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TOP 10 EMPLOYMENT LAW ISSUES IN THE ASIA-PACIFIC

MARCH 2018

WPG
/ a regional law network

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INTRODUCTION

WongPartnership LLP, together with Asia-Pacific members of the Employment Law Alliance ("ELA") have come together to prepare this report on the significant employment law issues and trends across the Asia-Pacific which we have seen in 2017 and expect to see in 2018.

From this exercise, we notice that across Asia-Pacific, similar employment law issues arise. These similar threads across multiple jurisdictions are not just interesting random observations but a highly relevant one to businesses and practitioners alike.

This knowledge allows one to formulate general employment policies across jurisdictions, thereby ensuring a consistent approach to the treatment of employees within one larger organisation. It also arms one with the ability to understand and properly identify issues, even where they relate to jurisdictions other than the ones we are most familiar with.

For the purpose of this report, we asked firms across 18 different jurisdictions in the Asia Pacific to list the top 10 issues in their jurisdiction and observed the following trends across many of the regions:

1. Measures have been implemented to address issues relating to employees under term contracts and independent contractors;
2. Increased collective bargaining and unionisation activity;
3. Having measures to manage a global workforce/foreign employees;
4. Greater awareness towards workplace harassment, bullying and discrimination;
5. Measures have been implemented to reduce retrenchment and mitigate its impacts;
6. Increased protection for employees' health and safety; and
7. Issues arising out of employee termination, relocation and reassignment.

We hope you will find this report insightful. Should you require any specific advice in respect of any jurisdiction, do reach out to the relevant ELA member firm in that jurisdiction.

The following members have contributed to this report:

1. Corrs Chambers Westgarth, Australia
2. Sattar & Co., Bangladesh
3. DFDL, Cambodia
4. JunHe, China
5. Deacons, Hong Kong
6. Trilegal, India
7. SSEK Legal Consultants, Indonesia
8. Ushijima & Partners, Japan
9. Kim & Chang, Korea
10. Shearn Delamore & Co., Malaysia
11. DFDL**,** Myanmar
12. Simpson Grierson, New Zealand
13. SyCip Salazar Hernandez & Gatmaitan, Philippines
14. WongPartnership LLP, Singapore
15. John Wilson Partners, Sri Lanka
16. Lee, Tsai & Partners, Taiwan
17. Price Sanond, Thailand
18. DFDL**,** Vietnam

SUMMARY OF RESPONSES

The table below shows the common trends and concerns across the various jurisdictions.

The most major concern, shared by 11 out of 18 jurisdictions in the region, relates to the rights of employees under term contracts and independent contractors. Collective bargaining and unionisation issues, the managing of a global workforce/foreign employees, harassment and bullying concerns and retrenchment issues come in a clause second with 10 out of the 18 jurisdictions flagging these as hot topics.

Country/ Issues	Australia	Bangladesh	Cambodia	China	Hong Kong	India	Indonesia	Japan	Korea	Malaysia	Myanmar	New Zealand	Philippines	Singapore	Sri Lanka	Taiwan	Thailand	Vietnam	No. of Countries flagging this issue
Fixed/non-fixed term contracts and independent contractors			✔	✔	✔			✔	✔		✔		✔	✔	✔		✔	✔	11
Managing a global workforce/ foreign employees	✔		✔	✔			✔	✔		✔ (out-sourcing)		✔		✔	✔			✔	10
Collective bargaining/ unions	✔	✔	✔			✔			✔		✔	✔	✔	✔				✔	10
Retrenchment		✔		✔		✔	✔			✔		✔		✔	✔		✔	✔	10
Harassment /bullying		✔			✔	✔	✔	✔	✔	✔		✔		✔	✔				10
Disciplinary procedure and safeguards for dismissal, termination, relocation and reassignment		✔			✔						✔		✔	✔	✔	✔	✔	✔	9
Health and safety	✔	✔					✔		✔	✔ (mental health)	✔	✔	✔			✔			9

SUMMARY OF RESPONSES

Country/ Issues	Australia	Bangladesh	Cambodia	China	Hong Kong	India	Indonesia	Japan	Korea	Malaysia	Myanmar	New Zealand	Philippines	Singapore	Sri Lanka	Taiwan	Thailand	Vietnam	No. of Countries flagging this issue
Pay equality/ workplace discrimination		✔			✔	✔		✔		✔		✔	✔		✔	✔			9
Minimum wage			✔	✔			✔		✔	✔	✔				✔			✔	8
Personal data protection				✔	✔			✔		✔			✔				✔		6
Amendment of employment legislation	✔			✔		✔						✔	✔	✔					6
Restrictive covenants										✔		✔		✔		✔	✔		5
Women's participation in the workforce		✔	✔		✔	✔		✔											5
Elderly employees		✔	✔					✔					✔				✔		5
Employment (including salary-related) claims			✔			✔					✔			✔	✔				5
Provident fund/social security			✔		✔	✔					✔				✔				5
Employee insurance			✔	✔						✔								✔	4
Overtime work	✔				✔			✔	✔										4
Work-life balance (e.g. max no. of working hours, leave)								✔	✔			✔				✔			4

SUMMARY OF RESPONSES

Country/ Issues	Australia	Bangladesh	Cambodia	China	Hong Kong	India	Indonesia	Japan	Korea	Malaysia	Myanmar	New Zealand	Philippines	Singapore	Sri Lanka	Taiwan	Thailand	Vietnam	No. of Countries flagging this issue
Whistle-blowers	✔						✔									✔			3
Transferring employees in M&A transactions						✔	✔										✔		3
Audits	✔								✔				✔						3
Right to privacy/social media concerns										✔		✔				✔			3
Same-sex spousal benefits					✔											✔			2
Antitrust concerns				✔	✔														2
Child labour		✔					✔												2
Gig economy					✔														1
Dispatch/ delivery businesses								✔											1
Grievance handling														✔					1
Strikes							✔												1
Participation in company's profits		✔																	1
Use of prescribed templates for contracts											✔								1

AUSTRALIA

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2017 Issues

1. Modern slavery, supply chain compliance and protection of vulnerable workers

The exploitation of vulnerable, especially migrant, workers has become a major issue in Australia since 2015. A number of regulatory responses have emerged, including the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) which substantially increases maximum penalties for underpayments and other workplace law breaches; introduces potential liability for franchisors and parent companies for contraventions occurring in their business structures; and gives enhanced investigatory and evidence-gathering powers to the Fair Work Ombudsman. The federal Government has also undertaken a consultation process on the enactment of legislation based on the UK's Modern Slavery Act, which is likely to be brought forward in 2018.

2. Regulation of trade unions (to address corruption, governance and other issues)

Implementing recommendations of the Royal Commission into Trade Union Governance and Corruption, several new statutes were introduced into Parliament in 2017. The Fair Work Amendment (Corrupting Benefits) Act 2017 was passed in August, introducing new criminal offences relating to various types of 'corrupting benefits' including the dishonest giving, receiving or soliciting of a corrupt benefit between employers and unions; and a new requirement for employers and unions to disclose to employees any 'beneficial terms' (for a union) under a proposed enterprise agreement. Two other bills are still before Parliament. The Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill would make it easier for the courts to deregister a union which has engaged in corrupt or repeatedly unlawful conduct, and to disqualify union officials from holding office if they are not fit and proper persons. The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill would implement governance and financial reporting requirements for worker entitlement funds such as redundancy, training and welfare funds.

3. High Court decisions affecting bargaining and industrial action

On 6 December 2017, the High Court of Australia handed down two significant decisions which will impact on the strategies adopted by employers and unions when negotiating enterprise agreements and considering the taking of 'protected' industrial action in support of bargaining claims. In *Aldi Foods Pty Ltd v Shop, Distributive and Allied Employees Association* [2017] HCA 53, the Court determined that an employer may make an agreement for a new part of its business with existing employees engaged in another part of the business (without having to make a 'greenfields' agreement with any unions that may have coverage rights over the relevant employees). In *Esso Australia Pty Ltd v Australian Workers' Union* [2017] HCA 54, the Court decided that a party to agreement negotiations may not lawfully engage in industrial action where it has previously breached a court or tribunal order relating to the bargaining (it was not necessary for the relevant order to be continuing in operation to make the party ineligible to take protected industrial action).

4. Penalty rate reductions in the fast food, retail and hospitality sectors

In February 2017, a Full Bench of the Fair Work Commission decided to reduce penalty rates (additional payments for performing work at irregular hours) in awards covering the following sectors: fast food, restaurants, hospitality, retail, pharmacies and licensed clubs (*4-Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001). The reductions to Sunday, late night and public holiday penalty rates are being implemented over a four-year period, and have generated considerable controversy as the union movement and Labor Opposition have strongly opposed the cuts (including attempts to override the decision through legislative amendments, and an unsuccessful court challenge). The decision is the first major move towards penalty rate reductions, which were recommended by a Productivity Commission report in 2015.

5. Construction industry bargaining under the new federal Code

The coming into effect of new enterprise agreement restrictions in the Code for the Tendering and Performance of Building Work 2016 required re-negotiation of agreements across the construction industry in 2017. The Code requires companies to have enterprise agreements in place which (generally) do not provide unions with various organisational rights, and do not impose limits on workplace flexibility and efficiency. As these requirements are conditions for companies to be eligible to tender for and be awarded Commonwealth-funded building projects, most major industry players re-negotiated their agreements with building unions to ensure Code compliance before 1 September 2017.

6. Rising penalties for workplace health and safety contraventions

There has been a marked increase in the levels of fines imposed for Category 2 offences under the Model Work Health and Safety laws which apply in all Australian jurisdictions except Victoria and Western Australia. At least nine cases in the harmonised jurisdictions have seen fines totaling A$200,000 or more imposed for Category 2 offences, reflecting the increasing intolerance of the courts for offenders who have failed to implement straight-forward safety measures (where there is evidence of actual knowledge of the risk and the steps required to minimise it). For example in April 2017, a South Australian employer was fined A$650,000 for failing to equip workers with technical and product information when trialing the company's new chemical waste processing plant (resulting in a fire which caused injuries to several workers).

7. Changes to the Skilled Migration Program

In April 2017, the federal Government decided to replace the Subclass 457 Visa Program (which has for many years facilitated the entry of skilled migrants to Australia) with two new Temporary Skill Shortage visas with effect from March 2018. In addition, the list of occupations eligible for a skilled migration visa was significantly reduced, with 216 occupations removed including human resources adviser, production manager (manufacturing), web developer and sales representative (industrial products) among other commonly utilised occupations. Stricter eligibility criteria will

apply for the new short-term (two-year) and medium-term (four-year) Temporary Skill Shortage visas when they become available next March.

8. New industrial manslaughter legislation in Queensland

Queensland became the second Australian jurisdiction to introduce legislation creating criminal offences relating to industrial manslaughter (following the Australian Capital Territory's 2004 industrial manslaughter statute). Under the Work Health and Safety and Other Legislation Amendment Act 2017 (Qld), a person conducting a business or undertaking (PCBU) and/or a senior officer of a corporation may be liable for one of the new offences, when a worker dies (or is injured and later dies) in the course of carrying out work; and the PCBU/senior officer's conduct, by act or omission, causes the worker's death or they were negligent about causing that death. The maximum penalties for breaches of the relevant offences are a fine of up to A$10 million for a PCBU, and up to 20 years' imprisonment for a senior officer.

9. Accessorial liability for workplace law breaches

Several recent cases demonstrate a trend of the extension of liability for underpayments and other workplace law breaches beyond the primary employer responsible for the contraventions. Payroll personnel, HR managers and even external advisers such as accounting firms have all been found liable under the accessorial liability provision (section 550 of the Fair Work Act 2009 (Cth)), which provides that a person may be liable where they have aided, abetted, counselled or procured a breach. The Fair Work Ombudsman is increasingly using section 550 to establish the liability of these types of additional parties in enforcement proceedings it brings before the courts.

10. Whistleblower Protection Bill introduced into Parliament

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill was introduced by the federal Government on 7 December 2017. It seeks to implement a new framework for the protection of persons making disclosures about misconduct within private sector organisations. Eligible whistleblowers will not be made subject to civil, criminal or administrative liability where they have made disclosures in relation to various types of regulated entities (e.g. companies/entities regulated by federal corporations, banking, insurance and superannuation legislation). Disclosures will have to be made to one of a defined list of eligible recipients (e.g. officers or auditors of a corporation), and 'emergency disclosures' may be made to politicians or the media in cases of imminent risk of serious danger to public health or safety or the financial system. The Government intends the new whistleblower protections to commence operation on 1 July 2018.

AUSTRALIA

2018 Issues

Most of the above will continue to be highly relevant issues in the Australian employment law landscape in 2018. In addition, new labour hire licensing laws aimed at driving out exploitative labour contractors will come into operation in Queensland and South Australia, with similar legislation just introduced into the Victorian Parliament (and likely to be passed early in the new year).

The workplace reform debate will also intensify heading into the next federal election (which could be held in 2018 or 2019). The Australian Council of Trade Unions will focus heavily on its campaign to 'change the rules', particularly around enterprise bargaining and limits on industrial action, with its concerns that employers have found numerous ways to avoid the ostensibly favourable provisions for union-based bargaining in the Fair Work Act. While that campaign will gain traction with the Labor Opposition, the (conservative) federal Government will point to the generally successful operation of the current legislation but also (most likely) resist pressures from its business constituency to further deregulate the labour market.

BANGLADESH

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1. Workplace Harassment

Currently, there is a lack of an express statute concerning solely with the harassment of workers at their workplace. Harassment at workplace is generally directed more towards women. Despite a requirement on part of the State, through Article 19 (3) of the Constitution of the People's Republic of Bangladesh, to ensure equality of opportunity and participation of women in all spheres of national life, women are harassed at workplace by colleagues and even by their employers.

Although the Bangladesh Labour Act 2006 (the "BLA") restricts any person in an establishment from behaving with a woman in a manner which may seem to be indecent or unmannerly or which is repugnant to the modesty or honour of that woman, passing remarks on women (for example) is not generally uncommon in a work place. There are however, separate provisions outside the BLA which addresses the issue of harassment in general. Nevertheless, the absence of an express provision providing specific protection puts workers, especially female workers at risk. It is pertinent to note that male employees are also subjected to harassment in the form of abusive words and poor treatment.

2. Unfair dismissal/termination

In Bangladesh, workers can be terminated without any reason. A terminated worker is entitled to benefits from the provident fund and to a certificate of service. Nevertheless, workers, especially in the RMG sector, are usually deprived of these benefits if the employer so wishes. The BLA states that where an employer intends to terminate the employment of a worker without any notice, he may do so by paying the worker wages for the period of notice, in lieu of the notice. The fact that this provision uses the term "may" instead of "must" may be used by unscrupulous employers to their advantage. It implies that it is devoid of a mandatory obligation on the part of employers to pay wages for the period of notice. This may be misused by employers as they may have the tendency to terminate workers without notice and without paying any heed to such provision.

3. Discrimination

The most common form discrimination amongst labour is gender discrimination. The common trend is men are treated more favourably, especially in relation to salary and wages. Although the BLA seeks to ensure equal treatment, in practice, men are treated more favourably than women. This is supported by the article – *work equal, wage not* (http://www.thedailystar.net/frontpage/work-equal-wage-not-70349) – published by *"The Daily Star"* on the 8th of March 2015, which recorded the statement of an employer who stated that "Men deserve a certain level of honour … So we have to pay them at least Tk 400".

BANGLADESH

The International Trade Union Confederation (ITUC) report, 2017 Global Rights Index, suggested that anti-union discrimination is also present in Bangladesh despite the fact that the BLA seeks to restrict unfair labour practices by employers towards the workers for their membership with the trade unions.

4. Working environment (health, hygiene and safety)

The BLA contains important provisions and deals with provisions relating to health, hygiene and safety of the workers. The major issue that lies in relation to these laws is the enforcement of the same. For instance, the BLA makes provision for ventilation and temperature. Workers, particularly in the RMG sector and chemical industries, suffer from poor ventilation. The BLA requires the existence of adequate ventilation to allow circulation of fresh air. The term "adequate" is interpreted by the employers as they deem fit and provide ventilation in accordance to their own will without considering the health and safety of the workers.

5. Child labour

Child labour is probably one of the biggest issues of labour law in Bangladesh. The BLA seeks to deal with employment of adolescent workers. While the BLA strictly restricts the employment of children (those who have not completed fourteen years of age), employment of children eight to 10 years, in practice, is a common phenomenon. Children are mostly seen to be working as a bus conductor or as a peon/office assistant. This clearly shows the disregard of the provisions of the BLA on part of the employer.

6. Retrenchment

It is stipulated under the BLA that "retrenchment" means the termination of the services of workers by the employer on grounds of redundancy. The cessation of employment by way of retrenchment has not been considered as a measure of punishment but it is a result of redundancy. However, not all the procedures and/or conditions are followed by the employer in terms of retrenching an employee and the unscrupulous employers wish to use this process to terminate employees at will as the compensation is relatively lower.

7. Participation in Trade Union and Industrial Relations

There are systems in place under BLA regarding the operation of Trade Union and Industrial Relations. However, the legal framework for trade unionism should be made in compliance with international standard for better protection of the workers. Relevant stakeholders will have to play pro-active role by encouraging the establishment of independent trade unions to protect workers' rights by representing the grievance of the workers properly and to settle labour disputes through peaceful means.

8. Maternity Benefit

The BLA deals with matters of maternity benefits and the BLA clearly states that no employer shall knowingly employ a woman in his establishment during the eight weeks immediately following the day of her delivery. The amount of maternity benefits and procedure of paying the same has also been stipulated in the BLA. However, many employers do not follow these procedures.

9. Participation of the Workers in the Profit of the Companies

The BLA deals with Workers' Participation in the Company's Profits. The BLA is applicable to all establishments or companies, subject to the fact that it qualifies one of the criteria provided below, namely:

- the paid up capital of the establishment or company is one crore taka or more at the end of the accounting year; or

- the value of the fixed assets at cost on the last day of the accounting year is not less than two crore taka or more.

Accordingly, if any company satisfies the above, it is obliged to create a fund and pay 5% of the "net profits" of the company accrued in the previous year to the said funds. However, it is rare that companies follow strictly this provision of the BLA.

10. Re-employment of Retired Worker

The BLA states that a worker employed in any establishment shall retire from employment ipso facto on the completion of 60 (sixty) year of his age. However, the BLA is silent in terms of re-employing the retired workers. This has caused some confusion amongst employers as to whether the retiring employees can be re-employed and, if so, then whether the BLA will be applicable to them in that case.

CAMBODIA

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There are 10 issues arising from the initiatives pursued by the Cambodian government:

1. Duration of Fixed-term Contracts

Recently, the Ministry of Labour and Vocational Training drafted a prakas (regulation) on the determination of fixed duration contracts ("FDC").

