

Employment

Newsletter

Asia Pacific

BAKER & MCKENZIE

First edition, 2009

Asia Pacific Law@Work

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Welcome to the first 2009 edition of the Baker & McKenzie Asia Pacific employment newsletter, Asia Pacific Law@Work. As the economic downturn continues, we look at the employment landscape across the region and consider the response to the economic situation by the governments of China, Malaysia and Singapore. In addition, we consider the effect of the downturn on company directors in Thailand and the unintended consequences of exceptions under the Thai Social Security Fund.

This edition also sees the introduction of significant immigration legislation in Australia, as well as new overtime measures in Japan. New legislation affecting employers has come into effect in Taiwan and Vietnam. Finally, Hong Kong has recently implemented major changes to its court process that will affect any employer with a case in the High Court (such as an appeal from the Labour Tribunal).

I'm sure that you will enjoy this issue and we look forward to providing you with further quality employment law updates in future editions. If you have any suggestions for future editions, please let me know.

With best regards,



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AUSTRALIA

Introduction of the Migration Legislation Amendment (Worker Protection) Act 2008

Demonstrative of the Australian Government's determination to rigorously and strictly control the visa status and work conditions of foreign national workers in Australia, the Migration Legislation Amendment (Worker Protection) Act ("**Worker Protection Act**") received royal assent on 18 December 2008 and is due to take effect in mid to late 2009.

Who is affected

The Worker Protection Act affects businesses which sponsor overseas employees to work in Australia using the Business Long-Stay visa, subclass 457 ("**457 visa**"). The 457 visa is the key Australian work visa and is available to skilled employees only.

The Worker Protection Act strengthens the power of the Department of Immigration and Citizenship ("**DIAC**") to monitor and penalise 457 visa sponsors found to be in breach of employer obligations. Under the Worker Protection Act, the Minister for Immigration can appoint inspectors who will have the power to enter, without force, the business premises of 457 visa sponsors for the purpose of determining compliance with sponsorship obligations.

Appointed inspectors will have substantially the same powers as workplace inspectors of the Workplace Ombudsman under the Workplace Relations Act 1996. Inspectors can inspect any relevant work, material, machinery, appliance, article or facility and also interview any relevant person and require relevant documentation to be produced.

Penalties

If an inspector finds that sponsorship obligations have been breached, the inspector can impose civil penalties or issue infringement notices. The civil penalty for an individual is A\$6,600 and A\$33,000 for a body corporate. Where an infringement notice is issued, fines of up to A\$1,320 for an individual and A\$6,600 for a body corporate may be imposed. It is very important to note that inspectors can also issue a written notice requiring a person to produce a document or thing to the inspector at a specified place within a specified period of not less than seven days. If a person does not comply with the requirement of the Inspector's written notice the person may be imprisoned for six months.

Enhanced information sharing

The Worker Protection Act also facilitates information sharing with other government departments. Information found by an Inspector under the Worker Protection Act can be disclosed to the Department of Education, Employment and Workplace Relations. In addition, notwithstanding any taxation secrecy provisions, the Worker Protection Act empowers the Commissioner for Taxation to disclose information relevant to a 457 visa holder and/or the sponsoring employer to the DIAC.

The Worker Protection Act complements the Migration Amendment (Employer Sanctions) Act 2007 ("**Employer Sanctions Act**") which imposes civil and criminal sanctions on employers and labour suppliers who allow or refer illegal workers to work.

Prior to the introduction of the Worker Protection Act and the Employer Sanctions Act, a failure of monitoring usually led to warnings, administrative penalties, visa application processing delays and, at

worst, the cancellations of sponsorship approvals and existing 457 visas.

Subsequent to the introduction of the Worker Protection Act and the Employer Sanctions Act, it is our view that risk management in relation to immigration compliance should become a matter of priority for employers who employ any foreign national workers. It is recommended that employers implement compliance assurance processes to avoid any potential exposure to administrative, civil and criminal penalties under the new monitoring regime.

Release of draft regulations re-defining obligations for employers of 457 visa holders

As a supplement to the Worker Protection Act, the Minister for Immigration, Senator Chris Evans ("**the Minister**"), has released draft regulations which clarify the sponsorship obligations for employers of 457 visa holders.

The draft regulations foreshadow the move towards stricter accountability of 457 sponsors and aim more clearly to specify when sponsorship obligations commence and conclude.

Under the draft regulations, employers who sponsor foreign employees to work in Australia on 457 visas will be required to meet seven new "Sponsorship Obligations" as follows.

