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Asia Employment Law: Quarterly Review

2020-2021

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Introduction

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 produces the **Asia Employment Law: Quarterly Review**, an e-publication covering 15 jurisdictions in Asia.

In this thirty-second edition, we flag and comment on employment law developments during the second quarter of 2021 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2021.

This publication is a result of ongoing cross-border collaboration between 15 law firms across Asia with whose lawyers Mayer Brown 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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Federal Court provides guidance regarding the Fair Work Act's transfer of business provisions

On 20 January 2021, the Federal Court of Australia handed down its decision in *Community and Public Sector Union, NSW Branch v Northcott Supported Living Ltd* [2021] FCA 8 (***Northcott***).

Under the *Fair Work Act 2009* (Cth), a transfer of business occurs when the following requirements are satisfied:

1. the employment of an employee of the old employer has terminated;
2. within 3 months of the termination, the employee becomes employed by the new employer;
3. the work the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer; and
4. there is a relevant 'connection' between the old employer and the new employer.

Where there is a transfer of business in the relevant sense, any enterprise agreement that applied to the transferring employees while they worked for the old employer would become binding upon the new employer in relation to those employees (and in very limited circumstances to non-transferring employees of the new employer).

Northcott was the first occasion upon which a court of tribunal has provided detailed guidance in relation to the 'same or substantially the same' requirement.

The Court determined that, when approaching this issue, courts and tribunals should not engage in a 'technical' comparison of the employee's duties for their first and second employer. Instead, they should focus upon whether the 'fundamental nature' of the employee's work had changed from what it had been before. This means, for example, that work can be regarded as the same or substantially the same even though:

- the manner in which employees perform their duties has changed;
- the new position includes additional duties;
- some duties are no longer required; and
- a typical working day in the new position has a 'different composition'.

If, however, the changes are 'fundamental' in character, then the work will be regarded as no longer being the same or substantially the same. This will be a question of fact and degree in each case.

Northcott concerned a group of employees who worked as 'Team Leaders' at disability care homes operated by a company called Northcott Supported Living Living (**NSL**). NSL was a subsidiary of Northcott Society Limited (**Northcott**). In July 2019 Northcott decided to restructure its operations. This included dissolving NSL and offering employment to most of NSL's employees with Northcott. For most employees there was to be no change in terms and conditions of employment, and the work was exactly the same as it had been at NSL. However, for one cohort of employees (**affected employees**) there were to be significant changes to terms and conditions of employment and in responsbility.

The Union which represented the affected employees applied to the Federal Court arguing that the proposed restructure constituted a transfer of business in the relevant sense, so that the affected employees would continue to enjoy the benefits of the enterprise agreement that had applied to them when they were employed by NSL. Northcott argued that there was not a transfer of business in the relevant sense because the work to be performed by the affected employees for Northcott was not the same or substantially the same as that performed for NSL.

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The Federal Court found in favour of the Union, determining that the transferring employees were performing substantially the same work in both positions. In reaching this conclusion, the Court took account of the similarities in seniority, duties, purpose, organisational context and position descriptions between the two positions.

In coming to this conclusion, the Court rejected the employer's argument that the employees were doing substantially different work due to the fact that the position description for the new role included additional managerial duties and limited patient-care responsibilities. The Court also took the view that the position description did not reflect the reality of a Service Coordinator's day-to-day duties.

The decision is *Northcott* is helpful in its rejection of an overly technical approach to the same or substantially the same requirement, but it is important to appreciate that to establish that positions are not the same or substantially the same there needs to be genuine differences of substance: differences of form are not enough.

Corrs Insight: 'Illuminating the operation of the transfer of business provisions in the Fair Work Act'
Community and Public Sector Union, NSW Branch v Northcott Support Living Limited [2021] 8, Federal Court of Australia, 20 January 2021

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High Court of Australia will hear two appeals on whether workers were employees or independent contractors

On 12 February 2021, the High Court of Australia granted special leave to appeal two decisions of the Full Court of the Federal Court of Australia. Both appeals will require the High Court to determine whether the workers involved in the two disputes were employees or independent contractors. The appeals will be heard together, likely in the second half of 2021. ***Jamsek v ZG Operations Australia Pty Ltd ('Jamsek')***

In *Jamsek*, the Full Court found that two truck drivers who had been classified as contractors were, in fact, employees. The drivers had worked exclusively for ZG Operations (and its predecessors) for almost 40 years.

Amongst the factors that led the Full Court to conclude that the drivers were employees were the fact that:

- the business operated by ZG Operations was the drivers' sole source of income for the 40 year period;
- the drivers worked more or less regular hours with consistent duties and work arrangements;
- the drivers were first engaged as employees. In 1986 the drivers were faced with either redundancy or agreeing to a new contract describing them as independent contractors. Beyond the drivers having to purchase their own delivery trucks, the working arrangements following their re-engagement as contractors were substantially the same as those in place when the drivers were employees;
- the drivers had no capacity to generate goodwill in their own business;
- ZG Operations required them to work from 6 am until at least 3 pm each day with the consequence that the drivers' ostensible capacity to work for other business was, in practical terms, illusory.

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd ('Personnel Contracting')

In *Personnel Contracting*, the Full Court determined that a young British backpacker engaged by a labour hire company to work on construction sites was an independent contractor. The Court was clearly not happy with this outcome, but felt constrained by earlier authority to reach the conclusion that it did.

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In the course of his judgment Chief Justice Allsop noted that if 'unconstrained' by previous authority, he would 'favour an approach which viewed the relationship … as that of casual employment', whilst Justice Lee observed that the development of a dichotomy between employee and independent contractor 'has produced ambiguity, inconsistency and contradiction' and that this 'traditional dichotomy' may not easily comprehend or accommodate the increasing prevalence of trilateral labour hire relationships, as well as the 'evolution of digital platforms and the increasing diversity in worker relationships'. It will be interesting to see how the High Court responds to these expressions of dissatisfaction with the existing state of the law.

Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122
Transcript – Personnel Contracting special leave application
Transcript – Jamsek special leave application
Special leave application results (12 February 2012)

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Federal Opposition unveils proposed industrial relations reforms ahead of likely 2021 election

The opposition Australian Labor Party has indicated a number of proposed industrial relations reforms amidst increasing speculation that there will be a federal election in 2021.

On 10 February, Anthony Albanese, leader of the Labor Party, delivered a speech in which he identified three major themes that would drive the program of a future Labor Government: addressing casualisation, giving more rights to gig economy workers and ensuring labour hire workers are paid at least as much as direct employees working alongside them. In doing so he averred that Labor is 'on the side of working families'.

In March 2021, the Labor Party followed up on these commitments by releasing what it described as the final draft of its National Platform, including proposals aimed at:

- achieving a national minimum standard for long service leave;
- introducing 26 weeks of fully paid parental leave;
- ensuring consistent treatment of public holidays between States and Territories;
- protecting gig economy workers;
- supporting penalty rates;
- establishing an independent umpire to adjudicate bargaining disputes; and
- expanding access to flexible working arrangements.

Opposition IR policy announcements pledged, as Burke retained, Workplace Express, (28 January 2021)
Albanese to unveil plan for contractors, Sydney Morning Herald, (9 February 2021)
Labor's expanded "employee" definition to encompass gig workers, Workplace Express, (10 February 2021)
Labor vow to favour firms that provide secure jobs, The Age, (10 February 2021)
IR blueprint points back to the future for Albanese, The Australian, (10 February 2021)
Anthony Albanese: Labor has a plan for job security in the gig economy, Daily Telegraph Online, (9 February 2021)
IR blueprint points back to the future for Albanese, The Australian, (10 February 2021)
ALP Special Platform Conference 2021, National Platform, Final Draft, pages 18 - 25

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Federal Parliament passes heavily amended *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, dropping majority of proposed reforms

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (**Bill**) was introduced into Federal Parliament on 9 December 2020. On 22 March 2021 a heavily amended version of this Bill was passed by both Houses of Parliament.

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- The amendments effectively removed four of the five principal reforms that were included in the original Bill, namely: changes in relation to additional hours agreements;
- the relaxation of the 'better off overall' test;
- the creation of criminal 'wage theft' offences; and
- the extension of the nominal life of Greenfields agreements relating to major projects.

What is left is a number of changes concerning the rights and obligations of employers in relation to their casual employees. The key changes :

- Give employers the ability to define an employee as a casual (with no leave entitlements or job security) at the time employment commences, provided that the offer of employment makes 'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work' and the employee accepts this offer.
- Requires employers to offer permanent employment to casual employees, provided the employee concerned has been employed for a period of 12 months and has worked a regular pattern of hours for the last 6 months.
- Responding to the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, where the Court held that that an employee who was ostensibly engaged as a casual was, in reality, a permanent employee and therefore entitled back pay for various entitlements.
  The legislation purports to prevent such 'double-dipping' by clarifying that if a court finds an employee to be a permanent employee, it must offset any amount payable to the employee by an amount equal to any casual loading already paid by the employer. Many employers would welcome this change since it would relieve them of potential claims to back-payments totalling many millions of dollars It has been suggested, however, that this aspect of the legislation may be susceptible to constitutional challenge on the grounds that it involves the acquisition of property without compensation.

Treasurer Josh Frydenberg has stated that the government may attempt to re-introduce some of the abandoned reforms at a future date – especially those relating to greenfields agreements for major projects.

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth)

Schedule of Amendments made by the Senate

Labor sets up IR omnibus Bill roadblock, Workplace Express, (2 February 2021)

Porter negotiating IR Bill changes with crossbenchers, Workplace Express, (11 February 2021)

Morrison government dumps changes to Better Off Overall Test, The Age, (16 February 2021)

Government goes ahead with workplace bill, The West Australian, (12 March 2021)
Government abandons bulk of industrial relations package in effort to save definition of casual work, ABC (18 March 2021)

PM told to try again on IR laws, The Australian (19 March 2021)

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First company in Australia to mandate COVID-19 vaccinations at work

Alliance Airlines is the first employer in Australia to order all of its workers to undergo vaccination for COVID-19 or face potential disciplinary action. Contractors and their employees will also be required to be vaccinated to conduct work on Alliance Group worksites, the company policy states.

Adam Thorn, 'Alliance to make vaccinations mandatory for all staff', Australian Aviation (online, 30 May 2021)

AUSTRALIA
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Minimum wage increase of 2.5 per cent

The Fair Work Commission has announced a 2.5 per cent increase in the minimum wage and related award minimum wages.

This will take the minimum wage for Australia's lowest-paid workers to $20.33 an hour, or $772.60 a week for full-time workers.

It will mean an extra $18.80 a week for Australia's lowest-paid full-time workers.

For the majority of the 2.3 million people on award rates or the national minimum wage, the increase will take effect from 1 July 2021. However, the increase for some industries that are particularly impacted by coronavirus restrictions will be delayed. For example, workers covered under aviation, fitness, tourism and certain retail sector awards will have their pay rise delayed until 1 November 2021.

Annual Wage Review 2020–21 92021] FWCFB 3500

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High Court rejects special leave application from Federal Court 'stand down' decision

The High Court has refused leave to appeal from a decision of the Full Court of the Federal Court of Australia in *CEPU v Qantas Airways Limited* [2020] FCAFC 205.

That decision considered whether Qantas could lawfully deny 20,000 employees it stood down in March 2020 access to their paid sick leave, carer's leave or compassionate leave entitlements. The Unions argued that an employee could not be taken to be 'stood down' under s524(1) of the *Fair Work Act 2009* where they were taking these forms of leave. Qantas, on the other hand, submitted that s 525 of the Act required that any absence that did not constitute a 'stand down' for purposes of s 524 had to be authorised by the employer.

A majority of the Full Court adopted the construction of the FW Act proposed by Qantas. In support of this view, the majority found that it would be "paradoxical if a provision that relieved an employer from making payments to employees during a period when they [could] not usefully be employed operated in a manner that meant that employees could take paid leave even though there was no work for them to perform and no potential to earn income."

In rejecting the Unions' application for leave to appeal from the Federal Court's judgment, the High Court found that there was no reason to doubt the correctness of the Federal Court's construction of the FW Act. The High Court's decision to refuse leave to appeal therefore confirms that employees are not entitled to take paid leave whilst they are stood down under the FW Act without the employer's approval.

CEPU v Qantas Airways Limited [2020] FCAFC 205
Communications Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia & Ors v Qantas Airways Limited [2021] HCATrans 100

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Introduction of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

The federal Government has introduced the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* ("the **Bill**") in the Australian Parliament. The Bill accepts (in whole or in part) the 55 recommendations set out in Sex Discrimination Commissioner Kate Jenkin's Respect@Work: Sexual Harassment National Inquiry Report (2020).

In its current form, the Bill proposes to amend the *Fair Work Act 2009* (Cth) (**FW Act**), *Sex Discrimination Act 1984* (Cth) (**SD Act**) and *Australian Human Rights Commission Act 1986* (Cth). Specifically, the Bill proposes the following key changes:

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- Extending the SD Act to cover members of Parliament, judges and State public servants.
- Conferring on the Fair Work Commission the power to issue 'stop sexual harassment orders' (similar to existing 'stop bullying orders'), including where there has been only a single instance of sexual harassment. Consistent with the anti-bullying regime, these orders will not be available where the person whose conduct amounted to sexual harassment is no longer at the workplace.
- Aligning the SD Act with the terms used in the model Work Health and Safety law (ie, 'worker' and 'persons conducting a business or undertaking' ('PCBU')) in order to expand the coverage of protections under the SD Act to persons who were not previously covered eg interns, volunteers, and self-employed workers.
- Expressly prohibiting harassment on the ground of sex, rather than only harassment of a sexual nature. The definition of sex-based harassment will capture unwelcome conduct which is not of a sexual nature (and therefore not sexual harassment) eg repeated sexist comments.
- Amending the unfair dismissal provisions in the FW Act to clarify that sexual harassment is a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.
- Extending the Australian Human Rights Commission's complaint period from six months to two years to account for the sensitive nature of sexual harassment complaints.
- Extending compassionate leave to cover miscarriage.

Notably, the Government has not accepted the Commissioner's recommendation to introduce a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, and victimisation. In its official response to the Respect@Work Inquiry, the Government suggested that imposing a duty of this nature would "create further complexity, uncertainty or duplication in the overarching legal framework".

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021
Respect@Work: Sexual Harassment National Inquiry Report (2020)
Attorney-General Media Release
Federal Government's Response to the Respect@Work Inquiry

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

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CHINA

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SPC Issues Judicial Interpretation (I) on Trial of Labor Dispute Cases

The Supreme People's Court ("SPC") has recently issued the Interpretation on Issues concerning the Application of Law in the Trial of Labor Dispute Cases (I) (the "Interpretation"), with effect from January 1, 2021. The Interpretation consists of 54 articles in total, specifying the scope, jurisdiction, prosecution and acceptance, and arbitration of labor disputes. Among others, the Interpretation stipulates that where an employee directly institutes a lawsuit on the strength of a slip on wage default issued by the employer as evidence, and the claims do not involve any other dispute over labor relationship, it shall be regarded as a dispute over the default on labor remunerations and shall be accepted by court as a general civil dispute; where, after the expiration of a labor contract, the employee still work for the original employer and the original employer does not express any objection, it shall be deemed that the parties agree to continue the performance of the labor contract in accordance with the original terms and conditions; if a party proposes to terminate the labor relationship, the court shall support it. The Interpretation also points out that where a labor contract is confirmed as invalid but the employee has already provided labor services, the employer shall pay the labor remuneration and financial compensation to the employee in accordance with the relevant provisions.

More...

There are no significant policy, legal or case developments within the employment space during 2021 Q2.

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

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Hong Kong Court Dismissed Former Director's Claim for Annual Commission and Housing Allowance

In *Ah Fat Jean Max v Xian Corp Ltd* [2021] HKCFI 22, the Court of First Instance (the CFI) dismissed the employee's claim for annual commission and housing allowance against his employer.

Background

The employee was the former managing director of the employer. The employment contract of the employee provided for, among other things, the payment of an annual commission of an amount equivalent to 10% of the net profit of a subsidiary of the employer to be incorporated (the Commission) and the payment of a monthly housing allowance (the Allowance). It was also expressly provided in the employment contract that its terms may not be modified or amended except by a written agreement signed by the parties.

Upon commencement of employment, the parties agreed to abandon the establishment of the Subsidiary. The parties also agreed that the employee be granted a licence to live in an apartment rented by the employee in lieu of the payment of the Allowance.

In January and November 2016, the employer made two advanced payments totalling US$90,000 (the Advance Payments) for the employee's annual commission, covering the period from the commencement of his employment up to 30 June 2016.

In November 2017, the employer terminated the employment of the employee.

The employee commenced action in the Labour Tribunal against the employer for payment of the statutory severance pay, the Commission and the Allowance. Although the Labour Tribunal ordered the employer to pay severance payment, his other claims were dismissed. The employee lodged an appeal to the CFI against the Labour Tribunal's decision.

CFI's Decision

The CFI dismissed the employee's appeal.

1. The Commission Claim

As the Subsidiary was never incorporated, there is an obvious gap in the Commission Clause as to how the amount of the Commission should be calculated.

The employee contended that the Commission should be based on the audited results of the employer's net profit (inclusive of all its subsidiaries). However, the Labour Tribunal and CFI were in favour of the employer's construction that the Commission was calculated based on the employees' profit centres for which he had been responsible. In coming to this conclusion, the Labour Tribunal and CFI looked at the parties' pre-contractual negotiations and found an agreed objective, where:

- it was stated in the parties' correspondence prior to the entering of the employment contract that the Subsidiary would be set up for the purpose of recording the profit made at the employee's own profit centres (i.e., the Asian and PRC markets); and
- the employee did not raise any objection to the above suggestion and, by inference, he must have accepted that the Commission was calculated based on the profits of his own profit centres.

In any event, the employee had already received the Advanced Payments, which exceeded the amount that he would be paid by reference to the audited results of the employer. As such, he was not entitled to payment of the Commission.

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2. The Allowance Claim

The Labour Tribunal and CFI dismissed the employee's appeal on this ground since the definition of wages under the Employment Ordinance specifically excludes "*the value of any accommodation*".

Due to a variation in respect of the Allowance by the conduct of the parties in January 2015, the employee was granted a licence instead of being paid the Allowance. This was a benefit in kind and did not form part of his wages. Upon termination, he was no longer entitled to any wages or the licence granted ancillary to his employment.

Lessons for Employers

As this case illustrates, clarity of a term in the employment contract is as important as its flexibility, especially when it concerns an employee's entitlement calculated with reference to a formula and payable at a certain time. If the formula fails for some reason (e.g., the disposal of a subsidiary referred to in the formula) and no further variation is made to give effect to the parties' arrangement, such a term may only be enforceable with reference to pre-contractual negotiations or other available evidence. This adds to the uncertainty as to the employees' entitlement and is likely to attract dispute.

Further, the variation of any contractual term should be clearly documented and employers should comply with the prescribed method for variation provided under the employment contract. If the variation concerns the reduction of an employee's entitlement, other additional benefits should be given in order to make the variation valid. It is not always the case that the court will find a waiver or estoppel to validate variations made without complying the relevant variation clause.

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Are your employees required to be contactable outside Office Hours?

In *Breton Jean v 香港丽翔公务航空有限公司* (HK Bellawings Jet Limited) [2021] HKDC 46, the District Court (DC) in Hong Kong allowed the statutory rest day pay claim by the employee, who was required to be accessible on his work phone, but dismissed his claim for wrongful dismissal against his employer.

