality basis was found to be warranted and MCVL was fined $10,000 and order to pay reparation of $80,000.

NEW ZEALAND

8 MAY 2018

Important decision on unpaid work

In *A Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Limited* [2018] NZEmpC 43 the Court has found that employees were entitled to be paid for daily 15 minute meetings that they were expected to attend prior to their shift starting.

For at least 15 years, every Smith City store held meetings of sales staff each morning before opening the business. Sales staff were not paid for their time attending these meetings, only once the store opened. The Court had to consider whether the morning meetings were work for the purposes of section 6 of the Minimum Wage Act. In finding that the morning meetings were work the Court had regard to the fact that the meetings were:

- organised by Smiths City;
- only attended by sales staff because they were employed by Smiths City;
- only to discuss matters pertinent to selling Smiths City's merchandise;

Continued on Next Page

NEW ZEALAND
8 MAY
2018

- solely for Smiths City's purposes to enable sales staff to earn revenue for the company, and be more effective in doing so;
- to inform sales staff about the business, sales figures, promotions, sales comparators and equipped sales staff to undertake their jobs; to sell Smiths City's merchandise; and
- only attended by sales staff because the subject matter was sales.

Applying these facts to the three factors developed in Idea Services the Court was satisfied that the employees were:

1. Under a **constraint** to attend morning meetings and listen;
2. Had **responsibilities**, in that they were obliged to sit and listen to the work related information that was being imparted and to absorb it; and
3. There was a **benefit to the employer** because it had a cost-free opportunity to prepare its staff for the working day.

Applying these three factors the Court conclude that the morning meetings constituted work within the meaning of section 6 of the Minimum Wage Act.

The Court also ruled that Smiths City Group Limited could not use the payment of commissions and incentives to satisfy their non-compliance with the Minimum Wage Act, as this was additional income earned outside the contractual hourly rate, and not a substitution for it.

First Union, who represents retail workers, has reported having received nearly 2000 complaints regarding similar issues, including from large companies and retail chains. The Labour Inspectorate has reported a 15% increase in its call volume since the Smiths City decision. The Ministry of Business, Innovation and Employment has also said that if the activity are integral to a worker's role and that there is an expectation to attend, then that is considered work and employees should be paid for it.

Find a copy of the decision here

NEW ZEALAND
29 MAY
2018

Holidays Act review announced

Workplace Relations Minister, Ian Lees-Galloway, has announced a working group to recommend changes to the Holidays Act, chaired by Gordon Anderson. The group is due to report back with recommendations in mid-2019 and Lees-Galloway has said they will "consult widely".

The taskforce will report back with recommendations on options for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave that can be readily implemented in a payroll system and is applicable to an increasingly diverse range of working and pay arrangements.

The review will not consider the issue of remediation of historical underpayments of holiday and leave pay. A new regime is likely to be two or three years away.

For more information on the Holidays Act review visit here

NEW ZEALAND
5 JUN
2018

Government establishes Fair Pay Agreement working group

The Government has set up a working group to develop a plan to introduce Fair Pay Agreements across entire industries. The group will be led by former National Prime Minister, Jim Bolger, and will report back by the end of the year on the design of a Fair Pay Agreement system.

Workplace Relations Minister, Iain Lees-Galloway, says that the aim of the Fair Pay Agreements is to "prevent a race to the bottom, where some employers are undercut by others who reduce costs through low wages and poor conditions of employment. Fair Pay Agreements will help lift wages and conditions and ensure good employers are not disadvantaged by paying reasonable, industry-standard wages."

Continued on Next Page

LOOKING BACK

NEW ZEALAND

5 JUN 2018

Through the working group, the Government intends to introduce legislation to allow employers and unions to create Fair Pay Agreements that set minimum employment terms and conditions for all workers in the industry or occupation. Industrial action (strikes and lockouts) will not be permitted in negotiations for Fair Pay Agreements.

Find the Terms of reference for the Fair Pay Agreement Working Group here
Find the Minister's media release on the beehive website here

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

There are no significant policy, legal or case developments within the employment space during 2018 Q2.

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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SINGAPORE
4 JAN 2018

Jurong Shipyard Fined for Fatal Accident Leading to Death of Two Workers

Jurong Shipyard Pte Ltd ("**JSPL**") was engaged to perform repair works on a vessel, and it engaged Shipblast Marine Pte Ltd, the employer of the two deceased workers, to conduct grit blasting work. The workers used a cherry picker (an aerial platform used to access work areas at height) owned by JSPL to perform the work. However, the workers were fatally injured when they fell about 30 metres to the bottom of a dry dock as a result of the collapse of the boom of the cherry picker. The investigations revealed that JSPL had failed to refer to the manufacturer's guidelines which would have required JSPL to replace the boom in question (which was corroded), and did not detect the defective sections of the boom due to its failure to conduct comprehensive checks on the boom. As a result, JSPL was fined S$230,000 under the Workplace Safety and Health Act (Cap. 354A) for failing to ensure that the cherry picker was maintained in a safe condition.

More...

SINGAPORE
4 JAN 2018

China Taiping Insurance (Singapore) Pte Ltd and another v Low Yi Lian Cindy and others

This main issue in this appeal was whether the dependants of a deceased worker who passed away intestate can make a valid claim for compensation under the Work Injury Compensation Act (Cap. 354) ("**WICA**"), without first obtaining letters of administration to represent the estate of the deceased worker. The High Court observed that the dependants had brought proceedings under the WICA at a time when they could have brought proceedings, in their own name, under common law for damages against a tortfeasor who caused the death of the victim pursuant to Section 20 of the Civil Law Act (Cap. 43) ("**CLA**"). In this regard, the High Court took the view that it was the dependants' entitlement to choose to bring a claim under the WICA as opposed to under the CLA. Given that Section 20 of the CLA allowed the dependants to bring the action in their own name if there is no executor or administrator of the deceased or if no action is brought within six months after the death by and in the name of an executor or administrator of the deceased, the High Court held that it was not necessary for the dependants to have obtained letters of administration before bringing a claim under the WICA.

More...

SINGAPORE
19 JAN 2018

Company Fined $200,000 for Fatal Workplace Electrocution Incident

MW Group Pte Ltd ("**MW**") was imposed a fine of S$200,000 for a fatal workplace incident involving a worker who died from electrocution when testing and calibrating an Arc Reflection System ("**ARS**") machine. During the investigations, it was found that prior to the incident, MW conducted a generic risk assessment and identified electrocution as the only hazard. However, there were no safety measures put in place to prevent the risk of electrocution and no risk assessment conducted for the testing and calibration of the ARS machine. Following a five-day trial, MW was convicted and fined for its workplace safety and health lapses.