1. Obligation to cooperate with inspectors.
2. Obligation to pay the minimum salary level.
3. Obligation to pay costs incurred by the Commonwealth.
4. Obligation to pay travel costs.
5. Obligation to keep records.

6. Obligation to provide records and information to the Minister.
7. Obligation to provide information to Immigration when certain events occur.

Notably, the draft regulations allow the DIAC to specify by legislative instrument what sponsorship records must be kept by sponsors in an auditable and reproducible format. Cessation of work and relevant changes in circumstances must be notified within 10 working days. Within 30 days of receipt of a written request from sponsored employees, sponsors will be required to pay for necessary and reasonable costs of return travel.

The Minister’s media release

In a recent media release on the draft regulations, the Minister has advised that the new minimum salary levels for 457 visa holders will be based on “market rates”. In our view, this will result in an increase to the current minimum salary levels. The Minister also advised that those who hold 457 visas will be required to purchase private health insurance and be solely responsible for their medical costs and their children’s schooling costs.

When do obligations commence and cease

Previously, most sponsorship undertakings ceased at the earliest of 28 days after notification of cessation of work or upon grant of another visa. For example, the minimum salary level must still be met for 28 days after notification of cessation of work.

In addition, the undertaking to pay medical costs and costs incurred by the Commonwealth continued until such debts are paid.

Under the draft regulations, the minimum salary level requirement will cease on the day employment

ceases. The obligation to pay costs incurred by the Commonwealth will generally cease five years after the 457 visa holder and their dependents obtain new substantive visas; or a nomination approval with another employer sponsor; or upon the expiry of their 457 visa. The remainder of the obligations will generally commence when sponsorship or nomination applications are approved and cease five years later.

The draft regulations are not yet finalised and we expect that further changes will likely be made.

As non-compliance with sponsorship obligations attracts serious penalties under the Worker Protection Act, we strongly recommend all employers who utilise the 457 visa scheme to be aware of the new obligations once they have been finalised.

Admissions of Reasonability and Enforcement of Restraints

In the decision of *Miles v. Genesys Wealth Advisers Limited* [2009] NSWCA 25, the majority of the Full Bench of the NSW Court of Appeal enforced a 30-month non-competition restraint and also a non-solicitation restraint in respect of a former Managing Director of Genesys. Genesys conducted the business of providing financial products and services to retail clients through member financial planning firms and practices. The ex-Managing Director had enjoyed 20 years’ employment with his ex-employer. Over the course of this period the Managing Director had developed long-standing relationship at a senior level with financial planning members who were serviced by Genesys.

The Court held that the restraints at issue were not unreasonable nor were they intended to stifle competition. This was principally because the ex-

Managing Director had access to information which was at a “high level of confidentiality” such as long term strategic planning. Access to this information could directly equip a competitor to attack Genesys’ weak points in its relationships with member firms and to build upon them, and therefore the risk of damage to the business of Genesys was very high.

The relevant restraints were contained in a Deed of Release. One of the restraints prevented the ex-Managing Director from engaging in a competing financial services business in Australia. The Deed also contained a restriction which prevented the ex-Managing Director from soliciting member firms. It was an important factor in the majority’s decision that the ex-Managing Director could have circumvented the non-poaching restraint by using the sale staff to solicit indirectly Genesys member firms. Even though indirect solicitation was prohibited by this clause, the majority judges opined that it would have been very difficult for Genesys to establish evidence of such a breach in these circumstances. For this reason, the Court ordered that the ex-Managing Director be restrained generally from being engaged in a competitive business.

Another factor which weighed heavily in favour of Genesys was that the restraints contained in the Deed of Release were part of a negotiated outcome which also involved the ex-MD obtaining certain share benefits under a long term incentive plan (which were in dispute). The Managing Director had obtained independent legal advice from solicitors who were experienced in employment law before entering into the Deed. The Court noted that the Managing Director had made a contractual admission in the Deed that

the restraints were reasonable. Although the Court did not regard this admission as conclusive, the Court indicated that it did give the admission considerable weight where the parties had negotiated the Deed on an equal footing and with the benefit of expert legal advice.

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CHINA

Recent Government Policies in Response to the Global Economic Crisis

In response to the global economic crisis, China has announced several employment-related policies. These policies include reducing employers' statutory labour costs, encouraging companies to avoid layoffs by taking other labour cost cutting measures, and punishing employers and shareholders who do not pay their employees properly.