Facts

The employee was a pilot. He joined the employer, a business jet management company, in July 2015 and was subsequently promoted to the position of Lead Captain. He had both flight duties and ground duties, such as monitoring aircraft maintenance.

The employee had no regular working hours and was required to work on demand. The employment contract provided that if he was designated on standby, he must answer the employer's calls within one hour and perform the necessary flying duties.

The employer's operations manual, which formed part of the contract of employment, provided that the employee was entitled to a certain duration of rest period for a corresponding number of consecutive working days. However, the employer had no roster system to inform him of these rest periods. The operations manual also provided that he had to return company phone calls and be ready to perform work duties within a specified time limit unless he was on scheduled annual leave or days off, and was prohibited from consuming alcohol 12 hours prior to reporting time.

The employee was asked to deal with some maintenance work on 8 December 2016 but he did not turn up to work. He could not be reached on his work phone either. The employer emailed him asking for his whereabouts but his response was evasive. He claimed that it was customary to be rostered with no duties two days prior to his annual leave, which was scheduled to commence

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on 14 December 2016. He was asked to attend a meeting on 13 December 2016 but he did not show up.

Upon returning to work from annual leave on 31 December 2016, the employee was summarily dismissed by the employer for his unauthorised absence from duty without a valid reason.

Court's Decision

The DC allowed the Rest Day Pay Claim but dismissed the Wrongful Termination Claim.

1. Rest Day Pay Claim

The DC accepted the employee's evidence that he was required to be contactable by his work phone whenever he was not flying. The employer's case was that the requirement of being contactable did not equate with being designated on standby and there was a "mutual understanding" that all of the employee's non-flight days were considered as rest days. However, the employer's evidence did not support the existence of the alleged "mutual understanding".

The issue was whether, on proper construction of the provisions in the employment contract and the operations manual, the requirement to be contactable equated to being on standby duty.

The DC considered that if the employee is truly on a rest day, he should be entitled to abstain from working. For example, the employee would be free to consume alcohol during his scheduled rest days and would refrain from doing so if he was put on standby duty.

The employment contract and the operations manual required the employee to answer his work phone, perform duties within a specific time limit and not consume alcohol 12 hours before the reporting time. The employee was effectively on standby duty when he was not on active duty, as he was not free to do whatever he wanted, like consuming alcohol.

The DC found in favour of the employee and held the employer liable for the Rest Day Pay Claim for more than 120 untaken rest days, which was assessed at over HK$660,000.

2. Wrongful Termination Claim

The DC did not accept the employee's case that he was entitled to be absent from work from 8 to 13 December 2016 because he was taking his rest days. No contemporaneous evidence supported this position, which the employee had not articulated during his employment. Evidence did not support the alleged customary day off before the scheduled annual leave either.

The DC found that the employee's absence from 8 to 13 December 2016 was without valid reason and unauthorised, and dismissed the wrongful termination claim.

Takeaways for Employers

Employers must ensure that their employee is entitled to abstain from working for 24 hours on a statutory rest day. Any constraint that the employer imposes on what the employee may do during those 24 hours (e.g., the employee must be on standby to answer work calls, report for duty within a specified timeframe or must not consume alcohol), may disqualify it as being a statutory rest day.

Failure to grant at least one statutory rest day in every period of seven days is an offence. The EO does not require an employer to pay for a statutory rest day; that is a matter for the parties' agreement. However, uncertainty about the appointment of statutory rest days as well as whether those days are paid, can give rise to potential claims (and criminal liability), as the above case

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illustrates. Another area where liability may arise is if the employer grants more than one rest day in a period of seven days, say, two days off, and it is unclear which of those two days off is the statutory rest day. In this scenario, there may be a risk that both days may be treated as statutory rest days. This may give rise to additional liability if, for example, a statutory holiday falls on one of those two statutory rest days and the employer would need to grant another day off. Therefore, it is important for employers to appoint the statutory rest day clearly and set out whether it is paid, and if yes, how much will be paid for that day.

Summary dismissal is a serious step for employers to take against an employee. The courts regard it as akin to capital punishment (in the employment law world) as it deprives the employee of various entitlements, such as wages in lieu of notice. An employee is more likely to sue the employer not only to clear their name but also to recover the amounts they have been deprived of because of the summary dismissal. Employers should consider whether it makes commercial sense to summarily dismiss an employee, given the time and financial costs of defending a claim made by an employee will often be greater than the amount of wages in lieu of notice required to terminate the employee by notice. Of course, there may be situations where the employer must proceed with summary dismissal (e.g., when there is a statutory prohibition on terminating an employee entitled to statutory sickness allowance by notice). In those situations the employer should ensure that it has cogent evidence to support the summary dismissal before proceeding.

The judgment is available at the following link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133147&currpage=T

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Hong Kong Government Launches Greater Bay Area Youth Employment Scheme

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The Government has launched the Greater Bay Area Youth Employment Scheme (the "Scheme"), one of the measures announced during the Chief Executive's 2020 Policy Address to create employment opportunities for university graduates. The Scheme provides 2,000 places, with approximately 700 designated for innovation and technology (I&T) posts. Enterprises participating in the Scheme can apply for a monthly allowance for each eligible graduate.

The Scheme entails a cross-border employment arrangement under a Hong Kong contract. As such, apart from the obligations under the relevant Hong Kong legislation including the Employment Ordinance (e.g. to provide the statutory leave benefits) and Occupational Safety and Health Ordinance (e.g. to provide a safe and healthy work environment), employers will also need to comply with any applicable local PRC law. It is important that employers seek legal and tax advice to understand their obligations and structure the arrangement appropriately before sending the employees to work in GBA Mainland cities.

The Scheme's guidelines for employers are available at: https://www2.jobs.gov.hk/0/Doc/information/en/gbayes/gbayes_guidelines_en.pdf

For general guidance, the Labour Department has also published a guide for Hong Kong people who plan to work in the Mainland, which is available at: https://www2.jobs.gov.hk/0/en/information/Mainland/Guide/

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Hong Kong's Statutory Minimum Wage Remains at HK$37.50 Per Hour

The statutory minimum wage (SMW) rate will remain at HK$37.50 per hour following a review by the Minimum Wage Commission. Such rate will continue

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to apply until 30 April 2023 where the next round of review will be conducted in October 2022.

In determining the SMW rate, the Minimum Wage Commission took into account a wide range of factors, including the general economic conditions, labour market conditions, social inclusion and the views of members of the public and stakeholders. The key objective is to strike an appropriate balance between forestalling excessively low wages and minimising the loss of low-paid jobs and to sustain Hong Kong's economic growth and competitiveness.

In light of the contraction of the Hong Kong economy with a business outlook clouded by uncertainties and unemployment and having considered the potential impact on the earnings of the low-paid employees and the operation costs of the businesses, the Minimum Wage Commission recommended, for the first time since its implementation in 2011, that the prevailing SMW rate be frozen.

Employers are reminded of their legal obligations under the Minimum Wage Ordinance (Cap 608). In particular, employers must ensure their employees are paid not less than the SMW, failing which it may give rise to both civil and criminal liabilities.

The 2020 Report of Commission is available at: https://www.mwc.org.hk/en/downloadable_materials/2020_Report_of_the_Minimum_Wage_Commission_en.pdf

The government's press release on minimum wage is available at: https://www.info.gov.hk/gia/general/202102/02/P2021020200476.htm

HONG KONG
5 MAR
2021

Employment (Amendment) Bill 202 Gazetted - Five More Statutory Holidays by 2030

Hong Kong's Employment (Amendment) Bill 2021 (the "Bill"), which seeks to increase the number of statutory holidays under the Employment Ordinance, was gazetted on 5 March 2021.

Under the Bill, the number of statutory holidays will increase from 12 days to 17 days progressively from 2022 to 2030. These five new statutory holidays are:

1. The Birthday of Buddha, being the eighth day of the fourth lunar month (starting from 1 January 2022);
2. The first weekday after Christmas Day (starting from 1 January 2024);
3. Easter Monday (starting from 1 January 2026);
4. Good Friday (starting from 1 January 2028); and
5. The day following Good Friday (starting from 1 January 2030).

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HONG KONG
17 MAR
2021

Passage of Anti-Breastfeeding Harassment Law in Hong Kong

The Legislative Council passed the Sex Discrimination (Amendment) Bill on 17 March 2021. It will amend the Sex Discrimination Ordinance to render it unlawful for a person to harass a breastfeeding woman. This new ordinance will work together with the protection against unlawful breastfeeding discrimination, which was introduced under the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020.

Both of the above ordinances will come into force on 19 June 2021.

The Sex Discrimination (Amendment) Ordinance 2021 is available at: https://www.gld.gov.hk/egazette/pdf/20212512/es1202125123.pdf

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HONG KONG
7 APR
2021

Reimbursement of Maternity Leave Pay Scheme in Hong Kong Opens for Applications

The Reimbursement of Maternity Leave Pay Scheme is now open for applications. Employers can apply for reimbursement of the statutory maternity leave pay paid to employees for the additional 11th to 14th weeks of maternity leave, subject to a cap of HK$80,000 per employee.

Background

The statutory maternity leave entitlement was increased from 10 weeks to 14 weeks from 11 December 2021. The current rate of statutory maternity leave pay is four-fifths of the employee's average daily wages, subject to a cap of HK$80,000 in respect of the 11th to 14th weeks of maternity leave.

After the payment of the 14 weeks' maternity leave pay, employers may apply for reimbursement of the statutory maternity leave pay paid in respect of the 11th to 14th weeks' maternity leave. The following requirements must be met for an application for reimbursement:

1. The employee relevant to the application is entitled to maternity leave and maternity leave pay under the Employment Ordinance;
2. The employee has taken her maternity leave and the employer (i.e. the applicant) has paid 14 weeks of maternity leave pay to the employee;
3. The employee's confinement occurs on or after 11 December 2020; and
4. The additional four weeks' maternity leave pay paid to the employee by the applicant has not been, and will not be, covered or subsidised by other government funding.

Applications can be made online through the Reimbursement Easy Portal at https://www.rmlps.gov.hk/home, or by email (enquiry@rmlps.hk), fax (+852 2178 0328) or post to the Scheme's service centre.

More details as to the application method and list of supporting documents required can be found at https://www.rmlps.gov.hk/howtoapply.

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HONG KONG
29 APR
2021

Typo Kills the Deal and Hong Kong Court Upholds Employee's Summary Dismissal

In張強 v. 思科系统有限公司 [2021] HKCFI 694, the Hong Kong Court of First Instance found that a typographical error in an agreement rendered the entire agreement void and dismissed the employee's claim that his summary dismissal was a wrongful termination.

Facts

The plaintiff employee was appointed to work for the defendant employer in Beijing in 2002. In 2005, the employee was told to relocate to Hong Kong and a relocation allowance as well as payment of certain expenses would be paid to him for that purpose. The relocation allowance was paid.

In September 2005, the employee wrote to the employer complaining about alleged incorrect grading, salary, job title and compensation from 2002 to 2005. To resolve the complaint, the employer provided a settlement offer to the employee who signed it (the "Settlement Agreement"). The employer later discovered that the Settlement Agreement stated a sum of "HK$64,4910.46" (rather than "HK$64,491.46" which was what the parties had agreed). Upon discovering the typo the employer sent a subsequent letter with updated terms to the employee to correct the stated sum but the employee did not sign this letter.

By April 2009 the employee had not relocated to Hong Kong and the employer directed the employee to do so, failing which he would be considered to be in breach of his employment contract. The employee made

Continued on Next Page

excuses and did not relocate as directed. In September 2009, the employee reported to the Hong Kong office for three days but left Hong Kong on the same day on all three occasions. In October 2009, the employer wrote to the employee to ask for his whereabouts and directed him to attend online meetings.

In November 2009, the employee told the employer that he was sick. The employer then asked him to provide a medical certificate and reminded him to contact his direct manager in relation to his absence. The employer told the employee that his medical certificate had been received on 6 January 2010. The employee's case was that he had submitted his medical certificate on 4 December 2009 but this evidence was rejected by the court.

On 8 December 2009, the employer sent a letter to the employee saying he had committed serious misconduct by being absent from work without authorisation and was liable to summary dismissal. The employee was eventually summarily dismissed on 11 December 2009.

Claims

The employee claimed a number of items against the employer including the original amount stated in the Settlement Agreement of HK$644,910.46 (based on a typo in the Settlement Agreement) and damages for wrongful termination of the employment contract.

Discussion and Decision

The two interesting issues for employers arising from the case are:

1. Whether the employee could recover the amount stated in the Settlement Agreement, and
2. Whether the employer had grounds to summarily dismiss the employee.

Dealing with each of these in turn.

1. Whether the employee could recover the amount stated in the Settlement Agreement

The Court found that, based on the evidence, the figure of "HK$64,4910.46" written into the Settlement Agreement was a mistake made by the employer when preparing the Settlement Agreement, and that the employer had no intention of making any offer with the sum of HK$644,910.46 included. The Court also found that the employee was aware of the misplaced comma in the amount stated in the Settlement Agreement, and should have known that the sum of "HK$64,4910.46" did not reflect the employer's intentions, and that this was a mistake.

A contract will not be concluded unless the parties agreed on its material terms. If the offeree knows that the offeror did not intend the terms of the offer, they cannot bind the offeror to a contract by purporting to accept the offer. The Court found that the effect of the employer's unilateral mistake was that there was never a contract at all because there was an absence of consensus of the parties.

In the present case, the Court found that as the employee was aware of the mistake, there was no "meeting of the minds" to form a binding agreement and therefore the Settlement Agreement was unenforceable.

2. Whether the employer had grounds to summarily dismiss the employee

The employer relied on the cumulative effect of the following four series of events to justify the employee's summary dismissal:

1. The employee ignored the employer's instructions to relocate from Mainland China to Hong Kong,
2. The employee failed to comply with the employer's instructions to attend online meetings,

Continued on Next Page

3. The employee failed to answer questions relating to his whereabouts from a manager in his reporting line, and
4. The employee failed to show any reasonable excuse for his absence of more than a month.

The Court found that:

- The employer had given clear instructions to the employee that he had no role in Mainland China and had to relocate back to Hong Kong. However, the employee only spent short periods in Hong Kong before leaving and establishing a temporary home in Shenzhen.
- There were two occasions where the employee failed to comply with instructions to attend (online) Telepresence meetings.
- The employee's refusal to answer his manager's questions about his whereabouts demonstrated "wilful defiance".
- The reasons that the employee gave for his absence were not believable. Those reasons included that he was ill, he could no longer access his Gmail account, he did not notice the four emails from his employer and that he had no way of contacting his employer at all. The employee had been absent from work for an entire month, and although knowing that he was expected to contact his direct manager and provide medical certificates, he did nothing.

In deciding whether summary dismissal is justified, *"[what] must be looked for … is whether what has been done by an employee is something which is expressly or implied a repudiation of the fundamental terms of the contract such as to justify an instant dismissal"*.

In the Court's view, the employee's absence of more than one month without reasonable excuse (i.e. item (d) above) would have been sufficient to justify summary dismissal. However, all four matters taken into consideration rendered the employee's conduct even more serious, were impliedly repudiatory in nature, and justified the summary dismissal.

Lesson for Employers

Naturally no one wants to make a mistake by inserting the wrong amount into a settlement agreement. However, where it is clear that there has been a genuine mistake, there may be recourse available such as in the present case.

We do not get many reported cases dealing with summary dismissal since employers tend to choose to terminate by notice (even where they may have the right to summarily dismiss the employee). This is because:

- Summary dismissal is a very serious step to take and the Courts have said it is a capital punishment in that if the dismissal is justified the employee will be deprived of all the protection under the Employment Ordinance as well as the usual termination payments. As such, there will usually need to be cogent evidence to justify summary dismissal,
- From a practical perspective, summarily dismissing an employee will in essence force the employee to sue the employer to clear their name and recover their usual termination payments, and
- Commercially, the cost of defending a claim (both in terms of time and money) and also potentially having to deal with adverse publicity will perhaps in many instances likely be greater than giving the required notice and paying the employee their usual termination entitlements. In the case discussed above, the employee was summarily dismissed in 2009 and the judgment was only handed down by the Court of First Instance earlier this year, and so this demonstrates that a case can drag on for a very long time!

However, from time to time an employer may decide to summarily dismiss an employee, as in the present case.

The judgment
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Summary Dismissal Upheld of Employee Involved in Competing Business

Summary dismissal cases are usually interesting because of their facts, and even more interesting if one is upheld by the court. In *Cosme De Net Co Ltd v Lam Kin Ming* [2021] HKDC 445, the District Court upheld the summary dismissal of an employee who was involved in a competing business without his employer's knowledge and consent.

Fundamental Breach of Contract by Competing Can Justify Summary Dismissal

The employer operated an online trading business. The employee was employed as a senior business development manager in charge of the overall implementation of the employer's e-commerce business.

In early 2016, the employee approached members of the employer's marketplace team for details of the employer's sales through an online platform, including the uploading of its listings of products, item descriptions, customer services and contacts. The marketplace team members became suspicious since these technical matters were outside the scope of the employee's role. The marketplace team then searched and discovered an online store selling products the employer was also selling (the "Competing Business"). Most of the product images the Competing Business used were also almost identical to those the employer used which were created by hired professional photographers. Upon further investigation, the employee was found to be involved in the operation of the Competing Business.

The court accepted on the facts that the employee had set up a scheme where the employer's products were sold to the Competing Business at a low profit margin of less than 5% and sometimes at a loss. The Competing Business then sold these products.

The employer summarily dismissed the employee for breach of his contract of employment and fiduciary duty of good faith, and for infringement of the employer's intellectual property rights.

On 14 April 2016, the employee commenced proceedings in the Labour Tribunal for payment in lieu of notice, year-end payment (bonus) and damages for wrongful dismissal. On 20 April 2016, the employer commenced proceedings in the High Court in respect of the employee's engagement in a secret business and infringement of its intellectual property rights. The Labour Tribunal proceedings were subsequently transferred to the High Court and the two actions were consolidated and in turn transferred to the District Court.

The employer claimed against the employee for, among other things:

1. Damages, alternatively, liquidated damages pursuant to the contract of employment equivalent to one month's salary of the employee,
2. An account of profits received by the employee in breach of his fiduciary duty,
3. Damages for infringement of intellectual properties,
4. An injunction restraining the employee from further breach, and
5. An injunction mandating the delivery up of copies of the articles that infringed the employer's intellectual property rights and the destruction of all electronic copies of those articles.

The court held that the summary dismissal was justified.

The employee was held to have breached the implied terms of his contract of employment, the relevant intellectual property, business information and confidentiality clauses contained in the employment agreement and his fiduciary duty to act in good faith and the best interest of the employer.

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However, despite the employer succeeding in some of its claims, it was unable to recover any damages. There was no evidence of loss of business or customers as a result of the employee's breach. As for the liquidated damages provision in the employment agreement, it was set out under the post-termination restraint of trade clause and there was no breach of those clauses in the current case. On the claim for account of profits, it was found that the employee was not involved in a way that entitled him to a share of the financial gains from the Competing Business during its short period of operation.

The employer however was granted an injunction enjoining the employee or his servants or agents from using the employer's intellectual property, i.e., the images and descriptions of the product listings created by the employer and an injunction to return and destroy all copies of that property. These orders were of little practical consequence since the Competing Business had already ceased operation on the evidence.