More...

SINGAPORE
4 MAR 2018

Enhanced Work-Life Grant

The existing Work-Life Grant ("**WLG**"), which provides funding and incentives for companies to offer flexible work arrangements ("**FWAs**") for employees, will be enhanced and will take effect from 1 July 2018. To qualify for the enhanced WLG, an employer must have adopted the Tripartite Standard on FWAs and must not have claimed for FWA Incentive under the current WLG. Under the enhanced WLG, the following incentives will be provided:

1. An employer can receive up to S$2,000 for each employee on FWAs, up to a maximum of 35 employees. Currently, employers receive S$2,000 per employee for the first 5 employees and S$1,500 for the subsequent 20 employees;
2. An employer can receive up to S$3,500, as opposed to the current S$2,000, for each employee who is a professional, manager, executive or technician, who is under job sharing arrangements.

Continued on Next Page

SINGAPORE

4 MAR

2018

The enhanced WLG also relaxed the eligibility criteria for application of the grant, as instead of requiring at least 20% of all employees to be on FWAs, it only requires each company to have 1 employee working on such arrangements.

More...

SINGAPORE

5 MAR

2018

Tightening Rules on Hiring Foreign Employees

During his Committee of Supply speech on 5 March 2018, Ministry for Manpower Mr Lim Swee Say announced that the rules relating to hiring foreign employees will be tightened in the following ways:

1. The minimum qualifying monthly salary for application of an S Pass, a work pass for mid-skilled foreign employees, will be increased from S$2,200 to S$2,400 over the next two years. The increase will take place in two phases – increase from S$2,200 to S$2,300 per month from January 2019, and increase from S$2,300 to S$2,400 per month from January 2020.
2. More employers will be required to advertise jobs on the national Jobs Bank for at least 14 days prior to making applications for Employment Passes. Currently, employers are exempted from this requirement where, amongst others, the company has 25 or fewer employees or the job position pays a fixed monthly salary of S$12,000 and above. Starting from 1 July 2018, these grounds for exemption will be changed such that companies with 10 or fewer employees and job positions which pay a fixed monthly salary of S$15,000 and above will be exempted from the advertising requirement. Please note that the other grounds for exemption remain the same.

More...

SINGAPORE

5 MAR

2018

Tripartite Standards on Contracting with Self Employed Persons

On 5 March 2018, the Tripartite Standards on Contracting with Self Employed Persons ("**Tripartite Standards**") were launched. The Tripartite Standards set out the benchmark which service buyers are encouraged to adopt when contracting with self-employed persons ("**SEPs**"). Specifically, under the Tripartite Standards, businesses are encouraged to:

1. Discuss the terms of products or services to be delivered with SEPs, and document the key terms agreed upon in writing;
2. Set out the written key terms clearly and include the following information:
   a. names of contracting parties;
   b. parties' obligations, such as nature of services to be provided (e.g. outcome; duration; location);
   c. payment – amount and due date of payment(s);
   d. if terms on variation of the agreement are provided for, how either party can vary the key terms or terminate the agreement; and
   e. if terms for resolving disputes are provided for, the option for mediation should be made available, without preventing either party from bringing any dispute directly to the Small Claims Tribunals.

Separately, with effect from 5 March 2018, the Tripartite Alliance for Dispute Management will also be extending voluntary mediation services to all SEPs who have payment disputes with businesses.

More...

SINGAPORE

5 MAR

2018

Changes to the Employment Act

On 5 March 2018, Minister for Manpower Mr Lim Swee Say announced in Parliament that changes will be made to the Employment Act (Cap. 91) ("**EA**") to cover more employees in Singapore with effect from 1 April 2019. This follows from the public consultation held by the Ministry of Manpower ("**MOM**") from January 2018 on proposed changes to the EA.

Importantly, the S$4,500 salary cap that excluded employees from core EA coverage will now be removed such that professional, managers and executives ("**PMEs**") in Singapore earning more than S$4,500 will be covered by the core provisions of the EA. The expanded coverage of the EA will, amongst others, allow all PMEs to enjoy protections relating to timely payment of salary, holiday and sick leave entitlements, and the ability to appeal against wrongful dismissals.

More employees will also be afforded additional protections targeted at more vulnerable employees under the EA (e.g. overtime payment and annual leave entitlements), as non-workmen earning a monthly salary of up to S$2,600 (as opposed to S$2,500 previously) will be protected following the amendments to the EA.

Further, calculation of overtime payments, which is dependent on the basic monthly salary level of the employee, will be revised upwards. While the existing EA limits calculation of overtime payments to a basic monthly salary of up to S$2,250, the new changes will allow overtime payments to be calculated for a basic monthly salary level of up to S$2,600.

Finally, the changes will also streamline the forum for hearing employer-employee disputes. Under the current legislative framework, statutory and contractual salary-related disputes are heard by the Employment Claims Tribunals ("**ECT**"), while wrongful dismissal claims are heard by the MOM. Following the amendments, the ECT will be hearing both salary-related and wrongful dismissal claims.

More...

SINGAPORE

27 APR

2018

Minichit Bunhom v Jazali bin Kastari and another [2018] 1 SLR 1037; [2018] SGCA 22

This case concerned the issue of whether the appellant ("**Appellant**"), a foreign worker who suffered injuries from an accident which occurred when he was travelling in a lorry driven by the respondent ("**Respondent**"), was entitled to claim his medical expenses as a special damages against the Respondent whose tortious act occasioned such expenses, in light of the fact that the Appellant was a foreign employee holding a work permit under the EFMA and hence a beneficiary of certain obligations relating to medical expenses and insurance imposed on his employer under the EFMR. The Court of Appeal held that while there was a general rule under the EFMA that the employer of a foreign employee is to be responsible for the provision of the latter's medical treatment, this did not have any bearing on the separate question of whether a victim-foreign employee could recover the medical expenses occasioned by a third-party tort from the tortfeasor. There was nothing in the EFMA which suggested that it was intended to abridge the recovery of medical expenses by a victim from tortfeasor and the victim. The court highlighted the distinction between the employment and the tortious relationship. The duty of the employer to provide medical coverage for his foreign employee is an incident of the employment relationship and is governed by the EFMA. This was a distinct issue from the entitlement of the victim to seek recovery from the tortfeasor, which is an incident of the tortious relationship and is governed by the common law. As such, the Appellant was not precluded from recovering damages from the Respondent simply because of the obligations of his employer to pay his medical expenses under the EFMA.