This draft Prakas aims to amend certain key provisions related to FDCs under the Labour Law. The draft Prakas includes, but is not limited to, the initial duration of an FDC, which must be not less than six months and can last for a maximum of two years. An FDC can be renewed one or more times on the condition that the period of renewal stays within the two-year cap and the total period of employment does not exceed four years. The duration of an FDC may be less than six months if the employment contract relates to replacement of an employee who is temporarily absent, seasonal work and occasional periods of increased or non-customary activity. In such case, an enterprise will need to obtain prior written approval from the labour inspector.

Based on the current Labour Law, there is no need to obtain prior approval from the labour inspector to enter into an FDC for a term of less than six months. Although an FDC can be renewed, the total duration of an FDC must not exceed two years. When the entire duration of the contractual relationship exceeds two years, whether renewed or not, the FDC will be deemed to have converted to an unspecific duration contract ("UDC"), regardless of the original intent of the contracting parties.

While the current Labour Law is silent regarding the gap period between FDCs, the draft Prakas provides that, after the four-year limit, there must be a gap period of four months between the expiration of the last FDC and a new FDC if an employer wishes to enter into an FDC with the same employee for the same or similar work. In addition, under the draft Prakas, contracting parties may switch from a UDC to an FDC on the condition that it is initiated by the employee, agreed by the employer and approved by the labour inspector. The draft Prakas also clarifies when severance must be paid. Article 73 of the Labour Law does not clearly stipulate when severance should be paid (which is normally 5% of the total contract value) to an FDC employee, whether at the end of each FDC or upon expiration of the final permitted extension. Under the draft Prakas, however, an employer is required to pay severance at the end of each FDC, even if the FDC is renewed.

2. Minimum Wage Increase

Prakas 396 on Determination of Minimum Wages for Employees in the Textile, Garment and Footwear Manufacturing Sectors for 2018 dated 5 October 2017 issued by Ministry of Labour and Vocational Training stipulates that a US$165 per month wage level will apply to newly-hired employees during their probationary period. Upon completion of the probationary period, the employees will then be entitled to US$170 per month. These minimum wage levels will be effective from 1 January 2018.

CAMBODIA

Employees receiving wages based on the quantity of the products they produce (pieceworkers) are entitled to wages based on the results that they achieve. If the work produced exceeds the minimum wage level, the employee must receive an additional amount reflecting this. If the work produced is lower than the minimum wage level, the employer must increase the wages to meet the minimum threshold.

Other than the sectors mentioned above, there is currently no mandatory minimum wage in Cambodia, although a law concerning the minimum wage for other sectors is currently at the drafting stage.

There is a draft minimum wage law that is under consultation with the relevant ministries and may be enacted in 2018.

3. Development on health insurance scheme

2016 and 2017 saw significant developments with respect to social security. In recent months, the Ministry of Labour and Vocational Training ("MLVT"), Ministry of Economy and Finance ("MEF") and Ministry of Health ("MOH") have issued various ministerial regulations (Prakas) concerning implementation of the health care insurance scheme, one of the three pillars covered by the National Social Security Fund ("NSSF"). These include:

- Prakas 404 on the Implementation of Health Care Scheme for Informal Workers and Provision of Additional Allowance for Female Workers Giving Birth issued by the MLVT, MEF and MOH on 11 October 2017 ("Prakas 404");

- Prakas 448 on the Registration of Enterprises and Their Employees with the NSSF for Persons Governed under the Labor Law issued by the MLVT on 10 November 2017 ("Prakas 448"); and

- Prakas 449 on the Determination of Rates, Forms and Procedures to Contribute to the NSSF for the Occupational Risk Scheme and Health Care Scheme issued by the MLVT on 10 November 2017 ("Prakas 449").

Prakas 404 provides additional benefits for female workers as noted in Section 4 below. Prakas 448 requires enterprises employing one or more employees to register the enterprise and their employees with the NSSF. This amends the previous requirement which only applied to enterprises with eight or more employees. Enterprises that are already in operation but are yet to register with the NSSF must do so by 31 December 2017. Those enterprises established after issuance of Prakas 448 must register with the NSSF within 30 days of commencing commercial operations. Enterprises that have already registered with the NSSF for the occupational risk and health care schemes are not required to re-register with the NSSF. Additionally, enterprises must register their employees with the NSSF no more than three days after the commencement of their employment. However, this does not include employees already in possession of a valid NSSF membership card.

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Prakas 449 requires all enterprises to contribute required payments to the NSSF within 30 days from the date of obtaining the certificate from the NSSF. Employers must make monthly contributions to both the occupational risk scheme and health care scheme no later than the 15th day of the following month. Once registered, each enterprise must pay monthly contributions to the NSSF based on the employees' salary ranging from US$0.40 to US$2.40 per employee for the occupational risk scheme and between US$1.30 to US$7.80 per employee for the health care scheme.

4. Increase in maternity benefits

Prakas 404 on Implementation of Health Care Scheme Through Health Equity Found System for Informal Workers and Provision of Additional Allowance for Female Workers Giving Birth issued by the MLVT, the MEF, and the MOH dated 11 October 2017 aims to determine the implementation of the health care scheme through a health equity fund system for informal workers and the provision of an additional allowance for both informal and formal female workers upon the birth of their child. These benefits are funded through the state budget and will be implemented starting from 1 January 2018.

For the purposes of this Prakas, informal workers refers to those that have entered into an employment contract to work for a period not exceeding eight hours per week, and casual workers. The health equity fund system refers to a funding mechanism for social health protection provided to a targeted group of citizens, allowing them to benefit from health care free of charge, at local public health centers funded by the government. Under this Prakas, the NSSF is the governmental agency responsible for supervision and registration of informal workers, and the payment of additional allowances for informal and formal female workers.

With respect to additional allowances, in order for female employees to receive the additional allowance during the delivery of their child, informal and formal female workers or their authorised representatives must report to the NSSF about the pregnancy of female employees within three months prior to the birth of the child or within one month, at the latest, from the birth of the child, in the case of failing to notify the NSSF within the prescribed timeline. Otherwise, the female employees will lose the rights to receive the additional allowance from the NSSF. Of note, the NSSF subsequently issued Notification No. 35/17 dated 10 November 2017 which imposes this reporting obligation upon employers, failing to do so will render them responsible before the law for causing the female employee to lose this right to an additional allowance.

CAMBODIA

5. Plan of pension scheme

The Law on Social Security Schemes provides that employees may, following the fulfilment of certain conditions, retire at the age of 55 and be entitled to receive an "old age pension". At present however, the NSSF's administration of the pension scheme, as provided for by the Law on Social Security Schemes, cannot be accessed by employees or employers as the pension scheme has not been implemented yet. As a consequence, the NSSF retirement scheme is yet to be implemented. We understand from the MLVT that the pension scheme may be implemented next year, in 2019.

6. Immigration issues (new visa categories)

To strengthen the management of non-immigrant foreign nationals, the Royal Government of Cambodia has issued Sub-Decree 123 on the Formalities on Permission for Non-immigrant Foreigners to Enter, Exit and Stay in Cambodia dated 10 June 2016 ("Sub-Decree 123"), which relates to permission for non-immigrant foreign nationals to enter, exit and stay in Cambodia. Non-immigrant foreign nationals who wish to enter Cambodia must apply for a visa at a Cambodian Embassy, or Consulate, international border, or online (for a tourist visa).

Pursuant to new Sub-Decree 123, significant changes regarding visa types have been introduced. Previously, when a Visa E was extended for a long-term stay, the Visa E holder would obtain a general Visa E. However, under Sub-Decree 123, when being extended, the Visa E is specifically classified into various types according to the purpose of the stay. For instance, when extended, a Visa E will become: (1) Visa E_B (for employees/labourers or merchants); (2) Visa E_G (for general non-immigration foreign nationals); (3) Visa E_P (for non-immigrant foreign nationals who wish to come to understand the business); (4) Visa E_R (for non-immigrant foreign nationals who are retirees); (5) Visa E_T (for technical personnel); and (6) Visa E_S (for non-immigrant foreign nationals who are students).

7. Work permit development (online system)

Prakas 352 on Launch of Workforce Data Management through Online System dated 17 August 2016 issued by MLVT ("Prakas 352") introduces the Foreign Workers Centralized Management System to manage the employment of foreign employees in Cambodia through an online system. The online system is implemented through the website (www.fwcms.mlvt.gov.kh) which was launched on 1 September 2016.

Employers are required to complete the formalities to request the approval of the foreign employee quota and foreign employee work permit through the new MLVT online system from 1 September 2016. In some necessary cases, the MLVT or Departments of Labour and Vocational Training ("DLVTs") may request an applicant to be present in person at the MLVT or DLVT or to provide other necessary documents. With the new online system, an applicant is required to pay an online fee of US$30 (excluding VAT) per application in addition to the official filing fee.

Under Prakas 352, a foreign national may now use his/her a valid health certificate issued by a recognised hospital other than the Labour Medical Department of the MLVT to apply for a foreign employment card and work book. This health certificate will need to be certified by the Labour Medical Department of the MLVT (with an official fee of US$5) via the new online system.

8. Development of the trade union laws

The Law on Trade Unions dated 17 May 2016 was enacted to: (1) provide rights and freedom for enterprises, establishments and persons governed by the provisions of the 1997 Labour Law and persons serving in air and maritime transportation and (2) sets out the organisation and functioning of professional organisations of employees and employers. This law includes provisions related to, among other things, the establishment, operation, dissolution, rights and obligations and dispute resolution concerning professional organisations of employees and employers. This law also addresses provisions related to shop stewards, employee unions with the most representative status, termination procedures of specially protected employees, and negotiation of collective bargaining agreements.

This law introduces significant changes relating to the eligibility of shop stewards when compared with the 1997 Labour Law. Under this law, an employee who is 18 years old, has employment seniority of three months and is able to read and write Khmer (additional qualification), is eligible to seek a position as a shop steward. Shop stewards may be elected from among candidates nominated by a local union or from among employees who, while not members of a local union, volunteer to be candidates. Effectively, this requires that any enterprise employing eight or more employees must now arrange for an election of shop stewards after the enterprise has operated for three months.

The mechanism and procedures for special protection against termination under the 1997 Labour Law and relevant regulations are incorporated into this law, such that shop steward candidates, elected shop stewards, union leader candidates, and the elected union leaders are entitled to protection against termination of employment. It is important to note that local unions are now required to, in addition to submitting a list of individuals entitled to special protection to the employer, file the same list with the Ministry of Labour and Vocational Training.

Of notable importance to enterprises is that this law requires representatives of local unions to seek and obtain approval from the employer before entering the enterprise to perform their union duties. The employer must not withhold approval unless such approval may hinder the normal operation of the enterprise. It is unclear under this law how a local union’s representative is defined, and whether union leaders are subject to this requirement as well. Furthermore, union management and administrators duly dismissed continue to have the right to temporarily enter the enterprise, limited to 60 days from the date of dismissal. This post-dismissal right to enter does not apply where dismissal is for serious misconduct.

Finally, employers are prohibited from retaliating against whistle-blowers who report or provide testimony about an enterprise's compliance with labour regulations. A breach of this restriction may result in a monetary fine of up to KHR 5,000,000 (approximately US$1,250).

9. Amendments to collective bargaining agreement provisions

Based on the Law on Trade Unions, the purpose of a collective bargaining agreement ("CBA") is to define the working conditions and the employment conditions, including for personnel serving in the air and maritime transportation, and to regulate the relationship between employers and employees, or unions, as well as between unions and employer associations.

A CBA should specify the scope of its application, which, pursuant to Article 69 of the Law on Trade Unions, may be geographical, occupational, sectoral, or in relation to air and maritime transportation.

The provisions of a CBA shall be more favourable to the employees/workers than those provided by existing laws and regulations, but they must not be contrary to the provisions of the public order and the laws in force. In order for a CBA to be registered, it must explicitly provide a labour dispute settlement procedure, guarantee the minimum essential services, other related services, and public order.

A CBA may have a definite or an indefinite duration. A CBA with a definite duration will be for a minimum of three years. We note that this is a significant change as the Labour Law previously prevented CBA's having a duration exceeding three years. A CBA with a definite duration will, upon expiry, retain the same effects unless it has been denied or revised by either party.

A CBA with an indefinite duration may be repealed. However, it remains in effect for a period of one year from the date of receipt of the repeal.

Once both parties have agreed on the terms and conditions of a CBA, it may be applied prior to registering of the CBA if this is stated clearly in the CBA. A CBA must be registered with the MLVT/DLVTs and will come into effect one day after it has been registered.

10. Dispute settlement systems

There are two types of labour disputes: individual labour disputes and collective labour disputes. An individual dispute is one which involves one employer and one or more employees. The Labour Law only recognises individual disputes that relate to rights disputes. A party to an individual rights dispute has the right to commence proceedings before a court in order for the court to consider and resolve his or her dispute. Alternatively, either party may file a complaint for conciliation of an individual right dispute with the MLVT or DLVT at which the other party is required to participate.

CAMBODIA

A collective dispute may involve one or more employers and a number of employees acting as a group. A collective labour dispute may be an interest dispute or a rights dispute. Conciliation is the first process used to resolve a collective dispute. After a dispute is brought to the attention of the MLVT, the Minister of the MLVT must appoint a conciliator within 48 hours. Conciliation must be carried out within 15 days of the conciliator's appointment. The parties may extend the conciliation time by mutual agreement. All parties must attend the conciliation meeting as arranged by the MLVT or the DLVT and refrain from any kind of action of a nature that brings conflict with the other party or with the conciliation itself. If the conciliation results in an agreement between the parties, a written agreement must be signed by all parties and then signed and certified by the MLVT or DLVT. If the conciliation fails to resolve all of the issues related to the dispute, the MLVT or DLVT must make a written report, noting the unresolved issues, and file the report with the Minister of the MLVT within 48 hours after the conciliation ends. The dispute must then be referred to one of the following dispute resolution mechanisms: (1) the arbitration procedure as prescribed in the relevant collective agreement, if any; (2) by any other procedure agreed to by the parties; or (3) in the absence of the above, to the Arbitration Council.

The MLVT announced a draft Law on Procedures for Labour Dispute Adjudication in September 2017. This draft law impacts the existing labour dispute procedures under the Cambodian Labour Law and, if passed, there will be major changes to the existing labour dispute procedures.

However, in December 2017, the MLVT withdrew this draft Law and has not make any announcement regarding the reasons for withdrawing. In this regard, the current dispute settlement under the Labour Law remains the same.

CHINA

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1. Adapting old laws to suit a new economy

The year 2018 looks to some changes to China's employment laws as the country moves to adapt a rather dated and rigid set of laws to a rapidly changing economy and workforce.

2. Increase in independent contractors

The explosive growth of the sharing economy and the proliferation of independent contractor relationships in particular challenges the traditional ideal and model of long-term, full-time employment with statutory benefits largely funded by employers. National rules issued in 2016 failed to resolve the status of rideshare drivers. Courts have since struggled to come up with workable tests to distinguish employees from independent contractors, particularly when labour agents are involved.

3. Personal data protection

Employers have also not been left with much guidance regarding their obligations on data privacy and protecting employee personal information. While the expectation remains that China will create legislation based on the European approach, China's regulation is still skeletal. Employers are left unsure whether they are deemed "network operators" under the 2017 rules and thus subject to heightened standards to store employee data in China and to complete annual compliance reviews regarding limits on the use and transfer of employee data. Greater clarity may arrive with further implementing of rules in 2018.

4. Amendment of the Labor Contract Law

The long-awaited amendment of the Labor Contract Law should move forward in 2018. Among the key changes employers can expect are reductions in severance requirements, relaxed requirements that require employers to provide employees with open-term contracts, and exemption of small businesses from certain contract and benefits requirements. The year ahead will likely see draft amendments circulated for public comment along with employer and employee interests weighing in on the debate.

5. Maintaining global competitiveness

Concerns about China's global competitiveness have also sparked reforms in the past two years. Employer rates for social insurance contributions have been reduced, tax breaks have been introduced, and increases in the minimum wages have been slowed in order to lower financial burden on employers. Efforts to control employer costs are expected to continue into 2018.

CHINA

6. Restructuring of state-owned enterprises

Restructuring state-own enterprises (SOEs) and reducing industrial over-capacity will likely remain a government priority. With 1.8 million employees already let go in 2016 and 2017 — mostly in the coal and steel industries — further layoffs will put pressure on local governments to cover severance costs as well as the risk of additional strains on welfare systems and communities.

7. Managing foreign employees

An ambitious program to reform the rules and procedures of work authorisation for foreign national employees was implemented on April 1, 2017 following a trial period in several cities and provinces. The changes include a nationwide online application system and classification of foreign national employees into three categories depending on their skills and work qualifications. Pressure from the central government in 2018 is expected to be placed on local governments to unify and simplify application procedures in order to expedite approvals.

8. Anti-unfair competition

Amendments to the Anti-Unfair Competition Law that took effect on January 1, 2018 will likely result in increased litigation and risks for employers.

9. Commercial bribery

Under the amended Anti-Unfair Competition Law, commercial bribery committed by employees is presumed conduct of the employer.

10. Protection of trade secrets

In addition, employees and former employees are now clearly obligated under the amended Anti-Unfair Competition Law to protect employers' trade secrets

HONG KONG

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1. Managing a shift in employment dynamics

With the emergence of automation and new technologies, Hong Kong, along with other parts of the world, has seen the proliferation of gig economy companies such as Deliveroo, Airbnb and Uber. Often these companies engage contingent or casual workers as independent contractors. Under the current employment law regime in Hong Kong, statutory employment benefits entitlement is heavily dependent on the dichotomous classification of independent contractors and employees, or more strictly, whether an employee is engaged under a "continuous contract". In determining whether a worker is an independent contractor or employee, the current position of the Courts in Hong Kong is that they would apply a holistic factual assessment of the parties' relationship on a case-by-case basis. Therefore it may be difficult for workers and corporations to classify a work relationship with certainty. The correct classification could nevertheless have immense impact on the rights and entitlements of the workers and the obligations and liabilities of the corporations. Unfortunately we have to put up with the existing regime whilst awaiting any modernisation of the employment regulatory framework.

2. Anti-trust concerns

In view of the recent enforcement efforts of the Hong Kong Competition Commission ("HKCC") whereby the HKCC, the city's antitrust watchdog, has brought two cases to the Competition Tribunal in 2017, employers should ensure compliance with the Competition Ordinance (Cap. 619) which came into effect on 14 December 2015. In particular, employers and human resources managers should avoid reaching agreements with competitors with respect to fixing wages, bonus or salary increment of staff members and avoid exchanging sensitive information on employees' remuneration and benefits.