- In a notice issued on 3 February 2009, the State Council advised local governments to take temporary measures to reduce labour costs, such as suspending social insurance premiums, reducing social insurance rates, and extending tax preferences for certain enterprises in economic distress, in order to avoid mass layoffs.
- The Ministry of Human Resources and Social Security ("MOHRSS"), All-China Federation of Trade Unions

("ACFTU") and China Enterprise Association ("CEA"), in a joint opinion issued on 23 January 2009, encouraged employers to avoid or reduce mass layoffs by adopting alternative cost cutting measures, such as wage reductions, work adjustments, holiday and annual leave rotations, and other flexible working arrangements.

- On 2 January 2009, the MOHRSS issued new rules stating that an employer's shareholders or holding company can be held liable to the company's employees if the company closes, or ceases to do business, without satisfying the company's labour-related liabilities.

- In a separate notice jointly issued by the MOHRSS and twelve other authorities on 6 January 2009, MOHRSS stated that local governments must combat and "punish" companies that illegally avoid paying wages. For foreign-invested enterprises that improperly close their operations in China, the MOHRSS stated that judicial assistance will be sought in those countries with a reciprocal treaty with China.

- In the same notice, the MOHRSS advised local governments to establish a wage arrears reporting system, and stated that if a company delays paying wages due to "difficulties in operation," it must obtain the "consent" of its union or employee representatives, and file a report with the local labour and social security bureaus.

As a result, companies may have greater flexibility in reducing their labour costs during the current economic conditions, especially if

such cost savings measures are designed to avoid a mass layoff. In practice, various localities have issued their own policies, such as encouraging companies to adopt cost cutting measures instead of layoffs and reducing some social insurance rates. Thus, companies considering such cost-cutting measures should be aware of such local policies and practices, and consult with their local labour bureau, labour union or other employee representative body, before taking such actions.

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HONG KONG

Civil Justice Reform in Hong Kong

With effect from 2 April 2009, the Hong Kong courts will implement key changes to its court process under the Civil Justice Reform (the "Reforms"). The Reforms will not affect proceedings in the Labour Tribunal, which has jurisdiction to hear the majority of employment disputes. They will, however, affect cases that are transferred from the Labour Tribunal to the High Court, as

well as appeals from the Labour Tribunal. They will also affect the types of disputes that are brought directly in the District Court and the High Court, such as cases relating to discrimination, restrictive covenants or confidential information.

The primary objectives of the Reforms are to:

- increase cost-effectiveness;
- ensure expediency, a sense of proportion and fairness; and
- facilitate settlement and fair distribution of court resources.

Whilst these are technical reforms which principally concern the solicitors conducting the litigation, they will, nevertheless, will have a significant impact on clients' approach to the resolution of disputes.

Amongst other measures, the Reforms provide the courts with increased powers to manage cases and impose harsher sanctions for non-compliance with deadlines.

Documents to be filed in court proceedings will need to be verified by a statement of truth made *personally* by the maker of the statement, so greater due diligence will be required in their preparation and verification. This will mean that up front costs of any litigation will almost certainly escalate, as it will no longer be possible to file unsupported allegations or denials. To assist in the due diligence process, in future potential claimants in all types of cases will now be able to apply for orders against potential defendants to disclose documents directly relevant to a case, *before* commencing an action. There will also be an increased focus on settlement and the use of alternative dispute resolution methods, such as mediation.

These measures will necessitate more active client involvement throughout

the proceedings and, in particular, an increased time and cost investment at the outset of the case.

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Partial Victory for Holiday Pay for Employees

Three Cathay Pacific Airways flight attendants won a partial victory at the Labour Tribunal on 12 January 2009 against their employer over holiday pay. They claimed that line-duty allowance, ground-duty allowance, commission earned from selling duty-free goods and overnight or out-port allowances should be included in the calculation of their holiday pay.

The Tribunal presiding officer held that line-duty and ground duty allowances, which were paid on top of the usual salary for monthly and hourly paid crew, were recurrent in nature, calculated on a daily basis and directly related to the number of hours worked. Accordingly, these allowances were part of their wages and should be included in the calculation of holiday pay. The commissions earned from duty-free sales should also be included in calculating holiday pay, as selling duty-free goods was part of the duties of hourly paid crews. Such commissions were also calculated on a daily basis and according to the number of items sold.

The Tribunal held, however, that the overnight or out-port allowances did not fall under the definition of wages

under the Employment Ordinance and should not be included in the holiday pay calculation. These allowances included meals, taxi fares and laundry allowances paid to flight attendants to cover expenses incurred while they stayed overseas between flights. They were non-recurrent in nature and were sums payable to the employees "to defray special expenses incurred by [them] by the nature of [their] employment". Further, the out-port allowances were never included in the employees' salaries tax computation.