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LOOKING BACK

SINGAPORE
8 MAY 2018

MOM advisory to employers of Indonesian foreign domestic workers on Indonesian Embassy's new performance bond requirement

On 8 May 2018, the MOM issued a press release explaining the new requirement for a SGD 6,000 performance bond ("**Performance Bond**") imposed by the Embassy of the Republic of Indonesia ("**Embassy**") in Singapore on employers who hire Indonesian foreign domestic workers ("**FDWs**"). The MOM clarified that this was not a requirement imposed by the Singapore Government and is separate from the SGD 5,000 security bond which MOM requires all employers to purchase for every FDW hired. According to the MOM, if notified by the employment agency in question, employers of new Indonesian FDWs or who renew the passports of their current Indonesian FDWs will be asked to purchase a Performance Bond guarantee from an insurer approved by the Embassy, and sign a standard employment contract issued by the Embassy. An employer could be liable to pay the insurer a sum of up to SGD 6,000 if the Embassy forfeits the Performance Bond, but the specific conditions under which this would take place are unclear. The MOM has told the Embassy and the Indonesian Ministry of Manpower that the Performance Bond requirement is unnecessary. Employment agencies are required to provide explanations and obtain written acknowledgement from affected employers of Indonesian FDWs that they understand the implications of purchasing the Performance Bond guarantee or signing the Embassy's standard employment contract. The MOM will also be sending an advisory to all existing employers of Indonesian FDWs to encourage them to read and understand the terms and conditions before committing to the Performance Bond guarantee or signing the standard employment contract, and to direct any questions to the Embassy.

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SINGAPORE
15 MAY 2018

Hauque Enamul v China Taiping Insurance (Singapore) Pte Ltd and another [2018] SGHC 118

This case concerned a claim made by a worker against his employer for work injury compensation under the Work Injury Compensation Act ("**WICA**"). The worker was injured and sent to the hospital when carrying pipes weighing 50 to 69 kilograms with a co-worker. The MOM found in favour of the worker and awarded him compensation for his injury. This decision was overturned on appeal by the employer before the Commissioner for Labour ("**Commissioner**"), who dismissed the worker's claim. The worker appealed against the Commissioner's decision before the High Court. In particular, to establish an employer's lability for compensation under the WICA, the worker has to prove that he has suffered a personal injury that has been caused by an accident, and that the accident arose out of and in the course of employment. It was not disputed that the worker had suffered a personal injury in this case. The main issue on appeal was whether the worker's injury was caused by an accident, which arose out of and in the course of employment.

On the question of what amounts to an "accident" under the WICA, the High Court cited previous cases which held that an injury by accident within the meaning of the WICA contemplates an injury that was unexpected by the workman, which was caused or contributed to by something done by or to the workman in the course of his employment. In this regard the court found that the evidence is consistent with the fact that the injury was suffered while the worker was carrying out the task of moving the pipes as he felt a sharp pain in his lower back while performing the task. The court highlighted that the point that an "accident" under the WICA is not limited to visually perceptible events such as where the worker falls down a lift shaft or where a crane drops its load or where a spillage of corrosive liquids occurs, as the WICA contemplates that an "accident" is not limited to a case where the incident and the physical aftermath can be readily perceived by the naked eye. On the facts, the court held that the present case amounted to an accident within the meaning of the WICA.

On the issue of whether the accident arose out of the worker's employment, the court noted that the WICA established a rebuttable presumption that, an accident arising in the course of an employee's employment will be deemed to have arisen out of that

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SINGAPORE
15 MAY
2018

employment. The court held that there was a distinction between an accident arising in the course of employment (i.e. it occurs while the employee is at work) and arising out of the employment (i.e. it arises because of some intrinsic risk in the nature of the employment). With the rebuttable presumption under the WICA, the court held that a claimant only bears the burden of proving on a balance of probabilities that his injury was caused by an accident that arose in the course of his employment, which can be fulfilled by showing that the accident occurred while he was at work. Once that is shown, the burden of proof shifts to the employer to prove otherwise. On the facts, the court found that there was no evidence to suggest that the worker did not carry out the work or that he did not sit down in pain while carrying a pipe, a fact supported by medical reports. As such, the court held that the worker had established on a balance of probabilities that the accident arose in the course of employment and, by way of presumption, that the accidence arose out of the employment.

For the above reasons, the court held that the employer was liable to compensate the worker under the WICA.

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SINGAPORE
24 MAY
2018

Director jailed and fined for illegal labour importation and kickback offences

On 24 May 2018, a director of Aik Heng Contracts and Services Pte Ltd was sentenced to 20 months' imprisonment and a total fine of SGD 158,750 in the State Courts for illegal importation of labour and collecting kickbacks. The MOM has also permanently barred the director from employing foreign workers. The investigations revealed that the director committed multiple EFMA offences from December 2014 to December 2016, including fraudulently obtaining work passes for 10 foreign workers despite knowing that there was no work for them, and subsequently collecting kickbacks from 8 of these workers as a condition to maintain the validity of their work passes valid. The director collected kickbacks amounting to approximately SGD 119,000. The court has made an order to confiscate these illegal proceeds.

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SINGAPORE
28 MAY
2018

Hasan Shofiqul v China Civil (Singapore) Pte Ltd [2018] SGHC 128

This case concerned a dispute between a foreign worker ("**Employee**") and his ex-employer ("**Employer**") over the rate of pay for work done on rest days and public holidays, the calculation of the actual number of hours worked by reference to which overtime could be assessed, and the Employee's right to one-month notice for the termination of his employment. During his employment, the Employee took on the role of a site supervisor at a construction site. The dispute was heard before the Assistant Commissioner for Labour ("**ACL**"), whose decision the Employee appealed against before the High Court.

