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Asia Pacific Employment & Compensation Quarterly Update

Quarter 3: 2021

Introduction

Our Asia Pacific Employment & Compensation Team is pleased to provide you with our third 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
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AUSTRALIA

Changes to national minimum wage and all award wages following the Annual Wage Review 2021[1]

IN BRIEF

The Fair Work Commission announced that from 1 July 2021, there will be a 2.5% increase to the national minimum wage and all award wages. From this date, the new national minimum wage is AUD 772.60 per week or AUD 20.33 per hour. The increase was delayed for certain industries most affected by the pandemic. For example:

- On 1 September 2021, the rates payable under the Retail Award increased.
- On 1 November 2021, the rates payable under other awards, including the Pilots Award and Hospitality Award, will increase.

Recommended action

Review contracts and wage rates. Comply with the new wage increases.

Increased Superannuation Guarantee Rate effective from 1 July 2021

IN BRIEF

The superannuation guarantee has increased from 9.5% to 10.0% of "ordinary time earnings" (Contribution Rate).

The implications of this for employers will depend on how contracts of employment are drafted.

Employment contracts generally deal with superannuation contributions in one of two ways:

A few notable recommendations include the following:

1. Expressing base salary as exclusive of superannuation–This will generally mean that the increase in the Contribution Rate will come at a cost to employers, as the rate at which contributions will need to be made (on top of base salary and other ordinary time earnings) will increase from 9.5% to 10%.
2. Expressing total remuneration as inclusive of superannuation–This may mean that an employer is able to "offset" the increase in the Contribution Rate by decreasing an employee's base salary and/or other ordinary time earnings, with no overall increase in remuneration. However, unless an employer's right to take this approach is made abundantly clear by the employment contract, we suggest that employers seek advice before implementing this approach.

Read the full Baker McKenzie article here.

Recommended action

Review contracts. Comply with the new superannuation increase.

[1] https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/annual-wage-review-2021

Increased high income threshold effective from 1 July 2021

IN BRIEF

From 1 July 2021, the high income threshold is AUD 158,500. The threshold is an eligibility limit for protection from unfair dismissal under the FW Act. In addition, employees with a "guarantee of annual earnings" must have an income above the threshold.

Recommended action

Employers should review and ensure that they comply with their guarantees of annual earnings. Employers should also ensure that they comply with unfair dismissal laws in relation to employees whose income is below the high income threshold (or who are award-covered). Regardless of whether an employee is protected from unfair dismissal, affording procedural fairness and having valid reasons for termination in respect of all employees will help employers in defending other claims that are not barred to high income earners.

Victorian wage theft laws come into effect from 1 July 2021

IN BRIEF

On 1 July 2021, the Wage Theft Act 2020 (Vic) (Act) came into effect. The Act makes it a crime for an employer to deliberately underpay employees, to dishonestly withhold employee entitlements, or to fail to keep proper records of employee entitlements in order to gain a financial advantage.

These crimes are punishable by a fine of up to AUD 198,264 or 10 years' imprisonment for individuals, and a fine of up to AUD 991,320 for companies.

Please read the full Baker McKenzie alert here.

Recommended action

For information

Fair Work Ombudsman priorities for 2021-22: Large corporate underpayments

IN BRIEF

The Fair Work Ombudsman (FWO) compliance and enforcement priorities for the 2021-2022 year ahead include addressing large corporate underpayments. This initiative coincides with a growing list of large corporate employers self-disclosing significant underpayments of employee entitlements (going back several years) to the FWO.

Recommended action

Employers should consider conducting an audit of their award coverage and compliance, particularly in relation to minimum rates of pay, overtime and penalty rates. An employer should not assume that because its employees are highly paid that they are not award-covered. Keep accurate time records for all award-covered employees.

Fair Work Amendment expands definition of "serious misconduct" to include sexual harassment

IN BRIEF

On 10 July 2021, the Fair Work Amendment (Respect at Work) Regulations 2021 (Cth) amended the Fair Work Regulations 2009 (Cth) to specifically include sexual harassment as a form of serious misconduct (along with the other pre-existing grounds, including theft, fraud and assault). Sexual harassment occurs when:

- a person makes an unwelcome sexual advance or an unwelcome request for sexual favours to the person harassed, or engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
- in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Recommended action

Ensure that any codes of conduct or other relevant policies are updated, and consider whether internal disciplinary aides are updated. Conduct regular training for employees and other workers on their obligations in relation to workplace behavior, including sexual harassment.

High Court overturns *WorkPac v Rossato* decision on casual employment

IN BRIEF

In its 2020 decision in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (Rossato), the Full Court of the Federal Court held that a casual mineworker engaged on a series of "assignment by assignment" casual contracts was not a true casual employee for the purposes of the National Employment Standards. The Full Court's decision followed a similar 2018 decision in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (Skene). The decisions created uncertainty for employers by holding that employees thought to have been engaged as casuals could be entitled to benefits associated with permanent employment (such as paid leave entitlements) if the "practical reality" of the employment relationship warranted this.