This case has resulted in a number of employees bringing claims in the Labour Department for back payments of annual leave pay, holiday pay and in some case termination payments. The decision was made on specific facts that will not apply in all cases, however, and many of the recent claims have eventually been found to be without merit.

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Employers Cannot Bypass Disciplinary Procedures

On 2 March 2009 the Court of First Instance ruled that an employer cannot bypass contractual disciplinary procedures when dismissing for misconduct, even if the contract permits termination without cause by way of notice or payment in lieu of notice.

The employment contracts between 23 aircrew officers and Cathay Pacific Airways Limited and one of its related companies ("**Cathay**") provided that Cathay could terminate by giving three months' notice or payment in lieu of notice. The contracts also set

out disciplinary procedures to be followed for misconduct. Cathay dismissed without any reason by giving notice. The employees argued that they were dismissed for misconduct and they could only be dismissed after Cathay followed the disciplinary procedures in their employment contracts. Cathay argued that it was entitled to terminate without cause by giving contractual notice.

The court assumed that termination was for reason of misconduct and followed the UK Court of Appeal case of *Gunton v Richmond-upon-Thames London Borough Council* [1981]1Ch448 where it was held that an employer could not simply terminate without cause on making a payment in lieu of notice if the true intention was to dismiss the employee on disciplinary grounds. As such, disciplinary procedures had to be completed before the dismissal could be effected. The court also found to be irrelevant that the fact that if the disciplinary procedures were followed, the dismissal might take longer than the contractual notice period.

It must be noted that the ruling was made on the assumption that termination was for reason of misconduct. The court in the *Gunton* case also stated that if termination was not for reasons of misconduct or was not assigned any reason, the employer could have terminated the employee without cause as provided under the employment contract.

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JAPAN

New Overtime Rate Increases in 2010

On 5 December 2008 the Japanese Diet enacted revisions to the Labor Standards Act that will raise the statutory minimum overtime allowance from its current 25% to 50% of the regular hourly wage for overtime hours in excess of 60 hours per month.

The revisions, which will come into effect from April 2010, are intended to discourage companies from having employees work long hours of overtime. The limited scope of the changes, however, indicates that any immediate affect on employee working hours will be modest. For overtime work up to 60 hours per month, the statutory minimum overtime allowance will remain at 25% of the average hourly wage, provided that for overtime hours of between 45 and 60 hours per month, the company must “make efforts” to set the overtime pay rate above the statutory minimum rate.

Under the current Labor Standards Act, the company is required to execute a labour management agreement with a employee representative or labour union representing a majority of the employees in order to have employees work over time (exceeding 8 hours a day or 40 hours a week) and must file the agreement with the local Labor Standards Inspection Office. Under the revised Labor Standards Act, the company will be required to set the applicable rate for overtime work in such agreement.

Notably, small and mid-size companies¹ are excluded from the

application of the new 50% overtime allowance. The question of whether to apply the new rate to these small and mid-size employers will be reviewed again three years after the amended law comes into effect. In the meantime, small and mid-size employers will only be required to “make efforts” to increase the overtime rate overtime work in excess of 45 hours per month.

For the first time, the amended Act will allow employers to provide substitute paid leave instead of paying the additional overtime allowance to be paid under the amended Act, by entering into a labour management agreement. Specifically, as agreed in a labour management agreement, for employees who have worked 60 hours of overtime work or more in any one month, the employee may provide leave instead of paying the additional 25% overtime allowance for overtime hours exceeding 60 hours a month. The remaining 25 % of the overtime allowance must still be paid.

Finally, in a bid to encourage employees to take their paid leave, employers will also be allowed to grant leave in hourly blocks, as opposed to the current system, whereby whole days must be taken. Employers wishing to implement such a system must enter into a labour management agreement.

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1. Small and mid-size companies are categorized based on the type of business, the capital amount, and the number of regular employees. For example, in the service sector, a company with capital of 50 million yen or less, or with up to 100 employees is categorized as a small and mid-size company.

MALAYSIA

Measures to alleviate rising unemployment levels in Malaysia: The new Supplementary Supply Bill 2009

In response to the deteriorating global economic outlook, the Malaysian government, on 10 March 2009, tabled the Supplementary Supply Bill 2009, or more commonly referred to as the “mini-budget”.

