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Asia Employment Law: Quarterly Review

2018-2019

ISSUE 26: FOURTH QUARTER 2019

INDEX:

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Updated as at December 2019

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

In this twenty-sixth edition, we flag and provide comment on anticipated employment law developments during the fourth quarter of 2019 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2020.

This publication is a result of ongoing cross-border collaboration between 15 law firms across Asia with whose lawyers our firm 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.

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This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA
13 FEB
2019

Proposed law to provide all casual employees with the right to request conversion to full-time or part-time employment

The Australian Government has introduced legislation to amend the Fair Work Act 2009 (Cth) (FW Act) extending the right for casual employees to request conversion to full-time or part-time employment, to apply to all regular casual employees. The amending legislating, the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (Casual Conversion Bill) incorporates a right to request conversion to full-time or part-time employment into the National Employment Standards.

Under the Casual Conversion Bill, an employee will have the right to request conversion from casual to full-time or part-time employment if the employee has:

- been designated as a casual employee by their employer for the purposes of the employee's contract of employment or any fair work instrument that applies to the employee; and
- in the previous 12 months worked a regular pattern of hours on an ongoing basis which without significant adjustment the employee could continue to work as a full- or part-time employee.

Employees who meet these two requirements may submit a written request to their employer for their employment to be converted to full-time or part-time employment, as consistent with the regular pattern of hours worked by the employee during the previous 12 month period. The employer may only refuse the employee's request if:

- it has consulted with the employee; and
- there are reasonable grounds for refusing the request based on facts known or reasonably foreseeable at the time of refusing the request.

The reasonable grounds for refusing an employee's request include:

- that converting to full-time or part-time employment would require a significant adjustment to the employee's hours of work;
- within the period of 12 months after giving the request:
- the employee's position will cease to exist;
- the hours of work which the employee is required to perform will be significantly reduced; or
- there will be a significant change in the days and/or times that the employee is required to work that cannot be accommodated within the days or times the employee is available to work; and
- granting the employee's request would not comply with a recruitment or selection process required under Commonwealth or State law.

The Casual Conversion Bill still requires the approval of the Senate before it is passed into law.

Fair Work Amendment (Right to Request Casual Conversion) Bill 2019
Explanatory Memorandum
Second Reading Speech

AUSTRALIA
14 FEB
2019

Potential changes to casual loading offset regulations

The Australian Federal Opposition has proposed a motion in the Senate to disallow the Federal Government's *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (**Casual Loading Offset Regulations**), which came into effect in December 2018. The Casual Loading Offset Regulations were introduced in response to the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, in which the Court decided that employees who were paid a casual loading in lieu of leave entitlements but who were actually employed as permanent employees could claim against their employer for unpaid leave entitlements.

Continued on Next Page

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA
14 FEB
2019

The Casual Loading Offset Regulations provide that employers who have paid identifiable casual loading to employees engaged as casuals but later found to be permanent employees can apply to have the loading offset against claims by such employees for National Employment Standards entitlements (including leave entitlements).

On 14 February 2018, federal Labor Senator Doug Cameron proposed a motion in the Senate to disallow the Casual Loading Offset Regulations, which was postponed until 2 April 2019. From 2 April 2019, if the motion is agreed to or has not been resolved or withdrawn within 15 sitting days after having been given, the Casual Loading Offset Regulations will cease to have effect.

Fair Work Amendment (Casual Loading Offset) Regulations 2018
Fair Work Amendment (Casual Loading Offset) Regulations 2018 Explanatory Statement

AUSTRALIA
19 FEB
2019

Changes to Australian whistleblower protection laws

The Australian Federal Parliament has passed the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (**Whistleblower Bill**). The Whistleblower Bill harmonises current whistleblower regimes under Federal law, expands existing protections and remedies for whistleblowers, and creates a whistleblower regime for tax-related misconduct and contraventions. The Whistleblower Bill has currently not received Royal Assent; it will likely commence on 1 July 2019.

The Whistleblower Bill will apply to disclosures made on or after commencement, and that relate to matters that occurred before, on or after commencement. The Whistleblower Bill also:

- requires public companies and 'large proprietary companies' (see definition below) to have mandatory whistleblower policies;
- facilitates the making of protected disclosures about a wide range of misconduct, including the existence of an 'improper state of affairs';
- broadens the range of people who may make protected disclosures than under the previous regime;
- allows anonymous disclosures;
- provides protections to whistleblowers on the basis that the disclosure was made to an 'eligible recipient' of the disclosure, which includes officers or senior managers (but not other employees generally) of the company, auditors, actuaries, or another person authorised by the company;
- no longer requires a whistleblower to act in good faith to gain the benefit of protections;
- expands the protections and redress available to whistleblowers who suffer reprisals, including access to compensation;
- allows for 'emergency' or 'public interest' disclosures to be made to the media or members of Parliament in extreme cases; and
- excludes most disclosures of personal work-related grievances from protection.

Public companies and 'large proprietary companies' must, within six months of the commencement of the Whistleblower Bill, implement a whistleblower policy. A 'large proprietary company' is currently defined as a company that meets at least two of the following three requirements: (a) consolidated revenue of $25 million or more; (b) gross assets of $12.5 million or more; and (c) the company and any entities it controls have 50 or more employees. Failure to comply with the requirement to implement a whistleblower policy is a strict liability offence, with a penalty of 60 penalty units (currently $12,600).

A company's whistleblower policy must set out information about:

- protections available to whistleblowers;

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA
19 FEB
2019

- the person / organisation to whom protected disclosures may be made, and how they can be made;
- how the company will support whistleblowers and protect them from detriment;
- how the company will investigate protected disclosures;
- how the company will ensure fair treatment of employees who are mentioned in protected disclosures, or to whom the disclosure relates; and
- how the whistleblower policy is to be made available to officers and employees of the company.

There will be significant penalties for corporations and individuals that contravene the provisions of the Whistleblower Bill. In relation to breaching confidentiality of the identity of the whistleblower:

- for an individual:
  - » a civil penalty of up to $1.05 million or three times the benefit derived or detriment avoided; and
  - » six months' imprisonment or a fine of up to $12,600 or both; and
- for a body corporate:
  - » a civil penalty of up to $10.5 million or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to $525 million); and
  - » a fine of up to $12,600.

The penalties in relation to victimisation or threatened victimisation of the whistleblower are:

- for an individual:
- a civil penalty of up to $1.05 million or three times the benefit derived or detriment avoided; and
- two years' imprisonment or a fine of up to $50,400 or both; and
- for a body corporate:
- a civil penalty of up to $10.5 million or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to $525 million); and
- a fine of up to $50,400.

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018
Revised Explanatory Memorandum
Second Reading Speech

AUSTRALIA
7 MAR
2019

Report of the Migrant Workers' Taskforce

The Australian Federal Government has committed to introducing the recommendations made by the Migrant Workers' Taskforce (**MWT**) in its Report released on 7 March 2019 ("**Report**"). The recommendations in the Report are intended primarily to 'deter unscrupulous businesses that profit by underpaying migrant workers, and to improve avenues for migrant workers to recover underpayments'.

The Report found that Australia's current regulatory model (primarily based on civil liability for workplace law breaches) 'is unable to tackle serious and systemic underpayments of workers'. The Report ultimately made 22 recommendations, the key ones being that the Government:

- introduce criminal sanctions into workplace legislation for the most serious forms of exploitative conduct where the exploitative conduct is clear, deliberate and systemic;
- increase the general level of penalties for breaches of wage exploitation related provisions of the *Fair Work Act 2009* (Cth);

Continued on Next Page

AUSTRALIA

7 MAR

2019

- empower courts to make additional enforcement orders, such as adverse publicity orders and banning orders, against employers who underpay migrant workers;
- extend accessorial liability provisions for breaches of workplace laws to situations where business contract out services to other persons;
- introduce a mandatory National Labour Hire Registration Scheme for labour hire operators, and require that host employers in the horticulture, meat processing, cleaning and security sectors use only registered labour hire operators;
- consider legislation making a person guilty of an offence where that person knowingly unduly influences, pressures or coerces a temporary migrant worker to breach a visa condition; and
- explore mechanisms to exclude employers from employing temporary visa holders for a defined period, where they have been convicted by a court of underpaying migrant workers.

The Government accepted in principle all 22 recommendations in the Report, intending to '[send] a strong and unambiguous message to those employees who think they can get away with the exploitation of vulnerable employees'. It committed to implementing the measures recommended by the MWT in order to protect vulnerable workers.

Report of the Migrant Workers' Taskforce
Government Response to the Migrant Workers' Taskforce Report

AUSTRALIA

6 APR

2019

Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019

The Australian Federal Parliament has passed the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019* (**SPEE Act**), which is designed to deter and penalise company officers, including company directors, from trying to avoid liability for employee entitlements in corporate insolvency.

The SPEE Act is aimed at stopping certain employers' inappropriate reliance on the Fair Entitlements Guarantee (**FEG**). The FEG is a scheme whereby the Federal Government provides financial assistance to cover certain unpaid employment entitlements to eligible employees who lose their jobs due to the liquidation or bankruptcy of their employer. The FEG covers Australian citizens and certain permanent residency visa holders who have lost their job due to, or less than six months before, their employer's liquidation or bankruptcy. It does not cover independent contractors or company directors.

The SPEE Act was introduced after concerns that certain corporate employers have adopted a practice of 'phoenixing', whereby a company transfers its assets to a new company without paying market value, before placing the first company into liquidation. By doing so, those employers have avoided liability for outstanding employee entitlements which would be covered by the FEG. This practice has enabled some employers to effectively shift the cost of payment of those entitlements from their businesses to the publically funded FEG scheme.

The SPEE Act amends the *Corporations Act 2001* (Cth) by lowering the fault element required to establish the criminal offence of avoiding employee entitlements, to include both 'intention' and 'recklessness'. Accordingly it is a criminal offence for an officer of a company to enter into a transaction or causing the company to enter into a transaction with the intention or while being reckless as to whether the transaction will:

- avoid or prevent the recovery of the entitlements of employees of the company; or
- significantly reduce the amount of the entitlements of employees of the company that can be recovered.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA
6 APR 2019

Further, a person is also liable for a civil penalty if the person knows, or a reasonable person in the position of the person would know, that the transaction would have the effect above.

Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019 (Cth)
Explanatory Memorandum
Second Reading Speech

AUSTRALIA
8 MAY 2019

Recent FWC decisions demonstrate willingness to overlook minor errors in agreement-making

In December 2018, the Federal Parliament passed an amendment to the *Fair Work Act 2009* (Cth) that allows enterprise agreements to be approved despite minor procedural or technical errors, so long as those errors are not likely to have disadvantaged employees in the bargaining process.

A number of decisions in the Fair Work Commission (**FWC**) have now applied this amendment, shedding light on what does and does not constitute a minor procedural or technical error. The errors have tended to relate the Notice of Employee Representational Rights (**NERR**), a document with mandated form and content that must be distributed to employees by their employer at the commencement of any enterprise bargaining. Other errors have related to the voting process required to approve proposed agreements.

The vast majority of errors that have been reviewed by the FWC have been declared minor and unlikely to disadvantage employees. Examples of these errors include:

- an out-of-date version of the NERR provided to employees;
- Legal name of the employer listed incorrectly on the NERR;
- NERR printed under employer letterhead/logo;
- Information fields left blank in the NERR, but this missing information was provided in an attached covering letter;
- Some employees initially overlooked in NERR distribution;
- Voting to approve an agreement commenced less than the necessary 7 days after employees were notified of voting details;
- Voting commenced less than the necessary 21 clear days after the last NERR was issued.

Since the amendment there have only be two instances where an error was not determined to be minor or unlikely to disadvantage employees. These were:

1. Alteration of the content of the NERR by omitting the union's role in the bargaining process; and
2. Ultimate scope of the types of work covered by the agreement was broader than that initially specified in the NERR.

These errors were deemed likely to disadvantage employees in the bargaining process; the first because it prevented employees from being fully aware of their rights to union representation and the second because different groups of employees were captured by the proposed agreement than those to whom the NERR was issued.

Corrs In-Brief Publication

AUSTRALIA
18 MAY 2019

Coalition Government re-elected in Federal Election

The Coalition Government, led by Prime Minister Scott Morrison, has been re-elected with an outright majority in the recent Federal Election held on May 18, 2019. While Labor, the Federal opposition party, had campaigned with an agenda of significant industrial relations reforms, the Coalition has said relatively little regarding any possible changes in IR policy beyond a commitment to retain the Australian Building and Construction Commission and the Registered Organisations Commission. The Government's commitment to the implementation of the Migrant Workers' Taskforce recommendations was not repeated in campaigning.

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

AUSTRALIA
18 MAY
2019

The Prime Minister stated during the campaign that it would be up to businesses to make the case for any further substantial reforms. Some of the issues industry and employer organisations have been advocating for include:

- the re-introduction of the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* which passed through the Lower but not Upper House of Parliament. The Bill imposed a public interest test on union mergers, and also allowed the Federal Court to cancel the registration of a union on the grounds of corrupt conduct;
- enterprise agreements that last for the entire duration of mega-projects;
- more appointees to the Fair Work Commission with business experience. The Coalition has already appointed 20 consecutive members to the FWC from an employer background;
- government action to boost productivity; and
- a simplified enterprise agreement option tailored to small businesses;

The Coalition have confirmed they will not introduce national industrial manslaughter laws, despite the adoption of state-level laws in Queensland and Victoria.

Pending the finalised results, it is unlikely the Coalition will obtain a majority in the Senate (the Upper House of Parliament). In order to pass any industrial relations reform that Labor will oppose, the Coalition will therefore need the support of minor party/independent crossbenchers.

The Coalition has also announced a new cabinet following the election. Attorney-General Christian Porter has been appointed as the Minister for Industrial Relations, following the retirement of previous Minister, Kelly O'Dwyer.

AUSTRALIA
21 AUG
2019

Federal Court clarifies correct method for calculating 'sick leave' for part-time employees and shift workers

The Full Court of the Federal Court of Australia handed down its decision in *Mondelez v AMWU* [2019] FCAFC 138, which clarifies employees' entitlements to paid personal/carer's leave (sometimes referred to as 'sick leave') under section 96(1) of the Fair Work Act 2009 (Cth) (**FW Act**).

Section 96 of the FW Act relevantly provides that:

1. for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.
2. an employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

There was controversy as to whether part-time employees and shift workers accrued personal/carer's leave on a pro-rata basis or are entitled to 10 separate calendar days of leave.

A majority of the Court held that an employee's entitlement to 10 days of personal leave in the FW Act is an entitlement to be paid for 10 separate 24 hour periods where the employee is not able to attend for scheduled work because they are ill, injured or face an unexpected emergency.

Mondelez Australia Pty Ltd provided all employees with a fixed pool of hours of personal leave each calendar year but then deducted personal/carer's leave based on the hours actually 'worked'. For some employees who were rostered on longer shifts, this system meant that they could potentially exhaust their allocation of paid personal leave before they had the benefit of 10 separate calendar days of leave (and have to access any additional leave as unpaid leave).

The *Mondelez* decision requires employers to provide all full time and part time employees access to at least 10 'working days' of personal/carer's leave each year, regardless of how long a shift on a particular day might be.

Continued on Next Page

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

AUSTRALIA
21 AUG
2019

On 16 August 2019, the Morrison Government and Mondelez International announced that they each intended to make an application for special leave to appeal the decision to the High Court. Unless and until the High Court determines the matter in their favour, however, it reflects the current state of the law.

Our detailed summary and analysis of the decision
Federal Court judgment

AUSTRALIA
29 AUG
2019

Exposure draft of *Religious Discrimination Bill 2019* released for consultation

The Morrison Government intends to introduce a bill as early as October 2019 that would prohibit discrimination on the basis of religion and would specifically prohibit such discrimination in employment.

In anticipation, the Attorney-General, Christian Porter has released an exposure draft of the *Religious Discrimination Bill 2019* (Cth) (Draft Bill) with detailed commentary and notes.

Under the terms of the Draft Bill a person would be allowed to make a complaint to the Australian Human Rights Commission alleging that they have been subject to unlawful discrimination on the basis of their religious belief or activity if the:

- person has or engages in a religious belief or activity (defined broadly as 'holding or not holding a religious belief' or 'engaging, not engaging or refusing to engage in lawful religious activity')
- person has been subject to direct or indirect discrimination on the basis of their religious belief or activity
- discrimination occurs in a specified area of public life, and
- conduct is covered by this Bill and an exception does not apply.

The Draft Bill prohibits both direct and indirect discrimination on religious grounds in a range of areas, including employment.

The prohibition would be in addition to the existing provisions in the Fair Work Act 2009 (Cth)(FW Act) which prohibit an employer from taking 'adverse action' against an employee or prospective employee because of the person's religion and also terminating employment on the grounds of a person's religion (sections 351(1) and 772(1)(f) of the FW Act).

For employers, the Draft Bill "imposes additional requirements on large businesses [defined in the Draft Bill as employers with a revenue of at least $50 million] relating to standards of dress, appearance or behaviour which limit religious expression"

If a large business imposes a condition relating to the standards of dress, appearance or behaviour of their employees, and that condition would restrict or prevent an employee from making statements of belief in their private capacity, the business is required to prove that compliance with the condition is necessary to avoid unjustifiable financial hardship to the business. If the business is unable to demonstrate that the condition is necessary to avoid unjustifiable financial hardship, the condition is not reasonable, and is therefore discriminatory, whether or not it would otherwise be reasonable under the general reasonableness test.

The Draft Bill is intended to implement recommendations 3, 15 and 19 of the 2018 Religious Freedom Review.

Discrimination on the basis of sexual orientation or gender identity continues to be regulated by the Sex Discrimination Act.

Consultation on the Draft Bill closes October 2.

Religious Freedom Bills homepage
Draft religious freedom bills, outline of reforms

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

AUSTRALIA
29 AUG 2019

Explanatory notes – Religious Discrimination Bill 2019
Exposure draft – Religious Discrimination (Consequential Amendments) Bill 2019
Explanatory notes – Religious Discrimination (Consequential Amendments) Bill 2019
Exposure draft – Human Rights Legislation Amendment (Freedom of Religion) Bill 2019
Explanatory notes – Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

AUSTRALIA
18 SEP 2019

Bill to grant employers 'amnesty' to report unpaid superannuation

Australian employers are required to contribute a minimum percentage of each eligible employee's earnings (ordinary time earnings) to a complying super fund or retirement savings account in accordance with the *Superannuation Guarantee (Administration) Act 1992* (Cth). This is known as the 'superannuation guarantee' (SG).

On 18 September 2019, the Morrison Government reintroduced the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* which, if passed will:

- provide a one-off amnesty to encourage employers to self-correct historical SG non-compliance;
- allows employers who qualify for the amnesty to claim tax deductions for payments of SG charge and contributions made to offset SG charge made during the amnesty period.

The Bill was first introduced prior to the Australian Federal election in May 2019.

To qualify for the amnesty an employer would be disclose to the Commissioner of Taxation (Commissioner) information related to an SG shortfall.

If passed, the amnesty would run from May 2018 – when the measure was first announced – until six months after it receives Royal Assent.

Explanatory Memorandum for the Bill
Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019
Parliament of Australia, Bills and Legislation

AUSTRALIA
19 SEP 2019

Attorney-General's consults on Industrial Relations reform; considers introduction of crime of 'wage theft'

Attorney-General and Industrial Relations Minister Christian Porter has commenced a review of 'potential improvements in Australia's Industrial Relations system.'

In a speech to the Committee for Economic Development of Australia The Attorney-General has stated that any reform will be 'incremental' rather than 'wholesale changes' and has placed emphasis on employers providing evidence to support any changes to the IR system.

Reforms, including possible amendments to the *Fair Work Act 2009* (Cth) (FW Act), will proceed by way of consultation with employers, employee-groups and the community. Over the coming months, the Attorney-General's Department will release 'discussion papers' on a series of topics which will include:

- The enforcement and penalties regime
- Greenfields agreements
- The Building Code applicable to Commonwealth funded building work;
- Casual employment;
- Small Business Fair Dismissal Code; and
- Several aspects of enterprise bargaining

Discussion papers covering the first two topics were released on 19 September 2019 (for return on 25 October 2019 and 1 November 2019 respectively).

Continued on Next Page

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

AUSTRALIA
19 SEP
2019

It will take some time before possible amendments are formulated, but it is worth noting that the discussion paper regarding the enforcement and penalties regime considers 'new and strengthened penalties' for non-compliance with the FW Act, including criminal sanctions for 'clear, deliberate and systematic' conduct. The Attorney General has previously stated that 'the issue of wage theft, and specifically the criminalisation of deliberate underpayments, is one of the areas that will be examined as a priority.'

Separately the Morrison Government has substantially increased funding to the Fair Work Ombudsman (the body responsible for regulating the FW Act) for the 2019-2020 financial year. Following the successful high-profile prosecution of restaurant group MADE Establishment Pty Ltd in July, Fair Work Ombudsman Sandra Parker said Made's "massive back-payment bill should serve as a warning to all employers that if they don't get workplace compliance right from the beginning, they can spend years cleaning up the mess".

The second discussion paper calls for feedback on a proposal to increase the term of enterprise agreements (beyond the current four-year nominal expiry date under the FW Act) that cover major new 'greenfields' projects.

Speech by Attorney-General to the Committee for Economic Development of Australia (19 September 2019)
Discussion Paper: Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance (Closing date for submissions: 25 October 2019)
Discussion Paper: Attracting major infrastructure, resources and energy projects to increase employment – Project life greenfields agreements (Closing date for submissions: 1 November 2019)

AUSTRALIA
30 SEP
2019

'Single Touch Payroll' reporting requirement becomes mandatory for all Australian employers from 30 September 2019

From 30 September 2019 all Australian employers are required to send up to date employee salary and wage information, pay as you go (PAYG) withholding and super information to the Australian Taxation Office (ATO) each time employees are paid.

This is described as 'Single Touch Payroll' (STP) and has been a reporting requirement for businesses with 20 or more employees since 1 July 2018. From 30 September 2019 employers with 19 or fewer are also required to report to the ATO via STP.

The STP reporting requirement was legislated in the *Budget Savings (Omnibus) Act 2016* (Cth).

Under STP there are a number of payments subject to withholding that are either:

- mandatory to report to the ATO;
- voluntary to report to the ATO; or
- cannot be reported.

Details of the requirements are set out in the ATO's 'employer reporting guidelines' (link below).

Employers who do not report via STP and without a referral may be contacted by the ATO. If employers do not start reporting within a reasonable amount of time, the ATO may apply penalties.

Australian Taxation Offices' Single Touch Payroll Portal
Australian Taxation Offices' Single Touch Payroll employer reporting guidelines

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA

13 NOV

2019

Senate Inquiry announced into 'Wage Theft'

In November 2019, the Senate referred an inquiry into the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue. The committee is to report to the Senate by the last sitting day in June 2020.

The Senate committee is likely to conduct hearings in early 2020 and employers, regulators and employee representatives may be called to answer questions as part of the Inquiry. The committee has also invited interested parties and the public to make submissions by 14 February 2020.

The inquiry follows a series of high profile disclosures by employers of historical underpayments and non-compliance with labour standards. These include disclosures by major employers such as Woolworths, Qantas and the Commonwealth Bank and has highlighted systemic flaws or complacency in the governance and payroll systems used by employers to monitor and pay employee entitlements.

In response to these disclosures the Fair Work Ombudsman has put employers 'on notice' about ensuring their compliance with all terms and conditions applicable to their employees and warned that, 'Companies should expect that breaking workplace laws will end in a public court enforcement outcome.'

To assist employers and employees clarify their rights and obligations, the Fair Work Ombudsman published an updated version of the Fair Work Information Statement. This document must be provided by employers to all new employees.

Senate Inquiry: Unlawful underpayment of employees' remuneration
Fair Work Ombudsman: Fair Work Information Statement (December 2019)

AUSTRALIA

27 NOV

2019

Industrial Manslaughter introduced as a crime in Victoria and the Northern Territory

In November 2019, the *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019* (Vic) and the *Work Health and Safety (National Uniform Legislation) Amendment Bill 2019* (NT) passed their respective parliaments. Both amending bills create the industrial manslaughter offence in their respective jurisdictions, albeit in different forms. The crime of industrial manslaughter is already law in Queensland and the Australian Capital Territory (and is currently being considered by the Western Australian parliament).

Victoria

The industrial manslaughter offence will be committed if conduct is engaged in that is negligent, constitutes a breach of an applicable duty that the person owes to another person and causes the death of that other person. If a body corporate, partnership, unincorporated body,

unincorporated association or self-employed person commits the offence, the maximum penalty is $16,522,000 or 20 years imprisonment for a natural person. If an officer commits the offence, the maximum penalty available is 20 years imprisonment.

Volunteers and employees are exempt from prosecution for the offence. The offence will be available from a date to be proclaimed or otherwise by 1 July 2020.

The Minister for Workplace Safety said that the state government promised it would "make workplace manslaughter a criminal offence and that's exactly what [it has] done – because there is nothing more important than every worker coming home safe every day".

Continued on Next Page

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

AUSTRALIA
27 NOV
2019

Northern Territory

The industrial manslaughter offence will be committed if conduct is intentionally engaged in that breaches a health and safety duty, causes the death of an individual to whom that health and safety is owed and the person is reckless or negligent about that conduct. The maximum penalty is $10,205,000 if a body corporate commits the offence and life imprisonment if an individual (including an officer) commits the offence.

The offence will be available from a date to be proclaimed.

Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019 (Vic)
Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 (NT)

AUSTRALIA
27 NOV
2019

Western Australia moves closer to harmonisation of safety laws with national 'model law'

Last month, the state government in Western Australia introduced the *Work Health and Safety Bill 2019* (WA). The bill will replace the *Occupational Safety and Health Act 1984* (WA) and amend other industry-specific safety legislation.

Key reforms in the bill include two industrial manslaughter offences (industrial manslaughter – crime and industrial manslaughter – simple offence), a prohibition on insurance and indemnities under which a person is covered for liability for a monetary penalty under the Act and a duty on persons conducting a business or undertaking that provide services relating to work health and safety.

For this new latter duty, a 'WHS service provider' must ensure, so far as is reasonably practicable, that its services are provided so that any relevant use of them at, or in relation to, a workplace will not put at risk the health and safety of persons who are at the workplace. 'Services' include testing or analysis, training or other educational courses, other information or documents (e.g. reports, plans, guidelines or manuals) and recommendations or other advice. Some services are excluded, including those subject to legal professional privilege and those which are provided in-house. The intention for introducing this duty is so 'WHS service providers' take "appropriate care" in the provision of services; it will not diminish the duties of the person conducting a business or undertaking that engaged the 'WHS service provider'.

Work Health and Safety Bill 2019 (WA)

AUSTRALIA
2 DEC
2019

Attorney-General's continues consultation on Industrial Relations reform

In September 2019, Attorney-General and Industrial Relations Minister Christian Porter commenced a review of 'potential improvements in Australia's Industrial Relations system.'

The consultation is proceeding by way of discussion papers released by the Attorney-General's office to which employers, employee groups and other interested parties are invited to respond.

Consultation has completed on the first two discussion papers which called for feedback on:

- a proposal to increase the term of enterprise agreements (beyond the current four-year nominal expiry date under the FW Act) that cover major new 'greenfields' projects; and
- the enforcement and penalties regime under the *Fair Work Act 2009* (Cth) including a criminal sanctions for 'wage theft'.

In November, the Attorney-General released the third, and relatively open-ended, discussion paper on 'cooperative workplaces' seeking views on whether and how improved productivity performance might be available to Australian workplaces through more harmonious workplaces.

Continued on Next Page

LOOKING BACK

AUSTRALIA

2 DEC 2019

Within the next six months the Government is likely to issue discussion papers, if not concrete reform proposals, on the following topics:

- The introduction of a National Labour Hire Registration Scheme, with an attempt to limit duplication between the new scheme existing licensing schemes in Victoria, Queensland and South Australia.
- A review of the definition of 'casual employee' and clarification of the scope of casuals' entitlements, subject to the pending decision of the Full Court of the Federal Court in *Workpac v Rossato*.
- Possible changes to enterprise bargaining and the enterprise agreement approval process, including the formulation of the 'better off overall test'. The Government has reportedly undertaken an 'end to end' review of the bargaining process with both business groups and unions advocating for measures to stem the steady decline in enterprise agreement making.
- A review of 'administrative clutter' associated with the compliance regime (including modern awards).
- Allowing employees to apply to the Fair Work Commission to recoup small claims which currently must be pursued through claims in the Federal Circuit Court or State Courts.
- A review of the operation of the small business dismissal code (which currently applies to businesses with 15 or fewer employees).
- A review of the *Code for the Tendering and Performance of Building Work 2016* (Cth) (Building Code) that applies to Commonwealth funded building work.

Speech by Attorney-General to the Committee for Economic Development of Australia (19 September 2019)
Discussion Paper: Cooperative Workplaces – How can Australia capture productivity improvements from more harmonious workplace relations

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY: CORRS CHAMBERS WESTGARTH

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

CHINA
28 FEB
2019

Circular on Further Regulating Recruitment Practices to Promote Female Employment

Nine departments, including the Ministry of Human Resources and Social Security ("MOHRSS"), jointly issued the Circular on Further Regulating Recruitment Practices to Promote Female Employment on 18 February 2019. The Circular gives a further detailed description of particular forms of gender discrimination in recruitment activities, clearly requiring that in preparing the recruitment plans or in other recruitment activities, all types of employers and human resource service agencies shall neither impose limits on gender or have gender preference, nor refer to the gender as an excuse to restrict opportunities available to women to seek employment or refuse to employ women. Also, the Circular calls for establishing the joint interview mechanism, under which authorities will hold a joint interview to talk with those employers on suspicion of gender discrimination during the recruitment process, according to whistleblower reports and complaints they have received; employers will be investigated and punished if they refuse to attend such talk or to make corrections after the talk, and their illegal practices will be exposed among the general public through the media. Moreover, the Circular stresses that, efforts shall be made to improve training services concerning women's employment, promote the development of care services for infants under the age of three, step up after-school services for primary and middle schools, optimize and put in place the maternity insurance system, and thus create a good environment and favorable conditions for women's employment.

More...

CHINA
28 APR
2019

Circular of the Ministry of Human Resources and Social Security, the Ministry of Finance, the State Taxation Administration and the National Healthcare Security Administration on Executing the Comprehensive Plan for Reducing the Social Insurance Contribution Rates

Four departments, including the Ministry of Human Resources and Social Security ("MOHRSS"), have issued the Circular on Executing the Comprehensive Plan for Reducing the Social Insurance Contribution Rates (the "Circular") on April 28 2019. The Circular reads that contributions to the employees' basic endowment insurance borne by enterprises in each region may be reduced to 16%, if the current level of contributions they make is higher than 16%; if the current level is lower than 16%, research shall be conducted to work out transitional measures. Further, the Circular expressly states that efforts will continue to lower the work-related injury insurance contribution rate, and that where privately-owned business and personnel seeking flexible employment opt to join the employees' basic endowment insurance scheme, individuals making the insurance contributions are allowed to select a proper base that ranges between 60% and 300% of the officially assessed base. The portion of state-owned capital allocated to supplement the social insurance fund will be enhanced and be set at 3.5% in 2019. Moreover, the Circular requires that practices to intensively settle and collect previous contributions in arrears without approval, and any practices to increase the actual burden of contributions on small and micro firms, are prohibited in all regions during the social insurance contribution collection regime reform, in order to ensure that the burden of social insurance contributions on enterprises, particularly on small and micro firms, will be substantially reduced.

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 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 2019 Q4.

CONTRIBUTED BY: 競天公誠律師事務所 JINGTIAN & GONGCHENG

Mayer Brown: We are not admitted by the PRC Ministry of Justice to practise PRC law. Under current PRC regulations, our firm as with any other international law firm with home jurisdiction outside the PRC, is not permitted to render formal legal opinion on matters of PRC law. The views set out in this document are based on our knowledge and understanding of the PRC laws and regulations obtained from our past experience in handling PRC matters and by conducting our own research. As such, this report does not constitute (and should not be construed as constituting) an opinion or advice on the laws and regulations of the PRC.

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG

18 DEC

2018

Recommendations to increase Maternity leave from 10 weeks to 14 weeks

In her 2018 Policy Address, the Chief Executive proposed that the statutory maternity leave ("SML") under the Employment Ordinance ("EO") be extended to 14 weeks (from the current 10 weeks). Following this, the Labour and Welfare Bureau submitted recommendations on this in the document "Review of Statutory Maternity leave". Their recommendations include:

1) extending SML to 14 weeks, with details including:
   a. the newly added 4 weeks will continue from the current 10 weeks granted to expectant mothers;
   b. the pay for the additional 4 weeks will remain at four-fifths of the employee's average daily wages;
   c. the government will fund the additional 4 weeks of SML wages – this will be paid by the employer to the employee following the current procedure for paying the 10 weeks of SML pay, and upon proof of payment the government will reimburse the employer;
   d. the additional 4 weeks SML pay will be capped at $36,822 per employee.

2) amending the EO as follows:
   a. amend the definition of "miscarriage" to "the expulsion of the products of conception which are incapable of survival after being born before 24 weeks of pregnancy" (currently it is 28 weeks) – this will entitle an employee whose child is incapable of survival after being born in the 24th week of pregnancy or after to SML (currently a termination of pregnancy in the 24-27th week will only entitle an employee to sick leave);
   b. require an employer to pay sickness allowance to a pregnant employee who attends a pre-natal medical examination provided that she provides a medical certificate and relevant documentary proof of her having done such medical examination.

The Government intends to introduce a bill amending the EO to the Legislative Council in late 2019.

More...

HONG KONG

3 JAN

2019

Hong Kong District Court Strikes Out Discrimination Claim Against Judges

Hong Kong's District Court (the "Court") in 庄裕安 v 关淑馨及另二人 [2018] HKDC 1589 struck out the Applicant's discrimination claim against the Respondents, who were the judges who dismissed the Applicant's appeal in a Court of Appeal case CACV 185/2017. The Court also gave a Restricted Proceedings Order against the Applicant.

Facts

The hearing of CACV 185/2017 was scheduled on 1 June 2018, but the Applicant was unable to attend the hearing due to his sickness. The Respondents dismissed the Applicant's appeal in the absence of the Applicant. The Applicant claimed that the Respondents discriminated him on the ground of his disability by refusing to adjourn the hearing.

For the present case, the Respondents applied for a striking-out order while the Applicant submitted an application to appoint an amicus *curiae* and an application to list the Judiciary as a respondent.

Decision

The Court struck out the Applicant's claim.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG

3 JAN 2019

The Court held that there was no reasonable cause of action in the Applicant's claim as it was inconsistent with the immunity from legal action provided by Article 85 of the Basic Law to the members of the judiciary in the performance of their judicial functions.

It is also impossible for the Applicant to pass the "but for" test used in the determination of whether there is "discrimination". The reason why the Respondents refused to adjourn the hearing was that they did not accept the Applicant's reason for his failure to attend the hearing. The Applicant claimed that he was suffering from a stomach ache, however, according to the medical certificate he was diagnosed as suffering from upper respiratory tract infection. Therefore, the Court held that the Respondents' refusal to adjourn the hearing was totally unrelated to the Applicant's alleged disability. The Applicant's claim was vexatious and was an abuse of the court's process.

The Court also refused the Applicant's applications to appoint an amicus curiae and to list the Judiciary as a respondent.

The Court awarded costs to the Respondents on an indemnity basis.

