



# Asia Pacific Employment & Compensation Quarterly Update

## Quarter 2: 2021

### Introduction

Our Asia Pacific Employment & Compensation Team is pleased to provide you with our second quarterly update for 2021 highlighting key employment law changes across the Asia Pacific region.

Please feel free to visit our [Building a New Workforce Reality](#) and [FutureWorks](#) sites designed to guide global employers on how to future-proof your workforce and to stay competitive in innovating and revolutionizing your working practices.

Please also see our [Asia Pacific Employment & Compensation webinars](#) and the [Renew & Reinvent: Own the Future sites](#) for our integrated solutions to help you to successfully renew and reinvent so you can own the future.



Stay safe,

Michael Michalandos

Head of Employment & Compensation Group, Asia Pacific



AUSTRALIA



PRC



HONG KONG



INDONESIA



JAPAN



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# AUSTRALIA

## Key changes to superannuation from 1 July 2021

### IN BRIEF

From 1 July 2021, the rate at which employers are required to make superannuation contributions will increase from 9.5% to 10% of "ordinary time earnings" ("Contribution Rate").

The Treasurer also announced a number of other intended changes to superannuation that will have an impact on employers, including the "stapling" of superannuation funds and the abolition of the superannuation guarantee income threshold.

Please read the full Baker McKenzie alert [here](#).

### Recommended action

Review contracts and policies for reference to the outdated rate. Consider whether the increase will fall on the employer or employee—whether remuneration is expressed as exclusive or inclusive of superannuation.

## Introduction of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

### IN BRIEF

In March 2020, the Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces was publicly released.

The Commission suggested several recommendations, including changes to the Sex Discrimination Act 1984 (Cth) (SDA), the Fair Work Act 2009 (Cth) (FWA), and the powers of the Fair Work Commission.

A few notable recommendations include the following:

- The introduction of a positive duty in the SDA on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible;
- The amendment of s 387 of the FWA to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable
- The introduction of a "stop sexual harassment order" equivalent to the "stop bullying order" into the FWA.

In response, on 24 June the Federal Government introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

Should the bill pass, one of its key changes will be an addition to the National Employment Standards. Employees will be entitled to two days' paid compassionate leave where an employee, or employee's current spouse or de facto partner, has a miscarriage. This would expand on the current entitlement to compassionate leave in circumstances where an employee's immediate family member, or household member, dies or suffers a life threatening illness or injury.

### Recommended action

Watch for developments.

## Victoria's Wage Theft Act comes into force 1 July 2021

### IN BRIEF

On 16 June 2020, Victoria became the first jurisdiction to criminalise wage theft when it passed the Wage Theft Act 2020 (Vic) ("Act").

The Act creates three new criminal offenses, as follows:

- Withholding employee entitlements, including allowing another individual to do so
- Falsification of employee entitlement records, including concealing financial gain
- Failure to keep employee entitlement record to dishonestly obtain a financial advantage

If found guilty, an employer may be liable for AUD 991,320 in fines, and individuals may face up to 10 years' imprisonment. Directors, officers or other company representatives may also be held personally liable.

Please see the Baker McKenzie alert [here](#).

### Recommended action

For compliance.

## Fair Work Commission rules that refusal to get the flu vaccine constitutes a valid ground for dismissal

### IN BRIEF

On 20 April 2021, the Fair Work Commission (FWC) issued a decision in *Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156*, affirming that Goodstart Early Learning ("Goodstart") was justified in dismissing an employee for failing to follow a reasonable request to get the flu vaccine.

The applicant's medical certificates were found not to provide an adequate medical reason to justify refusal to comply with Goodstart's vaccination policy, which was considered to be lawful and reasonable.

"Lawfulness" and "reasonableness" of a directive for employees to get vaccinated can be determined by certain factors, including the following:

- Unique regulatory obligations of an employer
- Employer's industry practices
- Employer's unique workplace
- Vaccine type
- Specific employee

This follows similar decisions regarding aged care providers (*Jennifer Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818; *Maria Corazon Glover v Ozcare* [2021] FWC 2989) and highlights the importance of governmental directives on vaccinations and high-risk environments when determining reasonableness of directions.

### Recommended action

For information only

### Fair Work Commission finds delivery driver to be an employee

#### IN BRIEF

On 18 May 2021, the Fair Work Commission (FWC) issued a landmark decision in *Diego Franco v Deliveroo Australia Pty Ltd (U2020/7066)*, holding that a delivery driver was considered an employee of Deliveroo and therefore entitled to protection from unfair dismissal.

The factor most strongly supporting the existence of an employment relationship was found to be the capacity of control Deliveroo held over the applicant. Namely, the practical reality of Deliveroo's system was to direct riders to undertake work at particular times and to make themselves available for work.

Notably, the FWC considered the relationship within the context of a "modern, changing workplace impacted by our new digital world" in which "traditional notions regarding the exclusivity necessary for the establishment of an employment relationship require reconsideration". As such, the applicant's concurrent engagement with Uber Eats was not seen to be fatal to the construction of an employment relationship.

### Recommended action

Watch for developments. There is an increasing trend classifying gig workers / independent contractors (e.g., delivery riders) as employees.

### Fair Work Commission awards 2.5% minimum wage increase

#### IN BRIEF

On 17 June 2021, following the Annual Wage Review 2021, the Fair Work Commission (FWC) announced a 2.5% increase in the minimum wage, to AUD 20.33 an hour. The increase will apply from 1 July 2021.

Due to the impact of the pandemic, the increase will be delayed for certain awards. The increase for the Retail Award will apply from 1 September 2021. The 21 other awards covering employees in hospitality, aviation, tourism, fitness and other retail sectors will apply from 1 November 2021.

See [here](#) for the full list of delayed awards.

### Recommended action

For compliance



# PEOPLE'S REPUBLIC OF CHINA

## Amendment to Work Safety Law issued

### IN BRIEF

On 10 June 2021, the Standing Committee of the National People's Congress amended the Work Safety Law. The amendments introduce several new rules and also increase the sanctions for noncompliance. The amended law will take effect on 1 September 2021. Some of the main changes and new employer obligations are as follows:

- **Emphasize care for employees.** The amendments require companies to pay attention to the physical, psychological conditions and behavior habits of their employees, and to strengthen psychological counseling and spiritual consolation for their employees.
- **Obtain work safety liability insurance.** The amended law requires companies belonging to high-risk industries (e.g., coal mining) to purchase work safety liability insurance. Other companies are encouraged (but not obliged) to do so.
- **Establish concept of public interest lawsuits.** If the illegal act of a company causes a major accident or hidden danger, which infringes the national interests or social public interests, the people's Procuratorate may file a public interest lawsuit against such company.
- **Increase sanctions for noncompliance.** The amended law increases fines for most non-compliant activities. For certain extremely serious violations, the fines may be up to CNY one hundred million. Other than fines, the company may also face frequent labor inspection, increased insurance contributions, suspension of project approval, etc. There is also a new penalty scheme. Companies who refuse to rectify the non-compliance after being fined may be additionally fined (the additional fine will accumulate on a daily basis based on the original fine amount).

