MAYER | BROWN

Asia Employment Law: Quarterly Review

2020-2021

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Updated as of December 2021

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-fourth edition, we flag and comment on employment law developments during the fourth quarter of 2021 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2022.

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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AUSTRALIA

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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

AUSTRALIA

12 FEB

2021

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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2021

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)

AUSTRALIA

30 MAY

2021

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
30 MAY
2021

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

AUSTRALIA
30 MAY
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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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2021

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

AUSTRALIA

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Australian businesses and governments mandate COVID-19 vaccinations at work

Since May this year, when Alliance Airlines became one of the first employers in Australia to require its staff to undergo COVID-19 vaccinations, an increasing number of businesses have indicated that they will implement mandatory vaccination policies for their employees. The push for mandatory vaccination is occurring in the context of significant outbreaks of the Delta variant and on-going lockdowns across the country.

Employers have duties under occupational health and safety laws to eliminate and minimise risks to health and safety in the workplace and to provide a safe working environment.

Employees are contractually obliged to observe the lawful reasonable directions of their employer, and are required by statute to take reasonable care for their own occupational health and safety and that of other persons whose health and safety may be impacted by their acts or omissions at work.

It follows that in most instances, a requirement to be vaccinated will be a lawful, reasonable direction that employees are obliged to observe under their contract of employment, and also something that they must do in order to comply with their statutory duties under occupational health and safety legislation.

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A number of Australian governments have also issued mandatory vaccination public health orders. Such orders include mandatory vaccination for:

- Hotel quarantine and border control workers in jurisdictions including Victoria, the Northern Territory, South Australia, and Western Australia;
- Aged care workers nationally;
- Healthcare workers in New South Wales, Victoria, Tasmania and Western Australia;
- Construction workers in New South Wales, Victoria, and the Northern Territory;
- Childcare and education workers in New South Wales, Victoria and the Northern Territory; and
- Retail and hospitality workers in certain areas of western Sydney, Victoria, and the Northern Territory.

The case for mandatory vaccinations in the workplace

AUSTRALIA

29 JUL 2021

Fair Work Commission Full Bench decision illustrates potential pitfalls in making 'small cohort' enterprise agreements

The decision of the Full Bench of the Fair Work Commission (**Full Bench**) in *CFMMEU v Karijini Rail Pty Limited* [2021] FWCFB 4522 (***Karijini***), which was handed down on 29 July 2021, highlights the potential pitfalls for employers who are seeking to make a 'small cohort' enterprise agreement.

A small cohort enterprise agreement is one where the employer negotiates and makes an agreement with a small number of employees, in circumstances where it is likely that a significantly greater number of employees will later be covered by the agreement. Small cohort agreements can be used as an alternative to 'greenfields' agreements, which allow employers to make an agreement in respect of a 'genuine new enterprise' that is being established or proposed by the employer(s) concerned. Unlike a small cohort agreement, however, greenfields agreements must be made with a trade union, and must be made prior to the engagement of 'any persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement'. Small cohort agreements can be made without any union involvement. They are most often used in the resources sector, and on major infrastructure projects.

Previous decisions of both the High Court of Australia and the Full Court of the Federal Court of Australia have made clear that small cohort agreements are permissible under the *Fair Work Act 2009* (Cth) (**FW Act**). However, the *Karijini* decision highlights some of the potential traps for employers if they overreach in their efforts to negotiate and secure a small cohort agreement – particularly if they fail to ensure compliance with all of the necessary requirements for agreement approval under the FW Act.

Looking to the facts of *Karijini*, TRRC Pty Ltd (**TRRC**) had a contract with Roy Hill Infrastructure Pty Ltd (**Roy Hill**) to provide it with rail crew labour. The employment of TRRC's employees was covered by an agreement (**TRRC Agreement**). When TRRC's contract with Roy Hill was due to expire, the relevant union raised with TRRC the possibility of starting to negotiate a replacement agreement.

Rather than entering into discussions with the CFMMEU, TRRC's parent company incorporated a new subsidiary called Karijini Rail Pty Limited (**Karijni**) for the purpose of negotiating a new commercial contract with Roy Hill. Karijini then engaged two train drivers and commenced negotiations with them for an enterprise agreement (**Karijni Agreement**) to cover operations if and when it started to supply labour to Roy Hill. The clear intention of the companies was to transfer current TRRC employees to Karijini once the Karijini Agreement was in place.

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Karijini reached agreement with the employees in early August 2018, and applied to the Fair Work Commission (**FWC**) for approval of the agreement. After a delay of 13 months the agreement was approved in September 2019. The union then appealed against this decision. After further tribunal proceedings, a Full Bench of the FWC in July 2021, determined that the agreement could not be approved.

It reached this decision on two principal grounds: first, that the employer had misled the employees about the terms and operation of the Agreement, such that it could not be held that the employees had 'genuinely agreed' to it; and second, that the group of employees with whom the agreement was made had not been 'fairly chosen' in the relevant sense.

The employer in this instance came unstuck because they tried to be a little too clever. But that small cohort agreements can be negotiated and approved under the FW Act is illustrated by the August 2021 approval of an agreement that was negotiated with just two employees in *ALE Heavylift (Australia) Pty Ltd Enterprise Agreement* [2021] FWCA 4865. The point is that in this instance the employer had taken care to comply with the substantive requirements of the legislation, whereas in *Karijini* it had not.

CFMMEU v Karijini Rail Pty Limited [2021] FWCFB 4522
ALE Heavylift (Australia) Pty Ltd Enterprise Agreement [2021] FWCA 4865

AUSTRALIA

30 JUL 2021

Federal court rules Qantas' outsourcing of employees was adverse action

On 30 July 2021, the Federal Court of Australia handed down its decision in *Transport Workers' Union of Australia v Qantas Airways Ltd* [2021] FCA 873 (***TWU v Qantas***), with further clarification issued on 25 August 2021.

In August 2020, amid the COVID-19 pandemic, Qantas announced it would outsource some 2,500 ground crew and baggage handler positions at 10 Australian airports, in addition to 6,000 redundancies it had announced two months earlier. In making this announcement, Qantas indicated that the Transport Workers Union (**TWU**) would be afforded an opportunity to bid for the outsourced work, as required pursuant to the relevant enterprise agreements. The TWU subsequently prepared and submitted a bid, but was advised in November 2020 that the bid had been unsuccessful and that the contract had been let to other providers.

In December 2020, the TWU initiated proceedings in the Federal Court, claiming that Qantas' actions were unlawful by force of the general protections' provisions in the *Fair Work Act 2009* (Cth) (**FW Act**).

Section 340(1) of FW Act relevantly provides that a 'person' must not take 'adverse action' against another person because that person has, or has not, exercised 'a workplace right'. Section 346, meanwhile, makes it unlawful to take adverse action against a person because that person 'is…an officer or member of an industrial association'.

In this case, the TWU alleged that Qantas had subjected its members to adverse action because they: were union members; had the capacity to engage in enterprise bargaining upon expiry of their current agreement; could participate in a protected action ballot, and could engage in protected industrial action for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement.

According to section 361 of the FW Act, in circumstances such as this where one person (ie TWU) alleges that another person (ie Qantas) took action for a particular reason or with a particular intent, it is presumed that the person has taken the action for the alleged reasons or with the alleged intensions, unless the person proves otherwise.

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The Federal Court was ultimately satisfied that Qantas had proved that the outsourcing decision was not driven by the fact that some or all of the employees were members of a union, or that at the time of the outsourcing decision they had the ability to initiate or participate in bargaining for an enterprise agreement. Critically, however, the Federal Court was not satisfied that Qantas had discharged the onus of proving that the decision was not motivated by a wish to deprive workers from exercising their workplace rights to bargain and engage in industrial action.

Qantas has lodged an appeal against this decision, but in the meantime the trial judge has indicated that he will hand down a decision in relation to the remedy to be provided to the Union and its members before the hearing of the appeal (which is expected in February 2022).

Pending the outcome of the appeal, the decision stands as a clear reminder of the potential reach of the general protection provisions in Part 3-1 of the FW Act in general, and of the 'reverse onus' provisions in section 361 in particular.

Transport Workers' Union of Australia v Qantas Airways Limited [2021] FCA 873 (30 July 2021)
Transport Workers' Union of Australia v Qantas Airways Limited (No 2) [2021] FCA 1012 (25 August 2021)
Qantas' Application for Leave to Appeal (7 Sep 2021)

AUSTRALIA

4 AUG 2021

High Court of Australia confirms correct approach to determining who is a casual employee

The High Court has clarified the nature of casual employment in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (***Rossato***), which it handed down on 4 August 2021. In doing so it overturned the earlier decisions of the Full Court of the Federal Court in *Rossato* and *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (***Skene***).

In both *Rossato* and in *Skene* the Full Court had determined that for purposes of the *Fair Work Act 2009* (**FW Act**) a casual employee was one who had no "firm advance commitment" to ongoing and indefinite work, and whose employment was characterised by irregular work patterns, discontinuity and intermittency of work. In other words, according to the Full Court it was permissible to have regard to the whole relationship when assessing whether a person is a casual employee. In *Rossato* the High Court overturned this part of the Full Court's reasoning, and determined that the question of whether there was a "firm advance commitment" should be assessed strictly by reference to the terms of the employee's contract, rather than the subsequent conduct of the parties.

In practical terms the decision of the High Court had largely been pre-empted by the passing of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (**2021 Act**), which was noted in the Review for Q1 2021. Nevertheless, the reasoning of the High Court in *Rossato* may still be relevant in circumstances where an employee is engaged in a way that falls outside the common law and statutory meaning of casual employment. One example could be casuals engaged under enterprise agreements that pre-date the 2021 Act and include an understanding of casual employment that does not accord with the common law or the FW Act.

WorkPac Pty Ltd v Rossato [2021] HCA 23
Rossato – High Court clears the air (Corrs Insight, 6 August 2021)

AUSTRALIA

5 AUG 2021

Fair Work Commission Full Bench determines that a pre-emptive lockout is not protected industrial action

In *Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd* [2021] FWCFB 4808, a Full Bench of the Fair Work Commission (**FWC**) has affirmed that a lockout of employees by McCain Foods (Aust) Pty Ltd (**McCain**) at its potato processing plant (**the Plant**) in Tasmania did not constitute 'protected industrial action' for purposes of the *Fair Work Act 2009* (Cth) (**FW Act**).

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In July 2021, the Australian Manufacturing Workers' Union (**AMWU**) notified McCain that it intended to organise industrial action (namely, a strike) at the Plant. The action had been approved in accordance with the relevant statutory requirements, but *before* the strike commenced McCain implemented industrial action of its own by 'locking out' employees from the Plant.

The AMWU then sought an order from the FWC to restrain the employer's unlawful industrial action. In support of its application, the Union submitted that for the action to be 'protected' under the FW Act it must be *in response* to employee industrial action that was *currently taking place* or had already *taken place*. The Union argued that, because McCain instituted its lockout *before* the AMWU's strike commenced, the lockout constituted 'unprotected' industrial action.

By a 2:1 majority the Full Bench agreed with the Union, overturning the first instance decision of the FWC. In doing so the Full Bench affirmed what had commonly been understood to be the intention of the Parliament in enacting the relevant provisions of the FW Act – as evidenced, for example by the Explanatory Memorandum for the Fair Work Bill and by a number of tribunal decisions.

Nevertheless, as indicated by the first instance decision in this case, and by the dissent in the Full Bench, the meaning of the relevant provision is not entirely clear. In light of the majority decision in *McCain* it must now be assumed that employers may not lawfully lock out employees in circumstances where they (and/or their union) have merely *given notice* of their intention to take protected industrial action, but have not yet taken such action. Employers can only lock out employees where those employees have taken, or are taking, industrial action.

Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd [2021] FWCFB 4808
Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd [2021] FWC 4661

AUSTRALIA

11 AUG 2021

Court of Appeal finds that overseas service does not count towards Victorian long service leave entitlements

On 11 August 2021, the Victorian Court of Appeal handed down its decision *Infosys Technologies Limited v Victoria* [2021] VSCA 219. At issue was whether Infosys Technologies Limited ("Infosys") was liable to make payments of long service leave to two of its employees under the *Long Service Leave Act 2018* (Vic) (**LSL Act**). Infosys is a company incorporated in India, and registered as a foreign company in Australia. The two employees had each completed more than seven years of employment with Infosys, commencing in India and thereafter continuing in Victoria until the termination of their employment. The LSL Act provides that employees who have completed at least '7 years of continuous service' with one employer are entitled to long service leave. The key question for the Court was whether the LSL Act operates to confer entitlement to long service leave based on employment that partially occurs outside of the State of Victoria.

The Court of Appeal held that the phrase 'continuous employment' under the LSL Act must be construed in light of s 48(b) of the *Interpretation of Legislation Act 1984* (Vic) (**ILA**) which relevantly provides:

> In an Act or subordinate instrument, unless the contrary intention appears—
> …
> (b) a reference to a locality, jurisdiction or other matter or thing shall be construed as a reference to such locality, jurisdiction or other matter or thing in and of Victoria.

The Court found that the LSL Act did not manifest any such contrary intention, and therefore the reference to '7 years of continuous service' is properly

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construed as seven years of continuous service with one employer **in and of Victoria**. As the two employees had not completed seven years of continuous service with Infosys in and of Victoria, Infosys was not liable to pay them long service leave entitlements under the LSL Act.

In so finding, the Court of Appeal declined to follow a previous decision of the Full Federal Court of Australia, *Cummins South Pacific v Keenan* (2020) 302 IR 400 (***Cummins***), on the basis that it was 'plainly wrong'. In *Cummins*, it was held that service completed overseas could be counted towards the calculation of long service leave entitlements if, at the time a potential entitlement to long service leave arises, it can be fairly said that the service as a whole has a 'substantial connection' to Victoria. In applying this 'substantial connection' test, *Cummins* followed long-standing authority with respect to the interpretation and operation of the equivalent New South Wales long service leave legislation.

There are significant differences in long service leave legislation as between the various States and Territories. Nevertheless, it is distinctly possible that the decision in *Infosys* may impact the interpretation and operation of long service leave schemes in other Australian jurisdictions.

It is important to appreciate however that the Court of Appeal did not determine that to count for purposes of establishing an entitlement under the Victorian legislation the entire period of service had to be in Victoria – rather it found that there must be a 'substantial connection' between the service and Victoria. This means that it would still be possible for overseas service to 'count', so long as that connection existed at the relevant time. What could not count, according to the Court of Appeal, was service that entirely predated the existence of any connection with Victoria (as was the case with the two employees who were claiming an entitlement in *Infosys*).

Infosys Technologies Limited v Victoria [2021] VSCA 219

AUSTRALIA

2 SEP 2021

Federal Parliament passes *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*

On 2 September 2021, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (**Act**) passed through both Houses of Federal Parliament. The Act implements some of the 55 recommendations set out in Sex Discrimination Commissioner Kate Jenkin's Respect@Work: Sexual Harassment National Inquiry Report (2020) ('Jenkins Report').

The Act will amend various acts including the *Fair Work Act 2009* (Cth) (**FW Act**), the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and the *Australian Human Rights Commission Act 1986* (Cth). Key changes include:

- Extending the SD Act to cover members of Parliament, judges and State public servants.
- Conferring on the Fair Work Commission ('FWC') 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.

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- 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 time limit for making complaints to the Australian Human Rights Commission from six months to two years.
- Extending compassionate leave to cover miscarriage.

The Act commenced on 11 September 2021, with the exception of the provision conferring the FWC's new power to make stop sexual harassment orders. This provision will come into effect in mid-November so that the FWC has adequate time to update its forms and procedural rules, train Members and staff, develop tailored resources, establish support services, and consult experts about case management processes.

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 Revised Explanatory Memorandum
Respect@Work: Sexual Harassment National Inquiry Report (2020)
Federal Government's Response to the Respect@Work Inquiry

AUSTRALIA

8 OCT 2021

Full Federal Court provides clarification as to when an employee 'is able to make' a complaint for the purposes of adverse action protections.

In October 2021, the Full Court of the Federal Court handed down its decision in *Alam v National Australia Bank Limited* [2021] FCAFC 178. This decision helps clarify the application of some aspects of the protections against adverse action contained in Part 3-1 of the *Fair Work Act 2009* (Cth) (**FW Act**).

Protection against adverse action taken because of a 'workplace right'

The FW Act prohibits the taking of adverse action (such as termination of employment or subjecting employees to other forms of disadvantage) against an employee 'because of' a number of proscribed factors, including that the employee possesses or exercises a 'workplace right'. For this purpose, an employee has a 'workplace right' if (among other things) they are 'able to make a complaint… in relation to his or her employment'.

Uncertainty regarding when an employee 'is able to make a complaint' in relation to their employment

Immediately prior to *Alam*, the expression 'able to make a complaint… in relation to his or her employment' had been interpreted in differing ways.

In in *Cigarette & Gift Warehouse Pty Ltd v Whelan* [2019] FCAFC 16 (***Cigarette & Gift Warehouse***) the Full Court of the Federal Court of Australia held that for an employee to be 'able to make a complaint' in the requisite sense, the complaint must be about some underlying legal right or entitlement possessed by the employee. For example, an employee would be 'able to make a complaint' about their contractual rights or legally mandated minimum employee entitlements. An employee would not, however, be 'able to make a complaint' about a personal grievance unrelated to any legal right or entitlement that they possessed.

This interpretation was unsettled by a number of subsequent Federal Court decisions. However, in Alam the Full Court re-affirmed the reasoning in Cigarette & Gift Warehouse, and determined that for purposes of the FW Act's adverse action protections, an employee is 'able to make a complaint' if the complaint is about an underlying legal right or entitlement which the employee possesses. It is not sufficient that the complaint is merely in relation to their employment, although it is not (as had been suggested in some of the post-Cigarette & Gift Warehouse decisions) necessary for the employee to have an underlying 'right to complain'. In reaching this conclusion, the Court noted that the Cigarette & Gift Warehouse interpretation was consistent with the protective purpose of the FW Act's adverse action protections, and that it was more consistent with the text surrounding the expression 'able to make a

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complaint' in the FW Act.

Alam v National Australia Bank Limited [2021] FCAFC 178
Cummins South Pacific Pty Ltd v Keenan [2020] FCAFC 204
PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15
Cigarette & Gift Warehouse v Whelan [2019] FCAFC 16

AUSTRALIA
13 OCT
2021

Intellectual freedom constrained by confidentiality

The Facts

Dr Peter Ridd (**Ridd**) was employed by James Cook University (**JCU**) for 27 years in a number of academic positions, including as Professor and the Head of Physics. He also managed the University's Marine Geophysics Laboratory. Starting in 2015 Ridd made numerous public comments in both electronic and print media which were critical of research on climate change that had been conducted under the auspices of JCU, and elsewhere. These criticisms included a statement in a television interview to the effect that 'we can no longer trust the scientific organisations like the Australian Institute of Marine Science (**AIMS**)', the AIMS being a research institute that was connected to JCU. Subsequently, JCU initiated a disciplinary process against Ridd which ultimately led to his dismissal for 'serious misconduct', after he disclosed to journalists confidential information pertaining to the disciplinary processes.

Decision

Ridd challenged the termination of his employment on the grounds that it was contrary to the protection of intellectual freedom that was set out in the University's enterprise agreement. JCU argued that the termination related to Ridd's serious misconduct, and to his breaches of the University's Code of Conduct. This, according to JCU did not improperly impinge upon the intellectual freedom that was protected by the enterprise agreement.

Ridd's challenge to his dismissal was successful at first instance, but that decision was overturned in a majority decision of the Full Court of the Federal Court of Australia. That decision was in turn upheld by the High Court of Australia, albeit on slightly different grounds.

The High Court found that the intellectual freedom clause in the enterprise agreement was not constrained by the obligation to act respectfully and courteously that was set out in the University's Code of Conduct, as this would sit uncomfortably with the very notion of intellectual freedom. Nevertheless, the intellectual freedom that was protected by the enterprise agreement was subject to JCU's Code of Conduct which required staff to raise their concerns with University decisions and the processes used to make those decisions through 'applicable processes'. Therefore, JCU's termination of Ridd was found to be justified on the basis that much of his conduct involved breaches of confidentiality obligations that were of such a character as to constitute 'gross misconduct'.

The decision turned on its facts, but does provide useful guidance in relation to the interaction between protections of intellectual freedom in enterprise agreements or other instruments and employers' disciplinary procedures.

Ridd v James Cook University [2021] HCA 32

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Proposed legislation would oblige labour hire providers to ensure that their employees receive at least the same pay as workers who are (or would be) directly employed by the host to do the same job.