Finally, the Court also imposed a Restricted Proceedings Order on the Applicant. Given that the Applicant has also issued unmeritorious legal proceedings against judges before, the Court was of the view that he has abused and is likely to continue abusing the court's process. The Applicant was prohibited from initiating new legal action against judges or members of the judiciary without the leave of the Court.

More...

HONG KONG

18 JAN 2019

Hong Kong Statutory Paternity Leave Increased from Three Days to Five Days from 18 January 2019

The Employment (Amendment) (No.3) Ordinance 2018 (the "**Amendment Ordinance**"), which increased the statutory paternity leave in Hong Kong from three days to five days, commenced on 18 January 2019.

Male employees must provide his employer with proper notice if he wishes to take paternity leave. If the employee already provided notice to his employer at least 3 months before the expected date of his child's delivery, he may take paternity leave once he informs his employer of the dates he will be on leave. Failing this, the employee must notify his employer of the dates he intends to take paternity leave at least 5 days in advance of taking such leave.

More...
More...

HONG KONG

18 JAN 2019

Increased Minimum Wage Rate to take effect from 1 May 2019

On 18 January 2019, the Minimum Wage Ordinance (Amendment of Schedule 3) Notice 2019 was gazetted to increase the Statutory Minimum Wage ("SMW") rate to HK$37.50 per hour. This is a HK$3.00 increase from the current rate of HK$34.50 per hour. The new rate will, subject to the approval of the Legislative Council, come into effect on 1 May 2019.

To reflect the change to the SMW rate the current HK$14,100 monthly cap on keeping records of hours worked will be increased to HK$15,300 per month. This will take effect on the same day the new SMW comes into force.

More...
More...

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

Guidance Note on How to handle Data Breaches published by the Privacy Commissioner

The Privacy Commissioner has published a note to guide data users on the remedial procedures to take after a data breach. The guidance note includes the following steps:

1. Immediately gather information about the breach and assess the damage done to the data subjects
   - The data users should create a designated team to investigate the breach and issue a report on its findings. The details that the team should collect include:
     - The time, date and location of the breach
     - The cause of the breach
     - Who detected the breach
     - The types of data and number of data subjects involved

2. Seek assistance from relevant authorities and attempt to contain the situation
   - The data user should contact the relevant authorities and experts for assistance in stopping the breach. Some methods of containment include:
     - Engaging technical experts to spot and cure the system loopholes to halt current and future hacking
     - Removing the access rights of individuals who are suspected to be involved
     - Changing the passwords of all those having access to the personal information
     - Contacting the police if there is a risk of identity theft

3. Evaluate the extent of harm done
   The damage done to data subjects include identity theft, financial loss, danger to personal safety, humiliation or damage to reputation and loss of employment and business opportunities. The degree of harm done depends on many factors, including the type and volume of data being hacked, whether such data was encrypted, whether the hackers are traceable and whether the harm is capable of being mitigated. Thus, it is imperative that the data users contain the breach as soon as possible to prevent the losses from exacerbating.

4. Notify the data subjects of such breach
   It is recommended best practice to formally notify those involved in a data breach as soon as possible by phone, writing email or face to face, although this is not required under the PDPO. Parties involved could include the data subjects, the Privacy Commissioner and any relevant law enforcement authorities. The contents of such notification could include:
   - a description on what happened – the time, date, and location
   - the cause of the breach
   - the level of harm done
   - actions done to mitigate and control the situation
   - contact details of a designated individual who could provide assistance to the data users affected

5. Measures to take to avoid recurrence

During the data breach investigation, it is essential for the data user to identify the insufficiencies in the user's system and make improvements to prevent another breach. The data user should review:

- whether the security measures in place is sufficient to safeguard the personal data
- whether the access rights is adequately controlled
- whether the current privacy policy is updated

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

HONG KONG

JAN

2019

- the need to provide training to the data user's employees to raise awareness of data privacy risks and how to manage data safely
- the mechanism used to supervise employees and data processors to ensure they are following the data user's privacy policy

More...

HONG KONG

21 FEB

2019

Investigation report published by the Privacy Commissioner regarding the HKBN Database intrusion

After the Hong Kong Broadband Network Limited ("HKBN")'s database intrusion in mid-April 2018 which lead to a personal data leakage affecting 380,000 individuals, the Privacy Commissioner published an investigation report and made the following findings:

Facts

The hacked database ("database A") was an inactive database which should have been deleted after a system migration many years ago. The failure to delete database A was due to human oversight and the failure to perform a comprehensive follow up review after the system migration to check that the database was deleted. It was also found that HKBN failed to consider an appropriate retention period for the personal data of its former customers and failed to give internal guidance to its employees on the retention period and procedure to deleting such personal data. Thus, HKBN contravened s26 PDPO and Data Protection Principle (DPP) 2(2) of Sch 1 PDPO by failing to erase all personal data in database A when it was no longer needed and retaining such data for longer than necessary.

By failing to protect the personal data in database A from unauthorized access, HKBN contravened DPP4(1) of Sch 1 of the PDPO. The contents of database A was not encrypted and the password of the compromised account used to hack into HKBN's network had not been changed for over 3 months, which shows the lack of enforcement of HKBN's password policy.

In light of the incident, the Privacy Commissioner served an enforcement notice on HKBN instructing it to:

1. Devise guidelines on the procedure, time limits and review measures for erasing unnecessary personal data following a system migration
2. Provide a clear data retention policy stating the retention period for personal data, ensuring that such retention period is no longer than required;
3. Formulate a data security policy to conduct regular review of the security controls of the remote access service;
4. Ensure that all employees are aware, informed and able to follow the guidelines mentioned in 1-3
5. If any personal data was found to be retained after the expiration of the retention period, all such data be deleted in accordance to 2.

Recommendations of the Privacy Commissioner

Personal data collectors should review and monitor their data inventories and retention periods. The duration of the retention period should be devised in accordance with the purpose of the data and collectors should ensure that such data is deleted when it is no longer needed. The Privacy Commissioner recommends the use of a privacy management programme along with a periodical review and ongoing monitoring process to ensure long term personal data protection. In the event of a data leak, the Privacy Commissioner recommends collectors to notify the Privacy Commissioner and those affected although there is no requirement to do so (good practice which was performed by HKBN).

The Privacy Commissioner deems it necessary for the Government to review the current law and consider imposing a fine for contravening the PDPO and increasing the sanctions as deterrence from noncompliance with the PDPO and DPPs.

More...

More...

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG

20 MAR

2019

Maximum tax deduction of HK$60,000 per taxpayer in place starting in the next financial year

In efforts to encourage the working population to make earlier retirement savings and be more prepared for retirement, The Inland Revenue and MPF Schemes Legislation (Tax Deductions for Annuity Premiums and MPF Voluntary Contributions) (Amendment) Bill 2018 was passed on 20 March 2019 and the Ordinance will take effect on 1 April 2019. This amendment will allow taxpayers to benefit from tax deductions under salaries tax and personal assessment for their contributions paid into tax deductible MPF voluntary contribution accounts and qualifying deferred annuities premiums. Each taxpayer can get a maximum of HK$60,000 per year in tax deductions, which is an aggregate limit for tax deductible MPF voluntary contributions and qualifying deferred annuity premiums.

For deferred annuity premiums, taxpayers are also entitled to tax deduction covering their spouse as joint annuitant or either one of the two as sole annuitant. The new Ordinance also allows taxpaying couples to allocate the deferred annuity premium tax deduction between themselves so that they can claim a total of HK$120,000 in tax deductions, as long as each taxpayer doesn't exceed the maximum limit per individual.

More...
More...
More...
More...

HONG KONG

4 APR

2019

Hong Kong Government Publishes Proposed Amendments to the Occupational Retirement Schemes Ordinance (ORSO)

On 4 April 2019 the Hong Kong government published the long-awaited Occupational Retirement Schemes (Amendment) Bill 2019. This Bill is designed to:

- ensure that retirement schemes which are registered or exempted under ORSO are "employment-based" (thereby outlawing certain purely investment-based products which have sprung up since ORSO commenced in the mid 90s)
- grant the MPF Authority (MPFA) increased powers and discretion to investigate, approve or reject applications for registration, and
- limit the circumstances in which retirement schemes can, in the future, apply for exemption under ORSO

These anticipated changes have been previously considered in our earlier alerts of:

Hong Kong's Mandatory Provident Fund Schemes Authority proposed new changes to the Occupational Retirement Schemes Ordinance, 19 June 2018

MPFA Launches Consultation to Overhaul Hong Kong Retirement Schemes Regime, 14 December 2017

Below are some of the more important consequences of the proposed legislation and some of the concerns arising from the proposed changes.

1. *Requiring all registered or exempted ORSO schemes to be "employment-related"*

   This is the most fundamental, and intrusive, change to the Hong Kong retirement schemes regulatory regime. It will require the employer of every single one of the over-4,000 ORSO registered or exempted schemes to confirm annually that each scheme satisfies the "employment-related criterion".

   A scheme satisfies the "employment-related criterion" if, in simple terms:
   - the only persons who are members of the scheme are employees (or former employees) of the employer, or employees of a former employer

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG

4 APR 2019

in respect of which a transfer has been made to the scheme, and

- no other types of person (i.e., non-employees) are permitted to become members of the scheme

The current draft of the Bill contains unusual provisions deeming "full-time" independent contractors to be "employees". Precisely how this is intended to work (or, indeed, why it is even in the proposed legislation) will no doubt be explained in due course.

An unexpected consequence of the proposed legislative changes is a material narrowing of the definition of "occupational retirement scheme" in ORSO by excluding from such definition any scheme or arrangement which does not limit membership to, in essence, "employees". Whilst this means that any scheme or arrangement which is open to any non-"employee" cannot be registered or exempted under ORSO, it also means that it will not be unlawful under section 3 of ORSO to contribute to or administer such a scheme. It is unclear whether this was the intention of the government. If it was, and so if this drafting is adopted, then it is possible that this may give rise to a new class of arrangement which is non-registered, non-exempt retirement schemes which cannot provide tax efficient benefits, but which are broadly unregulated.

Comment: The essence of this change is well intentioned and should be relatively easy for employers to embrace (other than, of course, the schemes which are not employment-related!). It will require each of the 4,000 schemes in existence to be considered in order to ensure that the membership rule is sufficiently tight so as to exclude "non-employees". We do have a slight concern that there may be overseas schemes that are currently exempt under ORSO and may have standard membership clauses which do not expressly exclude non-employees. If this is the case then this could result in major restructuring arrangements for such schemes, their employers and the impacted employees.

2. *Increasing the investigation powers of the MPFA*

   The Authority is seeking powers of investigation which are broadly aligned with those provided to other regulatory authorities in Hong Kong.

   Comment: This change should not be a cause of any particular concern.

3. *Limiting the circumstances in which a future retirement scheme can be exempted under ORSO*

   This change has been the subject of substantial discussion over the last year or so. It is also the primary topic of the two previous alerts from us referred to above.

   This change will materially narrow the circumstances in which a retirement scheme can obtain an ORSO exemption certificate in the future. The principal concern is that it is not at all uncommon for an international business looking to set up in Hong Kong (or send globally mobile international executives to Hong Kong) to wish to employ executives in Hong Kong who are members of an overseas retirement scheme (a "**Home Country Scheme**"). In order to avoid committing an offence under ORSO the employer must obtain an exemption certificate for the Home Country Scheme.

   Currently there is a clear and obvious route to enable the Home Country Scheme to obtain an exemption certificate (the "no more than 10 percent or 50 members being Hong Kong permanent identity cardholders" route). The proposed changes will result in this clear and obvious route being removed in its entirety. This will mean that

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG

4 APR 2019

the ONLY way in which the Home Country Scheme can obtain an exemption certificate is by applying under the (very rarely used) section 7(4)(a) ORSO. This section enables the MPFA to grant an exemption certificate where the applicant scheme is "*registered or approved by a regulatory authority outside Hong Kong performing functions which are generally analogous to those of the [MPFA]*" (the "**analogous authority exemption**").

Comment: The MPFA has historically failed to provide any guidance as to which "*regulatory authorities outside Hong Kong*" satisfy the criteria of providing analogous functions.

Notwithstanding numerous requests and despite the hugely increased importance of this analogous authority exemption, the MPFA continues to refuse even to commit to providing information to the retirement scheme industry of which overseas authorities it considers satisfy the condition of "*performing functions which are generally analogous*" to those of the MPFA.

This refusal to provide such information is a cause of concern. Either the MPFA is refusing to explain its position due to a desire to keep this exemption option very narrow (which would be a material issue for employers, and lawmakers, to consider when debating the impact of this legislation on Hong Kong) or the MPFA is unaware of the powers and functions being undertaken by its fellow regulators generally, which raises a separate set of concerns!

In any case, we would strongly encourage the MPFA to clarify this important issue, and for lawmakers to insist on a disclosure by the MPFA of the manner in which it intends to apply the analogous authority exemption.

Conclusion

When it gets to the stage of commenting on the drafting of the Bill then much of the "devil" will almost inevitably be in the "detail". Certainly most of the changes set out in the Bill were expected. That does not, however, mean that the implementation of the changes or, indeed, the impact of the changes is going to be seamless or painless. There will be pain and there will be disruption. The amount of pain and the amount of disruption can be minimised by transparency from the regulators who will oversee these changes, and by continued constructive dialogue with the industry as a whole. Many of these changes will be felt hardest by global employers who have operations in Hong Kong. If the new legislation is introduced in a clumsy or heavy-handed manner then this will impact Hong Kong's reputation globally.

More...

HONG KONG

4 APR 2019

The Occupational Retirement Schemes (Amendment) Bill 2019: "Devils" in the Details

Our recent update commented on the broad aim of the changes proposed to be made to the Occupational Retirement Schemes Ordinance (ORSO) by the ORS (Amendment) Bill 2019. This update dives deeper into the Bill to identify three of the ugliest or weirdest "devils" in the details of the Bill.

Devil 1 - Increased powers for the Registrar

The Bill grants the Registrar of Occupational Retirement Schemes materially increased powers of investigation. Such powers are broadly fine as they bring the Registrar in line with other Hong Kong regulators.

However, the Bill also looks to grant the Registrar the unilateral power to "*impose conditions for [exemption/registration]*" as "*the Registrar considers appropriate*". Such broad (and unfettered) power could be a concern for employers and the retirement scheme industry generally. In effect, it would give the Registrar quasi-legislative powers to determine the circumstances under which schemes can be exempted or registered under ORSO.

Continued on Next Page

HONG KONG

4 APR

2019

The Bill also replaces the current *obligation* of the Registrar to register a scheme which satisfies each of the specified statutory conditions with a *discretion*. As such, even where a scheme satisfies all required conditions the Registrar will, if the Bill is approved in its current form, be able to refuse to register such scheme.

Devil 2 - Codification of trust law obligations into ORSO

Over the course of several centuries, the general principles of trust law have been determined by the courts and such determinations have resulted in many thousands of pages of judgments and academic tomes. Such writings include a comprehensive analysis of how trustees should act and the extent of their obligations under different circumstances (also known as the "fiduciary obligations" of trustees).

The Bill attempts to condense the fiduciary obligations of trustees into around 160 words. There is no explanation as to why this is considered necessary. There is also no analysis on the impact such codification of fiduciary obligations may have on the rights of a beneficiary of the trust (for instance, will an aggrieved beneficiary now have to bring an action for breach of statutory duty as opposed to breach of fiduciary duties?).

Rather strangely, the Bill also contains an obligation on the employer of a retirement scheme which is applying for registration to confirm that the trustee has complied with the relevant obligations set out in the 160 words purporting to describe the fiduciary obligations of a retirement scheme trustee.

Precisely how any employer will satisfy itself that it can give such confirmation will, no doubt, be a cause of considerable discussion between the employer and the trustee.

Devil 3 – Amended definition of "occupational retirement scheme"

ORSO came into being in 1995 as a direct result of the Mirror Group/Robert Maxwell pension scandal in the early 1990s, which involved the theft of several hundred million pounds worth of Mirror Group Pension Fund assets. ORSO created an oversight structure designed to ensure that "occupational retirement schemes" set up for Hong Kong employees were properly funded and the assets appropriately secured.

To this end, the original (and current) definition of "occupational retirement scheme" was drafted in a broad manner to capture as many of these post-termination-of-employment-promise type arrangements as possible.

The Bill will narrow the definition of "occupational retirement scheme" by inserting a condition that only a scheme limiting its membership to employees or former employees[1] will fall within such definition of "occupational retirement scheme". Therefore, a current or future scheme that admits (or is drafted in a manner such that it *could* admit) even one person who is not an employee (or former employee) will cease to be an "occupational retirement scheme" for the purposes of ORSO. As such, it means that (1) such an arrangement is not governed by ORSO at all, and (2) such an arrangement is therefore not subject to any of the structural, funding or investment restrictions imposed by ORSO.

This would be a bizarre outcome and, we can only assume, is not the intention. This "devil" may well be a mistake!

More...

1 The actual phrase used in the Bill is "eligible person", which is slightly more complex than "employee or former employee", but is generally equivalent.

HONG KONG

8 APR 2019

Statutory Entitlements to Sickness, Holiday, and Annual Leave Pay

HK District Court in *Mak Wai Man v Richfield Realty Limited* ruled in favour of the employer taking the commission payment and bonus payment into account when calculating what amount may be used to discharge the employer's the statutory obligation to pay certain leave payments under the Employment Ordinance.

Facts

The four plaintiffs (the "**Plaintiffs**") were former employees of the Defendant. Upon termination of their employment, the Plaintiffs claimed for shortfalls in their statutory holiday pay, annual leave pay and/or sick leave allowance (the "**Statutory Entitlements**").

Under sections 35(4), 41(6), and 41C(6) of the Employment Ordinance ("**the Deduction Sub-Sections**"), if, pursuant to the terms of the employee's contract of employment or any other agreement or for any other reason, the employee is paid by his employer a sum of money in respect of a day of sick leave, statutory holiday and annual leave taken by him/her, the statutory leave payment payable to the employee in respect of that day of sick leave/statutory holiday/annual leave is to be reduced by the sum.

The Plaintiffs claimed that the 'team-based' commission ("**Commission**") and team leader bonus ("**Bonus**") they received during their employment were only attributable to working days, and therefore were not paid for or inclusive of Statutory Entitlements and should not be deducted from the calculations. The Defendant argued that since the Commission and Bonus were paid monthly, they should be taken to be payments for every day of the month and are inclusive of Statutory Entitlements.

Court's Decision

The court found both the Commission and Bonus fell within the Deduction Sub-Sections and held that such sums could be used to reduce the employer's obligation to pay the Statutory Entitlements. As such, there was no shortfall and the Defendant is not liable for any further sum to the Plaintiffs. In arriving at this conclusion, the court dealt with two issues:

1. Were the Commission and Bonus paid for or inclusive of Statutory Entitlements?

The amount that can be used to set off an employee's Statutory Entitlements is not limited to the employee's "wages", as defined in section 2. Where an employee is paid "a sum of money" in respect of the leave day, the sum of money which is not necessarily "wages" can be used to set off the Statutory Entitlements.

The court considered that the Commission and Bonus do not wholly fall within the definition of "wages" in section 2 of the Employment Ordinance as the payments cover not only work done by the individual plaintiffs themselves but includes payment for work done by their teammates. As such, for the Commission and Bonus to be included in calculating the Statutory Entitlements, they must fall within the extended definition of wages under the Deduction Sub-Sections.

The definition of "wages" in calculating the daily rate of the Statutory Entitlements covers not only payments by the employer to the employee in respect of work done, but also in respect of a day of leave or a normal working day where the employee is not provided with work.

Continued on Next Page

HONG KONG
8 APR
2019

Hence, it was held that both the Commission and the Team Leader Bonus were paid for each day of the month and attributable to both working days and notional or non-working days. In other words, the Commission and Bonus include payments to the Plaintiffs for days when they were on leave and therefore is paid for or inclusive of their Statutory Entitlements.

2. Should the Bonus and Commission be deducted pursuant to the Deduction Sub-sections?

The Deduction Sub-Sections allow for deductions of any sums of money paid by the employer to the employee pursuant to 1) the terms of the employment contract; 2) any other agreement; and 3) for any other reason, in respect of a day of holiday/annual leave/sick leave.

There was no express term in the Plaintiffs' employment contracts or express agreement providing that the Commission and Bonus was inclusive of Statutory Entitlements. Therefore, the question for the Court was whether the Commission and Bonus payments fell within the *'any other reason'* limb. The court adopted a purposive approach to interpreting that expression and held that "*any other reason*" encompassed a non-exhaustive list of reasons to further the legislative objective of avoiding double payment by the employer. Examples of such reasons included by operation of law and situations where estoppel may arise.

The court then held that the Commission and Bonus were paid for and inclusive of Statutory Entitlements, a failure to deduct such sums causes double payment by the employer and is inconsistent with the policy objective of the legislation and therefore such sums should be deducted from the calculation of the Statutory Entitlements.

Takeaways for employers

For contracts of employment which involve variable payments or commissions, it is recommended that employers state expressly in the contracts of employment that such sums are paid in fulfillment of the statutory entitlements of the employee to ensure that the payments fall within the Deduction Sub-Sections.

More...

HONG KONG
1 MAY
2019

Hong Kong's New Minimum Wage Effective from 1 May 2019

Effective 1 May 2019, the minimum wage rate in Hong Kong increased to HK$37.50 per hour.

The monthly threshold amount for keeping records of hours worked increased accordingly to HK$15,300 per month.

Employers should ensure that they remain in compliance with the new minimum wage rate.

More...

HONG KONG
14 MAY
2019

Think Twice before Delegating Authority to Employees!

In the case Tien Sau Tong Medicine Company (Hong Kong) Limited v Cheung Po Ling and Wu Chi On [2019] HKCFI 1258, the court considered whether two employees misused company funds for their personal purposes.

Facts

The Plaintiff company (the "**Plaintiff**") was wholly owned by one shareholder, Mr. Ng (who is also the sole director) and the 1st Defendant and 2nd Defendant were mother and son who were both employed by the Plaintiff. The 1st Defendant handled most of the day to day management and administration of the Plaintiff and had signing rights as she was the only authorised signatory for the Plaintiff's bank accounts. There was no dispute the 1st Defendant owed fiduciary duties to the Plaintiff.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

HONG KONG
14 MAY
2019

The 1st Defendant used HK$ 6 million belonging to the Plaintiff to purchase a property in the name of the 2nd Defendant for his personal use. After a repayment, the sum of money concerned was reduced to HK$5.8 million. The Defendants pleaded that the money was provided by the Plaintiff by way of a non-interest-bearing loan which was authorised by Mr. Ng pursuant to an alleged oral agreement between the 1st Defendant and Mr Ng. Mr. Ng denied the existence of such oral agreement and stated that the money was extracted without authorisation.

Court's Decision

The court found that there was no oral agreement for the loan. The court reached this decision by considering evidence which included (i) the unlikelihood that Mr Ng would authorise the loan given that the sum involved amounted to a quarter of the total asset of the Plaintiff in the same period; (ii) the fact that it was unrealistic to believe the Defendants could repay the sum and that (iii) key terms of the loan such as who was the real borrower, who would repay the loan and how the loan was to be repaid were not discussed with Mr. Ng which makes the existence of the loan unlikely.

The court also considered the fact that Mr. Ng rarely intervened in the company's operations and seldomly paid attention to corporate documents and just signed the documents as indicated. Thus the court accepted that although the loan was recorded in the Plaintiff's financial statements, he did not notice it and thus did not approve the loan.

The court accordingly held that the claims against the 1st Defendant and 2nd Defendant succeeded. The 1st Defendant breached her fiduciary duty owned to the Plaintiff, and she was a constructive trustee of the $5.8 million. The 2nd Defendant wa held to be a constructive trustee of the Property and restrained from disposing of the property or in any way encumbering it.

Takeaways for employers

Senior management should always keep track of the company's operations and refrain from giving employees unlimited authority with the management of the company. Providing a great degree of autonomy without supervision and scrutiny increases the chance of employees acting in ways which are not in the company's best interests, and increases the risk of senior management having to take legal action to recover assets lost or have no choice but to accept what was done when such act is finally realised.

More...

HONG KONG
3 JUN
2019

Revised Code of Practice published by the Labour Department introducing the new "Extreme Conditions" Announcement

After experiencing the might of Super Typhoon Mangkhut, the Government has revised the "Code of Practice in times of Typhoons and Rainstorms" ("CoP") to include new arrangements for the Government to issue an "extreme conditions" announcement before lowering a Typhoon Signal No. 8 ("T8").

Situations which warrant an "extreme conditions" announcement include major disruption to public transport services, serious flooding or landslides and large scale power outage following a super typhoon. Upon such announcement, other than essential staff who have agreed to work during the "extreme conditions", employees should stay at home/ in a safe place for 2 hours after the cancellation of T8 (the period of the "extreme conditions"). The Government will monitor and review the situation during these 2 hours and further advise on whether the "extreme conditions" will be cancelled or extended. If extended, employees should continue to stay in a safe place. If cancelled, the employees should resume work according to the work arrangements previously agreed with their employer.

Continued on Next Page

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG
3 JUN 2019

Employers should amend their Weather Work Arrangements Policy to include the work and resumption of work arrangements in the event of an "extreme conditions" announcement being made. Employers are reminded to consult their employees when drawing up such work arrangements and to adopt a flexible approach with due consideration to each employee's circumstances and needs when returning to work after an "extreme conditions" announcement. Top priority should be given to ensure the safety of all employees.

More...

HONG KONG
6 JUN 2019

Hong Kong continues its Journey Along the Rainbow-Coloured Road

In 2018 the Hong Kong courts determined that it was irrational for the Immigration Department to refuse to grant the same-sex spouse of an expatriate worker arriving in Hong Kong the same right to work in Hong Kong as is granted to every opposite-sex spouse (see our update *here*). This decision was greeted with acclaim internationally and, generally, was well accepted in Hong Kong also.

On 6 June 2019 the Hong Kong Court of Final Appeal took a further (lengthy) step towards internationally accepted norms by making it unlawful for the Hong Kong Government to provide lower benefits to a spouse in a same-sex marriage than to a spouse in a heterosexual marriage, and that it is unlawful for the Inland Revenue Department to refuse to accept same-sex marriages when considering individual tax treatment.

On 6 June 2019 the Court of Final Appeal issued its judgment in the case of *Leung Chun Kwong v. Secretary for Civil Service and Commissioner of Inland Revenue.*

The case involved a same-sex couple (Angus Leung and Scott Adams) who had been legally married in New Zealand (where it is lawful for same-sex couples to marry). Angus Leung works for the Hong Kong government as a civil servant. The terms of employment for a civil servant entitle the employee to certain benefits (medical and dental) which can be extended to the spouse of the civil servant. Mr. Leung applied for his spouse (Mr. Adams) to be granted such benefits. His application was rejected on the grounds that same-sex marriages were not recognised in Hong Kong.

In addition, the Hong Kong tax system contains preferential tax treatment for married couples. Mr. Leung sought to file tax returns with the Hong Kong Inland Revenue Department (IRD) naming Mr. Adams as his spouse. The tax returns were rejected by the IRD on the grounds that spouses cannot be of the same sex.

Mr. Leung challenged both of the above decisions and, having suffered various losses in the lower courts, the matter was heard by the Court of Final Appeal earlier this year. The primary argument put forward by the Government and by the IRD to justify their decision to reject the various applications made by Mr. Leung was that differential treatment between different-sex and same-sex relationships was necessary in order to protect the institution of traditional marriage.

The Court of Final Appeal (CFA) rejected the arguments put forward by the respondents. In particular the CFA determined as follows:-

- There is no rational connection between denying Mr. Leung (or his spouse) employment and tax benefits and protecting the institution of marriage, and
- The argument that spouses in same-sex marriages should be treated less favourably due to the fact that same-sex marriages are not possible in Hong Kong is a circular (and therefore flawed) argument.

The CFA held in favour of Mr. Leung on both counts.

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG
6 JUN
2019

What does this mean for the future?

This is a very clear indication of the way in which the Hong Kong judiciary view the issue of same-sex marriages. It is probable that more and more cases are going to be filed with the court seeking equality of treatment for gay couples, particularly in relation to the public sector. It is also probable that the Government's appetite for defending these cases will reduce and that it will begin being more proactive and taking steps to equalise the position without being directed to do so by the courts.

After all, even Taiwan now permits same-sex marriages!

Whilst neither this decision, nor any prior decision, impacts private sector employment contracts, it is a fact that the large number of public sector (and quasi-public sector) employees in Hong Kong will, in our opinion, drive a new "normal" in the HR landscape. That new "normal" will be the provision of equality of benefits for employees regardless of their sexual orientation.

Hong Kong is renowned for its ability to change its landscape rapidly through the creation of new infrastructure projects. It is now becoming known for its ability to change in other ways also.

This is a day to celebrate.

More...

HONG KONG
14 JUN
2019

Lessons Learned: The Significance of Restrictive Covenants

In McLarens Hong Kong Limited v Poon Chi Fai and others [2019] HKCFI 1550, the court refused to grant a springboard injunction in favour of the employer.

Facts

The 1st to 9th Defendants ("**D1 to D9**") were employed by the Plaintiff, a corporation providing insurance loss adjusting services. The 1st Defendant ("**D1**") was a director to the Plaintiff and the 2nd to 9th Defendants ("**D2 to D9**") were full-time employees. D1 to D9 terminated their employment contracts with the Plaintiff and joined the 10th Defendant ("**D10**"), which provided similar services as the Plaintiff and was a competitor of the Plaintiff.

The Plaintiff alleged D1 to D9 breached their duties of confidentiality, and in particular, D1 breached their fiduciary and director's duties; and alleged D10 was a party to the conspiracy to injure the Plaintiff and also vicariously liable for D1 to D9's breaches. In addition, the Plaintiff sought a springboard injunction against D1 to D9, restraining them from engaging in a similar business and soliciting any of the Plaintiff's customers and business partners for a period of six months.

Court's Decision

In refusing to grant a springboard injunction against D1 to D9, the court turned to five factors to decide whether a springboard injunction should be granted.

1. Whether there was unlawful use of the confidential information.

From the evidence, most of the Defendants copied and took away large quantities of the Plaintiff's documents, in particular, D1 who deliberately requested a confidential document from the Plaintiff a day before his resignation. The 3rd and 6th Defendants also copied a vast amount of documents that were unrelated to their duties. The court agreed that there is a legitimate concern of a real risk that the confidential information would be misused.

2. Whether the defendants obtained an unfair competitive edge (built a springboard) by reason of the breaches.

The Plaintiff has the burden to prove the causal link between the misuse of the confidential information and the building of the springboard. On this regard, although it was certain that D1 to D9 took client lists of the Plaintiff when they terminated their employment contracts, the court found that D1 to D9 did not

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG

14 JUN 2019

need to use the information for their own benefit, because some information taken by D1 to D9 was publicly available online. Further, the court agreed that without a restrictive covenant to this effect, D1 to D9 are entitled to persuade the Plaintiff's clients to move their case files to the 10th Defendant. Therefore, the Plaintiff failed to establish the causal linkage.

3. Whether the unfair advantage still existed on the date the springboard injunction is sought.

The court held that even if there was any unfair advantage previously, it would now be non-existent because the Plaintiff's information and documents had been returned and/or deleted.

4. Whether damages are an adequate remedy to the Plaintiff.

The court found a monetary award would be adequate to compensate the Plaintiff.

5. Whether a springboard injunction is a remedy that carries the lower risk of injustice if it turned out to be wrong.

The court decided that the grant of a springboard injunction does not carry the lower risk of injustice because the Plaintiff's interests were already protected by the Modified Undertakings (which was in effect an interim injunction) and the possibility of an account of profits or damages if they won at trial; whereas D1 to D9 would be out of a job for a significant period if the springboard

injunction was wrongly granted.

Takeaways for employers

Employers should consider carefully the types of information and connections/ goodwill it needs to protect when an employee leaves, and take steps to protect those interests. This can be done through a combination of things such as a longer notice period, garden leave clause, post termination restrictive covenant, express confidentiality obligation and/or long term incentive plan or other incentive payments.

More...

HONG KONG

24 JUN 2019

Terminating engagement in good faith and with rationality

Hong Kong Court of Appeal ("**CA**") in *FWD Life Insurance Co (Bermuda) Ltd v Poon Cindy* [2019] HKCA697 remitted a claim regarding an agency agreement to the Court of First Instance with the Judge to decide on whether the Defendant can successfully resist the Plaintiff's claim on the argument of Good Faith and Rationality, which was only raised at Appeal.

Facts

The Defendant claimed that her engagement was wrongfully terminated after she refused to accept a demotion. One of her arguments was that there was an implied term in her Agent Agreement ("**AA**") that it would not be terminated without valid reasons and an implied term to the Letter of Offer that she would not be demoted from the position as Agency Director without any valid reasons given.("**Valid Reason implied term**").

Decision

At the hearing in the Court of First Instance the Judge rejected the Valid Reason Implied Term argument as he decided there was no necessity for such an implied term in the AA and the Letter of Offer. Although the Judge was aware of the nexus of the proposed demotion and the termination, he did not give much consideration to the Valid Reason Implied Term against demotion since the Defendant did not actually accept the demotion. . The CA found that the Judge in the court below erred on this point because 'given the nexus between the proposed demotion and the termination, the Judge should examine the Valid Reason Implied Term in both contexts together.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG **24 JUN** 2019

The necessity for a Valid Reason Implied Term to restrict the power of demotion could affect the necessity for a Valid Reason Implied Term for termination. If the court is satisfied that there was indeed a Valid Reason Implied Term for demotion, it would go far in establishing the Valid Reason Implied Term for termination in the context of a termination based on refusal to accept demotion.'

The common law on an implied term based on good faith and rationality (the "Good Faith and Rationality Implied Term") had developed since 2015. As such, at the hearing of the appeal, Defendant's counsel advanced arguments based on the Good Faith and Rationality Implied Term, stipulating that:

'The power to terminate the Agent Agreement would be exercised in good faith and would not be exercised for arbitrary, capricious, perverse or irrational reasons. The power to demote the Defendant from her position as Agency Director would be exercised in good faith and would not be exercised for arbitrary, capricious, perverse or irrational reasons.'

The CA was of the view that it would be unjust if the Defendant wasn't given a chance to rely on and present arguments on the Good Faith and Rationality Implied Term. The CA viewed 'the Valid Reason Implied Term and the Good Faith and Rationality Implied Term to be two sides of the same coin. The Valid Reason Implied Term requires the Plaintiff to give a valid reason for the proposed demotion and (if demotion was not accepted) termination. In the context of the Good Faith and Rationality Implied Term, the requirement on the Plaintiff is to 'exercise the power of demotion and termination in good faith and rationally.' Therefore, the case was remitted to the Court of First Instance to decide whether the Defendant can successfully resist the Plaintiff's claim and pursue her counterclaim based on the Good Faith and Rationality Implied Term and the Valid Reason Implied Term.

More...

HONG KONG **26 JUN** 2019

Hong Kong Government Publishes Proposed Amendments in the Mandatory Provident Fund Schemes (Amendment) Bill 2019

At the meeting of the Executive Council on 11 June 2019, the Council advised that the Mandatory Provident Fund Schemes (Amendment) Bill 2019 be introduced into the LegCo. The Bill was gazetted on 28 June 2019 and the first reading was scheduled to be on 3 July 2019. The amendments mainly affect two areas: (i) a Centralized Platform ("**CP**"), and (ii) an Annual Registration Fee ("**ARF**").