### Recommended action

Every company should be aware of the new requirements under the amended law to avoid increased noncompliance penalties. The amended law reflects the importance that the government is giving to work safety issues and the increase in fines and liability further underlines this.

## Shenzhen issues electronic employment contract dispute settlement rules

### IN BRIEF

On 13 May 2021, the Shenzhen labor bureau and labor arbitration committee issued the Shenzhen Electronic Employment Contract Dispute Settlement Rules ("Shenzhen Settlement Rules"). The Shenzhen Settlement Rules provide useful practical guidance on the requirements for an electronic employment contract to be recognized as valid in labor arbitration in Shenzhen and the use of electronic employment contract service platforms ("Service Platforms") for the conclusion of electronic employment contracts.

Further to the Ministry of Human Resources and Social Security's general guidance on electronic employment contracts (see our March 2020 update [here](#)), the Shenzhen Settlement Rules provide practical guidance on the requirements for an electronic employment contract to be recognized as valid in labor arbitration cases. Specifically:

1. An employee shall be deemed to have agreed to conclude a written employment contract in electronic form if the employee signs an employment contract, or through other forms of data messages, acknowledges their willingness to sign an employment contract, by the following means:
  - i. the employee registers on the Service Platform
  - ii. agrees to apply for a digital certificate
  - iii. confirms their agreement to sign the employment contract
2. To the extent there is no conflicting evidence, the employee's identity shall be taken to be genuine and reliable if the Service Platforms verify any of the following pieces of information: (i) the employee's biometric data; (ii) the mobile phone text message verification information; or (iii) the employee's bank transfer verification information.

If a party acknowledges that the mobile phone numbers and digital certificates used to verify its identity during the signing of the electronic employment contract is accurate information in relation to that party, but denies that the signing process was operated by itself, such party is under an obligation to prove that it did not sign the contract because the relevant mobile phone and/or digital certificates were out of its control.

3. To the extent there is no conflicting evidence, where the parties use a digital certificate issued by qualified third-party certification service agencies, such certificate shall be deemed to be a valid electronic signature under the Electronic Signature Law.
4. Where the Service Platforms meet the relevant technical requirements outlined in the Settlement Rules and the Service Platforms use third-party electronic evidence preservation, or other technical measures such as hash verification or block chain to certify the key process of signing an electronic employment contract, the electronic employment contract shall be deemed to be complete, accurate and not having been tampered with.

The Shenzhen Settlement Rules also appear to promote the use of government-operated Service Platforms. The electronic employment contract data provided by a government-operated Service Platform shall be viewed as the most reliable form of evidence and would not be able to be rebutted even if the parties produce conflicting evidence.

Last, the Shenzhen Settlement Rules also make clear that the employer shall bear the corresponding legal liabilities if the employee suffers from any damages due to any technical malfunction of the Service Platforms in relation to the conclusion, administration, transmission, storage and retrieval of the electronic employment contract.

## Recommended action

There is an increasing trend by the MOHRSS and local governments in certain localities to promote the use of electronic signatures/forms for employment-related documents by providing clearer guidance in this area. Companies may consider using electronic employment documents, but should first evaluate/manage the legal risks before doing so. When choosing the Service Platforms, organizations may wish to consider using government- operated Service Platforms where available.

## Guangdong High People's Court publishes 10 typical labor dispute cases

### IN BRIEF

In April 2020, the Guangdong High People's Court published 10 typical labor dispute cases. The 10 court cases cover a wide range of topics such as compensation, annual leave, labor dispatch and work suspension during the COVID-19 pandemic, offering insights into both traditional employment law issues and new employment problems arising from COVID-19 or emerging industries.

Some of the interesting key points arising from the cases are as follows:

- A labor dispatch agency may not unilaterally terminate dispatched workers simply because the labor dispatch agreement between the agency and the host company expires.
- Where an employee is a serial litigant, and tampers with evidence and makes false statements in court, the courts may consider such behavior as dishonesty and penalize the employee for hampering civil litigation.
- Express delivery companies should reimburse the oil expenses that couriers have incurred for using the couriers' own cars at work, unless otherwise agreed.
- Where an employee is objectively unable to file a claim to employment arbitration or courts in time due to COVID-19, COVID-19 should be regarded as a force majeure event and the statute of limitations should be suspended.
- Companies must not hire minors under the age of 16. Where a company uses child labor and consequently, the child suffers any injuries or disabilities or dies, the company must pay the minor or their near relatives a lump sum of compensation, regardless of whether the injury/ disability/death is the company's fault.

## Recommended action

The 10 labor dispute cases either restate existing laws and regulations, or represent new trends in Guangdong judicial practice in relation to recent developments in employment law. Companies operating in Guangdong Province should keep a close eye on the local judicial practice.

## Jiangsu High People's Court provides guidance on typical employment cases in Jiangsu Province

### IN BRIEF

The Jiangsu High People's Court recently detailed 10 employment dispute cases in Jiangsu Province that may provide guidance to the courts in Jiangsu. Of particular note is that one of the cases relates to the termination of employment for violation of epidemic prevention measures and another relates to employment liabilities upon company liquidation.

#### ▪ Breach of epidemic prevention measures

In this case, the employee was employed by a labor dispatching agency and then was dispatched to a Nanjing university. Earlier in 2020, the university had formulated and adopted a series of policies on epidemic prevention controls. In May 2020, the university discovered that the employee had left Nanjing before the commencement of the new academic term, without notifying the university and had not undergone quarantine on return to Nanjing in accordance with the university's policies. In addition, the employee commuted between Nanjing and another city, Wuxi, without notifying the university and undergoing quarantine. The Nanjing university returned the employee to the agency on the basis of the employee's violation of the university's epidemic prevention measures, after which the agency terminated the employee. The employee sued the agency for wrongful termination.

The court ruled in favor of the agency and determined that the termination was justifiable. The court held that the employee's behavior not only violated the policies of the university, but also was irresponsible vis-a-vis the health of other persons.

### Recommended action

This case demonstrates that violation of epidemic prevention measures implemented by an employer may amount to a serious violation of the employer's rules and regulations, and such breach may justify summary dismissal. It also highlights the importance for employers to set out clearly in their rules/regulations/policies the types of misconduct that may result in summary dismissal. Such rules/regulations/policies should be adopted in accordance with Article 4 of the PRC Employment Contract Law.

#### ▪ Employment liabilities in the event of a company liquidation

In this case, the employee commenced employment with a Wuxi company in April 2016, and was injured during work in September 2016. In July 2018, the Wuxi Human Resources and Social Security Bureau determined that the injury was a work-related injury. In November 2018, the company announced the liquidation of the company in a newspaper. In April 2019, the employee was identified by a formal labor ability appraisal committee as having a Grade 8 disability. The company was de-registered in May 2019 based on a shareholders' resolution to dissolve the company. The de-registration documentation filed with the local administration of market regulation indicated that the company did not owe any debts. The employee filed a lawsuit against the members of the liquidation team to claim losses incurred relating to the work-related injury (i.e., medical expenses and nursing expenses, etc.).