On 4 August 2021, the High Court overturned the Full Federal Court's decision in Rossato (and the findings in Skene), holding that Mr. Rossato was, in fact, a casual employee. The result is that Mr. Rossato was found to be not entitled to any back payments.

The decision represents a shift in how courts have approached issues related to casual employment and provides employers with comfort in relation to casual employment arrangements.

Read the full Baker McKenzie alert here.

Recommended action

Ensure casual contracts are drafted with the new statutory definition of "casual employee" in mind.

Large payout in sexual harassment case

IN BRIEF

In *Golding v Sippel and The Laundry Chute Pty Ltd* [2021] ICQ 14, the Queensland Industrial Relations Commission awarded nearly AUD 160,000 to a laundromat employee whose manager engaged in ongoing sexual assault and awarded employee shifts in exchange for sexual favors. The conduct amounted to sexual harassment and sex discrimination under the Anti-Discrimination Act 1991 (Qld) and resulted in damages, including general and aggravated damages for non-economic loss together with economic loss. The component awarded for non-economic loss was significant, at AUD 130,000, which was an increase from the AUD 35,000 award at first instance.

In considering the award for non-economic loss, the Commission noted the "dramatic change" in community expectations and standards as to sexual harassment and discrimination in recent years, It was held that, taking into account the circumstances, the original award for non-economic loss was "manifestly inadequate."

Recommended action

The decision reinforces the need of employers to have strong practices in place regarding the prevention of sexual harassment in the workplace, including robust policies, training, and investigative and (where appropriate) disciplinary procedures.

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

IN BRIEF

On 10 September 2021, the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) received royal assent. The bill operates to amend the following pieces of legislation:

- Australian Human Rights Commission Act 1986 (Cth) (AHRC Act).
- Fair Work Act 2009 (Cth) (FW Act).
- Sex Discrimination Act 1984 (Cth) (SD Act)

In broad terms, the amendments to the above legislation are intended to enhance legal protections around sexual harassment and minimize any confusion or uncertainty around how existing legislation intersects on this point, in line with recommendations of the Australian Human Rights Commission report, "Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces".

The Act does not implement all the recommendations of the report but includes two key measures, as follows:

- Empowering the Fair Work Commission to make anti-sexual-harassment orders, building on the eight-year-old framework for anti-bullying orders
- Extending compassionate leave to miscarriages. (Compassionate leave is currently available where a member of the employee's immediate family or household contracts or develops a personal illness, or sustains a personal injury, that poses a serious threat to their life, or dies. Compassionate leave is also available where a child is stillborn.)

Please read the full Baker McKenzie alert here.

Recommended action

For information

Fair Work Commission casual terms review completed

IN BRIEF

The Fair Work Commission was required to review relevant terms in modern awards on the basis of their interaction with the new "casual employee" definition and casual conversion arrangements.

The Commission was required to complete its review by 27 September 2021.

Where the review found an inconsistency, difficulty or uncertainty, the Commission varied the award. This generally involved changing the award definition to refer to the definition in the National Employment Standards.

Recommended action

For information

We also set out a link to our FY21 in Focus - Employment Update: here.

PEOPLE'S REPUBLIC OF CHINA

Personal Information Protection Law to be implemented on 1 November 2021

IN BRIEF

The Personal Information Protection Law (PIPL) of the People's Republic of China was formally passed on 20 August 2021, and will be implemented on 1 November 2021. It is well known that companies often need to process personal information (including all kinds of sensitive personal information) of their employees in the course of recruitment, HR management, employee departures, restructuring, mergers, acquisitions, benefit management, internal investigations, etc. The PIPL will present employers with new requirements and challenges in the processing and management of their employees' personal information. As the PIPL's provisions are more in the nature of principles, many practical problems will not be resolved until detailed implementing policies are issued. Based on the latest legislation and market practice, we set out our preliminary views on key issues often encountered by employers here.

Recommended action

The PIPL subjects employers to more stringent requirements in managing their employees' personal information. In the past, many companies merely included blanket employee consent clauses in their employment contracts and employee handbooks. These clauses may no longer satisfy the latest legal requirements. Therefore, we recommend that employers take a number of steps before the new law becomes effective. Such steps should include conducting data mapping and a data inventory check (e.g., confirming which types of personal information have been collected, and how and why they were collected), preparing a stand-alone employee privacy notice for China, and updating data privacy sections in the employment contract and employee handbook (if and as necessary). Based on the PIPL, the relevant policies should itemize, among others, the types of personal information to be collected and processed; the purpose, method and scope of processing; the recipients of the information (including those located abroad); and the employees' rights. In addition, employers should give separate consideration to the collection and processing of sensitive personal information and address such processing activities in writing, including obtaining employee consent where appropriate.