Setting up wholly owned subsidiary for the CP

Currently, the inefficient administration of the MPF schemes and the cumbersome, paper-based administrative processes result in the high administration cost of the MPF system. The CP will facilitate the centralization of the Mandatory Provident Fund ("**MPF**") scheme so as to facilitate the reduction of MPF management fees and to reduce paper use. The Financial Services and the Treasury Bureau ("**Bureau**") considered different options of institutional arrangements for operating the CP, and they decided that creating a subsidiary of the MPF Authority ("**MPFA**") would be the most ideal way. The subsidiary will not be an approved trustee and hence it will not be regulated by the MPFA. The board of directors of the subsidiary will include directors of the MPFA, representatives of the Government, and persons who have relevant expertise.

There is currently no express power under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) for the MPFA to set up a limited company to perform such functions. Hence it was decided that it would be prudent to amend Cap. 485 to provide a legal and sound basis for the MPFA to set up the subsidiary to operate the CP. The setting up on the subsidiary would require the approval of the Financial Secretary under the amendment.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG

26 JUN

2019

Implementation of an ARF

It was intended that the MPFA be self-financing by recovering from approved trustees its costs of performing its functions for MPF schemes. Under s.22B of Cap. 485, the MPFA has the power to charge trustees ARF. The level of ARF charged is capped. However, the MPFA has never charged trustees ARF since the commencement of the MPF regime in 2000. The existing rate of ARF as provided for in Schedule 1 of the Mandatory Provident Fund Schemes (Fees) Regulation (Cap. 485C) is set at 0%. As such, the MPFA does not have a stable income stream.

The Bureau proposed charging ARF at the level of 0.03% for the first six years in order to allow the trustees to adjust. The ARF level will be revised with effect from the seventh year. In order to avoid the MPF trustees shifting the burden of the ARF to the scheme members, the proposed amendment to the legislation will expressly prohibit the transferal of burden. Even though the ARF would increase the operating costs of MPF trustees, the additional cost burden should be insignificant.

More...

HONG KONG

6 SEP

2019

Remedial Interpretation of the IRO following the Leung Chun Kwong case

In June 2019, the Court of Final Appeal ("**CFA**") handed down its judgment for *Leung Chun Kwong v Secretary for the Civil Service & ors*, granting spouses in a same-sex marriage the right to equal tax treatment (see our update *here*). Following the main judgment, the CFA proceeded to determine the relief to be granted and the costs order to be given.

In respect of the decision relating to entitlement to employment benefits for a same-sex spouse, the CFA ordered a declaration that the Applicant (Mr. Leung) and his same-sex married partner were entitled to the benefits and allowances that the Government provided to heterosexual married civil servants of the same employment terms and conditions of the Applicant and their spouses respectively. In respect of the decision relating to the joint assessment of tax return for same-sex marriage couples (**the "Tax Decision"**), the CFA ordered a declaration that provided for remedial interpretation of relevant terms in the Inland Revenue Ordinance ("**IRO**").

The term 'marriage' in section 2 of the IRO will be read as 'any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so, provided where the persons are of the same sex and such a marriage between them would have been a marriage under the IRO but for the fact only that they are persons of the same sex, they shall be deemed for the purposes of such a marriage to have the capacity to do so'. For the purpose of IRO, references to 'husband and wife', 'not being a wife living apart', and 'either husband or wife' shall be read as 'a married person and his or her spouse', 'not being a spouse living apart from the married person', and 'either the married person or his or her spouse' respectively.

The Commissioner of Inland Revenue was given time to implement the above remedial interpretation, as revisions to the Inland Revenue Department's computer system and practice notes were needed. However, it was also stated by the Commissioner of Inland Revenue that in the meantime, the Inland Revenue Department would process tax returns and assessments in accordance with the judgment.

Employers should keep an eye on the upcoming revisions and guidelines published by the Inland Revenue Department. This landmark judgment and revised interpretation of the IRO represent another step in the advancement of LGBTQ rights in Hong Kong. More LGBTQ people are bringing claims to court

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG
6 SEP
2019

through judicial review in order to fight for equal treatment in different aspects of the society. The most recent legal challenge is brought against the Hong Kong Housing Authority by a same-sex couple applying for public

housing under the 'ordinary family' category. As Hong Kong and surrounding jurisdictions advance in this area of human rights, employers can certainly benefit from a heightened awareness of relevant events.

More...
More...

HONG KONG
10 SEP
2019

Discrimination claim vs. summary dismissal

Hong Kong District Court ("**the Court**") in *Sarniti v Lee Suk Ling* [2019] HKDC 1158 held that Lee Suk Ling ("**the Employer**") exercised her right to summarily dismiss the domestic helper employed in her household ("**the Claimant**") justifiably, following the Claimant's argument that the Employer dismissed her in breach of the Employment Ordinance (Cap. 57) ("**EO**").

Facts

The Claimant worked in the Employer's household as a domestic helper from April 2016 to February 2017 and was dismissed summarily on 19 February 2017. She was pregnant when she was dismissed and she claimed that the Employer dismissed her upon learning about the pregnancy. Hence the Claimant claimed that the dismissal was unlawful under the provisions of the SDO. The Claimant never directly told the Employer that she was pregnant, until she was dismissed. However, it was alleged that her medical reports as well as pregnancy test, which was placed in the open in the flat, were moved whilst she was not at home. Based on those incidents, the Claimant concluded that the Employer and her husband knew about her pregnancy and dismissed her because of it.

On the other hand, the Employer claimed that she dismissed the Claimant because of the grounds under s.9 of the EO. The Claimant was habitually neglectful in her duties and hence justifying summary dismissal. Despite the Claimant alleging that there had been little complaint about her work performance before her pregnancy was allegedly discovered, the Employer supplied multiple text messages, past warning letters, and a video as evidence of the Claimant's poor attitude and work performance.

Decision

Under s.15 EO, an employer is prohibited from terminating the employment of a pregnant employee where the employee serves notice of pregnancy immediately after being informed of termination. This prohibition does not apply to an employee who is summarily dismissed under s.9 EO. The court found that s.9(1)(a)(iv) was applicable in this case as the Claimant was habitually neglectful in her duties. The court referred to the test laid out in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 in relation to summary dismissal. If summary dismissal is to be claimed as justifiable, the conduct complained of has to show the employee to have disregarded the essential conditions of the contract of service.

The requests made by the Employer were reasonable but the Claimant failed to carry out her basic duties. Despite the allegations by the Claimant's counsel that the Claimant's behaviour did not bring about severe consequences, the Court considered the 'totality of the evidence'. Even though the individual incidents seemed trivial, however, as a domestic helper, the Claimant's duties include basic housekeeping, cooking, and buying groceries. Her continuous and repetitive failure to carry out such basic duties reflected her lack of intention to perform well on this job. On the whole, her behaviour directly destroyed such employer-employee relationship. Hence, the court held that the Employer reasonably summarily dismissed the Claimant, and the Claimant would not be entitled to the damages claimed.

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

HONG KONG

12 SEP

2019

Offer of appointment letters and conditions of service

Hong Kong Court of First Instance ("**the Court**") in *Law Ting Pong Secondary School v Chen Wai Wah* [2019] HKCFI 2236 held that the defendant Chen Wai Wah ("**the Defendant**"), who backed out of an employment contract with the School ("**the Claimant**"), was not liable to pay for payment in lieu of notice because his employment had not commenced yet.

Facts

The Defendant signed on the Letter of Acceptance and Conditions of Service for employment on 17 July 2017. The Letter of Acceptance stated that the Defendant 'accept[ed] the appointment offered' in the letter 'in accordance with the attached Conditions of Service for Teachers'. It also stated that the Defendant, once signed, understood that the conditions of the new contract would 'come to immediate effect'. As part of the Conditions of Service, it was required that the Defendant give the Claimant three months' notice in writing, or payment in lieu of notice, or a combination of both in order to terminate the employment contract. The Defendant backed out of the contract on 22 August 2017 without giving notice. The Claimant requested for payment in lieu of notice, and the Defendant refused to pay.

The argument put forward by the Defendant was that his employment would not commence until 1 September 2017. As such, he was not bound by the notice requirement under the Conditions of Service. The Claimant's case was that upon signing the Letter of Acceptance on 17 July 2017, the employment contract came into immediate effect. Therefore, the Defendant should have given notice of intention to terminate.

Decision

The Labour Tribunal said that by the Defendant signing the Letter of Acceptance, the Defendant had understood and agreed to be bound by the paragraph regarding the immediate effect of the Letter. There was hence a consensus between the parties that the termination clause in the Conditions of Service would also become effective immediately. However, the appeal Court, considered the interpretation of the terms of the employment contract. The definition of an offer must involve an expression of willingness to contract by the offeror, and the willingness to contract must be subject to specified terms. The Court concluded that it was the terms set out in the Conditions of Service and not the Letter of Acceptance that were the specified terms of the offer. The reasoning was that in order to decide whether to accept the offer, a person must read the Offer of Appointment in conjunction with the Conditions of Service in order to ascertain the terms. This was also expressly stated in the Offer of Appointment, that the terms could be found in the Conditions of Service.
As such, the Court concluded that the specified terms of the offer were derived from the Conditions of Service. Following this finding, the Court held that it is 'trite law' that acceptance of an offer has to 'mirror' the offer made, in relation to the terms. Applying such law to the case, the terms set out in the Letter of Acceptance did not form part of the offer and hence they could not form part of the accepted terms.

Under the Conditions of Service, the period of employment was expressly stated to be from 1st September 2017 to 31st August 2018. Hence, the Defendant was not under employment at the date of termination and he was not liable to make any payment in lieu of notice.

The Court then considered the function of the Letter of Acceptance, given that it did not form part of the terms of the employment contract. In the Offer of Appointment, the Defendant was instructed to sign both copies of the Letter of Acceptance and Conditions of Service to accept the offer. In effect, the Defendant's act of signing the Letter of Acceptance was simply to comply with

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG

12 SEP 2019

the prescribed mode of acceptance stated in the Offer of Appointment. This does not mean the terms in the Letter would then become part of the terms of the contract. Employers hence have to be cautious of the incorporation of terms. More than one document are involved in most recruitment and hiring processes. Employers should therefore consider carefully which document to ask the employee to sign, and where to state the terms of employment.

More...

HONG KONG

11 OCT 2019

Can an employer summarily dismiss an employee for failure to properly manage and supervise his subordinate?

In the case of *Qvist Henrik v Clatronic Far East Limited [2019] HKCFI 2464*, the Court held that although the Plaintiff employee had breached certain duties to the Defendant employer, the breach was not serious enough to justify summary dismissal. The Defendant was ordered to pay the Plaintiff damages in the sum of HK$1.6million plus interest.

Facts

The Plaintiff was employed as Managing Director of the Defendant since 2009. The Plaintiff was the only person in the Hong Kong office with authority to sign cheques on behalf of the Defendant.

Mr. Tang joined the Defendant as an Administration Manager in 2011 and reported to the Plaintiff. By various means, Mr. Tang was able to procure the issuing of 50 cheques paying out a total of over HK$1.4million from the Defendant's account to himself.

The Defendant summarily dismissed the Plaintiff for acting in breach of his duties as Managing Director to manage, supervise and control the financial affairs of the Defendant, thereby allowing Mr. Tang to perpetrate his frauds causing loss to the Defendant.

The Plaintiff denied any alleged breach of his duties and claimed that the summary dismissal was wrongful.

Court Findings

The Court considered that the Plaintiff's duty as a Managing Director was to set up a system or mechanism for someone to check and review Mr. Tang's work so as to guard any possible frauds. The duty was not to set up a foolproof system that would guarantee that any improper acts of Mr. Tang would be prevented or detected. As there was some sort of checking and reviewing in place before the cheques are signed and monthly checking of accounts, the Court held that the Plaintiff had not breached his duties in this regard.

However, had the Plaintiff properly and reasonably carried out spot-checking of the financial transactions, he would have detected some of the fraudulent transactions by Mr. Tang. In this regard, the Court found that the Plaintiff failed to exercise due care and skill, or reasonable skills and competence, in performing his duties which resulted in loss incurred by the Defendant.

The Defendant alleged that the Plaintiff's failure to spot the first fraudulent transaction allowed and enabled the subsequent 49 transactions to happen. The Plaintiff's "habitual neglect of duty" therefore justified summary dismissal under s.9(1)(a) of the Employment Ordinance.

The Court followed the test in *Ko Hon Yue v Shiu Pik Yuk (2017)* and held that to establish "neglect of duty", the "neglect" must be both substantial and habitual. The breach must be sufficiently serious so as to indicate that the employee no longer intends to be bound by the contract.

The Court concluded that although the Plaintiff did make mistakes in his spot-checking of the accounts, the impact on the Defendant was not of sufficient seriousness to satisfy the substantiality requirement. As opposed to breaches leading to serious consequences like causing physical danger to people or

Continued on Next Page

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG
11 OCT 2019

serious harm to the business, the Defendant only suffered monetary loss of relatively modest amounts. Balancing the impact caused to the Defendant and the consequences of summary dismissal on the Plaintiff, the Court held that the neglect of the Plaintiff was not serious enough to warrant summary dismissal.

More importantly, the Court found that no matter how negligent or careless the Plaintiff may have been, it cannot be seen how the Plaintiff had shown an intention not to be bound by his contract of employment.

Takeaway for employers

Summary dismissal is a very serious step to take against an employee. An employee who has been summarily dismissed will likely sue the employer to clear their names and recover the lost benefits. As such, an employer must not approach the summary dismissal lightly. Care must be taken to ensure that there is cogent evidence to demonstrate that there is a serious and material breach of the employment contract by the employee. Whether a misconduct is such as to justify summary dismissal is a question of fact and degree.

More...

HONG KONG
27 DEC 2019

Employment (Amendment) Bill 2019 Gazetted – Enhanced maternity benefits

On 27 December 2019, the Employment (Amendment) Bill 2019 (the "Bill") was gazetted. The Bill relates to the proposed amendments to the maternity benefits of female employees who are employed under a continuous contract of employment.

The proposed amendments under the Bill are as follows:

- Increase the existing 10 weeks of statutory maternity leave entitlements to 14 weeks;
- The current maternity leave pay rate at four-fifths of the employee's daily average wages will apply to the extended period but the payment focr the extended period is subject to a cap of HK$36,822;
- Shorten the period of pregnancy mentioned in the definition of "miscarriage" from 28 weeks to 24 weeks (i.e. miscarriage means the child is incapable of survival after being born before 24 weeks of pregnancy);
- A certificate of attendance be accepted as proof in respect of entitlement to sickness allowance for a day on which a female employee attends a medical examination in relation to her pregnancy.

More...

HONG KONG
30 DEC 2019

Court sends clear message to employers on pregnancy discrimination

In the District Court case of *秦秀清 對 長鴻鋁窗裝飾工程有限公司* [2019] HKDC 1749 the Court found that the Defendant employer had engaged in unlawful pregnancy discrimination and victimisation of its employee. This case provides useful guidance on what factors the Court takes into account in deciding damages and costs awards in discrimination cases. The Court also took this opportunity to increase the starting point for damages for injury to feelings from HK$50,000 to HK$55,000.

Facts

The Claimant was employed as a clerk by the Defendant, a small-scale business specializing in windows inspection and repair. The Claimant gave written notice of her pregnancy to Mr. Chan who was a shareholder and director of the Defendant in early June 2016. She alleged that soon after learning of her pregnancy, Mr. Chan made a number of threats to force her to resign. Mr. Chan told the Claimant that she would be transferred to an office in a remote area and told her to consider whether she and her baby could

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

HONG KONG

30 DEC

2019

tolerate the long commute to work during the hot summer months. Mr. Chan also told the Claimant that if she decides to stay with the Defendant, "her days will not be good'. Instead, the Claimant was promised compensation if she chose to resign voluntarily. Despite this, the Claimant chose to continue her employment.

In mid-June the Claimant had a miscarriage. She underwent surgery and took a week's sick leave. The Claimant alleged that when she returned to work, she was not given any work to do and was dismissed by the Defendant soon afterwards. The reason for dismissal stated on the notice of termination was "poor work performance".

After termination, the Claimant complained to the Equal Opportunities Commission (the "**EOC**"). When Mr. Chan learned of the complaints, he told the Claimant that she would not be given severance pay or proof of employment.

The Claimant commenced proceedings claiming unlawful pregnancy discrimination and victimisation.

Mr. Chan denied having threatened the Claimant to force her to resign and claimed that, due to the Defendant's financial difficulties, he had only tried to persuade her to leave. Mr. Chan did not accept that the Claimant was in fact pregnant or that she had suffered a miscarriage. He further alleged that the Claimant had not notified him that she had had a miscarriage or a disability.

Court's Decision

After hearing the parties' evidence, the Court accepted the Claimant as a credible witness. Her version of events was largely supported by contemporaneous written evidence. On the other hand, the Court found Mr. Chan to be an incredible witness whose witness statement could not be relied upon. In particular, the Court found Mr. Chan's challenges to the Claimant's pregnancy and miscarriage unreasonable and lacking in common sense. In taking the Claimant's version of events, the Court held that the alleged less favourable treatment of her by the Defendant did take place.

The Court held that the Defendant had discriminated against the Claimant in breach of the Sex Discrimination Ordinance ("**SDO**") by dismissing her on the ground of her pregnancy. The Court found that Mr. Chan believed the Claimant's pregnancy would have a negative impact on her work and found her extended sick leave disruptive. The Court found that the Defendant would not have treated an employee who was not pregnant in the same manner as it had treated the Claimant. The Court found that the Claimant had been treated less favourably on the ground of her pregnancy.

Further, the Court held that even if the Defendant had dismissed the Claimant partly for another reason (Mr. Chan claims that the Claimant's work performance was poor), as long as her pregnancy was also one of the reasons for the termination, section 4 of the SDO operates to deem the termination done because of the pregnancy.

Separately, the Court held that a miscarriage was a "disability" under the Disability Discrimination Ordinance ("**DDO**"). Despite this, the Claimant was unable to prove that Mr. Chan was aware of her miscarriage before the dismissal. The Court believed that Mr. Chan had operated on the assumption that the Claimant's sickness days were only due to her pregnancy and not a disability. Hence the Claimant's claim of disability discrimination was not made out.

The Court accepted the Claimant's undisputed evidence that, upon learning of her complaint to the EOC, the Defendant had refused to provide her with severance pay and proof of employment. The Court found that this treatment amounted to victimisation under the SDO.

Continued on Next Page

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

The Claimant also claimed victimisation under the DDO. Even though the Court found that the Defendant had not engaged in disability discrimination, it held that the Defendant had refused to provide the Claimant with severance pay and proof of employment upon learning of the Claimant's disability discrimination complaint. The definition of a "discriminator" in the DDO includes "a person who could potentially be a discriminator". Applying this definition, the Court found that Mr. Chan fell within the definition of a discriminator and the claim for victimisation under the DDO was made out.

Award of damages

The Court awarded the Claimant damages in the sum of HK$133,000 for injury to feelings, loss of income and punitive damages.

Injury to feelings

The case of *Yuen Wai Han v South Elderly Affairs Limited* stated that the starting point for damages for injury to feelings in pregnancy discrimination cases should not be less than HK$50,000. The Court held that since this case was decided 15 years ago, it was time to update the figure and increased the starting point to HK$55,000.

In assessing the appropriate amount of damages to award the Claimant, the Court took into account a number of factors, including the fact that the Claimant and Mr. Chan have had an amicable working relationship for more than 3 years before her pregnancy; the immense stress caused by Mr. Chan's threats to the Claimant leading to the latter's insomnia and hair loss; and the Claimant's loss of a happy and stable job due to the pregnancy discrimination. The Court held that an award of HK$90,000 in damages was appropriate in such circumstances.

Loss of income

Although it took more than 3 months for the Claimant to secure the replacement job, the Court held that 3 months was a reasonable period of time for the Claimant's to secure new employment. The Claimant was unable to demonstrate that she was not offered an employment because she did not have the employment proof. The Claimant was therefore awarded damages in the sum of 3 month's salary.

Punitive damages

In making an award of HK$10,000 in punitive damages, the Court took into account how Mr. Chan had obstinately refused to accept that he had dismissed the Claimant due to her pregnancy; and unreasonably challenged the Claimant's pregnancy and miscarriage which had the effect of "rubbing salt in her wounds".

Award of costs

The general rule in discrimination cases is for each party to bear their own costs irrespective of the outcome of the case. The Court noted that Mr. Chan had conducted the proceedings in an unreasonable and detestable manner hence ordered the Defendant to pay for the costs of the proceedings.

The Court held that Mr. Chan had caused unnecessary stress to all parties by making serious and unfounded allegations against the Claimant, the Claimant's doctor, the Claimant's legal representatives and the handling judges. Mr. Chan also disrupted the proceedings by shouting in court and attempting to prevent the Claimant's counsel from making his closing submissions. This led to unnecessary delay and wasted court time. Based on the above, the Court ordered the Defendant to pay the legal costs incurred by the Claimant.

Takeaway for employers:

This case serves as a reminder for employers not to engage in unlawful

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

HONG KONG

30 DEC

2019

discrimination and victimisation. A claimant may have a valid victimisation claim even if the original allegation of unlawful discrimination is not made out.

Employers should be careful not to engage in unlawful discrimination on the ground of race, sex, pregnancy, marital status, family status and disability. Employers should also be careful not to engage in unlawful victimisation.

An employer should ensure that they have an appropriately drafted anti-discrimination policy, provide training on the policy and implement it.

More...

CONTRIBUTED BY: MAYER | BROWN

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA
4 OCT
2018

Amendment to the Kerala Shops & Commercial Establishments Act, 1960 ("**Kerala S&E Act**")

On 4 October 2018, the Kerala State Government amended the Kerala S&E Act by promulgating an ordinance. While the ordinance was in force, the State Legislative Assembly passed a bill to amend the Kerala S&E Act, incorporating the changes introduced by the ordinance. The bill received the Governor's assent on 21 December 2018 and has been made effective retrospectively from 4 October 2018 (i.e., the date of the Ordinance). The key changes introduced to the Kerala S&E Act are:

- **Grant of weekly holiday**: the earlier requirement for every shop to remain closed on one whole day in a week and for the shop-keeper to display a notice of the close-day has now been done away with. Instead, the only requirement now is that employees in shops and commercial establishments should be provided with at least one weekly holiday.
- **Increase in the working hours for women and children**: persons younger than 17 years and women are now permitted to work up to 9 p.m. (previously, allowed to work only up to 7 p.m.). Further, women can be employed between 9 p.m. and 6 a.m., after obtaining their consent, and ensuring that (a) at least 5 employees are present at those hours, of which at least 2 shall be female employees, and (b) adequate protection is provided to protect their dignity and safety, by provision of facilities such as, transportation from the establishment to their residence.
- **Significant increase in the penalties**: the maximum penalties for violating provisions on working hours, rest intervals, annual leave, notice of dismissal, health, hostel and seating facilities have been increased from INR 5,000 (USD 70) to INR 100,000 (USD 1,400) for first-time offences, and up to INR 2,00,000 (USD 2,800) for subsequent offences. Fines for contravention of provisions on overtime, employment of women and children at night, and production of records for inspection have been increased to from INR 50 (USD 7) to INR 50,000 (USD 700), subject to a cap of INR 2,000 (USD 30) per worker. The First-Class Judicial Magistrate is also now empowered to impose fine for violations under the Kerala S&E Act, up to INR 2,00,000 (USD 2,800).
- **Ability to maintain registers and records in electronic form**: registers and records under the Kerala S&E Act may now be maintained in electronic format. However, during the time of an inspection, a duly signed hard copy of the records will need to be submitted to the inspector upon demand.

More...

INDIA
12 DEC
2018

Amendment to the Payment of Wages Act, 1936 ("**PW Act**")

The Haryana Government has passed a notification dated 12 December 2018 (published on 25 December 2018), which amended the PW Act in its application to the State of Haryana. The PW Act is a central legislation which regulates the payment of wages to a certain class of employees working in specific kinds of establishments. In the first instance, the PW Act is applicable to persons employed in a factory, railways and to persons employed in an industrial or other establishment. "Industrial or other establishment" is defined under the PW Act to include, inter alia, establishments which the appropriate government (here, State Government) may specify by notification. By way of this amendment, the Haryana Government has notified shops and commercial establishments covered within the Punjab Shops and Commercial Establishments Act, 1958 ("**Punjab S&E Act**") (in its application to the State of Haryana), within the definition of "industrial or other establishment" under the PW Act. This would mean that shops and commercial establishments in Haryana will now be covered under the PW Act, and in turn, be covered under the Industrial Employment (Standing Orders) Act, 1946.

More...
More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

INDIA
18 DEC
2018

Exemption under the Punjab S&E Act

The Punjab S&E Act is a State legislation applicable to persons employed in shops or commercial establishments in the State of Haryana and Punjab. The Haryana Government by way of a notification dated 18 December 2018, amended the Punjab S&E Act to create an exemption in its applicability to the State of Haryana. The employer of every establishment is required to get their establishment registered under the Punjab S&E Act and obtain a registration certificate. Prior to the exemption, the registration certificate had to be renewed every 3 years by 31st March. The notification now exempts shops and commercial establishments in Haryana from the requirement to get the registration certificates renewed.

More...

INDIA
29 JAN
2019

Digitized Filing of Annual Returns under Certain Central Rules

By way of several notifications dated 29 January 2019, the Central Government has amended the following Rules to require filing of annual returns in electronic form:

- Payment of Bonus Rules, 1975
- Payment of Wages (Mines) Rules, 1956
- Payment of Wages (Railways) Rules, 1938
- Payment of Wages (Air Transport Services) Rules, 1968
- Minimum Wages (Central) Rules, 1950
- Maternity Benefit (Mines and Circus) Rules, 1963
- Industrial Disputes (Central) Rules, 1957

Accordingly, employers are now required to upload electronic unified annual return on the Ministry of Labour and Employment's website on or before 1 February every year, with details relating to the previous year. This amendment is in line with the government's initiatives of digitizing compliances.

More...
More...
More...
More...
More...
More...
More...

INDIA
15 FEB
2019

Draft Amendment to the Employees State Insurance (Central) Rules, 1950 ("**ESI Rules**")

15 February 2019, the Central Government published the draft amendment to the ESI Rules. The proposed amendment seeks to decrease the rates of the employees' state insurance (**ESI**) contributions required to be made by both, the employer and the employees. Currently, employers are required to make contributions in respect of all employees earning monthly wages of INR 21,000 (approximately USD 300) or less, at the rate of 4.75% of such wages, whereas, covered employees are required to make contributions at the rate of 1.75% of their wages. However, if the proposed amendment is brought into effect, then the existing contribution rates will be decreased to 4% (employer-contribution) and 1% (employee-contribution) of an employee's wages. Thus, this will reduce the financial burden on both, the employers and employees. The draft amendment to the ESI Rules is now open for public comments up till 17 March 2019 (i.e., 30 days from the date of its publication). The comments would be considered by the Government before finalizing the amendment.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

INDIA
22 FEB 2019

The Punjab Labour Welfare Fund (Haryana Amendment) Bill, 2019 ("**Bill**")

On 22 February 2019, the Haryana Government published the Bill seeking to amend the Punjab Labour Welfare Fund Act, 1965 (in its application to the State of Haryana). The Bill proposes that the contribution of the employee to the labour welfare fund every month, be revised to 0.2% of his/her salary or wages (subject to a limit of INR 25 i.e. approximately USD 0.36) instead of a flat contribution of INR 10 (approximately USD 0.15). The employer would be required to contribute twice the amount contributed by the employee. Further, the revised limit is proposed to be indexed annually to the consumer price index beginning from first of January each year.

More...

INDIA
28 FEB 2019

The Regional Provident Fund Commissioner (II) West Bengal v. Vivekananda Vidyamandir and Ors. (Civil Appeal Nos: 6221 OF 2011]

Under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, employers are required to deposit 12% of an employee's 'basic wages', dearness allowance and retaining allowance towards provident fund ("**PF**"), and employees make an equal contribution through a payroll deduction.
For very long, there has been an ambiguity on the wage-components to be included while determining 'basic wages', and several petitions and appeals were pending before the Supreme Court to provide clarity on this issue.
The Apex Court jointly heard 5 appeals arising from various High Courts to decide this commonly-raised question of law. It has now laid to rest the long-standing controversy, by holding that the crucial test for inclusion of allowances as part of 'basic wages' is universality i.e. allowances which are uniformly, universally, necessarily and ordinarily paid to all employees in a concern would form part of 'basic wages', on which PF contributions should be calculated. In essence, the Supreme Court has upheld the principles laid out in the earlier case of *Bridge and Roof Co. (India) Ltd. v. Union of India* (1963) 3 SCR 978. *The Bridge and Roof* case had observed that all universal allowances should be treated as part of 'basic wages', and hence should be subject to PF contributions. Organisations should take immediate note of this ruling and carry out a scrutiny of their pay structure and PF contribution practices, especially for employees whose basic salary is below INR 15,000 (USD 220) at present and for employees classified as 'International Workers' (for whom PF contribution caps don't apply).

More...
More...

INDIA
14 MAR 2019

The Punjab Labour Welfare Fund (Haryana Amendment) Act, 2019 ("**Act**")

On 22 February 2019, the Haryana Government published the Punjab Labour Welfare Fund (Haryana Amendment) Bill, 2019 ("**Bill**") seeking to amend the Punjab Labour Welfare Fund Act, 1965 (in its application to the State of Haryana). The Bill was brought in to effect on 14 March 2019. As per the Act, employee's monthly contribution to the labour welfare fund is revised from INR 10 to 0.2% of his/her wages (subject to a maximum of INR 25 i.e. approximately USD 0.36). Employers are now required to make monthly contributions at twice the employee's contribution. Further, the revised limit must be indexed annually to the consumer price index beginning from first of January each year.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA

6 APR 2019

Registration under the Kerala Shops and Establishments Act 1960 ("**Kerala S&E Act**")

The Labour and Skills Department, Government of Kerala passed an order on 6 April 2019 ("**Order**") eliminating the existing system of renewal of registration under the Kerala S&E Act. As per the Order, the registration will be auto-renewed once the self-certification is submitted and fee is paid online. Prior to the Order, employers were required to get their registration certificates renewed after submitting an application as prescribed under the Kerala S&E Act. The intent is to simplify and rationalise existing rules in line with the Central Government's initiative of 'ease of doing business' and to make governance more efficient and effective.

More...

INDIA

1 MAY 2019

Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 ("**Gujarat S&E Act**")

The Gujarat S&E Act received the Governor's assent and was published in the official gazette on 7 March 2019. Subsequently, the State Government appointed 1 May 2019 as the date for which the Act comes into force, thereby repealing the Gujarat Shops and Establishments Act, 1948 ("**1948 Act**"). Some of the key highlights of the Gujarat S&E Act include:

- **Scope**: Unlike the 1948 Act which was applicable only in specified local areas, the Gujarat S&E Act applies to all shops and establishments in the State.
- **Substantive provisions do not apply to small establishments**: Establishments employing fewer than 10 workers now only need to notify the Facilitator of commencement of their business. Substantive provisions relating to working hours, leave, holidays, opening and closing hours, etc., do not apply to such small establishments, allowing for greater flexibility in their operations.
- **Applicability of the S&E Act limited to "workers"**: The term "employee" under the 1948 Act is replaced with the term "worker" and the definition itself has changed significantly. "Worker" under the Gujarat S&E Act is defined on the similar lines as the term "workman" under the Industrial Disputes Act, 1947.
- **One-time registration**: Under the Gujarat S&E Act, every establishment needs to complete the registration process only once. Unlike the 1948 Act, there is no requirement for renewal of registration. Establishments having valid and subsisting registrations under the 1948 Act will not be required to register under the Gujarat S&E Act until the existing registration expires or becomes due for renewal. Further, a certificate of registration issued under the Gujarat S&E Act shall remain in force from the date of issue till the change in ownership or nature of business of the establishment.
- **Increase in the overtime limit**: Under the Gujarat S&E Act, an employee can be required to work overtime for a maximum of 125 hours in a period of 3 months. This is a significant increase from the 1948 Act under which employees were permitted to work overtime for a maximum of 3 hours per week.
- **Obligation to provide crèche facilities**: Under the Gujarat S&E Act, crèche facilities with suitable rooms have to be provided in every establishment with 50 or more workers. A group of establishments can however provide common crèche facilities within a radius of 1 km with the approval of the Facilitator.
- **Weekly holiday and women working night shifts**: All establishments will have the ability to remain open on all 7 days of the week as long as every worker is given a weekly holiday. Further, all establishments will be able to employ women in night shifts with the approval of the designated authority, provided the authority is satisfied that suitable measures relating

Continued on Next Page

INDIA
1 MAY
2019

to shelter, rest-room, night creche, ladies toilet, adequate protection of dignity, honour and safety and transportation from shops/establishment to residence is ensured and after obtaining consent from the woman worker.

- **Compliances will be moved to electronic mode**: In line with the Central Government's initiatives regarding 'ease of doing business', the Gujarat S&E Act provides for registration and maintenance of registers/records electronically. Inspections will also be done based on a randomised web-generated inspection schedule and will not be at the complete discretion of the labour authorities.
- **Significant increase in fines**: Under the 1948 Act, the maximum penalty was a fine of INR 750 (approximately USD 11). Under the Gujarat S&E Act, however, fines go up to INR 50,000 (approximately USD 710). The Gujarat S&E Act also provides for imprisonment in certain cases. However, opportunity has also been given to employers to compound a first-time offence.

More...

INDIA
24 MAY
2019

Exemption under the Industrial Employment (Standing Orders) Act, 1946 ("SO Act")

The Government of Karnataka issued a notification on 24 May 2019 granting an exemption to IT/ ITES/ Start-ups/ Animation/ Gaming/ Computer Graphics/ Telecom/ BPO/ KPO and other knowledge-based industries from the applicability of the SO Act in Karnataka. The Government had earlier granted this exemption in 2014 which was applicable till January 2019. The extension has now been extended for a period of another five years from the date of its publication in the official gazette. This has not been published in the gazette yet.

The exemption will be granted to the above-mentioned industries subject to the following conditions:

- Constitute an internal complaints committee as per the Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013;
- Set up a grievance redressal committee which has an equal number of persons representing the employers and employees and which addresses all types of complaints/grievances of the employees in a time-bound manner;
- Intimate the jurisdictional Deputy Labour Commissioner and the Labour Commissioner in Karnataka of the cases in which disciplinary action (such as suspension, discharge, termination, etc.) were taken against the employees;
- Promptly and fully submit all information sought by the jurisdictional Deputy Labour Commissioner and the Labour Commissioner in Karnataka regarding the service conditions of the employees.

More...

INDIA
5 JUN
2019

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

On 5 June 2019, the Government of Tamil Nadu published a notification permitting all shops and establishments covered under the TN S&E Act to remain open 24x7 on all days of the year for a period of 3 years from the date of publication of this notification. This is, however, subject to the following conditions:

- All employees must be given one day holiday in a week on rotation basis.
- Employers are daily required to exhibit details of the employees who are on holiday/leave at a conspicuous place in the establishment.
- Wages (including overtime wages) must be credited to their savings bank account
- Employer must ensure that no employee is made to work for more than 8 hours on any day and 48 hours in any week and period of work including overtime shall not exceed 10.5 hours in any day and 57 hours in a week.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA
5 JUN
2019

- If employees are found working on any holiday or after normal working hours without proper indent of overtime, penal action can be initiated as per the TN S&E Act.
- Women employees cannot be made to work beyond 8.00 p.m. on any day, unless a written consent has been obtained from the employee and subject to providing adequate protection of her dignity, honour and safety.
- Women employees who work in shifts must be provided with transport facilities.
- Employers are required to provide the employees with restroom, washroom, safety lockers and other basic amenities.
- Employers employing woman employees are required to constitute an internal complaints committee against sexual harassment of women under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

The above conditions need to be complied with in addition to the provisions specified under the TN S&E Act and the Rules thereunder.