The court held that the company was required to pay compensation to the employee for the work injury suffered by the employee since the company had not purchased social insurance for the employee. In addition, the members of the liquidation team had not informed the employee about the liquidation of the company, despite knowing that the employee had suffered a work injury and that the company had not paid any work injury benefits to the employee. The court found that the members of the liquidation team knowingly failed to notify the employee in writing of the dissolution and liquidation of the company in accordance with the law when they knew that the company owed debts to the employee. The court ruled in favor of the employee.

## Recommended action

This case demonstrates that employers may be liable to compensate employees for work injuries suffered where the relevant employee is unable to claim benefits from the social insurance fund due to a reason attributable to the employer (e.g., the employer's nonpayment of social insurance). It also makes clear that work injury compensation constitutes employment liabilities that are subject to protection under the PRC Company Law and Enterprise Bankruptcy Law.

## Shenzhen releases Q&A on employment issues relating to COVID-19

### IN BRIEF

In June 2021, the Shenzhen municipal labor bureau issued an official online Q&A to address common employment law questions relating to the COVID-19 pandemic. The Q&A explains that Shenzhen is conducting large-scale COVID-19 testing for people living in the city in accordance with the city's relevant rules on proactive COVID-19 management. Therefore, if an employee refuses to take a COVID-19 test without a justifiable reason, the employer can require the employee to take personal leave without pay. The Q&A also provides that, if an employee refuses to travel to a low-risk area which was formerly a high-risk area and the employee cannot provide a valid justification for the refusal, the company has the right to take disciplinary action against the employee in accordance with applicable laws, the employment contract and relevant policies.

In addition to the above, the Q&A also covers the following issues:

- payment obligations during medical treatment/observation/isolation periods
- extension of employment contracts which have expired without having been renewed during the COVID-19 pandemic
- termination protections applicable to employees who are unable work due to having COVID-19 or are suspected of having COVID-19
- types of employee misconduct/insubordination in relation to COVID-19 that may lead to termination of employment

## Recommended action

While the Shenzhen Q&A technically is not a legally binding document, it provides useful practical guidance for employers on the management of employees during the ongoing COVID-19 pandemic, as it reflects the current views and policies of the local labor authorities. Employers operating in Shenzhen should follow relevant local guidance and ensure that their internal company policies reflect the latest local guidance if and as appropriate.

## Suzhou Intermediate People's Court publishes guidance on typical cases involving post-termination non-competition restrictions

### IN BRIEF

On 30 April 2021, Suzhou Intermediate People's Court (the highest court in Suzhou) published information on typical cases involving post-termination non-competition restrictions in an employment context. We highlight below the main points for employers to note:

- **Paying non-compete compensation lower than the legal standard will not necessarily invalidate the non-compete restriction.**

Company A and its employee signed a non-compete agreement, which provided that the monthly non-compete compensation would be RMB 7,208. After the employee left Company A, he joined a competitor, Company B. Company A paid non-compete compensation to the employee based on the agreed amount in the contract, amounting to a total of RMB 122,536 for 17 months.

The court found that the employee's total compensation for the 12 months before the termination with Company A was RMB 350,034. The court held that although the monthly non-compete compensation RMB 7,208 was lower than 30% of the employee's average monthly compensation for the 12 months before the termination (which is the amount stipulated in the Supreme Court's judicial interpretation), this did not in itself invalidate the non-compete restriction. According to the spirit of the Supreme Court's labor dispute judicial interpretation, even if the agreement between the employer and the employee is silent on the amount of the non-compete compensation, such compensation can still be made up by the employer to the amount stipulated under the law and will not necessarily lead to the invalidation of the non-compete agreement. Therefore, the court ruled that Company A should make up the amount of the non-competition compensation to the amount prescribed under the law, and found that the employee had violated the non-compete restriction and should pay liquidated damages.

- **Employee found to have breached non-compete obligation**

In this typical case, an employee served as a sales manager in Company C (a packaging company) and signed a non-competition agreement with the company. After the employee resigned, the employee helped Company D (established by his wife) to promote products that were competitive to Company C's customers. At the same time, the employee was making social insurance contributions through a separate transportation company.

During the course of the employment arbitration and litigation, the employee provided social insurance details made through the transportation company to prove that he was not engaged in a competitive business. However, after reviewing the facts of the case, the court determined that the employee had violated the non-compete restriction and ruled that the employee should pay Company C liquidated damages.

### Recommended action

An ex-employee may still be in breach of a non-compete restriction if the ex-employee provides services to a competitor company (despite being employed and contributing to social insurance via a non-competitor company). Please note that courts in different cities may take a different approach on non-compete issues. For example, unlike in Jiangsu, in some cities, non-compete compensation lower than the legal requirement may entail risks of invalidating the non-compete agreement. Therefore, companies should check the local requirements when dealing with non-compete issues.

## Shanghai High People's Court rules cessation of employment legal when employee reaches statutory retirement age

### IN BRIEF

The Shanghai High People's Court recently denied an employee's claim demanding compensation for wrongful cessation of employment in a situation where the employee had reached statutory retirement age, but had not yet started to enjoy pension insurance benefits. In this case, the company sent a notice to the female employee who had just reached 55 years old (the statutory retirement age for female managerial employees) informing her of the cessation of her employment. The employee then filed a complaint against the company with the labor arbitration committee, claiming wrongful termination. The employee argued that as she had not started to enjoy her pension insurance benefits, (notwithstanding the fact that she had reached the statutory retirement age), under the PRC Employment Contract Law (ECL), the company was not entitled to end her employment.

This dispute arose primarily due to apparent inconsistent provisions in the ECL and the Implementing Regulations of the ECL. The ECL provides that an employer may end an employee's employment when the employee starts to enjoy pension insurance benefits. On the other hand, the Implementing Regulations of the ECL provide that an employer may end an employee's employment when the employee reaches the statutory retirement age.

In this Shanghai case, the labor arbitration committee ruled that the ending of employment was legal, and rejected the employee's claim. The employee then filed a claim with the court. Both the first instance court and appellate court decided that the company was entitled to apply the Implementing Regulations of the ECL to end the employment relationship since the employee had reached the statutory retirement age. The employee then applied for a retrial with the Shanghai High People's Court. The Shanghai High People's Court subsequently rejected the employee's claim and ruled that an employer may apply either the ECL provision or the Implementing Regulations provision when ending the employment relationship.

### Recommended action

This case provides welcome guidance on an issue that has caused some controversy in practice due to the difference in the wording of the ECL and its Implementing Regulations. The Shanghai High People's Court has now clarified that an employer may end the employment contract either when the employee reaches the statutory retirement age or when the employee starts to enjoy their pension insurance benefits. Although technically, there is no binding court precedent in China, this case at least provides guidance on this issue that lower courts may refer to.

## Beijing court requires general manager to return salaries due to false background information

### IN BRIEF

In a recent Beijing court case, an employee was forced to return to his employer part of salaries he received during the employment period. The company had hired the employee as general manager with a monthly salary of RMB 90,000. The company required the employee to provide original copies of his diploma and related authentication certificates during the recruitment and on-boarding processes, but the employee failed to do so, claiming that the original copies were missing. The employee subsequently passed his probationary period and resigned from the company after six months of work.

After the employee had left employment, the company conducted an internal investigation and discovered that all the education and business experience-related information provided by the employee were false. The company sued the employee: (i) arguing that the employment contract was invalid because of the employee's fraudulent conduct; and (ii) claiming a return of part of salaries paid to the employee.