3. Sexual harassment/bullying

Whilst there have been mixed voices in Hong Kong towards the global "Me Too" campaign since its launch in October 2017, a few victims of sexual harassment in the city did speak up in the wake of the campaign, with some complaining about sexual harassment in the workplace context.[1] Due to power imbalances and the prevalent conservative Asian culture in the work environment in Hong Kong, employees may tend to remain silent even when they face sexual harassment or bullying. Against this backdrop, the employer's role is of paramount importance to maintain a harassment-free workplace. An aggrieved employee in Hong Kong can in fact lodge a sexual harassment complaint with the Equal Opportunity Commission ("EOC"). Some employees, however, are wary of bringing the matter to the Commission, therefore it is vital that an employer has put in place written anti-sexual harassment and bullying policies, and an effective grievance mechanism which guarantees confidentiality of the process and the identity of the complainants. There should also be regular trainings and circulars to raise awareness among employees. These

[1] Alun John, BNP Paribas Hong Kong staff left shaken by details of 2012 sexual misconduct case (November 1, 2017), at http://www.scmp.com/business/companies/article/2118006/bnp-paribas-hong-kong-staff-shaken-details-2012-sexual-misconduct.

safeguards, policies and practices should not only apply to corporations but also to organisations which are employers including those in the social service sector in which the EOC has reportedly found worrying signs of underreporting of sexual harassment.[2]

4. Managing employees' misconduct

Summary dismissal has always been a difficult issue for employers with employees who have demonstrated certain misconduct. Whilst it is commonly known that summary dismissal should only be used in exceptional cases, it is rather strenuous to delineate whether a case is "exceptional" enough to warrant summary dismissal. The High Court of Hong Kong has in the recent case of *Cheung Chi Wah Patrick v Hong Kong Cement Company Limited* (HCLA 18/2016) clarified that in deciding whether an employer is entitled to summarily dismiss an employee on the ground of gross misconduct, any reasonable explanations that an employee has are relevant and will be taken into consideration.

5. Entitlements of same-sex partner to spousal benefits

Despite same-sex marriage not being officially recognised in Hong Kong, a male civil servant has in April 2017 successfully overturned the decision of the Secretary for Civil Service for denying spousal benefits to his same-sex spouse on the ground of unlawful discrimination based on sexual orientation in the High Court in the case of *Leung Chun Kwong v. Secretary for the Civil Service & Commissioner of Inland Revenue* HCAL 258/2015. Whilst a complaint against discrimination based on sexual orientation has not been expressly covered under the Sex Discrimination Ordinance, employees may however derive overarching protection against discrimination from the Basic Law and the Hong Kong Bill of Rights (which only binds the government and public authorities explicitly).

6. Security, storage and management of employment-related data

The recent WannaCry cyber-attack has swept across the world. It has infected at least 300,000 machines and hit at least 150 countries. In light of the increasingly prevalent cyberattacks, organisations should implement monitoring system and contingency procedures to ensure the continuation of operations and safeguard the security of any data it stores, including any employment-related data. For instance, access to employment-related personal data should be regulated by security features. Offline backup systems may also be performed to facilitate data restoration.

[2] Su Xinqi, Hong Kong watchdog fears sexual harassment underreported in social service sector (July 11, 2017), at http://www.scmp.com/news/hong-kong/education-community/article/2102241/hong-kong-watchdog-fears-sexual-harassment.

HONG KONG

7. Proposed abolishment of the MPF off-setting mechanism

Under the Employment Ordinance (Cap. 57), employers are entitled to off-set their contributions into the Mandatory Provident Fund ("MPF") of employees against statutory long service or severance payments. The former Chief Executive Leung Chun Ying in his policy address in 2017 announced plans to abolish the off-setting mechanism progressively and considered to lower the amount of severance and long service payments from the existing entitlement of two-thirds of the last month's wages to half. Subsequently in late July 2017, the Chief Executive Carrie Lam briefly proposed to abolish the MPF mechanism to cap the maximum amount of severance and long service payments at a level less than the present HK$390,000 instead of changing the payment formula.[3] In October 2017, it was reiterated in Carrie Lam's maiden policy address that the Government would support the abolishment of the off-setting mechanism; however the Government would still have to discuss with the business and labour sectors before putting forward a substantive proposal.[4]

8. Managing discrimination-related issues in workplace

Dismissing pregnant employees has remained one of the most contentious areas in human resources management. Employment-related pregnancy discrimination complaints accounted for 39% of the total complaints under the Sex Discrimination Ordinance (Cap. 480) received by the EOC from 2014 to 2016; thus care should be taken before terminating any pregnant employees.

As for potential legislative proposals, the lawmakers have considered nine recommendations that are more likely to drive consensus among stakeholders and society out of those proposed by the EOC. These recommendations include:

(i) introducing express statutory provisions to prohibit direct and indirect discrimination on grounds of breast-feeding;

(ii) amending the Race Discrimination Ordinance (Cap. 602) that prohibits direct discrimination on the ground of race of a "near relative" by replacing the definition of "near relative" by a wider definition of an "associate", and including protection from direct discrimination by perception or imputation that a person is of a particular racial group;

(iii) expanding the scope of protection from sexual, disability and racial harassment, such as between persons in a common workplace including consignments workers and volunteers; and

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[3] Cynthia Chung, Government's Latest Proposal on MPF Offsetting Mechanism, at http://www.deacons.com.hk/zh-hk/news-and-insights/publications/governments-latest-proposal-on-mpf-offsetting-mechanism.html.

[4] Speech by the Chief Executive in delivering "The Chief Executive's 2017 Policy Address" to the Legislative Council, at https://www.policyaddress.gov.hk/2017/eng/speech.html.

(iv) eliminating the requirement of proof of intention to discriminate in order to obtain damages for indirect discrimination under Sex, Family Status and Race Discrimination Ordinances.[5]

The Government is expected to conduct further consultations before rolling out any legislative proposals.

9. Proposed compulsory rehiring of unreasonably and unlawfully dismissed employees

The Employment (Amendment) Bill 2017 proposes to give the Court and the Labour Tribunal power to order an employer to rehire a sacked employee without the employer's consent if requested by an unreasonably and unlawfully dismissed employee, and the Court or the Labour Tribunal considers it appropriate and practicable. The Bill is currently in the process of Second Reading in the Legislative Council. If the Bill is passed, it is still unclear as to the extent to which the Court or the Labour Tribunal would exercise this power as it could have undesirable effect on the employer.

10. Proposed standard working hours regulations

The former Chief Executive Leung Chun Ying has proposed a framework on regulating standard working hours, such as mandating employers of an employee with a monthly wage of HK$11,000 or below to pay overtime wages at rates no less than the regular salary and to express in a written employment contract the employee's working hours and overtime remuneration arrangements.[6] However, it remains to be seen if the current Chief Executive Carrie Lam would push through this controversial proposal.[7]

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[5] Legislative Council Panel on Constitutional Affairs, An initial assessment of the recommendations in the Discrimination Law Review submitted by the Equal Opportunities Commission (March 20, 2017), at http://www.legco.gov.hk/yr16-17/english/panels/ca/papers/ca20170320cb2-981-2-e.pdf.

[6] Phila Siu, Viola Zhou, Hong Kong's low-paid to get contracts guaranteeing overtime pay (June 13, 2017), at http://www.scmp.com/news/hong-kong/economy/article/2098163/hong-kongs-low-paid-get-contracts-guaranteeing-overtime-pay.

[7] Yu Kam-yin, Carrie Lam unlikely to push statutory standard working hours (June 22, 2017), at http://www.ejinsight.com/20170622-carrie-lam-unlikely-to-push-statutory-standard-working-hours/.

INDIA

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1. Retrenchment under the Industrial Disputes Act, 1947 (ID Act)

Termination of employment in India can be a fairly onerous exercise. On a scale of 1 to 10, it would be safe to classify India at a 7 or 8 in terms of difficulty associated in terminating employment. Apart from the need to provide 'reasonable cause' to terminate, organisations also need to be mindful of other requirements such as:

- Following the last-in-first-out rule in case of redundancies involving 'workman' level staff (most staff except supervisors and managerial personnel);
- Seeking government permission to terminate a single workman or to close an undertaking in manufacturing establishments that employ 100 or more workmen (300 in some States); and
- Holding elaborate disciplinary proceedings before terminating any employee for misconduct.

It is critical to approach termination exercises with sufficient planning to avoid claims for unfair dismissal and potential re-instatement or compensation.

2. Compliances associated with the Law on Prevention of Sexual Harassment

India has a relatively new law on the subject of sexual harassment at the workplace. Under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("SH Act"), an organisation is expected to set up "Internal Committees" ("ICs") in all offices or branches with 10 or more employees. Since IC's need to have a specific composition (consisting of a senior woman presiding officer, one external independent member, two other employees '*committed to the cause of women*', and at least 50% women), complying with this requirement can be fairly onerous for most organisations, coupled with various other mandatory training and reporting requirements. Further, the SH Act places severe penalties for non-compliances, that could also result in loss of operating licences for repeating an offence. With the government's recent 'SHe-box' initiative (which is an alternative online portal for registering SH complaints, which also allows the government to track progress of the proceedings), there is increased pressure on organisations to comply with the SH Act comprehensively.

3. Employee Transfers in M&A Transactions

Unlike the Transfer of Undertaking (Protection of Employment) Regulations, 2006 (TUPE) in the U.K and Acquired Rights Directive (ARD) in the European Union, India does not have regulations that make it mandatory for a party to acquire employees in business outsourcing or transfer transactions. The limited law in India on this covers only 'statutory transfers' – i.e. where an entire business undertaking is being sold/transferred, and employees are offered 'as favourable' terms of employment with prior service recognition by the acquirer. In such transfers, the seller of the business need not pay any 'retrenchment compensation' to the impacted staff. Here too, the law

is conflicting on whether employee consent is a pre-requisite in such statutory transfers. Therefore, typically in India, parties tend to negotiate the terms of the transfer, based on a multitude of factors, such as tax treatment of the transaction, differences in the terms and benefits between the transferor and transferee, existence of unions, and other related aspects. Therefore, careful planning associated with employee transfers can be crucial for smooth M&A transactions.

4. Developments on Trade Unions in the IT Sector

The information technology ("IT") sector in India employs millions of individuals directly and indirectly. However, this sector has remained largely free of active unionisation over the years, which trend seems to be changing slowly. There has been increasing clamour around large scale redundancies in the IT sector and the manner in which they are conducted. Recently, the labour authorities in Bangalore (Karnataka) have certified the formation of the first trade union dedicated to IT sector employees in this State, officially recognised and registered by the labour department. Under Indian law, such unions can espouse the grievance/cause of an individual or group of workmen in the IT industry, thereby increasing the possibility of a larger number of industrial disputes arising in the IT sector, as well as impacting the flexibility with which the IT sector likes to operate.

5. The Maternity Benefit (Amendment) Act, 2017

The Maternity Benefit (Amendment) Act, 2017 has come into force from 2017 and has brought about some significant changes, as follows:

- Increase in maternity leave from 12 weeks to 26 weeks for a woman having less than two surviving children.
- Paid leave of 12 weeks for surrogate and adopting mothers.
- Establishments with 50 or more employees are required to provide crèche facilities.
- Requirement to inform new female employees of their maternity benefits (in writing and electronically) at the time of their joining.
- Option to work from home on mutually agreed terms after the period of maternity leave.

Rules pertaining to crèche facilities are pending, but the obligation itself is in place and in force.

6. Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017

The decades old Shops and Establishments Act ("S&E Act") in the State of Maharashtra has been replaced in its entirety with effect from 19 December 2017. The new S&E Act brings about certain key changes, as follows:

- Provisions around working hours, leave, holidays, opening and closing hours etc. would not apply to establishments employing less than 10 workers.
- The new law excludes persons in 'positions of confidential, managerial or supervisory character' from its applicability, and employers are required to list out such individuals on their website or other conspicuous place in their establishment.
- There is an increase in the number of leaves that can be accumulated and holidays, concept of casual leaves has been introduced, along with an increase in overtime hours.
- This law too places an obligation to provide crèche facilities with suitable rooms in every establishment with 50 or more workers.

The Rules for implementation of the new Maharashtra S&E Act are awaited.

7. New Disabilities Law

The Rights of Persons with Disabilities Act, 2016 ("RPD Act") came into effect on 1 April 2017 and soon after the underlying Rules were notified. The RPD Act prohibits discrimination against persons with disabilities, unless it can be shown that such act is a proportionate means of achieving a legitimate aim. Certain obligations have been cast on private employers as well. These include:

- Having an equal opportunity policy, which sets out the amenities to be provided to Persons with Disabilities to enable them to discharge their duties effectively.
- Appointing a liaison officer if the establishment has 20 or more employees.
- Maintaining records and ensuring compliance with specified standards of accessibility relating to physical environment, transport and information and communication technology.

INDIA

8. Issues surrounding Provident Fund contributions

Employees' provident fund ("EPF") is a social security scheme under which, employers are required to contribute provident fund ("PF") at the rate of 12% of 'basic wages', 'dearness allowance' and 'retaining allowance' paid to the employees. This contribution can be capped to INR 1800 (12% of INR 15,000) ("Cap") for domestic (Indian) employees. Expat employees (i.e. foreign passport holders) are classified as "international workers" ("IWs"), for whom PF contributions are not subject to the Cap mentioned above. It is common practice in India to split an employee's salary into various components (such as basic salary, medical allowance, transport allowance, housing allowance, education allowance, leave travel allowance, food allowances, etc.) due to underlying tax benefits to the employee. Organisations typically only pay PF on the 'basic salary' and not on the other allowances, since a plain reading of the definition of 'basic wages'[8] under the EPF Act suggests that allowances are excluded. However, the PF authorities have taken a contrary view and insisted that apart from the 'basic salary', all fixed and universal allowances should be treated as part of 'basic wages', and must be amenable to PF contributions. Since the Cap does not apply to PF contributions for IWs, organisations that limit PF contributions to only the 'basic salary', often face multi-million dollar claims for shortfall in PF contributions. Careful pay structuring and assessment of PF liability is therefore critical for organisations in India.

9. Applicability of the Building and Construction Workers Act to Interior Works

The Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 ("BOCW Act") was enacted to provide for health, safety and welfare measures for building and other construction workers. The associated Building and Other Constructions Workers Welfare Cess Act 1996 ("Cess Act"), provides for collection of a cess on the cost of any construction activity, to enhance the funds and resources of welfare boards for construction workers.

This law has commonly been applied to large scale construction activities involving large number of construction workers, for e.g. building of new factories, office buildings, etc. However, it is important to note that the definition of the term '*building and other construction work*' under the BOCW Act is very broad, and includes alteration, repairs, maintenance work as well. Increasingly authorities are auditing organisations on any interior fit/finish work they may have carried out, and demanding that cess under the Cess Act be paid for such interior works as well. It would therefore be important for organisations to determine if any interior works at their establishment is covered by the BOCW and Cess Act, and ensure due compliance, including payment of the applicable Cess.

[8] There is a proposal to amend this definition such that organizations will be required to pay PF on at least 50% of the total remuneration, if the sum of various allowances (such as medical, house rent, travel, etc.) exceeds 50% of the total remuneration.

INDIA

10. Insolvency proceedings for non-payment of employment dues

In 2016, the Government passed the Insolvency and Bankruptcy Code ("Code") which offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms). The Code recognises employees as an "operational creditors", allowing them to demand any outstanding "operational debt" (including wages, etc.) by issuing a formal notice to the employer, provided the debt is INR 1,00,000 or more. Employees are increasingly using the Code (rather than traditional labour courts) to try and recover funds from their employer. Under the Code, if the employer (debtor) fails to respond to the notice within 10 days, the employee (operational creditor) is entitled to file an application for initiating corporate insolvency proceedings. Initiation of such proceedings could result in the appointment of an Insolvency Resolution Professional (IRP) and, more seriously, the removal of the board of directors from the management of the company. It is critical therefore for organisations to keep very close track of any notices or demands under the Code.

OTHER LABOUR LAW AMENDMENTS – 2017

- **Payment of Wages (Amendment) Act, 2017**

With this amendment, the employer can pay wages to its employees even through the modes of cheque and by crediting it to his/her bank account without any requirement of obtaining a prior written authorisation as required earlier.

- **Ease of Compliance to maintain Registers under various Labour Laws Rules, 2017**

These rules were notified on 21st February 2017 which has in effect replaced the 56 Registers/Forms under 9 Central Labour Laws and Rules made there under, into five common Registers/Forms. It facilitates ease of compliance, maintenance, inspection and for providing easy accessibility to the public through electronic means and thereby increasing transparency.

- **Rationalisation of Forms and Reports under Certain Labour Laws Rules, 2017 (Rationalisation of Forms Rules)**

These rules provide for combined and simplified forms and reports required to be maintained, for compliance under the Central rules under the (1) Building and Other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996; (2) Contract Labour (Regulation and Abolition) Act, 1970; and (3) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. Under these rules, the combined forms and reports can be maintained electronically or otherwise. The Schedule of the Rationalisation of Forms Rules provides formats for 12 forms and reports, including for the licence/renewal of licence application, certification by principal employer etc.

INDIA

- **Employee's Compensation (Amendment) Act, 2017**

This amendment has introduced a requirement for the employer to inform the employee of his/her right to compensation in writing (in English, Hindi or the relevant official language) at the time of employing the individual.

KEY PROPOSED CHANGES – 2018

- **Payment of Gratuity Act, 1972**

There is a proposal to increase the limit on maximum gratuity amount payable from INR 1,000,000 to INR 2,000,000 for employees who have completed at least 5 years of continuous employment with the employer.

- **Four New Labour Codes**

There is a proposal for simplification, rationalisation and consolidation of the provisions of 44 labour laws into four labour codes, namely the Code on Wages, Code on Social Security & Welfare, Code on Industrial Relations and Code on Occupational Safety and Working Conditions.

- **Contract Labour (Regulation & Abolition) Act, 1970**

A 2017 bill is in the preliminary stages aiming to make various amendments to the Contract Labour (Regulation & Abolition) Act, 1970 including changes to the definition of "contract labour" (to exclude individuals who are in regular employment of the contractor), recognition of payment of wages by electronic means, intimation to be made to the appropriate government on work order received from an establishment, ability to compound first-time offences among others.

- **Maternity Benefits (Amendment) Act, 2017 - Notification on Crèche Facilities**

The Maternity Benefit (Amendment) Act, 2017 has made it mandatory from July 1, 2017 to have crèche facilities at establishments having 50 or more employees. A notification on crèche, which will define the location, area and other mandatory requirements is expected to be brought out soon.

INDONESIA

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1. Legal Compliance for Expatriate in Indonesia

Throughout the year, several Indonesian news outlets have been covering the influx of expatriates, specifically Chinese expatriates in Indonesia. The reason behind this rise is the fact that in 2016, the foreign direct investment from China reached US$2.67 billion. In setting up their businesses in Indonesia, Chinese companies, more often than not, brought their own employees and machines. This is the main issue in the legal reports as these companies then send illegal Chinese expatriates under tourist visas.