In addition, we recommend that employers establish a management and security protection mechanism and a personal information compliance management framework for their processing of employees' personal information (particularly sensitive personal information). They should also review and revise their service agreements with third parties that process their employees' personal information.

New measures to protect the labor security rights and interests of gig workers

IN BRIEF

Several policy measures to strengthen the protection of gig workers' rights and interests were spelled out at a State Council General Affairs Meeting held on 7 July 2021. A "Guiding Opinion on Protecting Labor Security Rights and Interests of Gig Workers" ("Guiding Opinion") was issued the same day by the Ministry of Human Resources and Social Security and seven other authorities. The Guiding Opinion imposes new requirements on entities (particularly platforms) that use gig workers and provide some innovative protections for gig workers. The key points are set forth below:

- Introduction of a new "establishment of a less-than-complete employment relationship" concept. A situation where a worker and an employer do not exactly establish an employment relationship but the enterprise manages the worker's labor is determined to constitute a "less-than-complete employment relationship," as opposed to an ordinary employment relationship or a civil law relationship.
- System rules and platform algorithms that involve gig workers are subject to the procedures for democratic consultation and publication. When an enterprise formulates or revises system rules or platform algorithms that directly involve gig workers, the government will see to it that the enterprise gives the labor union or worker representatives ample opportunity to air their opinions and recommendations and that it publishes the result and informs the workers.
- Establishment of pilot projects for occupational injury protection for platform gig workers and relaxation of the registered permanent residence restrictions on their enrolment in social insurance in their work localities. The government will set up pilot projects for occupational injury protection for platform gig workers and require platforms to join those projects as required by regulations. Local governments should relax the registered permanent residence requirements that currently restrict the enrollment of gig workers in employee social insurance in their work localities. Arrangements will be made to enable gig workers without employee social insurance to enroll in urban and rural resident insurance.
- Establishment of a system to protect gig workers with less-than-complete employment relationships. Enterprises will be supervised as to whether they remunerate the workers at rates no lower than the local minimum wage rate, whether their rest arrangements are reasonable, and whether the remuneration paid for work on statutory holidays is reasonable and higher than that paid for work during regular working hours. Enterprises should formulate comprehensive rules and regulations on production safety and perform their relevant compliance inspection and training obligations. They may not formulate performance indicators that harm the safety or health of the workers. Recruitment conditions should not be discriminatory, and workers should not be illegally restricted from providing services on more than one platform.

Recommended action

The Guiding Opinion reflects the importance that the government places on providing stronger protection for the rights and interests of gig workers. Nonetheless, it remains to be seen how local governments will implement the Guiding Opinion in practice. Entities that use gig workers should first satisfy the express protective requirements (e.g., paying the minimum wage, not restricting service provision on multiple platforms, announcing the relevant regulations and algorithms to the workers following democratic consultation) and then wait for specific implementing measures from the government (e.g., occupational disease protection for gig workers).

Supreme People's Court and Ministry of Human Resources and Public Security expressly state that the "996" work system is illegal

IN BRIEF

On 30 June 2021, the Supreme People's Court and the Ministry of Human Resources and Public Security ("Two Authorities") jointly published 10 typical overtime cases in which the courts set out the criteria for the application of the law to disputes concerning working hour systems, overtime pay, employee entitlement to rest and leave, etc.

One of the cases discussed the "996" work system, which is publicly a hot topic. Mr. Zhang joined a delivery service in June 2020 for a monthly salary of RMB 8,000. The probation period was three months. The delivery service's rules provided that working hours were from 9 am to 9 pm, six days a week, i.e., what is called the "996" work system. Two months into the job, Mr. Zhang refused the overtime arrangements on the grounds that they materially exceeded the statutory maximum. The company terminated his employment contract forthwith, on the grounds that he had not satisfied the employment conditions during the probation period. Mr. Zhang initiated arbitration proceedings, claiming RMB 8,000 in compensation for the company's illegal termination of the employment contract. After hearing the case, the arbitration commission rendered a final award requiring the company to pay RMB 8,000 in compensation for its illegal termination of the employment contract. Furthermore, it reported the case to the labor protection monitoring institution. The monitoring institution issued a warning to the delivery service and ordered it to correct its rules that violated laws and regulations.

In their analysis of the case, the Two Authorities pointed out that the provision in the delivery service's rules that "working hours are from 9 a.m. to 9 p.m., 6 days a week" exceeded the statutory maximum amount of overtime and should therefore be considered invalid. The employee had refused the illegal overtime arrangements in order to protect his own legitimate rights and interests. As such, his refusal could not serve as basis to determine that he had not satisfied the employment conditions during the probation period.