The employee admitted that he had falsified his educational background and business experience. However, he also argued that he was competent for the position of general manager because of his experience and capability. The employee further contended that the company should have checked his educational background and business experience at the time of recruitment or before the expiration of the probationary period, in a timely manner.

The court supported the company's claims and held that the employment contract between the company and the employee was invalid due to the employee's fraudulent tactics. The employee was also required to return part of his salaries received in the amount of RMB 300,000, which was decided at the court's discretion.

### Recommended action

Historically, courts have been reluctant to require an employee to return salary because of the employee's misconduct. Submission of false background information by an employee may lead to the employment contract being declared to be invalid. Where the employment contract has been declared invalid, the employer can also try to claw back any inappropriate salary payment made to the employee. However, in order to avoid having to rely on this course of action, employers should ensure that they conduct adequate background checks during the recruitment process.

## Hong Kong: Employees' Compensation (Amendment) Ordinance 2021 gazetted

### IN BRIEF

The Employees' Compensation (Amendment) Ordinance 2021 (Amendment Ordinance) was passed by the Legislative Council on 28 April 2021 and was gazetted on 30 April 2021. The Amendment Ordinance came into operation on 2 July 2021.

The Amendment Ordinance expands the Employees' Compensation Ordinance (ECO) to provide that an accident that happens to an employee when the employee is travelling between the employee's place of residence and place of work within the period specified in an "extreme conditions" announcement is deemed to arise out of and in the course of the employee's employment.

This grants protection to employees under the ECO, where an employee sustains an injury or dies as a result of an accident when commuting to or from work during the period of "extreme conditions" (as declared by the Chief Secretary for Administration) arising from a super typhoon or other natural disaster of a substantial scale.

Please read the full Baker McKenzie alert [here](#).

### Recommended action

Employers should be aware of this change and may need to review their adverse weather conditions policies. As a matter of best practice, employers should draw up in advance, realistic and practical work arrangements in times of and after typhoon and rainstorm warnings, post-super typhoon "extreme conditions" and other adverse weather conditions, for clarity.

## High Court clarifies application of section 11 of the Employment Ordinance to employee suspension

### IN BRIEF

In *Lengler Werner v Hong Kong Express Airways Ltd* [2021] CFI 1333, the High Court clarified the application of section 11 of the Employment Ordinance in relation to suspending an employee's duties.

#### Facts of the Case

The claimant ("Mr. W"), a pilot employed by Hong Kong Express Airways Ltd ("Airline"), had a verbal dispute with two colleagues and his flying duties were temporarily suspended for six weeks while an internal investigation was carried out. When he asked about the status of the investigation, he was informed that he would receive two warning letters. Mr. W resigned and argued that the Airline had constructively dismissed him.

He lodged a claim with the Labour Tribunal against the Airline for arrears of wages, wages in lieu of notice and overtime pay. The Labour Tribunal found in favor of Mr. W and the Airline appealed the decision to the High Court. The High Court found in favour of the Airline due to the application of section 11 of the Employment Ordinance (Cap. 57).

Section 11 provides that in certain circumstances, an employer may suspend an employee from employment for a period not exceeding 14 days during which period the employee has the right to terminate his/her employment without notice or payment in lieu of notice. However, in this case, only part of Mr. W's duties were suspended (i.e., his flying duties), and he was still able to fulfill his other duties and he had continued to be paid throughout the period of partial suspension of duties. The High Court clarified that section 11 of the EO applies only to *complete suspension of employment* and not suspension of *part of an employee's duties*. Further, the Court held that under the terms of the employee handbook, the Airline had a right to suspend the employee from part of his duties.

#### Conclusion

The High Court overruled the Labor Tribunal's decision that Mr. W had been constructively dismissed. Mr. W was ordered to pay the costs of the appeal to the Airline.

#### Recommended action

Employers should ensure they have clear contractual provisions detailing their right to suspend their employees from their duties of employment including suspension of part of their duties.

## District Court upheld summary dismissal of employee involved in competing business

### IN BRIEF

In *Cosme De Net Co Ltd v Lam Kin Ming* [2021] HKDC 445, the District Court upheld the summary dismissal of an employee who had engaged in a competing business without his employer's knowledge and consent.

#### Facts of the Case

The employee was employed as a senior business development manager in charge of the e-commerce business of the employer, a Hong Kong company which sold cosmetics and beauty products online. The employer discovered that the employee had been involved in a competing business selling products identical to those traded by the employer, but at a lower price. Following an internal investigation, the employer summarily dismissed the employee for breach of his contract of employment and fiduciary duty, and for infringement of intellectual property rights.

The employee filed a claim in the Labour Tribunal for payment in lieu of notice, year-end payment and damages for wrongful dismissal, while the employer commenced proceedings in the High Court in respect of the employee's involvement in the competing business and infringement of the employer's intellectual property rights. The two actions were consolidated and transferred to the District Court.

Based on the evidence submitted by the employer (which demonstrated the connection between the employee and the competing business), the District Court found in favour of the employer. The court held that the employee had breached his employment agreement and his fiduciary duty to act in good faith and the best interests of the employer.

#### Conclusion

The District Court held that the summary dismissal was justified in the circumstances. The employer was granted an injunction restraining the employee (or his servants or agents) from using its intellectual property. Interesting, however, in this case, the employer could not recover any damages since there was a lack of evidence of loss suffered by the employer as a result of the employee's breach.

#### Recommended action

Employers should consider setting out employees' duties of fidelity and good faith in the employment agreement expressly, and, where appropriate, impose post-employment non-compete and non-solicitation obligations.

This case also highlights the importance of conducting a prompt and thorough investigation upon discovery of any potential employee misconduct.

## Hong Kong Monetary Authority released principles of the mandatory reference checking scheme to address "rolling bad apples" phenomenon

### IN BRIEF

The Hong Kong Monetary Authority ("HKMA") released its Consultation Conclusions Paper on Implementation of Mandatory Reference Checking Scheme to Address the "Rolling Bad Apples" Phenomenon ("Scheme") on 3 May 2021, following a three-month industry consultation period.

The Scheme, which applies to all authorised institutions in respect of their Hong Kong business, will establish a common protocol for reference checking of employees.

Under current proposals, the Scheme will be implemented in two phases, based on specific roles of the individuals.

Phase 1 will cover:

- directors, chief executives, alternate chief executives approved under section 71 of the Banking Ordinance
- managers notified to the HKMA under section 72B of the Banking Ordinance
- executive officers approved under section 71C of the Banking Ordinance and
- responsible officers under the Insurance Ordinance and the Mandatory Provident Fund Schemes Ordinance.

Phase 2 will cover staff licenced or registered to carry out regulated activities under the Securities and Futures Ordinance, Insurance Ordinance and the Mandatory Provident Fund Schemes Ordinance.

The duration of the reference checking information should cover the prospective employee's employment records in the previous seven years up to the date of application for employment. The response timeframe from the reference providing authorized institution will be one month.

An Industry Working Group ("IWG") has been set up by the Hong Kong Association of Banks to work out operational details of the Scheme. The IWG is expected to provide operational details of the Scheme by November 2021.