Takeaways for Employers

1. Although there are duties of fidelity and good faith implied into every contract of employment, employers should consider setting out what these duties entail in the contract of employment, particularly for senior employees. This will not only manage the employee's expectations but also make it easier for the employer to refer to an express term where there has been a breach.
2. In the present case, fortunately, a member of the marketplace team followed up on the employee's suspicious request for data. Having clear roles within the business may help with this. It is also important for employers to have in place a process where issues and concerns can be raised and be investigated in a timely manner. The evidence gathered will help the employer to make informed decisions and, should the need arise, the evidence and credibility necessary to defend any summary dismissal claim.

The judgment
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HONG KONG
4 JUN
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Quarantine Exemptions and COVID-19 Vaccinations for the Hong Kong Financial and Insurance Industries: Who is Next?

The Hong Kong Monetary Authority (HKMA), Securities and Futures Commission (SFC) and Insurance Authority (IA) issued circulars setting out quarantine exemptions for certain individuals and encouraging vaccination of licensed individuals and other staff of regulated entities. The circulars raised a number of issues for employers including business continuity planning, employee health and safety, and personal data privacy considerations.

Exemption from Compulsory Quarantine Requirements

The 28 May 2021 circular issued by the SFC provides that fully vaccinated senior executives of licensed corporations (or overseas affiliates) may, upon meeting eligibility requirements, apply for an exemption from current compulsory quarantine arrangements when they return from overseas travel to Hong Kong (Exemption).

The scope of the Exemption is narrow and the requirements are onerous. Among other things:

1. The Exemption only applies to senior executives traveling primarily for the purpose of managing either the subject licensed corporation or the group entities for which they have responsibility;
2. As part of the application for the Exemption, a detailed itinerary of the proposed executive's entire trip (for a visiting executive) or throughout the entire medical surveillance period (for a returning executive) must be submitted to the SFC;

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3. Depending on the COVID-19 risk situation of the executives' previous locations, they must meet various pre-departure, upon arrival and post-arrival testing requirements;
4. Executives are required to either self-isolate or be subjected to medical surveillance for a period ranging from 14 to 21 days depending on their previous locations. **Executives who are subjected to self-isolation must stay at a designated quarantine hotel or an accommodation arranged by the sponsoring licensed corporation, except for certain permitted activities. Executives subjected to medical surveillance must limit their scope of activity in Hong Kong to certain permitted activities.**
5. The sponsoring licensed corporations are required to ensure compliance with the guidelines for vehicles providing point-to-point transportation.

While the proposal to open up Hong Kong for business is welcomed, it will be interesting to see how many will actually make use of the Exemption in light of these strict requirements.

Vaccination for Customer-facing and Critical Function Staff

The three regulators issued circulars on 1 June 2021 which targeted employees performing customer-facing or critical functions.

HKMA - The most far reaching is the HKMA's circular dated 1 June 2021 which requires all the authorized institutions (AI) to:

1. strongly encourage staff performing "client-facing roles or critical support functions" to get vaccinated;
2. identify and draw up a list of designated staff (Designated Staff1) who are expected to be inoculated, and produce to the HKMA by 14 June 2021 a breakdown by department or function of such Designated Staff;
3. request Designated Staff to get vaccinated as soon as possible; and
4. make arrangements for those who have not yet been vaccinated or are unfit for vaccination to undergo effective testing for COVID-192 every two weeks, with the first test to be completed by 30 June 2021.

While circulars from the HKMA are not mandatory in nature, non-compliance will reflect adversely on an AI and may be taken into account in determining whether an institution is fit to be an AI.

There are a number of issues an AI will need to consider in implementing the HKMA circular, including:

- **Does an employee have the right to challenge being identified as a Designated Staff?** In our view, no. The circular is directed at AIs and it is for the AI to discharge their obligations under the circular.
- **Does the AI need to identify the particular employee or the position of the Designated Staff?** In our view, the circular does not require the AI to identify the Designated Staff by name. According to some news reports, this is confirmed by the HKMA.
- **Can the AI direct Designated Staff to be vaccinated or tested?** Given the HKMA requirements under the circular, in our view, it would be a lawful and reasonable direction for an AI to direct an employee who is a Designated Staff to be vaccinated or submit to testing for COVID-19. Any failure by the employee to comply with this direction can give rise to potential disciplinary action by the employer.
- **Personal Data Privacy**: An AI will be collecting personal data of the Designated Staff in relation to vaccination and/or testing records, and so will need to ensure that it complies with the Personal Data (Privacy) Ordinance (Cap.486). Among other things, the AI should ensure it has an appropriate personal information collection statement.

Although the HKMA circular focusses on client-facing roles or critical support functions, the stated objective of the circular is to promote a high vaccination

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rate as part of the efforts towards the resumption of normal economic activities as well as facilitating business continuity planning. As such, in implementing the circular an AI should also consider employees other than Designated Staff and the message in the opening paragraph of the circular wherein the HKMA urges all AIs "to introduce additional effective measures to encourage all bank staff to get vaccinated".

SFC and IA - The SFC and IA issued circulars on 1 June 2021 to strongly encourage COVID-19 vaccination of staff.

Licensed corporations have been urged by the SFC to review their business continuity plans, identify functions which are critical to their business operations and client interest, and encourage staff performing such functions to get vaccinated; and to consider suitable arrangements for critical, non-vaccinated staff to undergo periodic testing.

In a similar vein, authorized insurers and responsible officers are encouraged by the IA to arrange for all staff and intermediaries who come into regular contact with customers, or who deliver critical functions, to be inoculated, while those who have not yet been vaccinated or are unfit for vaccination due to medication conditions should undergo periodic testing.

Who is Next?

Employers in other industries should take note of the circulars and what regulators are requesting of regulated entities in the financial and insurance industries in respect of COVID-19 vaccination and testing for those staff who are unvaccinated.

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Hong Kong Employment Law Ruling: Suspension of Duties Does Not Mean Suspension from Employment

In *Lengler Werner v Hong Kong Express Airways Ltd* [2021] HKCFI 1333, the Court of First Instance (CFI) confirmed that a suspension of duties during employment was not a suspension from employment under Section 11 of the Employment Ordinance (EO), which permits an employer in certain circumstances to suspend an employee from employment without notice or pay in lieu. In addition, the Court also held that just because the employee pilot was suspended from flying duties and did not receive overtime/ productivity bonus associated with flying duties, it did not mean that the employer had constructively dismissed the employee.

Background

The Respondent employee was employed by the Appellant employer as a pilot. He had a disputes with two other pilots and was suspended from flying duties pending the outcome of an internal investigation. After being told that warning letters would be issued to him, the Respondent resigned alleging that he was being constructively dismissed by the Respondent .

The employee lodged a claim against his employer at the Labour Tribunal seeking arrears of wages, wages in lieu of notice and overtime pay. The Labour Tribunal allowed the employee's claim, finding that he was entitled to rely on Section 11(2) of the EO to terminate the contract of employment without notice or payment in lieu; and that he had been constructively dismissed. The employer appealed to the CFI.

Issues

The key issues on appeal were:

1. Whether the Labour Tribunal erred in law by considering and applying Section 11 of the EO to the suspension of the employee's duties and by erroneously concluding that the employee was entitled to terminate his employment without notice under Section 11(2); and

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2. Whether the Labour Tribunal had erred in law in deciding that the employer had repudiated the employment contract and constructively dismissed the employee.

Discussion and Decision

Issue (1): Suspension from Employment without Notice or Payment in Lieu

There are limited circumstances under which an employer may suspend an employee's employment under Section 11(1) of the EO without notice or payment in lieu. They are: (a) as a disciplinary measure for any reason for which the employer could have terminated the contract of employment under Section 9 of the EO by way of summary dismissal; (b) pending a decision by the employer as to whether or not it will exercise the right to terminate the contract of employment under Section 9; or (c) pending the outcome of criminal proceedings in relation to the employee's employment.

Under Section 11(2), an employee who is suspended under Section 11(1) may at any time during the period of suspension terminate the contract of employment without notice or payment in lieu.

In considering whether Section 11(1) was applicable to this case, the judge drew a distinction between a *partial* suspension of some duties of the employee (in this case, the pilot's flying duties) and a "suspension from employment". To qualify for a "suspension from employment", the employee would not be required to do any work and the employer would not be required to pay the employee. In other words, the employee would be "suspended from his functions as an employed person". In the present case, it was decided that the pilot employee was not suspended from employment, but only *partially* suspended of his flying duties.

In view of the above, the judge decided that Section 11 did not apply in the present case and the employee was not entitled to rely upon Section 11(2) to terminate his employment without notice or payment in lieu.

Issue (2): Constructive Dismissal

When an employer does a repudiatory act, causing an employee to reasonably believe that it is impossible to continue to work for the employer, the employer's act may constitute 'constructive dismissal'.

In the Decision, the court considered that the employee's employment contract expressly provided that he "may be suspended from part of his duties" pending investigation or disciplinary action. The evidence before the CFI did not suggest that the employer had exercised its right to suspend the employee from his flying duties pending the investigation arbitrarily, capriciously or inequitably. Reduction in employee's income cannot be considered in isolation when determining whether there has been a repudiatory breach on the part of the employer. It was held that the drop in income had to be considered in conjunction with the issue of whether the employer was entitled to suspend part of the employee's duties.

Having regard to both the EO and the terms of employment, the judge took the view that as the employer was entitled to suspend the employee from part of his duties (i.e. flying duties), there was no repudiatory breach on its part. The claim for constructive dismissal could therefore not be supported.

Lesson for Employers

When suspending an employee, employers should be clear as to whether they are suspending the employee from their duties or from employment under Section 11(1) of the EO.

A suspension under Section 11(1) is only available in limited circumstances – and for a limited period of up to 14 days – if the suspension is not pending the outcome of criminal proceedings.

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While one advantage of a suspension under Section 11(1) is that the employer will not be required to pay wages or provide benefits under the contract of employment, a downside is that an employee can terminate the contract of employment at any time during the period of suspension without notice or payment in lieu under Section 11(2). As such, most employers will perhaps opt to suspend an employee from their duties, even when they may have grounds to suspend under Section 11(1).

However, a suspension from duties will need to be permissible under the contract of employment. To avoid dispute, employers should ensure that they expressly set out the right in the contract of employment to suspend the employee from their duties.

The judgment
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Breastfeeding Discrimination and Harassment Law in Hong Kong Commences 19 June 2021

The protection against unlawful breastfeeding discrimination and harassment under the Sex Discrimination Ordinance (SDO) in Hong Kong commenced on 19 June 2021.

The new breastfeeding discrimination and harassment law applies to a woman who is engaging in the act of breastfeeding a child or expressing breast milk, or a woman who feeds a child with her breastmilk even if the child may not be her biological child. The law gives protection to breastfeeding women in the context of employment; education; provision of goods, facilities or services; disposal or management of premises and clubs; and government activities.

There are two forms of unlawful breastfeeding discrimination under the SDO: direct and indirect. In the employment context:

- Direct discrimination means treating a breastfeeding employee less favourably than a non-breastfeeding employee in the same or not materially different circumstances on the ground that she is breastfeeding;
- Indirect discrimination arises when a condition or requirement is applied to employees equally but a smaller proportion of breastfeeding staff can comply compared to non-breastfeeding staff. The breastfeeding employees suffer a detriment as a result of the unjustifiable condition or requirement.

The SDO affords protection against breastfeeding harassment to employees as well as other workplace participants in a common workplace. These include contract workers, commission agents, firm partners, interns or volunteers. Breastfeeding harassment occurs when a person:

- Engages in an unwelcome conduct, which a reasonable person, having regard to all the circumstances, would anticipate that the breastfeeding woman would be offended, humiliated or intimidated by that conduct; or
- Alone, or with others, engages in a conduct which creates a hostile or intimidating environment for the breastfeeding woman.

For details of the new breastfeeding protection law, please see our recent Legal Updates: Changes to Hong Kong Discrimination Law and the Practical Considerations for Supporting Breastfeeding Employees in Hong Kong and our Guide to Discrimination Law in Hong Kong.

The Equal Opportunities Commission has also published the following guidance and leaflets to assist the public in understanding the new breastfeeding protection law:

- Guidance on Breastfeeding Discrimination and Harassment in Employment and Related Sector (April 2021);
- Leaflet on Breastfeeding Discrimination and Harassment in the Workplace.

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LOOKING BACK

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Employers should review and update their anti-discrimination and anti-harassment policies as well as the trainings they provide, to take account of the new breastfeeding protection law under the SDO.

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INDIA

31 DEC 2020

Draft model standing orders issued for public comments under the IR Code

The Industrial Employment (Standing Orders) Act, 1946 (**SO Act**) requires employers to formulate standing orders, which are essentially service rules pertaining to an establishment. In most states, the SO Act applies to 'industrial establishments' which employ / had employed 100 or more workmen on any day in the last 12 months. However, in a few states such as, Karnataka and Maharashtra, this threshold has been reduced 50 or more workmen. The obligation on employers (whose establishments are covered) is to draft standing orders and have them certified by the labour authorities.

State governments (which are the appropriate governments in case of private companies) have issued model standing orders (**MSO**), and employers are required to ensure that their draft standing orders are aligned with the MSO to the extent feasible. In most states, the MSO is deemed to be adopted until the certified standing orders are obtained.

The IR Code will increase the threshold for the applicability of provisions relating to standing orders. Under that Code, corresponding provisions will apply to industrial establishments (which includes commercial establishments) having 300 or more workers. Unlike the SO Act, under the IR Code, only the central government has the authority to issue MSO. Accordingly, in exercise of such authority, the central government has released draft sector-specific draft MSOs for **(1)** manufacturing sector, and **(2)** service sector.

The draft MSOs for both sectors provides include provisions on classification of workers, publication of working conditions, payment of wages, maintenance of service records, termination of employment, disciplinary action for misconduct, grievance redressal and complaints, etc.

The central government had provided 30 days' time (i.e., from 31 December 2020) to the public/stakeholder to provide their comments on the draft MSOs.

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INDIA

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Change in the expected implementation date of the labour codes, and release of draft state rules under the labour codes

The Indian government is in the process of consolidating 29 existing central labour laws into 4 labour codes. The prime objective of the consolidation has been to facilitate the ease of doing business, the use of technology, and to eliminate multiplicity and inconsistency of definitions across laws.

The Code on Wages, 2019 (**Wage Code**) was passed by the Parliament and approved by the President on 8 August 2019. The remaining three codes, viz. Industrial Relations Code, 2020 (**IR Code**), Code on Social Security, 2020 (**SS Code**) and Occupational Health, Safety and Working Conditions Code, 2020 (**OSH Code**) were passed by the Parliament and were approved by the President on 28 September 2020. However, all four codes are yet to come into effect on a date to be notified by the central government. In accordance with the labour ministry's announcement last year, the codes were proposed to come into effect from 1 April 2021. However, since many state governments are yet to publish their respective rules under the four codes, the implementation date has been delayed. There is no clarity on the specific date for implementation - that said, they are expected to come into effect later in 2021.

Some states have released their draft state rules under some or all of the 4 labour codes.

a. Draft State Rules for Wage Code:

The state governments of Jammu & Kashmir, Bihar, Uttar Pradesh, Karnataka and Odisha have released the draft state rules under the Wage Code, for

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INDIA

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public comments. The draft rules, once finalized, will subsume the respective state rules under the subsumed laws. The Draft State Wage Code Rules provide manner of calculating and paying minimum wages, working conditions i.e. working hours, overtime, leave, etc., salary deductions and recovery of excess deductions, setting up a state advisory board, timely payment of wages, claims and dues, maintenance and filing of specific forms, registers and records.

b. Draft State Rules for Social Security Code:

The state governments of Jammu & Kashmir, Bihar, Uttar Pradesh have released the state rules under the Social Security Code, for public comments. The draft rules, once finalized, will subsume the respective state rules under the subsumed laws. The Draft State Social Security Code Rules provide for rules regarding setting up of Social Security boards/organizations, composition of Employee Insurance Courts (for disputes regarding Employees' State Insurance), manner of making an application to receive gratuity payments, social security for building and other construction workers, relevant authorities and compliances under the Social Security Code, manner of compounding offence, etc.

c. Draft State Rules for Industrial Relations Code:

The state governments of Madhya Pradesh and Uttarakhand have released the state rules under the Social Security Code, for public comments. The draft rules, once finalized, will subsume the respective state rules under the subsumed laws. The Draft State Social Security Code Rules provide for procedural rules regarding constitution of works committee, trade unions, standing orders, notice of change, mechanism of resolution of trade disputes, strikes and lock-outs, lay-off, retrenchment and closure, remittances to the worker-reskilling fund (a newly introduced contribution which an employer is required to make to in case of retrenchment or termination), etc.

d. Draft State Rules for Occupational Safety, Health and Working Conditions Code:

The state government of Uttarakhand has released the state rules under the Occupational Safety, Health and Working Conditions Code (**OSH Code**), for public comments. The draft rules, once finalized, will subsume the respective state rules under the subsumed laws. The draft state rules on OSH Code provides for rules on, among other things, constitution of advisory committee, specific committee on health and safety, working conditions, special provisions for employment of women, contract labour and inter-state migrant workers, social security fund, standard of health and safety in use of equipment and conducting industrial processes, maintenance of statutory documents, offences and penalties for non-compliance, etc.

Public and stakeholder comments can be submitted to the respective state governments on the provisions proposed under the draft rules. Such comments can be provided within a window of 30 to 45 days from the date of publication of the draft rules. The state governments will review the comments received by various stakeholder, assess the scope for making changes/revisions to the rules, and thereafter publish the final rules under the codes. Draft state rules under the other state governments are expected to be issued in the coming months.

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Guidelines on preventive and response measures at workplace.

In June 2020, MoHFW had issued guidelines outlining the preventive and responsive measures to be observed to contain the spread of COVID-19 in office. However, MoHFW has issued a revised set of guidelines on the same.

The revised guidelines are applicable to offices and other workplaces with a view to prevent the spread of infection due to employees working together in relatively close settings and shared workspaces. The guidelines provide for:

- general preventive measures like social distancing, hand hygiene, use of face masks, thermal scanning at the entrance, disinfection, avoidance of physical gathering etc.,
- specific measures like advising employees at higher risk i.e. older employees, pregnant employees, and employees who have underlying medical conditions, meetings as far as possible should be done through video conferencing, etc.
- responsive measures for occurrence of symptomatic cases at the workplace - that is it requires employers to immediately isolate the symptomatic person and provide her/him with face covers, call the nearest health authorities, etc.

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INDIA
15 FEB 2021

Exemption from and Online Self-Certification for labour law compliances in Telangana

The Government of India has suggested the state governments to examine various legislations for rationalizing and simplifying the existing process of implementation of those legislations. This was aimed at minimizing the burden of regulatory compliance to the industries for the Ease of Doing Business initiative. Pursuant to the central government's suggestions, the Telangana State Government has:

a. granted exemption to establishments in the state from maintaining certain records and registers, requirements on displaying abstracts, allowed preservation of electronic records under various employment laws, including laws on shops and establishment, labour welfare fund, national and festival holidays, contract labour, inter state migrant workmen, minimum wages, SO Act, maternity benefit, etc..
b. permitted online self-certification in respect of the certain compliances under the said state and central laws.

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Revised Guidelines on International Arrivals

The Ministry of Health and Family Welfare (MoHFW) has issued revised guidelines on international arrivals (MoHFW Revised Guidelines) in supersession of the earlier guidelines dated 2 August 2020.