China's current working hour systems include the standard working hour system, the flexible working hours system and the comprehensive working hours system. For employees in a special position, the company may apply to the relevant authority for permission to implement the flexible or comprehensive working hours system. Nevertheless, most employees are subject to the standard working hour system, with respect to which the law provides that workers should not work for more than eight hours a day, 40 hours a week. If an employer needs to extend the working hours due to special reasons relating to production and business operations, it may extend the working hours for up to three hours a day and a maximum of 36 hours a month, provided that the worker's health is not put at risk.

This case shows that under the standard working hour system, the "996" work system violates the statutory standard for overtime. Nonetheless, what one often sees in practice is that the employee applies for arbitration or institutes an action claiming overtime pay from the company and that the case is concluded with the company's full payment of overtime pay. In this case, however, the employee directly challenged the "996" system and obtained the support of the arbitration commission. Moreover, the Supreme People's Court and the Ministry of Human Resources and Public Security published the case as a typical one and specifically pointed out that an employer's rules and relevant work arrangements must comply with laws and administrative regulations.

Recommended action

Employers to note

Beijing issues flexible employment measures for Free Trade Zone enterprises

IN BRIEF

On 12 July 2021, the Beijing Human Resources and Social Security Bureau issued "Several Measures To Further Strengthen Flexible Employment by Beijing Free Trade Zone Enterprises" ("Measures"). Consisting of nine articles, the Measures provide employment-related assistance to the China (Beijing) Pilot Free Trade Zone (FTZ), which was formally unveiled last September. The key points for FTZ enterprises are set forth in our alert here

Recommended action

The Measures were issued in order to strengthen the flexibility and innovation of enterprises in the Beijing FTZ. FTZ enterprises can apply the relevant policies in the Measures to, among others, the term of their employment contracts, the way in which they enter into their employment contracts, the scope of their use of dispatched staff, and their applications for special working hours. Such enterprises should also ensure continuity of their day-to-day HR management and compliance.

Shanghai court rules on whether conversation records on an office cell phone are private and whether they can be introduced as evidence

IN BRIEF

An internet company's sales rep ("Rep") resigned at the end of 2019 and returned his office phone to his employer.

After his departure, the company discovered that he had engaged in "order transferring" (the practice whereby a sales rep who has landed an order takes it to another company rather than the company employing them). They found a relevant conversation recording on the aforementioned office phone. The recording included sales negotiations between the Rep and another company.

The company's employee handbook states that employees who transfer orders should pay compensation equal to 40% of the transaction price. The company subsequently initiated arbitration proceedings with an employment arbitration institution, claiming compensation from the Rep for losses in excess of RMB 140,000 suffered as a result of his order transferring.

The employment arbitration institution sided with the company and determined that the Rep had engaged in order transferring. Its award required the Rep to pay the company more than RMB 140,000 in compensation. Dissatisfied with the award, the Rep filed a lawsuit and argued that he had merely been engaging in a friendly, routine exchange of notes with a like-minded friend in the industry. They had not discussed any specific project, time, amount or people, and the company did not suffer any business loss. The company, on the other hand, had materially violated his privacy by remotely monitoring his phone without prior notice. Accordingly, the recording could not serve as evidence of the facts of the case.

The company countered that the recording constituted conclusive evidence. It had been entitled to the conversation information because it had issued the phone to its employee for work-related use. Therefore, its claim for compensation from the employee was justified and lawful.

The court at first and second instance sided with the Rep for the following reasons:

1. Calls on an office phone are also private and such privacy may not be violated by the employer.

Article 1032 of the Civil Code of the People's Republic of China provides that natural persons are entitled to privacy and that no entity or individual may violate another person's privacy by means of spying, interference, divulgence or publication, etc.

In the present case, the office phone was indeed owned by the company, but the conversations arising from the employee's use thereof in the course of work, everyday life, social interactions, etc., were private. Accordingly, it was illegal for other persons to interfere with, learn of, collect, use or publish such conversations without the individual's consent.

2. The extent of an employer's exercise of its right to monitor and manage its employees should be lawful and reasonable.

Employees retain all their basic rights as citizens. The extent of an employer's exercise of its right to manage and monitor its employees must be lawful and reasonable. When exercising their management rights, employers should take even more care to perform their obligations and give maximum protection to the privacy of their employees. In the present case, the employer recovered conversation data from an office phone without the employee's consent. Such conduct does not constitute lawful, necessary and proper management. Rather, it constitutes abuse of management and supervision rights and should be prohibited.

Recommended action

China's legal protection of personal information is becoming increasingly strict, as demonstrated by the passage of the PIPL (see above). In the course of employee relations, companies will inevitably face issues relating to employee privacy and personal information. Companies should note this legal trend with respect to personal information.