### Recommended action

Authorised institutions will need to ensure internal systems are in place to comply with the Scheme requirements once it comes into operation. The specifics of the operational details will be important to understand e.g. details as to what information is reportable under the Scheme and the types of ongoing investigations should be reported, etc.

## Issuance of a new implementing regulation on the utilization of foreign workers

### IN BRIEF

Following the issuance of Law No. 11 of 2020 on Job Creation (which amends Law No. 13 of 2003 on Labor) and Government Regulation No. 34 of 2021 on Utilization of Foreign Workers, the Ministry of Employment (MOE) on 1 April 2021 issued MOE Regulation No. 8 of 2021 on the Implementation Regulation of Government Regulation No. 34 of 2021 on Utilization of Foreign Workers ("Regulation 8").

Regulation 8 stipulates the requirements to employ foreign workers and the process of obtaining a permit to employ foreign workers in Indonesia (known as Plan of Utilization of Foreign Workers—in Indonesian, Rencana Penggunaan Tenaga Kerja Asing or RPTKA). Regulation 8 revokes the previous MOE regulation on the utilization of foreign workers.

Key points on Regulation 8:

- Employers are required to appoint an Indonesian counterpart for each foreign worker employed, implement job education and training for the Indonesian counterpart worker, and facilitate Indonesian language education and training for the foreign worker. These requirements do not apply to the following categories of workers:
  - Director or commissioner of a limited liability company
  - Chief representative of a representative office
  - Founder, administrator and supervisor of a foundation
  - Foreign workers performing temporary work in Indonesia
- Employers are generally required to obtain an RPTKA to employ foreign workers in Indonesia, except for the following:
  - Directors or commissioners with certain share ownership
  - Diplomatic and consular staff at foreign countries representative offices
  - A foreign worker who is required in a production activity that has stopped due to an emergency, vocational education and training, technology-based start-ups, business visits, and scientific research for a certain period of time

- There are three main types of RPTKA, as follows:
  - RPTKA for temporary work (which only applies to certain activities, i.e., production of commercial film, office audit for a period of more than one month, work related to machine installation, electrical, after sales services, a one-time work or work that can be completed in a period of less than six months)
  - RPTKA for work for a period of more than six months
  - RPTKA for foreign workers working for social, religious and education institutions

Regulation 8 sets out the procedure to obtain the RPTKA.

### **Recommended action**

For information only

## Employers encouraged to retain workers up to age 70

### IN BRIEF

As mentioned in our last update, employers are encouraged to retain workers up to age 70 from 1 April 2021. The Japanese government is pushing for such measures because it is projected that one in three people in Japan will be 65 years or older by 2025. Although this amended law is not mandatory, it provides businesses with five options in retaining employees through the age of 70:

- Raising the retirement age
- Removing the retirement age
- Allowing employees to continue working past retirement age
- Outsourcing to retirees with start-ups
- Assigning retirees to their own or entrusted/invested institutions' philanthropic projects

The current legal retirement age is 60. However, employers are required to take action to sustain employment of employees aged 60 to 65, which is the target age group of this amendment.

Since these measures are not mandatory, employers may choose the relevant measures and select the employees to whom these measures shall apply. However, in order to prevent employers from selecting employees arbitrarily, the measures should be determined by discussion with the major labor union or the representative of the majority of the employees.

A significant change from the current set-up is that employers may permit employees to work at institutions outside of their group of companies (employees aged 60 to 65 must, however, still be employed within the organization). In addition, under the new measures, contract outsourcing with the relevant employees is permitted, that is, under a freelancing arrangement or outsourcing the employee to an outside vendor. However, note that when employers adopt such measures, they are required to formulate a detailed plan, which should include the amounts paid to the individual and the frequency of contract renewals, etc. Moreover, employers must obtain the agreement from the majority labor union or the representative of the majority of the workers since the employees will no longer be protected by labor law in such cases.

### Recommended action

According to a survey conducted by the Ministry of Health, Labour and Welfare in June 2020, the percentage of businesses that have their own systems in place that allow workers to continue working after the age of 65 was 34% for small and medium business (approximately less than 300 workers) and 28.2% for large businesses. However, even with such systems in place, not all organizations permit employees to continue working after the age of 65. Watch for developments.

## Concept of "Same Pay for Same Work" to harmonize difference in benefit treatment between regular employees and non-regular employees became applicable to small and medium-sized companies

### IN BRIEF

Amendments to the Part-Time Workers Act became applicable to small and medium-sized enterprises from 1 April 2021.

These amendments require reasonable equal treatment of regular employees and non-regular employees, including fixed-term contract employees and part-time employees.

The main changes introduced by the amendments are the following:

- Employers will be required to ensure that there are no irrational gaps in the treatment between regular employees and fixed-term contract employees / part-time employees, taking account of differences in: (i) job assignments; (ii) the level of flexibility of the employer in changing job assignments/locations; and (iii) other circumstances.
- Employers will be required to treat fixed-term contract employees and part-time employees in the same way as regular employees, unless a different treatment is justified. Whether the different treatment is justified will depend on, among other things: (i) the job descriptions; and (ii) the ability of the employer to change the job/location of work.
- If an employer treats non-regular employees differently from regular employees, the employer will be required to explain the reasons for the difference in treatment upon the employee's request.
- The government will be allowed to take enforcement measures, and alternative dispute resolution will be made available to the relevant parties.

### Recommended action

If small and medium-sized employers employ any fixed-term contract employees or part-time employees, the employers should ensure that these employees are treated equally in accordance with the amendments to the law.

## Introduction of requirement to disclose percentage of mid-career hires for companies with more than 300 workers

### IN BRIEF

A new amendment to the Act on the Comprehensive Promotion of Labor Policies and the Improvement of Employment Security and Working Life of Workers of the Workers took effect on 1 April 2021, and is applicable to companies with more than 300 full-time workers. The purpose of the amendment is to improve the environment of mid-career employment.

The amendment requires the relevant companies to publish the percentage of their mid-career hires (excluding new graduate employment) of regular employees for each of the last three fiscal years such that job applicants can access the data easily.

### Recommended action

The first disclosure should be made within the first fiscal year after the enforcement of the act (i.e., after 1 April 2021). The subsequent disclosure should be made within one year from the first disclosure.

## Modification to the purposes of withdrawal from a member's pension account with the Employees Provident Fund

### IN BRIEF

By way of background, the Employees Provident Fund Act ("EPF Act") and its rules prescribe that a member of the Employees Provident Fund (EPF) is permitted to withdraw a sum from their main pension account (i.e., Account 1) for the purposes of financing either of the following:

- a) Higher learning for themselves or for their child
- b) Payment of insurance policies taken out for themselves.

#### Financing for higher learning

On 1 May 2021, the Employees Provident Fund (Modification to the Purposes for Withdrawal) Order 2021 and the Employees Provident Fund Rules (Amendment) (No. 2) Rules 2021 came into effect, amending the EPF Act to allow a member to withdraw from their Account 1 for the purposes of financing the higher learning of their spouse or parent, in addition to themselves or their child.