On 22 November 2021, the Leader of the Federal Opposition introduced the Fair Work Amendment (Same Job, Same Pay) Bill 2021 (the Bill) into the Federal Parliament. Broadly, the Bill is designed to ensure that labour hire businesses provide their employees with pay and conditions that are no less

Continued on Next Page

favourable than those that are (or would be) provided by the host to its own employees to do the same job.

The central mechanism by which the Bill aims to achieve this objective is the 'same job, same pay obligation' which would require labour hire providers to accord their employees whom they supply to another person ('host') pay and conditions that are no less favourable than those that would need to be paid to:

- employees of the other person performing the employee's duties and working the same hours or completing the same quantity of work as the employee or
- employees of an associated entity of the other person under an enterprise agreement that applies to employees of the associated entity.

Additionally, if the worker supplied to the host is a casual employee, then the labour hire business would be obliged pay the worker the casual loading that the host would be required to pay a casual employee performing those duties. If no such loading would be payable, then the labour hire firm would be obliged to pay a loading of 25%.

It is envisaged that there would be exclusions for small (fewer than 15) employers; use of labour hire workers to cover for employees who are on leave; and situations where such workers were required to meet surges in demand.

Hosts, meanwhile, would be placed under a range of obligations relating to: provision of information; ensuring that labour hire providers comply with their obligations; access to facilities and amenities; access to training opportunities; and consultation in relation to work arrangements. These obligations would be subject to the same exceptions as exceptions as those on providers.

Contraventions of the obligations on providers and hirers would attract significant monetary penalties.

There is no real prospect that the Bill would become law in its current form. However if the Australian Labor Party were to win the Federal election that is due by May 2022, there is a real prospect that a modified version of this Bill wold become law.

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AUSTRALIA

22 NOV 2021

Full Court affirms that Preparatory Works Amount to Unprotected Industrial Action

On 23 November 2021, the Full Court affirmed in *CFMMEU v Boggabri Coal Operations Pty Ltd* [2021] FCAFC 211 that preparatory work undertaken by an employee prior to the commencement of protected industrial action constituted unlawful strike action, thereby triggering the employer's statutory obligation to deduct pay from employees who had participated in unprotected industrial action.

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In 2019, employees of the mining company Boggabri Coal Operations Pty Ltd (**Boggabri Coal**) were authorised to take protected industrial action for purposes of the *Fair Work Act 2009* (Cth) (**FW Act**) on three occasions for up to two hours. The employees were issued with a notice to 'work as normal' until the notified commencement times of the action. Despite the directions, Mr Boxsell, an employee of Boggabri Coal, spent under ten minutes performing 'parking up and finishing' actions on his earth-mover prior to the relevant notified commencement times on three occasions. Boggabri Coal took the view that this constituted unprotected industrial action and deducted the mandatory four hours' pay from Mr Boxsell's income for each of the three days, in accordance with s 474(1)(b) of the FW Act.

In June 2021, Justice Jagot of the Federal Court accepted Boggabri Coal's claim, finding that the preparatory steps amounted to unprotected industrial action. In her reasoning, Justice Jagot found that Mr Boxsell's preparatory activities were neither authorised by Boggabri Coal nor undertaken at the end

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of a shift or break as was normal practice for employees performing work of the character undertaken by Mr Boxsell.

On appeal, the Full Court determined that the 'sole question' was whether the employee's 'parking up and finishing' activities amounted to industrial action pursuant to s 19 of the FW Act. Mr Boxsell's union argued that the employee did not take industrial action because the preparatory conduct was not performed 'in a manner different from that in which it is customarily performed' as prescribed by the Act. The Union argued that Mr Boxsell had taken the same steps as those regularly taken when completing shifts, and the employee had therefore continued 'work as normal' in accordance with Boggabri Coal's directions.

The Full Court affirmed that Mr Boxsell was 'meant to be performing the productive mine work' at the relevant times in accordance with directions, and that the preparatory acts taken were not authorised by Boggabri Coal. The Court dismissed the Union's arguments as 'unsustainable' because they 'effectively presuppose that it is customary for employees to take protected industrial action', when it is 'self-evidently not so'. The Full Court found that accepting the Union's arguments would 'corrupt' the statutory scheme for protected industrial action, concluding that:

> 'Having lawfully subjected Boggabri Coal to the undoubtedly significant commercial consequences associated with stoppages of work, they presume also to require that it should pay for what they regarded as preparatory measures in respect of which no statutory immunity could properly have attached.'

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AUSTRALIA

25 NOV 2021

Federal Government introduces new laws to enhance religious freedoms in Australia

The Federal Government on 25 November 2021 introduced three Bills which would reform federal discrimination laws to include religion as a protected attribute.

The Bills prohibit discrimination on the ground of 'religious activity or belief' in certain areas of public life (for example, education, employment and the provision of goods and services). These provisions are broadly in line with other Commonwealth anti-discrimination laws (for example the *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992*).

More controversially, the bills will provides certain exceptions from anti-discrimination obligations. These include permitting:

- religious organisations (including hospitals and aged care facilities) to hire people on the basis of their belief
- religious bodies (including education institutions and charities) to give preference to people who hold the same religious views in hiring staff.

However, discrimination under other laws would still be prohibited in these circumstances. For example although a religious hospital may refuse to hire someone on the basis of their religious beliefs, it would not be permissible for it to refuse to hire someone because of their gender or sexuality.

The Bills also purport to override other anti-discrimination laws in certain contexts:

- 'statements of belief' do not constitute discrimination under any federal, state or territory law. This means that, although a manager could not lawfully refuse to promote a woman because of her sex, the same manager could lawfully express a view that women should not hold leadership positions.
- where State laws (as in the State of Victoria) outlaw discrimination on grounds of religion in the hiring of teachers.

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The proposed reforms have attracted criticism from advocates for gender and LGBTQI+ equality, although the bills will not actually effect significant legal change in their current form. Rather, the Bills preserve the existing exceptions in section 38 of the Sex Discrimination Act 1984 (Cth) which permit religious schools to discriminate against students and teachers on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy. Discrimination is already permitted in the federal jurisdiction in these circumstances insofar as it is 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'. More significantly, the new laws may encourage certain groups who wish to take advantage of the existing exemptions in discrimination laws with respect to gender and sexuality, and people may feel more empowered to express religious views.

It is unlikely that the bills will become law before the Federal election that is due before May 2022, and it is not clear whether the Opposition Labor Party would re-introduce them if elected to Government. Presumably, the Coalition would re-introduce them if it is returned to government, although media reports suggest that some members of the current administration are not overly keen on the proposed changes.

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: CORRS CHAMBERS WESTGARTH

CHINA
1 JAN 2021

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.

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CHINA
3 AUG 2021

Circular on Delegating the Approval and Management Authority of Human Resources Service Agencies of the Departments under the State Council

The Ministry of Human Resources and Social Security ("MOHRSS") issued Circular on Delegating the Approval and Management Authority of Human Resources Service Agencies of the Departments under the State Council ("Circular") on August 3 2021. The Circular states that the approval and management authority of the human resources service agencies of the departments under the State Council is now delegated to the Beijing Municipal Human Resources and Social Security Bureau. Relevant transition work shall be carried out effectively to achieve the administrative localization of the human resources service agencies of the departments under the State Council. The Circular further stipulates that, the delegation of authority relates to two aspects: the first is to delegate the approval and record-filing authority for administrative licensing applied for by the ministries, commissions and directly affiliated institutions of the State Council and their directly affiliated public institutions in Beijing, Beijing-based enterprises directly under the Central Government, and national associations, involving three categories of approval items such as engaging in employment intermediary activities. The second is to delegate the day-to-day management authority of the human resources service agencies of the departments under the State Council.

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CHINA
4 NOV 2021

Circular on Issues concerning Vocational College Graduates' Participation in the Open Recruitment of Public Institutions

On November 4, 2021, the Ministry of Human Resources and Social Security ("MOHRSS") has issued the Circular on Issues concerning Vocational College Graduates' Participation in the Open Recruitment of Public Institutions (the "Circular"). The Circular requires that, public institutions must establish the correct concept of selection and employment, break with the practice of only hiring from prestigious schools and those with academic qualifications, and earnestly safeguard and ensure that graduates of vocational colleges (including technical colleges, the same below) have legal right to participate in public institutions' open recruitment and have an equal opportunity to

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compete for positions. Additionally, the Circular proposes the actions to encourage and guide graduates of vocational colleges to actively participate in the cause of rural revitalization, and that graduates of vocational colleges and those of ordinary colleges and universities equally enjoy the preferential policy of open recruitment of grassroots public institutions in difficult and remote areas. Where grassroots public institutions in key counties receiving assistance for rural revitalization need to recruit skilled workers of urgently needed, they may carry out special recruitment actions targeted graduates of vocational colleges.

More...

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: 競天公誠律師事務所 JINGTIAN & GONGCHENG

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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HONG KONG
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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

HONG KONG

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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

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2021

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

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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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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

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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,

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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** 2021

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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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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2 JUL 2021

Extending employees' compensation protection to employees commuting to or from work under "extreme conditions"

The Employee's Compensation (Amendment) Ordinance came into effect on 2 July 2021.

The Employee's Compensation Ordinance (Cap.282), as it stands prior to the amendments in July 2021, compensates an employee for injury or death as a result of accidents under Tropical Cyclone Warning Signal No.8 or when the Red or Black Rainstorm Warning Signal is in force. The July 2021 amendment extends compensation to injury or death as a result of accidents under "extreme conditions". According to the ordinance, the Chief Secretary for Administration may make an "extreme conditions announcement" which states the existence of extreme conditions that arise from a super typhoon or other natural disaster of a substantial scale during the period specified in the announcement. The extended compensation applies if the employee:

1. travels from his place of residence to his place of work by a direct route within a period of four hours before the time of commencement of his working hours for that day; or
2. travels from his place of work to his place of residence within a period of four hours after the time of cessation of his working hours for that day.

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HONG KONG
9 JUL 2021

More Statutory Holidays in Hong Kong from 2022

On 7 July 2021, the Legislative Council of Hong Kong passed the Employment (Amendment) Bill 2021 which increases the number of statutory holidays under the Employment Ordinance (the "EO") by five days progressively from 2022 to 2030. The implementation of new statutory holidays will take the following order:

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).

What Should Employers Do?

An employee who has been employed under a continuous contract for not less than three months by the employer is entitled to statutory holiday pay. The EO prescribes a rate of statutory holiday pay which is generally the average wage earned in the 12 months immediately before the statutory holiday. Employers should review their calculations and update their systems to ensure that they pay not less than the prescribed statutory holiday pay in respect of the additional statutory holidays.

If an employee is required to work on a statutory holiday, then the employer must ensure that it complies with obligations under the EO to give notice of and grant an alternative holiday or substituted holiday within the prescribed timeframes. If the statutory holiday falls on a statutory rest day, an employer must grant a holiday on the next day that is not a statutory, alternative or substituted holiday or statutory rest day. Employers should review its arrangements taking into account the additional statutory holidays to ensure that they comply with the EO.

Employers should also review and update their contracts of employment and relevant holiday policies to reflect the increase in statutory holidays, if necessary.

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Hong Kong Court Strikes Out Employment Claim for "Window Dressing"

In Xinhua News Media Ltd & Another v Chan Chun Wo & Another [2021] HKDC 903, the District Court (Court) struck out the employers' claim against former employees for overpaid wages and expenses on the ground that they should have been initiated in the Labour Tribunal. The Court reiterated that the focus is on the substance of the claim, free of "window-dressing", when considering whether it falls within the Labour Tribunal's exclusive jurisdiction.

Background

The Defendants were former directors of the 2nd Plaintiff and employees of the 1st Plaintiff. Before the Court proceedings, the employees had brought claims in the Labour Tribunal against the employer for arrears of wages and other payments.

The employers commenced the Court proceedings claiming overpaid salaries and medical expenses arising from misappropriation of the employers' assets and/or breach of fiduciary duties.

The employees applied to either strike out the claim or permanently stay the proceedings, or for a declaration that the Court had no jurisdiction. The employers argued that the Court had jurisdiction because their claim was not based on breach of the employment contract but breach of fiduciary duties and tort.

The Court's Decision

The Court struck out the employers' claim, which it held fell within the Labour Tribunal's exclusive jurisdiction. The Court also held that the claim was an abuse of process.

The Court reiterated that the focus is on the substance, not labels, of the claim. Even where the claim is for breach of fiduciary duty which arose out of an employment contract, it falls within the Labour Tribunal's jurisdiction. It might be different if the claim for breach of fiduciary duty was for an employee's breach of confidence by exploiting their position.

The Court held that, ignoring any "window-dressing", the employers' claims were in substance simply for alleged overpayments of wages and reimbursements. Wages and reimbursement were express terms in the employees' employment contracts and the "Employment Handbook" incorporated into those contracts. Therefore, the claim fell within the Labour Tribunal's exclusive jurisdiction.

Further, from a practical perspective, the claim was simply a factual dispute of whether the employees had followed the required procedure such that the payments they had obtained were authorised. The Court considered it immaterial whether the legal basis was breach of fiduciary duty, bad faith, gross misconduct or honest mistake. Therefore, the claim would be suitable to be dealt with by the Labour Tribunal. This raised suspicions as to whether the employers' additional allegations were "window-dressing" as an excuse to initiate the action in the District Court in order to frustrate the employees' Labour Tribunal proceedings.

The Court found that regardless of the suspicion, it was an abuse of process for the employers to start their claim in the Court under the circumstances.

Therefore, the Court claim was struck out.

Takeaway for Employers

When starting legal proceedings against employees, employers should pay attention to the substance of their claim. If the claim is in substance for breach of the employment contract or a fiduciary duty arising out of it, then it should be started in the Labour Tribunal. Initiating the action in a court or another tribunal may result in the claim being struck out.

The judgment
More...

HONG KONG

26 AUG

2021

Equals Opportunities Commission ("EOC") releases updated guide for SMES to prevent sexual harassment

In the past three years, over 75% of sexual harassment complaints received by the EOC were employment related. Employers may be held vicariously liable under the Sex Discrimination Ordinance for any unlawful sexual harassment committed by their employees in the course of employment, even if the employer had no knowledge of it. A defence may be available if the employer proves it has taken reasonably practicable steps to prevent sexual harassment. The guide provides insight as to what reasonably practicable steps are.

In short, these steps are broadly categorized into preventive and remedial measures. In terms of preventive measures, an employer should develop a clear anti-sexual harassment policy, establish proper complaint channels and provide regular training to inform employees what constitutes sexual harassment. In terms of remedial measures, the employer should handle complaints properly, e.g. by conducting an investigation, and make temporary arrangements to protect the alleged victim and prevent further incidents. Appropriate disciplinary measures should follow if applicable and the company's anti-harassment policy should be reviewed regularly.

The guide provides further details as to how to implement the above steps

HONG KONG

17 SEP

2021

Jurisdictional limit of Minor Employment Claims Adjudication Board increases

The jurisdictional limit of the Minor Employment Claims Adjudication Board (MECAB) increases from not exceeding HK$8,000 per claimant to not exceeding HK$15,000 per claimant from 17th September 2021 (the "effective date").

For claims where the right of action arises wholly or partly after the effective date, the MECAB has exclusive jurisdiction to hear claims arising from breach of contract of employment, the Employment Ordinance other than claims founded in tort, where each claim concerns not more than 10 claimants and each claimant claims for a sum of money not exceeding HK$15,000. Claims for a sum of money exceeding HK$15,000 per claimant or where number of claimants exceeds 10 shall be lodged in the Labour Tribunal.

For claims where the right of action arose before the effective date, the jurisdictional limit of the MECAB remains to be HK$8,000 (maximum number of claimants is unchanged) and any claims exceeding that limit shall be lodged in the Labour Tribunal.

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HONG KONG

8 OCT

2021

Rainbow Shines into Hong Kong "Home Ownership Scheme" Flats

Following a trend of recognition of rights for same-sex couples, the case of *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] 3 HKLRD 427 marked another welcomed legal victory for same-sex married couples.

The judicial review was brought against the Housing Authority("**HA**"), which subsidised a Home Ownership Scheme (the "**Scheme**"). Under the Scheme only the owner and "authorised occupants" could occupy a flat. The HA's policies (the "**Policy**") stipulated that same-sex spouses of the owner were not recognized as "authorised occupants"; nor could the owner transfer the flat to same-sex spouses without paying a premium.

The Court of First Instance (the "**Court**") agreed that the Policy constituted unlawful discrimination on the ground of sexual orientation and struck the Policy down. In so holding, the Court reiterated that questions for determination were whether the challenged practices constituted differential treatment, and whether the differential treatment was justified.

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HONG KONG **8 OCT** 2021

The Court first found that there was differential treatment between heterosexual and homosexual couples under that policy. The Court observed that both heterosexual and homosexual couples are capable of equivalent interdependent and interpersonal relationships. and also do not intrinsically differ in their need for affordable housing, a family home to live together in, and their wish or desire to own a home jointly.

The Court went on to find the differential treatment unjustified. Whilst the HA argued that the traditional family can be promoted through denying benefits to same-sex couples, the Court emphasised the need to scrutinise the evidential basis of justifications of differential treatment against same-sex couples.

For a detailed commentary on the case and its potential implications, please refer to our legal update here.

HONG KONG **26 OCT** 2021

To Explain or Not to Explain (the Reason for Termination) – That is the Question for Hong Kong Employers

The Court of First Instance (the "**Court**") in Hong Kong has overturned a decision of the Labour Tribunal which held that an employer who failed adequately to prove that a stated reason for dismissal was "true and valid" had breached the implied duty of mutual trust and confidence.

The employer, the Equal Opportunities Commission ("**EOC**"), terminated the employment of an employee by payment of wages in lieu of notice in accordance with section 7 of the Employment Ordinance. In the termination letter, the reason given was that the employee's attitude and behaviour did not match with the employee's job requirements.

The Labour Tribunal found that the EOC had the burden to prove that the reason given was true and valid. Having failed to discharge that burden, the EOC had breached an implied duty of mutual trust and confidence which exists in every employment contract. The employee was awarded substantial damages.

In overturning the Labour Tribunal's decision, the Court held that the implied duty of mutual trust and confidence should generally apply only when the employment relationship is ongoing, not on its termination. Furthermore, the right to terminate can be exercised unreasonably (or even capriciously) as long as the exercise is in accordance with the contract (or statute). It is for the legislature, not the court itself, to determine the extent courts should consider the rightness or wrongness of a decision to terminate.

For a detailed commentary on the case and its impact on the decision to terminate a contract of employment, please refer to our legal update here.

HONG KONG **1 NOV** 2021

Hong Kong Court Grants Rare Temporary Injunction Enforcing Non-compete Covenant against Employee

The Hong Kong Court of First Instance (the "**Court**") recently granted a rare interlocutory (temporary) injunction enforcing a non-compete covenant ("**NCC**") against a former employee. As this was among only a handful of court decisions in Hong Kong dealing with non-competition contract clauses, this recent case provides good lessons on what should be done to maximise an employer's prospects of obtaining interlocutory relief to enforce an NCC.

Case Facts

The employer began employing the former employee in 2019. The employment contract included a term which prevented the former employee from being employed by a competitor within six months after terminating the employment contract. In breach of that term, the former employee joined a competitor less than a month after ceasing employment with the employer. The employer applied for an injunction to enforce the restrictive covenant.

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Ruling

In granting the injunction, the court found that:

- In general, restrictive covenants are unenforceable unless they can be shown to be reasonable in the interests of the parties and in the public's interest. The employer has adduced sufficient evidence to suggest it has a legitimate interest in protecting its own confidential information by enforcing the restrictive covenant.
- Even if the former employee may have forgotten details of the confidential information he had access to, a general impression of the information would be damaging, justifying the plaintiff to seek protection.
- A NCC serves a unique function in protecting an employer's interest and in general its legitimacy is unaffected by the presence of other protective clauses, such as a confidentiality clause, which has its own limits.
- In weighing up the balance of convenience, the Court considered that the former employee would suffer little prejudice if the NCC was enforced; because the plaintiff offered to pay him his former base salary during the restrictive period.

The Court held that on the basis of available evidence adduced and submissions advanced by the parties, the plaintiff demonstrated better prospects of success than the 1st defendant-former employee on whether the NCC would ultimately be enforceable. The Court also found that granting the injunction carried the lowest risk of injustice, causing the least irremediable prejudice.

For a discussion of other important factors and particular facts the Court relied on to reach its judgment, as well as the general lessons that an employer should bear in mind in enforcing a NCC, please refer to our legal update here.