One of the areas that is currently facing problems with foreign Chinese expatriates is in Sulawesi, where the Coordinating Maritime Affairs Minister stated that the government will send a team to clarify the rumours on the influx of expatriates from China.

2. Regional Minimum Wage

In November 2017, hundreds of members from various labour organisations gathered in Jakarta to protest the new regional minimum wage in Jakarta. The reason behind this protest is the campaign promises from the current Governor of Jakarta who stated that if he is elected, he will raise the minimum wage.

The new regional minimum wage for Jakarta is IDR 3.6 million (US$226). One of representatives from the labour organisations who were interviewed stated that they do not accept the fact that the minimum wage in Jakarta is the same as the neighbouring region (Bekasi) since they believe that the living cost in Jakarta is much higher.

3. Child Labour

Numerous reports still found that Indonesia is a haven for companies employing child labour. One of the reports became viral came after an explosion in a fireworks factory killed 30 people. Several eyewitnesses stated that the company hired children between the ages of 13 to 17 and paid their wages daily.

4. Dealing with whistle blower

Two provisions under the Indonesian Employment Law (i.e. Law No 13 of 2003) provide certain protections for employees who have knowledge of criminal acts of the employer. Article 153(1)(h) stipulates that an employer cannot terminate an employee for reason that the employee reports to the relevant authority an alleged criminal offense by the employer.

Article 169 paragraphs (1) and (2) in essence stipulate that an employee may terminate the employment relationship and still be entitled to severance, service and compensation pay if the employer, among other things, incites and/or orders the employee to commit an act contrary to laws and regulations.

INDONESIA

If an employee terminates the employment relationship for the above reason, the employee is entitled to two times severance pay, one time service pay and one time compensation pay. By contrast, in an ordinary resignation, the employee is only entitled to compensation pay.

5. Harassment/workplace bullying

The Indonesian National Commission on Violence against Women reported in 2017 that various women have reported cases of sexual harassment or sexual assault in their workplace.

6. Migrant Workers

Similar to the point above, the Indonesian National Commission on Violence against Women provided in the same report that the bureaucracy and management of the migration of Indonesian migrant workers involves a number of ministries and institutions where the authority and responsibility remains overlapping, especially regarding placement of migrant workers. This has an effect on the lack of clarity regarding who has the responsibility for protecting Indonesian migrant workers.

7. Health Protection for Labour

Various companies still employ labours with no concern to their health and wellbeing. In December 2017, one report in particular went viral where an ice cream factory outside of Jakarta is accused of abusing its labours. One of the labours reported that her health deteriorated from the constant exposure to ammonia that was leaking in the factory.

8. Mass Termination – Efficiency

The Indonesian Employment Law allows a company to terminate employees when closing the company for efficiency reasons (i.e. without two consecutive years of financial losses or force majeure*)* with double severance pay.

9. Transferring employees in M&A Transaction

In an acquisition under Indonesian Law, an employee can terminate his or her employment with the company being acquired, but employees of the acquiring company do not have such rights. In a merger, an employee of the target company also has the right to terminate his or her employment. Contrary to an acquisition, the employer also has the right to terminate an employee of the merged companies.

INDONESIA

10. Labour Strike

As stated in point number 2, strikes are very common in Indonesia. The most recent strike that was covered by many news outlets is the strike by 9,000 employees in the giant Grasberg copper mine operated by PT Freeport Indonesia ("PTFI"), the affiliation of Freeport McMoran Inc. This strike, regarding a dispute over the employment terms and layoffs, extended to two months.

PTFI has stated that the strike was illegal and that employees, who joined the strike, ignored the demands to go to work and were absent for five consecutive days, will be considered as having voluntarily resigned from their positions.

JAPAN

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1. Conversion from fixed-term employment contracts to non-fixed term employment contracts

The amendment of the Labour Contract Act made it possible for fixed-term contract workers to exercise the right to convert to non-fixed term workers when their fixed-term employment contracts with the same employers were repeatedly renewed for more than five years. This provision of a five year period is applicable to fixed-term employment contracts which commenced on or after April 1, 2013. As some of the fixed-term contract workers whose contracts will be renewed on or after April 1, 2018 will be the first workers who can exercise the right to convert, many companies have already started addressing the impact of this change.

2. Unification of licensing regulations concerning worker dispatching businesses

Prior to the enforcement of the amended Worker Dispatch Act on September 30, 2015, engagement in the "specified worker dispatch business" (i.e. dispatch of only workers who are continuously employed by dispatching business operators) simply required a notification to the Minister of Health, Labour and Welfare. After the enforcement of the amended Act, it became necessary to obtain the approval of the Minister of Health, Labour and Welfare in order to engage in any kind of worker dispatch business including the "specified worker dispatch business". Transitional measures for those dispatching business operators will expire September 30, 2018. In this connection, many dispatching business operators engaging in the "specified worker dispatch business" have started preparation in 2017 in order to apply for permission in 2018.

3. Equal pay for equal work

The "Action Plan for the Realisation of Work Style Reform" was established as of March 2017 by the Council for the Realisation of Work Style Reform, a private advisory body to Prime Minister Shinzo Abe. That plan stated the policy of "equal pay for equal work" (i.e. the concept of paying the same wage to workers who have the same content of work). This policy was raised in order to realise a society in which everyone is motivated and can demonstrate his/her ability to the fullest. Some lawsuits were filed in 2017 alleging that the wage differences between regular employees and non-regular employees are illegal, and such trend is expected to continue in 2018.

4. Regulations to limit overtime work

At present, it is not illegal to have employees work as long as required, so long as their working hours do not exceed the upper limit of the overtime working hours defined under an agreement between a labour union, etc. and an employer. However, based on the above-mentioned "Action Plan for the Realisation of Work Style Reform" which was adopted in March 2017, an upper limit for the said overtime hours, at 720 hours per year is now being considered.

JAPAN

5. "Premium Friday" Campaign – Encouraging workers to leave work early on one day a month

"Premium Friday" is the name given to a campaign throughout Japan which has been advocated and promoted by the Japanese government and the business community, aiming to let workers leave work early and enjoy their leisure time by setting the finishing time for work on the last Friday of every month to 15:00 (3:00 pm). The campaign started from February 24, 2017. Whilst there was initial uptake in this campaign amongst workers, that trend appears to be tapering off; nonetheless, the campaign is due to continue into 2018.

6. Power Harassment

According to the above-stated "Action Plan for the Realisation of Work Style Reform" adopted in March 2017, measures for Power Harassment and the like were listed as the necessary measures for creating a workplace environment where workers can stay safe at work. In response, in May 2017, the Ministry of Health, Labour and Welfare began to look into implementing regulations including a penalty for those engaging in Power Harassment.

7. Promotion of women's participation and advancement

The "Act on Promotion of Women's Participation and Advancement in the Workplace" went into effect on April 1, 2016, requiring employers with not less than 301 regularly employed workers to formulate and disclose action plans based on their understanding of the situation regarding women's participation and advancement in their own companies and the like. Since the above-mentioned "Action Plan for the Realisation of Work Style Reform" (which was established in March 2017) also referred to maintenance of a work environment which promotes women's participation and advancement, this has continuously been a hot issue in 2017 and will continue as such in 2018.

8. Promotion of employment of the elderly

The above-mentioned "Action Plan for the Realisation of Work Style Reform" adopted in March 2017 points out that the realisation of an ageless society in which workers can continue to work based on a fair evaluation of their abilities to work, regardless of their age, will also lead to an increase in young people's motivation, and the vitality of the company as a whole.

9. Issues related to accepting foreign personnel

Japan is a country with a labour shortage, it has been pointed out that the Technical Intern Training Program has been used as a way to secure a young workforce under the guise of "international contribution". This practice has resulted in a succession of reports of illegal long working hours of such technical intern trainees. In response to this, an Act was enforced in November 2017 to optimise the Program.

JAPAN

10. The Personal Information Protection Act

Previously, the Personal Information Protection Act applied only to those who used personal information databases, etc. which contained the personal information of more than 5,000 people, including employees of their own, for their business purposes. In this context, "personal information database, etc." means personal information which is systematically assembled to be readily searchable. After the enforcement of the amended Personal Information Protection Act in May 2017, this Act has become applicable, unexceptionally, to those who also use personal information databases, etc. which contain personal information of less than 5,000 people. Further, after the amendment, employers are prohibited from acquiring any "special care-required personal information" (i.e. information relating to a person's race, religion, medical history, criminal record, etc.) without the prior consent of the individual concerned.

KOREA

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1. Non-Regular Workers

President Moon Jae-in campaigned, in part, on improving working terms and conditions for "Non-Regular Workers", such as fixed-term and dispatch/agency employees, as well as subcontracted workers. Among other things, the government is working to amend laws regulating non-regular workers and also encouraging employers to hire more regular employees in the first place. One such law would require companies with 300 or more employees to disclose worker information based on employment types (e.g. dispatch workers, daily workers, subcontract workers, etc.). Beginning in 2018, the government also plans to apply stronger protections for subcontracted workers by closing the gap between their working terms and conditions and those applicable to employees of the principal company.

2. Labor Union Formation

Forming a labor union in Korea requires a minimum of only two employees, and there is no union election requirement or employer notification process (the employees only have to register their union with the local government). Korean labor unions are also increasing their efforts to organise workplaces, and Korean employees are generally more open to the prospect of joining unions. For example, employees in the IT industry (which was previously difficult to organise) are increasingly forming unions, with Microsoft and Oracle's Korean subsidiaries unionising in 2017.

3. Collective Bargaining

In Korea, collective bargaining agreements may be up to two years in duration. Furthermore, it is common practice to have yearly wage negotiations. Recently, labor unions are becoming bolder in their demands during collective bargaining, especially with regard to wages (in light of the significant increase in the minimum wage discussed herein).

4. Sexual Harassment and Workplace Bullying

As with many other jurisdictions, sexual harassment and workplace bullying are increasingly important issues in Korea. Korea already requires annual sexual harassment training for employers and employees. Furthermore, under the revised Gender Equality Employment and Work-Family Balance Act ("GEEA"), anybody can now report an occurrence of sexual harassment in the workplace. The employer then has the obligation to conduct an investigation and take necessary measures to protect the victim, such as changing the place of work, placing the victim on paid leave, etc. An employer that violates these obligations may be subject to an administrative fine of up to KRW 5 million. The revised GEEA prohibits an employer from dismissing, or taking any other disadvantageous measures against, an employee who reported the occurrence of sexual harassment in the workplace and/or the victim. The revised law also increases the criminal fine (from KRW 20 million to KRW 30 million) against an employer in violation of the aforementioned. Further, under the revised GEEA, even where the acts of sexual harassment are committed by a client, customer, etc., an employer is obligated to take the necessary measures to protect the victim, such as changing the place of work, placing the victim

on paid leave, etc. (and a violation of these obligations may subject the employer to an administrative fine of up to KRW 3 million).

The law also requires that the contents of the annual sexual harassment prevention training be posted within the workplace. An employer in violation of this obligation may be subject to an administrative fine of up to KRW 5 million.

5. Overtime, Nighttime, and Holiday Work

Per one interpretation of the Labor Standards Act ("LSA"), the maximum number of working hours per week is 68 hours (40 hours of regular work, 12 hours of overtime, and 16 hours of "holiday" or weekend work). However, the government has been promoting the 52-hour weekly working hour limit (40 hours of regular work and 12 hours of overtime) and has increased labor audits on this issue. The government will also introduce legislation to minimise the number of businesses that are specifically-excluded from general overtime hour principles.

The Korean Supreme Court has also decided to hold a public en-banc hearing to consider a recent case involving the legal overtime limit applicable to certain workers, which will take place on January 18, 2018. We expect that the Court's decision will clarify the maximum weekly overtime limit permitted by law, which will have a significant impact on many companies' businesses, in terms of the optimal sizes of their workforces, human resources management, labor costs, and employees' working conditions.

6. Leaves of Absence

The government is also making efforts to expand the types of and durations of leaves that employees enjoy under the law. For example, under the current version of the LSA, the childcare leave period is not counted as attendance at work for purposes of the calculation of the number of an employee's paid annual leave day entitlement. However, when this revision of the LSA becomes effective, then the childcare leave period will be considered as attendance at work for purposes of calculation of the number of an employee's paid annual leave day entitlement, and the paid annual leave days for employees reinstated after childcare leaves will also be fully-guaranteed. (Article 60 (6) (iii) of the revised LSA will be applicable to employees who apply to take childcare leaves after Article 60 (6) (iii) of the revised LSA becomes effective).

Additionally, the revised GEEA now requires an employer to provide the Fertility Treatment Leave (three days per year) to help employees receive medical fertility treatments, such as artificial insemination and IVF (in vitro fertilisation). An employer is required to provide the first day of the three days of Fertility Treatment Leave as paid leave (the other two days are unpaid leave days). The revised GEEA also prohibits employers from taking disadvantageous measures (such as dismissal or disciplinary action) against an employee on account of Fertility Treatment Leave. An employer that violates this obligation may be subject to an administrative fine of up to KRW 5 million.

7. Minimum Wage & Wage Increases

The 2018 minimum wage will be KRW 7,530 per hour, which represents a 16.4% increase (by KRW 1,060) over 2017, which is currently KRW 6,470 per hour. Ultimately, the government plans to increase the minimum hourly wage to KRW 10,000 by 2020. This is part of its efforts to promote the theory of wage-driven growth, wherein wage increases will drive expanded consumer consumption and, thereby, increase gross domestic product.

8. Reducing Working Hours

As noted above, the government is attempting to reduce the cap on permissible working hours from 68 hours per week to 52 hours per week. This is in line with its overall effort to reduce employee working hours, which average 2,193 hours per year (among the highest in the OECD) to the OECD average of approximately 1,749 per year by 2020.

9. Workplace Safety

In addition to accidents that occur while employees commute to or from work under the control and management of their employer, the Industrial Accident Compensation Insurance Act has been amended such that an accident occurring while an employee commutes to or from work using their usual route and means (e.g. the employee's car, bicycle, walk, public transportation) will be, in principle, deemed an occupational accident.

10. Government Audits

The Ministry of Employment and Labor ("MOEL") conducts regular audits of workplaces (normally every three to five years). The government has announced its intention to increase the frequency and intensity of these audits, and that it will hire additional labor inspectors to do this. Some of the action items for these audits will be to determine whether employers are treating their non-regular workers fairly, as well as the wage and hour issues discussed herein (such as overtime and maximum working hours). The government is also much more focused on alleged Unfair Labor Practices ("ULP"), as well, and the MOEL has adopted more stringent enforcement standards for ULPs.

MALAYSIA

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1. Employee insurance scheme

The proposed Employee Insurance System ("EIS") Act 2017 seeks to provide for an insurance system for insured persons who have lost their employment by providing certain benefits and re-employment placement programmes. The EIS will provide financial aid to employees who have been retrenched and have not found alternative employment. Aside from financial assistance, employees looking for new jobs will also be provided assistance with job search, career counselling and job suitability. The EIS will be administered by the Social Security Organization ("SOCSO"). Under the proposed EIS, both employers and employees will be statutorily required to contribute a relatively nominal amount towards the employee's insurance account. The EIS is expected to be implemented in January 2018. It has been announced that laid-off workers will qualify for an interim benefit in the form of a cash allowance of RM 600 per month for a maximum of three months under the EIS starting 2018.

2. Global outsourcing

One of the challenges that arises in an outsourcing transaction relates to the fate of customer employees who work in functions to be outsourced. A common issue is when the customer no longer needs or wants to retain those in-scope employees unless it can redeploy them within its business. Generally, Malaysian law does not limit the outsourcing of functions of services and surplus employees may be discharged. Where termination or retrenchment occurs as a result of the outsourcing, the employer will be obliged to justify the termination in the event the matter is brought before the court. While the courts will not interfere with a bona fide outsourcing of functions it will do so if the exercise was not bona fide or was arbitrary or capricious.

3. Personal data protection

The Personal Data Protection Act ("PDPA") 2010 came into force on 15th November 2013 and it applies to any personal data processed in Malaysia or is intended to be processed in Malaysia in respect of commercial transactions by any person established in Malaysia or person who is not established in Malaysia but uses the equipment in Malaysia to process personal data other than for purposes of transit through Malaysia. It was reported recently that there had been a massive data breach in Malaysia. The breach was believed to have occurred during a data transfer process at a telecommunications company. In the era of modern technology, corporations and organisations that process, collect and store data should relook their security measures and provide trainings on security and privacy to protect their systems and data.

4. Mental health at the workplace

Experts have warned that mental illness will become the second biggest health problem affecting Malaysians by 2020. There is a visible increase in the number of workplace-related depression cases in the country. A comparatively new issue – occupational mental health can seriously affect workers and may be very costly to manage. When an employee is suffering from such condition at the workplace, it can potentially cause mental illness and absence due to medical reasons and long-term incapacity for work. Although the Occupational Safety and Health Act 1994 requires every workplace with more than 40 workers to have a safety and health committee, it is crucial to note that at present, the committees mainly focus on the safety aspects of the workplace, such as physical hazards and risks. Due to the rise in mental health issues, the committees should be used as a forum to raise such issues on the mental health of the employees. A pertinent consideration would be the implementation of policies/schemes if an employee is up against termination due to their mental health disorder.

5. Post-employment non-compete clauses

When an employee is prohibited from joining any organisation after they cease employment with their former employer, this will amount to restraint of trade which is expressly prohibited under Section 28 of the Contracts Act 1950. Even a reasonable restriction of non-compete clauses in terms of geography or duration would be void and unenforceable under Section 28.

6. Use of social media at the workplace

The proliferation of social media has resulted in the extensive use of such tools and platforms at the workplace. The right to privacy at the workplace comes with certain limitations. Whilst the law recognises the limited right to privacy at the workplace, employers still have a legitimate right to either use reasonable means to monitor its employees to prevent the abuse of office facilities, enforce discipline and to protect employees from harassment. An employer would be justified to take action against an employee where it can be shown that the employee had posted a statement on social media which affects the reputation of the employer. Where employees are found to have excessively used the company's equipment to gain access to social media, the employer would be justified to monitor the use of the same. It is pertinent to note that the repercussion of the misconduct depends on the severity of the infringement and the most serious repercussion will lead to dismissal.

MALAYSIA

7. Minimum wage

The Minimum Wages Order 2016 provides that an employee shall be paid an average minimum wage of not less than RM 1,000 per month in Peninsular Malaysia or RM 920 per month in Sabah, Sarawak and the Federal Territory of Labuan. The minimum wage order must be reviewed at least once in two years. A new minimum wage for Peninsular Malaysia, Sabah, Sarawak and the Federal Territory of Labuan will be announced in 2018. Any increase in minimum wage is a balancing act between the interests of employers and employees. The Malaysian Employers Federation ("MEF") previously expressed concern that in the current economic condition, employers are already struggling to manage the costs of operating their businesses. MEF stated that the increase in costs that comes with an increase in the minimum wage may result in employers reducing the number of employees just to maintain costs.