The case is a reminder of the following:

Company policies should reasonably regulate in advance the company's right to monitor its employees' use of company IT resources and communication systems, including telephones, computers, etc., and the ways in which it monitors such use (as a defense against employees' privacy claims). In addition, we recommend that this policy be stated in the employees' employment contracts. As an employee's signature on the employment contract shows their consent, the contract's use as evidence in a future dispute will be favorable to the company.

Additionally, at the time the company gathers evidence of an employee's disciplinary offense, it must pay special attention to the way in which it does so. If the company gathers evidence in a way that breaks the law, the evidence will be illegal and thus inadmissible.

Beijing court rules that employee was lawfully dismissed for repeatedly failing to respond to work-related messages while working from home

IN BRIEF

Due to the COVID-19 pandemic, Company A arranged for all of its employees to work from home and required them to stay in touch on work matters by using Feishu software. Company A's employee ("Yang") repeatedly failed to reply to his work messages on Feishu. Company A gave Yang multiple written warnings, emphasizing the work discipline to be observed when working from home and requiring Yang to stay in touch on Feishu during working hours, but Yang remained lax in responding. Company A unilaterally dismissed Yang for "repeatedly failing to submit to management by the Company and committing a serious breach of work discipline." Dissatisfied with Company A's decision, Yang sued for unlawful dismissal.

The Beijing court held that employees should submit to management by their company and observe work discipline rules when working from home. Unlike normal circumstances where all employees work in the office, work-from-home arrangements cause employees to work in different physical locations. Working from home is bound to have an impact on work communications and work arrangements. Given these circumstances, there was nothing wrong with Company A requiring its employees to communicate about their work and reply to messages during working hours by means of the Feishu software. In this case, Yang repeatedly and over a long period of time failed to reply to Company A's work-related messages. He did not diligently perform his duties even after many warnings. As Yang's conduct amounted to a serious breach of work discipline, his dismissal by Company A was lawful.

Recommended action

Due to COVID-19, many companies are arranging for their employees to work from home. Managing remote employees means that companies are faced with novel HR management issues. We recommend that employers formulate specific work-from-home policies based on the features of the relevant working arrangements. The policies should clarify the work discipline requirements and the consequences for the employee for tardy work, etc. (for example, failure to respond to a work-related message within half an hour would constitute a half day's absence without leave and warrant a written warning; an aggregate two days of absence without leave or receipt of two written warnings in a month would warrant summary dismissal). To ensure effective application of the work-from-home policy, we recommend that it be formulated through democratic consultation as provided for in Article 4 of the Employment Contract Law.

Shenzhen court rules on dismissal of employee who used umbrellas to shield herself from an office camera

IN BRIEF

Company A installed several high-definition cameras in its office in June 2019. One of the cameras was located above the workstation of an employee ("Zhang"). As Zhang's protests to the company that the camera could breach her privacy were unsuccessful, she unfolded two umbrellas at her work station to block the camera. Company A's HR manager and its labor union chairman tried several times to persuade Zhang to remove the umbrellas, but Zhang refused. Company A gave Zhang two written warnings, but she continued to put up the umbrellas for as long as 10 working days after her receipt of the second written warning. After notifying the labor union, Company A dismissed Zhang for serious breach of work discipline or regulations. Dissatisfied with her dismissal, Zhang sought damages from Company A for unlawful termination of her employment contract. She successively initiated four procedures, namely employment arbitration; followed by first instance proceedings before the People's Court of Qianhai Cooperation Zone, Shenzhen, Guangdong; second instance proceedings before the Intermediate People's Court of Shenzhen, Guangdong; and a retrial before the Higher People's Court of Guangdong.

Zhang lost all four proceedings (arbitration, actions at first and second instance and Higher Court retrial) for unlawful termination. The courts held that her dismissal by Company A had been lawful. The courts' judgments were chiefly based on the following grounds:

1. Company A lawfully exercised its management powers and did not breach Zhang's privacy. On the one hand, the courts held that the purpose and limits of the installation of cameras in the office had been lawful. According to relevant evidence provided by Company A, it had installed the cameras in order to ensure the safety of people and property in the workplace. They had been installed in public areas with many people rather than in private areas of employees. Furthermore, the cameras were located in corners and the recorded video could only be viewed by senior management staff. The courts held that Zhang had provided insufficient evidence to prove that Company A's installation of the cameras had invaded her privacy. Even though the cameras could record her company account and password information, that information was intended for work-related matters anyway and did not constitute Zhang's private information. Company A could use other technical means to obtain account passwords without installing cameras. In addition, so long as Zhang was dressed properly, the camera in the corner could not film any private parts of her body.
2. The company's dismissal of Zhang was lawful, because she had committed a serious breach of work discipline. The courts held as follows: Company A's HR manager had twice talked to Zhang about her umbrellas and given her a total of two written warnings, but she had continued to put the umbrellas up for as long as 10 working days thereafter. Zhang's refusal to abide by Company A's management instructions not only had a considerable negative effect on her co-workers but it made it look as if the company's management rules existed on paper only. Therefore, her conduct had constituted a serious breach of work discipline and her dismissal on those grounds had been lawful.