Valued at RM60 billion, the mini-budget is the most comprehensive and substantial stimulus package proposed by the Malaysian government.

One of the primary aims of the mini-budget is to reduce the rising unemployment rate in Malaysia, through minimising retrenchment and through the creation of new employment opportunities. In this regard, the mini-budget contains several new measures.

Provision of training and the creation of employment opportunities

The government has allocated RM700 million to create training and job placement opportunities in both the public and private sectors. These placement opportunities are targeted at recently-retrenched workers and unemployed graduates, and encompasses the establishment of training programmes and skills training centres. There are also plans to create 22 new job centres nationwide, as well as the upgrading of 109 existing centres. These outlets provide job placements, career counselling and information on training opportunities.

The hiring of previously retrenched employees

Pursuant to the Income Tax (Deduction for Expenses Relating to

Remuneration of Employee) Rules 2009, remuneration expenses incurred by employers in hiring those who were previously retrenched are now given double tax deduction. Under this proposal, an employer who recruits a previously retrenched employee will be able to make a tax deduction from twice the worker’s remuneration from its adjusted income. The amount of remuneration eligible for this shall not exceed RM10,000 per month, and is limited to 12 months’ remuneration per employee. Also, the definition of ‘remuneration’ is confined to only wages, salary, or allowance in respect of having or exercising employment. It is proposed that the effective date for the implementation of this proposal is from Year of Assessment 2009 onwards. To be eligible, the employer must satisfy the following conditions:

- the employee is a citizen of Malaysia, is a tax resident and the new position must be full-time;
- the employee was retrenched (including under a voluntary separation scheme or a mutual separation scheme) from his previous position on or after 1 July 2008;
- the termination must have been registered with the Director General of Labour, the Ministry of Human Resources; and
- the new position must be obtained by the employee between 10 March 2009 and 31 December 2009.

Some anti-avoidance measures have also been implemented in respect of the above. The incentive does not apply if the new employee is hired as a replacement to carry out the same or similar functions of the former employee.

Also, the incentive will not apply if the former employer and the new employer are associated, related or under common control as defined in the specific tax legislation. Therefore, from a practical perspective, the double deduction incentive will not be available to restructuring exercises whereby employees who have been terminated pursuant to closure of a business are redeployed to a related company’s business.

Reducing the cost of doing business

Currently, eligible employers engaged in the manufacturing and services sectors are required to pay a monthly levy to the Human Resources Development Fund (“HRDF”) for training and skills upgrading purposes. The levy is 1% of the employees’ monthly wages.

In order to reduce the cost of employing workers, the mini-budget contains a proposal to exempt employers from having to effect levy payments for a period of 6 months. This exemption would apply to employers in the textile, electrical and electronics industries, and took effect from 1 February 2009. Furthermore, the rate of levy payments is to be reduced from 1% to 0.5% for employers in all economic sectors, for a period of 2 years, effective from 1 April 2009.

Ensuring the welfare of retrenched workers

At present, compensation for loss of employment, including payments pursuant to voluntary separation or mutual separation schemes, are exempt from income tax for up to RM6,000 for each completed year of service.

The mini-budget contains a proposal to increase the amount of tax exemption to RM10,000 for each completed year of service. The

increased tax exemption will only apply to payments made in respect of an individual who has been terminated on or after 1 July 2008. Notwithstanding that this proposal is still in the form of an Income Tax (Amendment) Bill, the amendment is deemed to take effect from 1 July 2008 onwards.

Efforts to reduce the number of foreign blue-collar workers

Steps are also proposed to reduce the dependence on foreign workers and, concurrently, to prioritise the hiring of local workers. The mini-budget contains three approaches in order to implement this proposal, namely:

- A doubling of the levy on foreign workers for all sectors, except construction, plantation and domestic servants. This levy is payable by employers, rather than the workers;
- Where the services of foreign workers are prematurely terminated, the levy will be refunded on a pro-rated basis to the employers. The employer's bank guarantee will also be returned; and
- The issuance of licenses to foreign labour recruitment agencies will be suspended. Furthermore, tighter conditions for the recruitment of foreign workers by existing foreign labour recruitment agencies will be introduced.

Attracting high-net-worth and skilled individuals

The government has pledged to roll out a new programme under which high-net-worth individuals bringing more than US\$2 million in investments and savings to Malaysia, and highly skilled non-Malaysian

professionals, will be able to obtain permanent resident status in Malaysia.

Last year, the government considered a number of measures to alleviate employment-related issues on account of the economic climate, such as establishing a retrenchment fund.