8. Retrenchment

Malaysia (and other countries around the world) is currently facing economic challenges. There is a wave of retrenchments especially in the oil and gas industry, the banking sector and the airline industry. Companies that are suffering losses may decide on a business strategy to minimise the impact of poor economic conditions, by for example terminating some employees and outsourcing those job functions to third parties in order to reduce costs. The selection process in identifying employees to be retrenched should be in accordance with the established industrial principle of "last-in-first-out" ("LIFO"). LIFO requires the employer to select the more junior employee in the category of employment for retrenchment. The potential danger of losing workers with key skills who have joined corporations/companies recently is a business disadvantage when LIFO is used. There have been departures from LIFO by companies in favour of their own selection criteria however courts have consistently insisted on strict adherence to the LIFO principle.

9. Sexual harassment

In August 1999, a Code of Practice on the Prevention and Eradication of Sexual Harassment was introduced but it does not have the force of law. Until 2012, there were no statutory provisions on sexual harassment in Malaysia. In April 2012, the Employment Act 1955 was amended to require employers to inquire into complaints of sexual harassment. However, the amendments did not provide for a complainant to claim damages from their harasser or from their employer. Sexual harassment has since been recognised as a tort by the apex court in 2016 thereby sending a message to employers to treat such claims seriously. At present, there is no special and comprehensive law on sexual harassment in Malaysia. As sexual harassment at the workplace is a recurring issue, it is high time that specific legislation be enacted to better address workplace harassment.

MALAYSIA

10. Discrimination

Discrimination in the workplace occurs in different forms based on characteristics, such as age, gender, race, marital status or ethnic background. A recent issue which cropped up is the hijab ban for Muslim women working at the frontline of hotels. In this respect, the Tourism and Culture Ministry plans to look into formulating a new act to enable stern action to be taken against discriminatory actions in the hotel industry. It was also suggested that hotels streamline their frontline staff uniforms in line with the religious requirements and cultural norms of all the communities to avoid elements of discrimination. Key consideration for employers would be workplace assessments, satisfaction surveys and data to find out which policies to implement.

MYANMAR

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The labour and employment framework in Myanmar continues to develop with collaborating efforts of employers' and workers' organisations, the Union of Myanmar Federation Chamber of Commerce and Industry ("UMFCCI"), and the International Labour Organization. The road to reform has presented challenges, some of which are noted below. Simultaneously, certain amendments provide welcome clarity to murky issues raised in the employment relationship. Below are the top 10 issues we see being contemplated by employers in Myanmar.

1. Requirement to use government template employment contract

On 28 August 2017, the Ministry of Labour, Immigration and Population ("MOLIP") issued Notification 140/2017 together with a revised Standard Employment Contract ("SEC 2017") which repeals and replaces the previous template, SEC 2015. Entities with more than five employees must use the SEC 2017 and register the executed contracts with the Township Labour Office ("TLO") in the relevant township. Employment agreements executed prior to the new Notification 140/2017 will remain valid until their expiry.

Using the SEC presents a number of challenges for employers, among them being the fact that it does not account for varying levels of employees. Further, it is overly prescriptive in some of its terms which have no basis in legislation, for example with respect to provisions on termination and dismissal. Simultaneously, the terms and conditions which do have a statutory basis reflect paragraphs copied directly from legislation rather than being revised as properly drafted contractual clauses with individual employees.

Further, the inability to freely add provisions within an appendix to the SEC means that employers must decide whether to leave out important provisions of management level contracts, e.g. non-compete clauses, non-solicitation; or, utilise their internal template contracts and not submit them to the TLO. An alternative to these choices is to have two different contracts – one submitted for registration to the TLO, and a separate one including the desired provisions which will de facto govern the employment relationship. None of these options are ideal.

In general, the requirement to use a government issued template which must go through an approval process decreases the ease of doing business in a country where development necessitates continued foreign investment. A 'one-size-fits-all' template contract is not a workable resolution to effect compliance with the local law requirement for employers to enter into employment contracts.

MYANMAR

2. Duration of fixed-term contracts

One of the most notable revisions to the SEC 2017 is Clause 5(d) which provides that the employer shall calculate the employee's term of service as inclusive of all consecutive terms of service of the employee commencing from the date of the employee joining the entity. As the law did not previously state that an employee's term of service included all consecutively renewed fixed-term contracts, this is a major revision. This revised calculation of service term would mean that severance pay, if applicable in an employment termination matter, would be based on the total term and not solely on the term of the most recent fixed-term contract. This is a positive development from the perspective of employee protection as well as employer understanding of obligations to an employee serving on consecutively renewed fixed-term contracts. Where the requirement falls short as compared to neighbouring jurisdictions is setting a limit on the number of years which an employee may work before being considered a permanent employee. Thus, it is not clear that an employee would be entitled to severance pay at any time if the employment contract naturally expires rather than being terminated by the employer, no matter how long the employee has been working for the employer. That said, the SEC 2017 does provide in Clause 5(b) that employment shall not be terminated if the employee has not violated the contract. The employer shall not deny the extension of the term of the employment agreement without giving any reason. Clause 15(b) provides that the employer shall keep the record of termination with the valid reason when the employer terminates the employee. These provisions indicate that "at will" employment is not a recognised principle in Myanmar and an employer will need a valid reason for termination of a contract, even if notice and severance requirements are fulfilled, and even if the contract term expires.

3. Internal Rules and Regulations

Myanmar law does not clearly prescribe that workplaces must have internal rules and regulations separately from those stated in the employment contract. Clause 21(b) of the SEC 2017, however, indicates that internal rules and regulations of the workplace, if in accordance with Myanmar law, are considered as part of the agreement. This provision severely limits an employer's ability to amend internal policies and regulations as needed without first obtaining employee consent which is required for contractual amendments. This consequently creates issues of efficiency and may prevent necessary modifications to human resources documentation if employee consent cannot be obtained.

Further, Clause 21(c) allows for the parties to agree on amendments to the SEC 2017 template if more than 50% of the employees consent. The SEC 2017 does not elaborate on any process or method to secure such consent, nor a mechanism to maintain the required level of consent during continued hiring of staff by an entity.

4. Minimum wage increases

The National Minimum Wage Committee ("Committee") established a minimum wage in Myanmar of MMK 3,600 (US$2.70) for an eight hour day, or MMK 450 per hour, effective since 2015. The minimum wage applied to the private sector, however, not to family businesses or small businesses with 15 or fewer workers.

In December 2017 the Committee proposed to increase the minimum wage to MMK 4,800 (US$3.60) or MMK 600 per hour, representing a 33% increase. The daily minimum wage applies in all regions and states to all businesses with 10 or more workers.

After studying the objections, recommendations and suggestions on the proposed rate in consultation with workers and employers and their representatives, the Committee will set the final figure and send conclusions to the union government. Confirmation is expected within 60 days thereafter.

Going forward, the Government intends to differ the minimum wage per the industry and labour type. Further industry specific notifications are expected but not yet implemented.

5. Social Security scheme limitations

Persons insured under the Myanmar Social Security scheme and making contributions to the relevant funds are eligible to receive the benefits conferred by the National Social Security Fund ("NSSF"). Registration is compulsory for a large number of employers including various businesses, government departments, companies, associations, shops, and development and financial organisations, subject to them employing at least five employees. Certain employers, including INGOs, are exempt though their employees may voluntarily register and make contributions, which the employer must match. The voluntary benefits are the same as the benefits of compulsory registration, and are available to employees who contribute the required amount to the fund. Currently, the Social Security Boards which are accepting contributions from registered members are the Health and Social Care; Employment Injury Benefit; and Family Assistance Funds. On the other hand, the Invalidity; Superannuation and Survivors Benefit; and Unemployment Benefit funds are not currently accepting contributions.

Issues arise with respect to: (1) the exceptions granted to certain employers who are not required to contribute to the system; and (2) the funds not currently accepting contributions. This leaves, e.g. INGOs, querying whether they should contribute voluntarily to the system, especially given that local law does not require an employer to provide employees with private health insurance coverage, though employers must provide medical treatment cost coverage to employees who are not covered under the Social Security Law. Employers also question whether the system is operating to provide members with the benefits listed as required, and whether the inoperative funds will eventually begin receiving contributions. If the funds not currently accepting contributions commence such receipt, the contribution amounts from employers and employee is

likely to increase. Currently, the level of inspections and enforcement of compulsory registration is low and needs improvement for the system to develop.

Further, insured members face issues with respect to the medical facilities and cash benefits. Insured persons can obtain free medical treatment from designated Social Security Board clinics. However, the designated clinics do not provide proper medical facilities for treatment. In addition, employees who have completed specified contribution amounts are entitled to receive cash benefits; however the process for granting such benefits is often delayed. At present, the MOLIP is inviting Expressions of Interest from local and foreign companies for proposals to enhance the health care treatment service for insured workers.

6. Termination of Employment Contracts

Termination of employment relationships under Myanmar law is a challenging area because there is no law providing the grounds and procedure. Under the Employment and Skills Development Law, the Ministry of Labour Immigration and Population shall issue notifications specifying compensation that an employer must pay to an employee if the work is completed earlier than the stipulated period; or the whole work or any part thereof must be terminated due to unexpected reasons; or the work has to be terminated due to various reasons. The law does not provide, however, specific reasons for termination of employment. The SEC 2017 sets out provisions on termination, but they are not connected to a legislative basis, and they are not extremely clear. As employers are required to use the government template contract, the SEC then takes on the force of law, though it is not a law. Often, employers must rely on the non-fault grounds provided in the SEC 2017 for redundancy terminations, even if those reasons listed are not worded specifically for what is occurring in the company or organisation. For example, termination of the employment contract is allowed if an employer can no longer offer the employment due to company liquidation/business closure, or cessation due to force majeure (SEC, Clauses 16(a) and (b)). These provisions do not cover other issues, for instance, restructuring, position upgrade, or outsourcing.

Further, per the SEC issued in 2017:

- Clause 5(b): Employment shall not be terminated if the employee has not violated the contract. The Employer shall not deny the extension of the term of the Employment Agreement without giving any reason.

- Clause 15(b): Employer shall keep the record of termination with the valid reason when the employer terminates the employee.

These provisions indicate that "at will" employment is not a recognised principle in Myanmar and an employer will need a valid reason for termination of a contract, even if notice and severance requirements are fulfilled.

7. Health and Safety

The existing occupational safety and health standards which are provided in separate laws such as the Factories Act, the Oilfields Labour and Welfare Act and the Shops and Establishments Act will be replaced by a new Occupational Safety and Health Law ("OSH Law"). The draft OSH Law addressing occupational safety and health was released in 2017. The draft law aims to improve and integrate the existing occupational safety and health standards spread among the varying pieces of legislation.

The proposed new law imposes obligations on employers, employees and those who design, manufacture, import, sell, install or demolish machinery and equipment that may cause risks to safety or health. There are wide-ranging penalties for violations such as fines from MMK 1,000,000 to a maximum of MMK 5,000,000, up to three months of imprisonment or both.

Many types of workplaces are covered (e.g. government departments, joint ventures, foreign-owned companies) and the law applies to a range of industries, including petroleum, natural gas and mining. The Ministry of Labour, Immigration and Population has the authority to extend the application of the OSH Law to more industries later.

Employers will have extensive obligations which vary on a case-by-case basis as each workplace has individual zones of possible danger. In particular they are obligated to evaluate the possible risks and implement protective measures to prevent any harm caused to their employees. Officers of the Department shall be responsible for administrative supervision and compliance with the law.

The Factories General Labour Laws Inspection Department under the MOILP is responsible for conducting inspections of whether workplaces are compliant with health and safety requirements. At present, a number of workplaces lack implementation of health and safety requirements, e.g. construction sites. Most of the workers in some industries lack awareness about workplace safety standards or do not comply with the health and safety requirements at the workplaces.

Occupational safety and health is an area needing significant development in Myanmar in many ways, including awareness, legislation, regulation, enforcement, and training.

8. Collective Bargaining, Industrial Relations

The Labour Organization Law permits any worker who has attained the prescribed age of 18 years old to join a labour organisation. Five types are recognised:

- Basic – requiring a minimum of 30 members;
- Township;
- Region or State;
- Labour Federation; and
- Myanmar Labour Confederation (MLC).

MYANMAR

Labour organisations represent employees in Myanmar. The employer shall recognise the labour organisations of its industry and must assist as much as possible if the labour organisations request help. The labour organisations have the right to participate in collective bargaining on behalf of the workers. The employer must not discriminate against employees who are union/labour organisation members. The employer shall allow an employee who is assigned any duty on the recommendation of the labour organisation executive committee to perform such duty, but not exceeding two days per month unless otherwise agreed.

Despite the legislative requirements, most factories have not formed a Workplace Coordination Committee or a labour organisation, and collective bargaining agreements are rare or not well drafted. The workers engage in collective bargaining when disputes arise between the parties, such as with respect to payment of wages, termination, overtime working hours and working on the rest days. Some employers fail to comply with their obligations with respect to employee's rights under the local labour law. On the other hand, some factories do negotiate and prepare collective bargaining agreements.

Industrial relations, trade unions, and collective bargaining are issues receiving significant attention from various stakeholders. The Labour Organization Law is currently being revised as part of comprehensive labour law reform efforts taking place in Myanmar.

9. Labour dispute settlement system

While Myanmar has a system for labour dispute settlement, issues arise for employers as decisions are influenced by factors involving perceptions of fairness, though the decisions of the final authority are not always grounded in law.

Per the Settlement of Labour Disputes Law (2012), employers in any business or trade where more than 30 people are employed must form a Workplace Coordinating Committee (WCC) consisting of two representatives of the employer and two representatives of each labour organisation or, if there are no labour organisations (LO), two elected representatives of the employees. Any grievances raised before the WCC by either the employer, an employee or an LO must be negotiated and a settlement sought within five days. If a settlement is not reached at the WCC level, then it goes to the relevant Conciliation Body (CB).[9] Individual disputes can then go to court through the CB, while collective disputes can be referred to the Dispute Settlement Arbitration Body (AB)[10]. If either party is dissatisfied with the decision the following options may be utilised:

- Either party may proceed to strike or perform a lockout in accordance with the Labour Organization Law 2011.

[9] Formed at State/Region level

[10] Also State/Region-level

- Both parties may apply within seven days of the decision from the AB to have the dispute heard by the Arbitration Council (AC).

A recent study[11] of a selection of Arbitration Council decisions states the following pertinent insight into dismissal cases brought to a local dispute resolution authority:

- *In most cases, the decision focused on the details of the termination process. Was the worker properly warned, did the worker sign a warning letter, was the worker forced to sign the warning letter, and did the employer pay the appropriate amount of severance and notice pay?*

- *Social justice was mentioned as a determining factor: "As [the worker] was dismissed from his job, he was not entitled to any severance pay nor compensation, but to show social justice it is considered that one month salary should be paid."* (Case 64/2016)

These insights indicate that if a case is brought within the dispute resolution process in Myanmar: (1) the termination process, including severance calculation will be closely scrutinised; and (2) "social justice", or what the local authorities deem to be "fairness" in a case may prevail without basis in legal reasoning, or the employer's statutory/internal regulation obligation. Thus, considering the country and dispute resolution context, the employer may aim to avoid a challenge rather than assume the risk of one being filed and potentially being successful, even where the employer's position appears legally sound and defensible.

Currently, amendments of the Labour Disputes Settlement Law are being discussed as it is one of the Myanmar labour laws to be revised as part of labour law reform efforts.

10. Contractor Agreements

The lack of guidance on contractor agreements and use in practice of hybrid arrangements raises issues for employers when determining liabilities to a contractor. In order to determine whether a party is employed as an employee or hired as an independent contractor under the laws of Myanmar, we first look to relevant legislation. Unfortunately, the Contract Law and other regulations do not provide specifically for "services" or "contractor" contracts. Further, the labour legislation does not specifically regulate independent contractors, and "employer" and "employee" are not consistently defined among the legislation. The Labour Dispute Settlement Law defines an "employer" as:

> a person who hires workers for the payment of wages by mutual consent in any trade under the relevant employment agreement, including a person who manages, supervises and administers directly or indirectly and is responsible to pay wages to

[11] Ediger, Laura and Chris Fletcher. 2017. "Labour Disputes in Myanmar: From the Workplace to the Arbitration Council. " Report. BSR, San Francisco.

> the worker and is responsible for employing and terminating the employment of the worker. (emphasis added).

In light of this provision, the view can be taken that a significant distinguishing factor in an employment relationship is the element of management, supervision, and administration which applies to employees and which would not apply to independent contractors (though the law does not provide a definition of contractors). While there is no binding judicial or administrative ruling which further describes these terms in respect of an employment relationship, one view is that it is intended to describe the extent to which the party who provides services to another is supervised or controlled in producing the required outcomes.

Entities frequently seek to engage "contractors" to carry out work and enter into a "contractor" agreement. The relationship, however, functions as an employment relationship wherein the contractor is expected to report to a particular place of work for certain hours and days, and be managed in the way a supervisor oversees an employee. Issues arise if the service user seeks to terminate the agreement, thereby exposing the company or organisation to a risk of claims for unfair dismissal and employment entitlements. Given the lack of legal framework, judicial precedent, and application of "social justice" applied in the dispute resolution context, operating in a "hybrid" contractor-employment manner raises risk for employers.

NEW ZEALAND

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1. Proposed new employment laws (following election of new Government in 2017)

A change to a Labour-led Government in late 2017 will likely mean significant employment law reforms in 2018 and beyond. The new Government has extended paid parental leave entitlements to 26 weeks, and other changes set out in its campaign manifesto that we can expect to see in 2018 include:

- Replacing the 90-day trial period framework with a new trial period system;
- Increasing the minimum wage to NZ$16.50 an hour and basing future increases on the real cost of living for people on low incomes;
- Restoring reinstatement as the primary remedy for employees who have been unjustifiably dismissed; and
- Reforming the collective bargaining regime.

2. Pay equity

The Employment (Pay Equity and Equal Pay) Bill was introduced to Parliament on July 26 2017 (prior to the Labour Government taking power), and was intended to ensure female dominated jobs are remunerated correctly to address the pay imbalance created by systemic and historic gender-based undervaluation. The new Government has stated that pay equity remains a high priority, but intends to make significant amendments to the Bill and start work on new legislation in early 2018.

3. Holidays Act 2003 compliance issues

There has been a recent focus by the Ministry of Business, Innovation and Employment ("MBIE") on compliance with minimum employment standards, including the Holidays Act. This has resulted in a number of audits of employers, identifying breaches of various minimum requirements, including calculation of holiday pay and relevant daily pay. As an alternative to formal enforcement action, there has been an increase in the use of enforceable undertakings as a means of remedying breaches and changing future practices. Enforceable undertakings are negotiated between an employer and MBIE and typically involve undertakings to review and recalculate holiday entitlements for all current and often past employees, dating back six years. We expect to see this trend continue in 2018.