The MoHFW Revised Guidelines require/provide that the following -

- travellers to submit a negative RT PCR test report on arrival or undergoing a RT-PCR test using the facility at the airport. There would be no obligation to quarantine (institutional or home) for travellers that submit a negative RT PCR test (conducted 72 hours prior to the journey) report on the airport portal, or the travellers opting RT-PCR test facility at the airport. However, they are still required to self-monitor their health.
- Travellers found to be symptomatic during screening on arrival at the airport will have to undergo 7 days' institutional quarantine, and/or home quarantine as per the order of the authorities and the existing protocol.
- Travellers may seek an exemption from submitting a negative RT-PCR test report on arrival if the reasons for arrival in India is death in family However, such traveler will require to submit their test sample at the airport before exiting the airport.

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There are also some variations for in the guidelines applicable to international travellers arriving from Europe, United Kingdom, Middle East, South Africa and Brazil. The MHA Revised Guidelines provide that international travellers from arriving from these countries would be required to undergo molecular testing and quarantine (home or institutional) according to the orders from the authority.

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Increase in the annual leave carry forward limit under the Karnataka Shops and Commercial Establishments Act, 1961 (Karnataka S&E Act)

The Karnataka S&E Act governs the working conditions of employees working in commercial establishments in the state of Karnataka.

Prior to the amendment, the Karnataka S&E Act provided for carry forward of up to 30 days' unused annual leave to the succeeding year. However, by an amendment on 19 February 2021, the Karnataka state government has increased this limit to 45 days. Given this, employees in shops and commercial establishments in Karnataka will be able to carry forward up to 45 days of unused annual leave.

The term 'year' under the Karnataka S&E Act is defined as a year commencing on 1 January. Given this, the impact of the amendment would become relevant when employees carry forward annual leaves from 2021 to 2022. However, organizations for which the leave calendar operates on a financial year (April to March) basis would need to be mindful that the increased threshold applies from February 2021.

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2021

Reservation/quota under for local candidates under the Haryana State Employment of Local Candidates Act, 2021 (Local Candidates Act)

The Haryana State Legislative Assembly passed the Haryana State Employment of Local Candidates Bill, 2020 (Bill) on 5 November 2020. It was approved by the Governor on 26 February 2021, and the Local Candidates Act was published in the state gazette on 2 March 2021. It will come into effect on a date to be notified by the state government.

On coming into effect, the Local Candidates Act would apply to private companies, partnership firms, limited liability partnerships, etc. employing 10 or more employees, and would require them to provide 75% quota for locally domiciled candidates in posts where the gross monthly salary is INR 50,000 or less (or such other amount that may be notified by the State government). There is a provision for employers to claim an exemption from the reservation requirement if adequate local candidates of the required skill, qualification or proficiency are unavailable.

In order to be eligible for a reservation, a local candidate is required to register herself / himself on a designation government portal. There would also be an obligation on private employers to **(a)** register every employee earning a gross monthly salary of INR 50,000 or less on the government portal; and **(b)** submit a quarterly report with details of the local candidates employed by them during that quarter.

Non-compliance with this reservation obligation could be penalized with a monetary fine in the range between INR 50,000 to INR 2,00,000 (USD 700 to USD 2800) in the first instance.

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Guidelines for Testing, Tracking and Treating of Coronavirus

As part of its continued response to containing the coronavirus pandemic (COVID-19), the Ministry of Home Affairs (MHA) has issued new guidelines for testing, tracking and treating the virus (**TTT Guidelines**). These guidelines, which are applicable till the end of April 2021, permit all activities outside (micro) containment zones.

Standard Operation Procedures (SOPs) have been issued by various ministries in relation to reopening of schools, higher educational institutions, air travel metro rails, shopping malls, hotels, restaurants and hospitality services, religious places, yoga and training institutes, gymnasiums, cinema halls, assemblies, congregations, etc. All such activities are permitted outside containment zones under the TTT Guidelines, subject to compliance with the relevant SOPs issued by the central government and/or relevant state or union territory.

In the earlier guidelines (in recent months), the MHA had directed state governments to not impose any lockdown outside containment zones at the state, district, or city levels (without consulting the central government). However, in light of latest surge in positive cases, the TTT guidelines allow state governments to impose local restrictions at district/sub-district/ and city/ ward level, with a view to contain the spread of COVID-19. District authorities can, in vulnerable and high incidence areas, demarcate containment zones at a micro level in their jurisdictions (based on parameters prescribed by MoHFW). Micro-containment zones would, for example be, an apartment building where a positive case is identified. Movement of people in and out of the (micro) containment zones is restricted, except for medical emergencies and essential services.

Further, State Governments and Union Territory Administrations are required to strictly enforce/ensure the following:

- Maximum testing, demarcation of containment zones, and quick isolation and treatment
- Strict perimeter control, and surveillance in the containment zones - only essential services should be allowed in the containment zone.
- COVID appropriate behaviour i.e. preventive measures such as, maintaining social distancing, wearing face masks, hand hygiene, etc. by citizens.
- Strict adherence of the SOP prescribed by various ministries for each activity
- Adequate vaccination measures for all the priority groups.

Further, the TTT Guidelines require State governments and Union Territories to strictly enforce the 'National Directives for COVID-19 Management'. The National Directives mandate the following for workplaces -

- Work-from-home, to the extent possible;
- Compulsory usage of face covers (masks) at the workplace;
- Ensuring thermal scanning at all entry exit points of the workplace;
- Having staggered work / business hours, lunch breaks, and shifts;
- Providing hand wash and sanitizers;
- Frequently sanitizing the workplace, all common facilities and points which come into human contact (such as door handles) including between shifts.
- Ensuring adequate social distancing at all times.

Since all activities are permitted outside containment zones under the TTT guidelines, the opening of private offices with full staff capacity would be allowed under those guidelines. However, given the spike of positive cases in recent weeks, a few state governments such as, Maharashtra and Delhi have ordered additional preventive measures till 30 April 2021.

Accordingly, in Maharashtra, private offices are required to remain closed till 30 April 2021 (except few essential services such as private banks, telecom service providers, insurance companies, pharmaceutical companies etc). In Delhi, a night curfew has been imposed (between 10 pm to 5 am). However,

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exemptions are given to some establishments from the night curfew - such as, telecommunications, IT/ITES services, internet services, broadcasting services, banks, private security services, etc.

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WAGE CODE

31 MAR

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SS CODE

1, 25 MAR

3 JUN

IR CODE

5, 31 MAR

3, 4 MAY

OSH CODE

9, 23 MAR

15 APR

17 MAY

2021

Ministry of Labour and Employment is targeting October 2021 for implementing the labour codes

The four labour codes i.e. Code on Wages, 2019 (**Wage Code**), Industrial Relations Code, 2020 (**IR Code**), Code on Social Security, 2020 (**SS Code**) and Occupational Health, Safety and Working Conditions Code, 2020 (**OSH Code**) were passed by the Parliament and were granted Presidential assent in September 2020 - however, they are yet to come into effect on a date to be notified by the central government. The codes were initially expected to come into effect on 1 April 2021. However, as many state governments are still in the process of drafting and publishing their respective state rules under the four codes, and since the governments' focus shifted towards containing the pandemic, the implementation date of the codes has been delayed. At present, there is no clarity on the specific date for implementation - that said, based on recent news reports, the Ministry of Labour and Employment is now targeting October 2021 for implementing the codes.

Meanwhile, a few state governments and the central government have released rules under some or all of the 4 labour codes. Public and stakeholder comments on the above draft rules can be submitted to the state governments and central government that has released the respective rules. The rules provide for a window of 30 to 45 days from the date of publication of the draft rules for submitting the public/stakeholder comments. The relevant state government or central (as the case may be) will review the comments received by various stakeholder, assess the scope for making changes/revisions to the rules, and thereafter publish the final rules under the codes. The draft rules, once published, will subsume the respective central and state rules under the subsumed laws. Draft state rules under the other state governments are expected to be issued in the coming months.

a. Draft State Rules for Wage Code:

The state governments of Punjab and Gujarat have released the draft state rules under the Wage Code, for public comments. The Draft State Wage Code Rules provide manner of calculating and paying minimum wages, working conditions i.e. working hours, overtime, leave, etc., salary deductions and recovery of excess deductions, setting up a state advisory board, timely payment of wages, claims and dues, maintenance and filing of specific forms, registers and records.

b. Draft Central and State Rules for SS Code:

The central government has released its draft employees' compensation rules under the under the SS Code, for public comments. The draft rules provide for procedural rules for claiming compensation towards accidents and injuries taken place at the workplace.

Further, the state governments of Punjab and Madhya Pradesh have released the state rules under the SS Code, for public comments. The Draft State SS Code Rules provide for rules regarding setting up of Social Security boards/ organizations, composition of Employee Insurance Courts (for disputes regarding Employees' State Insurance), manner of making an application to receive gratuity payments, social security for building and other construction workers, relevant authorities and compliances under the Social Security Code, manner of compounding offence, etc.

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WAGE CODE

31 MAR

2 APR

SS CODE

1, 25 MAR

3 JUN

IR CODE

5, 31 MAR

3, 4 MAY

OSH CODE

9, 23 MAR

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c. Draft Central and State Rules for IR Code:

The central government has released its draft trade union rules under the under the IR Code, for public comments. The draft rules provide for procedural rules regarding recognition of negotiating trade union or council, manner of verifying its members and facilities to be provided by the industrial establishment.

Further, the state governments of Karnataka, Punjab and Gujarat have released the state rules under the IR Code, for public comments. The Draft State IR Code Rules provide for procedural rules regarding constitution of works committee, trade unions, standing orders, notice of change, mechanism of resolution of trade disputes, strikes and lock-outs, lay-off, retrenchment and closure, remittances to the worker-reskilling fund (a newly introduced contribution which an employer is required to make to in case of retrenchment or termination), etc.

d. Draft State Rules for OSH Code:

The central government has released its draft rules on the technical committees under the under the OSH Code, for public comments. The draft rules provide for procedural rules regarding constitution of technical committees and its membership requirements

Further, the state governments of Uttar Pradesh, Madhya Pradesh and Punjab have released the state rules under the OSH Code for public comments. The draft state rules on OSH Code provides for rules on, among other things, constitution of advisory committee, specific committee on health and safety, working conditions, special provisions for employment of women, contract labour and inter-state migrant workers, social security fund, standard of health and safety in use of equipment and conducting industrial processes, maintenance of statutory documents, offences and penalties for non-compliance, etc.

Link 1 *Link 2* *Link 3* *Link 4* *Link 5*
Link 6 *Link 7* *Link 8* *Link 9* *Link 10*
Link 11 *Link 12* *Link 13*

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31 MAR

2021

Maharashtra Government notifies appellate authority under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**POSH Act**) if any person is aggrieved by the recommendations of the internal committee, they can avail the option of preferring an appeal before the appellate authority as notified by the state government under the Industrial Employment (Standing Orders) Act, 1946 (**SO Act**). The Maharashtra Government had not notified this appellate authority and the absence of such notification was questioned by the Bombay High Court in *Dasharath Kallappa Bhosale v State of Maharashtra & Others (Writ Petition Number 786 of 2021)*. The Bombay High Court *vide* its order dated 11 March 2021 directed an affidavit to be filed to the concerned officer to clarify whether a notification had been issued to notify the appellate authority as under POSH Act, and if not, the time frame within which the notification would be issued. Following the order of the Bombay High Court, the Maharashtra government notified the appellate authority under the SO Act.

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2021

Contributions to the Labour Welfare Fund is to be paid online in Haryana

Labour and Employment Department of Haryana has amended the Punjab Labour Welfare Fund Act, 1965 by substituting Section 9A(2). Earlier, under Section 9A(2) employers had to make contributions to the fund bi-annually in

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April and October through a crossed cheque or demand draft. Pursuant to the amendment, all employers in Haryana are now required to make contributions only once a year before December 31 and only through the online mode.

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COVID-19 vaccination at workplace, vaccination guidelines for pregnant and lactating women and administering second dose to international travellers

The Ministry of Health and Family Welfare (**MoHFW**) *vide* its notification dated 6 April 2021 permitted vaccination to be organised through workplaces both public and private from 11 April 2021. However, MoHFW had limited the provision of vaccination to only those employees that were above the age of 45. No outsiders including eligible family member were permitted to participate in the vaccination drive organised at workplaces. This notification was subsequently modified twice - first, on 19 May 2021 to permit vaccination at the workplace for all employees above 18, and second, on 21 May 2021 to permit vaccination all eligible family members and dependents (as defined by the employer) of the employees to be vaccinated at the workplace.

In order to implement this, employers must set up a workplace COVID-19 vaccination centre (**Workplace CVC**) and register it on the government portal COWIN. Further, each Workplace CVC must be tied up with a private hospital which will procure vaccines and administer it at the Workplace CVC.

Further, it is relevant to note that at first, the MoHFW had not permitted pregnant lactating women to receive the COVID-19 vaccine. Subsequently, the National Technical Advisory Group on Immunization (**NTAGI**), a technical committee on immunization under the MoHFW has recommended that all pregnant women have to be first informed of the risks and benefits associated with the vaccine and based on such information, a pregnant woman may be offered the vaccine at the nearest centre. However, the NTAGI has clarified that all lactating women are eligible to receive the COVID-19 vaccines any time after delivery.

In addition to the above, the MoHFW has given special dispensation to (i) Students who have to undertake foreign travel for the purposes of education; (ii) Persons who have to take up jobs in foreign countries and (iii) Athletes, Sportspersons and accompanying staff of Indian contingent attending International Olympic Games to be held in Tokyo, wherein these special category of individuals will be permitted to obtain their second dose of Covishield vaccine earlier i.e. before completion of the 84 day interval period in order to enable them to travel internationally for the purposes identified above. This dispensation has been extended till 31 August 2021 only.

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Increase in the minimum and maximum assurance benefit under the Employees' Deposit Linked Insurance Scheme, 1976

The Employees' Deposit-Linked Insurance Scheme, 1976 (**EDLI Scheme**) provides an insurance cover to be paid to the employee's nominee on the death of the employee during employment. The Ministry of Labour and Employment through its gazette notification dated 28 April 2021 has amended the EDLI Scheme. The amendment has increased the maximum assurance benefit under the Scheme from INR 600000 (~USD 8000) to INR 700000 (~USD 9500).

Further, a prior notification dated 15 April 2018 that had increased the minimum assurance benefit to INR 250000 (~USD 3500) for a period of two

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years, had expired on 14 February 2020. To give continuity to the said benefit, the present amendment has extended the benefit retrospectively with effect from 15 February 2020 thereby increasing the minimum assurance benefit to INR 250000.

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Guidelines for Testing, Tracking and Treating of Coronavirus

As part of its continued response to containing the coronavirus pandemic (**COVID-19**), the Ministry of Home Affairs (**MHA**) has issued new containment framework (**Framework**). This Framework is applicable till the end of June 2021 and direct states and union territories to implement the following directions:

- Individual obligations of wearing masks, maintaining 6 feet of distance, sanitizing hands frequently and not attending mass gatherings will continue;
- Imposition of night curfew to restrict movement of individuals except for essential activities. The duration of the night curfew hours will be determined by local authorities;
- Complete prohibition of social/ political/ sports/ entertainment/ academic/ cultural/ religious/ festival-related and other gatherings and congregations, at all times;
- Essential services and activities such as healthcare, police, fire, banks, electricity, water, sanitation including all incidental and related activities must continue;
- No restriction on inter-state and intra-state movement including transportation of essential goods;
- Public transport to operate at maximum 50% capacity;
- All offices (including private offices) can function at a maximum staff strength of 50%;
- Districts to continue the strategy of 'test-track-treat-vaccinate' and implementation of COVID-19 appropriate behaviour;
- 100% vaccination for all eligible groups.

Further, the Framework require State governments and Union Territories to strictly enforce the 'National Directives for COVID-19 Management'. The National Directives mandate the following for workplaces -

- Work-from-home, to the extent possible;
- Compulsory usage of face covers (masks) at the workplace;
- Ensuring thermal scanning at all entry exit points of the workplace;
- Having staggered work / business hours, lunch breaks, and shifts;
- Providing hand wash and sanitizers;
- Frequently sanitizing the workplace, all common facilities and points which come into human contact (such as door handles) including between shifts.
- Ensuring adequate social distancing at all times.

Given the spike in COVID-19 cases during the second wave, most states in India were under a strict lockdown till the end of May. Accordingly, private offices remained closed and movement within states were restricted. However, since the beginning of June 2021, some states have started easing in their lockdown restrictions depending on the number of active cases in their respective states.

Each state has adopted its own specific approach in reopening activities within the state. For example, in Maharashtra each municipal area is treated as a separate administrative unit. The administrative units are categorised into levels based on the positivity rate and availability of oxygen beds. The higher the level number, the more restrictions will be placed. In level 1 and 2 administrative units all private office can function at 100% capacity. Level 3

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can function till 4 pm at 50% capacity. Level 4 and 5 only certain exempted categories of private office can function at 25% and 15% capacity respectively.

Similarly, in Karnataka, districts are categorised into three categories based on positivity rate- In Category 1 districts i.e. with positivity rate less than 5%, private offices can function with a maximum strength of 50% subject to following COVID-19 appropriate behaviour. This is not permitted in the other two categories.

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2021

Implementation of Section 142 of the Code on Social Security, 2020 and its interpretation by various government agencies

The central government on 30 April 2021 notified Section 142 of the Code on Social Security, 2020 (**SS Code**) with effect from 3 May 2021. Section 142 mandates individuals receiving benefits under the SS Code to establish their identity through Aadhaar. Pursuant to this, government agencies such as the Employee' State Insurance Corporation (**ESIC**) and Employees' Provident Fund Organization (**EPFO**) have issued circulars on the implementation of Section 142 within their agencies.

a. Circular issued by ESIC:

The ESIC issued a circular dated 20 May 2021 clarifying that since provisions relating to Employees' State Insurance Scheme under the SS Code are yet to be made effective, requirement of Aadhaar for availing benefits under the provisions of the existing Employees' State Insurance Act, 1948 (**ESI Act**) is not mandatory.

b. Circulars issued by EPFO:

The EPFO issued a circular dated 1 June 2021 mandating requirement of Aadhaar to make contributions under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (**EPF Act**) with immediate effect. This circular was met with much criticism for coming into effect immediately and not providing sufficient time for employers to make necessary adjustments. This led to employer organisations filing representations before the EPFO and even filing writ petition before the Delhi High Court requesting to defer the implementation date in order to enable employees to obtain Aadhaar number. Subsequently, the EPFO issued another circular dated 15 June 2021 partially modifying the first circular by deferring the date of implementation to 1 September 2021.

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Central Government advisory to state governments and employers to permit nursing mothers to work from home

The Ministry of Labour and Employment has issued an advisory to all state governments and employers to permit nursing mothers to work from home, wherever the nature of work allows, for a period of one year from the date of birth of the child. The reason being that nursing mothers are highly vulnerable to COVID-19 and there is a need to protect them and their infants from the second wave of COVID-19 in India. This advisory is set against the backdrop of Section 5(5) of the Maternity Benefits Act, 1961 (**MB Act**) which enables nursing mothers to work from home even after the period of maternity leave, on such conditions agreed between the employer and nursing mother, if the nature of work is such that it can be performed from home. The Ministry further requests the state governments to create awareness within their states and encourage employers to implement the provisions of Section 5(5) of the MB Act.

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2021

ESIC COVID-19 Relief Scheme

The Employee' State Insurance Corporation (**ESIC**) has introduced a new scheme called the ESIC COVID-19 Relief Scheme to provide monetary assistance to the family members of those persons that qualify as employees under Section 2 (9) of the Employees' State Insurance Act, 1948 (**ESI Act**) and have died due to COVID-19. This scheme also extends relief to the family members of those employees that die within 30 days of recovery from COVID-19.