HONG KONG

10 NOV 2021

Resolving the Vexed Issue in Hong Kong of Offsetting MPF Contributions against Long Service & Severance Pay Just Got (Potentially) Simpler

For many years, employers in Hong Kong enjoyed the statutory right to reduce long service pay or severance pay an employee is entitled to by offsetting it against MPF contributions made by employers. Such offsetting arrangement met criticisms over the years and in 2018 the Hong Kong government (the "**Government**") proposed to gradually abolish the arrangement. The 2018 proposal involved three distinct elements:

- the abolition of the offsetting arrangement,
- requiring employers to fund their gradually increasing obligations for long service pay/severance pay by means of payment into a discrete account (the "**Designated Saving Account**"), and
- 25 years of subsidy from the Government.

Whilst the first two elements were easy to understand, the 25 years subsidy was based on a formula that, according to a majority of the employers, made it difficult for them to plan their costs. Thus, the Government came up with a simplified formula.

The New Subsidy Scheme

The easiest way to consider this new scheme is that the employer will pay a percentage of any LSP or SP due after the effective date. Such percentage due by the employer increases from 50% to 95% over the 25 years following the effective date. The Government will pay the balance of between 50% and 5%, reducing over the same period.

However, the above is a simplification because:

- the actual amount payable by an employer in respect of an employee in the first 9 years after the effective date is capped, and

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- if an employer in any year pays over HK$500,000 in LSP or SP to its employees in aggregate, then the employer will have to pay an increased percentage of the excess over HK$500,000 in any year from the 10th year after the effective date.

One point to highlight is that under this new arrangement, the amount of subsidy is entirely independent of the balance of an employer's Designated Saving Account. As such, the Designated Saving Account becomes a pure funding vehicle for the employer, rather than something which impacts the amount of subsidy potentially due from the Government.

For a review of the history of the offsetting arrangement and expert perspective of how the refined subsidy scheme compares to the proposed subsidy scheme in 2018, please refer to our legal update here.

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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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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WAGE CODE

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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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INDIA

13 FEB 2021

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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INDIA

17 FEB 2021

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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19 FEB 2021

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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INDIA

2 MAR 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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INDIA

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

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

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OSH CODE

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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.

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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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INDIA

5 APR

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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INDIA

5 APR 2021

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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6 APR 19, 21 MAY 2, 7 JUN 2021

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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INDIA

28 APR 2021

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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INDIA

29 APR 27 MAY 2021

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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INDIA

30 APR

20 MAY

1, 15 JUN

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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INDIA

1 JUN

2021

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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INDIA

3, 15 JUN

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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INDIA

14 JUN

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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INDIA

14 JUN 2021

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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INDIA

WAGE CODE

7, 14 JUL

3, 17 SEP

IR CODE

7 JUL

17 SEP

OSH CODE

2 JUL

17 SEP

SS CODE

27 AUG

17 SEP

2021

Implementation of labour codes delayed beyond October 2021.

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**) (together '**Labour Codes**') were passed by the Parliament and were granted Presidential assent in September 2020. The Labour Codes were originally expected to come into effect from 1 April 2021. However, the implementation of the Labour Codes has been deferred for the time being and the Labour Codes are likely to be implemented in 2022.

In recent months, the Central Government and few more state governments have framed draft rules under the Labour Codes. The draft rules provide for a window of 30 to 45 days from the date of publication of their publication for submitting public/stakeholder comments. The relevant state government or the Central Government (as the case may be) will review the comments received , assess the scope for making changes/revisions to the rules, and thereafter publish the final rules under the Labour Codes. The finalized rules, once published, will subsume the respective central and state rules under the subsumed laws. Set out below is a summary of the states that have released their draft rules in Q3 of 2021:

a. Draft State Rules for Wage Code:

The state governments of Himachal Pradesh, Jharkhand, Rajasthan, Maharashtra and Haryana 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 State Rules for IR Code:

The state governments of Jharkhand and Haryana 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.

c. Draft State Rules for OSH Code:

The state governments of Odisha and Haryana have released the state rules

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INDIA

WAGE CODE

7, 14 JUL

3, 17 SEP

IR CODE

7 JUL

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OSH CODE

2 JUL

17 SEP

SS CODE

27 AUG

17 SEP

2021

under the OSH Code for public comments. The draft state rules on OSH Code provide for rules on, among other things, constitution of an 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.

d. Draft State Rules for SS Code:

The state governments of Maharashtra and Haryana 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 claims), manner of making an application to receive gratuity payments, social security for building and other construction workers, relevant authorities and compliances under the SS Code, manner of compounding offences, etc.

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INDIA

20 JUL

2021

Amendment to working hours for opening of shops and establishments 24*7 in Karnataka

The Karnataka state government had published a notification on 7 January 2021 permitting all shops and establishments under the Karnataka Shops and Commercial Establishments Act, 1961 (**Karnataka S&E Act**) to function 24x7, subject to certain conditions such as:

- An employer shall not require or allow any person employed therein to work for more than **8 hours in any day** and 48 hours in any week.

To align this condition with the provisions of the Karnataka S&E Act, the notification has been amended whereby, the aforesaid condition has been substituted with the following:

- No employee in any establishment shall be required or allowed to work for more than **9 hours on any day** and 48 hours in any week.

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INDIA

26 JUL

2021

Portal launched to register unorganized workers.

The Ministry of Labour and Employment has launched a portal to register 38 core unorganised workers in the country and to eventually help in the implementation of social security schemes.

A worker can register on the portal using his/her Aadhaar card number and bank account details, apart from filling other necessary details like date of birth, home town, mobile number and social category. The workers will be issued an e-Shram card containing a 12-digit unique number for the purposes of availing the benefits under social security schemes.

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INDIA
4 AUG
2021

The Manipur Shops and Establishments (Regulation of Employment and Conditions of Service) Ordinance, 2021 (Ordinance)

The Manipur state government has promulgated the Ordinance. It repeals the Manipur Shops And Establishments Act, 1972. The Ordinance shall apply to the shops and establishments employing ten or more workers. It has come into force on the date of publication of the Ordinance.

The key changes introduced by the Ordinance are set out below:

- The provisions under the Ordinance is applicable only to shops and establishments with ten or more workers.
- Workers engaged in confidential, managerial and supervisory capacity are exempt from the applicability of the provisions of the Ordinance.
- Women workers can now work from 6 A.M. to 9 P.M. instead of from 7 A.M. to 7 P.M. However, subject to certain conditions and obtaining the written consent of the women workers, they can work between 9 P.M. and 6 A.M.
- The daily working hour limit has been increased to 9 hours from 7 hours a day.
- Rest interval of half an hour must now be provided after 5 hours of work instead of the first 3 or 4 hours of work (as determined by the employer).
- Casual leave entitlement has been reduced to 8 days a year to be credited on a quarterly basis from the earlier entitlement of 12 days a year.
- The privilege leave entitlement has been limited to 1 day for every 20 days worked in place of 1 month after every 12 months of continuous service.
- The Ordinance does not provide for any sick leave entitlement.
- The holiday entitlement has been increased from 6 to 8 days a year.

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INDIA
11 AUG
2021

The Labour Welfare Fund (Gujarat) (Amendment) Rules, 2021

The Gujarat state government has notified the amendment to the Labour Welfare Fund (Gujarat) Rules, 1962 (**Gujarat LWF Rules**).

It is no longer necessary for the employers to maintain and preserve the registers and records for a period of 10 years and the requirement to maintain register of wages in Form A under the Gujarat LWF Rules.

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INDIA
11, 21, 26 AUG
2021

Mandatory vaccination circulars/orders in some locations in India.

Bangalore - The Chief Commissioner of the Bruhat Bengaluru Mahanagara Palike (**BBMP**) has issued a circular, requiring the employers of commercial establishments/industries/hotels & restaurants and other offices within the BBMP jurisdiction to ensure vaccination of 100% working staff by 31 August 2021. The employees are required to carry with them proof of their vaccination. The BBMP authorities are authorized to carry out inspections to check compliance starting 1 September 2021.

Tamil Nadu - As per an order dated 21 August 2021, all establishments which are permitted to function (including IT/ITeS companies) are required to ensure that their employees are vaccinated.

Maharashtra - Under the revised state guidelines private establishments are permitted to operate at full capacity if all employees have been fully vaccinated. Further, private offices are allowed to remain open for 24 hours a day provided that not more than 25% of total employees work in each session.

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INDIA
14 AUG 2021

Auto renewal of registration under Andhra Pradesh Shops and Establishment Act, 1988 (**Andhra Pradesh S&E Act**)

The Andhra Pradesh state government issued a notification under the Andhra Pradesh S&E Act to minimise regulatory compliance burden by introducing auto renewal of registration under section 4 the Andhra Pradesh S&E Act, by online submission of a self-certification and receipt of the payment .

More...

INDIA
17 AUG 2021

Employees State Insurance Corporation (**ESIC**) notifies COVID-19 Relief Scheme (**Scheme**).

In the event of death of the worker covered under the Employees State Insurance Act, 1948 due to Covid-19, the average wages of the deceased worker will be distributed among the family members of the deceased worker every month and will be paid directly in their accounts.

The following requirements must be met in order to be eligible for the scheme:

- The insured person who died due to COVID-19 must have been enrolled on the ESIC web portal at least three months before the date of diagnosis of COVID-19.
- There must have been at least 70 days of contributions made or payable in respect of the deceased insured person within a period of maximum one year immediately preceding the diagnosis of COVID-19.
- In case of death due to COVID-19, the spouse, the son up to 25 years of age, the unmarried daughter and the widowed mother of the insured would be eligible for the relief.
- The Scheme shall be effective for two years from March 24, 2020 and the minimum relief under the scheme shall be Rs 1800/- per month.

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INDIA
26 AUG 2021

Employer Guidelines For Rectification Of Details For KYC Update Of Members

Where inaccurate information about the members of the Employees' Provident Fund Organisation (**EPFO**) have been filed by the employer, difficulties could be faced by such employees to complete their KYC online for the purpose of availing services of the EPFO online. To remedy this, the EPFO has set out a thorough process for employers to rectify the details of such employee members. The process for rectification is set out below in brief.

- If there are 2 or more field corrections, or complete member name corrections and/or his/her father's name corrections, then the request of joint declaration should be submitted manually to the EPF field office directly across the counter.
- If there are only spelling corrections, expansion of initials in employee member's name, and change in date of birth, then, it can be submitted online with documentary proof.
- The documents to be submitted for each case has been given in the notification.

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INDIA
26 AUG 2021

Portal launched by the Maharashtra state government, to report accidents in the factory.

The Maharashtra state government issued a notification under the Factories Act, 1948 which states that an online system has been developed to ensure timely receipt of information on accident in the factory. In case of fire, air leak, explosion or any other accident in factories, all manufacturers are required to fill the details in Form No.24 or 24-A of the Accident Reporting System, which could be found on the Directorate's website i.e.www.mahadish.in. This should be submitted with the signature of the Occupant/Manager of the factory to the concerned office of the Directorate within the prescribed time.

More...

INDIA
31 AUG 2021

Employers granted relief from penalty for non-filing of electronic- challan-cum-return (ECR) for May 2021.

The EPFO has granted relief to the employers who have not been able to file ECRs under under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (**EPF Act**) for the month of May, 2021 (due on or before 15 June 2021) on account of non-seeding of Aadhaar in the Universal Account Numbers for EPF members. In such cases, non-filing of ECRs for the month of May 2021 shall not be presumed as employers default.

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INDIA
31 AUG 2021

Expansion of list of Part-B countries under the Guidelines for International Arrivals.

The Ministry of Health and Family Welfare issued an addendum to the Guidelines in International Arrivals dated 17 February 2021 (**Guidelines**) and expanded the list of countries to include Botswana, China, Bangladesh, Zimbabwe, South Africa, Mauritius and New Zealand under Part B of the Guidelines. Travellers from Part B courtries are required to submit a Self Declaration Form on the Air Suvidha Portal and declare their travel history for the last 14 days.

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INDIA
11 SEP 2021

Deadline for seeding Aadhaar with UAN extended.

The EPFO has deferred the implementation of its order mandating filing of ECRs or provident fund returns with Aadhaar-verified universal account numbers (UAN) till 31 December 2021, for administrative zone of northeast region which comprises Assam, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland and Tripura and for certain class of industries like building & construction, plantations etc.

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INDIA
24 SEP 2021

The Goa Shops and Establishments (Amendment) Act, 2021 (Goa S&E Amendment Act)

The state government of Goa notified the Goa S&E Amendment Act to amend the Goa Shops and Establishments Act, 1973. The key highlights of this amendment are set out below:

- Female employees cannot be required or allowed to work in any shop or establishment between the hours of 7.00 PM to 6.00 AM However, subject to certain conditions (such as those relating to safety and transportation) and obtaining the written consent of the female workers, they can be required to work at the establishment's premises between 7.00 PM to 6.00 AM.
- Employees whose average monthly wages exceeds INR 24,000 are now exempted from the applicability of the existing S&E law.
- The threshold for the penalties for contravention of the provisions of the Goa S&E law have been substantially increased and these would now range from INR 500 to INR 30,000 depending on the nature of the offence. Earlier, the penalties ranged from INR 100 to INR 2000.
- Offences can be compounded by the officer for a sum of 75% of the maximum fine of the offence.

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INDIA
1 OCT 2021

The Tamil Nadu Labour Welfare Fund (Amendment) Act, 2021

The state government of Tamil Nadu has notified the amendment to the Tamil Nadu Labour Welfare Fund Act, 1972 to increase the contributions of the employee, employer, and the government from the existing rates of INR 10, 20 and 10 to INR 50, 100 and 50 respectively.

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Implementation of labour codes delayed beyond December 2021

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**) (together '**Labour Codes**') were passed by the Parliament and were granted Presidential assent in September 2020. The Labour Codes were originally expected to come into effect from 1 April 2021. However, the implementation of the Labour Codes has been deferred for the time being and the Labour Codes are likely to be implemented in 2022.

In recent months, the Central Government and few more state governments have framed draft rules under the Labour Codes. The draft rules provide for a window of 30 to 45 days from the date of publication of their publication for submitting the public/stakeholder comments. The relevant state government or central (as the case may be) will review the comments received by various stakeholders, assess the scope for making changes/revisions to the rules, and thereafter publish the final rules under the Labour Codes. The finalized rules, once published, will subsume the respective central and state rules under the subsumed laws. Set out below is a summary of the states that have released their draft rules in Q4 of 2021:

a. Draft State Rules for Wage Code:
The state governments of Assam, Mizoram, Goa, Telangana and Delhi 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. Further, the state government of Gujarat released the final state rules under the Wage Code after the public comments were considered by the state government.

b. Draft State Rules for IR Code:
The state governments of Telangana and Assam 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. Further, the state government of Gujarat released the final state rules under the IR Code after the public comments were considered by the state government.

c. Draft State Rules for OSH Code:
The state government of Bihar has released the state rules under the OSH Code for public comments. The draft state rules on OSH Code provide for rules on, among other things, constitution of an 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.

d. Draft State Rules for SS Code:
The state governments of Assam, Himachal Pradesh, Delhi and Gujarat 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 claims), manner of making an application to receive gratuity payments, social security for building and other construction workers, relevant authorities and compliances under the SS Code, manner of compounding offences, etc.

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INDIA 2021

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INDIA **6 NOV** 2021

The Haryana State Employment of Local Candidates Act, 2020 (LC Act)

While the state government of Haryana has notified the LC Act on 06 November, 2021, the LC Act will come into effect from 15 January, 2022.

The LC Act is applicable to all private companies, societies, partnership firms, trusts, any person employing ten or more persons in Haryana. The LC Act requires private sector employers to reserve 75% of job posts that offer a salary of less than INR 30,000 for individuals who are domiciled in Haryana. The state government of Haryana has also made the residency (domicile) requirement to 5 years for a person to obtain a residency certificate.

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INDIA **16 NOV** 2021

Notification for relaxation of time limit for filing and depositing of contributions towards employees' state insurance (ESI)

Taking into account of various disruptions in the Ministry of Labour and Employment's IT systems, an extension has been granted for remitting ESI contributions. The notification provides that (a) the contribution for the month of October 2021 can be remitted by 30 November 2021 instead of the earlier date of 15 November 2021; and (b) the return of contribution for the period from April 2021 to September 2021 can be filed by 15 December 2021 instead of the earlier timeline of 11 November 2021.

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INDIA **23, 24 NOV 8 DEC** 2021

Declaration of Uranium, Coal and Automobile Manufacturing industry as a Public Service Industry under the Industrial Disputes Act, 1947 (ID Act).

The central government has declared the 'Uranium Industry', covered under item 19 of the First Schedule of the ID Act, as a Public Utility Service for the purposes of this Act, for a period of six months, with effect from 19 December 2021. The Central Government has also declared the 'Coal Industry', covered under item 19 of the First Schedule of the ID Act, as a Public Utility Service for the purposes of this Act, for a period of six months, with effect from 27 November 2021.

The state government of Tamil Nadu has declared the 'Automobile Manufacturing Industry', covered under item 19 of the First Schedule of the ID Act, as a Public Utility Service for the purposes of this Act, for a period of six months, with effect from 24 November 2021.

Section 22 of the ID Act, which imposes additional notice requirements and other restrictions on strikes and lock-outs in public utility services, will therefore apply to the uranium, Coal and Automobile Manufacturing (in Tamil Nadu) industry for the notified period. Accordingly, among other conditions, workmen employed in banks cannot go on strikes without giving six weeks' notice to their employer, and similarly employers in the banking industry cannot declare a lock-out without giving six weeks' notice to their workmen.

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

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2021

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INDIA

9 DEC

2021

Notice to link Employees' State Insurance Corporation (**ESIC**) insurance number of insured person with Employees' Provident Fund Organisation (**EPFO**) universal account number (**UAN**).

Ministry of Labour and Employment has decided to link ESIC insurance number of insured person with their EPFO UAN, a 12 digit identification number allotted by EPFO. EPFO members with authorised aadhaar and bank details seeded against their UAN can submit their provident fund balance withdrawals/settlements/transfer requests. This has been introduced for the ease of access to various benefits under the Employees' State Insurance Act, 1948.

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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.

INDONESIA
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.

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").

INDONESIA
28 JUL 2021

New Regulation Lays Out Procedure to Obtain Unemployment Benefits

The Ministry of Manpower has issued Regulation No. 15 Year 2021 dated July 28, 2021, regarding Procedures to Obtain Unemployment Benefits ("MOM 15").

MOM 15 is an implementing regulation for Government Regulation No. 37 Year 2021 dated February 2, 2021, regarding the Implementation of the Unemployment Benefits Program. Under Article 31 of MOM 15, the right to obtain unemployment benefits is lost if the employee does not file a claim within three months of termination of employment, has found a new job, or passes away.

INDONESIA
13 AUG 2021

Indonesia's Manpower Ministry Issues Guidelines on Employment Relationship during Covid-19

The Indonesian Ministry of Manpower has issued a new decree, No. 104 Year 2021 dated August 13, 2021, regarding Implementing Guidelines for the Employment Relationship during Covid-19 ("MOM 104").

MOM 104 contains instruction on (i) the implementation of work from home and work from office; (ii) the implementation of wages; and (iii) steps to prevent employment termination.

INDONESIA
12 NOV 2021

Retroactive revocation of several manpower regulations

With the enactment of Law No. 11 of 2020 dated November 2, 2020 regarding Job Creation, also known as the Omnibus Law, and its implementing regulations, in practice, there were several ministerial manpower regulations whose substance had been regulated under new regulations or which were no longer suitable and therefore needed to be revoked.

On November 12, 2021, the Minister of Manpower ("**MOM**") issued MOM Regulation No. 23 Year 2021 regarding the Revocation of MOM Regulations as a result of Law No. 11 of 2020 on Job Creation and its Implementing Regulations ("**MOM 23**").

Continued on Next Page

LOOKING BACK

INDONESIA
12 NOV 2021

MOM 23 revokes 19 regulations including MOM regulations on termination benefits, investment, and outsourcing. MOM 23 applies retroactively from February 2, 2021.

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INDONESIA
25 NOV 2021

Job Creation Law ruled conditionally unconstitutional and must be revised within two years

The Indonesian Constitutional Court (*Mahkamah Konstitusi*), in Case No.91/PUU-XVIII/2020, ruled that Law No. 11 of 2020 dated November 2, 2020 regarding Job Creation, also known as the Omnibus Law, is conditionally unconstitutional and must be revised within two) years of the court's decision.

The Omnibus Law amended 78 Indonesian laws, including the Indonesian Manpower Law, with the stated aim of removing barriers to investment in Indonesia. This Constitutional Court decision raises the possibility that the substance of the current Indonesian Manpower Law, as amended by the Omnibus Law, might be changed during the anticipated revision process.