The measures contained in the mini-budget are the first to be formally implemented and it is possible that additional similar measures may follow.

Employers are therefore advised to be mindful of these measures and to adopt them where applicable.

It remains to be seen, however, whether, given that Malaysian employment regulations and the industrial adjudicatory system are widely perceived to be pro-employee, any changes on these particular fronts will be introduced.

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SINGAPORE

MOM steps up investigations against 'phantom' workers

The Ministry of Manpower ("MOM") has stepped up investigations against employers of 'phantom' workers i.e. workers falsely declared to be under the employer's payroll. Ten employers face 369 charges under the

Employment of Foreign Manpower Act ("EFMA") for inflating their foreign worker entitlement by falsely declaring the number of local workers under their employ. Each charge is punishable with a fine of up to \$15,000, or 12 months imprisonment, or both.

Currently, the marine, manufacturing, services and construction sectors all have administrative quota restrictions on the employment of foreign employees. Thus far, one employer has pleaded guilty all the charges placed against him.

The MOM has stated that it "will adopt a zero-tolerance approach with respect 'phantom' worker cases". Stringent processes and checks to flag out unusual company profiles that may indicate the use of 'phantom' workers have been put in place while on-site checks at companies to ascertain if the employees are indeed working for the company have been carried out. In a press release on its website, errant employees have been warned to 'immediately stop' the hire of phantom workers and that they will have to face 'the full consequences of the law' if they continuing doing so.

Jobs For Singaporeans

The Singapore Government has announced the Resilience Package ("Package") during Budget 2009 on 22 January 2009. The Package aims to preserve jobs for Singaporeans and to help Singapore weather through the economic crisis. The Package comprises five components, one of which is "Jobs for Singaporeans".

Jobs Credit

The Jobs Credit Scheme was introduced to encourage businesses to preserve jobs in the downturn and to sustain jobs for Singaporeans. This is a temporary scheme to help companies

through an exceptional downturn. Details of the scheme are as follows:

- All businesses that make CPF contributions for their employees, with the exception of local and foreign government organizations, will be automatically be eligible to receive the Jobs Credit.
- Employers will receive a 12% cash grant on the first \$2,500 of each month's wages for each employee on their CPF payroll.
- The Jobs Credit is for one year, and employers will receive the Jobs Credit in four payments: March, June, September and December 2009.
- For each payment, employers will receive Jobs Credits on the employees that are on their CPF payroll at the start of the quarter in which the payment is made. The wages paid to these employees in the previous quarter will be the qualifying wages used to calculate the 12% cash credit that employers will receive.

Spur For Workers And Professionals

Skills Programme for Upgrading and Resilience (“**SPUR**”) was launched by the Government to help Singaporeans upgrade their skills so that they can stay employed or seek re-employment. SPUR provides higher course fee support for companies, individuals and absentee payrolls for companies that send their workers for training.

The Government will make the following enhancements to SPUR to help professionals, managers, executives and technicians (“**PMET**”) re-train:

- Course fee subsidies for PMET-level courses that are eligible for SPUR will be increased from 80% to 90%, the same subsidy level as rank-and-file level courses. This includes all Specialist and Advanced Diplomas offered by the polytechnics.
- Selected tertiary courses at UniSIM and the three publicly funded universities will be included under SPUR.

Workfare Income Supplement (“WIS”) Special Payment

The Government will give low-income workers a temporary WIS Special Payment to supplement their pay and encourage them to stay employed. This would give low-income workers an additional 50% of the WIS payments that they will receive over the course of this year.

The work eligibility criteria of the WIS Special Payment would also be relaxed in order to enable more low-wage workers, particularly those with less regular employment, to reap the benefits.

Government Hiring

The Government will also expand recruitment. A total of 18,000 public sector jobs (including Government-supported jobs outside of the Government in areas such as childcare, tertiary education, and restructured hospitals) are expected to be available over the next two years.

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TAIWAN

On 11 March 2009 the Taiwan Commission of Labor Affairs (the central labour authority) announced that with effect from 1 May 2009, the Labor Standards Law (“**LSL**”) will apply to all social organizations. The definition of social organizations includes organizations or associations formed for social or public services, such as promoting culture, academics, medical treatment, hygiene, religion, charity, sports, business, etc.

The LSL provides minimum requirements for protecting the employees employed by Taiwan employer, such as salary, statutory termination causes, severance fee, pension, working hours, overtime pay, leaves, etc. LSL is applicable to the employment relationship, regardless the employee is a native or foreigner. The minimum requirements set forth in LSL have mandatory effect. Any agreement or company's policies that violate the LSL will be invalid.