Eligibility criteria under this scheme- employees that are (i) registered on the ESIC online portal at least 3 months prior to their COVID-19 diagnosis, (ii) in employment on the date of diagnosis and (iii) contributions for at least 70 days have been paid or payable during the period of 1 year preceding diagnosis. If any employee falls short of the requirement of 70 days of contribution and was under the maternity benefit, extended sickness benefit or temporary disablement benefit, then the number of days the employee was under any of these benefits will be counted for determining their eligibility.

Dependents include spouse, legitimate or adopted son and daughter and widowed mother. If the deceased employee is not survived by any of these relations then, it can be extended to parents other than widowed mother, illegitimate children, minor sibling, widowed daughter-in-law etc.

Relief - 90% of the average daily wages will be considered as the full rate of relief and will be paid to the dependents as follows- 3/5th of the full rate to spouse, 2/5th of the full rate to each legitimate or adopted child and 2/5th of the full rate to the widowed mother. If the total relief distributed exceeds the full rate, then each share will be reduced proportionately. Minimum relief will be INR 1800 per month.

Procedure - the claimant must file form CRS-I along with COVID-19 positive test report and death certificate to the nearest ESIC branch office. The regional director or sub-regional office in charge shall decide each claim within 15 days. Detailed instruction on implementation of the scheme will be issued separately.

The ESIC on 15 June 2021 has notified the scheme and invited for public comments and suggestions on the scheme for a period of 30 days.

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2021

Amendments to the Pension Fund Regulatory and Development Authority Regulations

The National Pension System is (**NPS**) is contribution pension system whereby subscribers' contributions are collected and accumulated in their individual pension account. These individual contributions are then pooled together to establish a pension fund which is invested as per the approved investment guidelines. The return on these investments are used to pay the monthly or any other periodical pension to its subscribers. The NPS is regulated by the Pension Fund Regulatory and Development Authority (**PFRDA**) and the funds are managed by the NPS Trust. The PFRDA issued five gazette notifications on 14 June 2021 to amend the following regulations:

(i) Pension Fund Regulatory and Development Authority (Exits and Withdrawals under the National Pension System) Regulations, 2015

(ii) Pension Fund Regulatory and Development Authority (National Pension System Trust) Regulations, 2015

(iii) Pension Fund Regulatory and Development Authority (Central Recordkeeping Agency) Regulations, 2015

(iv) Pension Fund Regulatory and Development Authority (Point of Presence) Regulations, 2018

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LOOKING BACK

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The relevant changes are highlighted below:

a. **Increasing the withdrawal limit**- Prior to the amendment the subscribers upon attaining the age of 60 or superannuation can withdraw the entire pension wealth if the total amount was INR 2,00,000 or less. This upper limit has now been increased to INR 5,00,000.

b. **Condition subject to which purchase of annuity can be deferred**- Prior to the amendment, the subscriber can defer purchase of annuity for a maximum period of 3 years provided the subscribers issues a prior written notice. The amendment has imposed an additional condition whereby, if the subscriber dies before the arrival of due date to purchase annuity, then the entire pension wealth will be paid to the nominee or legal heir.

c. **NPS Trust**- Pursuant to the amendment, the functions and responsibilities of the NPS Trust have been increased. The NPS Trust can now settle claims of subscribers, collect subscription fees, monitoring investment management activities etc.

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INDONESIA
15 FEB 2021

New Wage Rules for Some Labor-Intensive Industries Affected by Covid-19

The Indonesian Minister of Manpower ("MOM") issued MOM Regulation No. 2 Year 2021 on February 15, 2021, which concerns wages in specific labor-intensive industries (*padat karya*) during the ongoing Covid-19 pandemic. This regulation allows certain labor-intensive industrial companies affected by the pandemic to change how much employees are paid and the method of payment. Such changes, however, can only be introduced through an agreement with the employees.

INDONESIA
21 FEB 2021

New Regulation Looks to Ease Hiring Process for Foreign Workers

The Indonesian Government has issued various implementing regulations for the recently enacted Job Creation Law. Among these new implementing regulations is Government Regulation No. 34 Year 2021 dated February 2, 2021 regarding the Utilization of Foreign Workers ("GR No. 34"). GR No. 34 was made available to the public on February 21, 2021 and is expected to come into force on April 1, 2021.

GR No. 34 introduces a significant change to the expatriate work permit application process, removing the Notification (*Notifikasi*) application from the process. Previously, employers were required to obtain a Foreign Worker Utilization Plan (*Rencana Penggunaan Tenaga Kerja Asing* or "RPTKA") and a Notification approved and issued by the Minister of Manpower ("MOM") prior to employing foreign workers. GR No. 34 removes the Notification requirement and adds one new step, the RPTKA appropriateness assessment ("RPTKA Assessment"). During the RPTKA Assessment, the MOM will determine within two business days whether the submitted information and documents are correct and complete.

The stated aim of GR No. 34 is to simplify the process for hiring expatriate workers in Indonesia and in turn attract more investment into the country.

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21 FEB 2021

Changes to Employment Termination Process

Another implementing regulation for the Job Creation Law, Government Regulation No. 35 Year 2021 dated February 2, 2021 regarding Fixed-Term Employment, Outsourcing, Working Hours and Rest Times, and Termination ("GR No. 35") came into effect on February 2, 2021 but was only made available on February 21, 2021. GR No. 35 confirms significant changes to the employment law regime, including:

a. new specific requirements for Fixed-Term Employment Agreements (*Perjanjian Kerja Waktu Tertentu* or "PKWT");
b. new compensation for PKWT workers;
c. new protections for workers at outsourcing companies;
d. changes to business licensing for outsourcing companies;
e. new provisions on working hours, overtime, and rest times for workers;
f. new procedures for termination of employment; and
g. changes to severance pay, long-service pay, and compensation rights.

INDONESIA
21 FEB 2021

Regulation on Hourly Wages

Government Regulation No. 36 Year 2021 dated February 2, 2021 regarding Wages ("GR No. 36") is also an implementing regulation for the Job Creation Law. GR No. 36 came into effect on February 2, 2021 but was only made available to the public on February 21, 2021. GR No. 36 confirms that employers can pay part-time employees by the hour.

LOOKING BACK

INDONESIA
21 FEB
2021

New Job Loss Security Program

Another implementing regulation for the Job Creation Law is Government Regulation No. 37 Year 2021 dated February 2, 2021 regarding the Implementation of the Unemployment Benefits Program ("GR No. 37"), which came into effect on February 2, 2021 but was just made available on February 21, 2021. GR No. 37 introduces a new job loss security program. The contribution to the Job Loss Security Program is 0.46% of an employee's monthly salary. This will be paid by the Indonesian Government and the Job Loss Security Program funding resources (sourced from recompositing the occupational accident and death security contributions that are paid by employers). The benefits of this new program comprise cash, access to job market information, and job training.

INDONESIA
1 APR
2021

Changes to the employment of foreign workers in Indonesia

The Indonesian Minister of Manpower ("MOM") issued MOM Regulation No. 8 Year 2021 regarding Implementing Regulation for Government Regulation No. 34 of 2021 regarding Employment of Foreign Workers ("MOM Reg. 8/2021"), which entered into force on April 1, 2021.

MOM Reg. 8/2021 stipulates that employers in Indonesia are required to obtain a work permit for foreign workers. The employer must apply for the work and immigration permit through the TKA Online system (https://tka-online.kemnaker.go.id/), which is managed by the Ministry of Manpower.

This new regulation revokes and replaces MOM Regulation No. 10 of 2018 regarding Procedures for the Employment of Foreign Workers (July 11, 2018) ("MOM Reg. 10/2018").

LOOKING BACK

JAPAN

1 JAN 2021

Time Off for Child Care and Time off for Family Care on Hourly Basis

The amendment to the Ordinance for Enforcement of Childcare Leave and Caregiver Leave Act became effective on January 1, 2021. Before the amendment, employees can take time off for child care and time off for family care on a half-day or daily basis. After the amendment, employees can take those time offs on hourly basis as well.

More...

There are no significant policy, legal or case developments within the employment space during 2021 Q2.

MALAYSIA
01 JAN
2021

Industrial Relations (Amendment) Act 2020

The Industrial Relations Act 1967 is an Act to promote and maintain industrial harmony and provide the regulation of relationship between employers and workmen and their trade unions. Most provisions of the Amendment Act have come into force on 01/01/2021. The Amendment Act introduced various changes to the procedures and powers of the Industrial Court, as well as powers of the Minister of Human Resources and Director General of Human Resources. Harsher penalties are also introduced on offences relating to picketing, illegal strikes and lockouts.

More...

MALAYSIA
01 JAN
2021

Employees Provident Fund (Amendment of Third Schedule) (No. 2) Order 2020

Pursuant to the order, the statutory EPF contribution rate of employees is reduced from 11% to 9% from January 2021 to December 2021.

More...

MALAYSIA
26 FEB
2021

Emergency (Employees' Minimum Standards of Housing, Accommodations and Amenities) (Amendment) Ordinance 2021

Further to the amendments made in 2019 to the principal Act (the Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990), the Amendment Ordinance made further changes to the Act. The key changes include expanding application of the Act from only Peninsular Malaysia and Federal Territory of Labuan to the entire Malaysia, expanding the definition of "accommodation", and expanding the powers of the Minister and Director General of Labour to ensure better enforcement and stricter compliance in light of the pandemic to increase the standards of living conditions in accommodations provided to employees. The Amendment Ordinance has come into operation on 26/02/2021.

More...

MALAYSIA
1 JUN
2021

Employees' Social Security (Amendment of First Schedule) Order 2021 (P.U. (A) 247/2021)

From 1 June 2021 onwards, coverage of the Social Security Organisation (SOCSO)'s Employment Injury Scheme and Invalidity Scheme is extended to domestic workers, who were previously excluded from the SOCSO coverage. The rate of contribution for employers is 1.25% for the Employment Injury Scheme, and the employee is not required to contribute to this; whereas the rate of contribution for both the employers and employees is 0.5% for the Invalidity Scheme.

Pursuant to section 94 of the SOCSO Act, failure of employers to register their domestic workers under the Acts and/or make contributions, upon conviction, is punishable with a maximum penalty of two years' jail or RM10,000 fine or both.

More...

MALAYSIA
1 JUN
2021

Employment Insurance System (Amendment of First Schedule) Order 2021 (P.U. (A) 249/2021)

Wording: From 1 June 2021 onwards, coverage of the Employment Insurance System (EIS) is extended to domestic workers, who were previously excluded from the EIS coverage. The rate of contribution for both the employers and employees is 0.2%.

Pursuant to section 16 of the Employment Insurance System Act, failure of employers to register their domestic workers under the Act and/or make contributions, upon conviction, is punishable with a maximum penalty of two years' jail or RM10,000 fine or both.

More...

LOOKING BACK

MALAYSIA
1 JUN 2021

Employment Insurance System (Exemption) Order 2021 (P.U. (A) 250/2021)

Pursuant to the above, close relatives and foreign domestic workers who are hired by foreign employers are exempted from the extension of coverage of the EIS Act.

More...

MALAYSIA
1 JUN 2021

Pembangunan Slumber Amnesia Berthed (Exemption of Levy) No. 2 Order 2021 (P.U. (A) 251/2021)

Effective 1 June 2021 until 31 December 2021, all HRD-Corp registered employers are exempted from paying the mandatory Human Resources Development (HRD) levy under the Pembangunan Slumber Amnesia Berthed Act 2001. This is applicable to employers who register with the Corporation from 1 March 2021 to 30 June 2021.

More...

MALAYSIA
28 JUN 2021

Pace Perlindungan Rakyat Dan Pemulihan Ekonomi ("**Pemulih**") – Financial aid package announced by the Prime Minister of Malaysia on 28.6.2021

Wage Subsidy Programme 4.0

The Government will continue the Wage Subsidy Programme for up to 500 workers per employer with assistance of RM600 per worker for four months, i.e. two months for all sectors in the Second Phase of the National Recovery Plan (NRP), and a further payment for two months for the sectors categorised under the negative list in the Third Phase of the NRP. Unlike the previous wage subsidy programmes, there are no salary limit conditions for the Wage Subsidy Programme under Pemulih. Hence, employers may apply even if their employees earn more than RM4,000 a month.

Extension and improvements to PenjanaKerjaya programme – PenjanaKerjaya 3.0

The PenjanaKerjaya programme that is due to end in June 2021 will be extended with several improvements, namely reducing the salary eligibility limit from RM1,500 to RM1,200 for the "Malaysianisation" programme to give more incentives to employers to replace foreign workers with local workers, and reducing the employment contract period from 12 months to 6 months for employees aged 50 and above, the disabled and former prisoners.

Human Resources Development Fund Levy

Employers who are unable to operate during the lockdown will be granted an automatic exemption from paying a levy to the Human Resources Development Fund for two months. Employers from new sectors who are required to pay a levy to the Human Resources Development Fund as a result of the amendment to the Human Resources Development Fund Act 2001 will be exempted from paying the levy until December 2021.

Case Law Updates

NEW ZEALAND

17 DEC 2020

Arachchige v Raiser New Zealand Limited and Uber B.V. [2020] NZEmpC 230.

The Employment Court has issued another decision relating to the status of contractors

Mr Arachchige was an Uber driver in Auckland and applied to the Employment Court for a declaration that he was an employee of Raiser New Zealand Limited and/or Uber B.V. (collectively, Uber), so that he could raise a personal grievance for unjustifiable dismissal.

Mr Arachchige's main argument that his status was one of employee was the lack of control that he had over building a customer base and over determining what fare to charge. Without the ability for the driver to establish a relationship with passengers, he argued there was an inability to attract future work.

Uber argued that it was a technology business with its value being in the lead generation software application it provides to connect people who a need transport service, with people that provide transport services. Uber's position was that it had a Service Agreement with Mr Arachchige and he was not an employee.

The Employment Court held that Mr Arachchige's work was not directed or controlled by Uber beyond some matters that might be expected given he was operating using the Uber 'brand' and Uber did not direct Mr Arachchige in connection with the provision of the transport services. Mr Arachchige also determined whether and for how long he undertook services, provided all the necessary equipment and tools to undertake the work, and was responsible for his tax obligations. Given all these factors the Employment Court held that Mr Arachchige was not employed by Uber.

The Employment Court at the outset of the decision noted its inquiry was intensively fact specific and only addressed Mr Arachchige's situation. The Court distinguished the facts of this case from two other recent decisions of the Employment Court, where the drivers had to work as directed and had little authority over the way in which they carried out their business activities.

Read the decision here.

Case Law Updates

NEW ZEALAND

21 DEC 2020

Gate Gourmet New Zealand Ltd v Sandhu [2020] NZEmpC 237

This was the first Employment Court decision on COVID-19 issues, with the majority of the Full Court finding that the Minimum Wage Act did not require an employer to pay employees the minimum wage in circumstances where those employees did not perform work during New Zealand's Level 4 Lockdown in early 2020. This case concerned whether Gate Gourmet had breached the Minimum Wage Act 1983 (MWA) during New Zealand's Level 4 lockdown by paying employees who had not been rostered to work, at the rate of 80% of their normal pay (being 80% of the minimum wage).

On appeal, the majority of the Court found that the purpose of the MWA is to ensure that employees receive a base wage for their work to enable them to meet living expenses for themselves and their family, but that the MWA does not provide for a guaranteed minimum income. Instead, section 6 of the MWA provides for a minimum payment in exchange for work performed by an employee. The Court stated that accepting the employees' expansive interpretation of what constituted work (namely, the employees being ready, willing and able to work) "*would undermine the core concept of section 6*", which provides the exchange of payment for work.

While the Court acknowledged that Parliament has made it clear that the preservation of minimum employment rights is of the utmost importance, it saw no persuasive basis for departing from the well-established approach to assessing work for the purposes of section 6 of the MWA.

Continued on Next Page

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

NEW ZEALAND
21 DEC
2020

Accordingly, the Court concluded that "*when the defendants stayed home, they were not working for the purposes of the MWA, the MWA was not engaged, and no statutory minimum wage entitlements arose*".

Read the case here. Read Simpson Grierson's commentary here.

Case Law Updates

NEW ZEALAND
18 JAN
2021

A Labour Inspector of the Ministry of Business, Innovation and Employment v Tourism Holdings Limited [2021] NZCA 1.

In this case, the issue was, as a question of law, whether productivity or incentive-based payments were a regular part of an employee's pay when calculating ordinary weekly pay under the Holidays Act 2003 (**Act**). Tourism Holdings Ltd employed "*driver guides*" for their tours. Among other tasks, these guides sold tourist experiences to their clients whilst on tour. The guides earned commission for each tourist experience they sold. The commission was paid in a lump sum after the end of that tour.

Commission is always included in the employee's average weekly earnings, however the Labour Inspectors and THL disputed whether the guide's commission should be included in the employee's ordinary weekly pay.

Section 8(1) of the Act provides that ordinary weekly pay means the amount of pay an employee receives under his or her employment agreement for an ordinary working week. Section 8(1)(b)(i) of the Act stipulates that productivity or incentive-based payments in ordinary weekly pay "*if those payments are a regular part of the employee's pay*".

In allowing the appeal, the Court held that the purpose of the alternative approach found in section 8(2) is to provide for the calculation of "*ordinary weekly pay*" where the definition found in section 8(1) cannot be applied. One of those circumstances was, as in the case being considered, where there is no ordinary working week.

In relation to the qualifying word "*regular*" in section 8(1)(c)(i), the Court considered dictionary meanings for the word regular applied to commission as earnt by the driver guides. The Court held that payments are "*a regular part of the employee's pay*" if they are made:

- substantively regularly, being made systematically and according to rules; or
- temporally regularly, being made uniformly in time and manner.

If productivity or incentive-based payments are a regular part of an employee's pay, those payments must be included when calculating ordinary weekly pay under section 8(2) of the Act. This was irrespective of whether the payments were part of pay for an ordinary working week (in the driver guide scenario the payments did not as there was no ordinary working week given the varying length of the tours).

While the commission payments were not part of the payment of daily rate compensation for each week, the Court held that it did form part of pay in the week after the tour when it was paid, and commission was paid regularly. This meant that the driver guide's commission payments were regular payments and therefore not to be deducted as part of factor b in the section 8(2) formula.

More...
Simpson Grierson's commentary...

Legislative Update

Holidays Act Taskforce Final Report

In February 2021, the Minister for Workplace Relation released the Final Report of the Holidays Act Taskforce, and announced that the Government has accepted all 22 of the Taskforce's recommendations.

The Holidays Act Taskforce was established by the Government following calls from unions and employers to suggest improvements to the Holidays Act

Continued on Next Page

Legislative Update

2003, which has been difficult to interpret and apply. Many workplaces in New Zealand have found that payroll systems do not calculate all leave entitlements correctly, leaving employers in breach of the Holidays Act's requirements.

The Taskforce made 22 recommendations, all of which were jointly agreed to by union and business representatives. The key recommendations include:

- Retaining the current approach of providing and calculating annual holidays in "weeks" or portions of weeks, and retaining the current approach of providing and calculating FBAPS[1] leave in days;
- Re-working the methodologies for annual holidays and FBAPS leave, providing for a total of four methodologies;
- Defining "gross earnings" as including "all cash payments received, except direct reimbursements for costs incurred;
- On the sale and transfer of a business, employees would have a choice about whether to transfer all of their leave entitlements to the new employer or have them paid out and reset;
- Providing for "prescriptive processes" to determine how much leave needs to be taken for an employee to have a period of time away from work (ie where it is not clear what a "week" is for the employee) and to determine when a particular day is an "otherwise working day" for FBAPS purposes (eg if an employee has worked 50% or more of the corresponding days in the previous four or 13 weeks); and
- Amending closedown provisions to provide greater certainty for employees, including the removal of the requirement that holidays are paid out at 8% and that the employee's anniversary date should be reset (although it would still be possible for anniversary dates to be reset by agreement).

