

Republic of China (Taiwan)

Introduction

The Republic of China (“Taiwan”) has certain mandatory laws for employee protection. The major piece of law concerning termination of employment is the Labor Standards Law (LSL). Since January 1, 1999, the LSL is applicable to almost all of the industries in Taiwan, with the exception of a very few lines of business. The LSL provides the mandatory terms and conditions of employment and is applicable to all expatriates and employees, including those at the managerial level. Under the LSL, Taiwan employees have rather strong rights in regard to terminations and other working conditions, such as minimum working hours and overtime rates. The concept of “termination at will” (dismissing an employee for any reason, without notice, and at any time) is not permissible under the LSL, even if the employee agrees to it in his or her employment contract.

The only exception in the LSL is a managerial person who is appointed by the board of directors (e.g., general manager), is registered in the company’s corporate card filed with the Taiwan government and signs an appointment agreement (rather than an employment agreement) with the company. Such a person is deemed to be the representative of the company, and, thus, exempted from the LSL.

Courts in different cities of Taiwan interpret the LSL in a rather unified way because they rely on the rulings issued by the labor authorities (the Council of Labor Affairs in the central government and the Labor Bureau in the local governments). However, where the rulings by the labor authorities are contradictory, the courts will make their decisions independently based on their interpretations of the relevant law provisions.

Taiwan’s laws concerning employment discrimination and harassment against employees are rather limited. These rules mostly are set forth in laws or regulations with respect to criminal law or social order maintenance regulations. The only independent rule regarding anti-sexual harassment is established in the biggest metropolitan area, i.e., Taipei City.

Litigation involving employment disputes has become more prevalent than ever in Taiwan since the LSL was expanded to cover most industries in Taiwan. However, most labor law disputes are related to terminations rather than to sexual harassment or discrimination.

Terminations

Restrictions On Employers

Articles 11 and 12 of the LSL provide the statutory causes for which an employer may terminate an employment relationship. If a termination is not based on any cause under these two Articles, the employee is entitled to claim that the termination is illegal.

Article 11 of the LSL outlines the circumstances under which an employer can terminate a labor contract *with* advance notice, including when:

- (i) The employer's business is suspended or assigned;
- (ii) There is an operating loss of business contraction;
- (iii) Forced majeure necessitates business suspension for more than one month;
- (iv) A change in business nature requires a reduction in the number of employees, and the particular employee cannot be assigned to other proper positions; or
- (v) A particular employee is confirmed to be incompetent for the work required of him or her.

Article 12 of the LSL outlines circumstances under which an employer may terminate a labor contract *without* advance notice, including when:

- (i) An employee misrepresents any fact at the time of signing his or her labor contract in a manner which might mislead the employer and cause the employer to sustain damage;
- (ii) An employee commits violence or utters gross insults at the employer, the employer's family members or agents, or fellow employees;
- (iii) An employee has been sentenced to temporary imprisonment in a confirmed judgment, but is not granted a suspended sentence or permitted to commute the sentence on payment of a fine;
- (iv) There is a gross breach of the labor contract or a gross violation of work rules;

- (v) An employee deliberately ruins machinery, tools, raw materials, products or other property of the employer, or deliberately discloses any technological or confidential business information of the employer, thereby causing the employer to sustain damage; or
- (vi) An employee is absent from work without proper cause for three consecutive days or six days in a month.

In all of these situations (with the exception of cases of temporary imprisonment), the employer must terminate the labor contract within 30 days of becoming aware of the qualifying event.

Notice Provisions/Consequences Of A Termination In Violation of the LSL

If an employer terminates an employee for one or more of the reasons under Article 11 of the LSL, the employee is entitled to severance pay based on his or her years of service and prior notice (or payment in lieu of notice). For example, if a company is to be merged with another company, it may invoke Article 11(1) of the LSL to dismiss its employees and pay them money in lieu of prior notice in addition to the severance pay.