Recommended action

This is one of the cases published by the Shenzhen Intermediate People's Court as a typical employment dispute case. It involves a conflict between an employee's right to privacy and the employer's management powers. Currently, many employers (particularly those in the retail and manufacturing sectors) are starting to consider installing cameras on their work or business premises in view of the special characteristics of their industry or business. They are doing so in order to safeguard employee safety by providing a safe work environment and to protect the property of their employees, customers and third parties. However, in light of new requirements in the PIPL (see above), companies will need to be careful and fulfill relevant legal requirements when installing security cameras in the workplace.

Delivery workers to get new protection — seven authorities issue an opinion on protection of salary income and a new method of insurance enrollment

IN BRIEF

Given the rapid development of China's delivery industry, delivery workers have become an important segment of the country's gig economy. Recently, seven national authorities jointly issued an "Opinion on Duly Protecting the Legitimate Rights and Interests of Delivery Workers". The opinion expressly calls for the introduction and improvement during the term of the 14th Five-Year Plan of a system to protect the legitimate rights and interests of delivery workers. The main points are set forth below:

1. Formulation of a "Guideline for Settlement of Last-Mile Delivery Fees" — Enterprises should be supervised as to whether their last-mile delivery fees remain at a reasonable level. The income level of delivery workers should be stabilized and the issue of the delivery fee rate for single items should be resolved.
2. Formulation of a "Labor Quota Standard for Delivery Workers" — The labor intensity of delivery workers should be stabilized and those who work harder should be paid more. While the sector's labor efficiency should remain reasonable, overworking of delivery workers should be avoided.
3. The establishment of trade unions in enterprises that provide delivery services should be supported. Trade unions and industry associations should be guided in setting up a collective bargaining mechanism in the industry.
4. The methods of calculating and paying premiums for work-related injury insurance should be improved. Social insurance premiums should be paid for directly employed delivery workers. Grass-roots delivery outlets with gig workers and high worker turnover could calculate and pay work-related injury insurance premiums by taking into account the average level, or the percentage of sales, of the salaries of all urban employees in the area, and enroll delivery workers in work-related injury insurance on a priority basis.
5. The practice of "imposing fines instead of managing (workers)" should be stopped. Delivery services should be guided in improving their performance evaluation mechanism, taking responsibility as enterprises, practicing compliant HR management, and implementing work safety standards.

Recommended action

The opinion puts forward new tasks and new objectives for future labor protection of delivery workers. Delivery services should pay attention to the formulation and implementation of relevant national policies, guidelines and standards, and timely adjust their HR management practices accordingly.

The Court of Appeal considers notice provision in an employment contract and adopts the modern approach in determining penalty clauses

IN BRIEF

On 11 June 2021, in *Law Ting Pong Secondary School, v. Chen Wai Wah* [2021] HKCA 873, the Court of Appeal found that a notice and termination provision in an employment contract could take effect prior to the first day of work and that such a provision was not a penalty clause.

Facts of the case

A secondary school recruited a teacher for the school term commencing on 1 September 2017. In this regard, the teacher signed and returned three documents: (1) Letter of Appointment; (2) Conditions of Service; and (3) Letter of Acceptance.

The Letter of Acceptance stated that the notice and termination provision of the employment contract would come into immediate effect and that the teacher would need to give three months' notice to terminate the employment contract. This was in contrast to the wording of the Conditions of Service, which provided that the notice period applied during the contract period (which started on the first day of work).

On 22 August 2017, 10 days before the start of school term, the teacher backed out of the employment contract and informed the school that he would remain with his current employer. The school then successfully brought a claim in the Labour Tribunal against the teacher for payment in lieu of notice. The Labour Tribunal's decision in favour of the school was overturned by the Court of First Instance on appeal. The school then appealed to the Court of Appeal.

The issues in dispute were the following:

- Whether the termination provision became binding upon signing of the employment contract ("Contractual Interpretation Issue"); and
- If so, whether it was a penalty clause and was therefore unenforceable ("Penalty Clause Issue").

Conclusion

The Court of Appeal allowed the school's appeal finding that the Letter of Acceptance formed part of the employment contract and therefore the notice and termination provision became binding.