#### Insurance policies and takaful certificates

Further, the Employment Provident Fund (Modification to the Purpose for Withdrawal under Subsection 54(6)) (No. 2) Order 2021 ("Order No. 2") came into effect on 8 June 2021, amending the EPF Act to allow withdrawal for the financing of insurance policies as well as takaful certificates taken out for the benefit of the member or any other person approved by the EPF.

### Recommended action

Employers to note

## Extension of the coverage of the Employment Insurance System Act to domestic employees

### IN BRIEF

The Employment Insurance System (Amendment of First Schedule) Order 2021 ("EIS Amendment Order") and Employment Insurance System (Exemption) Order 2021 ("EIS Exemption Order") came into effect on 1 June 2021 to include certain types of "domestic employees" within the coverage of the Employment Insurance System Act ("EIS Act").

By way of background, the EIS Act established the Employment Insurance System (which is administered by the Social Security Organization or SOCSO) to provide certain benefits and opportunities to participate in re-employment programs for eligible persons in the event of loss of employment. All individuals specified in the First Schedule of the EIS Act, which include "domestic servants" (i.e., persons employed exclusively in the work or in connection with work in a private dwelling, and not of any trade, business or profession, such as house cooks, private house servants, private waiters, private butlers, etc.) ("Domestic Employees"), were not eligible to be registered or claim benefits under the EIS Act.

From 1 June 2021, the EIS Amendment Order extends such coverage of the EIS Act (including eligibility for benefits) to all Domestic Employees, save for those prescribed under the EIS Exemption Order.

Briefly, the EIS Exemption Order excludes the following Domestic Employees ("Exempted Domestic Employees") from the EIS Act:

- a) Any domestic employee who is employed by an employer who is a close relative
- b) Any foreign domestic employee who is employed by a foreign employer and
- c) Either of the following foreign domestic employee, who was without a valid employment pass but to whom a valid employment pass is issued after the date of coming into operation of the EIS Exemption Order:
  - is working in Malaysia on or after the date of coming into operation of the EIS Exemption Order or
  - has worked in Malaysia immediately before the date of coming into operation of the EIS Exemption Order

"Foreign employer" and "foreign employee" do not include the following:

- a) A non-citizen who is residing permanently in Malaysia and issued with an identity card
- b) A person who:
  - lawfully enters Malaysia under a valid immigration pass or permit
  - is allowed to reside in Malaysia for a period of 12 months and above and
  - is issued with an identity card

- c) A person who is born in Malaysia but whose citizenship status cannot be determined, and is issued with an identity card prescribed by the National Registration Regulations.

## Recommended action

The amendment in rules only apply to employers who employ domestic servants for private purposes (i.e., for private dwellings and not for any commercial purpose).

## Extension of the coverage of Employees' Social Security Act to domestic employees

### IN BRIEF

By way of background, the Employees' Social Security Act ("ESS Act") established the provision of social security benefits to insured employees in certain circumstances, such as "invalidity" and "employment injury."

With effect from 1 June 2021, the Employees' Social Security (Amendment of First Schedule) Order 2021 ("ESS Order") extends the coverage of the ESS Act to all Domestic Employees (who were previously not covered nor eligible to claim social security benefits under the ESS Act), save for the Exempted Domestic Employees listed under the Employees' Social Security (Exemption) Notification 2021, which are similar to those listed under the EIS Exemption Order (above).

Further, the Employees' Social Security (General) (Amendment) Regulations 2021 ("ESS Regulations Amendment"), which came into effect on 1 June 2021, amends the Employees' Social Security (General) Regulations to allow for the termination of a domestic employee who suffers from a "temporary disablement" for a continuous period of four days or more. Such termination will be subject to the usual dismissal-related laws in Malaysia. "Temporary disablement" means a condition resulting from an employment injury that requires medical treatment and renders employees, as a result of such injury, temporarily incapable of doing the work that they were doing prior to or at the time of the injury.

## Recommended action

The amendment in rules only apply to employers who employ domestic servants for private purposes (i.e., for private dwellings, and not for any commercial purpose).

## Employers in prescribed industries exempted from the requirement to pay levy pursuant to Pembangunan Sumber Manusia Berhad Act

### IN BRIEF

The Pembangunan Sumber Manusia Berhad (Exemption of Levy) (No. 2) Order 2021 ("HRDF Order") was promulgated on 31 May 2021 to exempt certain types of employers from payment of levy to the Human Resource Development Fund (HRDF) in respect of each employee from 1 June 2021 to 31 December 2021 ("HRDF Exemption").

In order to qualify for the HRDF Exemption, an employer must meet the following criteria:

- a) Fall within the prescribed list of industries under the HRDF Order ("Exempted Industries") and
- b) Be recently registered with the HRDF for the period between 1 March 2021 and 30 June 2021

The Exempted Industries are as follows:

- Agriculture and farming
- Livestock and fisheries
- Forestry and logging
- Cosmetic
- Recreation
- Real Estate
- Cultural, arts and entertainment
- Fashion and clothing
- Sports
- Personal Services
- Investment
- Household goods and services
- Banking and finance
- Insurance and takaful
- Prescribed sectors/activities related to:
  - Services
  - Construction
  - Trading, business and wholesale
  - Administration and support
  - Education
  - Science and Technology
  - Social Welfare
  - Administration of organizational membership
  - Professional Services
  - Automotive

### Recommended action

Employers falling within the criteria above to note

## Fees for special programme for handling pass holders

### IN BRIEF

Pursuant to the Fees (Employment Pass, Visit Pass (Temporary Employment) and Work Pass) Order 1998 ("1998 Order"), an employer of a Visit Pass (temporary employment) holder or Work Pass holder (collectively, "Pass Holder") who participates in a special programme for the purpose of managing the Pass Holder (e.g., the Labour Recalibration Programme to hire undocumented migrants for blue-collar work in specific sectors) is required to pay an additional fee of MYR 1,500 for the issuance of the pass, for the purposes of the employment. The fees apply for Pass Holders engaged to work in the following sectors:

- Manufacturing
- Construction
- Plantation
- Agriculture

With effect from 8 June 2021, the Fees (Employment Pass, Visit Pass (Temporary Employment) and Work Pass) (Amendment) Order 2021 amends the 1998 Order by requiring employers hiring Pass Holders under a special programme (such as the Labour Recalibration Programme) to also pay such fees if the workers are employed in the following additional sectors:

- Services for cargo, restaurant, wholesale and retail business, washing and cleaning, and transportation in Sarawak
- Mining and quarrying in Sarawak

### Recommended action

Employers who are looking to hire such employees through special programmes such as the Labour Recalibration Programme to note



# PHILIPPINES

## Senator seeks conduct of investigation in aid of legislation for gig economy workers

### IN BRIEF

Through Senate Resolution No. 732, Senator Risa Hontiveros seeks to look into the plight and work status of delivery riders on digital platforms and other workers in the so-called gig economy, including providing "employment benefits and other forms of social protection for workers" in digital platforms. According to Hontiveros, such workers are currently considered to be independent contractors and as such are not entitled to healthcare benefits, 13th month pay, retirement pay, leave credits, days off, and other forms of basic labor rights. The senator emphasized that, through the resolution, policymakers are also urged to break out of the contractor-employee binary and create a permanent social safety net that would cover all types of workers.