Article 16 of the LSL outlines notice requirements for contracts terminated under Article 11. It requires 10 days of advance notice where an employee has worked continuously for the same employer for more than three months but less than one year; 20 days advance notice when an employee has worked continuously for the same employer for between one and three years; and 30 days advance notice when an employee has worked continuously for the same employer for more than three years.

An employment agreement is not terminable at the employer's wish unless any of the statutory causes for termination exists under the above relevant articles. If an employer terminates an employee for reasons other than these statutory causes, the employee may file a lawsuit with the court, requesting to be reinstated to the previous position and compensated with salary for the period of illegal termination. Alternatively, the employee may choose to be compensated with salary for the period of the illegal termination period as well as the money in lieu of required prior notice before severance.

Mass Severance

The Mass Severance Protection Law (MSL) applies when an employer intends to lay off its employees under Article 11 of the LSL and one of the thresholds under the MSL is met. The MSL is triggered when an employer with a certain number of employees on a site is intending to lay-off a certain percentage of the employees within a certain number of days. The MSL specifies three instances where the law may be triggered.

When the MSL is triggered, the employer is required to follow specific procedure, including reporting to the local competent authority and the affected staff of the Mass Severance Plan (MSP) 60 days prior to the termination date of the employment, forming a negotiation committee within 10 days after submission of the MSP, etc. The negotiation with the employees representatives need to take place biweekly, and there is no payment in lieu of the 60-day negotiation time and advance notice. An employer will be subject to administrative fines ranging from NT\$100,000 to NT\$500,000 for violation of the above requirement.

Termination Indemnities

In addition to advance notice (or payment in lieu), Article 17 of the LSL requires an employer to pay separation fees to employees terminated for reasons outlined under Article 11 based on the years of service accrued under the LSL (the so-called old pension system, or “Old Scheme,” a defined benefit program). It requires a severance fee equivalent to one-month’s average salary for each full year in which the employee has worked continuously for the company. In cases where the employment is less than one year and for partial years, the severance pay must be computed proportionately. Service periods of less than one month must be computed as one month.

The new pension system under the Labor Pension Act took effect July 1, 2005 (the “New Scheme,” a defined contribution program). Employees who opted for the New Scheme or who were hired after July 1, 2005, will be entitled to one-half month of average salary for every year of service accrued under the New Scheme with a maximum payout of six months’ salary.

In addition to advance notice and the severance fee, the employer is required to submit a list of terminated employee(s) to the local competent authority as well as the Public Employment Services Agency at least 10 days prior to the employees’ termination date under Article 33 of the Employment Service Act.

In cases of mergers, Article 20 of the LSL provides an alternative that allows the merged company and the surviving company to have consenting employees continue working for the surviving company. In such cases, the employees will not receive a severance fee from the merged company, but the surviving company must acknowledge their prior seniority. Employees may consent to such an arrangement in order to maintain their entitlement to the pension for their prior seniority.

An employer is not obligated to pay severance to an employee for termination if the employee is found to have engaged in misconduct under Article 12 of the LSL. Some of the misconduct described in Article 12 of LSL are rather vague (e.g., where there is a gross breach of the labor contract or a gross violation of work rules, the employee may be terminated without entitlement to severance pay). Disputes often arise as to whether an employee's behavior constitutes misconduct for purposes of this Article. Therefore, an employer's work rules should describe any legitimate causes for termination with specificity.

Law On Separation Agreements, Waivers, And Releases

There are no laws in Taiwan with respect to separation agreements, waivers and releases. Nevertheless, it is becoming more common for employers to seek a release of liability from employees at the time of their termination in order to avoid future arguments as to whether or not the termination was legitimate. Taiwanese law does not require consideration for such separation agreements, waivers and releases. However, if an employer seeks a release of potential claims without paying any severance fee, Taiwanese courts usually will examine whether a statutory termination cause exists. If an employee signs a release of potential claims for termination after receipt of severance pay, the Taiwanese courts are less likely to examine the termination causes.