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THAILAND

Lost in Transition: Protection of Directors under the Social Security Fund

Various parts of the private sector, including the automobile, electronic and textile industries have been badly affected by the current financial crisis. As a result, thousands of workers have been laid off as these industries

struggle for their survival. As these laid off employees are attempting to cope with the unanticipated loss of income and the increasing cost of living while they are searching for new employment, the role of the Social Security Fund (the “Fund”) has become more vital than ever in providing money to assist these people in these troubled times. However, the recent experience shows how the Fund overly places emphasis on protection of less fortunate employees while completely ignoring another type of individuals; directors. This has left directors, who may ultimately be in no better position than other employees, with no protection or assistance from the Fund at all.

The Fund was set up by the Social Security Act B.E. 2533 to provide monetary support to assist its members in case of harm or illness, child delivery, disability, death, child welfare, old age, or unemployment. It is financially supported by monthly contributions from its members, the members’ employers and the government. There are two types of individuals who are eligible to become Fund securers (or members): (1) “employees” between the ages of 15 and 60 (who automatically become members of the Fund); and (2) “non-employees” who submit requests for membership and make annual contributions. However, these non-employees are entitled to substantially less monetary support than employees and are not entitled to assistance in case of unemployment.

It has recently been the Fund’s view that directors of companies shall never be regarded as employee members of the Fund since directors are not considered “employees”. Therefore, directors can become members of the Fund only as “non-employee” members by way of submitting a request and making annual

contributions. This means that directors have to bear extra burdens in order to receive less government assistance in their times of need than employees. Even worse, if directors become unemployed, possibly as a result of their business closing down, they will not receive any financial assistance from the Fund, even though they are members.

Some argue that one of the objectives of the Social Security Act is to provide a source of fair and equal financial support to people during their times of hardship. In order to achieve this, a broader and more practical view of the definition of employee is needed to maintain a fair and peaceful society, especially in these troubled economic times. They point to the fact that in many cases, the mere fact that a person is a director of a company should not preclude the person from being considered an employee. They cite, for example, the common case where a local employee is appointed as a director by the company’s headquarters to help facilitate the local company’s performance of its day-to-day tasks. This appointment does not mean that this person is granted absolute authority to run the company. Rather, the person only has signing power, while all decision-making powers still reside at headquarters. Accordingly, this person should not be barred from becoming an employee member of the Fund based on their director status alone. Therefore, in assessing whether individual directors are qualified to become employee members, it is recommended that the Fund look beyond their “director” title and consider whether they:

- are under an employment contract with the company;
- are paid for their work for the company;

- must comply with the company’s work rules and regulations including normal work hours and leave policies, and/or
- have a supervisor to whom they must report.

To help demonstrate that a person is in fact an employee and should be considered an employee member, all information in relation to the person’s job description above should be submitted to the Fund.

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VIETNAM

Unemployment Insurance Regime Takes Effect as of 1 January 2009

Unemployment insurance

A new unemployment insurance system took effect on 1 January 2009 under the Law of Social Insurance adopted by the National Assembly on 29 June 2006.

On 12 December 2008, the Ministry of Labour, Invalids and Social Affairs issued *Decree No. 127/2008/ND-CP* guiding the implementation of a number of articles in the Law on Social Insurance concerning the Unemployment Insurance.

The unemployment insurance system applies to Vietnamese citizens working under labour contracts with an

indefinite term, or with a definite term of 12 to 36 months, for employers who have 10 or more employees. Under this unemployment insurance scheme, employees must contribute 1% of their salary, and employers and the State must each contribute an amount equivalent to 1% of the total payroll of employees participating in the unemployment insurance fund.

To be entitled to unemployment allowance, unemployed workers must have contributed to the fund for at least 12 months within a 24-month period prior to their unemployment. They also must have registered their unemployment with the social insurance organization within seven days from the date of being unemployed, and they must not have found any jobs after 15 days from the date of unemployment status registration.

The monthly unemployment allowance is equal to 60% of the average monthly salary, which is the basis for calculating the unemployment insurance premium, for the six consecutive months prior to unemployment. The average monthly salary is capped at 20 times the monthly minimum salary (currently, the cap would be VND10,800,000 (approx. US\$635) per month). Unemployed workers may receive the unemployment allowance for 3, 6, 9 or 12 months if they have contributed to unemployment insurance for 12 months up to but excluding 36 months, 36 months up to 72 months, 72 months up to 144 months, or at least 144 months, respectively.