On the applicable rate of pay for work done within the normal hours of work on rest days and public holidays, the Employer's position was that the Employee is only entitled to the flat contractual rate pay, whereas the Employee asserted that he was entitled to the rates under Part IV of the Employment Act ("**EA**"). The ACL found for the Employer on the basis that the Employee was employed in an executive position and could not rely on Part IV of the EA. The court found that the applicability of Part IV turned on the question of whether the Employee was employed in an executive position, which is to be determined by looking at all the circumstances of the case. On the facts, the court stated that the fact that the Employee was a site supervisor is insufficient by itself to conclude that he was an executive, and a worker has a supervisory role does not necessarily remove his status as a workman. The court noted that the Employee did not have a diploma or possessed any specialised skills or training, and the tasks that he performed did not go beyond regular on-site routine administrative work. The court also found that the Employee was not in a position to make decisions over firing, promotion etc of other workers. Hence, the court held that the Employee was not employed in an executive position and Part IV of the EA will apply to the calculation of his overtime pay.

On the actual number of overtime hours the Employee had worked, the ACL relied on the Employer's bored pile records (as the Employee was involved in bored piling work), instead

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SINGAPORE
28 MAY
2018

of the Employee's own record of his overtime work to assess the amount of overtime pay. The court noted that the ACL only took into account the additional hours worked on a rest day or public holiday (i.e. work beyond the 8th hour of work), which the Employee submitted was inconsistent with the EA. In this regard, the court suggested that the actual number of overtime hours may be calculated with reference to the actual bored pile records, and to apply an uplift to the hours of work by running through the time cards of other workers, toolbox meeting forms (where available) and to compare them with the time cards of the Employee.

On the Employee's right to one-month notice for the termination of his employment and his claim for salary in lieu of such notice, the court found, on the facts, that the Employee was indeed entitled to such notice, and the Employer had provided the requisite notice. Hence, the court dismissed the Employee's claim for salary in lieu of notice.

In light of the foregoing, the court remitted the matter back to the ACL for him to reconsider the Employee's claims.

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SINGAPORE
31 MAY
2018

Government accepts National Wages Council's recommendations for 2018/2019

On 31 May 2018, the National Wages Council ("**NWC**") published its guidelines which apply from 1 July 2018 to 30 June 2019, with the following recommendations on the wages of workers, amongst others:

1. Wage Recommendations for All Workers:
   a. employers who have performed well and have good business prospects should reward workers with built-in wage increases and variable payments commensurate with their performance;
   b. employers who have performed well but are uncertain about business prospects may exercise moderation for built-in wage increases, but should reward workers with variable payments commensurate with their performance; and
   c. employers have not performed well and face uncertain prospects may impose wage restraints, with the management leading by example, and should put in greater efforts to improve business processes and productivity.
2. Wage Recommendations for Low-Wage Workers:
   a. employers should grant built-in wage increases to low-wage workers in the form of a dollar quantum and a percentage, to give low-wage workers a higher percentage built-in wage increase;
   b. employers should grant a built-in wage increase of SGD 50 to SGD 70 for low-wage workers earning a basic monthly wage of up to SGD 1,300; and
   c. employers should grant a reasonable wage increase and/or a one-off lump sum payment based on skills and productivity for low-wage workers earning more than SGD 1,300 a month.

The NWC's recommendations have been accepted by the government.

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SINGAPORE
4 JUN
2018

Jurong Shipyard Pte Ltd fined for fatal accident at workplace

Wording: Jurong Shipyard Pte. Ltd. ("**Jurong Shipyard**") was fined SGD 230,000 under the Workplace Safety and Health Act for failing to take reasonably practicable measures to ensure the safety of its workplace, which resulted in a fatal incident where a worker was struck and caught between a gantry crane and a manifold. On 20 March 2015, a safety coordinator and patrol man employed by a subcontractor of Jurong Shipyard was conducting safety checks near the manifolds located along the track of a gantry crane which was in operation. The same employee was found unconscious between a utility water supply manifold and the gantry crane's track by a co-worker, and passed away from his injuries on the same day. MOM's investigations showed that there were systemic failures in how Jurong Shipyard performed the lifting operation using the gantry crane, which ultimately resulted in the fatal accident.

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LOOKING BACK

SINGAPORE

21 JUN 2018

850 enforcement actions taken against companies in enforcement operation targeting machinery safety and amputation hazards

In April and May 2018, the MOM conducted an enforcement operation targeting machinery safety to address hand and finger injuries at the workplace. During the operation, 380 inspections were conducted at 350 companies in the manufacturing, construction and marine sectors. The inspections revealed that the main contraventions were the lack of machine guarding, failing to implement lock-out procedures during maintenance and repair, and inadequate risk assessment relating to machinery safety. The MOM took 850 enforcement actions against 276 companies, including 6 Stop-Work Orders and 78 composition fines amounting to SGD 91,000.

More...

SINGAPORE

22 JUN 2018

Directors and companies convicted for foreign workers housing offences discovered during Geylang fire incident

On 22 June 2018, three directors and their respective companies were convicted under the Employment of Foreign Manpower Act ("**EFMA**") for housing foreign workers in overcrowded private residential premises that did not comply with the Urban Redevelopment Authority's ("**URA**") guidelines. The said employers had housed their foreign workers at a shop house in Geylang since August 2014. On 6 December 2014, a fire broke out at the shop house, resulting in the death of 4 workers, with several others injured. Investigations conducted by the Ministry of Manpower ("**MOM**") revealed that there were 22 foreign workers residing in the shop house, which exceeded the URA's then prevailing occupancy cap of 8 persons. As such, the employers had breached the Employment of Foreign Manpower (Work Passes) Regulations, where they are required to provide accommodation that comply with applicable regulations for their foreign workers. The court imposed a total fine of SGD 153,000 on the employers, and MOM barred them from employing foreign workers.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

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LOOKING BACK

SOUTH KOREA

20 MAR 2018

EFFECTIVE DATE

Depends on the size of the business

Amendment to Reduce Working Hours

On 27 February, 2018, the Environment and Labour Committee of the National Assembly approved an amendment to the Labor Standards Act (the "Amendment") to reduce the number of total permissible working hours per week. The Amendment was reviewed by the Legislation and Judiciary Committee, and on 28 February, 2018, was approved by a vote at a National Assembly plenary session.

Under the Amendment, the maximum total working hours per week, including Saturdays and Sundays, will be reduced from 68 hours to 52 hours.

Key Aspects of the Amendment:

The amendment clarifies that "one week" consists of seven days, including public holidays, so that the current maximum working hours of 68 hours per week will be reduced to 52 hours per week. The effective dates for compliance will be based on the size of the business, as follows:

- Businesses with 300 or more employees and public agencies: 1 July 2018;
- Businesses with 50 or more employees, but fewer than 300 employees: 1 January 2020; and
- Businesses with five to 50 employees: 1 July 2021.