NEW ZEALAND

4. Health & safety compliance and prosecutions

Health and safety remains a key issue for New Zealand employers following the introduction of comprehensive new legislation in April 2016. The first significant sentencing decision under the Health and Safety at Work Act 2015 was issued in August 2017, resulting in a fine of NZ$100,000 for the employer. Enforceable undertakings are also being more commonly sought by WorkSafe as an alternative to prosecution.

5. Bullying/harassment in workplace

Claims of bullying/harassment continue to form a large proportion of employer investigations. Uncertainty still remains as to the status of guidelines issued by WorkSafe that contain definitions of bullying that differ to established case-law. For many years, case-law has required some element of intention to meet the threshold of bullying, whereas this requirement is absent from WorkSafe's guidelines.

6. Redundancies

Recent decisions of the Employment Relations Authority and Court continue to look closely into an employer's business case, and require it to justify its reasons for redundancies, the process it has followed and have reliable evidence to support any intended cost savings.

7. Union issues/collective bargaining

Widespread changes have been proposed by the new Government that will impact on union rights and collective bargaining. Key proposed changes include:

- Restoring unions' right to initiate collective bargaining in advance of employers;
- Restoring the duty on parties who are in collective bargaining, including those in multi-employer collective bargaining, to reach an agreement once bargaining has been initiated unless there is a genuine reason not to;
- Introducing a legislative framework that allows unions and employers in different industries to create Fair Pay Agreements that set minimum conditions in each industry; and
- Tightening the rules on employers automatically passing on terms and conditions to non-union workers.

NEW ZEALAND

8. Restraints of trade

The Employment Relations Authority and Court remain prepared to uphold restraints of trade. Care must still be taken to ensure the duration, geographical coverage and scope of any restraint are tailored to the extent that is reasonable and necessary to protect an employer's proprietary interests.

9. Privacy reform of laws

Amendments to the Privacy Act 1993 have been proposed with changes likely to be introduced in 2018. Areas of reform include stronger enforcement powers for the Privacy Commissioner, mandatory reporting of privacy breaches, new offences and increased fines.

10. Application of New Zealand Laws to overseas employees

The Supreme Court has recently confirmed that New Zealand's employment laws can potentially apply to employees working for overseas companies in New Zealand, despite choice of laws provisions in the applicable employment agreement stating otherwise. The case of *NZ Basing v Brown* was about whether the age discrimination provisions in NZ's Employment Relations Act and Human Rights Act 1993 applied to two pilots employed by a Hong Kong registered company under a Hong Kong employment agreement. The pilots lived in New Zealand, and commenced/concluded their tours of duty there, but worked offshore in the course of their employment. Their contracts required them to retire at 55 years and stated that Hong Kong laws applied. They challenged this under NZ law, claiming it was age discrimination. The Supreme Court held that the right to protection against discrimination applied to conduct which occurs in New Zealand and was not contractual, and independent of the employment agreement. The contractual choice of law clause was therefore held to not be applicable. This decision may have wider impact for overseas employers with employees based in New Zealand.

PHILIPPINES

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1. Trilateral Job Contracting

During the last presidential election campaign, then candidate (now President) Rodrigo Duterte made a promise to put an end to "Endo" – the term used to refer to the practice whereby workers are hired for a short term (usually five months), dismissed after the end of the term, then re-hired for another short term, preventing them from acquiring regular employment status. The practice is often identified with job-contracting. Even then, any practice of circumventing security of tenure by preventing the acquisition of regular employment status is already unlawful. Following that campaign promise, the Department of Labour and Employment (DOLE) was tasked to draft new rules on contracting and subcontracting. After protracted negotiations with various sectors, the DOLE came up with the new rules – i.e. Department Order No. 174, series of 2017 or DO 174. DO 174 was issued on March 16, 2017 and took effect on April 3, 2017.

DO 174 aims to strengthen the implementation of the law against "labour-only contracting" (supply of workers), while still allowing permissible job contracting (supply of services). Labour-only contracting is generally classified into two types: (1) where the contractor lacks substantial capital and the contractor's employees recruited and placed are performing activities which are directly related to the main business operation of the principal; and (2) where the contractor does not exercise the right to control the means and method of performing the work. In case of a finding of labour-only contracting, the contractor is considered merely an agent of the principal and the principal is deemed the direct employer of the contractor's employees. In other words, the contractor's employees are considered regular employees of the principal.

We anticipate job contracting issues will remain a significant concern this year. There are several pending bills before the legislature to amend the Labour Code of the Philippines to either criminalise labour-only contracting or prohibit job contracting and even fixed term employment all together.

2. Labour Audit and Inspections

Following the effectivity of DO 174 is a spate of site inspections and audits conducted by the DOLE in the exercise of its visitorial and enforcement power. These audits have resulted in cases for labour law compliance and cancellations of registration of job contractors.

It is anticipated that DOLE will continue the vigorous conduct of site inspections, especially with its issuance on October 30, 2017 of Department Order No. 183, Series of 2017 (DO 183) or the Revised Rules on the Administration and Enforcement of Labour Laws Pursuant to Article 128 of the Labour Code, as renumbered. DO 183 took effect on November 5, 2017.

PHILIPPINES

3. Personal Data Protection

The Philippines enacted Republic Act No. 10173 or the Data Privacy Act of 2012 on August 15, 2012. While the law took effect on September 8, 2012, the rules and regulations implementing it was issued only in the later part of 2016.

Under the Data Privacy Act, employers are considered personal information controllers (PICs). Generally, the law provides that the data subject must give consent to the processing of his or her personal information. On the one hand, processing of personal information is permitted only if not otherwise prohibited by law and when at least one of the conditions set forth in the Data Privacy Act for lawful processing of personal information exists. On the other hand, processing of sensitive personal information and privileged information is prohibited except in the cases set forth in the Data Privacy Act.

PICs are required to appoint a Data Protection Officer, who must be an employee, in the establishment regardless of the number of employees. The Data Protection Officer shall be responsible for cybersecurity and the protection of the employees' personal information. In case of a personal data breach, the Data Protection Officer is required to notify the National Privacy Commission within 72 hours from knowledge of such breach. Failure to comply with the requirements for data processing may result in penalties in the form of imprisonment and fine. If the offender is a corporation, the corresponding penalty shall be imposed upon the responsible officers.

4. Unions: "SEBA" certification

A union must be registered with the DOLE and thereafter certified by the DOLE as the exclusive bargaining representative of the employees in the bargaining unit it represents before it can lawfully demand the employer to engage in collective bargaining. Prior to the amendment of the rules, the process of certification in an unorganised establishment (i.e. an enterprise where no recognised or certified sole and exclusive bargaining agent exists) is generally through voluntary recognition by the employer or through certification election.

Voluntary recognition refers to the process by which a registered union is recognised by the employer as the exclusive bargaining representative in a bargaining unit. The voluntary recognition must be supported by at least a majority of the members of the bargaining unit.

Certification election refers to the process of determining through secret ballot the exclusive bargaining representative of the employees in the bargaining unit. For a certification election to be valid, at least a majority of all eligible voters in the bargaining unit must have cast their votes. The union which obtained a majority of the valid votes cast shall be certified as the sole and exclusive bargaining agent of all the employees in the bargaining unit.

PHILIPPINES

On September 7, 2015, the DOLE issued Department Order No. 40-I, Series of 2015 further amending Department Order No. 40, Series of 2003. The amendment, among others, repealed the provision on Voluntary Recognition and replaced it with provision on Request for Sole and Exclusive Bargaining (SEBA) Certification or the so-called "SEBA Certification".

The SEBA Certification process allows a union to be certified by the DOLE as the sole and exclusive bargaining agent without a certification election or recognition by the employer by submitting, among other documentary requirements, (1) a statement that no other labour organizations or collective bargaining agreement exists in the establishment, and (2) the names of employees comprising at least a majority of the employees in the bargaining unit who signify their support for the request for SEBA certification, certified and attested under oath by the union's president. The requesting union's submission shall be presumed to be true and correct unless contested under oath by any member of the bargaining unit during the validation conference. The employer or any representative of the employer shall not be deemed a party-in-interest in the validation conference but only as a by-stander to the process of certification.

5. Employment Termination

There is no at-will employment in the Philippines. Security of tenure is both a constitutionally and a statutory protected right. An employee may not be removed from his/her employment except for just or authorised causes under the Labour Code.

"Just causes" refer to those instances enumerated under Article 297 of the Labour Code, as amended. These are causes directly attributable to the fault or negligence of the employee – i.e. serious misconduct or willful disobedience; gross and habitual neglect; fraud or willful breach of trust; commission of a crime or offence against the person of the employer or any member of the immediate family of the employer or duly authorised representative of the employer; other causes analogous to the foregoing.

"Authorised causes" refer to those instances enumerated under Article 298 (i.e. closure, retrenchment, redundancy, installation of labour-saving device) and Article 299 (i.e. disease) of the Labour Code, as amended. These causes are brought by the necessity and exigencies of business, changing economic conditions and illness of the employee

The observance of substantive and procedural due process in employment termination remains a critical concern in view of the consequences of an unlawful dismissal. An employee who is unjustly dismissed is generally entitled to: (1) reinstatement to his/her position without loss of seniority rights and other privileges; (2) full backwages, inclusive of allowances, and to his/her other benefits or their monetary equivalent computed from the time of dismissal up to actual reinstatement; (3) payment of moral and exemplary damages, where there is a finding of bad faith; (4) payment of attorney's fees.

On September 7, 2015, the DOLE issued Department Order No. 147-15 (DO 147) Amending the Implementing Rules and Regulations of Book VI of the Labour Code of the Philippines, As Amended. DO 147 sets forth a detailed discussion of the substantive standards and procedure for employment termination. The Department Order further notes that in cases of installation of labour-saving devices, redundancy and retrenchment, the "Last-In, First-Out Rule" shall apply except when an employee volunteers to be separated from employment.

6. Anti-Discrimination Laws and Proposed Legislation

The Philippines abound with anti-discrimination laws. The Labour Code contains anti-discrimination provisions pertaining to women and unionism. Apart from the Labour Code, there are several special anti-discrimination laws pertaining to women, children, solo parents, indigenous people, people with disabilities, persons with medical conditions, and age.

The most recent anti-discrimination law is Republic Act No. 10911 or The Anti-Age Discrimination in Employment Act of 2016 (RA 10911), which prohibits discrimination in employment on account of age. Under RA 10911, it is unlawful for an employer to, among others, publish any notice of advertisement relating to employment suggesting preferences, limitations, specifications and discrimination based on age; to require the declaration of age or birth date during the application process; to decline any employment application because of age; or to discriminate against an individual in terms of compensation, terms and conditions or privileges of employment on account of such individual’s age.

There are currently several pending proposed legislation prohibiting discrimination on the basis of sexual orientation and gender identity or expression (SOGIE), race and ethnicity, and religious belief.

7. Retirement

Retirement is governed by Article 302 of the Labour Code. Article 302 has been amended by Republic Act No. 7641 and Republic Act No. 8558, and more recently, by Republic Act No. 10757.

In the absence of a retirement plan or agreement, the law provides that an employee who has reached the age of 60 years with at least five years of service may retire with benefits equivalent to ½ month salary (i.e. 22.5 days) for every year or service, a fraction of at least six months being considered one year. Compulsory retirement age is at 65 years old.

Republic Act Nos. 8558 and 10757 reduced the retirement age of underground and surface mining employees, as follows: optional retirement at 50 years old; and compulsory retirement at 60 years old.

Where there is a retirement plan or agreement, the provisions thereof shall apply. However, if the retirement benefits therein fall below the floor limits provided in Article 302, the employer shall nonetheless be liable for the differential.

Furthermore, if there is no retirement plan or agreement setting the retirement age, the option to retire at the age of 60 years old (or 50 years old for underground and surface mining employees) is the exclusive prerogative of the employee; the employer may not exercise that option and compel the employee to retire.

There has been a concern on the effect of Republic Act No. 10911 or Anti-Age Discrimination in Employment Act of 2016 on the ability of the employer to retire its employees pursuant to the Labour Code. RA 10911 states that it is unlawful for an employer to impose early retirement on the basis of the employee's age. However, RA 10911 also expressly provides that it shall not be unlawful for an employer to set age limitations in employment if, among other instances, the intent is observe the terms of a bona fide employee retirement or a voluntary early retirement plan consistent with the purpose of RA 10911 and provided that such retirement plan is in accordance with the Labour Code.

8. Fixed-Term Employment

While not in the Labour Code, the Philippine Supreme Court, in the landmark case of Brent School, Inc. v. Zamora, held that a fixed-term employment contract, where the employee is engaged to perform work for a specific or fixed period, is valid if it is not entered into to circumvent security of tenure.

For a fixed-term employment contract to be valid, it must be shown that:

- the fixed period was knowingly and voluntarily agreed upon by the parties;
- there should have been no force, duress or improper pressure brought to bear upon the employee, or any other circumstance that would vitiate the employee’s consent;
- the employer and the employee dealt with each other on more or less equal terms with no moral dominance being exercised by the employer over the employee;
- the employment contract is reasonable and not oppressive; and
- the parties entered into the fixed-term employment contract with no intent to circumvent the acquisition of tenurial security by the employee.

With the clamour against contractualisation, there are pending legislation that seeks to further delineate the scope of, and even ban altogether, a fixed term employment contract.

PHILIPPINES

9. Occupational Health and Safety

The DOLE has issued specific guidelines governing the employment and working conditions of employees in specific industries or performing hazardous jobs such as the following: (1) health personnel in the private healthcare industry; (2) employees who by the nature of their work spend long hours either standing (such as those in retail and/or service employees, assembly line workers, teachers and security personnel) or sitting (those working in toll booths and information technology and business process management industry); and (3) children below 15 years old engaged in public entertainment or information.

10. New Tax Laws on Employment

The National Internal Revenue Code of 1997 was recently amended by Republic Act No. 10963 (the Tax Reform for Acceleration and Inclusion or TRAIN), which took effect on January 1, 2018. The more salient amendments introduced by the TRAIN in relation to employment include the following:

the graduated individual income tax rate for Philippine citizens, resident aliens and non-resident aliens engaged in business in the Philippines was amended from 5%-32% to 0%-35% (taxable income not exceeding P250,000 is no longer subject to income tax);

- the allowable deduction for insurance premium payments was removed;
- personal and additional exemptions were removed;
- the exclusion from gross income of 13th month pay and other benefits was increased to P90,000 (from P82,000);
- fringe benefit tax was increased to 35% (from 32%); and
- the 15% preferential tax rate for employees of regional headquarters, regional operating headquarters, offshore banking units, and petroleum service contractors/subcontractors was removed.

SINGAPORE

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The employment law landscape in Singapore has welcomed several developments in 2017 and 2018. A unique feature of Singapore's employment law and practice is tripartism, which refers to the collaboration between employer representatives, unions and the government. The Tripartite Alliance for Fair and Progressive Employment Practices ("TAFEP") is an example of such collaboration. The TAFEP has been active in 2017 and we expect it to continue to be active in 2018. Hence, a number of the top 10 issues we see stem out of initiatives by the TAFEP.

1. Collective Bargaining

The framework for collective bargaining has been revised. In March 2017, the Updated Tripartite Advisory on Industrial Relations Practice was issued. This advisory outlines progressive workplace practices that employers may adopt to foster partnerships between employers and unions/employees.

Further, since April 2017, rank-and-file employees as well as professionals, managers and executives ("PMEs") who are union members in non-unionised companies have been able to participate in the tripartite mediation framework ("TMF") to resolve their individual disputes. The TMF's scope has also been expanded to resolve additional disputes relating to re-employment and other statutory employment benefits such as maternity leave.

2. Grievance Handling

The Ministry of Manpower ("MOM") has also recently introduced Tripartite Standards, which are sets of employment practices that employers may adopt to distinguish themselves as fair and progressive employers in Singapore. Among the various Tripartite Standards that have been announced, standards on grievance handling procedures seek to ensure that employee grievances are responded to in a systematic, accessible, fair, confidential and non-arbitrary manner.

In particular, the standards require employers to (1) have a clearly communicated and documented procedure for employees to raise their grievances, (2) for employers to conduct proper investigations and respond to affected persons, and (3) have an appellate process for the aggrieved employee to bring the unresolved issue to a higher level.

A new version of the TAFEP Grievance Handling Handbook has been published in January 2018.

3. Navigating the Employment Claims Tribunal

With its coming into force on 1 April 2017, the Employment Claims Act has established the Employment Claims Tribunals ("ECT"), which aims to provide expeditious resolution of salary-related employment disputes for eligible employees. The ECT has jurisdiction to hear claims up to S$20,000 (or up to S$30,000 if the dispute has undergone mediation assisted by the unions). The ECT has thus introduced another dispute resolution forum for employees, and is particularly helpful for PMEs who had fewer options previously.

The jurisdiction of the ECT is currently under review. In particular, as the ECT was established to deal only with salary-related employment disputes, an employee who wishes to bring a claim for wrongful dismissal and a concurrent claim for unpaid/underpaid salary would have to bifurcate his claims and approach both the Ministry of Manpower (for his wrongful dismissal claim) and the ECT (for his salary-related claim). Please see issue 10 below.

4. Retrenchment

On 1 January 2017, the Tripartite Guidelines on Mandatory Retrenchment Notification came into effect. Under the guidelines, if five or more employees are retrenched within a six-month period, employers must submit an online notification of the retrenchments to the MOM within five working days after the notice of retrenchment is provided to affected employees. Failure to notify within the required timeline is an offence and employers may be liable on conviction to penalties, including a fine not exceeding S$5,000. The notification is intended to enable groups such as Workforce Singapore, the tripartite partners and other relevant agencies to help affected employees find alternative employment and/or identify relevant training to enhance their employability.

Meanwhile, in March 2017, the revised Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment was released. The advisory sets out best practices for employers facing structural changes. It also strongly encourages companies to exercise retrenchment as a last resort, and to manage their excess manpower by "upskilling" employees or redesigning their roles.

To mitigate the impact of retrenchment, various programmes have been put in place. For instance, the Career Support Programme is a wage support scheme that provides short-term wage support of up to 50% and for a maximum of 18 months to encourage employers to hire PMEs who have been retrenched or unemployed for at least six months. Various Professional Conversion Programmes are also in place to help PMEs to undergo skills conversion and move into new occupations or sectors. The Adapt and Grow initiative also seeks to provide career matching services and funded work trial stints to help individuals better assess job fit. These programmes have seen encouraging growth in the number of beneficiaries, and such an upward trend is expected to continue as the government strengthens its outreach efforts.