Litigation Considerations

The majority of employment disputes that entail litigation in Taiwan involve wrongful termination. Since the LSL was expanded to cover most of the Taiwan industries, more and more cases will be brought in courts over employment-related disputes. Some employees do not retain a lawyer to argue a case on their behalf, as Taiwanese law does not require a litigant to be represented by an attorney. This is also because Taiwanese law does not require the party who loses a lawsuit to pay for the adverse party's attorney fees.

Employment Discrimination

Laws On Employment Discrimination

Taiwan's general rule against discrimination is set forth in Article 7 of the Constitution, which states that "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law."

This provision of the Constitution, however, is not directly applicable to an employee's remedy for discrimination during court proceedings. An employee who is discriminated against by his or her employer will typically base a claim on Article 184 of the Civil Code, which provides that "A person who, intentionally or by his own fault, wrongfully injures the rights of another is bound to compensate him for any damage arising therefrom. The same rule applies when the injury is done intentionally in a manner contrary to the rules of good morals. A person who infringes a statutory provision enacted for the protection of others is presumed to have committed a fault."

In addition, because discrimination against an employee involves personal rights, Article 18 of the Civil Code also may be applicable. This article provides that "If any personal rights are unlawfully infringed, application may be made to the court for the suppression of the infringement. Under the above circumstances, action for damages or for emotional compensation may be brought forth only in those cases which are specifically provided by law." According to Articles 17, 19 and 195 of the Civil Code, as well as court decisions, the personal rights in Article 18 include a person's liberty, name, body, health and reputation. By analogy, discrimination against an employee may be considered to have damaged the employee's reputation and thus fall under these Articles.

Another law relating to employment discrimination is the Protection Act for Rights and Interests of (Physically and Mentally) Disabled Citizens. Article 38 of this law requires a private organization that has 100 or more employees to hire physically or mentally disabled employees, totaling at least 1% of the whole staff. Violation of this article will subject the employer to a contribution to the handicapped welfare fund established by the Taiwanese government. The amount of the contribution is equal to the basic salary of the handicapped employee that the employer failed to hire in compliance with the regulations.

Employee Remedies For Employment Discrimination

An employee who wins an employment discrimination case can recover damages caused by the discrimination. However, Taiwanese law does not provide a specific rule to determine actual damages. The employee has to prove that the employer intentionally or negligently behaved in a discriminatory fashion in order to prove injury to his or her rights pursuant to Article 184 of the Civil Code. In cases where the alleged discrimination cannot be proved to have caused any harm to the employee, a Taiwanese court may not find in favor of the claim.

Potential Employer Liability For Employment Discrimination

An employee can sue both the employer and the person responsible for the discrimination. The employee's legal ground for filing the lawsuit against the company is Article 188 of the Civil Code, which provides that "The Employer is jointly liable to make compensation for any damage which the employee wrongfully causes to the rights of another person in the performance of his duties." However, the employer is not liable for damages if it exercised reasonable care in the selection of the employee and in supervising his or her duties or if the damage would have been occasioned regardless of such reasonable care. An employer also may defend itself by demonstrating that the acts of discrimination were not committed during the performance of the alleged violator's duties or with the instructions and authorization of the company's top management.

Practical Advice To Employers On Avoiding Employment Discrimination Problems

In Taiwan, there are very few cases brought alleging employment discrimination. However, it is advisable for employers to establish a solid system for maintaining appropriate employee records, documentation of personnel decisions and appropriate decision-making with respect to discipline, evaluation and terminations. The rules regarding discipline, evaluation and terminations are required to be set forth in a company's work rules if the company has 30 or more employees.

Law Concerning Gender Work Equality

The Gender Equality in Employment Law (GEEL) aims to protect the equality of work between the two genders. Among others, it prohibits the employer from discriminating against an employee based on his or her gender in any aspect of the

employment. Article 13 of the GEEL also requires the employer to prevent and correct sexual harassment from occurring in the workplace. Under the same article, an employer hiring over 30 employees is required to adopt measures for preventing and correcting sexual harassment and must display these measures in the workplace. The GEEL also provides some female-oriented rights, including menstruation leave and an extended maternity leave. Both female and male employees are entitled to maternal/paternal leave under Article 16, provided that they have been in service with the employer for one year and the employer hires more than 30 employees.