The resolution cited recent developments abroad classifying food riders as employees of digital platforms by courts in jurisdictions such as Spain and the United Kingdom.

### Recommended action

Employers must remain vigilant of developments regarding this matter. One of the major issues the resolution seeks to tackle is the practice of classifying gig economy workers as independent contractors and not as regular employees. Consequently, the passage of a law delving into the status of gig economy workers may result in increased employment-related benefits expenses.

## Employees' Compensation Commission (ECC) announces compensability of injuries, death and disability while working from home

### IN BRIEF

The ECC signed Board Resolution No. 21-03-09, which states that disability or death due to injuries sustained while working from home will be compensable under the Employees' Compensation Program (ECP). However, this is subject to the condition that the employer has issued a written directive or order for a work-from-home arrangement or the performance of certain tasks for a specific period at the residence or dwelling place of the employee. Under the ECP, workers who suffer from work-related sickness, injury or death are entitled to employees' compensation benefits such as loss of income benefits, medical benefits, and death and funeral benefits. ECC Board Resolution No. 21-03-09 was signed on 11 March 2021, but was announced to the public around the middle of May 2021.

### Recommended action

Watch for developments, particularly on the issuance of specific ECC guidelines implementing this resolution.

## Deferring increase in Social Security System (SSS) contributions

### IN BRIEF

Republic Act No. 11548 (which amends the Social Security Act of 2018) was passed to give the president of the Philippines the power to defer the 1% 2021 increase in SSS contributions and monthly salary credits for the duration of the state of calamity due to the COVID-19 pandemic in the Philippines.

### Recommended action

Watch for developments, particularly the president of the Philippines exercising its power to defer the 1% 2021 increase in SSS contributions and monthly salary credits.

## Online filing of maternity benefit reimbursement applications

### IN BRIEF

Starting on 31 May 2021, employers may choose to file maternity benefit reimbursement applications through the my.SSS portal in the SSS website, over-the-counter, or through drop box. However, from 1 September 2021, all maternity benefit reimbursement applications may only be filed through the online portal.

### Recommended action

Employers should take note of the new requirement of online filing of maternity benefit reimbursement applications commencing on 1 September 2021.

## Circumstances upon which an employer can claw back monies from an employee

### IN BRIEF

*Denka Advantech Pte Ltd. and another v. Seraya Energy Pte Ltd. and another and other appeals* [2020] SGCA 119 provides a timely reminder of the legality of the employer's right to claw back monies from its employees. For example, an employer may wish to claw back monies spent on employees who were sent on sponsored training programs, further studies, self-development courses, etc. This alert is of particular importance for employers who wish to understand if they can contractually claw back monies provided to employees for such sponsored training.

Please read the full Baker McKenzie alert [here](#).

### Recommended action

Employers must ensure that the conditions for sponsoring training are properly drafted and reasonable in all aspects. In addition, the following must be considered:

- The conditions must clearly state and show that the right to claw back is meant to be compensatory in nature.
- The amount stipulated is reasonable and represents a genuine pre-estimate of the loss (of investment in the employee).
- At no point should the condition be penal in nature, as it will affect the enforceability of the clause.

## Tightening of employment pass regulations for overseas intra-corporate transferee

### IN BRIEF

The Ministry of Manpower (MOM) has included an additional question to the Employment Pass (EP) online application form if employers declare that the candidate is applying to transfer to a branch, affiliate or subsidiary of the EP-sponsoring entity in Singapore. The response will determine if the family members of an intra-corporate transferee (ICT) are eligible for Dependants' Passes or Long Term Visit Passes and if the ICT can pursue further employment in Singapore.

If the candidate is assessed by the MOM to be an ICT, the MOM may request for the employer to download the ICT Declaration Form, get it signed by the candidate, and thereafter submit the completed form to the MOM for further review.

### Recommended action

For information only if a company intends to bring in foreign employees through the ICT route.

## Foreign worker levies waived during 2021 stay home notice period

### IN BRIEF

On 1 April 2021, the Ministry of Manpower announced that foreign worker levies for S Pass, work permit holders and migrant domestic workers will be waived during their stay home notice (SHN) period from January to September 2021.

As employers with workers serving their SHN will not be required to pay levies for this period, this will enable them to manage the increased costs due to the government's additional COVID-19 measures. These additional measures include limiting entry approvals for work pass holders and requiring newly arrived migrant domestic workers, S Pass and Work Permit holders to serve an SHN and undergo testing upon arrival into Singapore.

If employers have already paid levies for their workers' SHN duration in January and February, the waivers will be used to offset June's levy.

### Recommended action

Employers should be aware of the waived levies until September for their foreign workers.

## Dependant's Pass holders to apply for work pass instead of Letter of Consent to work

### IN BRIEF

From 1 May 2021, Dependant's Pass (DP) holders who wish to work in Singapore will need to apply for a relevant work pass, such as an Employment Pass, S Pass or Work Permit, instead of a Letter of Consent (LOC). Existing DP holders with LOC will be allowed to continue working until the LOC expires. However, employers will have to apply for an applicable work pass for such persons if they wish to continue employing them after the existing LOC expires.

### Recommended action

If an employer currently has employees with a LOC, please note that upon the expiration of the LOC, the employer will need to apply for a work pass for these employees to allow them to continue working in Singapore for the employer. Please also note that the prevailing qualifying criteria, dependency ratio ceilings and levies for the respective work passes will apply to the LOC applicants who are applying for the relevant work passes.

## Epidemic warning level 3 extended to 12 July

### IN BRIEF

Due to the spike in locally confirmed cases, the Central Epidemic Command Center (CECC) elevated the epidemic warning for Taiwan from Level 2 to Level 3, effective 15 May 2021 until 12 July.

#### 1. Employees are still allowed to work at the office.

According to the CECC rulings issued on 15 and 16 May 2021, employees are still allowed to work in the office. Our recommendations are as follows:

- Request employees to work from home as much as possible. If an employee needs to enter the workplace to take equipment or documents required for work, ask the employee to carry out the following:
  - a) Test forehead temperature and confirm no COVID-19 symptoms.
  - b) Sign a document confirming that they have not been to any venue visited by confirmed cases announced by the government.
  - c) Wear a mask at all times and leave the premises as soon as possible.
- If the employee insists on working at the office premises, inform the employee of the following:
  - a) The health risk situation is serious.
  - b) The employee has an obligation to protect the health and safety of the workplace.
  - c) If the employee later tests positive for COVID-19 and jeopardizes the workplace, the company will consider imposing appropriate disciplinary action for such misconduct.

#### 2. Disease prevention guidelines for employers

The CECC rulings mandate that everyone wear a mask at all times when going outside. Therefore, an employee should also wear a mask at all times when the employee is inside the workplace.

In addition, the CECC reiterated the Guidelines for Enterprise Planning of Business Continuity in Response to the Coronavirus Disease promulgated in 2019 and advises employers to follow its guidance throughout the duration of any continuous or widespread community transmission of the virus. The following are two additional key points:

- Employers should implement health-monitoring plans and measures for employees in order to handle and track health abnormalities.
- Employees should reconfigure working spaces to maintain proper distances between work stations.