More...

INDIA
23 JUN
2019
Maharashtra

1 JUL
2019
Telangana

Additional Obligations on Employers under the Law on Prevention of Sexual Harassment

Under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, a primary obligation on employers is to formulate an internal committee ("**IC**") at each workplace having 10 or more employees. In order to ensure that all employers constitute an IC, the Ministry of Women and Child Development ("**MWCD**") had launched an online portal, SHe-Box in 2017. On this portal, victims of workplace sexual harassment can raise complaints, which would then be forwarded by the MWCD to the relevant employer. The MWCD authorities and the complainants also have the ability to monitor the progress/status of a complaint forwarded to the IC.

Further to this, the Department of Women and Child Development ("**DWCD**") in Telangana and Maharashtra issued orders imposing additional obligations on employers in the respective States. The DWCD in Telangana has setup an online portal (called as 'T-she Box'), and all employers in the State are required to register their ICs on the portal. The last date for registration was 15 July 2019 in Telangana – however, given that the web-link for registration is still valid and it is possible to comply with this requirement even at this stage, it is advisable for the companies to register their ICs as soon as they are constituted. To comply with this requirement, companies need to upload the order constituting the ICs (by visiting this link https://tshebox.tgwdcw.in/icc-registration), and also submit additional details – such as name and address of the establishment, contact details of the Human Resources personnel and the IC members, etc. Further, the order constituting the ICs will also need to be uploaded on the online portal.

In the South Mumbai district in Maharashtra, while there is no specific online portal, the relevant DWCD had issued a notice to all employers in the area to submit details regarding the constitution of their IC in a specific format on or before 20 July 2019.

Failure to comply with the above obligations in both locations could subject employers to a monetary fine of INR 50,000 (~ $750) in the first instance. For repeated offences, employers could be subject to twice the fine, and cancellation of their business license.

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA
1 JUL 2019

The Employees' State Insurance (Central) Amendment Rules, 2019 ("**ESI Amendment Rules**")

On 13 June 2019, the Central Government published the ESI Amendment Rules to amend the Employees' State Insurance (Central) Rules, 1950 ("**ESI Rules**"). This amendment reduces the rate of employees' state insurance ("**ESI**") contributions required to be made by both employers and employees. Prior to the amendment, the requirement under the ESI Rules was for contributions to be made in respect of all employees earning gross monthly wages of INR 21,000 (approximately US$300) or less, at the rate of 4.75% of such wages as the employer's contribution and 1.75% of their wages as the covered employees' contribution. The ESI Amendment Rules has decreased these contribution rates to 3.25% (employer contribution) and 0.75% (covered employee's contribution). The ESI Amendment Rules have been made effective since 1 July 2019.

More...

INDIA
9 JUL 2019

Draft Haryana Maternity Benefit (Amendment) Rules, 2019 ("**Draft Haryana Rules**")

By virtue of an amendment to the Maternity Benefit Act, 1961 ("**MB Act**"), establishments having 50 or more employees are required to set up crèche facilities for employees. In pursuance of the same, State Governments are required to frame and notify rules to set out the manner in which such facilities should be set up. Accordingly, the Haryana State Government published the Draft Haryana Rules inviting comments and suggestions from the general public in relation to the provision on crèche facilities on 9 July 2019. As per the Draft Haryana Rules, every establishment having 50 or more employees is required to have 1 crèche for every 30 children (below 6 years of age). The Draft Haryana Rules also lays down specific requirements with respect to location, infrastructure, staff in the facility, working hours, medical records of the children, milk and refreshment facilities, outdoor play facilities and other facilities such as first aid, clean clothes, soap and oil. The Department of Labour in the Haryana Government invited comments on the proposed amendments in the Draft Haryana Rules for a period of 45 days from the date of its publication i.e. till 24 August 2019.

More...

INDIA
27 JUL 2019

Exemption under the Telangana Shops and Establishments Act, 1988

The Telangana Government issued a notification on 25 July 2019 (published in the gazette on 27 July 2019) exempting the IT/ITES establishments in Telangana from certain provisions under the Telangana Shops and Establishments Act, 1988, i.e. the provisions on opening and closing hours, daily and weekly hours of work, special provision for young persons, special provision for women and holidays (other than leaves). This exemption is granted for a period of 5 years with effect from 30 May 2018, subject to several conditions. Some of these conditions are that employees cannot be required to work overtime for over 48 hours per week, a weekly holiday must be given to the employees, young persons and women can be engaged at night only if adequate security and transportation is provided, etc. If these conditions are violated, the Telangana Government reserves the right revoke the exemption granted at any time without any prior notice. Prior to this exemption, a similar exemption was in force for 5 years as per a notification from Telangana Government dated 21 June 2013.

More...

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA
8 AUG 2019

Code on Wages, 2019 ("**Code**")

Wording: The Ministry of Labour and Employment drafted the Code with the intent to consolidate and replace the following four laws that are in force currently i.e. the Payment of Wages Act, 1936 ("**PW Act**"), the Minimum Wages Act, 1948 ("**MW Act**"), the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976. The Code has already been passed by the Lok Sabha (lower house) and the Rajya Sabha (upper house). Further, it has also received the Presidential assent on 8 August 2019, and will come into effect on a date notified by the Central Government. The significant changes introduced by the Code are as follows:

- **Definition of "wages"**: The Code provides for a uniform definition of wages (as opposed to the current laws where the definition of the term 'wages' has differed across employment laws).
- **Remarked introduction of Floor Wage ("Floor Wage")**: The Code has done away with the concept of "scheduled employments" that existed under the MW Act. Instead, it has introduced an obligation on the Central Government to fix a Floor Wage, by considering the minimum standard of living of workers. Additionally, the Central Government has additional powers to fix different Floor Wages for different geographical areas, and the State Governments can fix minimum rate of wages that is at least equal to or higher than the Floor Wage set by the Central Government.
- **Enlarged coverage of payment of wages**: The Code neither restricts its applicability to a specific set of industries nor to employees earning below a particular threshold. Earlier, the PW Act restricted the applicability to specific establishments and to employees earning less than INR 24,000 only.
- **Penal provisions** - The penalties under the Code for first time offences relating to non-payment of dues to the employees have increased to INR 50,000 (~ $700). The penalties currently range between INR 500 to INR 20,000 for the first instance (~ $6 to $275). The Code also allows for compounding of offenses which are punishable with a fine (or with imprisonment and a fine) under that Code.

More...

INDIA
8 AUG 2019

Karnataka Maternity Benefit (Amendment) Rules, 2019 ("**MB Amendment Rules**")

By virtue of an amendment to the Maternity Benefit Act, 1961 ("**MB Act**"), establishments having 50 or more employees are required to set up crèche facilities for employees. In pursuance of the same, State Governments are required to frame and notify rules to set out the manner in which such facilities should be set up. The Karnataka State Government notified the MB Amendment Rules, effective 8 August 2019, to this effect. A brief overview of the requirements under the MB Amendment Rules is as follows:

- Every establishment having 50 or more employees is required to have 1 crèche for every 30 children (below 6 years of age) within 500 metres of the entrance of the establishment.
- The facility must be provided to children of all employees, irrespective of the type and nature of employment, such as permanent, temporary, regular, daily wage, contract, etc.
- Specific requirements in relation to the construction and maintenance of the creche (such as, the height of the walls and rooms, area (in sq. ft.) per child, lighting and ventilation, good sanitary conditions, safe and potable drinking water, supply of milk and refreshments uniforms, clean towels, soap, washroom, water, first aid kit, mattresses, sheets, pillows, toys, sitting accommodation for parents, outdoor play areas, etc).

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA 8 AUG 2019

- Each category of staff (i.e. creche-in-charge, creche attendant and ayah) must have received certain basic training.
- Children to staff ratio is set at 10:1 for children below the age of 3, and 15:1 for children above the age of 3.
- Crèche is required to be kept open at all times.
- Regular medical examination of children.

INDIA 23 AUG 2019

Draft Amendment to the Employees Provident Funds and Miscellaneous Provisions Act, 1952

The Ministry of Labour and Employment issued a proposal to amend the Employees Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") on 23 August 2019 inviting public comments till 22 September 2019. Some of the significant changes being proposed include, amendment to the definition of wages in order to bring it in line with the Code on Wages, 2019, flexibility with respect to employees' contribution (depending on various factors like age, gender, income, etc.), the option for the covered employees to opt for the National Pension Scheme in lieu of the benefits provided under the EPF Act, limitation period of 5 years for initiation of inquiries, a time period of 2 years for conclusion of inquiry, enhanced penalties, etc.

More...

INDIA 25 SEP 2019

Apprenticeship (Amendment) Rules, 2019

On 25 September 2019, the Central Government amended the Apprenticeship Rules, 1992 ("**Apprenticeship Rules**") to amend, among other things, the applicability of the Apprentices Act, 1961 (**"Apprentices Act**"). The Apprentices Act is a Central legislation enacted to provide for the regulation and control of training of apprentices in the industries specified by the Central Government. The apprentices covered under this legislation undergo training for a specific duration and must be registered under the Apprentices Act. To this effect, the Apprenticeship Rules have also been formulated under the Apprentices Act.

By virtue of this amendment, employers having 4 or more workers are eligible to engage apprentices and it is obligatory for establishments having 30 or more workers to engage apprentices. Further, each establishment is required to engage apprentices in a band of 2.5% to 15% of the total strength of the establishment (including contract workers), subject to a minimum of 5% of the total to be reserved for fresher apprentices and skill certificate holder apprentices. For ease of reference, 'fresher apprentice' means a non-graduate apprentice who has not undergone any institutional training or skill training, before taking up on-the-job training or practical training under the Apprentices Act, and 'skill certificate holder' means a person, who holds a skill certificate for training of less than one year issued by an awarding body recognized under National Skills Qualifications Framework or any other authority recognized by the Central Government in this regard. The category of fresh apprentices and skill certificate holder apprentices is also introduced by way of this amendment. Apart from this, the amendment has also changed the provisions around payment of stipend to apprentices, working hours, etc.

Prior to the amendment, employers having 6 or more workers were eligible to engage apprentices and such engagement was not obligatory for establishments having less than 40 workers. Further, establishments were required to engage apprentices in a band of 2.5% to 10% of the total strength of the establishment (including contract workers).

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDIA
31 OCT
2019

Applicability of Employment Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**")

On 31 October 2019, the Central Government issued a notification extending the provisions of the EPF Act. As per this notification, the EPF Act is now applicable to establishments (employing 10 or more persons) covered under the provisions of the erstwhile Jammu and Kashmir Employees' Provident Funds and Miscellaneous Provisions Act, 1961, as it stood before its repeal by the Jammu and Kashmir Reorganization Act, 2019. Prior to this amendment, the EPF Act was not applicable to the state of Jammu and Kashmir. The amendment will take effect from 1 January 2020.

More...

INDIA
1 NOV
2019

Preliminary Draft Rules under the Code on Wages, 2019

The Central Government on 1 November 2019, circulated the preliminary draft rules under the Code on Wages, 2019 (**Draft Rules**). The Draft Rules provide for the manner of calculating the minimum rate of wages, working hours, weekly holidays, manner of fixing Floor Wage, constitution of central advisory board, procedure for payment of dues and claims, procedure for deduction from wages. The Central Government invited comments and suggestions from the public on the Draft Rules for a period of 1 month from the date of its publication i.e. till 1 December 2019. These Draft Rules are applicable only to those establishments that are carried on by or under the authority of the Central Government.

The release of draft rules by the State Government(s) is still awaited, given that the State Government(s) will be the appropriate government for private establishments.

More...

INDIA
20 NOV
2019

Women allowed to work in nights shifts in all factories in Karnataka

The Karnataka Government published a notification on 20 November 2019, allowing women workers at factories to work during the night shifts i.e. between 7 PM to 6 AM. Under the Factories Act, 1948 ("Factories Act"), women workers are not allowed to work in any factory in the night shifts. Recently, the Madras High Court ruled that this provision under the Factories Act is unconstitutional as violative of the fundamental rights of the constitution. Pursuant to this ruling, the Karnataka Government published this notification.

This permission to work in the night shift is, however, subject to a few conditions. Some of the conditions include:

- Written consent of women workers needs to be obtained prior to engaging them in night shifts at a factory.
- The employer has the duty to prevent or deter the commission of acts of sexual harassment and to provide the procedures for resolution, statement or prosecutions of acts of sexual harassment. For this, an employer is supposed to take measures such as, express prohibition of sexual harassment; frame rules relating to conduct and discipline prohibiting sexual harassment and provide for penalties; create awareness regarding the rights of women workers; encourage them to raise complaints and implement complaint redressals mechanism at the factories to deal with complaints in a time-bound manner; provide appropriate working conditions in respect of work, leisure, health and hygiene to ensure there is no hostile working environment towards women; and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

INDIA
20 NOV
2019

- The employer is required to provide proper lighting, separate canteen facility for female employees, restrooms, sufficient women security, canteen, appropriate medical facilities, and CCTV coverage in and around the facility. The employer must also provide transportation facility to women workers.
- At least 2 female wardens must be appointed who would work as special welfare assistants.
- Employer is required to send a report fortnightly to the Inspector of factories about the details of the employees engaged during night shift and shall also send a report to the Inspector as well as the local police station when there is an untoward incident.

There is no requirement to obtain a specific approval from authorities to employ women workers in night shifts at factories in Karnataka. Having said that, the Chief Inspector can withdraw the permission issued to employers under this notification, if there is a breach of any prescribed conditions. Prior to this notification, factory owners had to apply for an exemption to employ women workers till 10 PM in factories.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

INDONESIA
29 JAN
2019

Occupational Diseases

Presidential Regulation No. 7 of 2019 regarding Occupational Diseases was issued on 25 January 2019 to implement provisions of Work Accident Social Security under the Social Security Administrator (*Badan Penyelenggara Jaminan Sosial* or "BPJS") for Employment.

This new presidential regulation clarifies the definition of occupational disease, the scope of coverage, and the types of diseases that will be covered under Work Accident Social Security.

Presidential Regulation No. 7 of 2019 regarding Occupational Diseases replaces Presidential Regulation No. 22 of 1993 on the same subject.

INDONESIA
26 APR
2019

Minister of Manpower Regulation No. 4 of 2019 dated 26 April 2019 regarding the Amendment of Minister of Manpower Regulation No. 18 of 2017 regarding Online Procedures for Submission of Mandatory Manpower Reports by Companies (MOM No. 4).

On November 6, 2017 the Ministry of Manpower issued Regulation No. 18, which detailed the procedures for companies to submit a mandatory manpower report (WLK) through the ministry's online system. Under the 2017 regulation, all companies were required to submit an WLK once a year.

However, following the integration of business licensing in Indonesia under the Online Single Submission (OSS) system, MOM No. 4 stipulates that all first time reporters must submit their data through the OSS system.

INDONESIA
1 AUG
2019

Amendment to Outsourcing Regulation

Minister of Manpower Regulation No. 11 Year 2019 dated August 1, 2019 regarding the Second Amendment to Minister of Manpower and Transmigration Regulation No. 19 of 2012 regarding the Requirements for the Partial Delegation of Work to Other Companies ("**MOM Reg 11**") introduces several changes and provisions related to delegating work to other companies.

In accordance with the purpose to streamline and ease business licensing services, as provided for in the preamble to Government Regulation No. 24 of 2018 regarding Electronically Integrated Business Licensing Services ("**GR 24/2018**"), Article 1 point 7(a) and (b) of MOM Reg 11 appoints the agency managing the Online Single Submission (OSS) system to issue business licenses for and on behalf of the MOM, and also to organize government matters in the field of investment. Consequently, the OSS system is responsible for issuing Labor Supplier Business Permits.

INDONESIA
27 AUG
2019

New Rules on Positions for Expatriate Workers

Minister of Manpower Regulation No. 228 Year 2019 dated August 27, 2019 regarding Certain Positions Open for Expatriates ("**MOM Reg 228**") details those positions that expatriate workers can hold. Highlights of MOM Reg 228 include the possibility of having an expatriate Commissioner or Director (non-HR) in all 18 business sectors listed in the decree, and the possibility that the MOM will approve positions that are not listed in the decree. Another important point is that the MOM will evaluate the list of positions open to expatriates at least every two years, or whenever necessary. Work Permits (*Izin Mempekerjakan Tenaga Kerja Asing*) issued before the issuance of this new decree will remain valid until their expiration.

MOM Reg 228 revokes 19 MOM regulations on positions open to expatriates in 19 different business sectors and any MOM regulation that provides any positive list for expatriate manpower positions.

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

INDONESIA
22 OCT
2019

Handling Compensation Funds for Employing Foreign Workers

The Minister of Manpower ("MOM") has issued MOM Regulation No. 20 Year 2019 dated October 22, 2019 regarding the Administration of Non-Tax State Revenue Originating from the Compensation Fund for Employing Foreign Workers ("MOM No. 20"). This regulation provides details on how to make payments into and withdrawals from the Compensation Fund for the Use of Foreign Workers (*Dana Kompensasi Penggunaan Tenaga Kerja Asing* or "DKPTKA") that employers are required to pay into as compensation for employing foreign workers. As previously regulated, any employer that employs foreign workers must pay USD 100 per month for each foreign worker into the DKPTKA.

MOM No. 20 revokes the following regulations:

1. Minister of Manpower Regulation No. PER.282/MEN/1998 regarding Mechanisms for the Deposit and Administration of Non-Tax Revenue Originating from the Expertise and Skills Development Fund;
2. Minister of Manpower Regulation No. KEP.365/M/SJ/1999 regarding Technical Guidelines for the Implementation of the Mechanisms for the Deposit and Administration of Non-Tax Revenue Originating from the Expertise and Skills Development Fund; and
3. Minister of Manpower and Transmigration Regulation No. KEP-148/MEN/2001 regarding the Utilization and Development of the Expertise and Skills of Indonesian Workers.

LOOKING FORWARD

INDONESIA
2020

Public Holidays for 2020

A new regulation stipulates the public holidays and joint leave days for 2020. The holiday calendar for the coming year is found in the Joint Decree of the Minister of Religious Affairs No. 728 Year 2019, Minister of Manpower No. 213 Year 2019, and State Minister for Administrative Reform No. 1 Year 2019 regarding Public Holidays and Collective Leave for 2020.

There are 15 public holidays in 2020, as follows:

New Year's Day .... January 1
Chinese New Year .... January 25
Ascension Day of Prophet Muhammad SAW .... March 22
Hindu Day of Silence (Nyepi) .... March 25
Good Friday .... April 10
International Labor Day .... May 1
Buddha Day (Hari Raya Waisak) .... May 7
Ascension Day of Jesus Christ .... May 21
Idul Fitri .... May 24 and 25, plus 3-day bridge holiday
Pancasila Day .... June 1
Idul Adha .... July 31
Independence Day .... August 17
Islamic New Year .... August 20
Birth of Prophet Muhammad SAW .... October 29
Christmas .... December 25, plus 1-day bridge-holiday

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INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

JAPAN
1 APR
2019

New regulations regarding long working hours under Work Style Reform Act formally came into force on 1 April 2019

Pursuant to so called Work Style Reform Act promulgated on July 6, 2018, some new regulations regarding long working hours and realization of varied and flexible work styles came into force as of 1 April 2019.

Under these new regulations, unless an exception applies, overtime work may not exceed 45 hours a month and 360 hours a year. Even if an exception applies, total of overtime work and work on holidays must be less than 100 hours a month and must not exceed an average of 80 hours a month during any of 2 to 6 month period, and total of overtime work per year must not exceed 720 hours.

Further, an employer must ensure that an employee who is eligible to use 10 days or more of annual paid leave pursuant to the Labor Standards Act actually uses at least five days each year.

More...

JAPAN
5 JUN
2019

Employers will be statutorily required to establish appropriate measures to prevent workplace bullying

Workplace bullying is one of the recent hot issues in Japan. In this regard, on 5 June 2019, the Act on General Promotion of Labor Policy (*rodoshisaku sogo suishin ho*) was amended. The exact enforcement date of the amendment has not been determined, but the amendment will be enforced to large companies before June 2020 and small and medium-sized companies before June 2022. After the amendment is enforced, employers will be statutorily required to establish appropriate measures to prevent workplace bullying. The Ministry of Health, Labor, and Welfare plans to issue guidelines which includes matters such as the definition of workplace bullying and some guidance on what measures employers actually need to establish.

There are no significant policy, legal or case developments within the employment space during 2019 Q4.

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

MALAYSIA
1 JAN 2019

Minimum Wages Order (Amendment) 2018

The **Minimum Wages Order (Amendment) 2018** came into effect on Jan 1, 2019. With effect from 1 January 2019, the minimum wage for employees was set at RM1,100 per month or at RM5.29 per hour for workers paid at the hourly rate.

More...
More...

MALAYSIA
1 JAN 2019

Employees Provident Fund (Amendment of Third Schedule) Order 2018

With effect from 1st January 2019, EPF contributions for senior citizens (60 years old and above) , the rate of monthly contribution by the employer shall be calculated at the rate of 4%. The employees do not need to pay contributions.

More...

MALAYSIA
1 JAN 2019

Foreign Workers covered under SOCSO

With the gazetting of **Employees' Social Security (Exemption Of Foreign Workers) (Revocation) Notification 2018**, with effect from 1 January 2019, foreign workers in Malaysia shall be entitled to the protection under the Employee's Social Security (SOCSO). All employers are required to make statutory contributions under Social Security. However, there is a one year cooling off period. Previously, foreign workers are typically covered under the under the Foreign Worker Compensation Scheme (FWCS).

Foreign workers who are still covered under the FWCS shall be covered until the expiry of the scheme. Pursuant thereafter, the employer shall have to register and contribute for the said foreign worker's SOCSO contributions.

More...

MALAYSIA
27 FEB 2019

Possibility of Sectoral-based minimum wage

The Malaysian Minister of Human Resource has proposed that a sectoral based minimum wage may be implemented in the future. As it stands, the minimum wage for employees in Malaysia is RM1,100 based on the Minimum Wage Order 2018. However, the jump in minimum wages is deemed steep by certain employers which led to increased business operations. The Human Resource would thus the National Wages Consultative Council Resources, may make recommendations to the government on the coverage of the recommended minimum wage by business sector, type of employment and regional areas.

More...

MALAYSIA
5 AUG 2019

Implementing legislation to protect domestic workers

The Malaysian government is considering to enact a specific legislation in Malaysia to govern domestic workers in Malaysia. Amongst the salient provisions are legislation in respect of proper working hours, holidays, salaries as well as insurance.

More...

MALAYSIA
2 SEP 2019

Raising the retirement age

The Malaysian Human Resources Minister said that the government of Malaysia will consider the suggestion to increase the minimum retirement age in Malaysia. As it stands, the compulsory minimum retirement age in Malaysia is 60 years old. The Malaysian Trades Union Congress (MTUC) recently suggested the need to raise the mandatory retirement age to 65 years old.

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

MALAYSIA
7 OCT
2019

A major shakeup to the Industrial Relations Act 1967

The Malaysian House of Representatives has tabled Industrial Relations (Amendment) Bill 2019. This Bill seeks to introduce a wide range of changes to the Industrial Relations landscape, including, automatic referrals to the Industrial Court for adjudication as well as the avenue to appeal against the decision of the Malaysian Industrial Court. The Bill was then passed on 9 October 2019. The Bill will be debated before the State Assembly to discuss and/or propose any further amendments, if any.

More...

MALAYSIA
19 DEC
2019

New implementation of Minimum Wages

The Malaysian Government has mandated that a new minimum wage will be implemented with effect from 1 January 2020, limited to 57 cities and towns in Malaysia. As for the areas which are not identified in the list, the minimum monthly wage of RM1,100 remains. The implementation shall be based on the location of their workplace.

More...

CONTRIBUTED BY: Shearn Delamore &Co.

NEW ZEALAND
7 MAR 2019

Employment Relations Amendment Bill

This Bill was passed on 5 December 2018 and returns many provisions of the Employment Relations Act to the pre-2011 position. The general impact of the Bill is the bolstering of union protections and powers.

A number of changes came into effect on 12 December 2018. These changes include:

- Union representatives are now able to enter workplaces without consent, provided employees are covered under, or bargaining towards, a collective agreement. Union representatives are still obligated to follow health and safety /security measures, as well as exercising access rights reasonably. Consent is still required where no collective bargaining exists;
- An employer can no longer make partial deductions in response to partial strikes;
- An employer can no longer opt out of multi-employer collective bargaining. Employers must have a genuine reason based on reasonable grounds for not concluding a collective agreement;
- Reinstatement has been restored as the primary remedy for unjustifiable dismissals;
- Unions can initiate collective bargaining 20 days ahead of an employer;
- The extension of protections against discrimination on the grounds of union membership status.

A number of changes will come into effect on 6 May 2019. These changes include:

- Limiting the use of 90-day trial periods to employers with fewer than 20 employees;
- The reintroduction of greater prescription for rest and meal breaks. For example, an eight hour working day must include two 10-minute rest breaks and one 30-minute meal break.
- The restoration of the duty to conclude bargaining and the 30-day rule.
- Employers must provide new employees with an approved active choice form within the first ten days of employment;
- Where requested, employers must pass on information about the role and function of union to prospective employees;
- Pay rates must be included in the collective agreement.
- Union delegates are entitled to reasonable paid time to represent employees.

Simpson Grierson's coverage

NEW ZEALAND
7 MAR 2019

Employment Relations (Triangular Employment) Amendment Bill

A triangular employment arrangement involves a person being employed by one employer, but working under the control and direction of another business or organization. The purpose of this Bill is to ensure that employees in triangular employment arrangements have the right to coverage of a collective agreement, and are provided with a framework to raise a personal grievance.

The Select Committee report was released 17 December 2018. The Select Committee suggested removing the collective agreement provisions due to the potential difficulties faced by firms who may be required to manage multiple collective agreements. The report also suggested a framework that would facilitate joining the controlling third party to the personal grievance proceedings. The Government is currently considering the Select Committee Report.

Simpson Grierson's coverage

NEW ZEALAND 7 MAR 2019

Domestic Violence – Victims' Protection Bill

The Bill entitles employees affected by domestic violence to up to 10 days of leave per year. Employees will also be able to request a short term variation to their working arrangements, to which the employer must respond urgently and within 10 days.

This bill received the Royal Assent on 30 July 2018 and will come into force on 1 April 2019.

Recent coverage

NEW ZEALAND 7 MAR 2019

Privacy Bill

The Bill intends to replace the Privacy Act 1993 and bring New Zealand's privacy law in line with recent international developments and reforms. Key changes include:

- Mandatory reporting of privacy breaches;
- New ways to enforce information privacy principles;
- Stronger powers for the Privacy Commissioner;
- New offences and increased fines.

The Select Committee recently reported back the Privacy Bill, with some significant recommendations. These recommendations include:

- Clarification on the mandatory data breach reporting regime: The introduction of a mandatory data breach reporting regime is endorsed, but a number of amendments to it have been proposed. Most significantly, data breaches will now only be notifiable to the Commissioner and affected individuals if the breach has caused, or is likely to cause, "serious harm".
- Privacy Act extended to apply to activities of a NZ agency offshore: The Privacy Act will apply to all actions taken by a New Zealand agency, whether inside or outside New Zealand. It will also apply to all personal information collected or held by a New Zealand agency, regardless of where the information is collected or held, and where the individual concerned is located.
- Privacy Act extended to apply to offshore agencies: A significant proposed change is to expressly extend the Privacy Act to apply to agencies located offshore, so long as that agency is "carrying on business in New Zealand".
- Further strengthening to cross-border data flow protection: A new information privacy principle has been added for the off-shoring of personal information. If an agency wants to disclose personal information to an overseas person, it will need to rely on an applicable exemption.

Follow the Bill's coverage

NEW ZEALAND 7 MAR 2019

Equal Pay Amendment Bill

The Bill allows workers to make a pay equity claim within New Zealand's existing bargaining framework, and accelerate the process for progressing claims.

The Bill is currently at the Select Committee stage. The Select Committee report is due to be released on 16 April 2019.

Recent coverage

NEW ZEALAND 7 MAR 2019

Holidays Act Review

In May 2018, the Government established a Holidays Act Working Group to carry out a full review of the Holidays Act, focusing on the provision and payment of holiday and leave entitlement. Historic underpayments will not be considered. The Group is due to report back in May 2019.

Recent coverage

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

NEW ZEALAND

7 MAR

2019

Pay Equity Joint Working Group

A Fair Pay Agreement Working Group was established in June 2018 to advise on the establishment of a sector-level bargaining system. This would allow employers and unions to develop "fair pay agreements" that set minimum terms and conditions for workers in an entire industry. The Working Group recommendations were released publicly on January 31 2019. These recommendations included a compulsory system by default (with no opt-outs), and a low threshold whereby 10% of workers in an industry (or 1000 total, whichever number is lower) need to request a fair pay agreement in order to trigger bargaining.

Working Group's report

NEW ZEALAND

31 MAY

2019

Employment Relations Bill

This Bill was passed on 5 December 2018 and returns many provisions of the Employment Relations Act to the pre-2011 position. The general impact of the Bill is the bolstering of union protections and powers.

A number of changes came into effect on 6 May 2019. These changes include:

- Limiting the use of 90-day trial periods to employers with fewer than 20 employees;
- The reintroduction of greater prescription for rest and meal breaks. For example, an eight hour working day must include two 10-minute rest breaks and one 30-minute meal break;
- The restoration of the duty to conclude bargaining and the 30-day rule;
- Employers must provide new employees with an approved active choice form within the first ten days of employment;
- Where requested, employers must pass on information about the role and function of union to prospective employees;
- Pay rates must be included in the collective agreement; and
- Union delegates are entitled to reasonable paid time to represent employees.

From 12 June 2019, an employee's union membership will be added as a ground of discrimination. Employees will be able to raise this ground of discrimination within 18 months of the action complained of. This is an extension to the current 12 month timeframe.

Simpson Grierson's coverage

NEW ZEALAND

31 MAY

2019

Equal Pay Amendment Bill

The Bill allows workers to make a pay equity claim within New Zealand's existing bargaining framework, and accelerate the process for progressing claims.

The Select Committee recently reported back on the Equal Pay Amendment Bill, with some significant recommendations. These recommendations include:

- Prohibiting employers from differentiating between the remuneration rates of employees, on the basis of sex.
- Clarifying that an employee would only be barred from pursuing a claim under the Equal Pay Act or Human Rights Act if they had applied to the Employment Relations Authority for a resolution of a personal grievance. As introduced, the Bill barred claimants from the other legal avenues if they had raised a personal grievance under the Employment Relations Act.
- Inserting a definition for the threshold "predominantly performed by female employees". The Committee recommended inserting a new section to clarify this means work performed by a workforce of approximately 60% women.
- Clarifying that an employer must offer all of the terms of settlement (including back pay) to the employees who qualify for them, if they wish to bar future pay equity claims by those employees.

Coverage

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

NEW ZEALAND
31 MAY 2019

Domestic Violence – Victims' Protection Act

The Act came into force on 1 April 2019. Employees affected by domestic violence are now entitled to up to 10 days of paid leave per year. Employees are now able to request a short term variation to their working arrangements, to which their employer must respond urgently within 10 days.

References to 'Domestic Violence Leave' will change to 'Family Violence Leave' from 1 July 2019 to reflect the repeal of the Domestic Violence Act 1995 and the introduction of the Family Violence Act 2018.

Recent coverage

NEW ZEALAND
31 MAY 2019

Employment Relations (Triangular Employment) Amendment Bill

A triangular employment arrangement involves a person being employed by one employer, but working under the control and direction of another business or organization. The purpose of this Bill is to ensure that employees in triangular employment arrangements have the right to coverage of a collective agreement, and are provided with a framework to raise a personal grievance.

The Bill passed its second reading in early April 2019. The Government responded to the Select Committee's recommendations and:

- Adopted the changes to the key definitions.
- Removed the provisions of the Bill that required workers to be bound by the same collective agreement as the employees of the controlling third party
- Adopted a framework making it easier for an employee, employer and the Employment Relations Authority or Court to join the controlling third party to personal grievance proceedings.

Track the progress of the Bill

NEW ZEALAND
31 MAY 2019

Postal Workers Union of Aotearoa Inc v New Zealand Post Limited

The Employment Court recently held that delivery agents were entitled to refuse to perform work where an availability clause failed to provide reasonable compensation for making themselves available for work.

The Court held that for availability provisions to be enforceable, reasonable compensation has to be provided. Where remuneration is to incorporate reasonable compensation for availability, an agreement between employer and employee to this effect is required. In this case, there was no evidence of any such agreement, and therefore the availability provision was unenforceable.

Employers will need to be aware of any availability provisions in employee's contracts and ensure that reasonable compensation is provided to the employee.

Copy of the decision

NEW ZEALAND
31 MAY 2019

Jacks Hardware and Timber Limited v First Union Incorporated

The Employment Court recently upheld the Employment Relations Authority's determination to fix the terms of a collective agreement where the parties were unable to reach an agreement despite five years of bargaining.

The Court found that all the processes provided by the Act to assist the Union and Jacks Hardware in negotiating, and settling a collective agreement, were used unsuccessfully. It was therefore appropriate to fix the terms of the collective agreement in all the circumstances. This is the first time that the Court has approved use of this statutory power to override the parties' contractual freedom to define their own bargain in collective negotiations.

Simpson Grierson's coverage
Copy of the decision

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

NEW ZEALAND
13 JUN 2019

Government responds to recommendations of Film Industry Working Group

Workplace Relations and Safety Minister, Iain Lees-Galloway, has announced the Government will restore collective bargaining rights for screen sector workers, adopting a model put forward by the Film Industry Working Group. Legislation is expected to be introduced later in 2019 with changes expected to become law in mid-2020.

Minister Lees-Galloway's press release

NEW ZEALAND
13 JUN 2019

Government responds to recommendations of Film Industry Working Group

Workplace Relations and Safety Minister, Iain Lees-Galloway, has announced the Government will restore collective bargaining rights for screen sector workers, adopting a model put forward by the Film Industry Working Group. Legislation is expected to be introduced later in 2019 with changes expected to become law in mid-2020.

Minister Lees-Galloway's press release

NEW ZEALAND
27 JUN 2019

Employment Relations (Triangular Employment) Amendment Act 2019

The Act was passed on 27 June 2019 and will come into force 12 months' after this date (or earlier if the Governor General appoints another date). The Act's purpose is to introduce a new process to allow an employee working for a controlling third party to raise a personal grievance against that party as though it was their employer.

Coverage

NEW ZEALAND
26 JUL 2019

Tourism Holdings Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment [2019] NZEmpC 87

The case was in relation to how to treat tour bus drivers' commissions when calculating annual holiday pay once an entitlement to a paid holiday has arisen. The Employment Court held that as the commissions were earned over varying intervals of time, commission payments could not be considered to be the type of regular payment the Holidays Act 2003 contemplated being included in an 'Ordinary weekly pay' calculation.