For businesses with 30 or fewer employees, special extensions to working hours (up to eight hours) may be permitted upon written agreement with the employees' representative until 31 December 2022.

Also, cumulative or double premiums (i.e., overtime or night time, and holiday) will not apply for work performed on holidays. However, the Amendment provides for an additional 50% overtime pay premium for up to 8 hours of work on holidays, and an additional 100% overtime pay premium in the case over 8 hours are worked on holidays.

More...

SOUTH KOREA

20 MAR 2018

EFFECTIVE DATE

Depends on the size of the business

Amendment to Expand the Scope of Application of Public Holiday Regulations

The amendment expands the scope of application of public holiday requirements to include private companies (which previously only applied to public agencies), to ensure that public holidays are treated as paid holidays. The schedule for compliance will be based on the size of the business, as follows:

- Businesses with 300 or more employees and public agencies: 1 January 2020;
- Businesses with 30 or more employees, but fewer than 300 employees: 1 January 2021; and
- Businesses with five to 30 employees: 1 January 2022.

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SOUTH KOREA

20 MAR 2018

EFFECTIVE DATE

1 JUL 2018

Amendment to Reduce the Scope of Businesses Exempt from Working Hours Restrictions

The amendment reduces the scope of businesses which are exempt from the maximum working hours limits from 26 types to 5 types.

The only remaining business types which are exempt from maximum working hours limits are: land transportation (excluding passenger vehicle transportation with service routes), water transportation, air transportation, other transportation services businesses, and health services. However, with respect to these 5 special business categories, at least 11 continuous hours of rest must be ensured. The 21 types of businesses that are no longer subject to the exemption will be required to comply with the maximum working hours requirements.

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LOOKING BACK

SOUTH KOREA
29 MAY 2018

Increase to Annual Leave Entitlement

The Labor Standards Act has been amended to require employers to accrue 1 day of leave per month for employees with less than one year of service, which shall not be offset against paid annual leave days provided to the employee in the subsequent year's annual leave entitlement. As a result, employees will be entitled to up to 26 days of paid annual leave during the first 2 years of employment (up to 11 days in the first year of employment and 15 days in the second year of employment).

SOUTH KOREA
29 MAY 2018

Continued Accrual of Annual Leave during Childcare Leave

The Labor Standards Act has been amended such that an employee's childcare leave period will be considered to constitute attendance at work for purposes of calculating the number of an employee's paid annual leave entitlements. The paid annual leave days for employees reinstated after childcare leave are also fully guaranteed.

SOUTH KOREA
29 MAY 2018

Guaranteed Leave for Fertility Treatment

The Gender Equality Employment Act has been amended to provide mandatory Fertility Treatment Leave of up to 3 days of paid leave per year (and up to 2 additional days of unpaid leave) to assist employees in receiving medical fertility treatment, such as artificial insemination and in vitro fertilization.

SOUTH KOREA
29 MAY 2018

Increased Obligations to Respond to Sexual Harassment Complaints in the Workplace

The Act on Employment Promotion and Vocational Rehabilitation for Disabled Persons has been amended to require annual training to improve employees' awareness of disabled persons to eliminate bias in the workplace, to create stable working conditions and expand employment of the disabled. Violation of this training 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 construction work, or to provide goods or services.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY: KIM & CHANG

SC Appeal 79/2013 Sri Lankan Airlines Limited Vs Sri Lankan Airlines Aircrafts Technicians Union [SLAATA] and Others

This was an appeal to the Supreme Court by the Petitioner against the Judgment of the Court of Appeal which affirmed the award/order of an Arbitrator on an industrial dispute raised by the SLAATA (a Trade Union).

The issue referred to arbitration was whether the non-payment of what was referred to in a collective agreement entered into by the parties in 1999 as the "13th month incentive bonus" for the year 2001 to the employees of the company who were members of the Union was justified and if not, to what relief they were entitled.

The Arbitrator held that the non-payment of the "bonus" was not justified and directed payment to be made.

The company sought to quash the order of the Arbitrator by way of writ of certiorari but Court of Appeal refused to issue the writ and in the result the award stood affirmed. In appeal to the Supreme Court from this judgment, the employer's position was that the collective agreement entered into in January 1999 between the employer and the Union expressly stated that "A 13th month incentive bonus may be payable each year in the end December payroll as per the rules and regulations that are announced each year at the sole discretion of the management of the company to all employees."

The company's position was that the bonus was only payable at the discretion of the employer that given the financial problems of the company it could not pay the said bonus (and it was legally entitled to not do so) and that it could not do so due to the extremely difficult economic conditions which prevailed in the year 2001 even though it had been paying bonus until then for over 20 years.

The position of the Union was that after the change of the name of the employer from "Air Lanka" to "Sri Lankan Airlines Limited" in 1997, the Chief Executive Officer by letter dated 29/7/1999 informed the employees of the company that the terms and conditions of employment they enjoyed with Air Lanka and also the already negotiated collective agreement would remain unaltered by the change of name. The Union also contended that the 13th month incentive had been paid continuously from 1979 for a period of 20 years and that it was a customary payment from the employer to the employee. It was further contended that this was because, in fact, in the course of any year the employees concerned actually worked 13 roster cycles. As regards the matter of losses, the Union pointed out that the relevant year was the period 1/4/2000 to 31/3/2001 during which time there had not been any loss of income or any drastic economic downfall of the Company. It was contended that the employer had not used its discretion reasonably and on the contrary had acted unreasonably and unjustly.

The Supreme Court having referred to the relevant provisions of the Industrial Disputes Act noted that any terms of the collective agreement become implied terms in the contract of employment between the employer and the workmen.

The Court then went on to refer to the fact that in terms of the Act, when an industrial dispute was referred to arbitration by an Arbitrator, the Arbitrator was obliged to "make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute and thereafter make such award as may appear to him to be just and equitable". In this connection, the Court cited with approval a previous judgment of a bench of seven judges in which it was held that "an Industrial Arbitrator is not tied down and fettered by the terms of a contract of employment between the employer and the workmen".

The Court noted in particular that the payment for an extra month for each financial year was paid at the end of each calendar year and that it was called the "13th month incentive bonus" or named as such only after the collective agreement came into existence. While salaries were paid in respect of each month for only 12 months to every employee, the members of SLATAA being workers on roster cycles of 28 days in each month worked 13 lunar months.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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LOOKING BACK

SRI LANKA
12 MAR 2018

Having considered these matters, the Supreme Court opined that that "this payment which SLAATA has prayed for from the Arbitrator cannot be recognized as a payment on which the employer can use its discretion and avoid payment because it is a payment the employee has earned with his sweat having worked on a roster."