### 3. Disease Prevention Care Leave

As all schools have been suspended until the start of the summer vacation this year, the Ministry of Labor (MOL) announced that parents of students and/or disabled children who are 12 years old or younger who require child care supervision can apply for Disease Prevention Care Leave during this period. The key points of this special leave entitlement are as follows:

- An employer needs to approve this leave and is prohibited from imposing unfavorable treatment of employees who apply for this leave. The employer is also prohibited from requesting an employee to use instead their paid annual leave allowance or personal leave. Violations thereof are subject to a fine between NTD 20,000 and NTD 1 million (approximately USD 714 and USD 35,714).
- An employer has discretion whether or not to pay for this leave.

Please read the full Baker McKenzie alert [here](#).

#### Recommended action

For employers' compliance

### The Employees' Occupational Injury Insurance and Protection Act promulgated on 30 April 2021

#### IN BRIEF

The date when this new Act will come into force has yet to be determined, but the key points employers should note are as follows:

1. All employees must be covered by occupational injury insurance from their first day of employment (regardless of the size of the employer).
2. If employers fails to accurately pay the premium, they will be liable to a fine between NTD 20,000 and NTD 100,000 (approximately USD 714 and USD 3,571).

Employers should also be aware of the applicable insurance premium and that such premium may increase in the future.

#### Recommended action

Employers should ensure that all employees are covered by occupational injury insurance in accordance with the Act.

## Thai Cabinet approves in principle a Draft National Pension Fund Act

### IN BRIEF

On 30 March 2021, the Thai Cabinet approved in principle a Draft National Pension Fund Act. Under the National Pension Fund Act a new pension fund will be set up to broaden pension coverage to employees in general. The fund's coverage and requirements are summarized below:

- **National Pension Fund** – The fund will be set up as a governmental agency with a separate legal personality.
- **Coverage** – The fund will mandatorily cover all employees in the private sector and employees of the government, public organizations, and state enterprises between the ages of 15 and 60 years old who are not yet members of a provident fund.
- For private sector employers, this national pension fund will initially be required only for those who have 100 or more employees.
- **Contribution** – Employers and employees who are subject to this fund are required to make a monthly contribution to the fund. The rate of contribution is progressive, starting from 3% of the employee's monthly wage in the first three years to a maximum of 10% after 10 years. The employee's wage to be used to calculate the contribution rate is capped at THB 60,000 per month. Employees whose wage is less than THB 10,000 per month do not need to make the monthly contributions, but their employers are still required to do so.

Both the employer and employee may agree to increase the monthly contribution rate up to 30% of the employee's monthly wage without cap.

- **Benefits** – A member who reaches the age of 60 may choose to receive a monthly pension for 20 years or a one-time payment. It is not yet clear whether they will get this money automatically once they reach 60 years old or if they need to retire first. Discussions regarding tax benefits for the money paid from the fund are ongoing.

### Recommended action

For information only - Note the above details are subject to further amendments.

**Additional relief measures for employees and employers approved by the Cabinet (5 May 2021)****IN BRIEF**

As Thailand is currently facing a substantial surge in COVID-19 infections, further relief measures, including the following, were approved by the Cabinet on 5 May 2021 to assist affected employees and employers:

- **THB 2,000 cash transfer** – Eligible employees of private operators who registered with the Social Security Fund received an additional payment of THB 2,000, paid in two weekly installments of THB 1,000 each, through the government's Pao Tang e-wallet application. The payment transfers were done in May 2021.
- **Low-interest loans for employees receiving regular income** – Low-interest loans will be offered by the Government Savings Bank and the Bank of Agriculture and Agricultural Cooperatives until 31 December 2021, to people who receive regular income (e.g., employees of private operators), self-employed people, and farmers. The interest rate is fixed at 0.35% per month, with a maximum loan period of three years. The first six installments are interest-free and the borrower is not required to repay during this period.
- **Extension of tax incentive for hiring former convicts** – From 1 January 2021 to 31 December 2021, companies and juristic persons who employ former convicts of Thai nationality who have been released from prison for less than three years are entitled to record taxable expenses on the expense used to hire the former convicts at an additional 50% based on the portion of expense not exceeding THB 15,000 per person per month. A draft implementing legislation is being finalized and expected to be issued soon.

**Recommended action**

For information only

**Additional COVID-19 relief measures for employers and employees (21 May 2021)****IN BRIEF**

Further COVID-19 relief measures were announced by the government to provide financial support to employers and employees affected by the continued rise in COVID-19 infections, in addition to those that had already been put in place, including those mentioned above. The additional measures include the following:

- Reduction of the contribution rate to the Social Security Fund (SSF) – On 18 May 2021, the Cabinet approved in principle the draft Ministerial Regulation regarding the Contribution Rate to the SSF ("Ministerial Regulation"). According to the Ministerial Regulations, the monthly contribution rates of employers and employees to the SSF will be reduced from 5% to 2.5% of wage applicable for the period between 1 June 2021 and 31 August 2021 (i.e., three months).
- Reduction of the contribution rate to the Skill Development Promotion Fund ("Fund") – On 7 May 2021, the Ministry of Labour issued the Notification regarding the Contribution Rate and Method for Collecting the Contributions to the Fund to Alleviate the Hardship of Business Operators Affected by the COVID-19 Outbreak ("Notification").

According to the Notification, effective from 1 January 2021, the contribution rate is reduced from 1% to 0.1% for 2021.

- Extension of the contribution filing deadline to the Fund – Generally, an employer who has at least 100 employees and has a duty to pay contribution to the Fund must submit the contribution filing to the Fund within March every year. Under the Notification, the contribution filing deadline to the Fund for the year 2020 is extended to within July 2021.

**Recommended action**

For information only

## Additional categories of persons who are eligible to request entry into Vietnam using commercial flights

### IN BRIEF

Official Letter No. 3440/CV-BCD<sup>1</sup>. has expanded the categories of persons who may request entry into Vietnam. In particular, the additional categories are as follows:

- Vietnamese citizens—businessmen, intellectuals, students, the elderly, people visiting relatives, tourists whose tours have expired, workers with expired (offshore) labor contracts; students whose study time has expired, persons stranded overseas, persons travelling abroad for medical examination/treatment, persons with expired visas
- Persons requesting entry for humanitarian purposes and other special cases

The following points are of particular note:

- The arrangement of the state authorities for the return of Vietnamese citizens and the entry of foreigners must strictly follow approved plans and be suitable to Vietnam's capacity to prevent and control COVID-19 in Vietnam.
- For cases of entry to Vietnam for humanitarian purposes or other special cases, a written opinion of the Prime Minister or the National Steering Committee is required.
- Organizations and agencies organizing commercial flights for the return of Vietnamese citizens are required to carry out the following:
  - Obtain the written consent of the five ministries (Ministry of Health, Ministry of Foreign Affairs, Ministry of Transport, Ministry of National Defence, and Ministry of Public Security).
  - Get the approval of the People's Committees of provinces and cities on receiving people for quarantine.
  - Submit the abovementioned documents to the Prime Minister for consideration and approval.

### Recommended action

For information only

1 - Official Letter No. 3440 No. 3440/CV-BCD of the National Steering Committee For Covid-19 Prevention And Control regarding strict management on individuals requesting to enter into Vietnam - dated 27 April 2021.

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