5. Restrictive Covenants

Restrictive covenants are not uncommon in Singapore employment contracts. In general, restraint of trade covenants are *prima facie* contrary to public policy and illegal under Singapore law. However, they may be enforceable if (1) the employer has a legitimate proprietary interest to protect and (2) the restraints are not unreasonably wide. In this respect, reasonableness has two facets – the clause must reasonable in the interests of the parties, and having in the interests of the public.

It is notable that in *Stratech Systems Ltd v Nyam Chiu Shin (alias Yan Qiuxin) and others* [2005] 2 SLR(R) 579, the Singapore Court of Appeal held that where trade secrets or confidential information are protected by other express provisions in an employment agreement, the employer must be able to show that the non-compete clause protects a legitimate proprietary interest *"over and above"* the protection of confidential information or trade secrets.

Therefore, restraints of trade should be drafted with care. A one size fits all is not usually effective. The drafter should consider the width of the clause and the nature of the employee's responsibilities when crafting the same. It is also worth noting that while the general principles apply, restraint of trade clauses in a sale of business context are generally easier to enforce.

6. Harassment/Workplace Bullying

Workplace harassment was another topic that occupied the public consciousness in 2017, and will continue to be closely watched in 2018.

After the enactment of the Protection from Harassment Act (Cap 256A) ("POHA") in 2014, the MOM released a Tripartite Advisory on Managing Workplace Harassment in 2015. The advisory encourages employers to develop a harassment prevention policy, provide information and training on workplace harassment, and implement reporting and response procedures against the same.

The POHA affords legal protection against (among others) workplace harassment or bullying. It is expected that by criminalising and enacting civil remedies for harassment, employers are given more incentive to implement various employee protection measures so as to steer clear of practices that may attract legal sanction. In this context, we have noticed more employers enacting policies against harassment/workplace bullying.

SINGAPORE

7. Managing a global workforce

Another challenge facing Singapore pertains to managing a global workforce, and the employment of immigrants or expatriates. As the foreign workforce makes up close to 25% of Singapore's population, it is imperative that measures are put in place to deal with the heterogeneity. Two main issues are relevant in this discussion: (1) how employing foreigners affect the Singaporean "core"; and (2) data protection issues across jurisdiction.

The Fair Consideration Framework ("FCF") seeks to strengthen the Singaporean core by requiring employers to consider Singaporeans fairly before hiring foreigners. In particular, employees and employment agencies must comply with certain requirements when advertising for job vacancies, and the MOM scrutinises hiring practices for companies with discriminatory nationality-based hiring, or a disproportionately low concentration of Singaporeans at the PME level compared to others in the industry. Employers that do not meet the requirements may be penalised by having their work pass privileges curtailed. It is reported that over the past 2 years, a total of 500 companies have been put on the FCF watch list, which tracks companies that have unfair hiring practices.

A fairly recent development is the Human Capital Partnership Programme which was launched in 2016 as a tripartite initiative to provide incentives for companies that are committed to progressive employment practices and developing a local core. This programme aims to:

- Reinforce a Singaporean core by investing in the development of local employees across all levels;
- Foster stronger cohesion between local and foreign employees and strengthen the overall team; and
- Transfer skills/knowhow from foreign to local employees to enhance exposure and capabilities of the local workforce.

In terms of personal data protection, issues can arise when data is transferred across borders. Section 26 of the Personal Data Protection Act 2012 ("PDPA") imposes restrictions on the transfer of personal data out of Singapore by organisations. Part III of the Personal Data Protection Regulations 2014 specifies that an employer must take appropriate steps to ensure that (1) it complies with the PDPA while the personal data remains in its possession or under its control, and (2) the overseas recipient is bound by legally enforceable obligations to provide to the personal data transferred a standard of protection that is comparable to that under the PDPA. PDPA issues are likely to be increasingly pertinent as we see more cross-border movement of employees and their personal data.

8. Increasing Protection for Self-Employed Persons

Self-employed persons do not generally receive the protection of employment laws. There has been increasing awareness of this gap, and in 2018, the Tripartite Workgroup ("TWG") was formed to identify common challenges faced by such persons and to develop recommendations to address such challenges.

On 21 February 2018, the TWG released its report on self-employed persons. The report contained recommendations to address the challenges faced by them. The recommendations include the development of a Tripartite Standard to require written contracts when engaging self-employed persons, having sector agencies to mediate payment-related disputes, extend the Tripartite Alliance for Dispute Management's voluntary mediation services to self-employment persons, the development of special insurance schemes to provide for cash benefits for prolonged illness or injury, for government to promote the adoption of insurance in higher risk occupations through licensing controls, or as a service-buyer, as well as a "contribute-as-you-earn" Medisave model which mandates contributions whenever a service fee is earned.

The Singapore government has indicated that it has accepted the recommendations in-principle. Measures to implement the recommendations and the expected timelines will be provided in due course. For a start, on 5 March 2018, the government has announced the launch of the "Tripartite Standard on Contracting with Self-Employed Persons" to provide for a set of recommended best practices which should be adopted when engaging self-employed persons. The Tripartite Alliance for Dispute Management will also extend voluntary mediation services to all self-employed persons who have payment disputes with the businesses that engaged them.

9. Managing Disciplinary Procedures

In terms of disciplinary procedure, there is no legal procedural requirement for employers to abide by in investigating employees' misconduct and/or conducting inquiries. Section 14(8) of the Employment Act (Cap 91) ("EA") provides that for the purposes of an inquiry, the employer may suspend the employee from work for at most one week but shall pay him not less than half his salary for such period.

In *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151, the Singapore High Court provided useful guidance to how an employer may dismiss an employee (who is not covered under the EA) for misconduct, where the employment contract provides that "due inquiry" must be made before dismissing the employee. The phrase "due inquiry" was interpreted to mean "something more than just the making of inquiries and the conduct of an investigation." The employee must be clearly informed about the allegation(s) and the evidence against him so that he has an opportunity to defend himself. Although no formal process is required, the more informal the procedure, the more the court should scrutinise it to ensure that it accords with the notions of justice and fairness.

SINGAPORE

10. Review of the Employment Act

On 5 March 2018, following a month-long public consultation exercise on the EA, Singapore's main labour legislation, the following changes to the EA have been announced:

- Core provisions for public holiday and sick leave entitlements, timely payment of salary and allowable deductions, and redress for wrongful dismissal will be extended to all PMEs, regardless of their salary. Currently, only PMEs earning S$4,500 per month or less enjoy such protection;

- Salary thresholds for vulnerable non-workmen employees to qualify for entitlements such as annual leave, hours of work, overtime pay and rest day will be revised from S$2,500 to S$2,600. In terms of overtime pay, the salary cap for non-workmen will also be revised upwards from S$2,250 to S$2,600; and

- Dispute resolution services for statutory and contractual salary-related disputes (currently heard by the Employment Claims Tribunal ("ECT")) and wrongful dismissal claims (currently heard by the Ministry of Manpower) will be amalgamated and/or streamlined. The ECT will be empowered to hear wrongful dismissal claims.

The amendments to the EA will be introduced in Parliament later this year for implementation by April 2019.

SRI LANKA

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1. Non Disciplinary Terminations under the Termination of Workmen (Special Provisions) Act no. 45 of 1971

The Termination of Workmen (Special Provisions) Act (the "Termination Act") applies to (private sector) employers by whom an average of 15 or more employees have been employed during the six months preceding the date on which the employer seeks to terminate the employment of an employee's services, such employees being in scheduled employment – which means most employees. The employment of any employee covered by the Act cannot be terminated (except if the termination is a disciplinary one) by the employer without either the employee's consent or the prior written approval of the Commissioner of Labour. If one of these conditions is not fulfilled, the termination is null and void and the employee would be entitled to either to be reinstated with back wages and all other benefits to which he would have been entitled to if his services had not been terminated or to be paid compensation.

Accordingly, an employer cannot even terminate a single employee on grounds of incompetence or illness which occasions absence in consequence of which he or she is unable to fulfill his contractual duties, without either of the above. In effect this would mean that if the employee him/herself has not consented, it is the Commissioner who will decide on the employee's competence and/or whether he/she is able to adequately fulfil his/her contractual obligations.

The compensation that can/must be awarded by the Commissioner is as set out in a schedule but cannot exceed Rupees 1.25 million.

The problem for employers is the sheer unpredictability of whether or not the approval of the Commissioner would be granted - and also, if granted how long it would take. Although the Act at present, states that the Commissioner's decision shall be made within two months from the date of an application, inquiries are known to have taken very much longer, sometimes even one year or more. Moreover at the end of it, the employer may be refused permission to terminate in which case the employer cannot do so since to do so would be to commit a punishable offense.

2. Retrenchment

While the Termination Act would also apply to the retrenchment of employees covered by the provisions of the Act, those not covered by the Act are covered by the Industrial Disputes Act, so long as they have served one year and the employer has had 15 or more employees on an average on any working day during the month preceding that in which notice of intention to retrench is given.

In terms of this Act, an employer must in the first instance give not less than one month's written notice to the employee/s as well as the Trade Union, if any, of which he/they are members and to the Commissioner of the intended retrenchment. The employer cannot thereafter effect the retrenchment of the employee/s until two months from the date of the notice.

The Commissioner, (or the Minister), may then refer the matter to arbitration to be determined by an Arbitrator on the issue of whether the intended retrenchment is justified. Where such reference has been made, the employer cannot effect retrenchment for a further period of two months from the date of the reference to arbitration. It has been held that the arbitrator's award must itself be made within the said two months and that the employer is not in breach if he were to effect the retrenchment after the lapse of the said two months, with no arbitration award having been made. However, in that situation, the employee/s could seek relief from a Labour Tribunal since any employee whose services have been terminated is entitled to seek such relief.

The Labour Tribunal is entitled to make such order as appears to it as being just and equitable and to grant relief accordingly and there is no prescribed limit on what he may award as compensation, (if the Labour Tribunal does not award reinstatement with full or part back wages and/or other benefits).

Here again, it is a matter of speculation as to what the employer's liability may be.

3. Closure of a Business

It has been recognised by the Supreme Court of Sri Lanka that an employer has a lawful proprietary right to close down the business of the employer and that termination in consequence of such a closure is justified - subject to the fact that compensation is payable to the employee whose services are terminated since the termination did not flow from any fault on the part of the employee. This judgment was delivered in 1977 in respect of a termination which occurred before the Termination Act was in force and after amendment brought in by law no. 4 of 1976 which provided that where the services of an employee were terminated in contravention of the Act, (i.e. without the permission of the Commissioner), as a consequence of closure, the Commissioner may order compensation to be paid. According to the Act, termination in consequence of closure of business is also an instance where, in order to terminate the employment of an employee, permission has to be obtained. The resulting position appears to be that inasmuch as the employer is obliged to seek and obtain the permission of the Commissioner of Labour to effect the termination it is open to the Commissioner to refuse such permission.

This is the current technical position in light of the fact that the Act also provides that the Commissioner may grant or refuse his permission "in his absolute discretion". Thus, technically, on the one hand, while an employer would have a lawful proprietary right to close down his business, on the other hand, according to the "Termination Act", the Commissioner could refuse permission to terminate the employment of the employees who were employed in that business. This, in effect, would allow the Commissioner to compel the employer to continue his business (even at a loss) - which itself would be at variance with the recognised lawful proprietary right of an employer to close the business.

It would be best if clarity is provided by legislation (and/or amendment to existing legislation) as to the employer's rights and obligations in this regard.

4. Uncertainty of relief

Any employee whose employment has been terminated on any grounds is entitled to seek relief from a Labour Tribunal as stated above. According to statutory provisions, the Tribunal is expected to make its order within four months from the date on which the application is made and the High Court, to which an appeal would be lodged according to the statute, should deliver its judgment within a further four months from the date of the appeal. There can also be an appeal to the Supreme Court, provided that leave is obtained and if so, the Supreme Court is expected to deliver its judgment within four months from the date on which the appeal is filed (which can only mean the date on which leave to appeal is granted).

Thus, according to statutory provisions, the entire process should be completed within one year. The fact that this is manifestly impractical and unrealistic is evident from the fact that, for example, recent judgments of the Supreme Court, it was revealed that the whole process had taken between seven years and 22 years.

Neither party knows how long the process would take or can have any idea as to what the outcome would be, nor could an employer have even an approximate knowledge of what his liability would be - if the ultimate outcome is unfavourable to him. It is not infrequent to have orders for compensation, (where no reinstatement and/or back wages is awarded), for several years' salary as compensation – for example three, five, seven, ten and in one case even twenty years of salary have been awarded as compensation. While there are reported judgments, legally binding guidelines in the law as to the principles to apply when assessing compensation should be adopted if that would mean less uncertainty.

5. Out-dated Legislation

Some legislation badly needs review and updating. An example can be seen in the Shop and Office Employees (Regulation of Employment and Remuneration) Act (the "Shop and Office Act") which was passed in 1954 – last amended in 1985.

A glaring example of the need for the updating of this law is that one of its provisions is that the normal hours of work per day and/or per week prescribed for other employees does not apply to those employees in managerial or executive capacity in a public corporation whose annual salary is not less than Rupees 6720 – i.e. Rupees 560 per month and this provision still remains, despite the fact that since long ago the said salary would have been the minimum wage of the lowest paid worker.

Moreover, Act no. 04 of 2016 has stipulated that the minimum wage payable to any employee cannot be less than Rupees 10,000 per month – and this is while the earlier provision referred to in the Shop and Office Act still has in contemplation a monthly salary of Rupees 560 for a managerial/executive employee.

A further anomaly in this Act is the differentiation between managerial/executive employees of public corporations and those in the private sector. According to the literal interpretation of the provisions of the Act, even the Managing Director/Chief Executive Officer of a private sector establishment in receipt of a salary of several lakhs or even millions of rupees per month would be entitled to be paid overtime at 1½ times his normal remuneration for work in excess of eight hours per day or forty five hours per week.

6. Outsourcing and Independent Contractors

There is no legislation dealing with the issue of outsourcing – which would involve one entity obtaining the services of employees of another entity for the purpose of having some work of the former done by the employees of the latter, on the basis of an agreement between the two entities.

While there is no express prohibition on such arrangement and such an arrangement may be said to be impliedly recognised by the Wages Boards Ordinance, (section 59A), ultimately the question of whether the employees in question were in fact the employees of the principal organisation or employees of the "contractor" is left to be decided by a Court and it is entirely possible that it would be held on the facts of the particular case that the "contractor" was no more than an agent and that the purported agreement was only a subterfuge for the principal entity to have its work done without incurring the liabilities it would otherwise incur, were it to have employed the employees in question directly.

The problem is further compounded by the fact that, according to the provisions of the Shop and Office Act, the position would be that the employer of every person employed "in or about the business" for the purpose of which the office is maintained, would be the person carrying on, or for the time being responsible for the management of the business for the purposes of which the office is maintained.

Thus a literal and narrow construction of the Act would lead to the corollary that a particular entity maintaining an office for the purpose of its business can only have its own employees employed on any work, whether in or outside the office, which is ancillary to the business which is being carried on in that office.

7. Employment by Foreign Entities

There is no prohibition on foreign entities employing employees in Sri Lanka to perform services for the said foreign entity.

On the other hand, employment legislation of Sri Lanka contemplates employment by local employers who have a "presence" and are responsible for the fulfillment of their obligations within this jurisdiction; and who can be held accountable for the breach thereof. At present, it is possible for a foreign entity which is outside the jurisdiction of the Sri Lankan authorities/Courts to enter into contracts of employment – written or oral, express or implied with employees in Sri Lanka

and, in the event of breach of local law, there would be no legal possibility of instituting proceedings against such employers in view of the fact that they are outside jurisdiction and need not submit to process.

8. Fixed Termed Contracts

There is no legislation pertaining to employment for fixed terms and, according to judicial authority, in a case where there is a fixed term of contract of employment which expires, an employee is not entitled to seek relief on the basis of a termination of his employment by his employer. While this is no doubt a sound proposition, it still leaves room for employers to employ persons for long periods of time, (perhaps with artificial breaks in between), by resorting to the device of having numerous successive such contracts spanning even a period of ten or more years. It appears that while it is yet possible, conceptually, for a Labour Tribunal, (or higher Court), to hold that the true nature of the contract was in fact permanent and continuous though ostensibly for fixed terms, it would be preferable if legislation were enacted covering this topic so that there need be no doubt either on the part of the employer or the employee as to where the parties truly stand.

9. Discrimination and Sexual Harassment at the Workplace

At present there are no statutory provisions dealing with discrimination and sexual harassment at the workplace in Sri Lanka. While there are provisions relating to discrimination on grounds of race, gender, religion, etc., in the Constitution of Sri Lanka and in regard to sexual harassment in criminal law, there is no legislation specifically relating to discrimination and/ harassment in the workplace in Sri Lankan employment law.

10. Superannuation Benefits

In Sri Lanka, superannuation benefits are collected through Employees Provident Fund and Employees Trust Fund contributions (quite apart from gratuity). Employers are required to contribute 12% of the salary of the employee and the employee must contribute 8% which must be deducted and remitted to the Employee's Provident Fund by the employer within the stipulated time. However, the EPF Act does not apply to persons exempted by regulation - one category of which is a person employed in a managerial, executive or technical employment for whom superannuation benefits or benefits on termination of employment are provided under any provident fund or pension scheme or any other fund or scheme, established or administered outside Sri Lanka. It has been held that the fund or scheme referred to contemplates one that is of the same kind as those providing for superannuation (this will for instance not include unemployment benefits). Further, these benefits should be as or more favourable as the benefit that would be received by way of the provident fund.

The rationale is no doubt, that the employee in question would be in receipt of the benefits from the scheme abroad and there is no reason why he should also receive similar benefits once again on account of the same employment.

SRI LANKA

The Employees Trust Fund obligates the employer to make a contribution of a further 3% apart from the 12% provident fund, but does not make any exception even if the similar benefits that are being received by the employee outside Sri Lanka while being employed in Sri Lanka are more favourable. There seems to be no logical reason why this should be so in the case of Trust Fund. It would be more logical to consider the value of the benefits being received outside Sri Lanka and make provision that where those benefits (in total) are more favourable than both Provident Fund and Trust Fund taken together, even Trust Fund need not be paid by the employer.

TAIWAN

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1. One Day Off One Rest Day Policy

The current Labor Standards Act ("LSA") in effect (last amended and implemented on December 21, 2016) stipulates that in principle, workers should have two days off every seven days, with one being a day off, and the other a day of rest. Workers may not be made to work for a consecutive seven day period unless they work for a business employing the "four-week flexible work hours" scheme. After the above policy is implemented, there have been proposals from both the employers' side and the employees' side regarding further adjustments. A new draft amendment from Executive Yuan in November 2017 is proposing the following changes to the above policy: In sectors named by the central competent authority, if the employers have obtained consent of employee unions or through employer-employee meeting with unions or labor conferences, the "day off" may be separately arranged for placement within every "seven-day period".