In addition to the above, under the GEEL, employees are entitled to various child-care related benefits and rights and provides remedies and appeal procedures when an employee is injured as a result of the employer's violation of this law.

Sexual Harassment

Laws On Sexual Harassment

If an employee encounters sexual harassment in the workplace or in situations relating to work, the employee may allege criminal offenses under Article 224 of the Criminal Code, which provides that "A person who renders resistance impossible by threats or violence, by administering drugs, by inducing hypnosis, or by other means, and who commits an indecent act against a male or female person shall be punished with imprisonment for not more than seven years." Article 304 of the Criminal Code also may be implicated by workplace sexual harassment. It provides that threats against another person to do a thing which he or she has no obligation to do is punishable with imprisonment for not more than three years, detention or a fine of not more than NT\$ 300.

Article 83(3) of the Social Order Maintenance Act provides that anyone who teases persons of the other sex by using obscene language, gestures or any other means can be punished with a fine of not more than NT\$6,000. The Taipei City Government also has enacted a rule prohibiting sexual harassment. However, the measure is more in the manner of an administrative policy and no punishment is provided in cases of violation.

More specifically, Article 25 of the Prevention of Sexual Harassment Act imposes criminal penalty on "intentional sexual harassment." The Article defines intentional harassment as "kissing, hugging or touching the buttocks, breast, or any other private parts" of another. A person who is found to have violated the above article is required

to offer compensation to the injured party for his or her damages and will be required to take proper measures to restore the injured party's reputation, if such reputation is damaged. In addition, the person who violated the article will be fined between NT\$10,000 and NT\$100,000 by the competent authorities and may be imprisoned for a definite term of less than two years, be required to provide forced labor service under detention or pay a fine of less than NT\$100,000.

Employee Remedies For Sexual Harassment

The possible offenses described above may be initiated only upon a complaint (i.e., a prosecutor cannot initiate a criminal action unless a complaint has been filed with the prosecutor's office) filed by either the actual victim or the victim's spouse. For the offenses under the Criminal Code, the complaint must be filed within six months from the date the person entitled to complain was informed of the occurrence of the incident and the identity of the offender. For an offense under the Social Order Maintenance Act, the complaint must be filed within two months.

Potential Employer Liability For Sexual Harassment

If a company's staff members or managers are found to have engaged in sexual harassment, the company may be found liable under Taiwanese law. Similar to an employer's liability in cases of discrimination, Article 184 (which requires those who injure the rights of others to compensate them for damages) and Article 188 of the Civil Code (which requires employers to exercise reasonable care in the selection and supervision of its employees) also can be applied in cases of sexual harassment.

In its defense, the employer must prove that the acts of sexual harassment were not committed by the violator during the performance of his or her duties and not with the instruction or authorization by the company's top management. In addition, if the acts of sexual harassment are committed after working hours and during social contact between employees at their own initiative, the employer may not be found liable.

However, the employer will be subject to joint civil liability for the sexual harassment, unless the employer can show that it has complied with the Gender Equality in Employment Act and other relevant regulations and has exercised necessary care to prevent such incident from occurring even though its efforts have failed (Article 27 of Gender Equality in Employment Act).

Practical Advice To Employers On Avoiding Sexual Harassment Problems

The Taiwan government now encourages an employer to have an anti-sexual harassment policy and complaint procedure. With such a policy, it is easier for an employer to defend against sexual harassment charges. Accordingly, employers in Taiwan are encouraged to include such a policy and complaint procedure in their personnel policies. The policy should define sexual harassment, prohibit it as a matter of company policy, provide an avenue for aggrieved employees to make complaints regarding what they believe to be sexual harassment and authorize disciplinary action against any harassers.