Applying the English case of *Cavendish Square Holdings v. Makdessi* [2016] AC 1172, the doctrine of penalty can only be engaged when there has been a breach of contract, that is, a clause can only be a penalty if it operates upon a breach of contract. In other words, it is a secondary obligation triggered by breach of a primary obligation. The court in Law Ting Pong therefore first considered whether the payment in lieu provision was a secondary obligation arising from breach of a primary obligation, or simply a primary obligation to pay. It came to the conclusion that it was a primary obligation to pay rather than a secondary obligation arising upon breach of a primary obligation of performance. The school's claim was not a claim for liquidated damages; rather it was a claim for recovery of a contractual debt arising from a contractually agreed method of lawful termination. Therefore the provision did not engage the law on penalty at all because it does not operate upon a breach of contract but was a contractually agreed method of lawful termination and accordingly was enforceable.

Importantly, the Court of Appeal went on to hold that even if the law on penalty was engaged, the notice and termination provision would not have been a penalty clause. In this regard the Court applied the modem approach in Cavendish in determining whether a clause is a penalty clause. The true test is whether the clause is out of proportion to the innocent party's legitimate interest in the performance of the contract or some appropriate alternative to performance that goes beyond compensation. The court should first identify the legitimate interest of the innocent party that is being protected by the clause, and then assess whether the clause is out of all proportion to the legitimate interest by considering the circumstances in which the contract was made. In this case, the court recognized the school's legitimate interest beyond purely financial considerations, such as having a steady and sufficient number of teaching staff for its students to ensure proper operation of the school curriculum and extra-curriculum programme.

Recommended action

When drafting employment contracts, employers should avoid using multiple documents where possible. The use of multiple documents increases the risk of contradictory wording and may give rise to disputes as to which documents form part of the employment contract and which prevail.

Hong Kong's Employment (Amendment) Bill 2021 increases statutory holidays

IN BRIEF

On 7 July 2021, Hong Kong passed the Employment (Amendment) Bill 2021, which will increase the number of statutory holidays under the Employment Ordinance by five days to a total of 17. Currently, all employees are entitled to 12 days of statutory holidays and only some employees in certain sectors (such as banks and educational establishments) are entitled to 17 days.

The amendment means that all employees over a gradual period (one holiday will be added ever two years until 2030) will be eligible to the all 17 statutory holidays.

The five relevant statutory holidays are as follows:

- From 1 January 2022 - the Birthday of Buddha (the eighth day of the fourth lunar month)
- From 1 January 2024 - the first weekday after Christmas Day
- From 1 January 2026 - Easter Monday
- From 1 January 2028 - Good Friday
- From 1 January 2030 - the day following Good Friday

Recommended action

Review contracts and policies. Contracts should be updated to reflect the new holiday policies.

Once such days become statutory holidays, employers must comply with the provisions in the Employment Ordinance covering statutory holidays (e.g. they must comply with notice provisions on granting an alternative holiday or substituted holiday within the prescribed timeframes).

The jurisdictional limit of Minor Employment Claims Adjudication Board increases from HKD 8,000 to HKD 15,000 per claimant

IN BRIEF

The jurisdictional limit of the Minor Employment Claims Adjudication Board (MECAB) has increased from HKD 8,000 to a maximum of HKD 15,000 per claimant with respect to any claim for which the right of action arises on or after 17 September 2021. The jurisdiction of the MECAB is still confined to a claim not exceeding HKD 8,000 per claimant if the right of action arose before this date.

The MECAB was established within the Labour Department to provide a simple, quick and inexpensive adjudication service for employment claims arising from disputes of statutory or contractual rights of employment. Any employment claims above the jurisdictional limit of MECAB will be adjudicated by the Labour Tribunal of the Judiciary.

Recommended action

For information only

Legco passes the Personal Data (Privacy) (Amendment) Bill criminalizing doxxing acts

IN BRIEF

On 29 September 2021, the Personal Data (Privacy) (Amendment) Bill ("Bill") was passed in Legco. Aiming to strengthen enforcement against doxxing cases, the Bill criminalizes doxxing acts by way of a two-tier offense regime and confers on the Privacy Commissioner for Personal Data ("Privacy Commissioner") statutory powers to conduct criminal investigations and institute prosecution for doxxing cases.

Under the Bill, the proposed doxxing offenses extend to disclosure of personal data on an electronic platform (which would cover, for example, an online social media platform). This may have implications for employers if employees have used the employer's electronic platform when engaging in doxxing acts. In particular, if an employee is suspected by the enforcement authorities to have engaged in doxxing acts by using the employer's electronic platform, the Privacy Commissioner may serve a cessation notice on the employer directing the employer to take cessation action (e.g., removing the relevant message from the electronic platform) within a designated timeframe. The Bill also proposes providing the Privacy Commissioner with wide powers, including the power to enter and search premises; seize, remove and detain material in the premises; and reproduce and make copies of material stored in electronic devices.