More...
Simpson Grierson's commentary...

1. Family violence leave, bereavement leave, alternative holidays, public holidays and sick leave

Legislative Update

Holidays (Increasing Sick Leave) Amendment Bill

The Holidays (Increasing Sick Leave) Amendment Bill is with the Education and Workforce Select Committee, and the Select Committee is due to report back on the Bill by 6 April 2021. The main purpose of this bill is to increase the availability of employer-funded sick leave for employees.

Holidays (Increasing Sick Leave) Amendment Bill

Legislative Update

Holidays (Bereavement Leave for Miscarriage) Amendment Bill

The Holidays (Bereavement Leave for Miscarriage) Amendment Bill was passed by Parliament on 24 March 2020. The Bill amends the Holidays Act 2003 to provide that the end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave for parents, their partners and parents planning to have a child through adoption or surrogacy, and that the duration of the bereavement leave should be up to 3 days.

Holidays (Bereavement Leave for Miscarriage) Amendment Bill

NEW ZEALAND
30 & 31 MAR
2021

Title: Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2)

The Holidays (Bereavement Leave for Miscarriage) Amendment Bill (No 2) (the Bill) received royal assent on 30 March 2021, and came into force on 31 March 2021.

This legislation expands on the current paid bereavement leave measures by adding that the unplanned end of a pregnancy by miscarriage or still-birth constitutes grounds for bereavement leave for the mother and her partner or spouse, and that the minimum statutory duration of such bereavement leave is 3 days.

More...

NEW ZEALAND
1 APR 2021

Increase of minimum wage

On 1 April 2021, the adult minimum wage increased to $20.00 per hour (an increase from $18.90). The minimum starting out and training wage rates both increased to $16.00 per hour (an increase from $15.12), which is 80% of the adult minimum wage rate.

More...

NEW ZEALAND
7 MAY 2021

Fair Pay Agreements

On 7 May 2021, the Government announced the implementation of its pre-election commitment to Fair Pay Agreements ("FPA"). An FPA will set minimum standards for employees and employers in a particular occupation or industry, in New Zealand. The FPA bargaining process can only be initiated by unions if they have a support threshold of 10%, or 1000 workers within the occupation or industry, or if they meet a public interest test in an industry or occupation where employment issues exist, such as low pay or limited bargaining power.

Once an FPA is ratified, employees or employers cannot opt out of an FPA. If agreement is not reached, parties return to the bargaining process. If a second vote fails, the FPA will be under the jurisdiction of the Employment Relations Authority to determine.

FPAs will cover all workers within an industry or occupation whether they are a member of a union or not. Unions will represent employees. Employees who are not union members will have no freedom of association or choice as to who represents them.

We expect a draft bill to be released later this year.

More...
More...

NEW ZEALAND
24 MAY 2021

Holidays (Increasing Sick Leave) Amendment Bill

The Holidays (Increasing Sick Leave) Amendment Bill received royal assent on 24 May 2021. The Bill comes into force on 24 July 2021, and will increase the minimum statutory sick leave entitlement from 5 days to 10 days per year. Employees will therefore receive the increased entitlement on their first sick leave anniversary date following 24 July 2021. Employees who already receive 10 or more days' sick leave per year will not be affected by this change.

The maximum amount of unused sick leave that an employee can accumulate will remain at 20 days, but the maximum number of days of untaken sick leave that can be carried over from one year to subsequent years will be reduced from 15 days to 10 days.

More...
More...

NEW ZEALAND
2 JUN 2021

Barry v C I Builders Limited [2021] NZEmpC 82.

The Employment Court recently held that an individual engaged as a builder for a building company had been incorrectly classified as a contractor, and determined the real nature of the relationship to be one of employment.

In determining the real nature of the relationship, the Employment Court again emphasised the need to determine such issues on the specific circumstances. While it was clear from the outset that the plaintiff had been engaged as an independent contractor, the Court held that the true nature of the relationship between the parties was effectively an employment relationship. In reaching this decision, the Court took the following factors (amongst others) into account:

Continued on Next Page

LOOKING BACK

NEW ZEALAND

2 JUN 2021

- The defendant company had the right to exercise detailed control over the way work was performed by the plaintiff. The plaintiff moved between sites and worked on particular jobs as directed by the defendant, and the plaintiff's working records showed a relatively consistent pattern of work hours and did not reflect any real sense of flexibility that could be exercised by the plaintiff;
- The plaintiff was integrated into the defendant's organisation, as the plaintiff drove a company vehicle on occasion, reported to and was assigned tasks by the defendant's owner, and there was nothing to externally differentiate him from any of the other workers on site;
- There was no evidence to suggest that the plaintiff could subcontract or delegate his work, and the Court inferred that other workers would have to cover for the plaintiff if he was not at work;
- Although the plaintiff had his own tool belt with small tools in it, all other tools which he used to undertake his work were provided by the defendant; and
- The plaintiff was paid based on hours worked, any goodwill generated by the plaintiff's skill, labour or work ethic would accrue to the defendant, rather than the plaintiff.

The Court concluded that the plaintiff was effectively providing personal service to the defendant and was not, in reality, operating a business on his own account. Accordingly, the real nature of the relationship between the parties was one of employment.

More...

LOOKING BACK

PHILIPPINES
06 JAN 2021

Department of Labor and Employment (DOLE) Department Order (DO) No. 221, Series of 2021

Revised Rules and Regulations for the Issuance of Employment Permits to Foreign Nationals

More...

PHILIPPINES
07 JAN 2021

Philippine Overseas Employment Administration (POEA) Memorandum Circular No. 01, Series of 2021

Interim Protocols/Guidelines on the Recruitment, Deployment and Employment of Landbased Overseas Filipino Workers (OFWs)

More...

PHILIPPINES
25 JAN 2021

DOLE Labor Advisory (LA) No.01, Series of 2021

Waiver of Penalties for Alien Employment Permit (AEP) Renewal Applications in Areas Covered by Community Quarantine

More...

PHILIPPINES
03 MAR 2021

DOLE Department Order No. 224, Series of 2021

Guidelines on Ventilation for Workplaces and Public Transport to Prevent and Curtail the Spread of COVID-19

More...

PHILIPPINES
12 MAR 2021

DOLE Labor Advisory No. 03, Series of 2021

Guidelines on the Administration of COVID-19 Vaccines in the Workplace

More...

PHILIPPINES
6 APR 2021

Employees Compensation Commission Board Resolution No. 21-04-14

Specifying the conditions for the compensability of COVID-19 as an occupational and work-related disease.

More...

PHILIPPINES
23 APR 2021

Department of Labor and Employment (DOLE)-Department of Health(DOH)-Department of Interior and Local Government (DILG)-Department of Tourism (DOT)-Department of Trade (DTI) Joint Memorandum Circular No.21-01

Implementing Guidelines of the Safety Seal Certification Program to all private establishments and selected public places and government offices and providing penalties in case of non-compliance to ensure compliance with the government's Minimum Public Health Standards (MPHS) to contain the spread of COVID-19

More...

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SINGAPORE
4 JAN 2021

Unvaccinated employees will not need to have their work scopes reviewed

In response to a parliamentary question, Health Minister Mr Gan Kim Yong clarified that employees who have not received a COVID-19 vaccination will not have to have their work scope reviewed nor will deployment be necessary, unless there is a resurgence of local cases. However, employees should continue taking necessary precautions such as wearing of masks and, if necessary, donning of Personal Protective Equipment and Rostered Routine Testing.

More...

SINGAPORE
4 JAN 2021

Workers from construction, process and marine sectors to be amongst groups prioritised for vaccination

During the third update on the Whole-of-Government response to COVID-19, Health Minister Mr Gan Kim Yong stated that the Government will prioritise vaccinations of groups that are most at-risk, which is in line with the World Health Organisation's guidelines.

Foremostly, healthcare workers and staff working in the healthcare sector as well as COVID-19 frontline and other essential personnel with a higher risk of exposure would be prioritised for vaccination, followed by the elderly and those at greater risk of severe disease from COVID-19 infections. This is followed by employees who are holding jobs or work in settings where risk of a super-spreading event is high, such as those in the construction, process and marine sectors. Thereafter, vaccination will be opened to other Singaporeans as well as long-term residents who are medically-eligible.

More...

SINGAPORE
5 JAN 2021

Multi-Ministry Taskforce establishes additional COVID-19 testing regime for newly arrived foreign workers staying in dormitories

The Multi-Ministry Taskforce implemented an additional 7-day testing regime for newly arrived migrant workers that are approved for entry into Singapore and staying in dormitories which takes effect from 6 January 2021. This entails an additional swab tests while staying at a designated facility, and workers will still be able to go to work. The new regime is in addition to completing a 14-day Stay-Home Notice . Workers will only be allowed to stay in their dormitories after the additional testing is complete.

More...

SINGAPORE
16 JAN 2021

Multi-Ministry Taskforce mandates on-arrival COVID-19 tests for workers from Construction, Marine and Process sectors

The Multi-Ministry Taskforce has mandated that, from 18 January 2021 onwards, newly arrived work permit and S pass holders from the Construction, Marine and Process sectors from higher-risk countries/regions have to take additional COVID-19 tests on arrival. These include an On-Arrival Polymerase Chain Reaction test and an On-Arrival Serology Test. The cost of the tests is to be borne by employers. Workers that have recovered from COVID-19 and have antibodies will be exempted from the SHN, additional 7-day testing regime, and Rostered Routine Testing requirements.

More...

SINGAPORE
20 JAN 2021

Updated advisory to employers with Malaysian employees entering Singapore under Periodic Commuting Arrangement

On 20 January 2021, the tripartite partners issued an updated advisory to employers with Malaysian employees entering Singapore under the Periodic Commuting Arrangement ("**PCA**"), which is a Safe Travel Lane that allows work and business-related travel between Singapore and Malaysia during the COVID-19 period subject to Malaysia Citizens and Malaysia Permanent Residents with valid work passes being required to remain in Singapore for at least 90 days before returning to Malaysia for home leave.

Continued on Next Page

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

SINGAPORE **20 JAN** 2021

The key changes in this update are as follows:

- **Applications for Malaysian employees to enter Singapore under the PCA can be made online.** Companies based in Singapore may now apply for their Malaysian employees to enter Singapore under the PCA online, through the Immigration and Checkpoints Authority (ICA) SafeTravel website.
- **Employees that enter Singapore under the PCA have to serve their SHN period.** PCA-approved employees have to serve a 14-day SHN, before taking a COVID-19 PCR test. This is as compared to the previous minimum SHN period of 7 days.

More...
More...

SINGAPORE **22 JAN** 2021

Workplace Safe Management Measures continue even though Singapore has transited into Phase 3 of Safe Management Measures

On 22 January 2021, the Tripartite Partners clarified that despite Singapore having transited into Phase 3 of Safe Management Measures ("**SMM**"), work-from-home should still remain the default arrangement because of the higher risk of potentially more transmissible strains and recent trends of COVID-19 community cases. They also reminded employers that:

- Current SMM advisory entails employers implementing flexible and/or staggered work hours and allowing employees to report during off-peak periods, if employees have to return to the workplace.
- Companies are not allowed to organise any Chinese New Year gatherings and social events, as they are not considered as work-related events.

More...

SINGAPORE **26 JAN** 2021

Expansion of Progressive Wage Model ("PWM") to the Waste Management sector

On 26 January 2021, the Tripartite Partners announced the expansion of the Progressive Wage Model ("**PWM**") to a fifth sector of Waste Management. This will provide workers with a clear progression pathway to earn better wages as they increase their productivity and skills. The expansion of the PWM to the Waste Management sector is part of the effort by the Tripartite Workgroup for Lower-Wage Workers ("**TWG-LWW**")'s multi-year roadmap to improve the employment outcomes and well-being of lower-wage workers ("**LWWs**").

More...

SINGAPORE **29 JAN** 2021

Recommendations on Progressive Wage Model ("PWM") for the Landscape Maintenance sector accepted by the government

On 29 January 2021, the Government has accepted recommendations in the report of the Tripartite Cluster for Landscape Industry ("TCL") on the PWM for the landscape maintenance sector. Amongst things, the recommendations include:

- Introducing a Specialist Track under the PWM Career Ladder to attract new entrants and improve career progression.
- From 1 February 2021, expanding the list of Singapore Workforce Skills Qualification ("**WSQ**") courses that landscape employees can take under the enhanced PWM, keeping in mind digitalisation and job redesign.

More...

SINGAPORE **2 FEB** 2021

High Court clarifies employer's legal burden of proof in justifying summary dismissals

On 2 February 2021, the High Court issued its decision in *Wong Sung Boon v Fuji Xerox Singapore Pte Ltd and another* [2021] SGHC 24. The matter involved a claim by a former Senior Managing Director ("**Wong**") of Fuji Xerox Singapore Pte Ltd ("**FXS**") against FXS for having been summarily dismissed

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SINGAPORE
2 FEB
2021

without cause, in breach of his employment contact. Wong also claims that Fuji Xerox Asia Pacific Pte Ltd ("**FXAP**"), FXS's parent company, wrongfully induced FXS to breach its employment contract with Wong. FXS in turn argues that the dismissal was lawful and counterclaimed against Wong for losses due to Wong's breach of fiduciary duties and other obligations under his employment contract, on the basis that Wong had caused FXS to enter into transactions with various companies which, amongst others, unnecessarily exposed FXS to risk and were carried out without the necessary approvals and credit-worthiness evaluations .

The High Court held that FXS wrongfully dismissed Wong as FXS and FXAP (collectively, the "**Defendants**") could not prove the allegations which formed the basis of summary dismissal. In particular:

- The Defendants could not prove that Wong had exposed FXS to unnecessary risk by causing FXS to enter into transactions outside the ordinary scope of its business since FXS did not have internal company restrictions on its scope of business and it did not inform Wong what constituted its ordinary scope of business. Further, Wong consulted his staff and mitigated risks before entering into the transactions.
- The Defendants could not prove that Wong had failed to comply with relevant credit evaluation processes before entering into the transactions, as Wong's witnesses testified that strict adherence to FXS's written policy in this regard is not required, and FXS's legal department did not raise issues on this although it could have done so.

The High Court also highlighted that save for a termination notice stating Wong's conduct in relation to the transactions with specific companies amounted to serious misconduct or negligence, Wong was not given any reasons for his dismissal until the suit was commenced. The Defendants' evidence was also lacking in strength compared to Wong's as unlike Wong, the Defendants did not call witnesses who had direct personal knowledge of FXS's internal processes.

The High Court thus awarded Wong damages equivalent to three months' of salary in lieu of notice, other employment benefits under his employment contact (including variable bonus and accrued leave that Wong would have been entitled if not for the summary dismissal) and an end of term payment valued at nearly S$1.3 million in view of Wong's 37.9 years of service with FXS.

More...

SINGAPORE
3 FEB
2021

High Court holds that it is legally permissible for multiple persons to be vicariously liable for negligence of a single worker

On 3 February 2021, the High Court issued its decision in *Munshi Mohammad Faiz v Interpro Construction Pte Ltd and others and another appeal* [2021] SGHC 26. The matter involved an industrial accident in which the plaintiff, a construction worker, was injured by an excavator operated by another construction worker ("**Sujan**"). The plaintiff was the employee of the first defendant, Interpro Construction Pte Ltd ("**D1**"), which was a sub-contractor of the second defendant, K P Builder Pte Ltd ("**D2**"). D1 and D2 share a common director. Sujan was employed by the third defendant, Hwa Aik Engineering Pte. Ltd. ("**D3**"), and D3 was engaged by D2 to supply an excavator and qualified excavator operator (i.e. Sujan) for the works. Sujan was to work under the directions of D1 at the worksite in question.

As the High Court had affirmed the lower court's finding that Sujan was negligent in causing the accident, a relevant issue was whether D1, D2 and D3 can in principle all be vicariously liable for Sujan's negligence. On this issue, the High Court held that it was indeed legally permissible for multiple persons to be held vicariously liable for the negligence of a single worker for the following reasons:

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SINGAPORE **3 FEB** 2021

- There is robust authority supporting the recognition of the principle of dual vicarious liability, where two employers may be dually vicariously liable for an employee's negligence.
- Based on first principles, dual vicarious liability ought to be permissible for various rationales, including ensuring effective compensation for the victim as an employer is likely to have deeper pockets than the primary tortfeasor and deterring future harm by encouraging an employer, who has the relevant control over the employee or the activities undertaken, to take steps to reduce the risk of such harm.

On the facts, the High Court found that both D1 and D3, but not D2, were vicariously liable for Sujan's negligence. This was based on a multi-factorial test which takes into account the control of each defendant over Sujan, the closeness of relationship between each defendant and Sujan and whether such risk created or enhanced the risk that led to the tort, amongst others.

More...

SINGAPORE **3 FEB** 2021

Multi-Ministry Taskforce (MTF) announces additional measures for newly arrived foreign workers

On 3 February 2021, the MTF announced additional measures for newly arrived foreign workers, which are in effect from 5 February 2021. Amongst others, the measures include:

- The additional 7-day testing regime will now apply to all newly arrived Work Permit and S Pass workers in Construction, Marine and Process sectors from higher-risk countries/regions, rather than only workers that stay in dormitories.
- There will be a mandatory On-Arrival Serology test for foreign domestic workers ("**FDW**") and confinement nannies ("**CN**") who have recent travel history to higher-risk countries/regions. This is in addition to the current PCR test requirement. FDWs who have recovered from COVID-19 will be released early from SHN in Singapore.

More...

SINGAPORE **4 FEB** 2021

Progressive Wage Model ("PWM") for food sector under study

On 4 February 2021, Senior Minister of State for Manpower Zaqy Mohamad said that the Tripartite Workgroup on Lower-Wage Workers, which he chairs, is exploring ways to improve the well-being of lower paid workers. Minister Zaqy also stated that the workgroup is exploring the possibility of extending the PWM, which sets out minimum salaries for local workers in various roles along a career and skills progression framework, to the food sector as well as other sectors. An interim update is expected in mid-2021 and the study is expected to be completed by the first quarter of 2022.

More...

SINGAPORE **16 FEB** 2021

Extension of SGUnited Traineeships programme until March 2022

During the Committee of Supply Debate 2021 on 3 March 2021, the Minister of State for Manpower, Mrs Gan Siow Huang, announced that the SGUnited Traineeships Programme would be extended by an additional year until 31 Mar 2022. Further, with effect from 1 April 2021, training allowances would be increased by 30% for ITE graduates, up to a maximum of $1,800, and about 20% for polytechnic graduates, up to a maximum of $2,100.

More...

SINGAPORE **16 FEB** 2021

Enhanced support to employers under the Jobs Growth Incentive

During his Budget 2021 speech, Deputy Prime Minister Heng Swee Kiat announced that an additional $5.4 billion would be allocated to the second tranche of the SGUnited Jobs and Skills Package (the "**SGU JS**"), which would

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be extended till September 2021. SGU JS was initially introduced in May 2020 to provide job opportunities for workers affected by COVID-19. The second tranche of the SGU JS will focus on moving workers into growth areas and support employers to accelerate their hiring of local workers. Employers that:

- hire eligible locals will be given up to 12 months of wage support from the month of hire.
- hire mature workers (40 years old and above), persons with disabilities and ex-offenders will be given 18 months of enhanced wage support.