A copy of the decision

NEW ZEALAND
7 AUG 2019

Privacy Bill

The purpose of the Bill is to repeal and replace the Privacy Act 1993, as recommended by the Law Commission's 2011 review of the Act, and bring New Zealand's privacy law in line with recent international developments and reforms. On 13 March 2019, the Select Committee reported back on the Bill endorsing many of the proposed reforms but also making some key changes. These included:

- Clarification on the mandatory data breach reporting requirements;
- Extending the Privacy Act to apply to activities of a New Zealand agency offshore;
- Clarifying responsibilities for Cloud Service Provider Actions; and
- Further strengthening to cross-border data flow protection.

The Bill passed its second reading on 7 August 2019. The Bill is expected to pass in late 2019 with a start date of 1 March 2020.

Follow the Bill's progress

LOOKING BACK

NEW ZEALAND
19 AUG 2019

GD (Tauranga) Limited v Price [2019] NZEmpC 101

Wording: This case was in relation to whether relevant daily pay (RDP) or average daily pay (ADP) was the correct remuneration when employees took public holidays, alternative holidays, sick leave and bereavement leave (other leave).

The Employment Court found that if RDP was able to be calculated, the employer was permitted to use that method of calculation, even if the daily pay varied within the particular pay period. Applying the Supreme Court's decision in *New Zealand Post v Postal Workers Union of Aotearoa Inc*, and examining Parliamentary materials, the Employment Court found that the statutory scheme intended to provide the employer with discretion to pay RDP, as long as the employer was in a position to calculate RDP.

A copy of the decision

NEW ZEALAND
17 OCT 2019

Ministry of Business, Innovation and Employment (MBIE) releases Discussion Paper on Fair Pay Agreements System

MBIE released a Discussion Paper in October in relation to the proposed introduction of a Fair Pay Agreements System in New Zealand. The Discussion Paper focussed on issues regarding initiation, coverage, bargaining, dispute resolution, anti-competitive behaviour and how to conclude a Fair Pay Agreement. Submissions closed on 27 November 2019.

Find a copy of the Discussion Paper

NEW ZEALAND
17 OCT 2019

MBIE releases Consultation document on temporary migrant worker exploitation

MBIE released a Consultation Paper in October in relation to addressing the exploitation of temporary migrant workers. 10 proposals were suggested including introducing a labour hire licensing scheme providing certain protections for workers, establishing an MBIE dedicated migrant exploitation 0800 phone line and online reporting, and establishing new immigration offences for employer behaviour that contributes to exploitation and vulnerability. Submissions closed on 27 November 2019.

The Minister is due to report back to Cabinet in early 2020 on the results of the consultation process and with final proposals for change.

Find a copy of the Consultation Paper

NEW ZEALAND
19 NOV 2019

A Labour Inspector of the Ministry of Business, Innovation and Employment v Tourism Holdings Limited [2019] NZCA 569

The case was in relation to how to treat tour bus drivers' commissions when calculating annual holiday pay once an entitlement to a paid holiday has arisen. On appeal, application for leave to appeal was granted and the Court of Appeal held the approved questions of law were:

- What is the meaning of "not a regular part of the employee's pay" in s 8(1)(c)(i) of the Holidays Act 2003 for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?
- If productivity or incentive-based payments are a regular part of the employee's pay, do those payments have to be "pay the employee receives under his or her employment agreement for an ordinary working week" for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

Find a copy of the decision

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

NEW ZEALAND

26 NOV

2019

Ministry of Business, Innovation and Employment releases Discussion document on protections for contractors

MBIE released a Discussion document in November in relation to the issues facing vulnerable contractors in New Zealand, suggesting 11 possible options for change. Some of these options included giving Labour Inspectors the ability to decide workers' employment status; putting the burden of proving a worker is a contractor on firms; defining some occupations of workers as employees under New Zealand law; and extending the right to bargain collectively to some contractors.

Submissions on the Discussion document are due on 14 February 2020.

Find a copy of the Discussion document

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

PHILIPPINES
5 JAN 2019

REPUBLIC ACT No. 11165 also known as the "Telecommuting Act"

The Act institutionalizes 'Telecommuting' as an alternative work arrangement for employees in the private sector. Under the Act, *Telecommuting* refers to a **voluntary** arrangement between the employer and the employee in the private sector allowing the employees to work from an alternative workplace, eg., from home, with the use of telecommunication and/or computer technologies.

More...

PHILIPPINES
22 FEB 2019

REPUBLIC ACT No. 11199 also known as "The Social Security Act of 2018"

The Act rationalizes and expands the powers and duties of the Social Security Commission, repeals Republic Act No 1161 (Social Security Act of 1987) and expands the mandatory coverage of the Social Security System to include Overseas Filipino Workers.

More...

PHILIPPINES
1 MAR 2019

REPUBLIC ACT No. 11210 also known as the "105-Day Maternity Leave Law"

The Act increase the maternity leave period with pay from 60 days (for normal birth) and 78 days (for ceasarian section) to 105 days regardless of mode of delivery for pregnant employees in the public and private sectors, including those in the informal economy, regardless of civil status, or the legitimacy of the child, with the option of extending the leave for an addition thirty (30) days without pay , and granting an additional fifteen (15) days for solo mothers. As defined in the Solo Parents Act, otherwise known as Republic Act No. 8972.

More...

PHILIPPINES
24 APR 2019

Department of Labor and Employment Department Order (DOLE-DO) No. 202-19

Rules and Regulations of Republic Act No. 11165 otherwise known as the "Telecommuting Act".

Telecommuting refers to a work arrangement based on the voluntariness and mutual consent of the employer and employee that allows an employee in the private sector to work from an alternative workplace with the use of telecommunication and/or computer technologies.

More...

PHILIPPINES
1 MAY 2019

Implementing Rules and Regulations of Republic Act No. 11210 otherwise known as the "105-Day Expanded Maternity Leave Law"

The Rules provide for the implementing regulations in the grant of one hundred five (105) days maternity leave with full pay to all covered female employees regardless of civil status, employment status, and the legitimacy of her child , and an additional fifteen (15) days with full pay in case the female worker qualifies as a solo parent under Republic Act No. 8972, or the "Solo Parents' Welfare Act of 2000". In cases of miscarriage or emergency termination of pregnancy, sixty (60) days of maternity leave with full pay shall be granted.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

PHILIPPINES 17 MAY 2019

Social Security System Circular No. 2019-009

The Circular provides for the guidelines on the payment of the expanded maternity benefit effective March 11, 2019 pursuant to Republic Act No. 11210.

More...

PHILIPPINES 9 JUL 2019

Department of Labor and Employment Department Advisory (DOLE-DA) No. 01-Series of 2019

Guidelines in the Computation of salary differential of female workers during her maternity leave and its criteria for exemption pursuant to Republic Act No. 111210, otherwise known as the "105-Day Expanded Maternity Leave Law"

More...

PHILIPPINES 29 JUL 2019

DOLE Department Circular (DOLE DC)No. 01-Series of 2019 Implementing Rules and Regulations of Republic Act No. 11210 otherwise known as the "105-Day Expanded Maternity Leave Law"

Guidelines on the issuance of DOLE certification as a requirement for application for payment of unemployment insurance or involuntary separation benefit

More...

PHILIPPINES 17 OCT 2019

Department of Labor and Employment Department Order (DOLE DO) No. 205, Series of 2019

Implementing Guidelines on the Issuance of Certificate of No-Objection on the Application for Work-Related Permits, Visas, and Authorities of Foreign Nationals

More...

PHILIPPINES 4 NOV 2019

DOLE Department Order (DOLE DO) No. 01-A, Series of 2019

Clarification on Tax Treatment of Salary Differential in Relation to Maternity Benefits Under Republic Act No. 11210 otherwise known as the "105-Day Maternity Leave Law"

More...

PHILIPPINES 19 NOV 2019

DOLE Department Order (DOLE DO) No. 206, Series of 2019

Implementing Rules and Regulations of Republic Act No. 11360 entitled "An Act Providing That Service Charges Collected by Hotels, Restaurants and other similar establishments be Distributed In Full to all covered employees amending for the purpose Presidential Decree No. 442, as amended, otherwise known as the Labor Code of the Philippines"

More...

PHILIPPINES 26 DEC 2019

DOLE Labor Advisory (DOLE LA) No. 14, Series of 2019

Distribution of Collected Service Charge in Relation to Non-Diminution of Befits

More...

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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

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Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE
8 JAN 2019

Company fined $400,000 for fire at Petroleum Refinery in Pulau Bukom

On 8 January 2019, Shell Eastern Petroleum Pte Ltd ("**Shell**") was fined $400,000 for a fire at a petroleum refinery in Pulau Bukom which resulted in six workers suffering varying degrees of burns.

On 21 August 2015, two groups of workers were simultaneously conducting maintenance and project works on a Crude Distillation Unit at the refinery. The first group of workers was carrying out hot works at various points on a scaffold, while the other group was carrying out cold works at the ground level. Flammable vapours from the cold works came into contact with sparks from the hot works. Although the worker was alerted and immediately closed the valve, a fire broke out.

In the process of escaping from the fire, six workers sustained varying degrees of burns, including two workers who were closer to the fire suffering about 50% and 70% burns. The fire was contained and extinguished by the Bukom Emergency Response Team within 30 minutes.

Investigations revealed that there was a systemic failure in Shell's oversight to check for compatibility of different work activities carried out within the same vicinity at the same time. The hot works and cold works carried out by the two groups of workers in the same vicinity were not coordinated, thus creating a situation where flammable vapours generated by the cold works was ignited by sparks from the hot works.

Shell was fined $400,000 after pleading guilty in October 2018 to an offence under the Workplace Safety and Health Act for failing to implement adequate control measures to ensure compatibility of works carried out at the refinery.

More...

SINGAPORE
15 JAN 2019

F&B firm fined for making false salary declarations

On 27 December 2018, food and beverage company, GD Group Pte Ltd ("**GD Group**"), was convicted of seven charges under the EMFA, and fined $94,500 for making false salary declaration in order to fraudulently apply for Employment Passes ("**EPs**"). Another 13 charges were taken into consideration for the purpose of sentencing. MOM has barred the company from hiring foreign employees.

Investigations found that the company had circumvented foreign worker quota rules by hiring foreigners on EPs, but paying them less than the salaries declared in the work pass applications. Between February 2013 and July 2015, the company falsely declared salary amounts of between $4,000 and $4,800 for 20 foreign employees to meet the salary requirement for EPs. However, the foreign employees were paid salaries of between $1,500 and $2,200.

In a statement, MOM's foreign manpower management division director of employment inspectorate Kandhavel Periyasamy said GD Group had gained an unfair advantage in hiring foreigners at the expense of other firms, and that MOM will continue to take stern actions to uphold the integrity of its work pass controls.

All employers in Singapore must make accurate, complete, and truthful declarations to the Controller of Work Passes in their work pass applications. If convicted of making false declarations to the Controller, offenders can be fined up to $20,000 per charge and/or jailed for up to two years under the EFMA. They will also be barred from employing new foreign workers and renewing their permits of their existing foreign workers.

More...

SINGAPORE

22 JAN

2019

Woman employee who stole nearly $340,000 jailed for criminal breach of trust

On 21 January 2019, a 37-year-old administrative executive at a property management firm, Soh Huay Ching, was sentenced to three years and four months' jail for misappropriating almost $340,000 from her employer. Soh pleaded guilty to one count of criminal breach of trust linked to more than $320,000. Two other similar charges involving the remaining amount were considered during sentencing.

The offences took place between January 2012 and November 2014. Soh was tasked to collect rent and utility fees from tenants as well as maintain the season parking at Goldbell Tower in Scotts Road. The maintenance of season parking included allocating spaces and collecting the annual fees of $2,880 from tenants who own vehicles. Although the company's policy is not to offer season parking to non-tenants of Goldbell Tower, Soh went against this policy and sold season parking to 45 vehicle owners who were non-tenants without authorisation. She collected fees from these persons and misappropriated them for her personal use instead of handing them over to the company. She also misappropriated monies for items such as rentals and utilities.

Her illegal activities came to light when she went on maternity leave in October 2014 and her colleagues discovered discrepancies in areas such as the collection of rental payments. A police report was made in November 2014. In early 2015, Soh's employer received complaints that non-tenants were parking at Goldbell Tower. The non-tenants told the company that they had paid Soh for the season parking spaces. Some of them lodged claims against the firm at the Small Claims Tribunals. All 45 affected vehicle owners were given their refunds.

More...

SINGAPORE

1 FEB

2019

Proposed Amendments to the Work Injury Compensation Act

On 31 January 2019, MOM announced that it had reviewed the Work Injury Compensation Act ("**WICA**") to provide injured employees with greater assurance of compensation and much sooner after the accident. The Ministry sought public feedback on the proposed amendments to the WICA.

Broaden WICA Coverage and Increase Payout

The MOM proposed expanding mandatory insurance coverage to prioritise lower-income employees most at risk of financial hardship, if their employers fail to compensate. More than 24,000 currently uninsured employees will benefit from the expanded mandatory insurance coverage by April 2021.

The MOM also proposed expanding the scope of eligibility for compensation. Currently, only injured employees placed on medical leave are compensated. Those who are injured but have been certified by doctors to be well enough to perform light duties are not eligible for compensation. MOM proposed to expand compensation to those placed on light duties as a result of work injury, such that they are no worse off than those given medical leave.

The MOM will also lift maximum compensation levels under WICA by at least 10% to keep pace with wage growth and rising medical costs.

Speed Up Claims Processing

To offer a lower cost and speedier resolution to work injury compensation ("**WIC**") cases as compared to filing a suit in the courts, MOM proposed streamlining various aspects of claims processes to speed up claims processing. One of the measures is making compensation based on the assessment of incapacity at least six months after the date of accident, instead of waiting for the final extent of injury to be determined. For employees with injuries that take longer to stabilise, doctors can still defer assessments to a later date.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE 1 FEB 2019

MOM will also accredit WIC policies, based on a core set of standard terms and conditions, to ensure adequate WIC insurance coverage to protect both the employers and the employees. This is because currently, WIC insurance policies that exclude coverage of risky work situations increases the risk of employees not being compensated for their work injuries.

To ensure that claims are processed in a fair and timely manner, MOM will license insurers to sell and process all insured WICA claims. MOM will also be empowered to overrule the insurers' decisions if necessary.

Other amendments

The maximum fines for employers delaying or avoiding compensation will also be increased from $10,000 to $15,000. To deter repeat offenders, the maximum fines for second or subsequent WICA offences will be doubled.

More...

SINGAPORE 18 FEB 2019

Singapore Budget 2019: Lower foreign worker quota in services sector; continued support for unemployed PMETs

On 18 February 2019, Finance Minister Heng Swee Keat delivered his Budget speech. Among several measures announced in his speech, it was announced that the Dependency Ratio Ceiling (DRC) for the services sector – a quota setting the maximum number of foreign workers a firm can hire for every full-time local worker it employs – will be lowered from 40% to 38% on 1 January 2019. The tighter ratio will also place a cap on the number of S Pass holders (i.e. mid-skilled foreigners earning at least $2,300) companies can hire in the next two years - from 15% to 13% on 1 January 2020, and to 10% on 1 January 2021. For firms that exceed the new ceiling, the new quota will apply when they apply for renewals of permits. The DRC will remain unchanged for other sectors.

To help firms adjust to these foreign workforce policy changes, higher funding of up to 70% under two grants will be extended for three years up to 31 March 2023. These are the Enterprise Development Grant (EDG), which funds projects for firms to improve efficiency and internationalise, and the Productivity Solutions Grant (PSG), which subsidises the cost of off-the-shelf technology to help companies boost productivity. MOM still provides some flexibility for companies to employ more foreign workers while they transition to a more manpower-lean operating model under the Lean Enterprise Development Scheme, as well as on a case-by-case basis if companies need to bring in foreign workers with specialised skills lacking among Singaporeans.

Minister Heng also announced that, to help experienced workers, the Career Support Programme will be extended for two years until 2021. It subsidises the wages of Singaporeans who are mature and retrenched or are long-term unemployed, who are hired for professional, manager, executive and technician (PMET) jobs. New professional conversion programmes will also be launched to help workers move into careers in growth areas (e.g. blockchain, embedded software and prefabrication).

More...

SINGAPORE 18 FEB 2019

Public Prosecutor v Anita Damu @ Shazana bt Abdullah [2019] SGDC 35

On 24 December 2018, 49-year-old Anita Damu ("**Accused**"), was sentenced to 31 months' imprisonment for abusing her 27-year-old domestic helper, Siti Khodijah ("**Victim**"). The Accused pleaded guilty to various charges under the Penal Code (Cap 224) and under section 22(1)(a) of the Employment of Foreign Manpower Act (Cap 91A) ("**EMFA**").

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

18 FEB

2019

During the course of the Victim's employment, the Accused restricted the Victim's sleeping hours to 11:00 pm to 4:00 am, when she would be required to wake up to get the Accused's daughter ready for school. As a result, the Victim felt constantly tired as she did not have enough rest. The Ministry of Manpower ("**MOM**") subsequently received information that the Victim had been abused by her employer.

Given the above facts, the Court held that the Accused had failed to provide the Victim with adequate rest and had thereby committed an offence under Section 22(1)(a) of the EFMA. After considering various factors, including the Accused's plea of guilt, the Court imposed a global sentence of 31 months' imprisonment and ordered a total compensation of $12,000 to be paid to the Victim.

More...

SINGAPORE

22 FEB

2019

Asplenium Land Pte Ltd v Lam Chye Shing and others [2019] SGHC 41

Asplenium Land Pte Ltd ("**Asplenium**") applied to the Court for orders to restrain various parties from disclosing, receiving and/or using certain documents which Asplenium claimed to be legally privileged pursuant to section 128A(1) of the Evidence Act (Cap 97) ("**EA**").

One of the issues that arose was whether one Mark Hwang ("**Hwang**") could be deemed an employee and therefore the in-house legal counsel of Asplenium at the material time, although Hwang was formally employed by Nuri Holdings (S) Pte Ltd ("**Nuri**"). Nuri held approximately 46.46% of the shareholding of Tuan Sing Holdings Ltd ("**Tuan Sing**"). Tuan Sing was, in turn, the holding company of Asplenium. Although formally under the employment of Nuri, Hwang was also performing legal work for Tuan Sing for which Tuan Sing paid Nuri an equivalent to half of Hwang's salary under a cost-sharing arrangement between Nuri and Tuan Sing.

Since Asplenium was a subsidiary of Tuan Sing, the Court found that as long as Hwang could be regarded as a legal counsel employed by Tuan Sing at the material time, he would also be regarded as a "legal counsel" of Asplenium. Therefore, the dispute turned on how the term "employed" is to be interpreted and applied in the context of section 128A(4) of the EA. The Court considered the following non-exhaustive factors relevant to the identification of an employment relationship:

Extent of control: The evidence showed that Tuan Sing would assign work directly to Hwang without need for clearance from Nuri. There was also no evidence that Hwang had the discretion to turn down assignments given by Tuan Sing. Therefore, the test of control had been met.

Extent of integration: Hwang was seated in Tuan Sing's premises and was involved, on a daily basis, in providing legal advice to Tuan Sing and its subsidiaries through various means. Further, Hwang's work became so integral to Tuan Sing that Nuri proposed in 2014 that Tuan Sing should share the cost of Hwang's salary, and Tuan Sing readily accepted the proposal. Therefore, the test of integration had been met.

Remuneration of the putative employee: Tuan Sing shared in Hwang's remuneration by making a regular monthly payment to Nuri equivalent to half of Hwang's salary. Although Nuri had made the actual payments of Hwang's salary and CPF payments, the Court was of the view that the more important point was that all parties were aware that a cost-sharing arrangement between Nuri and Tuan Sing was in place, under which Hwang would provide his legal services to Tuan Sing, and Tuan Sing would pay Nuri the relevant part of Hwang's salary.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

22 FEB

2019

Obligation to work for one employer: The Court was of the view that this did not go against the existence of an employment relationship between Hwang and Tuan Sing. Since Tuan Sing only paid half of Hwang's salary, Hwang could not be expected to work full-time for Tuan Sing to the exclusion of Nuri. Therefore, the fact that Hwang had continued working for Nuri while serving Tuan Sing was not inconsistent with the existence of an employment relationship between Hwang and Tuan Sing.

Provision of tools, equipment and training: The Court accepted that this was a relevant factor and that the evidence did show that Tuan Sing had provided Hwang with office space and equipment. However, it did not consider this factor conclusive and did not place too much weight on it.

Obligation to provide and accept work: The Court accepted that Hwang was obliged to accept work from Tuan Sing. Further, given that Hwang was Tuan Sing's only in-house legal advisor and that Tuan Sing paid half of Hwang's salary, Tuan Sing would have, as a matter of course, provided work to Hwang. However, the Court did not consider this a conclusive factor.

Right to dismiss, suspend, or evaluate the putative employee: The Court said that the fact that Hwang had superiors within Tuan Sing to report to suggested that Hwang would be evaluated by the management of Tuan Sing. Consequently, it is possible that Tuan Sing could terminate its relationship with Hwang. However, the Court did not consider this a conclusive factor.

Taking into account the above factors holistically, especially the control and integration tests, the Court found that an employment relationship existed between Hwang and Tuan Sing in respect of the work which Hwang did for Tuan Sing.

More...

SINGAPORE

5 MAR

2019

World Fuel Services (Singapore) Pte Ltd v Xie Sheng Guo [2019] SGHC 54

World Fuel Services (Singapore) Pte Ltd ("**Plaintiff**") applied to the Court to enforce a confidentiality clause ("**Clause 4**"), as well as a non-competition and non-solicitation clause ("Clause 5") in the Defendant's employment contract dated 15 August 2016 with the Plaintiff. Clause 4 imposed duties of confidentiality on the Defendant, and Clause 5 stated that for six months after the Defendant's termination for whatever reason, he would not compete or participate in businesses that compete against the business of the Plaintiff, and would not solicit the patronage of customers, or any brokers, traders, managers or directors employed by the Plaintiff.

The Defendant tendered his resignation on 19 November 2018 and informed the Plaintiff that he intended to join a company called China Aviation Oil (Singapore) Corporation Ltd ("**CAO SG**") on 19 February 2019 immediately after he ceased employment with the Plaintiff. CAO SG is a public listed company in Singapore, and its controlling shareholder is China National Aviation Fuel Group, a state-run entity in China which supplies aviation oil to the Plaintiff. After tendering his resignation, the Defendant was put on garden leave until 18 February 2019. The Plaintiff also applied to the Court to prevent the Defendant from commencing employment under CAO SG.

The Plaintiff was mainly concerned that the Defendant had contacts with its suppliers in China and knew the prices that the Plaintiff bought and sold its aviation oil. The Plaintiff argued that this constituted clear confidential information that was useful to a competitor, including CAO SG, as CAO SG and its subsidiaries would tender for aviation oil contracts alongside the Plaintiff. The information would enable the competitor to negotiate prices for the purchase and sale of aviation oil to the disadvantage of the Plaintiff.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

5 MAR 2019

The Court allowed the Plaintiff's application to prevent the Defendant from commencing employment under CAO SG, finding that the Defendant's experience must have been an important consideration for CAO SG to employ him. The Court was also of the view that it was obvious the Defendant carried all his knowledge of the Plaintiff's connections and business with its suppliers and customers. It would be impossible to separate confidentiality from a detached discharge of his duties with CAO SG. In this regard, the Court noted that the Defendant's regular visits to China to meet the Plaintiff's suppliers seemed like a serious and important job. Additionally, the Court was of the view that, as a supply manager for the Plaintiff, the Defendant had access to important and confidential information such as the price that the suppliers sold to the Plaintiff, and the price the Plaintiff sold to its customers.

Even though the Defendant argued that Clause 4, which prevented him from disclosing confidential information, adequately protected the Plaintiff's interests and that he would honour his undertaking under Clause 4, the Court questioned why the Defendant was not similarly willing to honour Clause 5.

Finally, the Court noted that the Defendant will be paid $10,400 a month with unspecified bonuses and a sign-on bonus of $10,400, whereas the Plaintiff had a U$40 million annual trading turnover derived from the aviation oil contracts. Even assuming that the Defendant may lose his job if prevented from working for CAO SG and taking into account the difficulty in finding another job, the loss of his new job was easily quantifiable. On the other hand, the loss of business by reason of price adjustments by the Plaintiff's competitors including CAO SG would be a more difficult exercise.

For the reasons above, the Plaintiff's application was allowed.

More...

SINGAPORE

6 MAR 2019

Government, unions and employers agree to raise retirement, re-employment age

On 5 March 2019, Minister of Manpower Josephine Teo announced that the Government, unions and employers have agreed on the need to raise the retirement and re-employment ages beyond 62 and 67. A workgroup comprising representatives from the Government, labour unions and the private sector has come to a consensus on the matter.

Minister Teo said that the workgroup, to which she is an adviser, believes that a higher retirement age will motivate both workers and employers to invest in skills upgrading and job redesign for older workers, as people enjoy more years of good health. The re-employment age, up to which firms must offer eligible workers re-employment, also remains useful. The workgroup said that the increases in the retirement and re-employment ages should be implemented in small steps over time as employers will need to make considerable adjustments. The workgroup also said that it is critical to ensure employment arrangements remain flexible.

Minister Teo said the WorkPro scheme, which covers various grants that fund efforts by employers to make their workplaces more age-friendly, will also be reviewed and may be extended beyond June this year. The workgroup will also be making recommendations on Central Provident Fund ("**CPF**") contributions for older workers later this year.

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

17 APR 2019

New guidelines to help employers

New guidelines are being published to guide employers on their employment practices.

On 16 April 2019, it was announced that new guidelines on the provision of proper rest areas for outsourced workers will be published to guide employers on how to provide a more conducive work environment for cleaners, security guards and landscape maintenance workers, amongst others. In coming up with these guidelines, MOM representatives visited approximately 200 work sites in Singapore to gain an understanding of current practices. The objective of the guidelines is to enhance the work environment of low-wage and outsourced workers.

On 1 April 2019, MOM, NTUC and SNEF published a new set of tripartite guidelines on wrongful dismissal to provide clear illustrations and examples of what constitutes wrongful dismissal. Amongst other things, the guidelines clarify that for discrimination, it would be wrongful to dismiss someone after his employer made discriminatory remarks about the employee's race and expressed a preference to hire someone of another race. This is so even if notice had been provided to the employee. The guidelines have been introduced following changes to the Employment Act that came into effect on 1 April 2019. Amongst other things, the Employment Act now allows all employees to file claims against their employers for wrongful dismissal. Previously, this was only available to those earning less than $4,500 a month. It is said that these guidelines will provide employees with clarity on the grounds on which aggrieved employees can appeal if they feel they have been wrongfully dismissed.

On 8 May 2019, Senior Parliamentary Secretary for Manpower and Education Low Yen Ling said that more than 960 companies employing almost 500,000 workers in Singapore have adopted a set of good practices to address workplace unhappiness, including sexual harassment complaints. In Singapore, the Tripartite Alliance for Fair and Progressive Employment Practices ("**TAFEP**") has introduced the Tripartite Standard on Grievance Handling, which is voluntary for employers. Despite the voluntary nature of the advisory, Ms Low said if a workplace harassment case has not been handled fairly, the TAFEP may advise the employer to review the case again. MOM may also commence action against the company in more severe cases, such as failure to provide a safe working environment.

More...
More...
More...

SINGAPORE

18 APR 2019

Former employee jailed for accepting bribes

On 17 April 2018, former senior procurement officer of Keppel Shipyard Neo Kian Siong ("**Neo**") was sentenced to a year and nine months' imprisonment for receiving more than $740,000 in bribes from some of the company's suppliers. Neo had accepted bribes in return for telling these suppliers the prices of products quoted by their competitors, even though he was not authorised to divulge such information. Further, Keppel Shipyard considered such pricing information to be confidential. Keppel Shipyard said in a statement that all their employees must abide by its code of conduct, which prohibits bribery and corruption, amongst others. For each count of corruption, Neo could have been jailed for up to five years and fined up to $100,000.

More...

SINGAPORE

23 APR 2019

PAP Community Foundation [2019] SGPDPC 6

On 23 April 2019, the Personal Data Protection Commission ("**PDPC**") issued its decision against PAP Community Foundation ("Organisation") for breaching the Personal Data Protection Act ("**PDPA**").

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

23 APR

2019

One of the preschools managed by the Organisation organised a school trip which involved the children's parents. Personal data of the parents, including their National Registration Identity Card ("**NRIC**") numbers, were collected by the preschool for identity verification purposes. A few days prior to the trip, a teacher at the preschool sent a photograph of the attendance list to a WhatsApp chat group to remind parents of the upcoming trip. The attendance list contained personal data relating to students and their parents, including their contact numbers and NRIC numbers. After reviewing the evidence, the PDPC was of the view that the Organisation had failed to make reasonable security arrangements to protect the personal data in its possession, in breach of its obligation under section 24 of the PDPA. The PDPC noted that the breach is attributed to the Organisation's lack of specific policies to guide its employees on how to use, handle and disclose personal data. Without such policies, the Organisation cannot be assured that its employees were consistently discharging their duties in compliance with the PDPA. Therefore, the Organisation had fallen short of its obligation to provide reasonable security arrangements.

In reaching the decision not to impose a financial penalty, the PDPC pointed out the mitigating value in the Organisation acting swiftly to address its inadequate policies. Amongst others, the Organisation developed a practical employee handbook and conducted refresher training for its employees. The PDPC was of the view that these measures sufficiently addressed the gap in policies and practices relating to the handling of personal data by the Organisation's employees. Therefore, the PDPC decided to issue a warning to the Organisation without further directions or imposing a financial penalty.

More...

SINGAPORE

23 APR

TO

30 APR

2019

Employment agency fined $48,000 for insensitive online advertising of Foreign Domestic Workers on Online Market Place and Providing Inappropriate Living Conditions

Several companies and their directors have been penalised for their treatment of foreign workers.

MOM fined SRC Recruitment LLP ("**SRC**"), an employment agency $48,000 for insensitive advertising of foreign domestic workers ("**FDWs**") on an online marketplace, in breach of its EA Licence Conditions on responsible advertising. It was also fined an additional $30,000 on charges for other offences under the Employment Agencies Act (Cap. 92) ("**EAA**"). These advertisements had been posted on online marketplace Carousell. According to MOM, the advertisements likened the FDWs to commodities. These advertisements were posted despite MOM having informed the EA industry through various alerts regarding the EA Licence Condition on responsible advertising. The breach of any EA Licence Condition is an offence under the EAA. Offenders may be fined up to $5,000 and/or jailed up to six months per charge. MOM said that it will not excuse any offensive and insensitive advertising methods that depicts FDWs in a negative light. It added that it will not hesitate to take stern enforcement actions against errant employment agencies, including revocation of EA licences.

In another case, MOM and Urban Redevelopment Authorty ("**URA**") announced that Shi Bao Yi ("**Shi**") and Chen Ming ("**Chen**"), directors of construction companies Genocean Enterprises and Genocean Construction, were fined for letting foreign workers live in illegal dormitories which were severely crowded and unsanitary. Guidelines from the URA only allow a maximum of eight people to reside in the properties. However, investigations revealed that 66 foreign workers and 116 beds had been crammed into a shophouse in Geylang. The shophouse was illegally converted into a dormitory without URA's permission. Genocean Enterprises was fined $60,000 for converting private residential properties into workers' dormitories without

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE 23 APR TO 30 APR 2019

planning permission, while Shi and Chen were fined $137,000 and $60,000, respectively, for similar offences. Genocean Enterprises has also been banned from hiring foreign workers.

More...
More...

SINGAPORE 3 MAY 2019

Dentist jailed for role in $388,700 Medisave scam

On 3 May 2019, dentist Daniel Liew Yaoxiang ("**Liew**") was sentenced to two year's imprisonment for his involvement in a scam involving fraudulent CPF claims, after pleading guilty to various cheating and forgery charges. Over a period of three years, Liew certified that certain dental procedures were performed on patients on multiple dates to circumvent the daily withdrawal limits set by the MOH. However, in reality, the procedures only lasted one or two days. As a result, he received a total of $388,700 from patients' Medisave accounts. After the company deducted the costs for various items such as anaesthesia, Liew received half of the remainder as his profit. Liew had made restitution of more than $470,000, comprising the principal sum of $388,700 and an interest of 4% per annum.

More...

SINGAPORE 13 MAY 2019

Taishan Sports Engineering Pte Ltd v Sivalingam Pragadesh Vinoth [2019] SGHC 123

Taishan Sports Engineering Pte Ltd ("**Applicant**") appealed against the decision of the Assistant Commissioner who ordered the Applicant to pay $86,220 to its former employee Mr Sivalingam Pragadesh Vinoth ("**Respondent**") who suffered an injury at work. The Court dismissed the appeal. In reaching its decision, the Court was of the view that the purpose of the WICA is to provide a speedy and inexpensive mechanism for employees to obtain compensation for injuries suffered in the course of their employment, and an employer must not take out an appeal to delay or frustrate payment of compensation. Second, Section 29(3) of the WICA requires an employer to deposit the compensation award with the Commissioner pending an appeal. However, this had not been done. Third, the Court said that the Applicant had notice of the hearing date, and the appeal was uncomplicated. The Court went on to examine the merits of the appeal. On the day of the accident, the Respondent was instructed by his superior to supervise the unloading of the steel panels, and the accident took place during the unloading of the panels. Even though the Applicant argued that the Respondent was instructed not to participate in the loading or unloading process, the Court said that the Applicant would still be liable as Section 3(4) of WICA provided that it is immaterial whether the employee contravened any orders given by his employer.

For the above reasons, the Court dismissed the Applicant's appeal.

More...

SINGAPORE 15 MAY 2019

Two Malaysians arrested for working illegally as food delivery riders in Singapore

On 15 May 2019, MOM announced that it has commenced investigations against food delivery companies Foodpanda and Deliveroo for employing foreigners who did not possess valid work passes. This announcement came after two Malaysians were arrested in two separate occasions for delivering food orders without valid work passes. They were caught using other people's Deliveroo and Foodpanda accounts to illegally carry out the deliveries. Foreigners who want to work in Singapore must first obtain valid work passes.

Continued on Next Page

LOOKING BACK

SINGAPORE 15 MAY 2019

If caught working without a valid work pass, they may be fined up to $20,000 or sentenced to a jail term of up to two years, or both. Foreigners found guilty will also be banned from entering and working in Singapore. Employers who employ foreigners without valid work passes will also face a fine of up to $30,000 or imprisonment of up to 12 months, or both.

More...

SINGAPORE 13 APR TO 22 MAY 2019

Companies and their supervisors penalised for workplace accidents

There have been several cases involving companies and their supervisors breaching the Workplace Safety and Health Act (Cap. 354A) ("**WSHA**"), which led to serious or fatal workplace accidents.

In the first case, site supervisor of ZAP Piling Pte Ltd ("**Company**") was sentenced to 8 weeks' for offences related to a fatal workplace accident that led to the death of Mr Arumugam Elango ("**Mr Arumugam**"). He was also sentenced to 8 weeks' imprisonment under the Penal Code (Cap. 224) for asking a worker to take the blame for the fatal incident. The Company was convicted and fined $290,000. On the day of the accident, Tay instructed crawler crane operator to shift a boring bucket that was in front of the bore piling machine to another location, which was next to a stack of bore pile casings. During the process, the bucket knocked against the casings, which toppled and pinned Mr Arumugam against the tracks, causing him to die. MOM's investigations revealed that Tay was negligent and had endangered the safety of his employees by failing to apply for a permit-to-work ("**PTW**") as required under the Code of Practice. He also instructed the crane operator to carry out the lifting without any lifting plan as required under the WSHA. Further, MOM said that he attempted to obstruct the course of justice by asking another employee to take the blame.