The Court held that "even though Clause 13.1 of the collective agreement reads 'at the sole discretion of the management of the company' the just and reasonable interpretation of the use of the discretion of the employer should be in favour of the employee. It is nothing but reasonable for the employer to recognize that that payment was something the employee had worked for and earned." It (the Court) further noted that even if the employer was not in a position, economically, to pay the dues at that particular time of the year - i.e. December 2001 - it was something that the workers had earned by the end of the financial year by April 2001, payment of which was only put off by practice by the employer. The 13th month payment was in fact not an incentive bonus but a payment which the employees had earned.

In conclusion, the Supreme Court affirmed the judgment of the Court of Appeal - holding that that Court had quite correctly affirmed award of the Arbitrator - and dismissed the appeal of the employer.

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SRI LANKA
18 JUN 2018

Shop And Office Employees (Amendment) Act, No. 14 Of 2018
Maternity Benefits (Amendment) Act, No. 15 Of 2018

Two Acts passed by the Sri Lankan Parliament on the 18th of June, 2018 amending the law governing maternity benefits/leave. As provided for in the Maternity Benefits Ordinance [MBO] and the Shop and Office Employees Act [S&OEA] respectively.

The amending Acts are the Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act, No. 14 of 2018 ("S&OEAA 2018"] and also passed the Maternity Benefits (Amendments) Act, No. 15 of 2018 ("MBAA 2018").

The law prior to the amendments provided leave for a total of 12 weeks under the MBO and the S&OEA, where the confinement results in the birth of a live child and the employee has, at that date no child or one child. In the case of any subsequent children, the entitlement was to six weeks [MBO] and/or forty-two days [S & OE A].

The major amendment is to provide for entitlement to the same amount of maternity benefits/leave, regardless of the number of children the employee has at the date of her confinement/birth of the child.

The amendments to the MBO also entitle a woman worker's leave, in consequence of any confinement, to be in addition to any holiday or leave to which she would be entitled.

The amended laws now provide for maternity leave of a total of 12 weeks under MBAA 2018 and eighty four (working) days under the S&OEAA 2018.

Furthermore, the amendments to the S&OEA provide for two nursing intervals, in any period of nine hours, if the child is under the age of one. The interval must be no less than thirty minutes if a place for nursing is provided, or at least one hour if no place for nursing is provided. This will be in addition to any other intervals provided to the employee.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY: John Wilson Partners

The Executive Yuan promulgated in its Yuan-Tai-Jiao-Zi-1070002554 Order the "Act for the Recruitment and Employment of Foreign Professionals" that was announced on 22 November 2017, which entered into effect on 8 February 2018.

The key points of the law is as follows:

I. Loosening of employment, visa and residence rules

1. Foreign professionals
    1. Issuance of "employment-seeking visas": A stay of up to six months for foreigner needing an extended period of time to look for professional work in Taiwan (Article 19).
    2. Once the foreigner has obtained permanent resident status from the National Immigration Agency, Ministry of the Interior, he or she is no longer required to stay at least 183 days per year in Taiwan (Article 18).
2. Foreign professionals in particular fields
    1. Foreign professionals in particular field may apply to the National Immigration Agency, Ministry of the Interior for an Employment Gold Card, which combines a work permit, resident visa, Alien Registration Card and a re-entry permit, for a term of one to three years, which may be renewed upon expiry. This provides greater convenience in the freedom to seek employment, enter into employment and switch employment (Article 8).
    2. Extension of the term of work permit for foreign professionals in particular fields: The term of work permits for foreign professionals in particular fields has been extended from a maximum of three to five years, with renewal possible upon expiration (Article 7).

II. Relaxed rules on parents, spouses and children visits and obtaining resident rights

1. Loosened rules on spouses and children applying for permanent residence: In reference to international norms and human rights protection, for a foreign professional who has obtained permanent resident status, his or her spouse, minor children and adult children with disabilities may apply for permanent residence after continually residing in Taiwan for five years, with no financial capability certification required (Article 16).
2. Relaxation on rules for joint application of permanent residence by the spouse and children of high-level professionals: Pursuant to the amendment suggestions in Article 25 of the Immigration Act, for the spouse, minor children and adult children with disabilities of a high-level professional, they may all jointly apply for permanent residence at the same time (Article 15).
3. Work permits for adult children staying in Taiwan: For a foreign professional who has obtained permanent resident status, if his or her adult children are eligible for extended stay, they may apply for their own work permits pursuant to Article 51 of the Employment Service Act (Article 17).

III. Pension, health insurance and tax benefits.

1. Strengthen protection of the pension of workers.
    1. Foreign professionals who have received permanent resident status may apply the new pension scheme under the Labor Pension Act (Article 11).
2. The spouse, minor children and adult children with disabilities of a foreign professional are no longer subject to the six-month wait period for national health insurance once they have obtained residence documents (Article 14).
3. Tax benefits: First-time foreign professionals in particular fields who also earned NT$3 million per year may, for the next three years, enjoy tax exemptions for portions of income above the threshold to be calculated in half of its amount (Article 9).

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

Presidential order to amend the Labor Standards Act

The Hua-Zhong-1-Yi-Zi-10700009781 Presidential Order dated 31 January 2018 announced the amendments to Articles 24, 32, 34, 36-38 and 86 of the Labor Standards Act and the addition of Article 32-1. All changes entered into effect on 1 March 2018.