And if the Government of Indonesia fails to implement the revision as ordered by the Constitutional Court, the Omnibus Law (including the Indonesian Manpower Law, as amended by the Omnibus Law) will become permanently unconstitutional and all the earlier laws amended or replaced by the Omnibus Law will become valid again.

More...

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: SSEK Indonesian Legal Consultants

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...

JAPAN
9 JUN 2021

Amended Child Care Leave and Family Care Leave Act – Introducing a More Flexible Child Care Leave System

The amended Child Care and Family Care Leave Act was promulgated on June 9, 2021. Of particular note is the establishment of a flexible child care leave system that allows employees to take up to 4 weeks of child care leave within 8 weeks of the child's birth, in order to especially encourage male employees to take child care leave (effective October 2022). In addition, the Child Care and Family Care Leave Act has been amended in several points, including to require employers to confirm the intent to take leave of individual employees who inform the employer of a pregnancy or childbirth (effective April 2022).

More...

JAPAN
1 APR and 1 SEP 2021

Expansion of the special enrolment system for workers' compensation insurance

Due to the diversification of work styles that are not based on employment, on April 1, 2021 and September 1, 2021, the eligibility for special workers' compensation insurance was expanded to certain persons (other than employees) as follows:

- from April 1, 2021 – (i) certain elderly persons, such as those who continuously conclude outsourcing contracts with their former employer after retirement until the age of 70, (ii) judo therapists, (iii) entertainers and individuals engaged in entertainment industry, and (iv) individuals engaged in the animation industry
- from September 1, 2021 - Bicycle delivery persons, IT freelancers

JAPAN
15 SEP 2021

Revision of the Criteria for Recognizing Work-Related Injuries due to Brain and Heart Disease

For the first time in approximately 20 years, the criteria for the recognition of workers' compensation for brain and heart disease have been revised in light of developments in the workplace environment and as a result of recent progress made in medical research carried out in this field.

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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...

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.

MALAYSIA
26 JUL 2021

Pembangunan Sumber Manusia Berhad (Exemption of Levy) No. 3 Order 2021 (P.U. (A) 315/2021)

This Order is effective from 1 January 2021 – 30 June 2021, where employers in industries of tourism and recreation, trading, business and wholesale of motor vehicles, retail sale in non-specialised stores and retail trade not in stores, stalls or markets are exempted from paying the levy under Sections 14 and 15 of the Pembangunan Sumber Manusia Berhad Act 2001.

More...

LOOKING BACK

MALAYSIA
26 JUL 2021

Pembangunan Sumber Manusia Berhad (Exemption of Levy) No. 4 Order 2021 (P.U. (A) 316/2021)

This Order is effective from 1 January 2021 – 30 June 2021, where HRD-Corp registered employers who are affected by the COVID-19 disease are exempted from paying the levy under Sections 14 and 15 of the Pembangunan Sumber Manusia Berhad Act 2001.

More...

MALAYSIA
25 OCT 2021

Employment (Amendment) Bill 2021

The Bill proposes various changes to the primary legislation concerning employees of the private sector, including enhanced protections concerning pregnant employees, maternity leave, discrimination and sexual harassment issues. The Bill also proposes to introduce new provisions of flexible working arrangements and paternity leave. The statutory hours of work are proposed to be reduced. It also seeks to introduce a statutory presumption of "employer" and "employee".

More...

MALAYSIA
22 NOV 2021

Pembangunan Sumber Manusia Berhad (Exemption of Levy) (No. 2) (Amendment) Order 2021 (P.U. (A) 424)

The exemption from paying the levy under Sections 14 and 15 of the Pembangunan Sumber Manusia Berhad Act 2001 for HRD-Corp registered employers who are affected by the COVID-19 disease is extended from 30 June 2021 to 31 December 2021.

More...

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.

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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
30 APR
2021

COVID-19 Public Health Response (Vaccinations) Order 2021

The COVID-19 Public Health Response Vaccinations Order came into force on 30 April 2021, requiring specified groups of workers to be vaccinated against COVID-19 before performing certain work (subject to limited exemptions). Those individuals who are not vaccinated (and are not exempt from being vaccinated) are not permitted to carry out work specified under the Order.

The categories of workers that the Health Order applies to, include (but are not limited to) workers at managed quarantine/isolation facilities, aircrew members, and airport baggage handlers.

COVID-19 Public Health Response (Vaccinations) Order 2021

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:

- 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...

NEW ZEALAND

24 JUL 2021

The Holidays (Increasing Sick Leave) Amendment Act 2021

On 24 July 2021, the Holidays (Increasing Sick Leave) Amendment Act 2021 came into force, amending the Holidays Act 2003 (**Holidays Act**) to increase the minimum sick leave entitlements provided to employees from 5 days to 10 days per annum. The maximum entitlement of sick days that an employee can have at any one time under the Holidays Act remains at 20 days, however the number of sick days that an employee can carry over from one 12 month period to a subsequent 12 month period has been reduced from 15 to 10.

In accordance with the Holidays Act, new employees will become entitled to their sick leave entitlement of 10 days on the date following 6 months' continuous employment. Current employees will receive their sick leave entitlement of 10 days on their next entitlement date following 24 July 2021, which would either be after reaching 6 months' continuous employment, or on their next sick leave entitlement date (which is the date 12 months after an employee last became entitled to sick leave).

The Act
Simpson Grierson's commentary

NEW ZEALAND
24 JUL
2021

COVID-19 Public Health Response (Vaccinations) Order 2021

The COVID-19 Public Health Response Vaccinations Order came into force on 30 April 2021, requiring specified groups of workers to be vaccinated against COVID-19 before performing certain work (subject to limited exemptions). Those individuals who are not vaccinated (and are not exempt from being vaccinated) are not permitted to carry out work specified under the Order.

The categories of workers that the Health Order applies to, include (but are not limited to) workers at managed quarantine/isolation facilities, aircrew members, and airport baggage handlers.

COVID-19 Public Health Response (Vaccinations) Order 2021

NEW ZEALAND
20 AUG
2021

FMZ v TZB [2021] NZSC 102

The Supreme Court has issued a significant judgment clarifying that the Employment Relations Authority (**Authority**) has exclusive jurisdiction over claims that have arisen in the context of an employment relationship, regarding of how such a claim is framed.

The case involved a former employee who commenced proceedings in respect of a personal grievance in the Authority (well out of time) and separate tortious claims in the High Court alleging negligence against her employer. Although the cause of action differed between the two proceedings, both the High Court and the Court of Appeal determined that the jurisdiction to hear the claim lay solely with the Authority. The Court of Appeal's decision was then appealed to the Supreme Court.

The Supreme Court considered s 161(1)(r) of the Employment Relations Act 2000, which provides that the Authority has jurisdiction to consider any action arising from, or related to an employment relationship "*other than an action founded on tort*". The majority of the Supreme Court held that if the problem relates to or arises from an employment relationship then the problem must be dealt with in the Authority, regardless of how it is framed.

It also held that the Authority's exclusive jurisdiction is not limited to problems that "*directly and essentially*" concern the employment relationship and that the Authority's jurisdiction is not necessarily limited to problems between parties to employment relationships themselves.

Click here to read Simpson Grierson's commentary
Click here to read the full judgment text.

NEW ZEALAND
1 SEP
2021

GF v New Zealand Customs Service [2021] NZERA 382

The Authority recently issued its first determination regarding an employee who was dismissed for refusing to be vaccinated.

The employee was dismissed by the employer after reaching the decision that the employee's role was required to be performed by someone who was vaccinated against COVID-19. The employee raised a personal grievances in respect of unjustified dismissal and unjustified disadvantage, and that the employer had breached its good faith obligations.

The employee claimed reinstatement to the role, citing that the process of dismissal lacked a genuine reason and the employer had insufficient grounds to justify a requirement that the role required the employee to be vaccinated on health and safety grounds. The employee also claimed that the employer had wrongly determined the employee's role to fall within a category of workers that required vaccination.

Continued on Next Page

NEW ZEALAND

1 SEP 2021

Alternatively, it was also argued that the requirement to be vaccinated altered the terms and conditions of the role occupied to the point that the incumbent should have been the subject of a contractual restructuring process and declared redundant.

The employer claimed that the employment was legitimately brought to an end when the COVID-19 Public Health Response (Vaccinations) Order 2021 (**Health Order**) came into effect on 30 April 2021. The Health Order required specified categories of frontline border workers to be vaccinated in order to continue performing specified work. The employer completed a thorough health and safety risk assessment and identified that the employee's role came within the scope of the categories of roles that required vaccination. Accordingly, it determined that it had no choice but to dismiss the employee on the basis that they were not vaccinated by the cut-off date under the Health Order.

The Authority held that the dismissal was substantively justified and a fair process had been followed. The Authority considered that that the employer had provided ample information to the employee on the reasons why the role needed to be performed by a vaccinated person, and the consequences of the employee refusing to be vaccinated. The employer also provided the employee with a number of opportunities to identify her concerns about the vaccination process and the health and safety risk assessment undertaken by the employer.

While this decision is not relevant to all employers (given the limited application of the Health Order), it provides useful guidance on how the Authority may view vaccination matters going forward, and the standard that an employer may be held to in order to justifiably dismiss an employee who refuses to be vaccinated.

The full judgment text

NEW ZEALAND

26 OCT 2021

Metropolitan Glass & Glazing Limited v Labour Inspector, Ministry of Business and Innovation and Employment [2021] NZCA 560

The Court of Appeal allowed Metropolitan Glass' appeal of an Employment Court decision, finding that its incentive scheme was discretionary and that bonus/incentive payments could therefore be excluded from holiday pay calculations.

The Employment Court had previously taken a narrow interpretation of what a "discretionary payment" was, for the purposes of holiday pay calculations. On appeal, the Court of Appeal held that the definition of "discretionary payment" is a payment the employer is not contractually bound to pay.

The terms of the relevant incentive scheme stated that "*[a]ny payments made under this Scheme are totally at the discretion of [Metropolitan Glass] and there is no guarantee of any payment in any year...*" and that Metropolitan Glass had the "*sole discretion not to make any payment even where the criteria in this Scheme are met.*" Further, it was able to amend, revoke or discontinue the incentive scheme at any time including during a fiscal year.

In these circumstances, the Court of Appeal found that Metropolitan Glass had done more than just label its scheme discretionary and that there was no contractual requirement to pay. As there was no requirement for Metropolitan Glass to make payment under the incentive scheme, such payments were considered to be discretionary.

The Court of Appeal also confirmed that the incentive scheme formed part of the employment agreement even though it was in a separate document. The Court commented that "*the mere fact that the [Scheme] were in separate documents to the individual employment agreements does not of itself take them outside the category of gross earnings*".

Click here to read the full judgment
Click here to read Simpson Grierson's case note

NEW ZEALAND

11 NOV

2021

Sandhu and Ors v Gate Gourmet New Zealand Limited and Joils [2021] NZCA 591

The recent decision of *Sandhu and Ors v Gate Gourmet New Zealand Limited and Joils* concerned whether, in the absence of sickness, default or accident, the minimum wage is payable for all of an employee's agreed contracted hours of work that the employee has agreed to work, and is available to work, but does not work at the discretion of the employer.

Gate Gourmet provided inflight catering services to passenger aircrafts both domestically and internationally. The Government had deemed them an essential service during the Level 4 lockdown, but they did not have enough work to provide all staff. Consequently, Gate Gourmet implemented a partial closedown, paid their employees at 80% of their normal wage (which was below minimum wage) and topped up their wage with annual leave at the employees' option.

The Court of Appeal held that it is not lawful to make deductions from wages for lost time not worked at the employer's discretion. The minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform because of such a direction. This reading of s 6 of the Minimum Wage Act 1983 (**Act**) was considered the only interpretation that was consistent with the Act as a whole, its purpose and s 7(2) which permits deductions for time lost only in limited circumstances. The Court of Appeal also confirmed it would be inconsistent with the purpose of s 6 to allow an employer to avoid their obligations under the Act by simply directing an employee not to work.

Employees are still able to agree with their employer to take leave without pay, or to reduce the agreed hours to be worked. The Act would not apply to any agreed period of unpaid leave and would only apply to the agreed reduced hours of work.

Click here to read the full judgment

NEW ZEALAND

23 NOV

2021

WXN v Auckland International Airport Limited [2021] NZEmpC 205

WXN v Auckland International Airport Limited was an appeal from the decision of the Employment Relations Authority (**Authority**). WXN, who is a longstanding employee of Auckland International Airport Limited (**AIAL**), refused to become vaccinated in accordance with the COVID-19 Public Health Response (Vaccinations) Order 2021. WXN raised a personal grievance claim for unjustified disadvantage and unjustified dismissal. However, AIAL proceeded with issuing a notice of termination. The Authority subsequently dismissed WXN's claim for interim reinstatement.

WXN immediately appealed to the Employment Court. WXN did not seek reinstatement so that he could return to the workplace, but so that he could "*remain as an employee on leave*" and "*have time to discuss the issues in good faith with AIAL, and/or to preserve the status quo until the Authority could fully investigate his employment relationship problem*".

The Employment Court overturned the Authority's determination and reinstated WXN (not to the workplace, but on paid leave for two months and then unpaid leave until further order of the Authority). The Court held that aspects of WXN's claims were weakly arguable (about whether his role was covered by a vaccination mandate), but that some were at least arguable (such as in relation to the inadequacies of the process as the steps taken were not those of a fair and reasonable employer).

Click here to read the full judgment.

NEW ZEALAND **23 NOV** 2021

COVID-19 Public Health Response (Vaccinations) Order 2021

A number of amendments have been made to the COVID-19 Public Health Response (Vaccinations) Order 2021 since it was first introduced, including, but not limited to:

- Expanding the categories of workers who are required to be vaccinated in order to perform work, to include workers in the health and disability sector, workers in the education sector, prison workers, and workers in food and drink business or services;
- Introducing various duties on business relating to the vaccination records of workers who are required to be vaccinated under the Order; and
- Clarifying the process for obtaining an exemption from the requirement to be vaccinated, on the basis that they meet specified COVID-19 vaccination exemption criteria.

Click here to read the COVID-19 Public Health Response (Vaccinations) Order 2021

NEW ZEALAND **26 NOV** 2021

COVID-19 Response (Vaccinations) Legislation Act 2021

The COVID-19 Response (Vaccinations) Legislation Act 2021 came into force on 26 November 2021, amending the COVID-19 Public Health Response Act 2020, and providing (amongst other things):

- The Minister with the power to make further vaccination and testing orders;
- The Governor General with the power to introduce regulations prescribing an assessment tool (to assist businesses with ascertaining whether it is reasonably to require its workers unless those workers are vaccinated or are required to undergo medical examination or testing for COVID-19); and
- Restrictions on an agency's ability to hold, store, use or disclose personal information collected for the purposes of whether an individual is vaccinated, has been issued with a vaccination certificate, or has complied with the Act or a COVID-19 order.

The COVID-19 Response (Vaccinations) Legislation Act 2021 also amended the Employment Relations Act 2000, by adding Schedule 3A which addresses:

- An entitlement to reasonable paid time off for employees to obtain their COVID-19 vaccination;
- The termination of employment for failure to be vaccinated (either in accordance with a Government mandate, or a health and safety risk assessment conducted by an employer); and
- The provision of a minimum four week notice period for employees who are terminated on the basis that they are not vaccinated (either in accordance with a Government mandate, or a health and safety risk assessment conducted by an employer).

Click here to read the COVID-19 Response (Vaccinations) Legislation Act 2021

NEW ZEALAND **2 DEC** 2021

COVID-19 Public Health Response (Protection Framework) Order 2021

The COVID-19 Public Health Response (Protection Framework) Order 2021 came into force on 2 December 2021, replacing the previous COVID-19 Alert Level system. The Protection Framework uses a 3-level approach, commonly known as the traffic light system.

Many of the COVID-19 provisions are substantially the same as the equivalent requirements under the Alert Level system. These include (but are not limited to) the use of face coverings, the use of QR codes and physical distancing.

The Protection Framework does contain new requirements relating to COVID-19 vaccination certificates (CVCs), capacity limits and specific requirements around gatherings and events. Certain businesses or services must choose between operating either without or without CVCs. Greater restrictions will apply if businesses or services choose to operate without CVCs. In some instances, this may mean the premises are required to be closed.

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LOOKING BACK

NEW ZEALAND
2 DEC 2021

Businesses or services that operate from certain designated premises are prohibited from operating with CVC restrictions. These include supermarkets, health services and most public transport services.

Click here to read the COVID-19 Public Health Response (Protection Framework) Order 2021

NEW ZEALAND
13 DEC 2021

COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021

The COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021 prescribes an assessment tool that businesses can use to ascertain whether it is reasonable to require workers not to carry out work unless they are vaccinated. The assessment tool involves consideration of four factors, being:

- The environment in which a worker carries out work;
- The proximity of a worker to other people;
- The time in which a worker is in the proximity of other people; and
- Whether the worker provides services to other people who are vulnerable to COVID-19.

Conducting a draft risk assessment in accordance with the assessment tool, would provide a business with a degree of protection in being able to justify the risk assessment (and/or the outcome). The regulations state that if three of the four assessment factors are met, then it will be reasonable for a business to require a worker or class of workers to be vaccinated to carry out work for the business.

The COVID-19 Public Health Response Act 2020 also makes it clear that in conducting a risk assessment, a business may, in its absolute discretion, decide whether to undertake a risk assessment in accordance with the assessment tool. The assessment tool is therefore not required to be used in order to complete a risk assessment.

Click here to read the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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

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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)

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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

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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

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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...

PHILIPPINES
23 JUL 2021

Department of Labor and Employment (DOLE) Labor Advisory (LA) No. 14, Series of 2021

Working Conditions of Delivery Riders in Food Delivery and Courier Activities: to ensure compliance with applicable general labor standards and occupational safety and health standards and better working conditions for all delivery drivers in food delivery and courier activities using digital platforms and providing for minimum benefits to all delivery riders who are deemed employees or independent contractors, as the case may be.

More...

LOOKING BACK

PHILIPPINES

31 AUG 2021

DOLE LA No. 16-21

Issuance of Alien Employment Permit (AEP) or Certificate of Exemption/ Exclusion (COE) for applications filed by the Philippine based Employers for foreign national intending to come to the Philippines for long term employment [more than six {6} months].

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PHILIPPINES

14 OCT 2021

Resolution No. 144-A of the Inter Agency Task Force of the Management of Emerging Infectious Diseases

Regulating the entry into the Philippines of Suspected or Confirmed (COVID-19) patients including arriving foreign nationals

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PHILIPPINES

PUBLISHED ON 22 NOV

BECAME LAW ON 7 DEC 2021

Department of Labor and Employment Department Order No. 230, Series of 2021

Guidelines on Support for Workers in the Informal Economy under Republic Act No. 11313 ("Safe Spaces Act") to include, among others, a provision in household employee's employment contract access to internet connectivity as part of the right to access tooutside information.

More...

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: ROMULO

ROMULO MABANTA BUENAVENTURA SAYOC & DE LOS ANGELES

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

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

Continued on Next Page

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:

Continued on Next Page

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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SINGAPORE **16 FEB** 2021

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 **16 FEB** 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.

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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.

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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.

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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.

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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.

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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.

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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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- 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.

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Proposed Amendments To Child Development Co-Savings Act To Provide More Support For Parents And Employers

The Ministry of Social and Family Development (MSF) is proposing to amend the Child Development Co-Savings Act (CDCA) to ensure that more working parents with Singaporean children benefit from family-friendly policies at the workplace. The amendments will support a wider group of parents and employers, including parents not on regular employment, and employers who offer parental leave to new staff, among others.

The Bill seeks to introduce Government-Paid Paternity Benefit (GPPB) and Government-Paid Adoption Benefit (GPAB) schemes later this year, as announced by the Government in February 2021. With these schemes, working fathers and adoptive mothers on short-term employment contracts or whose employment contract had ended just before their child was born or adopted, can qualify for paternity or adoption benefits respectively. The GPPB and GPAB schemes will give parents cash benefits equivalent to the Government-paid portion of Paternity Leave and Adoption Leave for Mothers. Similar benefits were previously only applicable to working mothers via the existing Government-Paid Maternity Benefit (GPMB).

The benefits will apply to parents whose child's date of birth or formal intent to adopt falls on or after 1 January 2021. Parents must have worked for at least 90 days in the 12 months before the child's date of birth or formal intent to adopt. As further subsidiary legislative amendments are to be made, eligible parents may apply from 1 December 2021.

The Bill also proposes to grant GPMB, GPPB or GPAB top-ups for parents who have been retrenched but have unconsumed parental leave that would have otherwise been forfeited. Some parents may be affected by unforeseen job losses even though they have not used their full leave entitlement.