In a separate case, MOM announced on 22 May 20109 that it has fined construction company Ava Global Pte Ltd ("**Ava**") $210,000 for breaching the WSHA. Ava's construction supervisor, Sarkar Mithun ("**Sakar**"), was also sentenced to nine weeks' imprisonment for an offence under the WSHA. These breaches resulted in workplace accident, which left Ava's worker Miah Jobayed ("**Jobayed**") permanently disabled. On the day of the accident, under Sarkar's supervision, Jobayed used a boom lift to get to the ceiling, but did not wear any fall protection equipment. Unfortunately, the panel that Jobayed was standing on dislodged, and he fell to the ground. Despite undergoing surgery at National University Hospital, Jobayed suffered a spinal cord injury which left him permanently paralysed. MOM's investigations revealed that, amongst other things, Sarkar did not obtain a PTW before carrying out the installation works, and did not ensure the workers wore safety equipment. Separately, Ava as an employer was required to take reasonably practicable measures to protect the safety and health of its employees. However, it did not establish a proper method of carrying out the works and did not manage the risks arising thereof, including requiring its employees to wear protective equipment. It also failed to ensure that its employees were sufficiently trained to carried out the tasks.

MOM highlighted that it will take firm action against employers and supervisors who disregard the safety and health of their workers.

More...
More...

SINGAPORE 22 MAY 2019

Public Prosecutor v Chia Puay Yeoh [2019] SGMC 22

55-year-old Chia Puay Yeoh ("**Accused**") pleaded guilty to 16 charges under the Employment of Foreign Workers Act ("**EFMA**") for engaging in a conspiracy with others to obtain work passes for foreign employees for a business that did not require such foreign workers. For these offences, the

Continued on Next Page

SINGAPORE

22 MAY 2019

Accused was sentenced to a total of 25 months' imprisonment. The Court also imposed a fine of $15,000 and a penalty of $54,490. The Accused asked one Guay Boon Chwee ("**Guay**") to register a company, which would be used to sell its work permit quotas to other companies. The Accused promised to pay Guay $1000 every month. The offences involved work permits issued under the company although the company did not actually employ the foreign workers. Subsequently, the Accused sold work permits to a food stall owner who wanted to employ foreign workers but did not have any foreign worker quota, at $1,000 per worker. The Accused even roped in his wife, who helped the Accused collect payment from the food stall owner.

The Court pointed out several aggravating factors, such as the foreign workers being deprived of the protection that were otherwise afforded to them by the conditions under their work passes. This is because the workers were not employed by companies stated in their work passes. Although the Accused claimed that he had helped generate employment and helped food stalls with their manpower shortage, the Court did not accept that as a mitigating factor, as the Accused should not be given credit for violating the law.

More...

SINGAPORE

29 MAY 2019

Arpah bte Sabar and others v Colex Environmental Pte Ltd [2019] SGHC 137

On 19 July 2017, 62-year-old Abu Samad bin Omar ("**Deceased**") died at his workplace because of his ischaemic heart disease. The Deceased's next-of-kin ("**Claimants**") appealed against the Assistant Commissioner's decision, who ruled that the Deceased's death was caused by his own medical condition and did not arise out of his employment. Accordingly, the Assistant Commissioner said that the Claimants were not entitled to a payout by the Deceased's employer ("**Employer**") and the Employer's insurer. On the facts, the Employer's insurer took the view that the Deceased's death was due to his own medical condition and not caused by or arisen out of and in the course of his employment. The Assistant Commissioner ruled in the insurer's favour, and The Court affirmed the three requirements for establishing an Employer's liability to pay compensation, namely: (a) the workman has suffered a personal injury; (b) the injury has been caused by an accident; and (c) the accident arose out of and in the course of his employment.

The first requirement was satisfied as parties did not dispute that the Deceased suffered a personal injury in the form of his death.

On the second requirement, the Court affirmed earlier authorities that said an accident may include an internal medical condition that caused an unexpected injury while the worker was carrying out his work. In this case, the Deceased suffered from severe coronary heart disease, which is the internal medical condition, and the death is the personal injury. Therefore, the Court held that the Deceased's injury was caused by an accident, thus satisfying the second requirement.

On the third requirement, the Court held that there are two aspects to it: (a) the accident must arise in the course of the workman's employment; and (b) accident must arise out of the workman's employment. On the first aspect, the heart attack happened during the time that the Deceased was on scheduled work and within the Employer's premises. Further, the Employer was also aware that the Deceased frequently volunteered for bin duty. Hence, the Court was of the view that the accident arose in the course of the Deceased's employment. In relation to the second aspect, section 3(6) of the WICA provides for the presumption that an accident arising in the course of an employee's employment is deemed to have arisen out of that employment. The Court said that the Employer has not rebutted the presumption.

For the reasons above, the Court held that the Claimants are entitled to the assessed sum pursuant to section 3(1) of the WICA.

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

1 APR TO 18 JUN 2019

Employees jailed for misappropriating from their employers

Several employees were sentenced to jail terms for misappropriating their employers' monies.

In the first case, former car salesman Tan Sze Hian ("**Tan**") was sentenced on 18 June 2019 to 3 ½ years jail for misappropriating almost $370,000 from his employer, Subaru distributor Motor Image Singapore. His role as a sales executive included serving walk-in customers, preparing sales documentation and collecting payments from buyers. Some customers would write cheques when paying for their purchases. Despite the employer's standard policy of writing a crossed cheque, Tan asked the customers to issue him cash cheques, representing that he would transfer the payment to his employer. Through such acts, Tan misappropriated monies from his employer, reportedly to fuel his gambling habit.

In a separate case, restaurant manager Lee Sung Eun ("**Lee**") was sentenced on 10 June 2019 to 2 ½ years' imprisonment for misappropriating more than $200,000. Despite being entrusted by the restaurant owner with a debit card and cheque book that were linked to the restaurant's bank account, Lee made numerous cash withdrawals and debit card transactions for his personal use. His offences came to light when the restaurant owner became suspicious that the eatery was not making any profit and only admitted to misappropriating the monies when confronted.

In the third case, primary school customer service officer Siti Rafeah Abd Hamid ("**Siti**") was sentenced on 1 April 2019 to four months' imprisonment after pleading guilty to misappropriating $36,000. She was entrusted with money collected from the students for activities like school trips, events and co-curricular activities ("**CCA**"). Siti was required to document the collection of money in the school system and pass the monies to the school's operation manager, who would deposit the monies into the school's bank account. However, she did not do so but instead used the money for her own expenses. The offences came to light when the school discovered it was unable to pay a CCA vendor due to lack of funds. Internal investigations revealed that Siti failed to hand over more than $36,000 to the operation manager.

For criminal breach of trust as an employee, these employees could have been jailed for up to 15 years and fined.

More...
More...
More...

SINGAPORE

12 JUN 2019

Singapore ratifies ILO convention, strengthens commitment to Workplace Safety & Health 2028 targets

On 12 June 2019, Minister for Manpower Mrs Josephine Teo announced that Singapore will be adopting the International Labour Organisation's (ILO) Occupational Safety and Health Convention ("**Convention**"). This announcement is aligned with Singapore's recent announcement of its Workplace Safety and Health 2028 strategies. These strategies are aimed at making Singapore one of the countries with the safest and healthiest workplaces globally. The MOM said this aim will be achieved by lowering workplace fatality rate, which is currently at 1.4 per 100,000 workers. MOM hopes to achieve a workplace fatality rate of less than 1 per 100,000 workers by 2028. Singapore's ratification of the Convention will therefore reinforce its commitment to the 2028 targets, and to give its workers safe and healthy work conditions.

More...
More...

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

SINGAPORE
12 JUN 2019

CPF Board fails to claim alleged arrears from country club

On 12 June 2019, the Singapore High Court ("**Court**") rejected the Central Provident Fund Board ("**CPF Board**")'s attempt at recovering approximately $417,000 in arrears of Central Provident Fund ("**CPF**") contributions. The CPF Board alleged that the arrears were owed for gym instructor Mr Mohamed Yusoff Hashim, who worked at Jurong Country Club ("**JCC**"), which is no longer in operation.

Mr Yusoff was employed by JCC in 1991 as its gym instructor. In 1998, his status was purportedly converted to an independent contractor. JCC not only stopped contributing to his CPF, it also terminated his other employee benefits, including paid annual leave, medical coverage and annual wage supplements. Thereafter, Mr Yusoff continued to work at JCC under several contracts negotiated every year or every two years. Investigations began in 2016 when Mr Yusoff found out that JCC was closing, and approached the CPF Board to enquire whether he was entitled to employer's CPF contributions.

The Court held that Mr Yusoff was not an employee of JCC, but an independent contractor. In reaching its decision, the Court set out the legal test for determining whether an individual is an employee falling under the Central Provident Fund Act (Cap. 36). In applying the test to the present case, the Court said that various factors pointed to Mr Yusoff being an independent contractor. For example, Mr Yusoff was not part of JCC's headcount and was not subject to employee performance appraisal. Further, the Court noted the fact that Mr Yusoff's contract was negotiated annually or biennially, suggesting that his working relationship with JCC was not intended to be permanent. The Court said that the evidence also suggests that both JCC and Mr Yusoff himself did not consider Mr Yusoff an employee. Although Mr Yusoff was shocked when told about the change in his status in 1998, including the fact that he would have to pay his own CPF, he nonetheless accepted the arrangement.

More...
More...

SINGAPORE
19 JUN 2019

Feedback sought on proposed changes to Income Tax Act

On 19 June 2019, the Ministry of Finance ("**MOF**") invited members of the public to provide feedback on proposed changes to the Income Tax Act (Cap. 134). Amongst the key proposed amendments sought to be introduced include the cessation of the Not Ordinarily Resident ("**NOR**") scheme introduced in 2002, which provides tax breaks to highly skilled foreigners who meet the qualifying criteria. The scheme is now set to cease after the tax year of assessment ("**YA**") 2020, with the final NOR status to expire by YA 2024.

More...

SINGAPORE
4 JUL 2019

Cleaners and landscape maintenance workers to get bonuses from 1 Jan 2020 and annual pay rises

The Progressive Wage Model, which is developed by tripartite committees comprising unions, the government and employers, sets out minimum pay, increments and bonuses for job levels in the cleaning, security and landscape industries. The Commissioner of Labour has accepted recommendations in relation to the cleaning and landscaping industry.

Eligible landscape maintenance workers will be entitled to a bonus that is at least two weeks of their basic monthly salary. This is payable at least once a year. The minimum monthly salary will be increased progressively on a yearly basis. The first increase will be S$150, from July 2020.

Eligible cleaning workers will be entitled to a bonus from 1 January 2020. They will also be entitled to a 3% annual increment from 1 July 2020 to 2022.

Continued on Next Page

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE 4 JUL 2019

Companies in these industries must ensure that their wage arrangements comply. Otherwise, if licensing conditions are breached in this regard, companies will face financial penalties and may face suspension or revocation of their licenses.

More...
More...
More...
More...

SINGAPORE 4 JUL 2019

First prosecution under the Foreign Employee Dormitories Act 2015

The Ministry of Manpower ("**MOM**") MOM inspected four purpose built dormitories ("**PBD**") that were managed by dormitory operator Labourtel Management Corporation Pte Ltd ("**Labourtel**"). The MOM found that the PBDs were poorly maintained, which included missing or damaged light fixtures, defective shower taps, rusted railings and staircases, lack of natural and mechanical ventilation, lack of shower point partitions, as well as dirty and unacceptable living conditions, where cockroaches were found in the rooms. Consequently, Labourtel and its director were prosecuted under the Foreign Employee Dormitories Act 2015 for failure to comply with licensing conditions, which is the first prosecution of its kind in Singapore. Offenders face a fine of up to S$50,000 and/or 12 months' jail, for each count of violation of a licensing condition.

More...

SINGAPORE 19 JUL 2019

Chiew Kok Chai v Public Prosecutor [2019] SGHC 169

The accused was a director of a Wan Fu Builders Pte Ltd ("**Wan Fu**") that was not entitled to a foreign manpower quota, due to previous levy defaults. The accused hence provided false information in three work pass applications, which indicated that the three foreign employees will be employed by a different company, even though the intention is for them to be employed by Wan Fu instead.

A question arose as to whether a financial penalty or a custodial sentence should be imposed. The court observed that Parliament's intention to deter circumventions of the rules on the hiring of foreign manpower is reflected in the increases of the maximum punishment under the relevant provisions of the Employment of Foreign Manpower Act.

Consequently, a custodial sentence should therefore be the starting point for the furnishing of any false or misleading information in a work pass application.

More...
More...

SINGAPORE 22 JUL 2019

Genki Sushi Singapore Pte. Ltd. [2019] SGPDPC 26

Following a notification by Genki Sushi Singapore Pte Ltd ("**GSSPL**") that a server on its network storing its employees' personal data had been the subject of a ransomware attack, the Personal Data Protection Commission ("**PDPC**") commenced an investigation as to whether GSSPL had failed to comply with the Personal Data Protection Act 2012 ("**PDPA**").

GSSPL uses and licenses an off-the-shelf payroll software application, which was used by employees to view their e-payslips as well as by supervisors to confirm the employees' attendance at the various GSSPL restaurants. The application hence contained, amongst other things, personal data of GSSPL's former and current employees. The ransomware attack caused an unauthorised modification of GSSPL's data, including the employees' data files, and the ransomware encryption caused the data files to be unreadable. The data files included, amongst other things, the employees' names, identity numbers, bank account information, gender, marital status, date of birth, salary details, address, phone numbers, etc.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

SINGAPORE
22 JUL
2019

The question before the PDPC was whether GSSPL had put in place reasonable security arrangements to safeguard the personal data hosted on the server. The PDPC highlighted that where personal data was sensitive, including without limitation identity numbers, bank account details or salary details, higher standards of protection should be implemented. The standard for security arrangements in relation to IT systems was that it must be sufficiently robust and comprehensive to guard against possible intrusions or attacks. The PDPC emphasized that organizations need to have an "all-round" security of its system and while the security system need not be perfect, it must be reasonable in the circumstances.

The PDPC found that GSSPL had failed to implement "all-round" security of its system, finding the following gaps:

(a) the server's firewall was not set to filter out unauthorised traffic and block unused ports;

(b) penetration tests were not carried out periodically to assess the robustness of the IT security and to identify any vulnerabilities; and

(c) the server and application were not regularly patched.

Consequently, GSSPL was found to have breached its obligations under the PDPA and was ordered to pay a penalty of S$16,000.

More...
More...

SINGAPORE
30 JUL
2019

Avant Logistic Service Pte. Ltd. [2019] SGPDPC 28

On 25 November 2017, a customer ("**C1**") of an e-commerce platform raised a complaint to the PDPC, on the basis that her personal data had been disclosed without her consent to another customer ("**C2**") of the same platform, by an employee ("**Employee**") of Avant Logistic Service Pte Ltd ("**ALSPL**"). The facts were as follows:

(a) C1 sought to self-collect a package that was ordered from the e-commerce platform. At the collection point, the Employee gave C1 two packages. C1 informed the Employee that the packages were not hers as they showed a user ID and mobile number that was not hers. The Employee told C1 to take the packages, which C1 then did;

(b) C2 arrived later and was informed by the Employee that her packages had been collected by someone else. Subsequently, the Employee sent C2 screenshots of two delivery lists containing user IDs and mobile numbers of some customers of the e-commerce platform; and

(c) C2, using C1's user ID, found C1's Facebook and Instagram pages and sent her messages to recover the packages.

The issue that arose was whether ALSPL had made reasonable security arrangements to protect personal data in their possession. The PDPC found that even though ALSPL had required its delivery personnel to comply with the e-commerce platform's Privacy Policy and Employee Handbook, this was inadequate because the employees were not briefed on what exactly they needed to do to protect customers' personal data. ALSPL itself did not have policies or procedures in place to prohibit disclosure of personal data by its delivery personnel, nor had provided training on proper handling to the same.

Significantly, ALSPL sought to argue that the Employee's employment contract contained a confidentiality clause that prohibited him from disclosing customer information, without ALSPL's consent. The PDPC stated that even though such clauses are relevant to the protection of personal data, by themselves, they are insufficient. This is because they usually do not contain elaboration as to what constitutes personal data and how employees are to handle and protect personal data. Instead, companies are expected to provide employees with specific and practical instruction on the same.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

SINGAPORE

1 AUG 2019

Palraj Duraiarasan v Chia Lip Seng t/a Mong Seng Construction [2019] SGDC 156

The plaintiff, Palraj Duraiarasan, was a construction worker employed by the defendant, Mong Seng Construction. The plaintiff allegedly met with an accident on 15 January 2016 at a construction worksite. Four days later, on 19 January 2016, the defendant provided the plaintiff with a company chit, to attend the company doctor. Subsequently, a metal piece was removed from his eye. The plaintiff alleged that he was "hammering in a nail on a concrete wall as instructed at the worksite when some metal debris from the tip of the nail entered into his right eye through the gap of the goggles that he was provided with". On 4 April 2016, the MOM's Notice of Assessment for the plaintiff's work injury compensation claim stated that no compensation was payable as the injury was not caused by an accident arising out of and in the course of his employment. The plaintiff then commenced a claim against the defendant under common law.

The court found that the plaintiff had succeeded in establishing his case on a balance of probabilities, for reasons including the following:

(a) even though it would be optimal to seek immediate medical attention, people have different thresholds for pain and hence it was not unreasonable for the plaintiff to seek treatment only after 4 days. The court also stated that the circumstances of the plaintiff as a foreign worker should also be taken into account;

(b) the defendant's argument that the injury was not sustained on 15 January 2016 was unsupported. In this regard, the court highlighted that the strongest evidence in this regard would have potentially been the attendance records at the worksite. The court added that "clearer and better record keeping beyond scribbled signatures on an attendance sheet or tamper resistant records would have helped established the Defence"; and

(c) the fact that the MOM ruled that no compensation was payable in respect of the plaintiff's workman compensation claim was inconclusive either way. In any event, MOM's notice of assessment itself expressly allowed a party to dispute the assessment within a prescribed time.

The court further noted that it was constrained from apportioning liability against the plaintiff, as the defendant did not plead contributory negligence on the part of the plaintiff.

SINGAPORE

8 AUG 2019

Pradeepto Kumar Biswas v East India Capital Management Pte Ltd [2019] SGHC 183

Between July 2015 to August 2015, Pradeepto Kumar Biswas ("**Pradeepto**") and one Simon John Hopkins had discussed forming East India Capital Management Pte Ltd ("**EICM**") and its wealth and fund management business. On 15 October 2015, Pradeepto commenced work with EICM. Subsequently, on 21 October 2015, the finance manager of EICM wrote to Pradeepto, agreeing that Pradeepto would be paid a "notional" monthly salary of S$20,000 when EICM became profitable. Pradeepto, having control of Indian Ocean Group Pte Ltd ("IOG") purchased 24% shares in EICM on 12 November 2015. On 18 June 2017, EICM terminated Pradeepto's engagement with the company alleging misconduct. Consequently, Pradeepto made a claim against EICM for unpaid salary amounting to S$351,312.64. EICM counterclaimed against Pradeepto for, amongst other things, breach of fiduciary duties.

One issue that arose was whether, in the absence of any employment contract, Pradeepto was an employee of EICM (in which case he would be entitled to salary), or a partner (in which case he would only be entitled to EICM's profits).

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

SINGAPORE

8 AUG 2019

The court held that the parties had an employment relationship, even though there was no employment contract. There were several factors pointing to the existence of the same. First, based on the evidence, Pradeepto was to be employed to find business for IOG. In return, he was to be paid a "notional" salary, which the court held to mean that the actual payment would be deferred. Second, EICM had made employer's contributions to Pradeepto's Central Provident Fund ("**CPF**"). Third, wordings such as "terminated Pradeepto's employment" were used in correspondences in relation to his termination.

Hence, Pradeepto's claim for deferred salary was allowed, in spite of an absence of an employment contract.

More...

SINGAPORE

14 AUG 2019

Company fined S$220,000 for breach of Workplace Safety and Health Act

On 25 July 2016, four workers from Environmental Landscape Pte Ltd ("**ELPL**") were instructed to clean an underground storage tank. The tank was situated in a confined space which was 3.2m deep. This was only accessible via a ladder at an open manhole. Three of the workers entered the confined space. The workers switched on the socket extension to turn on the floodlight, sparking an explosion. Upon investigations, MOM found that ELPL failed to:

(a) conduct risk assessment for the described work activities, and hazards including toxic or flammable gases were not identified prior to the commencement of the work; and

(b) ensure that the four workers were trained to work in a confined space, did not brief them of the risks involved in doing so, and did not set out safety precautions or implement emergency procedures to deal with issues arising from such work.

Employers are subject to fines of up to S$500,000 for violation for violating section 12(1) of the Workplace Safety and Health Act, In the instant case, ELPL was fined S$220,000. The MOM had indicated that they will "continue to press for high fines against employers who knowingly put their workers at risk".

More...
More...

SINGAPORE

19 AUG 2019

Retirement and re-employment ages to be raised incrementally, CPF rates for older workers to be adjusted

It has recently been announced that the retirement and re-employment ages will be raised incrementally by the year 2030. The retirement age will be raised to 63 by 2022, and 65 by 2030. The re-employment age will be raised to 68 by 2022, and 70 by 2030.

The Central Provident Fund contribution rates for workers above the age of 55 will be raised from 2021 onwards. This is expected to be implemented in the following manner:

(a) for workers above 55 years old to 60 years old, the CPF contribution rate will be increased from the current 26% to 28% by 1 Jan 2021, to 37% by 2030;

(b) for workers above 60 years old to 65 years old, the CPF contribution rate will be increased from the current 16.5% to 18.5% by 1 Jan 2021, to 26% by 2030; and

(c) for workers above 65 years old to 70 years old, the CPF contribution rate will be increased from the current 12.5% to 14% by 1 Jan 2021, to 16.5% by 2030.

The change in contribution will be split between employer and employee.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE
3 SEP
2019

Work Injury Compensation Bill 2019 passed on 3 September 2019

The Work Injury Compensation Bill 2019 was passed on 3 September 2019 and will come into force on 1 September 2020 as the Work Injury Compensation Act 2019 ("WICA"). The amended WICA includes, amongst other things, the following changes:

(a) The WICA will allow information sharing between insurers of their clients' past claims record. This is intended to facilitate more accurate premium pricing, so that companies that have safer workplaces will be rewarded. Consequently, employers with good safety records would be able to enjoy lower premiums than those with poor safety records.

(b) The WICA will allow compensation for permanent incapacity ("PI") claims to be based on the prevailing state of incapacity at the earliest opportunity six months from the date of accident. This expedites claims for PI. Otherwise, PI claims are only settled after several months due to the time taken to assess the PI.

(c) For serious or fatal injuries, employees or their representatives need not file claim applications. Processing begins upon notification to the MOM or the insurer of the accidents.

(d) Employers will be required to purchase work injury compensation insurance for non-manual employees earning up to S$2,600 by April 2021, on a progressive scale. Previously, for these employees, employers were not required to purchase the same if they earn more than S$1,600 per month.

(e) Employees suffering work injury and placed on light duties will be compensated for loss of earnings as well, so as to be consistent with the treatment for employees placed on medical leave due to work injuries. This compensation applies if they are receiving lower salary during their period of light duties.

(f) Employers are to report all medical leave or light duties arising from work injury to the MOM. The level of detail required for reporting will differ depending on the number of days of medical leave or light duties in question.

(g) If an employer's doctor provides unfair or inadequate incapacity assessment, an employee will be able to switch doctors, on a case-by-case basis.

(h) The compensation limits for death and permanent incapacity will be respectively increased by about 10%, to $225,000 and $289,000. The compensation limit for medical expenses will be increased by about 25%, to $45,000.

(i) The WICA will prescribe a core set of standard terms that is complaint with WICA. This ensures adequate coverage, as currently employers may find that some work scenarios are excluded.

(j) Persons found to be withholding necessary information or documents for claims processing will face a fine of up to S$5,000 and/or 6 months' imprisonment.

More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE
14 OCT
2019

Bintai Kidenko Pte Ltd v Biswas Dipu [2019] SGHC 242

The case involved an appeal by Bintai Kidenko Private Limited ("**Bintai**") against the Assistant Commissioner of Labour's ("**ACL**") order directing it to compensate its employee, Biswas Dipu ("**Biswas**"), for the injuries that Biswas had sustained during his employment, under Section 17(1) of the Work Injury Compensation Act (Cap. 354) ("**WICA**"). Section 17(1) requires a principal, who contracts with an employer to carry out any work, to pay any employee employed by the employer in the execution of the work any compensation, as if the employee was immediately employed by the principal.

In this matter, Bintai was engaged to carry out air-conditioning and mechanical installation work at a project site. Bintai in turn sub-contracted Ling United Pte Ltd ("**Ling United**") to fabricate and install the air-conditioning ducts. Biswas was an employee at Ling United. On 4 November 2016, Biswas sustained an injury at Ling United's workshop located in Tuas while operating a machine that fabricated air-conditioner ducts, resulting in a permanent incapacity of 13% of his right hand. Bintai was found liable by the ACL to pay Biswas the full sum of S$21,174.89 as a principal under section 17(1) of the WICA.

Bintai sought to set aside the ACL's order on, amongst other things, an argument that Bintai was not a principal under section 17 of the WICA.

The High Court rejected this argument. Bintai had submitted that it could not have been liable as a principal due to section 17(5) of WICA, which states that "[section 17] shall not apply in any case where the accident occurred elsewhere than at or about the place where the principal has undertaken to execute work or which is under his control or management." The issue was therefore whether the workshop was considered a place that Bintai undertook to execute work, or was under Bintai's control or management. As case law indicated that "place" in section 17(5) of WICA included "a site next to the work site of the principal or another site where work is done for the purpose of the principal's job at the work site", the High Court found that the workshop amounted to a place where work was done for the purpose of Bintai's job at the worksite, and hence a place where Bintai undertook to execute work there. Specifically, the wording "undertaken by the principal" under section 17(5) of WICA is not a requirement for the principal to provide an undertaking. As such, section 17(5) of WICA did not apply, and Bintai was liable as a principal under section 17(1).

More...

SINGAPORE
16 OCT
2019

NTUC announces target of 1.5million members

The NTUC has announced a target of having 1.5 million members by 2030, or by 2025 if possible. This is in line with the trend of increasing unionisation of employees across various industries. For instance, NTUC has previously indicated its intention to unionise 50 to 100 small and medium-sized enterprises (SMEs) by the end of 2020. This is significant as unionisation traditionally occurs in large and multinational companies.

More...
More...

SINGAPORE
4 NOV
2019

Call in Parliament for stronger stance against ageist employment practices

On 4 November 2019, Members of Parliament urged for stronger action to be taken to address age discrimination in the workplace. Specifically, they have called for firms found to be guilty of such practices to be named and shamed. Such practices include discriminating against them at the hiring stage, marking down older employees unfairly, making work unduly difficult for them to force them to quit and allowing unkind age-related comments to be made.

Continued on Next Page

SINGAPORE
4 NOV
2019

Other suggestions raised include introducing a certification scheme which rewards age-inclusive companies and using non-legislative measures to combat age discrimination. They also urged for the TAFEP to be given more powers to deal with age discrimination. Currently, where there is non-compliance with TAFEP's guidelines on workplace discrimination, TAFEP works together with the MOM to take remedial action, such as removing the employer's work pass privileges.

More...

SINGAPORE
4 NOV
2019

Refunds from the Central Provident Fund to be permitted in limited circumstances

On 4 November 2019, during the Parliamentary speech at the Second Reading of the Central Provident Fund (Amendment) Bill ("**CPF Amendment Bil**l"), the Minister for Manpower announced, amongst other things, the following change to the Central Provident Fund Act (Cap. 36) ("**CPF Act**").

It was observed that some employers structure employment agreements to tie wage components to the fulfilment of certain contractual conditions, e.g. tying a sign-on bonus to a minimum period of service. If the employee fails to fulfil this condition, the employee is to refund the sign-on bonus to the employer. Currently, under the CPF Act, the CPF Board is unable to refund the CPF contribution paid by the employer on the sign-on bonus. The CPF Amendment Bill seeks to address this gap. Employers and employees will have the option of applying to have that CPF portion refunded to the employer.

More...

SINGAPORE
6 NOV
2019

Managing retrenchment exercises effectively

Travel retailer DFS Group had announced that it would be laying off its staff at its Changi Airport and T Galleria shops, as well as its shared services centre, offering an initial severance package to the retrenched employees at two weeks' pay per year of service, capped at 13 weeks. This fell below the minimum compensation set out in MOM's guidelines, triggering much unhappiness and thereafter intervention by the MOM, Tripartite Alliance of Dispute Management and Tripartite Alliance for Fair and Progressive Employment Practices ("**TAFEP**"). The severance package was then revised to two weeks' pay per year of service capped at 26 weeks. After further negotiations between DFS Group and the trade union Singapore Manual and Mercantile Workers' Union ("**SMMWU**"), it was announced on 6 November 2019 that the severance package was further revised to one month's salary for each year of service, capped at 25 years of service, which was significantly higher than the initial package offered.

This exercise illustrates the importance of adequately compensating retrenched employees. The guidelines set out in the Tripartite Advisory on Responsible Retrenchment may not mechanically applied and the prevailing industry norms and financial position of the company must be carefully considered. In conducting retrenchment exercises, it is critical for employers to ensure proper and sensitive communication in relation to their employees at all times.

More...
More...
More...

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE
13 NOV
2019

Court holds that terms of SBS Transit's collective agreement do not breach Employment Act

On 13 November 2019, the Industrial Arbitration Court ("**IAC**") president, Justice Chan Seng Onn, held that the terms of the collective agreements entered into by SBS Transit ("**SBST**") and the National Transport Workers' Union ("**NTWU**") did not breach the Employment Act (Cap. 91). A separate suit brought by five SBST bus drivers in the state courts was not heard by the IAC.

In this matter, five SBST bus drivers had brought a suit against SBST, claiming that SBST were paying them below the MOM's regulated rate for overtime work. Further, they alleged that there were discrepancies between the records of their working hours and their monthly payslips. As the collective agreements affected not just the five claimant drivers but also 6,000 SBST drivers, SBST referred the terms of the collective agreements to the IAC.

Based on the sample employment contracts, sample rosters and pay calculations, Justice Chan found that the SBST did comply with the collective agreements. However, he observed that the employment contracts required its drivers to work 48 hours a week, including four hours of mandated overtime. Failure to meet the four hours overtime would amount to a breach of the employment contract. This differed from the Employment Act, which provides that if employees covered by Part IV of the Employment Act (i.e. employees who earn a monthly basic salary of not more than S$2,600 or workmen earning a basic monthly salary of not more than S$4,500) work for more than 8 hours a day or more than 44 hours a week, they will be entitled to overtime pay of at least 1.5 times their hourly basic rate of pay.

As SBST's 48 hours work week included at least 45 minutes of rest periods a day and by taking into account the rest periods, the number of working hours a week was effectively 43.5 hours, which was lesser than 44 hours, and hence not a breach of the Employment Act.

Notably, in calculating the number of working hours, Justice Chan treated the mandated four hours overtime per week as part of the ordinary contractual working hours and not overtime per se, as overtime should always be optional for the employee. In view of this, Justice Chan highlighted the need for the language used in the employment contracts to be clearer to avoid any confusion as to whether the Employment Act has been complied with. In particular, he noted that the meanings of "hours of work" or "working hours" and the practice of building-in overtime in employment contracts are different from that defined or envisaged under the Employment Act. As such, it was up SBST to choose whether they wish to revise their drivers' employment contracts and adopt the same definitions as those set out in the Employment Act.

More...

SINGAPORE
19 NOV
2019

Changes to the Central Provident Fund treatment for cash reimbursements of employee benefits

Currently, certain cash reimbursements of employees on employee benefits are considered as wages, which means that employers have to pay CPF contributions on them. The CPF Board has made changes to the CPF treatment on some of these employee benefits. The CPF's table of changes is set out below, which changes are highlighted in red:

Reimbursements	Are CPF contributions payable?		
	Employee	**Employer's spouse**	**Employer's child**
Medical treatment (local and overseas)	No	No	**No**
Dental treatment (local and overseas)	No	**No**	No
Holiday benefits	**Yes**	Yes	Yes
Other benefits	Yes	Yes	Yes

These changes will take effect from 1 January 2020.

More...

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SINGAPORE

22 NOV

2019

Ministry of Manpower issues circular cautioning against bypassing mobile cranes' safety devices

The MOM has noted certain instances that safety devices (e.g. overload, hook over-hoist) in mobile cranes had been intentionally bypassed or overridden without authorisation during lifting operations. This is an offence under the Workplace Safety and Health (WSH) Act (Cap. 354A).

In light of the above, MOM has issued a circular which requires the implementation of an authorisation system for overriding safety devices on mobile cranes (excluding lorry loaders), including the following:

1. For mobile cranes with key-operated bypass switches, the bypass keys are always to be stored in an access-controlled area by an authorised person during lifting operations. All requests for the use of the bypass key must be assessed and permitted only after the authorised person grants prior approval.
2. For mobile cranes with non-key-operated bypass switches or keys that cannot be removed from the switches, the bypass switches must be enclosed within a lockable secure housing. Its key is always to be stored within an access-controlled area at all times during lifting operations, by an authorised person. All requests for the use of the key must be assessed and permitted only after the authorised person grants prior approval.
3. Crane Operators must ensure that all bypass switches are properly turned off at the start of each work-shift, or before access to the bypass switches has been locked out; and
4. Lifting Supervisors must check and ensure that all bypass switches in Mobile Cranes are properly turned off at the start of each work-shift.

Additionally, the circular encourages occupiers, crane owners and employers to actively monitor data logger reports to detect any non-compliance involving the overriding of safety devices. Any incident of non-compliance detected must be investigated and necessary remedial action must be undertaken.

In the event where loads beyond the safe working load of cranes are lifted, it is strictly prohibited to activate the bypass switch that overrides safety devices. In this regard, Regulation 21(7) of the Workplace Safety and Health (General Provisions) Regulations (Cap. 354A, Rg 1) provides that lifting appliances and lifting machines can be loaded beyond their safe working loads only pursuant to such a direction by an Authorised Examiner or an inspector for the purpose of testing such lifting appliance or lifting machine.

More...

SINGAPORE

3 DEC

2019

MOM stepping up measures as worksite deaths surge

On 28 November 2019, it was announced that eight worksite deaths occurred during November, seven of which involved foreigners. This was the highest death toll for the year 2019.

On 27 November 2019, it was reported that a worker had died after being struck by a collapsed wall of Anglo-Chinese School (Barker Road) while carrying out housekeeping works. Separately, on 22 November 2019, it was reported that a 37-year-old Bangladesh worker had died after a fatal accident at a construction site located at Sengkang. The worker was trapped between metal barricades and the counterweight of a crawler crane when the crane rotated.

The authorities have indicated that the MOM would be engaging in greater enforcement efforts in the coming months by carrying out an additional 400 inspections in high-risk sectors, such as construction and marine. This will be in addition to the regular inspections that would be carried out.

More...
More...
More...

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

SINGAPORE

9 DEC 2019

Proper rest areas for outsourced workers

The Ministry of Manpower ("**MOM**"), National Trades Union Congress ("**NTUC**") and Singapore National Employers Federation ("**SNEF**") have jointly developed the Tripartite Advisory on Provision of Rest Areas for Outsourced Workers ("**Advisory**"), which was first published on 9 December 2019. The Advisory is intended to ensure that outsourced workers, such as cleaners and security officers, are given proper and reasonable rest areas to provide them with better working conditions and to promote their well-being. Prior to issuing the Advisory, MOM observed that rest areas of workplaces of outsourced workers lacked proper hygiene, adequate ventilation and shelter.