Summary of amendments made:

1. Work hours on days of rest is now changed to the number of actual hours worked, and the employer's decision to have employees work on days of rest reverts to being based on the actual needs of the employer (amending Article 24)
2. The need for more flexibility between the employer and employees regarding overtime leads to the following system: Once the labor union agrees, or if no labor union is present, the consent of the employer-employee conference, overtime hours may be counted on a quarterly (3-month) cycle, with allowable overtime increased to 54 hours per month, up to a maximum of 138 hours over the three months. For employers with more than 30 employees, it shall report to the local competent authority for recordation (amending Article 32).
3. To set down the rules for makeup leaves in law, for the extended hours worked or work provided on rest days, if the worker chooses to take makeup leave and the employer consents, the makeup leave shall be calculated based on the number of such hours worked (new Article 32-1)
4. While the current rule for at least an 11-hour rest period gap between shifts is beneficial for the worker's health, such regime applied uniformly throughout may have an impact on some industries with the three-shift arrangement. As such, in addressing the nature of some positions or other particular reasons, in industries announced by the central competent authority (per the request of the competent authority in the industry with a central objective), an employer may, with the consent of the union or the employer-employee conference where there is no union, separately stipulate to an appropriate amount of rest hours that is no less than a contiguous 8-hour period. Recordation to the local competent authority is required for employers with more than 30 employees (amending Article 34).
5. Arrangement of official day off: Other than the business units with a 4-week flexible working hours arrangement, which shall still apply the original rules, for industries designated by the central competent authority and with the consent of the competent authority in the industry with a central objective, an employer may, with the consent of the union or the employer-employee conference where there is no union, adjust the day of the official day off in the 7-day period. Recordation to the local competent authority is required for employers with more than 30 employees. Balance shall be considered in the arrangement of the official day off for the need of workers to connect to other leave days on one side, and the employer's need to make the adjustment to the official day off for manpower arrangement reasons on the other (amending Article 36)
6. For the days of annual leave not taken by the end of the year, the employer and the employee may negotiate as to whether those days may be deferred to the next year to comply with the purpose of annual leaves. However, to ensure that the worker's right to those annual leave days are not infringed upon as a result of the deferral, if those deferred days are still not used up by the end of next year or the termination of employment, the employer shall provide compensation for those days not taken (amending Article 38).

More...

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

TAIWAN
12 FEB 2018

A worker's request to an employer for unpaid child care leave because of the need to raise two or more children personally is considered to be a "proper reason" under the proviso Article 22 of the Act of Gender Equality in Employment.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-4-Zi-1070130162
Issue date: 12 February 2018

Key points:

Article 22 of the Act of Gender Equality in Employment provides that a worker whose spouse does not work cannot apply for unpaid child care leave unless there is a proper reason as the spouse who does not work is able to take care of his/her families. It is recognized that because a single parent may not be able to take care of multiple children alone, if the worker also needs to take unpaid child care leave in assisting to raise the children, then the worker's request for unpaid child care to the employer shall be deemed as a "proper reason" under the above proviso to Article 22 of the Act of Gender Equality in Employment.

More...

TAIWAN
14 FEB 2018

Regarding the transfer of pension reserves of the Taiwan branches of two foreign companies who are engaged in a merger overseas

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Fu-3-Zi-1060136515
Issue date: 14 February 2018

Key points:

When two foreign companies engaged in a merger overseas, their Taiwan branch companies will also merge. Because Article 15 of the Business Mergers and Acquisitions Act do not apply when two foreign companies are involved, the pension reserves of the dissolved Taiwan branch company may not be simply transferred for the surviving or the new company to assume accordingly. If there are any amounts remaining after paying the pensions and severances to employees not retained decided by the new and old employers, the new and old employers shall negotiate to have the old employer transferred the amount in its pension reserves to the pension reserves established by the surviving or new company.

More...

TAIWAN
21 FEB 2018

Explanations regarding the preferential retirement plan enacted by a business entity to an employee moving between affiliate companies by combining the seniority accumulated, as well as the handling of a request to access the pension reserves to make such pension payments.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Fu-3-Zi-1070135081
Issue date: 21 February 2018

Key points:

A preferential pension program in which an employer combines the past position seniorities of an employee who uses the new pension system so that it pays pension to such employee based on the old pension system results in an issue: While the system is more favourable to the employee than the law requires as a result of private law contract negotiations over the pension payment, the employer is not obliged to perform the duty under public law to contribute to the pension reserve, and if consent to using the funds in the pension reserves is approved, it may affect the rights of workers under the old pension system. As a result, the employer should make payment from other funding sources and not pay from the pension reserves from the current or previous positions.

Continued on Next Page

TAIWAN

21 FEB 2018

In order to strike a balance between the rights and interests of the retiring worker and the purpose of Article 56, Paragraph 2 of the Labor Standards Act, when local competent authorities receive an application from a business entity for permission to enact a preferential pension plan by combining an employee's seniorities in past positions and the access to its pension reserves, they shall:

1. If the competent authority has already approved of such a plan, for reasons of reliance, the originally approved preferential pension may be paid out from the pension reserves, but the amount remaining shall still be compliant with Article 56, Paragraph 2 of the Labor Standards Act.
2. From this point on, any application of a preferential pension plan by combining seniorities shall only be approved to the extent of the calculation of seniorities. The employer shall be responsible to secure another source of funding to the pension amount, and it may no longer use the pension reserves to do so.

More...

TAIWAN

27 FEB 2018

The Ministry of Labor announces amendments to several provisions of the Enforcement Rules of the Labor Standards Act.

The Lao-Dong-Tiao-3-Zi-1070130354 Order dated 27 February 2018 announced the amendments to Articles 20, 22, 24-1 and 37 of the Enforcement Rules of the Labor Standards Act and the addition of Articles 22-1 through 22-3.

Summary of amendments made:

1. In accordance with the new extended working hours proviso in the Labor Standards Act, the cycle shall be over three consecutive calendar months (amending Article 22).
2. Regarding the new recordation mechanism for the extended working hours, time between shifts and exceptions to the one day rest over seven day arrangement, the following matters are stipulated: the calculation method to determine whether an employer has 30 or more employees, the definition of a local competent authority, and the requirement on employers to report to the local competent authority for recordation at the very latest one day before the implementation of extended working hours, the change to resting periods, and adjustments to official days off. (new Article 22-1)
3. In accordance with the new makeup leave arrangements for overtime, the method such makeup leaves may be implemented is stipulated, as well as the time limit on the makeup leave and the deadline for payment in consideration of makeup leave not taken. (new Article 22-2)
4. Clearly setting out the details regarding the one day off every seven days arrangement. The cycle shall be over seven calendar days, and unless the employer makes adjustments pursuant to Article 36, Paragraphs 4 and 5 of the Labor Standards Act, it cannot cause employees to continuously work for more than six days in a row (new Article 22-3).
5. Regarding deferral of annual leave not taken in the year to the next year by negotiations between the employer and employee, it is specified that when the worker takes annual leave in the next year, it should be taken out first from the deferred annual leave days left from the last year (amending Article 24-1).
6. Clearly setting out the calculation method to determine whether an employer has 30 or more employees (amending Article 37).

More...