In support of parents with stillborn children who would have been Singapore Citizens if born alive, parents will be entitled to birth-linked leave and benefits under the CDCA.

The Bill also seeks to amend the CDCA to reimburse employers who voluntarily grant leave to their employees who have not met the minimum three-month employment criterion to qualify for parental leave schemes. Other amendments will also be made to allow for greater checks and accountability of Government monies e.g. audits and recovery of erroneous payments, as more benefits are extended.

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New measures to facilitate retention and hiring of work permit holders in the Construction, Marine Shipyard and Process sectors

The Government is introducing new measures to help companies in the Construction, Marine Shipyard and Process (CMP) sectors retain their existing Work Permit Holders (WPHs) and facilitate the inflow of new WPHs. The new measures will ensure that the CMP sectors continue to meet manpower needs for their operations, preserve core capabilities and emerge stronger from COVID-19.

The Government will support all firms in the CMP sectors through the following measures:

a. Work permits expiring between July and December 2021 will be allowed to be renewed for up to two years, even if they do not meet the renewal criteria. This includes WPHs who are reaching the maximum period of employment, or who are reaching the maximum employment age. Firms also do not need to maintain at least 10% of their WPHs as higher skilled workers.
b. From July 2021, the validity of In-Principle Approvals (IPAs) of all work pass holders who are unable to enter Singapore due to border control measures, will be extended by up to one year.
c. (The Government will partner the Singapore Contractors Association Ltd (SCAL) to introduce a six-month retention scheme (1 September 2021 till 28 February 2022) for experienced construction WPHs whose previous employment has been terminated.
d. (There is a minimum Period of Employment (POE) requirement for WPHs to qualify for Man-Year Entitlement (MYE) waiver. From 1 October 2021 to 31 March 2022, this requirement will be removed for new and renewal WPH from India, Sri Lanka, Thailand, Bangladesh, Myanmar and Philippines and the People's Republic of China (PRC) for firms in the Construction and Process Sectors.

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Mandatory Retrenchment Notifications To Be More Comprehensive In Coverage

From 1 November 2021, employers with at least 10 employees will be required to notify the Ministry of Manpower (MOM) of all retrenchments regardless of the number of employees affected. This will allow the tripartite partners and relevant agencies to provide timely support and assistance to workers who are retrenched.

The mandatory retrenchment notification has to be filed by employers within five working days after they provide notice of retrenchment to the affected employee(s).

Currently, these employers are only required to notify the MOM when they retrench five or more employees within a six-month period. The revised notification enables the tripartite partners, Workforce Singapore, National Trade Union Congress' (NTUC) Employment and Employability Institute (e2i) as well as other agencies to better reach out to affected local employees to provide employment and job search support.

The updated requirements on mandatory retrenchment notification will be reflected in the Employment (Retrenchment Reporting) (Amendment) Notification 2021.

Employers should also ensure that they manage any retrenchment exercises responsibly and fairly, in line with the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment.

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LOOKING BACK

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Singapore expected to implement workplace anti-discrimination laws

Following the Prime Minister's announcement during his National Day Rally Speech where it was announced that the Tripartite Alliance for Fair and Progressive Employment Practices (TAFEP) shall be formalised into hard law, the Tripartite Committee on Workplace Fairness (TCWF), which consists of business, unions, government and human resources representatives, is currently considering how to enact anti-discrimination guidelines produced by the TAFEP into law and expects to give the Government their recommendations in the first half of 2022. If the Government accepts these recommendations, legislation shall be prepared to enact them.

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Government Accepts Recommendations by Tripartite Workgroup to Uplift Wages and Well-Being of Lower-Wage Workers

The Tripartite Workgroup submitted 18 recommendations to the Government to uplift wages and the well-being of lower-wage workers. The 18 recommendations can be broadly summarised into the following:

1. The Progressive Wages model shall be expanded to numerous new sectors on a staggered basis over the next 2 years.
2. Firms employing foreign workers have to pay at least the Local Qualifying Salary (currently at S$1,400) to all local workers from 1 September 2022.
3. Progressive Wages and Local Qualifying Salary will be converted to fair hourly rates for those working part-time or overtime.
4. The Baseline Progressive Wage growth for workers at the 20th percentile should outpace median wage growth, so that lower-wage workers gain ground with the median. Employers should aim for higher than baseline Progressive Wage growth for lower-paid lower-wage workers; and lower than baseline Progressive Wage growth for workers in wage rungs above the 20th percentile wage level.
5. Occupational progressive wages will be introduced for administrators and drivers across all sectors from Mar 1, 2023, covering another 55,000 workers. This is to cover lower-wage occupations across sectors that cannot be targeted using sectoral progressive wages.
6. The National Wages Council will set annual guidance for Progressive Wage growth and recommend annual wage growth of Occupational Progressive Wages.
7. Firms employing foreign workers have to pay at least the relevant Sectoral or Occupational Progressive Wages to all local workers in applicable job roles.
8. Use the Work Pass system to ensure that employers pay Progressive Wages and Local Qualifying Salary before they can access any foreign workers, while complemented by current licensing regimes.
9. In the long-term, Progressive Wages shall be expressed in gross terms.
10. Government will review Workfare regularly to ensure that lower-wage workers continue to be supported even as Progressive Wages become more pervasive.
11. Government will provide transitional support for employers, with higher support in the initial phase as businesses recover from the impact of COVID-19.
12. Beyond wages, employers should advance the well-being of lower-wage workers by (i) supporting them to upskill and progress in their careers; (ii) providing them with a safe and healthy work environment; and (iii) providing them with adequate rest areas.

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13. The Government shall establish a new Tripartite Standard on Advancing Lower-Wage Workers' Well-Being, to help more firms adopt and implement the specified practices and be publicly recognised for doing so.
14. A new Progressive Wage Mark ("PW Mark") is established to recognise firms that pay Progressive Wages. In addition, "PW Mark Plus" marks are conferred on firms that go the extra mile to uplift lower-wage workers holistically by advancing their well-being.
15. Public and private sector buyers should require their suppliers to obtain the PW Mark.

In addition to these measures, the Government has announced that it will increase support for the Workfare Income Support Supplement Scheme from S$850million to S$1.1billion per year and shall lower the qualifying age from 35 to 30 years old.

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Updates to Public Health Measures for Migrant Workers in Dormitories

As Singapore moves towards COVID-19 resilience, the Ministry of Health (MOH) has adjusted its prevailing healthcare protocols around the Home Quarantine Order and Home Recovery Scheme for the community. In alignment, the Ministry of Manpower have made corresponding adjustments to our health measures for workers living in the dormitories.

Adjustments will be made in three key areas:

- **Testing**: We will increase the use of Fast and Easy Tests such as Antigen Rapid Tests (ARTs) to make testing more convenient. Regular testing remains the cornerstone of our efforts to detect and isolate cases early. Since 13 September 2021, we have introduced regular ART for workers on top of their regular Rostered Routine Testing (RRT) cycles. Moving forward, we will progressively shift towards the use of only ART tests for RRT. Dormitory residents with acute respiratory illness (ARI) symptoms should continue to report sick at one of the regional medical centres and a polymerase chain reaction (PCR) test will be administered if clinically indicated.
- **Tracing**: We will tighten contact tracing rings to focus on those who are most at risk of being exposed to the virus. Previously, entire blocks or sections within blocks may be quarantined as a precautionary measure when new cases are detected. With dormitories now more resilient, quarantine orders (QO) will only be issued to roommates of confirmed cases on PCR test. The quarantine period will also be reduced from 14 days to 10 days from the date of last exposure to the confirmed case, with workers to self-administer ART from Day 11 to Day 14.

The revised policy for QOs will reduce the extent and duration of work disruptions while protecting public health. However, wider quarantine rings may still be applied to contain the spread of COVID-19 in the event of new large clusters.

Other residents in the dormitory who are close contacts of a PCR positive resident may be issued with either a Health Risk Warning (HRW) or Health Risk Alert (HRA) via TraceTogether (TT) and follow MOH's prevailing protocol.

- **Isolating**: We will allow fully vaccinated workers who tested positive for COVID-19 and have no symptoms to isolate and recover in a dedicated facility within the dormitories for up to 10 days. These asymptomatic vaccinated workers will have access to thermometers, oximeters for monitoring and telemedicine support. These workers will be required to take an ART test after Day 3 and will be discharged from the recovery

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facilities upon receiving a negative ART result. Symptomatic workers will be given a confirmatory PCR test and conveyed to community care facilities (CCF) or hospitals depending on their condition. This will ensure better prioritisation of healthcare capacity for treating serious cases, as well as for other healthcare needs.

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Vaccination As Entry Requirement For Long-Term Pass Holders From 1 November 2021

From 1 November 2021, all work pass holders and their dependants must be fully vaccinated before arrival in Singapore. MOM will also be resuming entry approvals for Migrant Domestic Workers (MDWs), and S Pass and work permit holders from the Construction, Marine Shipyard and Process (CMP) sectors, entering Singapore from higher risk countries/regions, on the condition that they are fully vaccinated before arrival. These groups can start applying for entry approval from 15 October 2021. Entry approvals will be limited in view of the evolving local and global COVID-19 situation and need to minimise importation risk. Pass holders may have to wait about three to six months before they can enter Singapore.

Work pass holders entering Singapore via on-going industry initiatives with tightened end-to-end safe management processes and lower risk of COVID-19 importation can do so without proof of vaccination, on the condition that they complete the full vaccination regimen within two months after they arrive in Singapore.

The vaccination requirement will also apply to all travellers who are entering Singapore from 1 November 2021 under the Student's Pass Holder Lane.

The vaccination condition for entry will not apply to those aged below 18 years old at the point of arrival. Unvaccinated individuals aged between 12 to less than 18 years old at the point of arrival can enter without proof of vaccination, on the condition that they complete the full vaccination regimen within two months after they arrive in Singapore. Pass holders who are medically ineligible for vaccination may appeal for exemption from the vaccination requirement, supported by a doctor's memo, before applying for entry approval.

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New Initiatives To Support Children And Early Childhood Sector

Minister for Social and Family Development Mr Masagos Zulkifli announced new initiatives to support early childhood (EC) educators, preschool operators and children at the Early Childhood Conference today. These initiatives build on the Early Childhood Development Agency (ECDA)'s continuing efforts to improve the quality of preschools, strengthen the professional development of EC educators and enhance the provision of support and resources to give every child a good start.

Support for the Professional Development of Educators

Launch of the refreshed Skills Framework for Early Childhood

ECDA launched the refreshed Skills Framework for Early Childhood that spells out the career pathways and competencies required for various job roles in the EC sector. In the refreshed framework, the Infant and Early Years Educator career pathways have been expanded to reflect the potential progression and development pathways available for educators teaching children in the younger age groups (i.e. 2 months to 4 years old). The Leadership career pathway has also been expanded and senior educators can aspire towards new job roles such as the Lead Early Years Educator, Deputy Centre Leader, and Curriculum/Pedagogy Specialist.

ECDA also included new career tracks for Learning Support Educators (LSEds) and Early Intervention (EI) educators in the refreshed Skills Framework for Early

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Childhood. These additions seek to encourage greater porosity between the career pathways for Early Childhood and Early Intervention educators as part of our ongoing effort to advance inclusion in preschools.

In response to stakeholder feedback, ECDA will standardize the nomenclature in preschools to "Educators" (e.g. Early Year Educators, Preschool Educators) for both "Educarers" (currently referring to those teaching children up to nursery level) and "Teachers" (currently referring to those teaching kindergarten levels) going forward. ECDA will work with operators to operationalize the changes by 1H2022.

In addition to the enhanced career map, the refreshed Skills Framework includes information on emerging trends, in-demand skills, and desired attributes of EC and EI educators. EC and EI educators can refer to the Skills Framework to plan for their skills upgrading and career development. Operators can use the framework to plan for their talent management and training/development strategies. Training providers can also progressively refresh their training programmes to align to the skills and competencies identified in the Skills Framework.

Continuing Professional Development (CPD) Roadmap

With the launch of the refreshed Skills Framework for Early Childhood, ECDA will also be developing a Continuing Professional Development (CPD) Roadmap, which lays out competencies that educators may wish to prioritise at different stages of their career and the professional development opportunities to develop those skillsets. The CPD Roadmap will also highlight focus areas for the EC sector that educators may wish to have more targeted training in. ECDA will be rolling out the roadmap for different job roles progressively from 2022, starting with 7 EC job roles and 6 focus areas. A similar roadmap would be developed for 9 EI job roles.

A Leadership Development Framework (LDF) and training roadmap targeted at future and existing EC leaders will also be developed and more details will be announced in 2022.

Support for Preschool Operators

Driving Digitalisation via the EC Industry Digital Plan (IDP)

8. At the MSF Committee of Supply (COS) Debates in Mar 2021, it was announced that ECDA is developing the early childhood IDP with IMDA, SSG and sector partners to guide preschools on the digital solutions they can adopt, along with recommended skills training, across three stages of growth1. Funding would also be provided to encourage preschools to adopt these solutions.
9. Today, ECDA launched the Early Childhood Digitalisation Grant (ECDG) to support adoption of the IDP by preschools. Over $4 million will be available over the next 3 years, to help preschools defray the cost of adopting pre-approved digital solutions. Operators can now submit their grant applications through the Business Grants Portal (BGP).
10. ECDA and IMDA have pre-approved solutions that will assist preschools in their operations at different stages of digital readiness. These solutions are supported by certified vendors and have been curated to facilitate simple and quick adoption by preschools. Apart from preschool management, operators and educators can look forward to new solutions for e-enrolment and data analytics for centre operations from early November. More pre-approved solutions will be added progressively.

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Implementation of Workforce Vaccination Measures

Only Vaccinated Employees Can Return to Workplaces

To keep the workforce safe, the Multi-Ministry Task Force (MTF) has decided

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that from 1 January 2022, only employees who are fully vaccinated or have recovered from COVID-19 within the past 270 days, can return to the workplace.

Unvaccinated employees will not be allowed to return to the workplace unless they have tested negative for COVID-19. The test should be a Pre-Event Test at an MOH-approved COVID-19 test provider, and must be valid for the duration that the employees are required to be present at the workplace.

Employees Who Are Medically Ineligible for Vaccination

There is a small minority of unvaccinated employees who are doctor-certified to be medically ineligible for mRNA COVID-19 vaccines. With the announcement that Sinovac-CoronaVac COVID-19 vaccine ("Sinovac") will be included in the National Vaccination Programme (NVP), following HSA's authorisation under the Pandemic Special Access Route, most of these employees can get vaccinated with Sinovac and are strongly encouraged to visit an approved private clinic to do so as soon as possible. Employees who are medically ineligible for all the vaccines under NVP, including Sinovac, are exempted from the workforce vaccination measures if they need to work on-site.

Pregnant Employees Are at High Risk of Severe COVID-19 and Should Get Vaccinated

Pregnant employees are strongly encouraged to be vaccinated with the vaccines under the National Vaccination Programme as soon as possible. Unvaccinated pregnant women are at higher risk of complications and severe illness should they contract COVID-19. As of end-September 2021, among unvaccinated pregnant women hospitalised with COVID-19 in Singapore, 20% required oxygen supplementation and 10 percent needed the Intensive Care Unit (ICU) or high dependency care. In contrast, not a single vaccinated pregnant woman who contracted COVID-19 has needed oxygen or was sent to ICU. Pregnant women may wish to consult their obstetrician to discuss benefits and risks.

Tripartite Consensus on Work Arrangement for Unvaccinated Employees

The tripartite partners support the move to better protect the workforce and have issued an advisory on COVID-19 vaccination at the workplace. The advisory provides guidance to employers and employees on the work arrangement employers can take to manage unvaccinated employees who are unable to be physically present at the workplace.

Vaccination Rate Checker for Employers

The tripartite partners also call upon employers who have not attained 100% vaccine coverage for their employees, to encourage them to do so. Employers may check their company's vaccination rate at https://go.gov.sg/percentvaccinated (CorpPass login required), from 9am on Monday 25 October.

Current Workplace Safe Management Measures Remain

During the Stabilisation Phase (27 September – 21 November 2021), work-from-home (WFH) remains the default working arrangement, including for vaccinated employees. Employers must continue to ensure that all employees who are able to WFH continue to do so. Vaccinated employees who need to return to the workplace for ad-hoc reasons are strongly encouraged to take an ART and test negative before returning onsite.

MOM would also like to remind employers and employees to continue to exercise social responsibility, and ensure Safe Management Measures are properly implemented at the workplace.

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Retirement and Re-Employment (Amendment) Bill 2021 and CPF (Amendment) Bill 2021

The Retirement and Re-Employment (Amendment) Bill 2021 and CPF (Amendment) Bill 2021 support older Singaporeans who wish to continue working to do so and better prepare them for retirement through:

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- Stipulating that the Minister for Manpower can prescribe a Retirement Age and Re-Employment Age of up to 65 and 70 respectively, in line with the recommendations made by the Tripartite Workgroup on Older Workers in 2019. The Retirement Age and Re-Employment age will be raised to 63 and 68 respectively on 1 July 2022.
- Making it easier for members to prepare for retirement

The key policy-related changes in the Bills are outlined below.

1. **Increasing the Retirement Age and Re-Employment Age to 65 and 70 respectively by 2030**

   Currently, the Retirement and Re-Employment Ages are 62 and 67 respectively. In 2019, the Government accepted the Tripartite Workgroup on Older Workers' recommendations to raise the Retirement and Re-Employment Ages to 65 and 70 respectively by 2030. This will support older workers to continue working for longer if they wish to do so and improve their retirement adequacy.

   To give effect to the Workgroup's recommendations, the Retirement and Re-Employment (Amendment) Bill stipulates that the Minister for Manpower can prescribe a Retirement Age and Re-Employment Age of up to 65 and 70 respectively. As agreed by the Workgroup, the first shifts of the Retirement Age to 63 and Re-Employment Age to 68 will take effect from 1 Jul 2022, while the timing of subsequent shifts will be subject to tripartite partners' agreement.

   There are no changes to CPF withdrawal ages.

2. **Making it easier for members to prepare for retirement**

The CPF (Amendment) Bill seeks to:

- Make it easier for members to receive retirement payouts. Currently, Retirement Sum Scheme (RSS) members who have depleted their Retirement Account (RA) savings can only continue receiving payouts if they apply to transfer their Ordinary Account (OA) or Special Account (SA) monies (if any) to their RA. To ensure no disruption to their payouts, we will automatically disburse OA and SA savings to members when they have used up their RA savings instead. This will benefit 83,000 RSS members upon implementation in the first quarter of 2022.
- Simplify the rules of the Retirement Sum Topping-Up (RSTU) and Voluntary Contributions to MediSave Account (VC-MA) schemes.
- Streamline CPF system We will streamline the administration of CPF schemes to increase the efficiency for our members. For example, the CPF Act will be amended to allow rightful claimants to receive CPF bequests more easily and quickly.

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Government Accepts Recommendations of the Security Tripartite Cluster

The Government accepts the Security Tripartite Cluster (STC) recommendations that seek to provide a six-year schedule of sustained baseline Progressive Wage Model (PWM) wage increases for the security industry, and intensify efforts to raise industry standards and improve the working conditions for security officers.

These recommendations will better support tripartite efforts to transform the security industry under the Security Industry Transformation Map (ITM).

Six-year schedule of PWM wage increases from 2023 to 2028

With the recommended PWM wage schedule, the monthly gross wage of an entry-level security officer is expected to increase from about $2,2593 in 2022 to $3,530 in 2028. More than 40,000 resident security officers will benefit.

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The number of extra hours worked above the standard 44-hours per week will continue to be capped at 72 hours per month. The cap of 72 hours per month will be enforced by the Police Licensing and Regulatory Department as part of the PWM for the security industry (see the STC report for more details). This will safeguard security officers' welfare and ensure that they do not work excessive hours. It will also ensure that all security officers remain fit to discharge their duties.

Intensify efforts to raise industry standards and improve working conditions for security officers

The Government also accepts the recommendations by the STC to intensify efforts to raise industry standards and further improve working conditions for security officers. These recommendations include:

1. Providing enhanced protection for security officers: The Ministry of Home Affairs amended the Private Security Industry Act in October 2021 to better protect security officers, by introducing new offences to address common types of harassment and abuse faced by security officers in the course of their official.
2. Implementing the Security Agencies Competency Evaluation (SACE): SACE will be a licensing criterion for security agencies from 20224. A key assessment area under SACE will be the technology used by security agencies to augment critical areas such as training, operations, and command, control and communications. The competencies assessed under SACE will be reviewed periodically to align with technological and industry developments, and will help spur security agencies to invest in training and technology to deliver high quality security services.
3. Reviewing paid-up capital requirement to ensure that only financially sound security agencies enter the industry: With the last review conducted in 2013, the Police Licensing & Regulatory Department will be consulting the industry in 2022 on its upcoming review of the paid-up capital required for new security agency licensees. More details on this review will be shared in Q4 2022.