More...

SINGAPORE
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2021

Ministry of Manpower ("**MOM**") announces reduction of the S Pass sub-Dependency Ratio Ceiling ("**sub-DRC**") for the Manufacturing sector

On 16 February 2021, the MOM announced that they would be reducing the Manufacturing S Pass sub-DRC to incentivise restructuring and improve manpower resilience in the Manufacturing sector. With the reduction of the sub-DRC, which is the maximum permitted ratio of foreign workers to the total workforce that a company is allowed to hire, it is hoped businesses will be encouraged to reduce their reliance on foreign manpower at the S pass level and strengthen the Singaporean core in the sector.

This will be done in 2 steps:

- Reduction of sub-DRC from 20% to 18% from 1 Jan 2022; and
- Further reduction to 15% from 1 Jan 2023.

Upon the changes taking effect, employers will not be able to hire or renew their S-passes until they come within the new sub-DRC percentage. However, employers will be allowed to retain existing S Pass holders until the expiry of their work passes.

More...

SINGAPORE
17 FEB
2021

Aviation industry to receive enhanced wage support

In order to help the aviation industry tide through the COVID-19 pandemic, the Job Support Scheme ("**JSS**") has been extended for 6-months from April to September 2021 for the aviation industry. The JSS, which provides wage support to assist employers in retaining local employees, will provide 30% wage support for local employees in the aviation industry from April to June 2021 and 10% wage support from July to September 2021. The Ministry of Transport also announced that, in addition to the JSS, it will top up support to 50% of wages from April to September to a cap of S$4,600 of monthly wages. Companies eligible to receive the grant include those based principally at Changi Airport.

In addition, Singapore-based airlines will also receive support to convert existing pilots to operate other aircrafts to provide an adequate pool of pilots to support the eventual recovery.

More...

SINGAPORE
3 MAR
2021

MOM pilots one-stop Migrant Worker Onboarding Centre for newly-arrived migrant workers

On 3 March 2021, MOM announced in a press release that with effect from 15 March 2021, they will be piloting a non-stop Migrant Worker Onboarding Centre ("**MWOC**") at five dedicated Quick Build Dormitories ("**QBD**") – located at Punggol, Eunos, Choa Chu Kang and two at Tengah. The pilot will allow all newly-arrived migrant workers from the Construction, Marine and Process (CMP) sectors from higher-risk countries/regions who clear their On-Arrival Tests to complete their SHN, additional 7-day SHN testing regime, medical examination and Settling-In Programme ("**SIP**") at a MWOC. Prior to clearing their On-Arrival Tests, workers have to serve SHN for four days at a SHN Dedicated Facility while awaiting the results of their On-Arrival Tests. If

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SINGAPORE **3 MAR** 2021

the worker has recovered from COVID-19 before, he will only need to undergo the medical examination at the MWOC.

More...

SINGAPORE **3 MAR** 2021

Dependant's Pass holders who wish to work have to apply for work pass from 1 May 2021

During her speech at the Committee of Supply 2021 on 3 March 2021, Minister for Manpower, Mrs Josephine Teo announced that from 1 May 2021, Dependent's Pass holders who want to work in Singapore will have to apply for a work pass (e.g. Employment Pass, S Pass or Work Permit). The previous requirement for Dependant's Pass holders to obtain a Letter of Consent ("**LOC**") to seek employment in Singapore will no longer suffice. However, existing DP holders working on an LOC would be given sufficient time to transit to this new requirement.

More...

SINGAPORE **3 MAR** 2021

Statutory minimum retirement age and re-employment age to be increased from 1 July 2022

During her speech at the Committee of Supply 2021 on 3 March 2021, Minister for Manpower, Mrs Josephine Teo announced that the Government will push ahead with its plan to increase the statutory minimum retirement and re-employment ages by 1 July 2022, with the exception of the public service which would implement the changes one year ahead of schedule. The following changes would take effect from 1 July 2022:

- The statutory minimum Retirement Age will go up from 62 to 63.
- The statutory Re-Employment Age will go up from 67 to 68.

In addition, the Tripartite Partners will raise senior worker CPF contribution rates from 1 Jan 2022. In tandem with this, the CPF Transition Offset scheme will absorb half of the increase for employers during the first year, and the Senior Employment Credit will provide a wage offset of up to 8% to employers of senior workers for the next two years until the end of 2022.

More...

SINGAPORE **5 MAR** 2021

Ministry of Manpower ("**MOM**") issues advisory on Red AccessCode status at worksites and report any non-compliance via the SnapSAFE mobile application

On 5 March 2021, the MOM issued an advisory relating to foreign employees on worksites with a Red AccessCode status. For background, a Red AccessCode may be assigned to foreign employees if they are on stay-home notices or they have been tested positive for COVID-19. In the Advisory, the MOM reminded everyone that:

- As part of safe management measures in worksites, foreign employees with a Red AccessCode status are not allowed to leave their residence for work. Foreign employees can check their AccessCode status on the SGWorkPass mobile application.
- Foreign employees with a Red AccessCode status should be turned away at the worksite, and employers should report any instances of non-compliance via the SnapSAFE mobile application.
- Failure to comply will result in strong enforcement action by MOM against all parties, including prohibiting worksites from operating, imposing fines, and revoking employer's work pass privileges as well as errant employees' work passes.

More...

SINGAPORE
8 MAR
2021

Vaccination to be extended to essential services personnel and higher risks groups

On 8 March 2021, the Ministry of Health ("**MOH**") announced that, further to the earlier extension of the vaccination programme to personnel involved in providing essential services such as security agencies and those involved in the provision of utilities such as water and energy, it will be also extending the vaccination programme to include:

- Essential personnel involved in other critical functions, such as postmen, delivery staff, news reporters, and bank operation staff engaged in critical banking and financial systems operations.
- Persons with multiple touch points with the community such as workers in hawker centres and food delivery industry
- Educators and staff who come into prolonged contact with children and youth.
- Migrant workers who have never been infected by COVID-19 and are living the five largest dormitories.
- Selected cargo drivers and accompanying personnel who enter Singapore from Malaysia on a regular basis.

More...

SINGAPORE
8 MAR
2021

Ministry of Manpower ("MOM") issues advisory on easing of restrictions on foreign employees' visits to Recreation Centres

Prior to 10 March 2021, foreign employees were given only one Exit Pass a week. Exit Passes give foreign employees the opportunity to visit Recreation Centres ("**RCs**") for 3 hours, for their leisure and mental well-being. With MOM's new advisory, foreign employees will be given three Exit Passes a week instead from 10 March 2021. Foreign employees will be allowed to use multiple Exit Passes on the same day to spend a longer time at the RCs and will be given one hour of travelling time per visit. In addition, employers cannot restrict or disallow their foreign employees from visiting the RCs as long as they have a valid Exit Pass. The advisory also stipulates the following:

- **Application for Exit Pass.** For their assigned rest day, foreign employees may apply for the Exit Pass 7 days in advance. However, on other days, foreign employees may only apply on the day itself.
- **Contract tracing devices on hand.** When visiting the RCs, foreign employees must have their contract trading devices on themselves visibly all the time.
- **Safe Living and Safe Distancing Measures in the RCs.** This includes a limited time period for interaction at the RCs, a maximum group size of 8 people with Safe Distancing between each group, and only allowing employees from cleared dormitories or those that have recovered or tested negative for COVID-19 to leave their dormitories to visit the RCs.

More...

SINGAPORE
24 MAR
2021

Work from home no longer the default mode as Ministry of Manpower ("MOM") issues update to Safe Management Measures ("SMM")

Education Minister Mr Lawrence Wong, who co-chairs the multi-ministry taskforce tackling COVID-19, announced that from 5 April 2021, working from home will no longer be the default and more employees will be able to return to the workplace. Under the update to the SMM issued by the MOM, from 5 April 2021 onwards:

- Up to 75% of employees may work at the workplace at any given time, although employers are encouraged to support as many employees to work from home as possible;
- Work-from-home measures should enable employees to maintain work-life harmony;

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LOOKING BACK

SINGAPORE

24 MAR

2021

- Split-team arrangements are no longer mandatory, although such practices may be maintained for business continuity purposes;
- Employers are to stagger start times and allow flexible workplace hours to reduce congregation of employees and reduce congestion in public places;
- Work-related events are subject to the SMM with a cap of 50 persons to limit exposure with meals at such events being discouraged;
- Social and recreational gatherings at the workplace will be allowed, with a maximum gathering size limit of 8 persons;
- Employees must continue to wear masks to minimise exposure; and
- Common spaces must continue to be cleaned regularly.

The Ministry of Health also warned that employers to continue observing the SMM and that any employers who fail to comply with the SMM will risk workplace closure and that, in the event of an increased risk in resurgence of local cases, stringent measures at the workplace may be reintroduced.

More...
More...

There are no significant policy, legal or case developments within the employment space during 2021 Q2.

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY:

RAJAH TANN

Lawyers who know Asia

LOOKING BACK

SOUTH KOREA
1 JAN 2021

(Ministry of Employment and Labor Notice under the Minimum Wage Act) Increase in minimum wage

Under Article 6(4) and Article 10, and Notice of 2021 Minimum Wage, the minimum wage for 2021 has been increased to KRW 8,720 which is a 1.5% increase compared to 2020 (the 2020 minimum wage was KRW 8,590). Among regular bonuses and cash welfare benefits, bonuses exceeding 15% of and welfare benefits exceeding 3% of the monthly calculated sum (KRW 1,822,480 based on 209 hours) of the 2021 minimum hourly wage (KRW 8,720) will be counted in calculation of the minimum wage (this is part of the phased expansion of application of such payments to the minimum wage calculation from 2019 to 2024).

More...

SOUTH KOREA
1 JAN 2021

(Amendment to the Labor Standards Act) Guarantee of public holidays as paid holidays

Under the amendment to Article 55(2) and Article 30(2) of the Enforcement Decree of the Labor Standards Act ("LSA"), businesses with 30 or more permanent/regular employees are required to provide public holidays as paid holidays (they were previously not required to do so). For businesses with more than 5 and fewer than 30 full-time employees, this requirement will be effective from January 1, 2022. Upon reaching an agreement with the Employee Representative, employers may substitute work on public holidays.

More...

SOUTH KOREA
1 JAN 2021

(Amendment to the Equal Employment Opportunity and Work-Family Balance Assistance Act) Reduction of working hours

Under the amendment to Article 22(3) and 22(4) of the Equal Employment Opportunity and Work-Family Balance Assistance Act, the reduced work hours for family care, etc. shall be applicable for businesses with 30 or more permanent/regular employees (for businesses with 30 or fewer employees, this shall be applicable from January 1, 2022). Under this system, employees may apply for a reduction in working hours for family care, prepare for retirement (if the employee concerned is 55 years old or older) and/or to allow an employee to pursue his/her studies. The reduced working hours shall be 15 - 30 hours per week within one year, and the wages may be reduced in proportion to the reduced working hours.

More...

SOUTH KOREA
1 JAN 2021

Notice of the Ministry of Employment and Labor regarding the Employment Promotion and Vocational Rehabilitation of Disabled Persons Act

If the number of persons with disabilities employed by an employer does not meet the number of persons obligated to be employed, the sum of the number of lacking individuals multiplied by the base amount (monthly) to be paid must be reported and paid. The annual base amount for 2020 was 1,078,000 KRW and was increased to KRW 1,094,000 for 2021.

More...

SOUTH KOREA
1 JAN 2021

Amendment to the Occupational Safety and Health Act

In order to induce the establishment of a systematic industrial accident prevention system at the corporate level, representative directors must establish a plan for safety and health and report it to the board of directors and obtain approval. If a representative director fails to fulfil this obligation, an administrative fine of up to 10 million KRW shall be imposed.

More...

SOUTH KOREA
1 JAN 2021

Amendment to the Enforcement Decree of the Employment Insurance Act

The employment maintenance subsidy is a system that provides subsidies when employers which inevitably have to adjust their workforce due to a decrease in sales, etc. maintain the work force through employment maintenance measures such as business suspension or leave of absence instead of reducing employees. Nonetheless, as it was stipulated that support shall be provided to a business or business owner basis in cases where employment maintenance measures are implemented , it was difficult to provide support for employers which dispatch/provide services to various other companies. Under this Amendment, if an employer which uses dispatched workers, etc. implements reduction of working hours or paid leave of absence for its employees, the dispatch agency or subcontractor may implement employment maintenance measures with respect to the dispatched workers, etc. without having to prove the inevitability of workforce adjustment measures.

More...

SOUTH KOREA
12 JAN 2021

Amendment to the Enforcement Decree of the Industrial Accident Compensation Insurance Act

WPreviously, the Korea Workers' Compensation & Welfare Service required that nursing care benefit applicants undergo medical examination at an industrial accident insurance medical institution, if necessary to determine whether nursing care is required, but the relevant statutory grounds for such examinations were lacking. Accordingly, this Amendment clarified the legal grounds by adding "examination to determine if nursing care is necessary after the healing" to the grounds in which Korea Workers' Compensation & Welfare Service may request a special medical examination.

More...

SOUTH KOREA
16 JAN 2021

(Amendment to the Occupational Safety and Health Act, OSHA) Preparation and submission of material safety data sheets (MSDS) and displaying and training etc. regarding MSDS

Under the amendment to Article 110-115, Article 162, Item 9-10, Article 165(2)25-27, Article 166(1)9 of the OSHA, employers are required to prepare and submit MSDS when manufacturing/importing chemical substances or mixtures classified as hazardous factor to the Ministry of Employment and Labor. In addition, employers are required to display MSDS in an area where workers handling the substances can easily access and provide training to workers handling the materials.

More...

SOUTH KOREA
18 JAN 2021

Amendment to the Enforcement Decree of the Industrial Accident Compensation Insurance Act

The effective period of the Night Work Special Health Examination Institution System, which was to expire on January 17, 2021, was extended for another two years (until January 31, 2023). Accordingly, workers who work at night in areas where there is no special health checkup agency may receive a checkup at special health checkup agencies for night-time work for two more years.

More...

SOUTH KOREA
26 JAN 2021

Amendment to the Employment Insurance Act and Industrial Accident Compensation Insurance Act

This amendment is to reduce the burden of employers who cannot pay the premiums for employment insurance and workers compensation within the deadlines by reducing the penalty charge ratio and the maximum limits. Previously, after the payment deadline, an amount equivalent to 1/1000 was

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SOUTH KOREA
26 JAN
2021

added as a penalty charge per day within 30 days, and after 30 days and until 210 days, an amount equivalent to 1/3000 was added per day as a penalty charge, and the limit was up to 9% of the premium. Under the Amendment, after the payment deadline, an amount of 1/1500 is added a penalty charge per day within 30 days, and after 30 days and until 210 days, an amount of 1/6000 is added per day as a penalty charge and the limit is up to 5% of the premium.

More...

SOUTH KOREA
1 FEB
2021

Amendment to the Enforcement Decree of the Industrial Accident Compensation Insurance Act

Under this amendment, a subcommittee may be established under the Occupational Diseases Determination Committee to effectively determine the recognition of occupational diseases, and the application period for vocational training has been extended from one (1) year to three (3) years as of when the level of disability is determined to promote the hiring of trainees who have received disability levels. Also, previously, when foreign workers applied for lump-sum payment of insurance benefits, they could only receive physical testing for calculating insurance benefits at higher-level large-size hospitals but can now receive testing at medical institutions of the Korea Workers Compensation & Welfare Service.

More...

SOUTH KOREA
10 FEB
2021

Amendment to the Enforcement Decree of the Wage Claim Guarantee Act

Under this amendment, the limit of loans that the employer can apply for to pay unpaid wages, etc., has been increased from 70 million KRW to 100 million KRW per employer, and the limit of the loans for individual employees eligible for loan payments has been increased from 6 million KRW to 10 million KRW, respectively. This amendment is intended to protect workers by supporting the payment of overdue wages by employers, etc.

More...

SOUTH KOREA
6 APR
2021

Amendment to the Labor Standards Act

Under an amendment to the Labor Standards Act (the "LSA"), a legal basis for flexible working hour systems with a unit period of in excess of three months and within six months has been added. This amendment shall be applicable for employers with 50 or more employees effective as of April 6, 2021, and shall be applicable for employers with 5 or more and less than 50 employees effective as of July 1, 2021.

SOUTH KOREA
18 MAY
2021

Amendment to the Enforcement Decree of the Act on Employment, etc. of Foreign Workers

Previously, the Enforcement Decree of the Act on Employment, etc. of Foreign Workers did not stipulate the purpose of providing guidance and inspecting work places which hire foreign workers (non-Korean nationals). The Amendment addresses this issue and states that the purpose of providing guidance and inspecting work places is to "manage appropriate employment of foreign workers"

SOUTH KOREA
18 MAY
2021

Amendment to the Act on the Protection, etc. of Fixed-Term and Part-Time Workers

The scope of responsibility has been clarified by establishing a new exemption provision. Under the new provision, employers are not punished as a result of vicarious liability penalty provisions if they have fulfilled certain duty of care and thus are not at fault.

LOOKING BACK

SOUTH KOREA
27 MAY 2021

Amendment to the Act on the Improvement Regarding the Employment of Construction Workers, etc.

Under an amendment to the Act on the Improvement Regarding the Hiring of Construction Workers, etc., a basis for implementation of the construction technician rating system has been prepared to enable systematic management of qualifications and work history of construction workers and to improve their treatment. The Minister of Land, Infrastructure and Transport consulted with the Minister of Employment and Labor to classify and manage construction workers by functions according to the criteria prescribed by Presidential Decree, such as work experience, qualifications, education/training, etc. Upon the request of a construction worker, business owner or contractor, a certificate of confirmation regarding the functional level of construction workers can be issued.

SOUTH KOREA
9 JUN 2021

Amendment to the Industrial Accident Compensation Insurance Act

Under the current Industrial Accident Compensation Act, small-and-medium sized employers can register under industrial accident compensation insurance provided that they bear all of the premiums for the insurance. However, family members who provide labor to employers for free were not eligible to be registered under the industrial accident compensation insurance despite their exposure to similar industrial accidents. With this amendment, family members who provide labor to small-and-medium sized employers (including spouse and fourth degree relatives of small-and-medium sized employer) can be registered under the industrial accident compensation insurance through the same method as small-and-medium sized employers.

LOOKING BACK

SRI LANKA
19 FEB 2021

Amendment to one provision of the Order containing the compensation formula referred to in section 6D of the Termination of Employment of Workmen (Special Provisions) Act no. 45 of 1971 (TEWA)

By an Order dated 19th February 2021, published in Gazette Extraordinary no. 2216/17 of 25th February 2021, an important amendment to one provision of the Order containing the compensation formula referred to in section 6D of the Termination of Employment of Workmen (Special Provisions) Act no. 45 of 1971 (TEWA) has been made.

The previously operative Order under section 6D, containing the formula for the computation of the amount of compensation payable to an employee "*on a decision or order made by the Commissioner under this Act*" which was published in Gazette Extraordinary no. 1384/07 of 15th March 2005 – provided [in paragraph (2) thereof] that-

> *"No amount in excess of Rupees One Million Two Hundred and Fifty Thousand shall be paid to any workman (i.e., employee) as compensation computed according to the above formula."*

The Order dated 19th February 2021, referred to above, amends the above provision by the substitution of the words "*Two Million Five Hundred Thousand*" for the words *One Million Two Hundred and Fifty Thousand.*

Thus, the maximum amount of compensation that may be awarded to an employee on an order by the Commissioner under the TEWA is now Rupees Two Million Five Hundred Thousand.