2. Post-termination Non-compete Agreement

In past practice, there has been a substantial controversy over whether non-compete clauses post-termination of employment are enforceable. To settle such debate, the LSA was amended in December 2015 to expressly stipulate the conditions that a post-termination non-compete clause must meet in order to be enforceable. Those conditions were further detailed in the amendment to the Enforcement Rules of the LSA in October 2016, which include but are not limited to limiting the duration of the clause to a maximum of two years, and that it cannot exceed the lifetime of the information or trade secret that the employer wishes to protect through the use of a post-termination non-compete clause.

3. Employee Monitoring

The tug-of-war between the employer wishing to monitor the employees' work and the employees' reasonable expectancy of privacy in the workplace have given rise to disputes over issues such as "the permissible scope of recording employee telephone conversations", "monitoring devices provided by the employer", and "using cameras to monitor the workplace". Current legal precedent in Taiwan requires the employer to clearly inform the employees and obtain their (express or tacit) consent if the employer intends to implement the first three surveillance measures. However, as for using cameras to videotape the workplace, as the image of the employee is considered the personal information of such employee, the employer is also required to comply with the Personal Information Protection Act in the processing and use of such recordings, among others.

TAIWAN

4. Annual Leave

The current LSA in effect (last amended and implemented on December 21, 2016) requires the employer to provide wages in consideration of any annual leave not taken by the employee at the end of the year, regardless of the reason that such annual leave was not taken. Because many companies originally had the practice of allowing unused annual leave to roll over to the next year, Executive Yuan in November 2017 proposed a further amendment to expressly stipulate in the LSA that untaken annual leaves may be deferred for one year, and the employer will still be required to pay wages if such rolled-over leave is still not taken in the next year. However, there have been comments that such proposal may be a bit too simplistic and may not actually work out in practice.

5. Unilateral Employer Terminations

Taiwan labor law provides that an employer may only unilaterally terminate an employment agreement (indefinite term) if the termination meets certain statutory conditions, and those statutory conditions further distinguishes between "ordinary employees" and "special employees" (i.e. pregnant workers, workers who have been injured in an occupational hazard). Unilateral terminations that do not meet the statutory grounds will be deemed invalid, and the employment relationship would be deemed to continue to exist.

6. Minimum Time of Service Agreement

There has been controversy over the enforceability of "minimum time of service" clauses in some employment agreements in the past. The December 2015 amendment to the LSA specifically provides for the conditions that such "minimum time of service" clauses must meet in order to be enforceable.

7. Employee Relocation

There have been instances where an employer intentionally relocates an employee or otherwise reduce wages or employment terms so as to cause the employee to resign. To address such practice, the December 2015 amendment to the LSA stipulates five principles that employers must adhere to with respect to the relocation or transfer of employees for protecting the employees' rights. Employers are also further requested to consider the family or childcare needs of the employee in making such decisions.

TAIWAN

8. Protection from Occupational Hazards

Taiwan law provides for significant protection of the rights of employees injured in an occupational hazard. The law clearly stipulates the employer's duty to provide compensation to such injured employees, and the employer has less grounds to unilaterally terminate an employee injured by an occupational hazard versus the aforementioned unilateral termination of other (uninjured) employees. However, regardless of the actual definition provided in law, disputes very often still arise as to whether a particular case "constitutes an occupational hazard", or if the injury so sustained by the employee is just "an ordinary injury" versus an occupational hazard injury. These factual issues are left to the courts to decide.

9. Gender Equality Issues

After the Grand Justices issued the No.748 Interpretation on May 24, 2017 declaring the Civil Code's "failure to allow two individuals of the same sex to establish an intimate and exclusive permanent relationship for the purpose of living together" as unconstitutional and requiring all relevant agencies to amend the relevant regulations within two years from May 24, 2017, all matters relating to "spousal rights" of employees, such as wedding leave, parental leave, family care leave, etc. may all be amended as a result.

10. Whistleblower Regulations

The December 2016 amendment to the LSA and the "Regulations on the Confidentiality and Handling of Complaints under the LSA" promulgated by the Ministry of Labor on May 15, 2017 in essence established the whistleblower statutes in Taiwan law. The new rules cover the confidentiality of the whistleblower and how such matters shall be handled, such as how the complaint shall be made, notification on the handling of the case, maintaining confidentiality of the identity of the whistleblower, etc. so as to protect the whistleblower during the competent/investigatory authority's handling of the matter and reduce the risk of unauthorised disclosure, thereby providing better protection of the whistleblower and strengthening the protection for the rights of employees.

THAILAND

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1. Termination

In Thailand, an employee terminated other than for "cause" (which is narrowly defined in Thai legislation) will be entitled among other things to severance pay. This is a fixed tariff based on length of service; and currently the maximum severance entitlement is 300 days of basic wage, for employees of 10 years or more. Introduction in 2018 of a further "band" of severance entitlement, of 400 days of basic wage for employees of 20 years or more, is under consideration. An employee terminated with severance is often also able to succeed with an additional "unfair termination" claim for additional damages fixed at the court's discretion. There are few reliable criteria as to when a termination is unfair, or as to what measure of damage is appropriate - but a common award is one month per year of employment. Aggregation of severance pay, unfair termination damages and other smaller items can make Thailand an expensive jurisdiction in which to terminate.

2. Treatment of employees who are not directly employed

A business operator whose operations include employees of outsource suppliers or of subcontractors is required to remunerate those employees and provide them benefits and welfare on terms no less favourable than those enjoyed by direct employees having the same or an equivalent function. Where there are no equivalent direct employees, this requirement does not arise. Additionally, should the business operator inform an outsource supplier or subcontractor that it no longer requires certain of their employees (whether or not those outsource or subcontract employees have an equivalent among the business operator's direct employees), and should those outsource or subcontract employees in consequence be terminated by the direct employer (the supplier or the subcontractor), the business operator will be jointly liable with the direct employer for all components of termination compensation payable to those employees.

3. Reassignment

A scenario sometimes encountered is that expatriate personnel with a long history of continuous employment with an international group are assigned to the group's subsidiary in Thailand, which ends up being the final assignment for whatever reason, where the circumstances do not constitute "cause" for termination in Thai law. Even if having worked in Thailand for only a short period such employees can often claim severance from the local subsidiary in Thailand based on the length of their global employment within the group. In some cases there will also be an unfair termination entitlement, and again the global employment period would form the basis for whatever damages awarded. At the same time those employees may have wider retirement or separation entitlements under contracts with group entities outside Thailand, which were agreed upon without anticipation of the employee also having substantial statutory entitlements in the jurisdiction of his/her last employment with the group. In such cases it can sometimes make sense for the group to consider reassigning the executive from Thailand to a different jurisdiction before proceeding with other steps, though the rationale for any such reassignment must not be made explicit.

THAILAND

4. Severance pay

Severance pay is a multiple of daily basic wage, which is money paid for work performed during regular work hours. Issues often arise as to whether allowances, commissions and other such amounts fall within the meaning of the term "wage", and each case turns on its own facts. Broadly speaking recurring fixed amounts paid without the employee being required to produce evidence of having incurred expense are apt to be treated as "wage", but there can be exceptions and in recent years there has been a slight trend in the courts towards stricter interpretation, i.e. exclusion of certain types of payment from the "wage" definition. A factor frequently held relevant by the court is the place in the employment contract where the entitlement is dealt with; should it be in a section of the contract under a heading such as "remuneration" then it may be found to fall within the meaning of "wage", whereas an opposite conclusion might have been reached had it been dealt with elsewhere in the contract. Draftsmen of employment contracts need to be alive to this issue.

5. Transfer of employees in M&A transactions

Contracts of employment may not with few exceptions be transferred without the consent of the employee. An exception at present is where employees transfer by operation of law as for example upon an amalgamation in which two or more amalgamating companies cease to exist and a new company emerges from the process – amendment to the law is however currently being considered to allow such employees to claim severance pay if not wishing to transfer. In M&A transactions taking the form of asset sales, where it is intended that employees will go over to the purchaser, individual employee consents are always required. If not consenting to transfer, and if laid off in consequence by the vendor in the transaction, employees are regarded as having been terminated by the vendor without "cause", with entitlement to severance pay, unfair termination damages and other amounts described above. For employees who do consent to transfer, a harmonisation of employment terms by the new employer across its entire workforce again requires individual employee consents.

6. Non-compete and non-solicitation clauses

Non-compete and non-solicitation provisions in employment contracts are permissible, but under unfair contract terms legislation will be upheld only to the extent they are found to be fair and in line with market practice. It sometimes happens however that such restrictions are imposed in consideration of significant ongoing payments, arising at the date of termination, and it is thought – though there have been few if any cases on point in the Thai courts – that Thai courts would then look more favourably on such provisions.

THAILAND

7. Elderly employees

There is no mandatory retirement age under Thai law for the private sector. However a retirement age may be prescribed in an employment contract, or in the work rules of the employer filed with the Department of Employment. Also, when the employee has reached 60 years of age he may at any time thereafter give one month's notice to the employer of retirement, and must then be released with severance pay calculated as if the employer had terminated the employee. An employer terminating based on the employee's age is considered terminating without "cause" and is thus required to give severance pay, even where the employee is at an agreed or prescribed retirement age. In many cases there would then also be the prospect of an unfair termination claim by the employee. Where an agreed or prescribed retirement age has been reached it is however unlikely that the employer would be considered to be terminating unfairly.

8. Retrenchment

An employer who retrenches an employee whose services are no longer required will be considered in most situations to be terminating without "cause", and thus to be liable for severance pay, unfair termination damages, etc. If the employee is being let go as a result of introduction of machinery (including office equipment) or improvement in technology then 60 days' advance notice is required, and should this requirement not be observed then certain additional severance pay can be claimed over and above the regular severance pay. The only situation in which an employer may terminate a redundant employee without such liabilities is where it can be demonstrated that the employee's position has disappeared, for example as a result of sale or amalgamation, or where the whole or a discrete part of the business is being closed because of demonstrable inability to realise a profit. There are no consultation requirements applicable where a termination is based on redundancy.

9. Relocation

If the relocation of a workplace affects the ordinary course of life of employees or their families, the employer must give 30 days' advance notice of the relocation, and if an employee chooses not to relocate but to resign then he/she must be given special severance pay, equal to the regular severance pay that would have had to be given upon a termination by the employer. However if an employer has two or more locations then in general based on various Supreme Court decisions, it can move its employees between them, unless in particular cases this would violate the employment contract. There is an unresolved issue as to whether or not the special severance pay requirement arises where the employer fails to give the required notice of relocation but the employee acquiesces in the situation and makes the move anyway. There is also an amendment to the law being considered which would allow an employer to consolidate all its employees at a single workplace without being subject to these requirements.

THAILAND

10. Protection of personal data

All employers are subject to a requirement to keep records of employees' email, chat, internet usage and personal identification for a minimum of 90 days. Additionally an employer may generally collect and transfer employee data without limitation. There have been various proposals for introduction of legislation to impose data protection obligations throughout the private sector by giving individuals (as well as their heirs or spouses) the right to control the collection and dissemination of their personal data. However this process has been in flux for several years and many employers have filled the gap by providing their own data privacy policies setting out the employer's rights and obligations with respect to employee data. Under general provisions of Thai law employers are advised not to share employee data with third parties unless required in connection with the employee's employment or they first obtain the employee's consent.

VIETNAM

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1. Increases to Vietnam's Minimum Wage

Vietnam's minimum wage increased in 2018, following issuance of Prime Ministerial Decree 141/2017/ND-CP on 7 December 2017. Based on this decree, the regional minimum wage increased by 6.5% from 2017 levels, and now ranges from VND 2,760,000 (approximately US$120) per person per month in remote areas of the country to VND 3,980,000 (approximately US$175) per person per month in the country's largest cities: Hanoi and Ho Minh City.

2. Scope of Vietnam's Compulsory Social Insurance Scheme Expanded

Two new categories of employees have been added to the scope of Vietnam's compulsory social insurance scheme, as set out in Vietnam's Law on Social Insurance. As of 1 January 2018, Vietnamese employees working under employment contracts with a term of between one and three months, and foreign employees working in Vietnam under work permits, practice certificates, or practice licenses, will be required to pay into Vietnam's compulsory social insurance scheme. The social insurance contribution rates for employers and employees are 17.5% and 8% respectively. As of the time of writing, however, no practical payment mechanism had been established for employers to actually make these social insurance contributions on behalf of foreign employees.

3. Changes to Social Insurance Contributions Calculations

Changes were recently introduced to the method for calculating the monthly social insurance contributions of persons working under employment contracts in Vietnam. As of 1 January 2018, the basis for calculating social insurance contributions now includes the employee's salary, plus allowances, and any other additional amounts stated in the employment contract (the calculation was formerly restricted to an employee's salary plus allowances). Other benefits to employees, such as meal, travel and accommodation allowances, child care allowances and financial assistance provided by an employer to an employee in the event of a work accident or occupational disease, are excluded from an employee's social insurance calculations.

4. Enhanced Criminal Liability for Unlawful Dismissals

An amendment to Vietnam's Criminal Code, which took effect at the beginning of 2018, introduces enhanced criminal liability for unlawful dismissals by employers. Such criminal liability can be imposed in addition to any civil liability that an employer might face under the Vietnam's Labour Code for an unlawful dismissal. The criminal penalties for an unlawful dismissal now include a fine of up to VND 200 million (approx. US$8,900) or a period of imprisonment of between one and three years per violation by an employer. An individual offender may also be prohibited from holding certain positions in an organisation if he/she is found guilty of unlawfully dismissing two or more people or a pregnant woman whose pregnancy is known to the offender, or where the offence causes very serious consequences to the dismissed individual.

5. Criminal Sanctions for Evading Social Insurance Payments

As of 1 January 2018, employers can also be subject to criminal sanctions for evading payment of social insurance, health insurance, and unemployment insurance contributions on behalf of employees. If unpaid social insurance amounts are from between VND 50,000,000 (approximately US$2,100) to under VND 300,000,000 (approximately US$13,200,000) or an individual employer evades making payments for between 10 and 49 workers for a period of six months or more, the individual employer may be subject to a fine of between VND 50,000,000 (approximately US$2,100) to VND 200,000,000 (approximately US$8,800) or face a penalty of three to 12 months' imprisonment. Criminal sanctions can only be applied where the employer has already incurred an administrative penalty for the same offence.

Increased fines are provided for in the case of repeat offences and where social insurance payments have not been paid by the employer on behalf of a larger number of employees or by a corporate legal entity (for example, criminal fines of up to VND 3 billion (approximately US$132,000) can be applied where unpaid insurance amounts are greater than VND 1,000,000,000 (approximately US$44,000) or where social insurance payments are not made for a period of 6 months or more on behalf of more than 200 employees by a corporate legal entity).

6. Introduction of the Vietnam Jobs Public Service Website

In mid-2017 the online application process for the following permitting procedures under Vietnamese law was formalised: (1) approval of the demand for employment of foreign workers; (2) issuance or re-issuance of work permits for foreign workers; and (3) certification of exemption of certain foreign workers from work permit requirements. Online applications for the above permitting procedures can now be made at http://dvc.vieclamvietnam.gov.vn, a website managed by the Ministry of Labour, Invalids and Social Affairs (Vietnam Jobs Public Service Website). However, the process is not fully electronic and applications must still be followed by submission of the hard-copy application dossier to the authority in person or by courier.

7. Note on Employment Contracts Generally

Individuals can be employed in Vietnam on the basis of an indefinite-term contract, a definite-term contract, a seasonal contract or a contract for a specific job (which is for less than 12 months). Under a definite-term contract, the parties are free to agree to the term and the time of termination of the contract, provided that the contract is for a duration of less than 36 months.

Seasonal labour contracts and specific job contracts are used for work that is irregular and where the duration of the job is less than 12 months. It is prohibited for such a contract to be used for work which is regular and has a duration of 12 months or more, except to temporarily replace an employee who is absent temporarily (i.e. for military service, maternity leave, sick leave, or leave as the result of a work-related accident).

An individual can provide services to an enterprise or organisation in Vietnam as an independent contractor. The provision of services as an independent contractor, however, falls under the jurisdiction of Vietnam's Civil Code and Commercial Law, and is generally not considered an employment relationship to which the Labour Code would. As such, an independent contractor is not entitled to any statutory employment rights under Vietnam law.

Vietnamese law does not specifically address the use of service contracts by employers. If a service contract contains features more customarily found in an employment contract (for example, where the contractor is subject to the employer's working hours, or to disciplinary actions for a breach of the work rules), the contract will be treated by the authorities as an employment contract, even if it is referred to as a service contract. As a general rule, the use of a service contract for permanent and long-term work is not encouraged, as this can be viewed by the labour authorities as a circumvention of employment-related requirements, such as contributions to Vietnam's social insurance scheme.

8. Redundancy due to Restructuring

Employers should bear in mind the regulatory requirements that apply in cases of termination of employees due to restructuring, change of technology or changes for economic reasons. If the employer is unable to create new jobs and must make employees redundant, the employer must pay severance allowance to those employees. Where an employer intends to terminate two or more employees as part of a restructuring, the employer must have discussions with the grassroots (i.e. the trade union at the company level, if any) or the labour federation at the district level and provide 30 days' advance notification to the relevant provincial Department of Labour, Invalids and Social Affairs of the terminations. As part of the notification process, a labour usable plan must be submitted to this authority specifying the number of employees to be made redundant and the severance package to be paid to these employees.

9. Internal Labour Rules

Enterprises with ten or more employees must have written internal labour regulations which must be registered with the provincial Department of Labour and Social Affairs where the enterprise is located. Prior to adopting the internal labour regulations, the employer must consult with the grassroots trade union (i.e. the trade union at the company level, if any) or the labour federation at the district level. The internal labour regulations must include information on working hours and rest breaks, rules and codes of conduct for the enterprise; occupational health and safety requirements, protection of assets and confidentiality, and disciplinary procedures and penalties.

Employees must be made aware of the internal labour regulations, which must be posted publicly within the enterprise. An employee who breaches the internal labour regulations may, depending on the seriousness of the breach, be subject to disciplinary measures.

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10. Work Permits

Foreign nationals working in Vietnam must obtain a work permit from the relevant provincial Department of Labour and Social Affairs. Various exceptions apply to this general requirement, including where a person is: (1) an equity member or owner of a limited liability company; (2) a member of the board of management of a joint stock company; (3) a chief of a representative office, a project of an international organisation or a non-governmental organisation in Vietnam; or (4) entering Vietnam for a period of less than three months to offer services or provide technical expertise. Foreign nationals who are exempt from the requirement to obtain a work permit must, nevertheless, obtain confirmation of work permit exemption, unless they are entering Vietnam for a period of less than three months to offer services or provide technical expertise. A work permit is for a maximum of two years and must coincide with the period of employment.