The key recommendations in the Advisory include providing outsourced workers with designated rest areas, facilities to safekeep their belongings and access to drinking water, as well as ensuring that the rest areas are sheltered, sufficiently ventilated, safe, clean and quiet. While employers may face costs or space restraints and are hence unable to implement every recommendation set out in the Advisory, they should minimally ensure that outsourced workers can safe keep their belongings and have access to drinking water and adequate ventilation.

More...

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

CONTRIBUTED BY: RAJAH TANN

Lawyers who know Asia

SOUTH KOREA
15 JAN 2019

Amendment to the Labor Standards Act ("LSA") regarding Notice of Dismissal provision

The amendment to the LSA inserted an exception to the advance notice of dismissal requirement in Article 35 for employees whose consecutive service period is less than 3 months (i.e., regardless of whether they are probationary employees or not). The amendment deleted other existing exceptions to the notice of dismissal – which were based on the types of employment – to reduce controversy on the fairness of the existing system. This change was largely driven by the Supreme Court's holding that it was unconstitutional to exclude a salaried employee whose consecutive service was less than 6 months from the notice of dismissal requirement.

This amendment to the LSA has become effective from January 15, 2019, immediately upon its promulgation. However, as the amendment is applicable to employment contracts executed after 15 January 2019, the employment contracts executed before 15 January 2019 remain governed by Article 35 of the LSA before the amendment.

SOUTH KOREA
15 JAN 2019

Promulgation of an amendment to the Labor Standards Act ("LSA"), which defines and prohibits workplace harassment for the first time in Korea

An amendment to the LSA was promulgated on 15 January 2019, which established a new obligation to prohibit workplace harassment as follows.

The Amendment to the LSA prohibits workplace harassment, which is defined as an "act by an employer or employee[,] which causes physical or mental suffering, or worsens the working conditions/environment of another employee, by taking advantage of his/her (superior) status or (power) position in a relationship within the workplace beyond the appropriate scope of work" (Article 76-2 of the LSA Amendment).

An employer is required to include or amend the workplace harassment-related provisions on preventive and responsive measures upon occurrence of workplace harassment in the company's Rules of Employment ("ROE"), and report the new or amended ROE to the relevant labor authorities.

Any employee may report the occurrence of workplace harassment to the employer. An employer is required to promptly conduct an investigation if the employer receives a complaint, or is otherwise made of aware of workplace harassment. If workplace place is confirmed through the investigation, the employer is required take appropriate measures, such as disciplinary action, against the harasser.

During the investigation process, an employer is required to take appropriate measures (e.g., changing the victim's workplace, placing the victim on paid leave, etc.) to protect the victim-employee from (further) harassment after hearing the opinion from the victim.

If an employer takes any disadvantageous measures against the victim-employee or the employee who reports the occurrence of workplace harassment, the employer may be subject to a fine of up to KRW 30 million or imprisonment of up to 3 years.

Workplace harassment-related provisions in the LSA will become effective on 16 July 2019, which is 6 months from date of official promulgation.

SOUTH KOREA
19 APR 2019

Announcement/Enforcement of the Rules on the Occupational Health and Safety Standards

On April 19, the Ministry of Employment and Labor (the "**MOEL**") announced and enforced the "Rules on the Occupational Health and Safety Standards". These Rules have been adopted to prevent accidents that may occur during various operations relating to shunting trains (e.g., separation/combination of

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

SOUTH KOREA
19 APR
2019

coaches, redirection of railways), and to strengthen health measures to protect workers who handle harmful chemicals.

As workers may fall, collide, or be dangerously cramped while climbing up a train to conduct various shunting operations, the MOEL enacted these rules to prohibit the operation of a train while a worker remains situated on a ladder during the course of his/her duties. Moreover, the MOEL enacted the rules mandating the instalment of a safety rail at a location where an employee would board the train in order to mitigate the risk of falling.

The MOEL included Indium and 1,2 dichloropropane, which have been confirmed as carcinogens causing lung disease and bile duct cancer in Japan, in the list of substances subject to control pursuant to the Occupational Health and Safety Act, and required the employers to subject the workers to appropriate health measures.

Indium, which has been confirmed to cause lung disease, was designated as a "harmful substance subject to control" posing a significant health hazard, and the MOEL mandated the instalment of a ventilation system, leak prevention measures, and other health measures for handling Indium. 1,2 - dichloropropane, which has been confirmed to cause bile duct cancer, was designated as a "substance under special control" posing serious health hazards. In addition to aforementioned measures, the MOEL required additional measures, such as notifying workers of health hazards and drafting handling report of the substances.

SOUTH KOREA
1 JUL
2019

Implementation of the 52-hour work week to businesses falling under special categories

Wording: The 52-hour work week, which includes overtime and holiday work, has been implemented in phases depending on the size of a business. The 52-hour work week became effective on July 1, 2018 for businesses with more than 300 or more employees and on July 1, 2019 for businesses falling under special categories. The same requirement will become effective on January 1, 2020 for businesses with 50 or more, but fewer than 300 employees and on July 1, 2021 for businesses with 5 or more, but fewer than 50 employees.

Businesses falling under special categories for which the 52-hour work week became effective as of July 1, 2019 include 21 types in the following industries: auto/auto parts, wholesale and brokerage of goods, retail, storage and warehouse, finance, insurance and pension finance, finance and insurance-related services, mail, educational services, research and development, hospitality, food and beverage, advertising, market research and polling, business facilities and landscape management, beauty salons/public bath or similar services, production and distribution of motion pictures and audio records, broadcasting, telecommunications, waste water and human waste processing, social welfare, etc.

SOUTH KOREA
16 JUL
2019

Workplace Harassment laws go into effect

The amended Labour Standards Act prohibiting workplace harassment and requiring measures to prevent and address workplace harassment went into effect on July 16, 2019.

Once a workplace harassment incident takes place, the employer is obligated to investigate and take appropriate measures. The employer shall not dismiss or treat the reporter or the victim in a disadvantageous manner. Moreover, the employer shall have workplace harassment provisions (e.g., prevention, measures to address workplace harassment, etc.) in the rules of employment.

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SOUTH KOREA

17 JUL 2019

An amendment to the Fair Hiring Procedure Act goes effective

Wording: As of July 17, 2019, the amended Fair Hiring Procedure Act became effective to prohibit any act that undermines fairness of the hiring process or any request/collection of personal information unrelated to job performance such as an applicant's physical appearance.

The amendment prohibits improper requests, pressure and/or coercion with respect to hiring, and prohibition of providing and/or receiving money, goods, entertainment or proprietary benefits regarding hiring in violation of the law. Moreover, applicants cannot be required to provide personal information unrelated to work of themselves, their direct lineal ascendants/descendants and siblings

SOUTH KOREA

1 OCT 2019

The Amendment to the Equal Employment Opportunity and Work-Family Balance Assistance Act ("Act")

The amendment to the Act expanded paternity leave and reduced working hours for childcare period.

With respect to 'Paternity Leave', the amendment extends the leave period to 10 days (all paid leave days). Prior to this amendment, paternity leave was limited to five days (and only the first three days were paid leave). Further, the amendment extends the period for requesting paternity leave from within 30 days of the date a male employee's spouse gave birth to within 90 days of birth. The amendment also enables employees to split their paternity leave into two separate segments.

This amendment only applies to employees using the leave from October 1, 2019. Employees who have already used their paternity leave or those with the expired request term (up to 30 days after giving birth) before September 30, 2019 are not eligible for this extended paternity leave.

With respect to 'Reduced Working Hours for Childcare Period', previously, the total period of an employee's combined use of (i) childcare leave and (ii) reduced working hours for a period of childcare could not exceed one year. Following the amendment, however, an eligible employee may take up to one year of childcare leave and also another year of reduced working hours during the period of childcare (or some combination thereof for a maximum two-year period).

The amendment also enables employees to split their terms of reduced working hours for childcare leaves multiple times so long as it is for at least a 3-month period term. In addition, the amendment enables employees to reduce 1 hour of their working hours per working day during the childcare period; it was previously only allowed for employees to reduce working hours from 2 to 5 hours per working day. The above amendment is applicable to employees using childcare leave after October 1, 2019 (including those who split their leaves), and employees who have already used all of their childcare leave (1 year) are not eligible for this amendment.

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA
1 FEB 2019

The minimum wages for six trades have been amended with effect from 1st February 2019

Amendments to the minimum wages for the to the following six trades :-

1. Motor Transport;
2. Hosiery Manufacturing;
3. Coconut Manufacturing;
4. Prawn Culture and Exports;
5. Match Manufacturing and
6. Brick and Tile Manufacturing.

have been notified by the Secretary, Ministry of Labour by notices dated 28 and 29 January 2019 was published in the Ceylon Daily News of 1st February 2019.

SRI LANKA
6 MAR 2019

Agrapathana Plantations Ltd. and (2) Lanka Tea and Rubber Plantations (Pvt.) Ltd. – Respondent-Appellants v. Seevali Arawwawala [Supreme Court].

The Applicant-Respondent-Respondent ["the applicant"] had been employed as an Assistant Manager of an estate owned by the [1st] Appellant ["the employer"]. He was so appointed on 1 July 2009 and placed on probation for a period of six months from that date but, on 28 January 2010, the period of probation was extended for a further period of three months from 1 January 2010 to 31 March 2010.

Thereafter, by letter dated 17 March 2010., his employment was terminated with effect from 1 March 2010 as his performance had not improved.

The applicant sought relief from the Labour Tribunal which, in its order dated 30 September 2011., directed the employer to reinstate the applicant and transfer him to another estate controlled by the employer. The employer then appealed to the High Court, which affirmed the order of the Labour Tribunal.

Before the Labour Tribunal, the employer, while admitting that it terminated the services of the applicant further stated that the termination had been effected whilst the applicant was on probation.

The Labour Tribunal ordered that, as the employer had admitted the termination, the employer should begin the case. It was contended by the Appellant that this was erroneous since the termination had occurred while the applicant was on probation. Counsel for the Applicant, on the other hand, contended that the applicant was not on probation at the time of the termination of his services since, by the time the period of probation was extended on 28 January 2010, the period of probation had already come to an end on 31 December 2009.

In considering this issue, the Supreme Court noted that the letter of appointment provided, inter alia, that the employer had reserved to itself the right to extend the period of probation and also provided that confirmation would be in writing and the applicant would continue to be on probation until so confirmed. Noting further that the applicant had never been confirmed, the Supreme Court held that the services of the applicant had been terminated while he was on probation.

Proceeding to the next question as to which party should begin the case in such circumstances, the Court adverted to one of its previous judgments [Anderson v Husny – 2001 SLR 168] where it had held that

> "upon proof that the termination had taken place while the employee was on probation the burden was on the employee to establish unjustifiable termination and the employee must establish at least a prima facie case of mala fides before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA
6 MAR
2019

Accordingly, the Supreme Court held that the order of the Labour Tribunal was wrong, could not stand and held further that the High Court had also erred in that while (rightly) holding that the probation had been lawfully extended, nonetheless affirmed the order of the Tribunal.

The order of the Labour Tribunal and the judgment of the High Court were set aside and a 'retrial' was ordered by the Supreme Court.

SRI LANKA
7 MAY
2019

CA (Writ) Application 13/2019
Kotuwegedara v. Commissioner General of Labour and Six Others

This case was decided on 7th May 2019.

The 6th Respondent, Unilever Sri Lanka Limited, made an application (P2) under section 2 of the Termination of Employees (Special Provisions) Act no. 45 of 1971, (hereafter "the Act") to the Commissioner General of Labour, (hereafter "the Commissioner"), seeking permission to terminate the services of the Petitioner - who had been employed by it for 25 years and last held the post of Production Assistant at the Company's factory at Horana.

The basis on which the application was made, was that the production facility at the said factory had been completely destroyed by fire and that this necessitated the termination of the Petitioner's services. At the time of making the application to the Commissioner, the Company had also written to the Petitioner (by P3) instructing him not to report for work until a final ruling was made by the Commissioner. The Petitioner was also informed that he would continue to be paid his salary and would be entitled to his medical benefits.

It was not in dispute that:

a) until the application was made, the Petitioner had - apart from his salary - been paid all allowances which included a traveling allowance and a special overtime allowance; and

b) that upon the application being made, the payment of the said allowances had been discontinued;

At the inquiry, the Petitioner took up a preliminary objection on the basis that the non-payment of the allowances constituted a termination of his services and that there could be no inquiry into the application, (which was for permission to effect the termination).

It was contended that the 2nd Respondent, (the Assistant Commissioner who held the inquiry), had initially informed the Company, (by decisions marked P7 and P12), that its application would not be proceeded with unless the allowances were paid. The latter had not complied - but subsequently, the 2nd Respondent decided to proceed with the inquiry.

The Petitioner made this application to the Court of Appeal, seeking writs of Certiorari and Mandamus respectively, to quash the decision to proceed with the inquiry and to compel the Commissioner to dismiss the application of the company. An interim order to stay/suspend the continuance of the inquiry until compliance by the company with the orders P7 and P12 was also sought.

The Petitioner prayed for the aforesaid reliefs on the basis that the non-payment of the allowances was tantamount to a termination of his employment and that, as such, proceeding with the application, (for permission to terminate), was illegal. He relied on section 2(4) of the Act which states:

"For the purposes of this Act the scheduled employment of any workman shall be deemed to be terminated by his employer if, for any reason whatsoever, other than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include:-

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA

7 MAY

2019

a) non-employment of the workman in such employment by his employer whether temporarily or permanently; or
b) non-employment of the workman in such employment in consequence of the closure by his employer of any trade industry or business."

The Court which referred to previous decisions of the Supreme Court and juristic opinions made the following observations.

a) Sections 2(1) and 2(2) did not specify that payment of wages pending an application was a condition precedent to maintaining an application under section 2(1) but, in view of the provisions of subsection (4), it was clear that the payment of wages until the date of the application was mandatory as non-employment without the payment of wages would result in the termination of employment.
b) Section 6 of the Act empowered the Commissioner to conduct an inquiry where there had been a termination contrary to section 2(1) and, if it was the contention of the Petitioner that his services had been terminated contrary to the provisions of the Act, he was entitled to have made an application under section 6 of the Act or section 31B of the Industrial Disputes Act – neither of which he had done.
c) In fact a finding by the Court that the non-payment of the allowances had resulted in the services of the Petitioner being terminated in September 2017– which would be the effect of a writ of Mandamus prayed for, would be to the detriment of the Petitioner as any application to challenge such application would be out of time.

Having considered a decision of the Supreme Court [Samalanka v. Weerakoon – 1994 (1) SLR 405], where the Court observed, inter alia - as follows -

"But even if there had been a failure to pay wages pending the inquiry, I do not think that in the circumstances of this case, it could constitute a "termination" ...." [at p.411], the Court of Appeal, (in the instant case), went on to state that:

"The reasoning of the Supreme Court thus makes it clear that once the process under section 2(1) is triggered by making an application, non-payment of wages thereafter does not make the Commissioner General of Labour functus in respect of that application. The 1st Respondent is required by law to proceed with the inquiry and make a decision on the application. This Court would, with all respect, take the view that it would be in the best interests of justice if the basic salary is paid to the employee during the period that the application is under consideration."

It was held that the condition precedent to making an application under section 2(1) (b) and thereafter receiving a decision under section 2(2), is for the employer to pay all wages inclusive of allowances until the time the application is made to the Commissioner. The Court observed that:

"In the circumstances, this Court is of the view that in the present application, even though the 6th Respondent did not pay the allowances after the application was made, the decision of the 2nd Respondent to proceed with the inquiry is neither illegal nor irrational."

In the course of its judgment, the Court of Appeal also observed that there were two significant features in section 2(2) of the Act that demonstrated the rationale for the reasoning that what was required was the payment of wages and allowances until the date of the application – namely:

a) the time period within which the inquiry must be concluded (and order made) – i.e. originally 3 months, subsequently reduced to 2 months by section 11 of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act no. 13 of 2003; and
b) the "absolute discretion" granted to the Commissioner by section 2(2)(b) to grant or refuse his approval and by section 2(2)(e) to decide the terms – including those as to payment of gratuity or compensation - subject to which such approval.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA

7 MAY

2019

As regards a) the Court noted that the legislature, while protecting the interests of the employee by the introduction of the Act, had also been mindful to protect the interests of the employer by requiring the conclusion of inquiry within the stipulated time. While observing that, (as previously held by the Supreme Court), the failure to conclude inquiry within the prescribed time would not vitiate the order, "it is in the best interests of both parties that a decision is made either way within the shortest possible period of time so that the employer does not have to incur loss by continuing payment of salary for a period of more than three months and the employee does not have to suffer loss by receiving only his basic salary for a period beyond three months"; [as stated above, the period had been reduced to two months].

As regards b) the Court observed that in view of the absolute discretion granted to the Commissioner, if he were to refuse to grant approval, he could order reinstatement with an appropriate order on the allowances and other payments that were due to the employee during the pendency of the inquiry, while if he were to grant approval, "the terms and conditions on which such approval is to be granted including the payment of compensation for loss of employment and the payment of allowances and other payments that were due to the Petitioner during the period the said application was pending, can be decided by the Commissioner."

Concluding its judgment, the Court reiterated that the continuation of the inquiry into the application for approval to terminate the services of the Petitioner and making a determination thereon was not illegal and dismissed the application of the Petitioner.

This judgment would constitute authority for the proposition that the non-payment of allowances, (such as those relevant to this case), during the pendency of an inquiry into an application for approval to terminate the services of an employee would not constitute a termination of the employee's services and/or render the continuation of an inquiry illegal.

It may also be observed that there was a rational basis for the non-payment of the particular allowances referred to in this case, in that the rationale for the travelling allowance would – largely, if not wholly - be preferable to the need for the employee to travel to work; and the special overtime allowance would be preferable to overtime work – neither of which would arise where the employee did not have to come for work at all.

However, it may be noted that as regards the, (obiter), observations as to whether the employer is bound to pay wages during the pending inquiry, the position is unclear. The reference to the "two significant features in section 2(2) of the Act that demonstrate the rationale for the reasoning that what is required was the payment of wages and allowances until the date of the application" implies that neither wages (salary) nor allowances need be paid thereafter, during inquiry into the application. On the other hand, the observation that:

> "it is in the best interests of both parties that a decision is made either way within the shortest possible period of time so that the employer does not have to incur loss by continuing payment of salary for a period of more than three months and the employee does not have to suffer loss by receiving only his basic salary for a period beyond three months" implies that salary must continue to be paid.

The latter would seem to be more acceptable, in that non-payment of salary would constitute a fundamental breach of the contract of employment – giving rise to a constructive termination.

It is also noted that the Court, in observing that the matter of compensation, (and the quantum thereof), for loss of employment was to be decided by the Commissioner "in his absolute discretion", did not advert to section 6D of the Act – brought in by the Termination of Employment of Workmen (Special

Continued on Next Page

SRI LANKA

7 MAY 2019

Provisions) Act no.12 of 2003 – which provides that:

> "Any sum of money to be paid as compensation to a workman on a decision or order made by the Commissioner under this Act, shall be computed in accordance with such formula as shall be determined by the Commissioner, in consultation with the Minister, by Order published in the Gazette.";

[The order being the one published in Gazette Extraordinary no. 1384/07 of March 15, 2005, in terms of which inter alia the maximum compensation that could be awarded is Rs. 1,250,000].

SRI LANKA

7 JUN 2019

Lanka Banku Sevaka Sangamaya [Ceylon Bank Employees' Union] (on behalf of E.A. Sugathapala) vs. People's Bank – Supreme Court Appeal 69/2011.

Decided on 7th June 2019

At the time material to this case, the employee on behalf of whom the application was made was an Assistant Manager of the Respondent Bank.

He was found to have granted Temporary Overdrafts (TODs) far above authorised limits during a period of 11 months, when he was functioning as Acting Manager of the Bank's branch in Kalpitiya. At an independent inquiry which was held subsequently, he was found guilty of having acted in violation of the Bank's circulars and of having "brought risk to its financial situation" and his services were terminated, whereupon he made an application for relief to the Labour Tribunal – which, after inquiry, held that the termination had been unjustified and awarded relief in a sum of Rs. 1,581,178 (One Million Five Hundred and Eighty One Thousand One Hundred and Seventy Eight) being the equivalent of the salary he would have earned during the period of non-employment.

The Bank appealed to the Provincial High Court, which set aside the order of the Tribunal and the Union then preferred this appeal to the Supreme Court – which had granted it (special) leave to appeal on the following questions -

1. Has the High Court misdirected itself in regard to the burden of proof in the circumstances of this case? and
2. Did the High Court err in its conclusion that the Labour Tribunal had failed to properly evaluate the evidence placed before it?

In reviewing the evidence and the order of the Tribunal, the Supreme Court found that:

a) the employee had an approval limit of Rs.100,000 for TODs and they were to be for thirty days. Any exceeding of the limits could only be done with the approval of his superiors, in very exceptional circumstances, where qualifying requisites had not been satisfied.
b) The employee had far exceeded the limits and the monies had not been recovered within the stipulated 30 days. More than 30 million rupees had been granted and these were not recovered for more than 10 months.
c) The employee had also not obtained adequate sureties and some of the surety assets had been overvalued by him.
d) The employee's defence was that approval had been obtained from the higher officials of the Bank and that the relevant documents were available at the Bank; but none of them had been produced at the inquiry or at the Labour Tribunal.
e) Although the employee's contention was that the money could be recovered from the borrowers, according to the Respondent (Bank) in most of the cases, it was not and the matters were referred to the mediation board. Some were referred for filing of cases for recovery.

In considering the order of the Tribunal, the Supreme Court noted that the Tribunal had placed a burden on the Bank to prove its case beyond reasonable doubt. He had also "completely relied on the provisions of the

Continued on Next Page

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA

7 JUN 2019

Evidence Ordinance" despite the fact that section 36(4) of the Industrial Disputes Act provided that (inter alia) a Labour Tribunal shall not be bound by any of the provisions of the Ordinance.
[N.B. - no reference was made to the later Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act no. 13 of 2003 – section 9 of which goes further, to state "The provisions of the Evidence Ordinance shall not apply to the conduct of proceedings under this Act].

The Supreme Court affirmed that the Labour Tribunal "should not set a standard of proof of any fact at a standard of beyond reasonable doubt" and that the High Court had rightly held that the Tribunal had erred in requiring the Bank to establish its case on that standard. Accordingly, the Supreme Court went on to hold that the High Court had not misdirected in regard to the burden of proof in this case.
As regards the second question of law on which leave to appeal had been granted, the Supreme Court further held that the High Court had not erred in its conclusion that the Tribunal had failed to, (properly), evaluate the evidence placed before it. It was held that, on the other hand, the High Court itself had properly done so.

In view of the above findings of the Supreme Court, the appeal of the Union was dismissed and the decision of the Provincial High Court affirmed.

The decision is of some significance since firstly, it reaffirms the principle that proof of any fact in a Labour Tribunal need not be beyond reasonable doubt – and therefore, by necessary implication, that proof on a balance of probability would suffice; secondly, that, (while, in the first instance, it is within the province of a Labour Tribunal to evaluate the evidence placed before it), it is competent for the High Court in appeal to determine whether the Tribunal has properly done so; and, thirdly, since it endorses the fact that a Labour Tribunal should not be hidebound by the provisions of the Evidence Ordinance.

SRI LANKA

24 SEP 2019

Act No. 14 of 2019 certified on 24th September 2019, amends provisions of the Wages Boards Ordinance

The significant amendment is the repeal of the former section 59A which related to a situation where, by way of trade or for a commercial purpose, one person arranges to have work performed by another – and the other person employs workers for the performance of such work.

Section 59A itself has been replaced by a new section and, further new sections 59B to 59D have been introduced. The new section 59A provides statutory recognition to a principle which had already been established by judicial decision.

The current statutory position is – very briefly stated – as follows:

Where work performed by the workers employed by the second person mentioned above, is performed, (by them), on a regular basis and is integral to the business activities of the former, (the one who obtains the services), the contract/arrangement is deemed to be a disguised employment relationship; and, where the Commissioner of Labour is satisfied that there is in fact such a relationship, the Commissioner is empowered and bound to direct the first mentioned person to refrain from having such work executed under such arrangement. A right of appeal to a Special Employment Relations Tribunal, is provided for.

The establishment of such Tribunal and matters incidental thereto are provided for in section 59B. Section 59C provides for the hearing and determination of appeals and the steps to be taken thereafter, and section 59D makes failure to comply with the Commissioner's directive an offence in respect of which action may be filed in the Magistrate's Court.

Continued on Next Page

SRI LANKA

24 SEP

2019

failing to furnish the means necessary for any authorised officer for entry or inspection or exercise of any other powers conferred by section 55;

a) failing to furnish the means necessary for any authorised officer for entry or inspection or exercise of any other powers conferred by section 55;

b) hindering or molesting such officer in the exercise of such powers;

c) refusal or failure, without adequate reason, to produce any register, record of wages or notice or give any information required by the officer under section 55.

cc) preventing or attempting to prevent any person from answering any question put by the officer during an examination provided for in section 55.

d) Making or causing to be made, a register, record of wages or notice which is false in any material particular, or producing or knowingly allowing the production of any such document to any officer acting under section 55, knowing the same to be false.

e) Knowingly furnishing any false information to such officer.

f) Making default in compliance with a direction of the Commissioner under section 54 (for the furnishing of any return, register record of wages, information etc. he may require)

g) Where no penalty has been specifically provided for, committing any breach of any provisions o regulations.

The penalty previously provided was a fine of up to Rs. 1000 or imprisonment for up to 6 months, or both. This has now been enhanced to a fine of not less than Rs. 20,000 or imprisonment of up to 12 months – or both.

SRI LANKA

13 NOV

2019

"SC Appeal 178/2018 – Linea Aqua (Pvt) Limited – Respondent – Appellant – Petitioner [Employer] v Lakdeva De Silva – Applicant – Respondent – Respondent. [Employee] – Decided on 13th November 2019

Deposit of security in order to appeal from an order of a Labour Tribunal to the High Court is mandatory.

The Company abovenamed [the employer] had terminated the services of the Applicant – Respondent - Respondent [the employee] on the ground of that he had fraudulently obtained a sum of Rs. 15,000 from an insurance company - with which the employer had an insurance scheme in respect of its employees - by presenting a false prescription and receipt.

The employee made an application for relief to the Labour Tribunal, which ordered his reinstatement without back wages. Being aggrieved by this order, the employer preferred an appeal to the High Court under section 31D of the Industrial Disputes Act.

Section 31D(4) of the Act provided inter alia that [section 31D(4)(b)iii)] where the Tribunal had ordered only the reinstatement of the employee, a sum equivalent to twelve months salary be deposited as security. Further, section 6(1) of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act no. 13 of 2013 required that the appeal be preferred within thirty days, excluding Sundays and Public Holidays, of the making of the order against which the appeal was preferred; and 31D(6) provided that every petition of appeal to a High Court in every case where security was required to be deposited, should be accompanied by a certificate under the hand of the President of the Labour Tribunal that the appellant had furnished such security.

In the instant case, the High Court, (which, according to the judgment of the Supreme Court, took up the case on 23rd February 2018), found that the employer had not complied with the requirement of depositing security in a

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA

13 NOV 2019

sum equivalent to one year's salary and, upholding the preliminary objection of the employee, dismissed the appeal.

The Supreme Court found that, despite the contention of the employer's counsel that he had complied with the relevant provision, there was no valid material to show that this was so.

In the course of its judgment the Supreme Court referred to a previous judgment of that court – Wimalasiri Perera and Others v. Lakmali Enterprises Diesel and Petrol Motor Engineers and Others ([2003 1 SLR 62) wherein it had been stated that:

> The deposit of security was mandatory and the High Court erred in holding that the unexplained failure to deposit the security did not justify the rejection of the appeal."

The Supreme Court in the instant case observed, in concluding its judgment, that, (in any event), the employer had not complied with the provisions of the Industrial Disputes Act at the time of filing the appeal on 2nd September 2016.

In this connection it should be mentioned that, as regards the time within which the security should be deposited, the same judge who made the observation quoted by the Supreme Court in this case, has affirmed in a previous judgment - Sri Lanka General Workers Union v. Samaranayake (1996) 2 SLR 268 - where security had been deposited seven days after the thirty day period - that, (while the deposit of the stipulated security is mandatory), it is not mandatory that the security should have been deposited at the time of filing the petition of appeal or that it must be deposited within the thirty day period allowed for the filing of the petition of appeal. The view of the High Court that the implied provision for the deposit of security was directory only, was affirmed in that case.

SRI LANKA

10 DEC 2019

SC Appeal 36/2015 D.M. Ranbanda-Applicant-Respondent-Appellant [Employee] v. Peoples

Bank-Respondent-Appellant-Respondent [Employer]. Decided on 10th December 2019

Circular instructions of the Bank were mandatory rules and where a branch manager had contravened them and thereby caused loss to the bank, the termination of his services was justified and he was not entitled to any relief

The employment of the employee who at the relevant time was manager of the Thambutttegama Branch of the employer was terminated, on 20.06.2002, on his being found guilty at a domestic inquiry of having – in violation of circular instructions – granted temporary overdrafts [TODs] to customers and of having caused loss to the bank.

The Labour Tribunal, to which the employee applied for relief under section 31B of the Industrial Disputes Act, held that the termination of the employee's services was an excessively harsh punishment in the light of the fact that he had not personally benefited in any way by the grant of the TODs, and, accordingly, held that the termination was unjustified.

The employee had been 52 years and 9 months old when he made his application to the Tribunal on 30.11.2002 and had not prayed for pension benefits - to which employees of the bank became entitled on reaching the age of 55 (or 60 if granted extensions of service till then).

In granting relief to the employee on the basis that the termination of his services was not justified, the Labour Tribunal - which made order on 28.10.2010 – ordered that the employee be considered as having served the bank without a break in service until he reached the age of 55 and granted all pension rights on the premise that he was a retired employee.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA
10 DEC
2019

The employer appealed against this order to the High Court, which set aside the order of the Labour Tribunal and dismissed the employee's application to the Tribunal. In its judgment the High Court observed inter alia that it agreed with the submission of the bank's counsel that the bank being a financial institution, strict compliance with circular instructions was of absolute Importance and that failure to follow such instructions by an employee holding the position of manager of a branch amounted to an act of gross misconduct which entails severe punishment. The High Court further observed that

"This is a case where the public should be taken into consideration for the reason that respondent-appellant bank is an institution that deals with the money deposited by the public with very high expectation of safety of their money and higher benefits."

The Supreme Court endorsed the views expressed by the High Court and affirmed its judgment. It (the Supreme Court), in the course of its judgment rejected the contention of the employee that circular instructions were only guidelines and not mandatory rules. In this connection it observed –

> "In this case due to the conduct of the Employee-Appellant the bank has been exposed to a loss of Rs. 19,686,889.22 and an actual loss of Rs. 4,373,687.21 has been caused to the Respondent Bank. Thus, as mentioned above, the strict adherence to the circular instructions is mandatory to the Bank [sic] and on many occasions branch managers who have granted TODs in a manner (that) caused a loss to the Bank have been terminated as a deterrent against such practice and the Employee- Appellant is one such a [sic] manager."

SRI LANKA
19 DEC
2019

S.C. Appeal 106/2014 Paradigm Clothing (Pvt.) Limited – Respondent – Appellant – Appellant v Mahagamage Chandramadu and 223 Others – Applicants – Respondents – Respondents. Decided on 19th December 2019.

Treating 224 employees who did not comply with a transfer order was held – unanimously by a bench of three judges - to be a constructive termination of their employment. As regards compensation, two judges held that there had been no proper consideration of material questions including the loss (if any) suffered by each applicant in consequence of the termination, and varied the order of the Labour Tribunal – which had been affirmed by the High Court.

It was also held (by the majority of the Court) that the absence of evidence on material questions was as much the fault of the parties as it was of the Labour Tribunal, which had a duty to hear and consider all necessary evidence.

The main facts pertaining to the principal issue (whether there had been a constructive termination of the services of the employees) was stated by the Supreme Court as follows.

The Applicants-Respondents [the employees] were "blue collar" employees employed at the Niyagama "Branch" (i.e. factory) of the Respondent-Appellant [the employer].

They had been granted their New Year holidays from 08.04. 2009 till 27. 04. 2009 and, while they were on holiday during this period, the employer sent them letters of transfer dated 15.04.2009 transferring them to factories at Dehiwala and Karandeniya with effect from 27.04.2009 and, in the meantime, obtained an *ex parte* enjoining order from the District Court on 23. 04. 2009, against all employees (413 in number) from entering the factories at Niyagama and Karandeniya [*sic*]. The alleged ground on which this order was sought and/or granted, was that of a reasonable suspicion that there "could be a possibility of unrest."

At a subsequent mediation process which commenced on 24.04.2009, the employer suggested a "slightly higher" payment, if the employees agreed to

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

report at the new workplace and also agreed (in principle) that compensation could be paid to those who did not so report to that workplace; but, on 30.04.2009, before the next meeting - fixed for 12.05.2009 - sent letters to the employees informing them that they could report to the new workplace on or before 11.05.2009 and that if they did not so report, their services would be terminated.

On 12.05. 2009, employees stated that they were unwilling to report to the new workplace and further discussions were held to consider the possibility of reopening the (Niyagama) factory with 250 employees – for which Board approval was necessary - and, accordingly, a further meeting was fixed for 15.05.2009. However, on that date the employer was absent and underrepresented.

The employees appeared at the District Court of Elpitiya in response to the notices issued to them but the employer was absent and unrepresented there too, and the enjoining order was dissolved.

On 19.05.2009 the employer notified the employees that if they failed to report to the new workplaces by 01.06.2009, they would be treated as having vacated employment.

The Court does not state so in its narration of the facts but, apparently, the employees did not report as directed and were treated as having vacated employment since the Court next states that the employees made applications to the Labour Tribunal seeking reinstatement with back wages or, in the alternative, compensation. All 413 employees had filed applications but only 224 participated in the proceedings and order was ultimately made only in respect of them. The Tribunal, having held that the employees' employment had been constructively terminated, made order that they be paid compensation amounting to a total of Rs. 26,668,995. A breakdown was provided and the Supreme Court judgment discloses that three months' salary per year of service had been ordered as compensation in respect of each employee.

The eight grounds that had been stated by the Labour Tribunal for its finding of constructive termination were reproduced by the Supreme Court and were as follows –

i. *The transfers were "mass scale" and without sufficient prior notice.*

ii. *Convenience of the workmen [employees] and individual issues of the individual workmen should have been considered individually and it is the duty of the employer to give a platform to submit appeals setting out their grievances.*

iii. *The employer has offered to pay Rs. 2000 for those who have been transferred to Dehiwala but (the) evidence show(s) that this amount is anyway not sufficient for accommodation and meals.*

iv. *In making transfers, the employer has not considered the financial challenges that might arise in respect of those employees, especially since the employees were earning very low salaries, approximately Rs. 6,300 a month.*

v. *Had there been a genuine economic reason to close down the factory, such closure would have been justified and the employer should have followed the Termination of Employment (Special Provisions) Act No.45 of 1971.*

vi. *The employer had made use of the New Year vacation to transfer employees and to resort to a District Court for Enjoining Order preventing them from entering the factory. It is very clear that there was no actual evidence but only reasonable suspicion that any disturbance would happen.*

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA

19 DEC

2019

vii. *The transfers were effected for a long distance but sufficient notice was not given.*

viii. *The workmen had not been given any opportunity to appeal against* the transfer.