SRI LANKA
10 MAY 2021

Relaxation of Working Conditions for Pregnant Employees in the Light of COVID 19 Pandemic

Circular no. 02/2021 (II) dated 10/05/2021 issued by the Ministry of Public Services, Provincial Councils and Local Government authorized Heads of Government Institutions/Departments to decide to require the minimum staff needed to carry out the functions of the Government without interruption, to be present at the workplace. In terms of paragraph 5 of the said Circular, it is provided that pregnant female employees should not be required to work at the workplace.

More...

SRI LANKA
19 MAY 2021

Commissioner General of Labour made a request to Employers' Federation of Ceylon in connection with the previously mentioned concession

Having regard to the provision regarding pregnant female employees in Circular no. 02/2021 (II) dated 10/05/2021, the Commissioner General of Labour (CGL) requested by his letter dated 19th May 2021 addressed to The Employers' Federation of Ceylon (EFC) that the same concessions be extended to pregnant mothers employed in private sector establishments as well.

CONTRIBUTED BY: John Wilson Partners

TAIWAN
02 FEB
2021

The Ministry of Labor's interpretation regarding "Subject to the employer's consent, employees who are unable to use up all wedding leave within the time specified in the Lao-Dong-Tiao-3-Zi-1040130270 Circular due to COVID-19 may use up such leave within an year after the end of the pandemic " .

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-3-Zi-1100130044
Issue date: February 2, 2021

1. Pursuant to the Ministry's Lao-Dong-Tiao-3-Zi-1040130270 Circular dated October 7, 2015, an employee shall use all of his or her wedding leave in a three-month period starting from ten days before the wedding. However, with the employer's consent, it may be used up over a year's time."
2. As the global pandemic situation is still serious, in order to provide employees with more flexibility in planning wedding leaves, if the employee cannot use up all the wedding leave within the time stipulated in the above Circular, then with the employer's consent, the employee may use up such leave within an year after the end of the pandemic.
3. The "end of the pandemic" above refers to the date the Central Epidemic Command Center is disbanded.

TAIWAN
13 APR
2021

An employee whose spouse gave birth overseas shall be granted paternity leave despite not having left the country.

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-4-Zi-1100130213
Issue date: April 13, 2021

1. Article 15, Paragraphs 5 and 6 of the Act of Gender Equality in Employment stipulates that an employer shall give a 5-day paid paternity leave upon the employee's spouse giving birth. Article 21 further stipulates that the employer may not refuse the employee's request for such paternity leave or make any adverse decision against the employee, such as regarding such leave as an absence in terms of the full attendance bonus. Besides, according to Article 13 of the Enforcement Rules for Act of Gender Equality in Employment, employers may request the employee who request for the paternity leave to provide with related verification documentations, if necessary.
2. Given the various ways a father may spend time with a newborn child and his spouse, paternity leave shall be granted even if the employee has not left the country.

TAIWAN
28 APR
2021

Amending the Labor Insurance Act; implementation date to be set by the Executive Yuan.

Issued by: The President
Ref. No.: Hua-Zhong-1-Yi-Zi-11000038701
Issue date: April 28, 2021

After the amendment, persons seeking insurance payments may present identification documents of the insured and open a dedicated account at a financial institution for the insurance payment. The amount deposited in this account may not be used for collateral or be the target of compulsory enforcement. Workers and beneficiaries receiving one-time, lump sum insurance payments may now also open an account that is protected from seizure (as collateral or target of enforcement), thereby protecting their property rights and avoiding economic hardship.

TAIWAN
30 APR
2021

The establishment of the Occupational Hazard Worker Insurance & Protection Act; implementation date to be set by the Executive Yuan

Issued by: The President
Ref. No.: Hua-Zhong-1-Yi-Zi-11000040931
Issue date: April 30, 2021

The Occupational Hazard Worker Insurance & Protection Act is a law that combines the occupational hazard insurance provisions in the Labor Insurance Act and the current Act for Protecting Workers of Occupational Accidents. The new law not only expands the scope of insurance to cover new employees from the first day of starting work, it guarantees government insurance payment in the event of an occupational hazard incident, increased the amount paid out for each insurance item, provide more efficient assumption of responsibility by an employer in providing compensation, as well as integration with occupational hazard prevention and rebuilding after incidents to create a more robust comprehensive protection system in response to occupational hazard incidents.

TAIWAN
6 MAY
2021

COVID-19 vaccination-related leaves for employees

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-3-Zi-1100058758
Issue date: May 6, 2021

To increase the incentive for receiving COVID-19 vaccination and protect the rights of those looking to get vaccinated, pursuant to Article 31, Paragraph 1, Subparagraph 11 of the Disaster Prevention and Protection Act, an employee who is looking to receive COVID-19 vaccination may request an up to two days' vaccination leave (from day of vaccination to 23:59 the following day) from the employer by submitting his/her vaccination record to minimize the impact of potential harmful side effects from the vaccine. The employer may not regard such leave as absence without leave, force the employee to take a personal leave instead, withhold the full-attendance bonus, dismiss the employee or make any other adverse decision against the employee for requesting such leave.

TAIWAN
17 MAY
2021

The application of Article 32, Paragraph 4 and Article 40 of the Labor Standards Act to certain industries for increased overtime as a result of increased demand for essential products due to COVID-19

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-3-Zi-1100130312
Issue date: May 17, 2021

As demand for daily livelihood essential products have greatly increased due to elevated restrictions imposed to stem the COVID-19 outbreak, the overtime by employees in the relevant industries as a result of the increased production and logistics of such products to meet the increased demand shall still be regulated by Article 32, Paragraph 4 and Article 40 of the Labor Standards Act on "overtime in times of natural disasters, incidents or other unexpected events" in addition to the other overtime regulations on ordinary business days, rest days and holidays.

TAIWAN
4 JUN
2021

Announcement by the Ministry of Labor on an amendment of the scope of the proviso in Article 34, Paragraph 2 of the Labor Standards Act, effective June 4, 2021

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-3-Zi-1100130446
Issue date: June 4, 2021

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LOOKING BACK

TAIWAN

4 JUN 2021

Article 34, Paragraph 2 of the Labor Standards Act contains a proviso that allows a reduction of the minimum time of rest between shifts from a consecutive 11 hours to a consecutive 8 hours due to the nature of the work performed or other special reasons (and as publicly announced by the central competent authority upon request from the competent authority for the industry). Due to the COVID-19 surge, there is a need to change the amount of rest time between shifts for employees in the manufacturing, wholesale, general goods retail and warehouse storage industries, and this change will need to be maintained for an appropriate transition period to the original shift schedule after the epidemic alert level is lowered from the current Level 3. As such, for the time the COVID-19 Prevention and Special Stimulus Provisions remain in effect, and starting from the date the alert level was raised to Level 3 by the Central Epidemic Command Center until 30 days after the epidemic alert level is lowered from such level, the proviso in Article 34, Paragraph 2 of the Labor Standards Act shall apply to the aforementioned employees.

THAILAND
09 JAN 2021

COVID-19 : Provident Fund Measures

Pursuant to the Notification of the Ministry of Finance on the Determination of the Type of Business, Duration, and Conditions for Employees or Employer to Cease or Postpone the Submission of Savings or Contributions to the Provident Fund in Areas Affected by Economic Crisis, Disaster, or Other Severe Events Affecting Economic Conditions published on April 29, 2020, a second edition of the Notification was promulgated due to the prolonged effects caused by the Pandemic.

This Notification permits both employers and employees to cease, or postpone, the duty to submit contributions to the provident fund between January and June of 2021, with no effect on the membership status of such provident fund. However, the employees may continue to contribute to the provident fund, even though the employer did not.

Such temporary cessation, or the postponement, of the contribution of the provident fund must obtain a resolution from a general meeting of the provident fund's members, which is held in accordance with the fund's regulations, or resolved with a simple majority vote of the attendees, if the fund regulations did not explicitly specify the vote counting. In the event that a general meeting cannot be held, the fund committee shall unanimously pass a resolution to cease or postpone the contributions temporarily. If the provident fund is a pooled fund consisting of more than one employer, the resolutions must be obtained from the meetings of the members of each employer, or from the fund committee of each employer.

The employer, or the fund committee, must notify the registrar that they have resolved to make use of the exemption, and attach the following documents:

(a) A certification, signed by the employer's director(s), certifying that the business is facing operational and financial difficulties due to the Pandemic; and
(b) Minutes of the general meeting, or minutes of the meeting of the Fund Committee, with details in relation to the employer's operational and financial difficulties caused by COVID-19, and a resolution approving the cessation or postponement of the contributions and the duration, but not exceeding June 2021.

The employees and employers may notify the registrar, in order to resume their contributions to the provident fund.

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28 JAN 2021

SEC's Waiver on the Obligation to Submit Financial Statement and the Auditing Report

The Office of the Securities and Exchange Commission (SEC) has imposed a waiver on the preparation and submission of provident fund's financial statements and auditing reports for fiscal year 2020 for private fund management companies, due to the coronavirus outbreak situation 2019 (COVID 19).

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Additional requirements for tax exemptions for hiring STEM workers

The Notification of the Director-General of the Revenue Department on the Criteria, Procedure, and Conditions for Corporate Income Tax Exemptions for the Hiring of Employees in Science, Technology, Engineering, and Mathematics (STEM) Areas (No.392) was issued on November 3, 2020 and published in the Government Gazette on January 28, 2021. The Revenue Department provides further details in addition to the Royal Decree issued under the Revenue Code on the exemption of tax rates (No. 711) B.E. 2563, which offers fifty percent corporate income tax deductions for up to

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THB 100,000 per month on the actual expenses paid for STEM salary costs. according to the employment agreement. The requirements for the qualified expenses include the following:

- The employment agreement of such high skilled employees in science, technology, engineering, or mathematics related sectors must be executed during the period from January 1, 2019 through December 31, 2020;
- The employee is certified by the Office of National Higher Education Science Research and Innovation Policy; and
- The employment position is in a company/juristic partnership in the targeted industries which are certified by the Office of National Higher Education Science Research and Innovation Policy.

Additionally, the notification further requires that companies, or juristic partnerships, in target industries wishing to apply for the corporate income tax exemption must clarify the details of the employment by filing a report, together with the Corporate Income Tax Filing Form (P.N.D.50), to the Revenue Department in the accounting period for the tax year. The details must include: (i) the list of high skilled employees in the companies which are applying; (ii) details of the employment (e.g. name of the employment agreement and the employment start date/end date); and (iii) certification issued by the Office of National Higher Education Science Research and Innovation Policy and the number on such certification letter.

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Less Requirements for the Social Security Office's unemployment benefits

On January 20, 2021 the Social Security Office (SSO) Social Security Office issued the Notification of the Social Security Office on the Eligibility Criteria for Unemployment Benefits B.E. 2564 (2021), in order to slightly revise the procedures for receiving unemployment compensation for unemployed insured persons under Section 33 of the Social Security Act. Under Section 78 of the Social Security Act B.E. 2533 (1990), the SSO generally entitles the eligible unemployed persons to receive monthly payments for up to six months until they go back to work, provided they pay monthly contributions for at least six months within the period of fifteen months prior to unemployment. However, the required documents to be submitted by the unemployed person and the procedures can be lengthy and disadvantageous to the employees, which might eventually prevent them from receiving the compensation. In particular, the unemployed person would not be eligible for the compensation under the following circumstances:

- the unemployment is caused by termination as a result of misconduct;
- the unemployment is caused by termination as a result of intentionally committing a criminal offence against the employer;
- the unemployment is caused by termination as a result of intentionally causing damage to the employer;
- the unemployment is caused by termination as a result of violating rules or work regulations, or grossly disobeying the lawful order of the employer;
- the unemployment is caused by termination as a result of neglecting duties for seven consecutive days, without a justifiable reason;
- the unemployment is caused by termination as a result of negligently causing serious damage to the employer; or
- the unemployment is caused by termination as a result of or being imprisoned by a final judgment to imprisonment, except for an offence which is committed through negligence or it is a petty offence

With the cancellation of the previous regulations, including the Notification of the Social Security Office on the Eligibility Criteria for Unemployment Benefits B.E. 2547 (2004), and the Notification of the Social Security Office on the Eligibility Criteria for Unemployment Benefits (No. 2) B.E. 2563 (2020), the final

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judgment of the Labour Court - on the reasons for termination in the case of unemployment resulting from termination of employment - is no longer mandatory under the new Regulation. Consequently, employees that are dismissed by employers, who specify that the cause for termination is one of the abovementioned causes, shall be able to receive the SSO's unemployment benefits.

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Changes to the submission methods for Social Security Fund contributions

The Ministry of Labour issued a notification (Notification of the Ministry of Labour regarding the Rate of Contributions, the Procedures for Payment, and the Minimum and Maximum Wage used as the Base for the Calculation of Skill Development Fund contributions) to facilitate the monthly payment of Social Security Fund (SSF) contributions, by providing an alternative electronic platform or e-service system for the Department of Skill Development. Section 9 of this notification has repealed and replaced Section 9 of the Notification of the Ministry of Labour regarding the Rate of Contributions, the Procedures for Payment, and the Minimum and Maximum Wage used as the Base for the Calculation of Skill Development Fund contributions dated July 1, 2558 (2015), which provides that the contribution payment shall only be made by submitting the Contribution Form under Section 8 to the Bangkok Skill Development Institute or the Provincial Skill Development Institute. The payment of contributions to the fund can now be made via the e-service system, unless such submission is impossible or there is a system error.

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Updates on the Social Security Contribution Rate 2021

The Ministerial Regulation prescribing the Rate of Contributions to the Social Security Fund (No.2) B.E. 2564 (2021) was published in the Government Gazette on February 5, 2021. Having been reduced, the new contribution rates of 0.5% in total, shall apply to contributions which are paid between February 1, 2021 and March 31, 2021 by the employees who are insured person under Section 33 of the Social Security Act B.E. 2533 (SSA).

The employee's contribution rates in each category are as follows:

- 0.2% of the monthly salary for benefits relating to injury, sickness, disability, death, and childbirth;
- 0.2% of the monthly salary for benefits relating to old age and child allowance; or
- 0.1% of the monthly salary for benefits for unemployment.

However, Employers and the Government are obliged to pay total social security contributions at the same rates.

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Additional financial measures to remedy the impact of the Coronavirus 2019 (COVID-19)

The Thai Cabinet has passed a resolution which imposes financial measures to alleviate the debt burden of people, and to help SMEs so they are able to continue their business, with the details as follows:

(1) Improving the implementation of Loans for the Expenses Program for self-employed people who are affected by the Coronavirus (COVID-19) at the Government Savings Bank and the Bank for Agriculture and Agricultural Cooperatives (BAAC), with a total credit limit of 40 billion Thai baht (20 billion Thai baht per Bank) to people who are self-employed, with a flat interest rate of less than 0.10% per month, by extending the grace period for the principal and interest payments to no more than 12 months, from the original 6 months, in accordance with the criteria and conditions set by

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the Government Savings Bank and BAAC, including the extension of the loan period to no more than 3 years from the original 2 years 6 months; and

(2) The SMEs low-interest loan program has funds for tourism businesses totalling 10 billion Thai Baht. The Government Savings Bank will provide low-interest loans to SMEs entrepreneurs in the tourism sector, and supply chain sectors using vacant land and/or land and buildings with the title deed as collateral, with no requirement for credit bureau due diligence. The credit limit per individual shall not exceed 70% of the government's land appraisal value, with a maximum of 50 million Thai baht, a loan term 3 years, and interest rate of 0.10 percent per annum in the first year, 0.99 percent per annum in the second year, and 5.99 percent per annum in the third year. The loan applications can be filed until June 30, 2021.

The Ministry of Finance is confident that the implementation of such financial measures will help to alleviate the burden of the public, and help resolve the financial difficulties of entrepreneurs and enable them to operate their businesses and maintain employment. In order for the economy to continue to be driven forward in the midst of the COVID-19 Pandemic, the Ministry of Finance will closely monitor the situation, and it will be ready to issue appropriate measures to take care of the Thai economy in a timely manner when the situation changes.

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THAILAND
7 MAY 2021

Changes to the rate of contributions and submission methods for the Skill Development Fund:

The Ministry of Labour issued a notification (Notification of the Ministry of Labour regarding the Rate of Contributions and the Submission Methods for the Skill Development Fund to Support Business Operators Affected by the COVID-19 Outbreak) to alleviate the impact of the COVID-19 pandemic, and to facilitate monthly Skill Development Fund contributions, by reducing the rate of the contribution to 0.1% of monthly wages* in 2021. The contributions shall be made by those business operators who do not arrange any skill development. The new rate shall be calculated in accordance with the proportion of employees who do not receive any skill development training, or in the event that the employees do not take, or do not pass, the assessment for National Skill Standards, or in the event that the employees missed the training as prescribed by law. In addition, the Notification further prescribed the deadline of 31 July 2021 for the submission of the compulsory contribution form for calendar year 2020.

*The monthly wages are based on the minimum wage rate, which is the same rate as that stipulated under labour protection law, which the business operator paid in the last year before the year in which contributions are made.

THAILAND
28 MAY 2021

Updates on the Contributions Rate to the Social Security Fund in 2021

The Ministerial Regulations prescribing the Contributions Rate to the Social Security Fund B.E. 2564 (2021) were published in the Government Gazette on May 28, 2021 and came into effect on June 1, 2021. The updated Ministerial Regulations repealed the previous regulations, including the Ministerial Regulation prescribing the Rate of Contributions to the Social Security Fund B.E. 2563 (2020), and the Ministerial Regulation prescribing the Rate of Contributions to the Social Security Fund (No.2) B.E. 2564 (2021).

The Regulations were promulgated by virtue of the Social Security Act B.E. 2533 (1990), Section 7 paragraph one, and Section 46 paragraph one and paragraph two. They provide that the Government, the employer, and the employee under Section 33, shall contribute to the fund in order to receive compensation in the event of an injury, illness, disability, death, childbirth, child support, and old age, based on list for contribution rates, as attached to these Ministerial Regulations, which are shown below:

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Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

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Contributions Rate - List A - From 1 June 2021 to 31 August 2021

Contributors	Contribution Rate - Wages of the Employee (%)
1. Contributions for the compensation in the event of an injury or illness, disability, death, or childbirth: (1) Government (2) Employer (3) Worker	 1 1 1
2. Contributions for the compensation in the event of child support, and in the event of old age: (1) Government (2) Employer (3) Worker	 1.5 1.25 1.25
3. Contributions for the compensation in the event of unemployment: (1) Government (2) Employer (3) Worker	 0.25 0.25 0.25

Contributions Rate - List B - From 1 September 2021 onwards

Contributors	Contribution Rate of Wages of Employee (%)
1. Contributions for the compensation in the event of an injury or illness, disability, death or childbirth: (1) Government (2) Employer (3) Worker	 1.5 1.5 1.5
2. Contributions for the compensation in the event of child support, and in the event of old age: (1) Government (2) Employer (3) Worker	 1 3 3
3. Contributions for the compensation in the event of unemployment: (1) Government (2) Employer (3) Worker	 0.25 0.5 0.5

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Important: action likely required

Good to know: follow developments

Note changes: no action required

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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 2021 Q2.

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