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Public Consultation on Strengthening Protections for Platform Workers

The Advisory Committee on Platform Workers ("Advisory Committee") invites members of the public to give feedback on strengthening protections for platform workers from today to 15 December 2021. The public consultation exercise, published on REACH's website at go.gov.sg/feedbackplatformworkers, will complement the Advisory Committee's plans to consult a wide range of stakeholders including platform companies and platform workers.

Platform workers, which refer specifically to delivery persons, private-hire car drivers, and taxi drivers, currently make up about 3% (or ~ 79,000 persons) of our resident workforce.

The Advisory Committee has identified three priority areas to give platform workers a more secure future, namely (i) improving housing and retirement adequacy, (ii) strengthening financial protection in case of work injury and (iii) enhancing representation. As these are complex issues with multiple trade-offs, the Advisory Committee seeks to gain a deeper understanding of the platform landscape. The Advisory Committee also welcomes feedback and suggestions on how each of the priority areas could be addressed adequately and in a sustainable manner.

Ms Goh Swee Chen, Chairperson of the Advisory Committee said, "We aim to present recommendations that result in tangible protection improvements

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for platform workers. At the same time, we recognise the need for solutions to be practical and sustainable for businesses and consumers. To achieve this, we are consulting widely, and will deliberate thoroughly before sharing our recommendations next year. We strongly encourage all interested parties to give their feedback through the public consultation exercise and look forward to fruitful discussions with related parties in the coming months."

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New Primary Healthcare System for Migrant Workers

The Ministry of Manpower (MOM) has appointed four Anchor Operators (AOs) to deliver a new primary healthcare system for migrant workers. As part of this system, MOM will also introduce a new primary care plan (PCP), which is a healthcare financing scheme, for employers and migrant workers. These two measures, to be implemented in 2022, will provide migrant workers with quality, affordable and accessible healthcare that is catered to their needs.

Appointment of Anchor Operators

Under the new primary healthcare system, Singapore will be organised into six geographical sectors, each to be run by an AO. MOM has appointed three medical service providers (Fullerton Healthcare Group Pte Ltd, SATA CommHealth and StarMed Specialist Centre Pte Ltd) as AOs for five geographical sectors after evaluating the proposals submitted for MOM's Request for Proposal (RFP). For the sixth geographical sector, MOM appointed St Andrew's Mission Hospital (SAMH), a non-governmental organisation (NGO), as the operator under a philanthropy-led initiative.

All four AOs will provide primary healthcare services at medical centres complemented with 24/7 telemedicine services. They will also ensure rapid response to public health concerns in dormitories via mobile clinical teams. To minimise language and cultural barriers, they will put in place IT-enabled multilingual translation capabilities and augment the clinical team with healthcare workers who can speak the native languages of our migrant workers.

Migrant workers will be automatically enrolled with the AO in the geographical sector of their residence, so that they can seek care conveniently near where they live and build a strong patient-doctor relationship over time.

The new primary healthcare system is also complemented by designated General Practitioner Clinics to form part of the larger healthcare ecosystem comprising other partners such as public healthcare institutions and private hospitals.

Primary Care Plan

At the same time, MOM will introduce a new primary care plan to ensure that healthcare services for migrant workers are kept affordable. Under the PCP, medical consultations and treatments, medical examination for work pass purposes, and telemedicine services will be covered.

The PCP prices range from $108 to $145 per worker per year based on the competitive bids submitted under the RFP. This can be paid by employers in regular instalments such as through monthly payments.

To encourage prudent use of medical resources and instil personal ownership of their own health, migrant workers will pay the AOs a medical treatment fee of $5 for each visit to the medical centre, and $2 for each telemedicine session.

More...

SINGAPORE **4 DEC** 2021

Ceasing Of Entry of Construction, Marine Shipyard and Process (CMP) Workers And Other Dormitory Bound Workers via Vaccinated Travel Lanes

With effect from 4 December 2021 2359hrs, employers of all Construction, Marine Shipyard and Process (CMP) S Pass and work permit holders, as well as other dormitory-bound work pass holders, will not be allowed to make new

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SINGAPORE

4 DEC

2021

applications to enter Singapore via Vaccinated Travel Lanes (VTLs).

CMP workers and other workers who stay in dormitories should enter Singapore via ongoing industry initiatives (e.g. programmes with upstream testing and isolation in the source country) or the Work Pass Holder General Lane. The number of workers entering under these lanes meet industry needs while allowing the entry of these workers to be done at a pace where they can be safely onboarded (e.g. verification of vaccination, medical examination, settling in programme) before entering the dormitories and worksites as these are higher risk settings. The onboarding programme is an existing requirement for new CMP workers.

CMP workers and other workers who stay in dormitories, who have obtained approval prior to the effective date to enter Singapore via VTLs, will still be allowed to do so. They will need to take an on-arrival COVID-19 Polymerase Chain Reaction (OAT-PCR) test and self-isolate while waiting for the results. Those who test negative will go through the five-day onboarding programme. More details will be communicated to the employers.

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SINGAPORE

11 DEC

2021

COVID-19 Vaccination to be a condition for Long-Term Passes, Work Passes and Permanent Residence from 1 February 2022

From 1 February 2022, COVID-19 vaccination will be a condition for the approval or grant of new long-term passes, work passes, as well as permanent residence. Additionally, vaccination will be required for the renewal of existing work passes. These measures will help sustain our high vaccination rates and facilitate the safe reopening of our society and economy.

Verification of Vaccination Status

Work pass holders and dependants

- At the point of application, employers will be required to make a declaration that their work pass holders and dependants are fully vaccinated upon arrival in Singapore. Pass holders are also required to submit or present their vaccination certificates as part of the verification process.
- Pass holders with digitally verifiable certificates will have to verify their certificates by uploading them to ICA's Vaccination Check Portal system.
- Pass holders without digitally verifiable certificates will have to present their vaccination certificates to the airlines, ferry operators or at the checkpoint before boarding.

Those who are unable to produce the necessary documentation will be denied boarding or entry into Singapore unless prior exemptions have been granted. All pass holders will also be subjected to the prevailing immigration entry requirements and health protocols in Singapore.

Individuals who have received their vaccination overseas must update their vaccination records in the National Immunisation Registry (NIR). They will be given a grace period of 30 days upon arrival in Singapore, to undergo and show a positive serology test result taken at a Public Health Preparedness Clinic. Should they test negative, they will be required to complete the full vaccination regimen in Singapore or face revocation of their passes.

The vaccination condition will not apply to the following:

1. Individuals below 12 years old;
2. Individuals aged 12 to below 18 years old - they can continue to make a declaration to complete the full vaccination regimen after arriving in Singapore;
3. Pass holders who are medically ineligible for vaccination, provided they submit a doctor's memo at the point of application, and undergo a medical review upon arrival in Singapore.

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LOOKING BACK

SINGAPORE

11 DEC 2021

New Permanent Residence, Long-Term Visit Pass, and Student's Pass applications

Vaccination will be a condition for the grant of new Permanent Residence (PR), Long-Term Visit Pass (LTVP) and Student's Pass (STP) applications.

Vaccination status of applicants will be verified during the pass issuance process. Their vaccination records will have to be updated in the NIR (i.e. vaccinated in Singapore or receive a positive serology test result). If applicants are not registered in the NIR (e.g. unvaccinated or vaccinated overseas but tested serology negative), they will have to complete the full vaccination regimen in Singapore to fulfil the vaccination condition before they can be granted PR or long-term passes. The vaccination condition will not apply to PR, LTVP and STP applicants who are aged below 12 years old, as well as those who are medically ineligible for vaccination.

More...

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: PK Wong & Nair.

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.

SOUTH KOREA
1 JUL 2021

Amendment to the Labor Standards Act - Implementation of 52-hour work week

Pursuant to an amendment to the Labor Standards Act (the "LSA"), the reduction in working hours resulting in a 52 hour work week (40 hours of work plus up to 12 hours of overtime work per week) shall be applicable for workplaces with between 5 or more and less than 50 employees as of July 1, 2021.

SOUTH KOREA
1 JUL 2021

Amendment to the LSA - Introduction of Agreement on Special Extensions to Working Hours (8 hours per week)

In the case of workplaces with between 5 or more and less than 30 employees, by executing a written agreement with the Employee Representative, employers may additionally implement 8 hours of overtime work per week (up to 60 hours per week) by specifying (i) the reason and period for which it is necessary to work in excess of the overtime work hours (12 hours per week) and (ii) the scope of the employees subject to such additional overtime work by (this is possible on a limited basis system from July 1, 2021 to December 31, 2022).

SOUTH KOREA
1 JUL 2021

(Exception) application of employment insurance and benefits for labor providers

Under an amendment to the Employment Insurance Act, the Act shall be applicable for special type employment workers such as insurance agents, credit card agents, etc. who receive a monthly salary of KRW 800,000 or above via a contract for provision of labor. Also, if a special type worker pays insurance premiums for more than 3 months before the date of birth and does not provide labor before or after the date of birth, the worker can receive maternity benefits for 90 days (120 days in the case of multiple births).

More...

SOUTH KOREA
1 JUL 2021

Amendment to the Labor Standards Act - Increase of the period of selective working hour system for R&D employees

Under an amendment to the LSA, for R&D work of new products/technologies at workplaces with between 5 or more and less than 50 employees, the calculation period for the selective working hour system has been increased from the previous one month to three months. This shall be limited to only R&D work of new products/technologies and by averaging on a one month basis for each month, overtime work allowances shall be paid for the hours worked in excess of 40 hours per week.

SOUTH KOREA
1 JUL 2021

Amendment to the Industrial Accident Compensation Insurance Act - new requirements for application for exclusion from special employment type workers

Special type employment workers are required to subscribe to the Industrial Accident Compensation Insurance Act and the following paragraphs have been added as grounds for applying for exemption of application: (1) if a special employment type worker suspends his/her business for at least one month due to an injury, disease, pregnancy, childbirth, or childcare; (2) if a special employment type worker suspends his/her business for at least one month due to a cause attributable to the business owner; and (3) other cases as prescribed by Presidential Decree as equivalent to subparagraph 1 or 2.

SOUTH KOREA
6 JUL 2021

Trade Union and Labor Relations Adjustment Act

Article 2, Item 4, Sub-item (d) of the Trade Union and Labor Relations Adjustment Act (the "TULRAA"), which was interpreted as restricting dismissed employees, etc. from joining a company union has been deleted. As such, regardless of the form/structure, unions can determine membership eligibility on their own based on their own bylaws. Under this change, in principle, the membership of officers of a union may be determined in accordance with the union's bylaws. Union members of a union who are not workers (employees) working in a business or workplace are allowed to carry out union activities to the extent that such activities do not hinder the efficient operation of the business of the workplace.

Moreover, the provision on the prohibition of full-time union officers' payment of wages, which was interpreted as the government's intervention in labor-management relations, was deleted, but for those who receive wages from the employer and engage in labor union affairs (paid time-off officers), payment of wages is possible within the limit of paid time off hours. A collective bargaining agreement or employer's consent that provides for matters exceeding the paid time off limit will be null and void, and if an employer pays wages in excess of the paid time-off limit, this will be punished as an unfair labor practice.

If individual bargaining sessions are held with the employer's consent, the employer shall faithfully bargain with all the unions that requested bargaining and shall not discriminate between them. Previously, there was a basis for separating the bargaining units due to significant difference in working conditions, etc. in one workplace, but there was no basis for integrating the separate bargaining units due to a change in circumstances. As such, a basis was newly established for the integration of bargaining units.

Also, the maximum effective term of a collective bargaining agreement has been extended from two years to three years, taking into account economic and social changes, costs incurred for bargaining, etc.

SOUTH KOREA
14 OCT 2021

Amendment to the Labor Standards Act (LSA)

1. A new provision concerning sanction against employers' workplace harassment

The revised LSA has a new provision concerning sanction against workplace harassment by an employer or an employee who is the employer's relative

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within the scope as prescribed in a Presidential decree.

2. Employers' enhanced obligation to take actions

The revised LSA provides more details regarding the employer's obligation to conduct an objective investigation of the relevant parties in the event of workplace harassment, and aims to ensure that such investigation is not carried out in a biased manner, which makes it easier to determine employer's compliance with its obligation to investigate. In addition, the amended LSA provides that confidential information acquired in the course of investigation shall not be disclosed to a third party against the victim's will and imposes a fine not exceeding KRW 5 million violation of such obligation, ensuring that victims feel more protected during the investigation process.

3. A new provision concerning sanction against employer's failure to comply with their obligations

In case an employer fails to comply with his/her obligations to investigate an alleged case of workplace harassment, take actions to protect the victim or discipline the harasser, a fine not exceeding KRW 5 million shall be imposed. This new provision is expected to provide victims with more protection from additional harassment.

More...

SOUTH KOREA
14 OCT
2021

Amendment to the Enforcement Decree of the LSA

Under the amended LSA, starting from October 14, a fine not exceeding KRW10 million shall be imposed on an employer or an employee who is the employer's relative that has committed workplace harassment. In this regard, the revised "Enforcement Decree of the LSA" defines the employer's relatives who are subject to such punishment for workplace harassment as 1) the employer's spouse; 2) first cousins by blood and closer blood relatives; and 3) first cousins by marriage and closer in-laws. In addition, a fine not exceeding KRW 5 million shall be imposed, when the employer fails to comply with his/her obligations, including an obligation to conduct an objective investigation into an alleged case of workplace harassment. Accordingly, the Enforcement Decree sets forth the amount of the fine based on the type and frequency of violation. In the past, when the harasser was the 'employer' or an 'employee who was the employer's relative', employers were expected to not take proper actions. This new penal provision ensures that the employer's obligations are effectively enforced.

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SOUTH KOREA
14 OCT
2021

Revision of the Wage Claims Guarantee Act (WCGA)

1) Change of the Korean term for "substitute payment" from "체당금 (chedanggeum)" to "체불 임금등 대지급금(chebul-imgeum-deung-daejigeupgeum)" (or "대지급금(daejigugeum)" in short) to make the law easier to understand/interpret.

2) Simplification of the procedures for small substitute payments
Under the existing law, small substitute payments may be made only when the court has finally decided that the employer should pay the employee overdue wage, etc. However, the revised law has simplified the procedures for small substitute payments, by providing that small substitute payments may be made upon the 'written confirmation on the unpaid wage, etc.' issued by the local labor office even without the court's final decision. This simplified process will greatly reduce the time to receive small substitute payment, approximately from 7 months to 2 months.

3) Extended coverage of the substitute payment system to include incumbent employees
The small substitute payment system which applies only to retired employees under the current law shall be extended to include incumbent employees. As a result, in case an employee has unpaid wages, he/she will be able to claim

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a small substitute payment even before his/her retirement, and this extension will substantially stabilize incumbent employees' livelihood. However, the extension will take effect on a gradual basis, due to the funding situation, etc., starting with low-paid employees.

4) Heavier sanctions on fraudulent receipts of substitute payments
The penalty for receipt of substitute payment through fraudulent means has increased from 100% or less to 500% or less of the fraudulently received amount. This is expected to further prevent fraudulent receipts of substitute payments.

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SOUTH KOREA
14 OCT
2021

Revision of the Enforcement Decree of the WCGA

Under the revised WCGA, the substitute payment system shall be extended to include incumbent employees starting from October 14, and the procedures for substitute payments shall be simplified. Accordingly, the Enforcement Decree of the WCGA has inserted new standards on to whom the substitute payment system shall apply. In the case of an incumbent employee, a small substitute payment may be made when 1) the employee's employment contract has not ended, as on the date when the lawsuit or complaint is filed; 2) the amount of unpaid wage is not above the limit designated by the Minister of Employment and Labor; and 3) the lawsuit was filed within 2 years from the last date of non-payment or the complaint was filed within 1 year from the last date of non-payment.

In the case of a retired employee who claims a simplified substitute payment (small substitute payment) based on the 'written confirmation on unpaid wage, etc.' with no final decision from the court, the substitute payment may be made "if the complaint, etc. was filed within 1 year from the date of retirement". The Enforcement Decree has been revised in accordance with the amendments, including the simplified terms and the heavier sanctions on fraudulent receipts, in the WCGA. More precisely, in line with the replacement of the term "체당금" with "체불 임금등 대지급금"(대지급금 in short), "일반체당금(general substitute payment)" has been replaced by "도산대지급금(substitute payment for insolvency)" and the term "소액체당금(small substitute payment)" has been replaced by "간이대지급금(simplified substitute payment)". In addition, the amounts and the maximum of reward of cash for a report of fraudulent receipt of substitute payment have doubled under the amended law.

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SOUTH KOREA
14 OCT
2021

Amendment to the Act on the Employment, etc. of Foreign Workers (AEFW)

1) Reduction of the re-entry restriction period for foreign workers specially permitted to re-enter (from 3 months to 1 month)

Foreign workers, upon their first entry, may work for up to 4 years and 10 months in Korea, and if they work in the same workplace throughout the period, they shall be specially allowed to re-enter Korea 3 months after they depart from the country and to work for up to 4 years and 10 months again. However, it has been concerned that the 3-month re-entry restriction period may cause discontinuance of work in their workplaces. In recognition of this concern, the period has been shortened from 3 months to 1 month.

2) Expanded scope of beneficiaries of the special re-entry system

As foreign workers are allowed to re-enter only when they continue to work in the same workplace for 4 years and 10 months, there are some cases where they couldn't ask for a change of workplace even when they were mistreated because they wanted to re-enter the country. In addition, employers cannot continue to use certain foreign workers if they have ever changed their workplace and are not allowed to re-enter to work in Korea. However, under

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the revised law, foreign workers who have ever changed their workplace but have continued to work for 4 years and 10 months in the same sector as the first one where they started to work in Korea (companies with fewer than 100 employees in manufacturing, service, agriculture/livestock or fisheries) may be specially allowed to re-enter Korea, so long as the remaining period of their employment contract with the employer who apply for an approval for their special re-entry is 1 year or longer.

3) Supplementary consideration for special re-entry in the case of foreign workers who have changed their workplace for a reason not attributable to themselves

Currently, in case foreign workers have changed their workplace due to a reason not attributable to themselves, such as violence or sexual harassment, they may be specially allowed to re-enter so long as the remaining period of their employment contract with the workplace concerned is at least 1 year. This could result in a case where a foreign worker cannot change his/her workplace even though he/she is being mistreated, because his/her remaining contract period is less than 1 year. In order to prevent this potential problem, the revised law provides that foreign workers who have changed their workplace for a reason not attributable to themselves and whose remaining contract period is less than 1 year may be specially allowed to re-enter, if the head of the public employment service agency finds it reasonable to allow their re-entry and employment, after hearing the opinion of the council on the protection of foreign workers' rights and interests.

4) Mandatory education for the employers who are permitted to hire foreign workers for the first time

Starting from October 14, employers who get a first-time permission to hire foreign workers shall be obligated to complete education on labor law, human rights, etc., within 6 months from the date when the permission was issued. The education is provided by the HRD Service of Korea for free, and lasts for 6 hours in a classroom or online (using a PC or mobile phone). Employers who fail to complete this mandatory education shall pay a fine of KRW 3 million.

5) Addition of mining to the list of the sectors covered by the special employment permission system

Currently, under the special employment permission system, foreigners of Korean descent (H-2) may be hired in construction, service, manufacturing, agriculture and fisheries, and the revised law has added mining to this list. Minister of Employment and Labor Ahn Kyung-duk observed that "Considering a high demand for skilled foreign workers with long work experiences in industrial fields, this institutional improvement will likely help minimize the labor shortage on employers' part and reinforce human rights protection on foreign workers' part".

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SOUTH KOREA
14 OCT
2021

Amendment to the Enforcement Decree of the AEFW

Under the amended "AEFW", starting from October 14, employers who are permitted to hire foreign workers for the first time are obliged to complete education on labor law, human rights, etc. The matters necessary to enforce the new provision, including the level of penalty to be imposed against employers who fail to complete the mandatory education, are set forth in the Enforcement Decree of the AEFW.

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SOUTH KOREA
14 OCT
2021

Amendment to the Occupational Safety and Health Act (OSHA)

1) Extended coverage of health protection from linguistic violence, etc.