On the basis of the facts stated above, the Tribunal had held that the transfers were tainted with malice and unfair labour practice and were therefore unjustified.

As regards the contention of the employer's Counsel that the transfers were lawful since there was a specific clause providing for such transfer, which clause had been accepted by the employees, the Supreme Court, (referring also to other judgments), adverted to the facts that a Labour Tribunal was not restricted by the terms of a contract of employment in granting relief and, further, that a transfer that was mala fide was not legitimate.

On the question of compensation, the majority of the Court, (hereinafter referred to as 'the Court' or 'the Supreme Court'), held that the Labour Tribunal and the High Court had failed to consider the matters that should be considered in awarding compensation.

It was observed, at the outset, that -

"Lately, however, this court has observed that there had been failures on the part of the learned Presidents of Labour Tribunals to adhere to well-settled principles in awarding compensation to Applicants who invoke the jurisdiction of the Labour Tribunals"

It was observed that while the Industrial Disputes Act did not specify the criteria for calculating the quantum of compensation, jurisprudence had introduced several such criteria and that there is a duty cast on Labour Tribunals to give due regard to such criteria – which included *the nature of the employer's business, his capacity to pay, the employee's age, the nature of his employment length off service, seniority, present salary, future prospects, opportunities for obtaining similar alternative employment, the employees past conduct, manner of dismissal, effect of the dismissal on future pension rights, (and) any sums paid or actually earned or which should also have been earned since the dismissal took place. [Ceylon Transport Board v. Wijeratne – 77 NLR 481].*

It was noted that the Tribunal had incorporated only the distinctions among the employees in length of service, terminal/present salary and the designation for the purpose of constructing the formula for calculating the amount of compensation payable to each employee and that other factors had been mentioned had been "*conveniently overlooked*".

The Court referred also to the fact that the success of the business of the employer which was the manufacture of clothing for export was contingent upon market forces – more precisely, the demand for clothing in the overseas markets.

Counsel for the employer had contended that due to the global economic downturn in 2006, orders given to the employer for garments had dwindled, resulting in manufacture having to be drastically reduced and that it was in this backdrop that the employer decided to close down the Niyagama factory and transfer that workforce to its other two factories at Dehiwala and Karandeniya and had offered an additional allowance of Rs. 2000 each, to offset the additional expenses they may have to incur in reporting to work in places far from their homes. The Court observed, in this regard, that the fact that the employer suffered losses during 2006 to 2008, (although for different reasons), "*had been admitted to a certain extent*" by the employees. It further observed that the Respondent employees refused the offer though many did take it. The Supreme Court stated that these were factors that the that the

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

SRI LANKA

19 DEC

2019

Tribunal should have considered in arriving at the quantum of compensation to be ordered.

In the instant case, having referred to some of its previous decisions – notably *Jayasuriya v State Plantations Corporation, [1995 (2) SLR 379]*, – the Court found that the Tribunal had failed to accurately assess the immediate loss/ actual financial loss suffered by the employees "*which was claimed by the learned President as the sole basis for granting compensation.*" The Supreme Court noted that the Labour Tribunal had resorted to "*a mechanical formula of 3 months' salary for each year of service*" and, (having previously referred to the fact that it had been held in the abovementioned case that a dismissed employee had a duty to mitigate his loss), stated, *inter alia*, -

"…The employees' respective losses of earnings from the date of dismissal to the date of the LT order had not been calculated nor has remuneration obtained from fresh employment been deducted from that sum, as no evidence had been adduced by the Applicants regarding the securing of alternative employment. Therefore, no mitigating effect on the employees' loss of earnings was considered, nor was it considered whether any unemployed worker remained so through a fault of his/her own."

The Court (Aluvihare J) further held as follows :-

*"As regards the absence of evidence on a key factor in calculating the immediate loss such as securing of alternative employment, in **Jayasuriya** (above), it was determined that the **burden is on the employee to adduce sufficient evidence to enable a Labour Tribunal to decide the loss**. But such failure to provide evidence should be considered against the employee, and not as a ground to award an enhanced amount of compensation, by disregarding any remuneration he/she earned from alternative employment. As the Employment Appeal Tribunal observed in **Adda International V Curcia** [1976] 3 All ER 620, 624 as cited in **Jayasuriya** on page 415,* "The Tribunal must have something to bite on and if an applicant produces nothing for it to bite on, he will only have himself to blame if he gets no compensation. *"Therefore, the failure on the part of the employees to adduce such evidence should have been factored in to prevent possible overcompensation or under-compensation.*

The Supreme Court also noted that:

*"In terms of section 31 C (1) of the IDA (i.e. the Industrial Disputes Act), it is the duty of the Tribunal to make **all such inquiries** into the application and **hear all such evidence as it may deem necessary**, untrammeled by the rules of evidence and after adopting such procedure to make such order as may appear to the Tribunal to be just and equitable."*

In this regard, the Court endorsed the view [Nigel Hatch – *Commentary on the Industrial Disputes Act of Sri Lanka*] that "*the requirement to record tendered evidence is no bar to the adjudicator **calling in addition any "necessary evidence"*** [emphasis added by Aluvihare J].

Having made the above-mentioned observations, Aluvihare J went on to observe *inter alia* that –

a) The learned President had failed to make "all such inquiries" and call all "necessary" evidence, in order to avoid placing the employees in a more favourable position than they ought to be in.

b) Any award of compensation must consider each employee separately and the tests must be applied to each employee when deciding the loss that each has suffered. In this respect, there must be separate evidence relating to each employee and, "*In the absence of such evidence, the Tribunal cannot award compensation as it cannot or assume or hypothesize the loss that each has made (sic)*".

Continued on Next Page

LOOKING BACK

SRI LANKA

19 DEC

2019

c) Compensation awarded in the present case was based on a mechanical formula and was more akin to the payment of gratuity.

d) The failure of the Labour Tribunal to consider the necessary criteria (referred to previously) subjective to each employee was an error of law in that it was a failure to consider and decide material questions.

e) The High Court judgment had simply affirmed sums of compensation ordered by the President of the Tribunal.

f) It was clear that the Tribunal had overlooked several of the established criteria, material to the computation of compensation which could either reduce and/or increase the sum awardable as compensation and "*Court has always jurisdiction to intervene if it appears … that the Tribunal has made a finding for which there is no evidence". [Commissioner of Inland Revenue v. Fraser – (1940 -1942) 24 TC 498 at 501].*

Notwithstanding the Court's finding that the burden of proving the loss (if any) suffered by the employees was on them – which they had failed to discharge – and the approval of the pronouncements that "the Tribunal must have something to bite on and if an applicant produces nothing for it to bite on he has only himself to blame if he gets no compensation", the Court [Aluvihare J] proceeded to state that:

"As I have stated above, the employees would legitimately be entitled to compensation and the only issue that is to be decided is the quantum of compensation applying the criteria referred to herein before";

and held that the compensation ordered by the Labour Tribunal, (amounting to a total of Rs.26,668,995), should be made to the employees but that the interest that had accrued on that amount, (which would have been deposited as security at the time of filing the appeal), should be paid to the employer.

Perhaps by way of explanation of the apparent inconsistency of – in effect – affirming an award of compensation made on a mechanical formula - where the applicants (employees) had produced nothing for the Tribunal "to bite on" - and regarding which award the Court had commented adversely, Aluvihare J concluded his judgment as follows -

Having answered the question in the affirmative, I make haste to observe that this litigation has run its course since 2012. The long delay attached to this case, taken together with the admission by the employer, that the Respondents are entitled to compensation, warrants that there be an end to the litigation with an outcome that serves justice to both parties. It is possible that the Respondents may be entitled to more compensation than what was awarded to them by a mechanical formula. It is also possible that the Appellant may have been able to contest that amount, had they adduced substantial evidence with regard to their capacity to pay. The absence of such evidence in the judgment is as much a failure by the respective parties ***as it is by the Labour Tribunal.*** *However, taking into account the concerns of the Respondents and the fact that the Appellant business had several branches which speaks of the availability of the resources, I am of the view that it is reasonable, in the unique circumstances of this case, that the Appellant company pay Rs. 26,668,995/- to the Respondents minus the accrued interest. Accordingly, I make order directing the learned President of the Labour Tribunal to have the monies deposited by the Appellant be paid to the Respondents (employees), and the interest accrued on the sum of Rs. 26,668,995/- be paid to the Appellant.*

CONTRIBUTED BY: John Wilson Partners

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

TAIWAN
23 JAN
2019

Amending the types of occupations defined under Article 36, Paragraph 4 of the Labor Standards Act

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-3-Zi-1080130098
Issue date: January 23, 2019

After negotiations between the Ministry of Labor and representatives from the relevant industries and sectors, while it is recognized that having passenger transport (i.e., tour bus) drivers work on national holidays, labor day and other holidays designated by the central competent authority according to the traffic mitigation plans made by the Ministry of Transportation and Communications represent a very important facet of public convenience, their personal health as well as road safety are both important concerns as well. As such, considering the public convenience as well as the health and welfare of the drivers, it is proposed to include those drivers under Article 36, Paragraph 4 of the Labor Standards Act for flexible adjustments of mandatory days off during any 7-day period on the "time specific" exceptional occasion. However, such day-off shifting and adjustments should comply with the following rules:

1. Driver may not be made to work for more than nine consecutive days.
2. Driver may not be made to remain on duty for more than 11 hours per day for more than three consecutive days.
3. Maximum driving time of 10 hours per day.
4. For every two continuous days on duty, there shall be a continuous 10-hour or more break period.

TAIWAN
31 JAN
2019

The Ministry of Labor's interpretation regarding the determination of "Negotiation Eligibility" requirements under Article 6 of the Collective Agreement Act and relevant laws and regulations in case of a union of dispatched workers requesting to engage in collective bargaining with the dispatch company according to the Collective Agreement Act.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Guan-2-Zi-1080125196
Issue date: January 31, 2019

In the event a collective bargaining request is made by a dispatch workers' union to a dispatch company by which the dispatched union member workers are employed where the negotiation proposal clearly states that it is applicable only to those dispatched union member workers "serving at the same employer that they were dispatched to", then as long as the number of member-workers exceed at least 1/2 of the total number of workers dispatched by the dispatch company to that same employer, then the union shall be considered a labourer-side party that is "qualified to engage in collective bargaining" under Article 6, Paragraph 3 of the Collective Agreement Act. However, the above does not apply if the dispatch business has dispatched less than 20 workers to the same employer.

Since the "same employer" shall be defined according to the parties in the dispatch contract, when the regional labor authorities are engaged in assisting the two sides in determining the qualification for collective bargaining, it should have the dispatch company provide the relevant dispatch service contract for use as a basis to determine the said qualifications.

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

TAIWAN

21 FEB

2019

The "justifiable reasons" proviso in Article 22 of the Act of Gender Equality in Employment shall be determined on a case-by-case basis. If a worker is personally raising two or more children of less than 3 years of age and is requesting unpaid child care leave from his/her employer, such circumstance shall be considered as a "justifiable reason" under the proviso in Article 22 of the Act of Gender Equality in Employment.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-4-Zi-1080130174
Issue date: February 21, 2019

Since it is provided as a proviso (i.e., an exceptional circumstance to the general rule) in Article 22 of the Act of Gender Equality in Employment that a worker may still request unpaid child care leave even if he or she has a spouse that is not in employment if there are justifiable reasons, the matter should be decided on a case-by-case basis.

In the current case, in consideration that it may be difficult for a single parent to take care of two or more children under the age of 3, as well as the general policy of encouraging parental involvement in child development, if the worker is requesting unpaid child care leave for taking care of two or more children under the age of 3 from his/her employer, it shall be deemed as a "justifiable reason" under the Article 22 proviso.

TAIWAN

4 MAR

2019

The Ministry of Labor's interpretation of how the Labor Standards Act and other relevant regulations apply for wage payments to workers under the Labor Standards Act Article 84-1 who work on the election/removal days for the president, vice-president, and all types of public officials as well as the referendum day.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-2-Zi-1080130118
Issue date: March 4, 2019

In general, for workers under the Labor Standards Act Article 84-1, on the election/ removal days for the president, vice president and all types of public officials as well as the referendum day ("election days" in general), Article 37 of the Labor Standards Act stipulates them as a leave day, and every worker who has the right to vote and is obliged to work on that day shall have paid leave (for 24 consecutive hours from 12 am to 12 pm); those that did not have to work on that day do not get an extra day of leave. Once an employer has obtained consent for the worker to work on election day, the employer shall provide wages commensurate with the hours worked pursuant to Article 39 of the Labor Standards Act, while also taking care to avoid interfering with the worker going to the polls to vote. The employer shall pay the worker at a rate double the regular rate for work performed during "regular hours" (i.e., the hours the worker would have worked) on the election day, as well as overtime pursuant to Article 24, Paragraph 1 of the Labor Standards Act stipulates that if the worker performs work outside such "regular hours". Lastly, since the right to vote may only be exercised on election day, election day is different in nature from all other national holidays or days off, and it is not possible to shift around that day off with other working days in the same way as other holidays of the year.

When the employer has obtained consent from the worker to work on an election day, it shall provide wages per the aforementioned rules; if the worker would like to take make-up leave after work on that day instead of receiving wages, it would be up to the employer and the worker to negotiate the terms of the make-up leave (such as the standards and time-limit of taking the leaves

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

TAIWAN 4 MAR 2019

as well as how to deal with the untaken hours of leaves) so as to protect the rights of both sides. As such, if an employer unilaterally restricts workers to only be able to choose make-up leave after working on election day, such work rule is not consistent with the Labor Standards Act.

TAIWAN 15 MAY 2019

Presidential Order to amend the Labor Standards Act

The Presidential Hua-Zhong-Yi-Yi-Zi-10800049091 Order promulgated on 15 May 2019 announced the amendments to Articles 2 and 9 as well as the new Article 22-1. All changes enter into effect on the day of promulgation.

Key points of the amended provisions:

1. Per the Judicial Yuan Interpretation No.740, the definition of a labor agreement in this Act shall be based on whether the labor providing party is in a "personal servitude" position from the freedom to decide the form of labor service to be provided, as well as whether that party is responsible for the business operation risks and thus "economically dependent". Hence, Paragraph 6 of Article 2 now clearly specifies that a labor agreement refers to an agreement stipulating an employer-employee relationship with master-servant characteristics. (Amending Article 2, Paragraph 6)
2. To provide more clarity to the character of long-term employer-employee relationships entered into between and maintained by dispatched workers and dispatcher entities in this country, as well as prevent the dispatcher entities from avoiding their relevant severance upon termination responsibilities in labor law by entering into fixed-term contracts with the dispatched worker based on the dispatch period, while also taking account of the stable employment of dispatched workers, it is specifically stipulated that the labor agreements entered into between dispatcher entities and dispatched workers shall be considered indefinite-term agreements (Amending Article 9, Paragraph 1)
3. To prevent back pay by dispatcher entities from seriously affecting the livelihood of workers, it is hereby stipulated that when a dispatched worker is owed wages and still fail to receive payment despite having requested the dispatcher entity to provide payment, the entity that the dispatched worker is dispatched to has the responsibility to provide such back pay. As to the duty to provide wages is ultimately the responsibility of the dispatcher entity, it is also stipulated that the dispatched entity may, after paying off the back pay to the worker, require the dispatcher entity to reimburse such amount. Further, to balance the obligation on the dispatched entity to provide back pay and preventing the dispatched entity from being harmed by such a responsibility, Paragraph 2 of this article shall stipulate that in the event of the circumstances in the first paragraph, the dispatched entity may offset such amount from any amount that is due but remains unpaid pursuant to the dispatch agreement. (New Article 22-1)

TAIWAN 15 MAY 2019

Presidential Order to amend the Labor Pension Act

The Presidential Hua-Zhong-Yi-Yi-Zi-10800049101 Order promulgated on 15 May 2019 announced the amendments to Articles 4, 7, 8-1, 14, 23, 26 to 29, 33, 34, 41 to 44, 50, 53 and 54, as well as the new Articles 45-1, 53-1, 54-1 and 56-1 to 56-3, while Article 47 is deleted. All changes enter into effect on the day of promulgation.

Key points of the amended provisions:

1. Expand the scope of applicable persons: Foreigners obtaining permanent residence are now included to provide for their post-retirement lives after permanently residing in Taiwan (amending Article 7, Paragraph 1, Subparagraph 4)

Continued on Next Page

TAIWAN
15 MAY
2019

2. Expand the scope of availability for preferential tax treatment on pensions: Individuals running his/her own business, employers who engage in actual labor, and workers who were commissioned to perform may now enjoy preferential tax treatment for portions of income derived from their work that they voluntarily contribute to their pension accounts. (amending Article 14, Paragraph 3)
3. Opening a dedicated account for pension that is protected from seizure: To protect the worker's right to request a one-time payout of his/her pension, they are now afforded the same rights as workers receiving monthly pension payouts and may open up a dedicated pension savings account that is protected from being used as an offset, seized, provided as collateral to secure a debt or as a target for compulsory enforcement. (amending Article 29, Paragraph 2)
4. Extended duration for right by a worker's survivors or designated persons to claim the pension: The right of a worker's survivors or designated persons to claim pension from the pension account is increased from five years to ten years. (amending Article 28, Paragraph 4)
5. Strengthen protections for labor creditors:

- Business entities who have been fined or ordered to make a late penalty for violations of the Act shall have their names, the names of their owners or principal entity, the name of the responsible person, the date of the sanctions, the provision violated and the sanctioned amounts publicly disclosed.(new Article 53-1)
- If the business entity fails to pay the pension or late penalty, and its assets are insufficient to cover such payments, its responsible person or representative shall be liable for the payment. (new Article 54-1)
- Pension and late payments have priority over ordinary debts. (new Article 56-1)
- The debt release rules, such as the reorganization provisions under the Company Act, the settlement provisions in the Consumer Debt Cleanup Regulations, the bankruptcy provisions in the Bankruptcy Act, shall not apply to labor pensions. (new Article 56-2)

6. Increased penalties: The fine for failure to make the old system (Labor Standards Act-based) pension payments, the severance payments under both the old and the new systems shall be raised from under NT$250,000 to between NT$300,000 and NT$1,500,000. (new Article 45-1)
7. Coordination with Executive Yuan Reorganization: The supervision and administration of the labor pension fund is now handled by the Ministry of Labor, while the Bureau of Labor Funds under the Ministry of Labor is responsible for the investment/management of the fund. (amending Article 4 and Article 33, Paragraph 2)

TAIWAN
23 MAY
2019

Supervisory/administrative personnel whose monthly wages exceed NT$150,000 shall be considered workers defined under Article 84-1 of the Labor Standards Act.

Issued by: The Ministry of Labor
Ref. No. Lao-Dong-Tiao-3-Zi-1080130514
Issue date: 23 May 2019

As the supervisory/administrative personnel who were hired by business units for handling management and administrative affairs at more than NT$150,000 in monthly wages have considerable discretion in their working hours, to ensure that they may negotiate with their employer flexibilities in their working hours and other items so as to keep a smoothly operating employer-employee relationship, those personnel shall be considered as workers defined under Article 84-1 of the Labor Standards Act.

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

TAIWAN
19 JUN
2019

Presidential Order to amend the Labor Standards Act

The Presidential Hua-Zhong-Yi-Yi-Zi-10800060011 Order promulgated on June 19, 2019 announced the amendments to Articles 63 and 78 as well as the new Articles 17-1 and 63-1. All changes enter into effect on the day of promulgation.

Key points:

1. To prevent the dispatch target entity and the dispatch business entity from essentially agreeing to do a "personnel shifting" service, the dispatch target entity could not interview or otherwise select the dispatch employee prior to entering into a dispatch agreement with the dispatch business entity; a violation of this rule will entitle the dispatch employee to require (within 90 days after the start of providing labor services to the dispatch target entity) the dispatch target entity to negotiate and prepare an employment agreement for execution, and the dispatch target entity is to respond within 10 days. To prevent the dispatch target entity from refusing to or fail to timely negotiate with the dispatch employee, an employment agreement will still be considered to have formed on the 11th day even if no consensus was reached, and the labor terms for this dispatch shall serve as the labor terms of the employment agreement. (Article 17-1, Paragraphs 2 and 3)
2. The dispatch business and dispatch target entity may not take retaliatory measures against the dispatch employee for making the above request, and any such measures will be deemed null and void in law (Article 17-1, Paragraphs 4 and 5)
3. To prevent a potential breach of the service term limit in the original employment agreement when the dispatch employee is departing from the dispatch business entity, Paragraph 6 of Article 17-1 protects the dispatch employee's rights upon a contract transfer.
4. To prevent a break in the accrued seniority from a contract transfer, the dispatch employee has a right to request the dispatch business entity to pay severance or pension.
5. For the rights of the dispatch employee to receive compensation for injuries received in an occupational hazard incident, the dispatch business entity and the dispatch target entity are to be jointly liable for such compensation; if another law has already required either entity to compensate the dispatch employee for the same incident, that entity may claim offset (compensation) from the other. If the incident may be attributed to both entities' violation of the relevant occupational safety regulations, both shall be held jointly liable. (Article 63-1)
6. To prevent the above "personnel shifting" practice and the potential discriminatory treatment in retaliation for the direct employment request from the dispatch employee, administrative penalties are set for the dispatch business entity or the dispatch target entity's violations of the provisions in Article 17-1 (Article 78)

TAIWAN
21 JUN
2019

Response regarding questions on the applicability of Article 17-1 of the LSA

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Guan-2-Zi-1080127025
Issue date: June 21, 2019

1. Since Article 17-1 does not contain any special retroactive application language, it is effective starting from the date it entered into effect.

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

LOOKING BACK

TAIWAN 21 JUN 2019

2. For the dispatch business entities and the dispatch target entities who were already engaging in the aforementioned "personnel shifting" practice, or dispatch target entities who have refused requests from dispatch employees to negotiate a direct employment agreement, although the ex post facto principle applies, if the dispatch employee wishes to seek a declaratory decision to confirm whether an actual employer-employee relationship with the dispatch target entity existed, the employee may request a court to do so through a civil action, and the court will decide the issue based on the facts. .

TAIWAN 26 JUL 2019

Legislative reasoning behind the prohibition on the dispatch target entity to select specific dispatch employees in advance per Article 17-1 of the LSA and examples of such conduct

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Guan-2-Zi-1080127136
Issue date: July 26, 2019

1. The legislative reasoning in Article 17-1, Paragraph 1 of the LSA prohibiting the dispatch target entity to select specific dispatch employees in advance is because of the "personnel shifting" service that dispatch business entities and dispatch target entities often engage in. Thus, the provision prohibits a dispatch target entity that already had a specific candidate in mind (whether through recruiting or interviewing) from transferring that individual to employment under a dispatch business entity, and then have him/her dispatched back to the dispatch target entity to perform work per the instructions of the dispatch target entity.
2. This also prevents a practice where the dispatch target entity goes to another dispatch business entity and requests that other entity to hire the dispatched employees as the dispatch agreement is expiring.

TAIWAN 19 AUG 2019

Announcement by the Ministry of Labor to increase the minimum wage, effective January 1, 2020

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Tiao-2-Zi-1080130910
Issue date: August 19, 2019

1. The hourly minimum wage is adjusted to be NT$158.
2. The monthly minimum wage is adjusted to be NT$23,800.

TAIWAN 3 OCT 2019

The Ministry of Labor's Occupational Safety and Health Administration issued the "Safety Guidelines for Food Delivery Work" and requested compliance from the industry.

Issued by: The Occupational Safety and Health Administration of the Ministry of Labor
Ref. No.: Lao-Dong-An-1-Zi-1081040118
Issue date: October 2, 2019

To improve the safety measures for those engaged in food delivery, the Occupational Safety and Health Administration of the Ministry of Labor issued the "Safety Guidelines for Food Delivery Work" on October 2 after consulting opinions from the industry and examining the practical requirements. The food delivery platform companies are being requested to establish traffic accident prevention and handling, as well as heat hazard prevention safety prevention measures; for the safety of delivery persons, food delivery work should be suspended during typhoons or other inclement weather.

In addition, occupational safety and sanitation training should be provided to delivery workers, and work rules regarding occupational safety shall be provided to those workers and require them to comply with such rules. Periodical or spot inspections of food delivery work will be conducted, and guidance shall be provided as to how to properly implement risk assessment, safety administration and improvement measures.

Click here to view 2018 edition

Important: action likely required
Good to know: follow developments
Note changes: no action required
Looking Back
Looking Forward

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

TAIWAN
19 NOV
2019

The Ministry of Labor issued the "Guideline Principles for Labor Contracts" to assist businesses to understand labor contracts and avoid infringing on workers' rights.

Issued by: The Labor Relations Department of the Ministry of Labor
Ref. No.: Lao-Dong-Guan-2-Zi-108128698
Issue date: November 19, 2019

The Ministry of Labor issued "Guideline Principles for Labor Contracts" the on November 19 to specify the standards by which labor contracts shall be considered, as well as the "Labor Contract Relationship Determination Table", which contains 25 items to be reviewed. Businesses are reminded that businesses must take care to avoid breaching its employer obligations under the law even for those workers with whom they have not entered into labor contracts with.

The Ministry of Labor further explained that all current jurisprudence considers labor contracts based on the nature of the master-servant relationship between the employer and the employee. As such, the main standards the Guideline Principles examine are the master-servant relationship, the economic dependency and the organizational dependency. The master-servant relationship is determined based on the "working hours, how labor service is rendered and where labor service is rendered by the employee", specifically the level of restraint on the employee, such as "inability to refuse assignment", "must submit to employer performance review", "must personally provide service", etc. Economic dependency looks at whether the employee is paid regardless of result, whether the employee assumes any risk in the operations of the company, whether the employer supplies the instrumentalities and tools for the employee's service, whether the employee can only receive wages based on the standards of the employer, and whether the employee can only provide the stipulated labor services through the employer. Organizational dependency examines whether the employee needs to cooperate and work with others to complete an assignment. Other considerations include labor insurance, wage withholding taxes and the contracts of other employees performing similar services.

The "Labor Contract Relationship Determination Table" is thus made to enable workers to better understand the above relationships. The more items out of the 25 that the employee can check off as present in circumstance, the more likelihood that the contract is closer to a formal labor contract in nature. The Ministry of Labor cautioned that final judgment, however, still depends on the actual contents of the contract, and how much restriction the employer puts on the employee in reality in performing the labor services; courts and administrative agencies will not be bound by the form of the contract or the job title of the employee.

TAIWAN
25 NOV
2019

The Ministry of Labor issued the "Notes for Employers in Conducting Labor-Management Conferences" in stipulating operational rules for labor-management conferences.

Issued by: The Ministry of Labor
Ref. No.: Lao-Dong-Guan-5-Zi-1080128650
Issue date: November 26, 2019

The Ministry of Labor's "Notes for Employers in Conducting Labor-Management Conferences" contains 15 items regarding how the voting, convening and passing of resolutions shall be conducted at labor management conferences for reference by employers and unions. This also provides more uniform rules for the local labor administrative agencies to apply with regards to how businesses in their jurisdiction may conduct such conferences. The key points are:

1. The employer shall be responsible for the necessary expenses, facilities and location of the conference. A list of what is considered necessary expenses is provided.

Continued on Next Page

INDEX
2019
AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

TAIWAN
25 NOV
2019

2. The employer shall announce the details of the employee representative election to be conducted at the labor-management conference (the number of representatives up for election, the date and location of the election, how the election shall be conducted).
3. The employer shall hold the labor-management conferences at regular intervals (e.g., once every three months)
4. If the conference is to be held through videoconference, the decision to do so shall be resolved by the conference. The conference must be conducted in a way that all can sufficiently recognize each other, and all attendants must be able to see and hear the entire proceeding at all times. For the meeting minutes, the attendance record shall be done in an electronic form that is sufficient to recognize the identities of the attending personnel so as to determine the number of attendants and the resolution voting thresholds.
5. For any resolution involving consent under the Labor Standards Act (e.g., a change to regular work hours), an expiration date may be attached.
6. Records relating to labor-management conferences shall be kept by the employer for 5 years and may not be altered or forged.

The Ministry of Labor reminds employers that the purpose of the conference is to allow employee participation, and the convening of such meetings is relevant to review of matters such as work hour adjustments, the employer company's IPO application, and the hiring of foreign migrant workers.

TAIWAN
2 DEC
2019

The Ministry of Labor issued the amended "Safety Guidelines for Food Delivery Work 2.0" and again requires the employers to provide reasonable insurance.

Issued by: The Occupational Safety and Health Administration of the Ministry of Labor
Ref. No.: Lao-Dong-An-1-Zi-1081052314
Issue date: December 2, 2019

To provide greater safety and protection of rights for food delivery workers, the amended "Safety Guidelines for Food Delivery Work 2.0" calls for food delivery platforms to not only provide reasonable allocation of orders to workers based on factors such as traffic, weather and time of day, it shall also provide the following insurance: Death and disability insurance (up to NT$3 million); injury insurance (NT$30,000 for pay-as-you-go expenses, hospital visit NT$300/day, hospitalization NT$1,000/day); compulsory vehicle insurance (NT$2 million for death/disability, NT$200,000 per injured person); and motorbike third party liability insurance (NT$2 million per injured person, NT$4 million per accident). The food delivery platform employers shall also provide protective equipment to the workers, such as reflectors, and establish preventive measures to avoid harm to the worker's physical and mental health as a result of overwork.

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

THAILAND 5 APR 2019

Amendments to the Labour Protection Act

A new act was published in Thailand's Government Gazette on April 5, 2019, which will amend the current Labour Protection Act ("LPA"). The new act will become effective 30 days after publication—i.e. on May 5, 2019.

The key amendments to the LPA are as follows:

- The amount of statutory severance pay for an employee who has worked for at least 20 years has been increased to 400 days at the employee's last wage rate (from 300).
- Employers must grant pregnant employees 98 days' maternity leave, which includes leave taken for pre-natal exams before the delivery date, and holidays that fall during the maternity leave period. The employer must pay up to 45 days' wages during maternity leave.
- Employers must grant employees three days of "necessary business leave" with wages paid.
- If an employer relocates its current workplace to a new establishment, or to another of its existing work locations, the employer must post a conspicuous announcement at the current work place for a continuous period of at least 30 days in advance of the relocation. The announcement must include the details of the new workplace and the timing of the relocation.
- Where a change in employer results in any employees being transferred, those employees must consent to that transfer before it can take effect.
- Employers are required to pay 15 percent interest on money that they owe to employees for:
  - payment of wages in lieu of advance notice;
  - wages, overtime payments, payment for working on holidays, and payments for working overtime on holidays;
  - wages during temporary cessation of the employer's operations; or
  - severance pay and special severance pay.
- Where an employer terminates an indefinite term employment contract without notifying the employee at least one payment cycle in advance, the employer must pay wages in lieu of advance notice to the employee on the termination date.
- Employers must pay wages, overtime payments, payments for working on holidays, and payments for working overtime on holidays, at the same rate for both male and female employees who undertake work of the same type, quality, and quantity.
- Several penalties for employers that fail to comply with the provisions in the LPA have also been amended.

THAILAND 27 MAY 2019

Personal Data Protection Act (2019) ("PDPA")

The PDPA was published in the Government Gazette on 27 May 2019, though most of its operative provisions will not be effective for some months, yet. Employers should watch for forthcoming guidance as regulations are issued.

There are no significant policy, legal or case developments within the employment space during 2019 Q4.

CONTRIBUTED BY: Tilleke & Gibbins

INDEX

2019

AUSTRALIA
CHINA
HONG KONG
INDIA
INDONESIA
JAPAN
MALAYSIA
NEW ZEALAND
PHILIPPINES
SINGAPORE
SOUTH KOREA
SRI LANKA
TAIWAN
THAILAND
VIETNAM

Click here to view 2018 edition

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

LOOKING BACK

VIETNAM
16 NOV
2018

Decree No. 157/2018/ND-CP

The Decree provided for region-based minimum wage (ranging from VND 3.98 million (US$172) to VND 4.18 million (US$180)) applied for contracted employees as prescribed by the Labor Code 2012 in four different regions in Vietnam. Such rates are the lowest rates used as the basis for any salary arrangement between employers and employees who perform simplest tasks. Any trained employees must be paid at least 7% higher than the above regional minimum wage rates.

This Decree takes effect as from 1 January 2019 and its regulations take effect as from 1 January 2019.

VIETNAM
15 NOV
2019

The Prime Minister issued Decree 90/2019/ND-CP for new minimum wage on 15 November 2019

As from 1 January 2020, the monthly minimum wage is 5.75% higher than the current rates. The new minimum wage in Decree 90 dividing into four different regions, each with its own rate listed as below table. For qualified employees must be paid at least 7% higher than the below regional minimum wage rates:

Region	Current Minimum Rates		New Minimum Rates	
	VND	US$	VND	US$
I	VND4,180,000	US$180	VND4,420,000	US$190
II	VND3,710,000	US$159.8	VND3,920,000	US$168.8
III	VND3,250,000	US$140	VND3,430,000	US$147.7
IV	VND2,920,000	US$125.7	VND3,070,000	US$132.2

Districts of Hanoi, Ho Chi Minh, Hai Phong Cities, major cities of Dong Nai, Binh Duong and Ba Ria – Vung Tau in Region I

Districts of Da Nang City in Region II.

VIETNAM
20 NOV
2019

The new labour code 2019 adopted on 20 November 2019 and take effect from 1 January 2021 (the "New Labour Code").

Labour Contract

Employer is permitted to execute a labour contract with an employee via electronic method (e.g. emails).

Employer is prohibited to force the employee to perform a labour contract so that the employee can pay back an amount of debt that such employee owes employer (e.g. there may have a loan the employer grants to an employee).

The seasonal labour contract is removed. According, there are two types of labour contract including (i) definite term of up to 36 months and (ii) indefinite term.

An employee holding manager position can be subject to the probationary period of up to 180 days instead of up to 60 days under the current law.

An employer is obliged to pay severance payment within 14 working days from the date of termination of labour contract. The current law requires 7 working days.

An employer may enter in to a number of defined term contracts with foreign worker and the term must be in line with the work permit.

Labour Discipline

An employer may still apply labour discipline if a violation is clearly stated in the labour contract. This is major changes as under the current law, an employer can not apply labour discipline if such violation is in the absence of registered internal labour regulations.

Continued on Next Page

INDEX

2019

AUSTRALIA

CHINA

HONG KONG

INDIA

INDONESIA

JAPAN

MALAYSIA

NEW ZEALAND

PHILIPPINES

SINGAPORE

SOUTH KOREA

SRI LANKA

TAIWAN

THAILAND

VIETNAM

LOOKING BACK

VIETNAM

20 NOV

2019

Number of Holidays

The New Labour Code has increased 01 paid day off for Vietnamese Independence Day from the work. Therefore, an employee is entitled to 11 paid public holidays.

Increase the Retirement Age

From 2021, the retirement age in normal working conditional is at 60 and 3 months if a male worker and at 55 and 4 months if a female worker. After, each year, the retirement age will be increased by 3 month for male worker and 4 months for female worker until the age of 62 if a male worker by 2028 and at 60 if a female worker by 2035.

Addition in the Jurisdiction of Labour Arbitration Council

The Laour Arbitration Council can be chosen to resolve labour disputes other than Labour Conciliators and People's Courts.

Click here to view **2018 edition**

Important: action likely required

Good to know: follow developments

Note changes: no action required

Looking Back

Looking Forward

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