The duration of unemployment insurance contribution for determining unemployment benefits is the accumulated period of unemployment insurance contribution

until unemployment insurance benefits are claimed. Once the unemployment insurance benefits are claimed, the duration of unemployment insurance contribution resets for a new period of time.

In addition to the cash allowance, unemployed workers are supposed to receive support in job search and vocational training. The social insurance organization will pay health insurance for workers who are receiving unemployment allowances.

Impact on severance allowances

The new unemployment insurance system does not completely supplant the current seniority-based severance entitlement system.

According to Article 42 of the Labour Code, employees who have worked for an employer for at least 12 months are entitled to a severance allowance equivalent to half a month's salary for every year of service when their labour contracts are terminated, except when the employees are dismissed for cause. Article 17 and Article 31 of the Labour Code provide that if such employees lose their jobs because of structure or technology change; enterprise merger, consolidation, division or separation; or transfer of property ownership, management or use right, they will receive a job-loss allowance equivalent to one month's salary for every year of service.

Article 139.6 of the Law on Social Insurance provides that "*the period of time during which employees contribute to unemployment insurance will not be considered in calculating job loss allowance or severance allowance in accordance with the labour laws and laws on state cadres and officials.*"

Decree 127 was issued just 15 days before the effective date of the

unemployment insurance system. According to Article 41.2 of the Decree, the term of employment that is not subject to unemployment insurance contribution is used to calculate severance or job-loss allowances. This implies that severance or job-loss allowances instead of an unemployment allowance still would apply to the employment periods before 1 January 2009, in the event that contracts are terminated after 1 January 2009; for organizations of fewer than 10 employees, severance and job-loss allowances will continue to apply to the employment period starting 1 January 2009.

Likewise, Article 41.3 of the Decree provides that employers will be exempt from paying severance or job-loss allowances for the period during which employers contributed to the unemployment insurance fund.

Guidance from the Ministry of Labour, Invalids and Social Affairs ("MOLISA")

MOLISA has issued some Official Dispatches ("ODs")² to interpret Article 139.6 of the Law on Social Insurance.

According to these ODs, if an employee terminates a labour contract or loses his or her job after 1 January 2009, he or she will receive a severance or job-loss allowance from the employer for the duration of his or her employment until 31 December 2008 and enjoy unemployment benefits provided by the social insurance fund for the duration of employment that he or she participated in the unemployment insurance scheme beginning 1 January 2009.

ODs serve only as a guide to governmental authorities for specific cases or questions and, thus, are not

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considered as legal normative documents.

Pending Issues

Questions remain regarding the interface between the Law on Social Insurance and the Labour Code, as well as with MOLISA's interpretations.

First, it is unclear how employers should handle the transition period after 1 January 2009 until the employee is eligible to benefit from the unemployment insurance. Employees will receive benefits only after at least 12 months of contributing to the unemployment insurance fund effective 1 January 2009 (i.e., the earliest benefits will be doled out 1 January 2010).

Employees starting their contribution to the unemployment insurance fund on 1 January 2009 and terminating their labour contract before 31 December 2009 will not be eligible for receiving allowances under the unemployment insurance fund, because they will not yet have satisfied the conditions concerning the period of contribution to the unemployment insurance fund.

Second, only Vietnamese employees are eligible for unemployment insurance. Therefore, it is unclear whether foreign employees will still receive severance or job-loss allowances when their labour contracts are terminated.

Third, for employers with fewer than 10 employees who wish to participate in the new unemployment insurance system, it is not yet clear how they may do so, or what special arrangement may need to be made. This issue arises especially in the case of thousands of foreign representative offices currently operating in Vietnam.

Fourth, the social insurance organization will be responsible for the health insurance contribution for unemployed workers; however, it is unclear whether the organization will pay only 2% of the employees' monthly salary which is the contribution responsibility of employers, or the entire 3% for both employees and employers. It also is unclear which amount will be the basis for this contribution during the unemployment period.

According to one of the above-mentioned ODs, MOLISA will issue circulars guiding the Decree in due course. We expect to see further clarifications from MOLISA as the new system is set into motion.

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2. Official Dispatch No. 152/CVL-PBHTN&QLLD dated 16 July 2008; Official Dispatch No. 3266/LDTBXH-LDTL dated 15 September 2008; and Official Dispatch No. 3721/LDTBXH-LDTL dated 14 October 2008.

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