The revised OSHA newly provides that, as for any employee who may be exposed to linguistic violence, etc. from a third party including customers in

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LOOKING BACK

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relation to his/her work, the employer shall take proper protective measures, such as temporary suspension of work or relocation, in case the employee's health problem occurs or is highly likely to occur, and shall not treat the employee unfavorably. The current OSHA requires these protective measures only for "customer response employees", whereas the revised law has extended the coverage of the mandatory protective measures to include employees who do not engage in the work of dealing with customers but may be exposed to a third party's linguistic violence, etc., such as security guards, ensuring further protection of employees' rights.

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SOUTH KOREA
14 OCT 2021

Amendment to the Enforcement Decree of the OSHA

With the amendment to the "OSHA", starting from October 14, the coverage of employers' obligation to protect employees' health shall extend from the previous 'customer response employees' exposed to 'customers' linguistic violence, etc.' to 'all employees' exposed to 'linguistic violence, etc. from a third party including customers'. Accordingly, the title and wording of the corresponding article in the Enforcement Decree of the OSHA has been aligned with the amendment in the OSHA, in line with the effective date of the amended OSHA. It is expected that employees' right to health will be protected further, as the coverage of protection will extend to include employees who are not classified as customer response employees but those who may be exposed to customers' and other third parties' linguistic violence, such as security guards

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SOUTH KOREA
19 NOV 2021

Amendment of the Labor Standards Act

Pursuant to the amended Labor Standards Act, starting from November 19, 2021, employer must provide wage slip which includes matters prescribed by the Presidential Decree, such as composition of wage, calculation method, deductions, etc. The wage slip can be delivered electronically pursuant to the Act on Electronic Documents.

More...

SOUTH KOREA
19 NOV 2021

Amendment of the Equal Employment Opportunity and Work-Family Balance Assistance Act

Pursuant to the amended he Equal Employment Opportunity and Work-Family Balance Assistance Act, starting from November 19, 2021, pregnant employees may also use childcare leave of absence.

More...

SOUTH KOREA
19 NOV 2021

Amendment of the Enforcement Decree of the Occupational Safety and Health Act

Considering that employees who visit customers to provide their services, such as door-to-door sales persons, visiting inspection service providers and home appliance service providers, and truck owners and software technicians have a high risk of accidents due to the nature of their work and thereby require protection, the Enforcement Decree was amended to include 5 job types as special type employment protected by the Occupational Safety and Health Act. As a result, there are now 14 special job types (previously 9 special job types) subject to such protection of the Occupational Safety and Health Act.

According to the Amended Occupational Safety and Health Act, in case a relevant subcontractor is exposed to a danger due to mixed/combined works, etc., the principal must adjust the subcontractor's work time and content. On this issue, the Enforcement Decree has specified 8 types of danger as "fire/explosion, being jammed, collision, fall, risk of falling or flying objects, overturn, collapse, and suffocation."

According to the Amended Occupational Safety and Health Act, a party

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LOOKING BACK

SOUTH KOREA
19 NOV 2021

requesting construction work must obtain a safety and health expert's confirmation on adequacy of its safety and health registry, and the Enforcement Decree sets forth the scope of such safety and health experts who may review the safety and health registry.

According to the Amended Occupational Safety and Health Act, the cap on a fine for not submitting the investigation report on harmful and hazardous new chemicals has been increased from KRW 3 million to 5 million, and accordingly, for failure to submit the investigation report on harmful and hazardous new chemicals, KRW 1 million is imposed on the first occasion, KRW 2 million on the second occasion, and KRW 5 million on the third or more occasions, and for failure to submit the investigation report on harmfulness and hazardousness of chemicals with health issues or materials that are necessary for harmfulness and hazardousness evaluation, KRW 5 million will be imposed on all of the first, second, and third or more occasions. In addition, the cap on a fine for not furnishing the process safety report, which is directly related with life protection of employees, has also been increased to ensure the effectiveness of the systems.

More...

SOUTH KOREA
19 NOV 2021

Enactment of the Essential Work Designation and Employee Protection Act

With establishment of the Act, starting from November 19, upon occurrence of an accident, persons who engage in essential work for public life and safety, and maintenance of social functions, must be appointed immediately. In case a large scale accident occurs, the Minister of Employment and Labor must establish and implement a support plan which includes the scope of persons who engage in such essential work and protection measures for such persons by deliberation of the "Essential Work Designation and Employee Protection Commission."

More...

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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.

SRI LANKA
7 JUL 2021

SC/HC/LA/50/2020 Asia Broadcasting Corporation – Petitioner v, K.H. Lalith Priyantha – Respondent

The issue to be determined by the Supreme Court was whether the application for leave to appeal against the judgment of the High Court (affirming an order of the Labour Tribunal in favour of the Respondent) should be dismissed on the ground that it was out of time.

The Respondent (Employee) had made an application to the Labour Tribunal alleging that his services had been unjustly terminated by the Petitioner (Employer) and sought an order for reinstatement with back wages or, in the alternative, compensation.

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The Labour Tribunal made order on 3rd January 2018 holding that the Respondent's services had been unjustly terminated and awarding compensation by way of relief. The Petitioner appealed to the Provincial High Court ['the High Court'] – which affirmed the order made by the Tribunal and dismissed the appeal. The judgment of the High Court was delivered on 13th March 2020.

By petition dated 17th July 2020 the Petitioner sought the leave of the Supreme Court to appeal to that court from the order of the High Court affirming the order of the Labour Tribunal and the judgment of the Supreme Court referred to herein is as regards that application.

When the application came up for support before the Supreme Court Counsel for the Respondent taking up a preliminary objection, submitted that it could not be maintained since it had been filed out of time. Counsel relied on rule 7 of the Supreme Court Rules which states that

"Every such application shall be made within six weeks of the order, judgement, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought."

The submission in opposition to the objection was that Rule 7 had no application to an application for leave to appeal from a judgment of the Provincial High Court. Counsel for the Petitioner contended that Rule 7 applied only to applications for special leave to appeal from a judgment of the Court of Appeal.

In deciding the issue of the time limit for applications for leave to appeal from a judgment of the Provincial High Court in appeal from the Labour Tribunal (under section 31DD of the Industrial Disputes Act) the Supreme Court, in the instant case, adverted, inter alia, to the following –

i. The rules presently in force were the Supreme Court Rules 1990 set out in Gazette No.665/32 dated 7th June 1991.

ii. At the time the Supreme Court promulgated those rules, legal provision had not been made in respect of appeals to be made to the Provincial High Courts.

iii. It was by Act No.19 of 1990 (later amended by Act No. 54 of 2006) that provision for such appeals was made.

iv. In several of its previous judgments, to which specific reference was made and from which excerpts were extensively quoted, the Supreme Court had held that, notwithstanding the absence of any statutory provision or specific rule in the Supreme Court Rules, the time limit for making an application for leave (or special leave) to the Supreme Court from an appellate judgment of the Provincial High Court was six weeks (42 days).

One of the excerpts so quoted was the following – from the judgment in Mahaweli Authority of Sri Lanka Vs United Agency Construction (Pvt) Ltd – 2002 (1) SLR 8 – was the following -

"The rules provide for a party seeking leave to appeal from a judgment or order of the Court of Appeal to the Supreme Court to apply to the Court of Appeal for such leave on a substantial question of law within twenty-one (21) days since the Court of Appeal must make an order on such an application within twenty-one days or as set out in the proviso to Rule 23 (5) and that if no order is made within that period the application for leave is deemed to have been refused.

According to the rules a party may apply directly to the Supreme Court for special leave to appeal within a period of forty-two (42) days of the judgment or order of the Court of Appeal. So that it is seen that in providing for a period of forty-two days for presenting an application for special leave the Supreme

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Court has allowed a party who has been unsuccessful in his application for leave to appeal in the Court of Appeal a further period of twenty-one days within which an application for special leave can be made.

In my view, the clear inference is that the Supreme Court in making the rules did not consider it necessary to go beyond a maximum of forty-two days for making an application for special leave to the Supreme Court. In deciding on these periods within which such applications for leave to appeal should be made we must necessarily conclude that the Supreme Court fixed such periods as it was of the view that such periods were reasonable having regard to all relevant circumstances, and also that the Supreme Court acted reasonably in doing so. In this context, also relevant, would be the question as to whether, in a situation where the appealable period from the Court of Appeal to the Supreme Court is forty-two days, it is conceivable that the appealable period from the High Court to the Supreme Court should be longer? If so, by how many days?

SRI LANKA

7 JUL 2021

For the above-mentioned reasons I hold that the period of fifty-five days from the date of the order of the High Court taken by the petitioner to file his application for leave to appeal cannot be considered to be a reasonable period and therefore uphold the preliminary objection raised by the learned counsel for the respondent. I, accordingly, reject this application for leave to appeal."

In the instant case, the Court observed that the judgment of the High Court had been delivered on 13th March 2020 and the application for leave to appeal had been made only on 17th July 2020. However, the Supreme Court (Temporary Provisions) Rules 2020 published in Gazette Extraordinary 2174/4 of 06.05.2020 provided that the period from 16th March 2020 to 18th May 2020 would not be taken into account in computing the period of 6 weeks referred to in Rule 7. Even when the said period was excluded from the computation, the application for leave to appeal had been filed on the 62nd day from the date of the judgment of the High Court and was thus out of time.

Accordingly, the preliminary objection was upheld and the application was dismissed.

More...

SC Appeal 133/2016 Titus Jayantha v Sri Lanka Transport Board

SRI LANKA

9 JUL 2021

The Appellant had been employed at the Sri Lanka Transport Board since 29th June 1991 and, at the time of the termination of his services, had been a Depot Route Inspector at the Giriulla bus depot.

After a general election on 2nd April 2004 which resulted in a change of the ruling party, certain other workers at the Giriulla depot had threatened the Appellant and other members of the party that was unsuccessful at the elections not to report for work. In this regard, the Appellant made complaints to the police and to the Deputy Commissioner of Labour requesting that he be allowed to report back for work.

Pursuant to the above complaints a settlement has been entered into between parties and the Appellant was allowed to report back to work from 1st June 2004.

Thereafter the Appellant had been stabbed with a piece of glass on 20th June 2004 and was admitted to hospital where he had been treated for 11 days until 30th June 2004. The medical report and medical certificates were issued covering the period up to 30th June 2004 and thereafter further medical certificates covering the period up to 16th Aug 2004 had been submitted by the Appellant.

The Respondent accepted the medical certificates and granted him leave for the period up to 16th August 2004 and the Appellant was required to report for work on 17th. He failed to do so and, on 23rd August 2004 – after one

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week's absence - the Respondent, by telegram, called upon him to report back for work. There was no response from the Appellant and letter dated 27th August 2004 was sent to him informing him that he should report for work within 7 days from the date of the letter and that if he failed to do so he would be treated as having vacated post voluntarily. The Appellant did not respond nor report back for work and the Respondent issued notice of vacation of post by letter - upon expiry of 3 weeks from 17th August 2004.

Thereafter the Appellant (through his trade union) made an application to the Labour Tribunal alleging that his services had been unjustly terminated. After inquiry, the Labour Tribunal held that the Appellant's services had been constructively terminated by the Respondent and awarded him a sum of rupees Rs.221,250 (30 months' salary) as compensation. In making this order the Tribunal sought to rely on a dissenting judgment by one of 3 judges of the Supreme Court in Nandasena v Uva Regional Transport Board (1993)1 SLR 318. The Tribunal further stated that

"Evidence presented to the tribunal does not reveal that the applicant had any intention of leaving the service voluntarily" and that "the applicant was unable to report for duty and engage in duties due to the physical damage caused to him by an employee of the Giriulla Depot. In the case of Nandasena v. Uva Local Transport Board 1993 SLR 318, Hon. Mark Ferando J. has stated that temporary absenteeism is not a vacation from service."

The Respondent appealed to the Provincial High Court ("the High Court) which set aside the order of the Labour Tribunal, holding that the Appellant had voluntarily vacated post as pleaded by the Respondent. In making this determination the High Court relied on a previous judgment of the Supreme Court in Building Materials Corporation vs Jathika Sewaka Sangamaya (1993) 2 SLR 316 and also relied on the following pronouncement of the Court of Appeal in an unreported case, namely, Jayawardane vs ANCL (CA 562/87)

"No employer could indefinitely, keep a post vacant without any information from the worker of his inability to come to work, especially. Where the employer has given an opportunity for the applicant to tender any explanation or inform the employer about his inability to report to work."

In considering the appeal of the Appellant, the Supreme Court having considered the facts of the case in some detail, as well as previous decisions of the Court, including the judgments in the case in which the dissenting judgment relied on by the Labour Tribunal was delivered, finally concluded as follows:

"As observed above where an employee endeavours to keep away from work or refuses or fails to report to work or duty without an acceptable excuse for a reasonable period of time such conduct would necessarily be a ground which justifies the employer to consider the employee as having vacated service. In the circumstances, I am of the view that the Respondent has in this case proved that the Appellant was absent without leave from 17th August 2004 for a period of approximately 21 days and that it is reasonable on the facts established in this case to draw the inference that the Appellant had no intention to report for work at the Giriulla depot. Further, there is no evidence produced before the Court to prove that the Appellant was subject to fear of life between the period from 17th August 2004 to the 06th September 2004 in which period he was absent for work."

The Supreme Court also noted that it was not competent for the Tribunal to have based its decision on a dissenting judgment since it did not constitute the ratio decidendi in that case. The Court observed "Further it could be seen that the Learned President of the Labour Tribunal has wrongfully relied on this case as the dissenting judgment of the Justice Mark Fernando is not the ratio decidendi in that case thereby not an opinion for the Labour Tribunal to follow."

The judgment of the High Court was affirmed and the Appellant's appeal dismissed.

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SRI LANKA
3 AUG
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2021

Gazettes re Employment Provident Fund Act

Regulations made under the Employees Provident Fund (EPF) Act by the Minister of Labour, published in Gazette Extraordinary No. 2239/26 of 3rd August 2021, contained a form (EM 3) to be filled by an employer when remitting EPF contributions, according to which incentive payments were to be included in the "total earnings" of an employee on which EPF contributions must be made.

This was contrary to what had prevailed hitherto and the Employers' Federation of Ceylon [EFC] issued a circular to its members stating, inter alia, that the inclusion was probably by oversight and that it would be making representations to the authorities in this connection.

Subsequently, by notification in Gazette Extraordinary No, 2244/14 of 8th September, the regulations published in Gazette Extraordinary No. 2239/26 of 3rd August 2021 were rescinded.

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SRI LANKA
6 AUG
2021

SC/Appeal 132/2016 S. Raju - Appellant v. Barberyn Reef Hotel Ltd.- Respondent

The Employee-Appellant ["the Applicant] had been employed by the Respondent as a Chef at its Hotel from 1992 to 2010.

During the course of his employment, he had been warned on several occasions for late attendance - more specifically, by letters dated 30th October 2006 for late attendance on 10 days in September, letter dated 20th November 2006 for 14 days in October, and by letter dated 15th February 2007 where the Applicant had reported to work late on 7 days in the months of November and December.

Despite these warnings, the Applicant's late attendance continued in the months of February and March 2007 as well and he was sent on compulsory "no pay" leave for a period of approximately one month.

On 21st April 2010, the Applicant was found sleeping in the staff rest room when he should have been on duty and was suspended by letter dated 22nd April 2010.

A "charge sheet' (R8) containing three charges was subsequently sent to him by registered post. The charges were

1. Neglecting mandatory services and leaving the kitchen without permission on 21st April 2010.
2. Neglecting mandatory services for a period exceeding 3 hours on 21st April 2010 by going to the hostel without permission during work hours.
3. Acting in breach of discipline or attempting to act in breach of discipline by the actions in 1 and 2 above.

The Applicant was required to submit his response within 7 days but he did not respond at all and, by letter dated 10th June 2010, his services were terminated.

He thereafter sought relief from the Labour Tribunal alleging that his services had been unjustifiably terminated. The Respondent's position was that having regard to the previous record of unsatisfactory attendance and the final act of misconduct, the termination of the Applicant's employment was justified.

The Labour Tribunal held that the employer had adduced sufficient evidence to establish charge 1 (above), but held that the termination was unjustified since the employer had not complied with the principles of natural justice. The Tribunal made order directing that the applicant be reinstated – but without back wages.

The Employer appealed to the Provincial High Court, which set aside the order of the Labour Tribunal. The High Court held that the Labour Tribunal was in

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error in ordering the reinstatement of the Applicant since he (the Applicant) had failed to show cause as to why he should not be dealt with and steps taken against him (despite having been afforded the opportunity to do so). Thus, the High Court found that the Tribunal had erred in holding that the employer had not complied with the principles of natural justice.

The Applicant sought leave to appeal to the Supreme Court – which allowed leave to appeal on the following questions (as stated in the petition) -

a) In the circumstances pleaded, is the judgment of the High Court which had dismissed the application of the applicant just and equitable in terms of law?
b) Could the High Court set aside the order of the Labour Tribunal considering only the fact that, the "supplicant" (sic) had not answered the charges levelled against him on 10. 05. 2010?
c) In the circumstances pleaded, is the judgement of the High Court according to the law and according to the evidence adduced in the case?

That Supreme Court, on a careful consideration and analysis of the evidence noted that although the applicant had initially taken up the position that he did not receive the show cause letter he had later admitted having received it and stated that it was in fact the letter of termination that he did not receive. It was also noted by the Supreme Court that the Applicant himself had admitted the fact that he had been asleep in the staff quarters when he should have been on duty and that he had sought to excuse himself stating that he was suffering from uncontrollable diabetes. In this connection it was noted that, in a statement made to his superior officer on the day after the incident, the applicant had not made any mention of either suffering from uncontrollable diabetes or having consulted any doctor – although, at the Tribunal, he had submitted a medical certificate from a doctor who also gave evidence for him. This medical certificate was said to have been obtained on the same day on which he was found sleeping. It is implicit in the judgment of the Supreme Court that there was merit in the contention of the employer that this medical certificate was wrongly dated and obtained much later for the purpose of the case.

In its judgment the Supreme Court reaffirmed the following principles –

a) That it was not incumbent on an employer to conduct a domestic inquiry prior to taking disciplinary action – even termination of services – against an employee
b) Nevertheless, the principles of natural justice should be complied with by an employer prior to taking such action. Such principles would be satisfied where the employee is given an opportunity to state his response to the allegations against him. In the instant case he had been given such an opportunity by the show cause letter which called for his response within seven days; but the employee had not responded even after a month.
c) In determining whether the termination was justified or not, the final act of misconduct should not (only) be considered in isolation but in connection with previous lapses (in this instance, lapses of a similar nature) in the course of employment.
d) A previous pronouncement by the Supreme Court that "justice and equity can themselves be measured not according to the urgings of a kind heart but only within the framework of the law" was cited with approval and the Court observed

"Therefore, it is clear that equity s not sympathy and that a court is barred from reaching a just and equitable decision based solely on sympathetic considerations. A just and equitable decision in an industrial matter is one which takes into consideration the situations of both the employer and the employee and assumes a holistic approach to the issue at hand based on the legal framework."

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SRI LANKA

6 AUG 2021

With regard to the hotel industry in particular the Supreme Court stated as follows –

"From the evidence led before the Labour Tribunal it was revealed that the work of the Applicant was necessary for putting together, on time, the meals served for the guests staying at the hotel. This was a job where the work simply had to be completed by a given deadline if the residents of the Hotel were to be satisfactorily served their meals in keeping with the standards of the Respondent Hotel as an Ayurvedic resort, catering predominantly to foreign tourists……"

"This court observes that the Respondent was engaged in the hospitality trade where success largely depends on the customer satisfaction or the satisfaction of the guest to be precise. Thus, in the highly competitive present-day business world the sustenance of a business of this nature hinges on the customer reviews. Hence the employees are not only expected but are under a duty to rise up to industry demands and to act reasonably and with a sense of responsibility…."

In the result, all three questions of law on which leave to appeal had been granted were answered in the affirmative (in favour of the employer) and the appeal was dismissed.

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SRI LANKA

16 AUG 2021

The National Minimum Wage of Workers Act No. 3 of 2016

The said Act was amended by Act No. 16 of 2021 (certified on 16th August 2021) and the mandatory minimum monthly wage of a worker was increased by Rs.2,500 to Rs. 12,500. The minimum daily wage was increased from Rs.400 to Rs. 500.

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SRI LANKA

13 OCT 2021

Employees' Provident Fund (Amendment) Act no. 23 of 2021

The definition of "employee" has been amended to exclude one described as a "detached worker" which is defined as, "*…an international worker on a temporary assignment in covered employment in Sri Lanka and contributing to a social security programme in the country in which he is a citizen and who in terms of a social security agreement has been exempted from making any contribution under this Act for the period as set out in such agreement;*"

In terms of the amending Act an "international worker" means, an employee who is a citizen of a country other than Sri Lanka;"

A "Social Security Agreement" means *a bilateral agreement to which Sri Lanka is a party and which provides exemptions to citizens of one country working in another country, on temporary assignment as detached workers, from contributing to a social security programme in such other country*;

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SRI LANKA

28 OCT 2021

Dehiwattage Rukman Dinesh Fernando vs. Union Apparel (Pvt.) Ltd. - SC Appeal: 19/2015

Facts

Applicant was the 'Manager-Packing' of the Appellant-Company. On 3rd April 2008, he was served with a letter of suspension from service. He had been told that a domestic inquiry would be held but his employment had been terminated without such inquiry on 22nd April 2008.