TAIWAN

9 MAR 2018

The Ministry of Labor amends the "Guideline Principles for Labor Dispatch Rights" and "Matters to be Contracted or Prohibited from Contract in Dispatch Labor Agreements"

The Lao-Dong-Guan-2-Zi-1070125576 Order issued by the Ministry of Labor dated March 9, 2018 announced the amendments of the "Guideline Principles for Labor Dispatch Rights" and "Matters to be Contracted or Prohibited from Contract in Dispatch Labor Agreements".

The key points of the amendments are:

1. To protect the freedom of employment of employees, and to prevent the dispatching entity from forcing employees to stipulate "minimum service" and "post-departure non-compete obligation" agreements and thereby limiting the employees' ability to find a more fixed position, if the dispatching entity does not meet the legal requirements for the above terms, it cannot require the employee to pay a penalty for breach during the time the employee is dispatched if the employee chooses to become an official employee of the entity that he/she is dispatched to; nor shall the dispatching entity prohibit the employee from taking a position at the entity that he/she was dispatched for a certain period of time after the termination of the labor agreement.
2. Requiring employees to work on rest days shall require the employee's consent to protect the employee's rights. The wages and hours of such work shall be stipulated in the dispatch agreement.
3. The entity that the employees are being dispatched shall take responsibility in setting up the safety and sanitation equipment around the workplace and providing compensation/ damages through insurance planning to protect the employees' labor rights.

TAIWAN

14 MAR 2018

Explanations on the calculation of wages and work hours in the event employees working on a rest day on the employer's request encounter natural disasters, incidents or other unexpected emergencies

Key points:

1. In the event employees had previously agreed to work on a rest day per the request of the employer, but on that rest day, there occurred a natural disaster which caused the head of the district where the work site, the employee's residence or any place that the employee must travel through in his/her commute is located to declare the suspension of business according to the Regulations Governing the Suspension of Businesses and Classes because of Natural Disasters, the employee does not have to arrive at work, and the employer should not treat employees as absent from work, late for work or force employees to take personal leave or other kinds of leave, or take any sanctions against the employee, including requiring the employee to do make-up work, withhold bonuses for attendance, terminate the employment agreement, etc. If the employee had already started work at the work place on a rest day and, due to the natural disaster, the employee decided to stop working or the employer requested the employee to stop working, as such suspension is not attributable to employees, the employer must still pay the overtime wages for the hours that the employee has already worked as specified under Article 24, Paragraph 2 of the Labor Standards Act; those hours that the employee has already worked shall be calculated as part of the total overtime working hours in a month (which is subject to the restrictions of Paragraph 2 of Article 32 of the Labor Standards Act).
2. If the occurrence of a natural disaster, incidents or other unexpected emergencies causes an employer to request an employee to work on a rest day, in addition to paying wages for the hours that the employee has already worked pursuant to Article 24, Paragraph 2 of the Labor Standards Act, those working hours are not counted under the statutory cap stated in Article 32, Paragraph 2 of the same.
3. As working on a rest day is by nature an extension of working hours, if the employer requested such work due to a natural disaster or other unexpected event, the employer is required to notify the union, or if there is no union, the local competent authority, within 24 hours of the commencement of work, as well as provide the employee with appropriate time of rest afterwards.

LOOKING BACK

TAIWAN
14 MAR
2018

Explanations for the calculation of leaves, work hours and wages in the event the employer had previously obtained consent from an employee to work on a rest day, but the employee turned out to be unable to provide service on that day

Key points:

1. Whether an employee should work on a rest day, and for how long, are matters to be decided between the employer and the employee as a business internal management matter. Once the employee had consented to provide service, he/she has the obligation to provide service on that day. If the employee turned out to be unable to do so on the agreed day for personal reasons, the employee must inform the employer. Unless otherwise agreed by the parties to discharge the obligation to provide service on a rest day, the hours that the employee could not provide service may be taken as a leave depending on the reason for the absence pursuant to the Regulations of Leave-Taking of Employees and other laws and regulations.
2. It is highly suggested to stipulate the rules for the above situation (including the notice procedures and whether the employee shall take leaves, etc.) in the collective agreement, employer agreement or work rules so that the parties may have a written reference.
3. Unless the absence was caused by a natural disaster or unexpected incident, the total extended work hours as stipulated under Article 32, Paragraph 2 of the Labor Standards Act shall be calculated based on the actual hours that the employee had provided service on the rest day. For wages, in addition to regular pay, the hours that the employee had provided service on the rest day shall be calculated per Article 24, Paragraph 2 of the Labor Standards Act, and the pay for the leave taken shall be calculated on the rest day extra pay standard.

TAIWAN
11 APR
2018

Explanations regarding the time limit of annual leave deferrals

Key points:

1. The employer may discuss with a union or at a labor-management conference regarding the time limit of deferrals or how deferrals may work, or to negotiate a general rule. However, each individual request for deferral shall still require the consent of both the employer and the employee before it may be carried out. A decision by the employer to defer without exception all untaken annual leave to the following year at that time is not consistent with the law.
2. A negotiated arrangement to defer annual leave for a term of less than a year is acceptable (e.g., a 3-month deferral); it is also acceptable to further defer for the same duration (e.g., a second 3-month deferral negotiated upon the expiration of the first 3-month deferral), provided that the leave must be used by the last day of the following year. Leave that has been deferred to the following year but remains untaken at the last day of the following year can no longer be further deferred, and the employer shall pay wages to the employee in compensation for such untaken leave.

TAIWAN
11 APR
2018

Explanations regarding whether the wages for deferred leaves not taken should be included in the calculation of average wages

Key point:

While deferred leave that has yet to be taken even at the end of the following year or because of the termination of the employment agreement shall be converted by the employer to wages, how such wages are regarded in the calculation of average wages shall first depend on whether "the end of the original year for the annual leave" took place within 6 months of the date of the calculation of average wages as such wages are in nature the compensation (for annual leaves not taken) in the original year. If it does fall within 6 months, as the law is silent on how much of the wages in lieu of leave not taken in the original year shall be included in the calculation of average wages, it is up to the employer and the employee to negotiate an arrangement. If it falls outside of the 6-month period, then such wages shall not be included in the calculation of average wages.

CONTRIBUTED BY: 理慈 Lee, Tsai & Partners

There are no significant policy, legal or case developments within the employment space during 2018 Q2.

Click here to view **2017 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY: MAYER · BROWN JSM

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