The reason given being his failure to ensure the polybags used were in compliance with the requirements of the buyers.

The employee made an application for relief to the Labour Tribunal in terms of the Industrial Disputes Act.

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Order of Labour Tribunal and the decision of Provincial High Court

Having conducted an inquiry into his application, the Labour Tribunal held the termination to be unjust and wrongful and ordered the Appellant-Company to pay Rs.420,000/- as compensation. The Labour Tribunal did not elaborate how the actual loss was computed, but, (as can be gathered from the judgment of the Supreme Court), made the award on the basis of 3 months' salary per year of service.

On appeal to the Provincial High Court by the Appellant-Company, the learned High Court Judge affirmed the award of the Labour Tribunal.

Issues

The Respondent-Appellant-Company [the employer] sought leave to appeal to the Supreme Court and was granted leave on the following two questions of law -

- whether the compensation was granted in the accepted manner and whether the standard of proof adopted by the High Court was correct?
- did the High Court err by holding that a domestic inquiry is mandatory under the established legal principles of Sri Lanka?

Judgment of the Supreme Court

Computation of compensation

The Supreme Court held that, it is preferable to have a computation which is expressly shown to relate to specific heads and items of loss as opposed to simply stating that a certain amount is just and equitable. Where no such basis for the compensation awarded is given, the order is liable to be set aside on the ground that it is arbitrary or without a sound rationale.

A Labour Tribunal should take into account such circumstances as the nature of the employer's business, his capacity to pay, the employee's age, the nature of his employment etc. when computing the amount of compensation.

The following statement was made by the Supreme Court on the question of compensation –

The courts have upheld the expectation that a tribunal would specify in detail, to the extent possible, the specific heads on which the compensation was computed and, that the burden of adducing evidence to enable the court to compute the loss in such a meticulous manner is with the employee whose services have been terminated. As the employee in this case has starved the Labour Tribunal of the information necessary to make a well laid out computation, the Tribunal cannot be faulted for failing to set out the specificities. Furthermore, based on the details provided to the Labour Tribunal, it cannot be said that the computation of compensation is totally disproportionate to the alleged loss, and we do not wish to disturb the order of the Labour Tribunal as to the amount of compensation. [emphasis added]

The Supreme Court finally affirmed the judgment of the High Court and the order of the Labour Tribunal.

Burden of proof

The Industrial Disputes Act does not state on whom the burden of proof should lie in a labour matter. However, case law provides that 'he who alters the status quo and not he who demands its restoration, must explain the reasons for such alteration." Accordingly, the burden of showing that the termination was justified lies on the employer.

Regarding the standard of proof in labour matters, Courts have taken the stance that the standard of balance of probability should apply, as none of the objectives of adjudication can be achieved by the adoption of the high standard of proof required in criminal cases.

Requirement of conducting a domestic inquiry

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In Sri Lanka, there is no statutory requirement to conduct a domestic inquiry prior to the termination of the services of a workman. Therefore, it was a fault on the part of the High Court to hold that the termination without a domestic inquiry is unjust and unreasonable 'as a matter of law'.

Case law provides that the absence of a domestic inquiry alone is not sufficient reason to declare the termination unjust. Therefore, it was the conduct of the Appellant-Company in informing the Applicant that a domestic inquiry would be held and then terminating his services without such inquiry that was unjust.

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SRI LANKA

15 NOV 2021

Proposed Wages Board Decisions

The proposed changes of minimum wages for the following trades, (increasing as specified from the first to the last year of employment as stated in greater detail in the newspaper notification), have been specified. Below are the proposed minimum monthly wages for the first and the last stated years for each category within the trades.

1. Textile manufacturing trade
   - Unskilled workers - Rs. 12,500/- and Rs. 13,400/-
   - Semi-skilled workers - Rs.13,025/- and Rs.14,150/-
   - Skilled grade II workers - Rs. 13,550/- and Rs. 14,900/-
   - Skilled grade I workers- Rs.14,075/- and Rs.15,650/-
2. Retail and wholesale trade
   - Grade I class workers - Rs.15,055/- and Rs. 16,630/-
   - Grade II class workers - Rs.14,275/- and Rs.15,625/-
   - Grade III class workers - Rs.13,502/- and Rs.14,672/-
   - Grade IV class workers - Rs.12,750/- and Rs.13,150/-
3. Security services trade
   - Operational service workers- Rs.12,500/- and Rs.15,000/-
   - Supervisory service workers - Rs.13,275/- and Rs.17,025/-
4. Printing trade
   - - 'A' class worker other than learners and apprentices - Rs.14,450/- and Rs.17,250/-
   - 'B' class workers other than learners and apprentices - Rs.13,962.50/- and Rs.16,412.50/-
   - 'C' class workers other than learners and apprentices - Rs.13,475/- and Rs. 15,575/-
   - 'D' 'F' Class workers other than learners and apprentices - Rs.12,987.50/- and 14,737.50/-
   - 'E' Class workers other than learners and apprentices - Rs.12,500/- and 13,900/-
   - 'A' class worker (learners and apprentices) - Rs.10,000/- and Rs.10,600/-
   - 'B' class workers (learners and apprentices) - Rs.9,662.50/- and Rs. 10,162.50/-
   - 'C' class workers (learners and apprentices)- Rs.9,312.50/- and Rs.9,712.50/-

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SRI LANKA

17 NOV 2021

Termination of Employment of Workmen (Special Provisions) (Amendment) Act, no. 29 of 2021

Section 3(1)(c), referring to non-applicability of the Act to cases of retirement in terms of a contract of service or a collective agreement, which formerly read as "*(c) to the termination of employment of any workman who has been employed by an employer, where such termination was effected by way of retirement in accordance with the provisions of –*

(i) any collective agreement in force at the time of such retirement; and

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(ii) any contract of employment wherein the age of retirement of such workman is expressly stipulated; or"

has now been repealed and substituted for, by the following wording:

"(c) to the termination of employment of any workman where such termination was effected upon such workman attaining the minimum retirement age as specified in the Minimum Retirement Age of Workers Act, No. 28 of 2021;".

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Minimum Retirement Age of Workers Act, no. 28 of 2021

By this Act the minimum age of retirement of an employee – notwithstanding anything to the contrary in any contract of service or collective agreement – is fixed at 60 years for all employees who on the date of the coming into force of the Act had not attained the age of 52 years or those who are recruited after the operative date. In the case of those who are between the age of 52 and 55 schedule 1 to the Act sets out the retirement age as follows -

Between 52-53 retirement age - 59
Between 53-54 retirement age - 58
Between 54-55 retirement age - 57

The operative date of the Act is 17th November 2021.

There is no specific provision for those above 55 years whose retirement age will presumably therefore be as stated in the contract or will have to be terminated or would have to be retired with the approval of the Commissioner General of Labour [CGL] where the Termination of Employment of Workmen (Special Provisions) Act applies to them or with their prior written consent.

Some of the main features of the Act are the following -

1. In terms of section 3(1) an employer who employs 15 or more workers shall not retire any worker other than workers specified in Schedule II to the Act or those prescribed by Regulation.

However, provision is made for certain specified exceptions in which the employer may 'prematurely retire' any worker in terms of the provision of contract of service or collective agreement as follows:

(a) where any registered medical practitioner registered under the Medical Ordinance (Chapter 105) has certified that a worker is permanently 'incapacitate' [sic] of engaging in work due to some sickness;
(b) where the service of a worker has been terminated as a result of any disciplinary inquiry and the decision of such termination has not been revised by law;
(c) upon closure or the destruction of an establishment due to any natural cause; or
(d) with the prior written approval of the Commissioner General under the provisions of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971.

Section 3(1) will also not apply to an employer who has employed "fifteen or workers less" on an average within the twelve month period prior to the retirement of any worker.

2. Provision is made for a worker who has been prematurely retired in contravention of section 3(1) to make a complaint to the CGL within 2 months and it is provided that the latter must make the final determination after inquiry within 2 months from the date of receipt of the complaint.

Where there has been such premature termination section 5 (3)(b) provides that the Commissioner General shall either direct the employer to reinstate such worker from the date of such notice, in the same capacity in which the worker was employed prior to such retirement and to pay him his wages and all other benefits from the date of such retirement; or where the

Continued on Next Page

Commissioner-General is of the opinion that reinstatement is impractical due to the closure of the establishment or commencement of liquidation process of the establishment in which such worker was employed, to pay the worker compensation in terms of the formula determined by the Commissioner-General as specified in section 6D of the Termination of Employment of Workmen (Special Provisions) Act, no. 45 of 1971, based on the last paid wages to such worker up to the date of closure of such establishment or the date of commencement of liquidation of such establishment, as the case may be, in lieu of reinstatement.

3. An employer may make an application for an order in the nature of a writ against the decision of the CGL under section 5, but must furnish security in order to do so. Such security will be a sum of money that has been ordered to be paid and/or where reinstatement has also been ordered the equivalent of 12 months' salary of the worker. It is also provided that the Court of Appeal shall not entertain the application unless it is accompanied by a certificate of the CGL that the security has been furnished.

4. Section 8 of the Act vests certain powers on the Commissioner General for the purpose of any inquiry in respect of a complaint made under section 5. These include the powers to summon and compel the attendance of witnesses, the production of documents and to require evidence of any witnesses to be given on oath or affirmation. He may also, by notice in writing, direct an employer to furnish such matters of information as are referred to in section 8(2). And in terms of section 8(3), any person who fails to appear as noticed/summoned refuses to be sworn or affirmed as a witness, or to extend assistance required or commits any of the acts mentioned in paragraphs d-h of subparagraph 3 is guilty of an offence punishable with a fine of 5,000 Rupees or imprisonment of either description for a term not exceeding 6 months or both.

5. The offences under the Act include contravention of the provisions of section 3(1) (i.e., prematurely retiring a worker). Other offences include failing to comply with a direction issued by the CGL under section 5.

Where an offence is committed by a body of persons which -

(a) is a body corporate, every director and officer of that body corporate;
(b) is a firm, every partner of that firm;
(c) if such body of persons is a trade union, every officer of that trade union; and
(d) is a body other than a firm or trade union and unincorporated,

the president, manager, secretary and every officer of such body, shall be deemed to be guilty of that offence.

6. Workers to whom section 3(1) and mentioned in Schedule II – referred to above, are the following:

   1. *Any worker in the public sector.*
   2. *Any worker in any statutory body established under written law.*
   3. *Any worker of Government owned business undertakings registered under the Companies Act, No. 7 of 2007.*
   4. *Any worker in any Provincial Council or Local Authority.*
   5. *Any worker recruited by any registered society within the meaning of the Cooperative Societies Law, No. 5 of 1972.*
   6. *Any worker of a charitable institution that has been identified by section 68 of the Inland Revenue Act, No. 24 of 2017.*
   7. *Any worker entered into any contract of service for training in any trade or occupation.*

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LOOKING BACK

SRI LANKA

17 NOV

2021

8. Any apprentice or trainee in any wages board established under the Wages Boards Ordinance (Chapter 136).

9. Any apprentice or trainee covered by the Tertiary and Vocational Education Act, No. 20 of 1990 or the Employment of Trainees (Private Sector) Act, No. 8 of 1978.

10. Any worker who enters into and works under a fixed term employment contract or casual employment contract.

11. Any worker who enters into and works under a contract of fixed term employment with an employer.

12. Any worker who enters into and works under a seasonal employment contract with an employer.

13. Any part time worker who enters into contract of service with an employer.

14. Any probationary worker who enters into contract of service with an employer.

15. Any daily paid worker who engages in an employment of casual nature.

16. Any student who serves under a contract for a temporary term of employment during study leave.

17. Any domestic service.

18. Any worker who serves under a contract for an assignment basis employment, entered into with an employer.

"Fixed term employment" is a written contract of employment for a fixed term of time, specified in days, months or years between an employer and a worker and includes a consecutive fixed term contract entered into with the same individual where such contract is specifically linked to the performance of a particular task or project and the employer retains the services of such worker after the end of such fixed term contract without entering into a new employment for more than twelve calendar months, which shall be deemed to have extended for a length of time identical to the existing fixed term employment contract; and

"employment of a casual nature" is defined as 'an employment of a worker not in excess of hundred and eighty days in any one calendar year".

More...

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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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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.

TAIWAN
7 JUL
2021

Amendment and publication of the Act for the Recruitment and Employment of Foreign Professionals

Issued by: The President's Office
Ref. No.: Hua-Zhong-1-Yi-Zi-11000060901
Issue date: July 7, 2021

The amendment covers the following:

1. More recognized fields of expertise for foreign professionals: "National defense" and any field "recognized by the competent authority upon further discussion" are added.
2. Graduates of "top colleges and universities recognized by the Ministry of Education" no longer need to have 2 or more years of experience before engaging in a professional or technical position in Taiwan.
3. More relaxed rules regarding residency and relatives: The immigration formalities for the foreign professional and relatives are simplified, and they may now apply for residency directly. The duration of stay for permanent residency eligibility has been reduced from 5 to 3 consecutive years, and certain foreign professionals who have obtained a master's or doctor's degree in Taiwan may further offset such permanent residency eligibility duration by 1 to 2 years.
4. Improved social welfare and tax treatment: The duration of the preferential tax treatment under the previous Act is extended from 3 to 5 years. Foreign professionals working solo or for a qualified employer may apply to enroll themselves or their direct relatives in the national health insurance program without the 6-month waiting period.

The implementation date will be set by the Executive Yuan.

TAIWAN
19 JUL
2021

The days of vaccination leave taken and the associated pay will not be included in the average wages calculation under Article 2, Paragraph 4 of the Labor Standards Act, effective May 5, 2021

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-2-Zi-1100130753
Issue date: July 19, 2021

The Ministry of Labor issued its official interpretation that in light of the response measures mandated by the Central Epidemic Command Center, employees taking vaccination leave shall not have the leave days and the associated wages included in the calculation of the employee's average wages under the Labor Standards Act. This interpretation shall be retroactively effective from May 5.

TAIWAN
27 JUL 2021

Employers unable to provide their employees work due to response measures taken against the COVID-19 pandemic will not have to include the period during which their employees are unable to work into the average wages calculation per Article 2, Paragraph 4 of the Enforcement Rules of the Labor Standards Act.

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-2-Zi-1100130738
Issue date: July 27, 2021

The Ministry of Labor issued its official interpretation that since the COVID-19 pandemic fits the definition of an incident under the Labor Standards Act, per Article2, Paragraph 4 of the Enforcement Rules of the Labor Standards Act, employers who are unable to provide their employees work due to the pandemic will not have to include the duration of the non-working period into the employees' average wage calculations.

TAIWAN
27 JUL 2021

The wording "twice" in Article 2 of the Unpaid Child Care Leave Implementation Act refers to the number of times unpaid child care leave may be taken if the employee is taking care of two or more children

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-4-Zi-1100130788
Issue date: July 27, 2021

Unpaid child care leave for an employee's children under the age of three is stipulated in Article 16 of the Act for Gender Equality in Employment, which limits such leave to two years maximum, and in case of simultaneously caring for multiple children, the overlapping period is computed aggregately, and the maximum duration is limited to two years of care total for the youngest of the children. The new Unpaid Child Care Leave Implementation Act that came into effect on July 1, 2021, suggests that unpaid child care leave should not be less than six months in principle, and if an employee requests less than six months of unpaid child care leave, it should still be no less than 30 days, and such requests may only be made twice at most. When read together, since unpaid child care leave for multiple children overlaps with each other, the number of times an employee may request unpaid child care leave is also computed aggregately and is similarly limited to a maximum of two such requests for the youngest of the children.

TAIWAN
20 AUG 2021

The Grand Justice Interpretation No.807 has declared Article 49, Paragraph 1 of the Labor Standards Act as unconstitutional

Issued by: The Judicial Yuan
Ref. No.: Shi-Zi-807
Issue date: August 20, 2021

Article 49, Paragraph 1 of the Labor Standards Act had stipulated that an employer may not ask female employees to work between 10PM to 6AM the next day unless consented by a union or the labor-management conference and certain other requirements are met, such as the employer providing sanitation facilities, transportation or dormitories. This was deemed to be discriminatory of female employees and contrary to Article 7 of the Constitution on protecting gender equality. As a result, this provision is no longer valid as of the date of the Interpretation.

LOOKING BACK

TAIWAN
15 OCT
2021

The Ministry of Labor's order to amend the hourly minimum wage and the monthly minimum wage, effective January 1, 2022.

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-2-Zi-1100131349
Issue date: October 15, 2021

The minimum wage is now amended to be:
(i) NT$168 per hour; and
(ii) NT$25,250 per month.

TAIWAN
30 NOV
2021

The Occupational Safety and Health Administration of the Ministry of Labor promulgated the "Safety and Health Guidelines for Night Time Work at the Workplace"

Issued by: The Occupational Safety and Health Administration of the Ministry of Labor

Ref. No.: Lao-Zhi-Wei-1-Zi-1101060521
Issue date: November 30, 2021

The Guidelines are drafted to strengthen the safety and health for night time work, protect the physical and mental health of employees and lower the risk of violence at the workplace. The contents include how the relevant risks of night time work may be evaluated, and a checklist of key safety and health related items for night time work.

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.

More...

THAILAND
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).

More...

THAILAND
28 JAN 2021

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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THAILAND

28 JAN 2021

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.

More...

THAILAND

29 JAN 2021

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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THAILAND

29 JAN 2021

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.

More...

THAILAND

2 FEB 2021

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.

More...

THAILAND

5 FEB 2021

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.

More...

THAILAND

15 FEB 2021

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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THAILAND

15 FEB 2021

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.

More...

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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THAILAND

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2021

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	1
(2) Employer	1
(3) Worker	1
2. Contributions for the compensation in the event of child support, and in the event of old age:	
(1) Government	1.5
(2) Employer	1.25
(3) Worker	1.25
3. Contributions for the compensation in the event of unemployment:	
(1) Government	0.25
(2) Employer	0.25
(3) Worker	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	1.5
(2) Employer	1.5
(3) Worker	1.5
2. Contributions for the compensation in the event of child support, and in the event of old age:	
(1) Government	1
(2) Employer	3
(3) Worker	3
3. Contributions for the compensation in the event of unemployment:	
(1) Government	0.25
(2) Employer	0.5
(3) Worker	0.5

THAILAND

5 JUL

2021

Thailand announces a six month extension to the previous easing of provident fund requirements

With reference to the previous announcement by the Ministry of Finance in relation to easing the requirements for provident fund contributions, the Ministry of Finance has extended the easing of provident fund contributions for another six months, starting from July 2021 to December 2021.

This announcement exempts both employers and employees from their duties to submit contributions to the provident fund between July 2021 to December 2021, subject to certain criteria and their agreement to make use of the exemption.

Please note that in order to make use of the exemption, employers will have to certify that they meet certain conditions, and the exemption also requires a resolution which grants approval.

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

THAILAND

8 SEP

2021

Thailand announces a three months extension for social security contributions reductions.

On 18 May 2021, the Social Security Office announced a reduction for mandatory social security contributions to the Social Security Fund (SSF) in order to ease the financial burden of employers and employees due to the resurgence of COVID-19 cases. The reductions were as follows: (i) mandatory contribution rate reduced from 5% to 2.5%, with a maximum of THB375 per month; and (ii) voluntary contribution rate for former employees who continued to contribute to the SSF after leaving their jobs from THB432 to THB216 per month. These reductions were initially effective for three months from 1 June 2021 – 31 August 2021.

On 8 September 2021, the Social Security Office announced plans to extend the reduction of mandatory social security contributions for another three months i.e. from 1 September to 30 November 2021. The mandatory social security contribution rate remains the same, from 5% to 2.5%, with a maximum of THB375 per month. However, the voluntary contribution rate for former employees who continued to contribute to the Social Security Fund after leaving their jobs, has been reduced from THB432 to THB235 per month.

However, please note that as of the current date, no official legislation has been issued on this matter. The Social Security Board is expected to propose these extensions to the Cabinet meeting shortly.

There are no significant policy, legal or case developments within the employment space during 2021 Q4.

Click here to view **2020 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

There are no significant policy, legal or case developments within the employment space during 2021 Q4.

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