Recommended action

Employers should consider reviewing their internet usage policies to expressly prohibit doxxing acts. Additionally, employers may need to ensure that certain staff are trained to respond to such investigation and enforcement action.

District Court rejects discrimination claim against employer for terminating employee who is on long-term sick leave

IN BRIEF

On 3 September 2021, the District Court gave judgment in the case of *Lee Chi Bun v Novartis Pharmaceuticals (HK) Ltd* [2021] HKDC 1101, rejecting an employee's claim that the termination of the employment amounted to discrimination by the employer.

Facts of the case

The employee was employed as a sales supervisor. He went on sick leave in December 2015 after having been diagnosed with end-stage renal failure and/or chronic kidney disease. Upon his return to work on 8 January 2016, the employer's HR manager informed him that he had scored unsatisfactorily in his 2015 performance review and gave him the option to resign. Subsequently, the employee took further sick leave for almost the whole of 2016. On 23 December 2016, when the employee was still on unpaid sick leave, the employer terminated his employment on the ground of redundancy. The employee brought proceedings against the employer under the Disability Discrimination Ordinance, alleging that his employment was terminated because of his medical condition.

Conclusion

The District Court rejected the claimant's evidence, holding that the claimant's role was eliminated solely as a result of the employer's ophthalmology business unit being integrated with another company. The judge noted that apart from the employee's position, other positions were also eliminated as part of the integration exercise and all eliminated positions were not refilled after the integration. There was no evidence that the other employees whose positions were eliminated suffered from any disability. Of relevance also was that Novartis had concerns about the employee's performance before it had knowledge of his medical condition.

Recommended action

Employers should exercise caution when terminating the employment of an employee who is on long-term sick leave or who has a disability. In light of the potential appearance of discrimination and in order to protect themselves from any possible discrimination claims, employers should ensure that there are strong and justifiable reasons for the termination and that they have a solid paper trail of their decision-making process.

Legco passes the Crimes (Amendment) Bill 2021 introducing new sexual offenses

IN BRIEF

The Crimes (Amendment) Ordinance 2021 came into effect on 8 October 2021. It introduces specific offenses against voyeurism, unlawful recording or observation of intimate parts, publication of images originating from such offenses, and publication or threatened publication of intimate images without consent. The new offenses carry a maximum penalty of five years' imprisonment.

Recommended action

Employers may consider reviewing their existing policies on workplace conduct and revise them where appropriate. In particular, in addition to any existing prohibition on sexual harassment in the workplace, employers may draw employees' attention to these new specific offenses.

High Court grants injunction and upholds non-competition covenant in employment contract

IN BRIEF

In the recent case of *BFAM Partners (Hong Kong) Ltd v. Gareth John Mills & Segantii Capital Management Limited* [2021] HKCFI 2904, the High Court upheld a six-month non-competition covenant and granted an injunction to restrain a former employee from working for a competitor.

Facts of the case

- The ex-employee ("Mr. Mills") was employed as a technology consultant by the plaintiff ("First Employer"), under a fixed term contract from 11 February 2019 to 10 February 2020. The First Employer provided fund management services and managed assets and capital for the benefit of institutional investors.
- The employment contract included a non-competition clause ("NCC"), barring him from working for a competitor for a period of six months upon termination of his employment with the First Employer.
- By a letter dated 7 August 2019, the First Employer made an offer to convert Mr. Mills' fixed term contract to a permanent and full-time employment with effect from 8 August 2019. His monthly salary was HKD195,000 per month and all other terms and conditions would remain the same.
- In March 2020, the First Employer's Chief Technology Officer fell ill and Mr. Mills was given additional responsibilities.
- On 22 February 2021, Mr. Mills resigned and gave three months' notice such that that his employment would end on 21 May 2021. Mr. Mills went on garden leave on 1 May 2021 until the end of his notice period. As part of the garden leave arrangements Mr. Mills was reminded of his post-termination restrictions. The First Employer would pay Mr. Mills after the termination date, on a monthly basis, a sum equivalent to his monthly base salary during the six month restriction period.
- Three days after the end of the notice period, Mr. Mills started working as Chief Technology Officer for the Second Employer, a company which the court found was a competitor of the First Employer. The First Employer sought an injunction against both Mr. Mills and the Second Employer to enforce the non-competition clause.
- According to the First Employer, Mr. Mills had been developing IT products and providing services to the First Employer during the relevant time and was privy to confidential information, and that it was legitimate for the First Employer to protect its interests in the confidential information through the NCC. In particular, Mr. Mills had not only acquired confidential information regarding the First Employer's proprietary technology, but also had highly confidential information and sensitive information about the First Employer's trading strategies across all asset classes and products in which it traded.

The First Employer submitted that it had a legitimate interest in protecting two categories of information when an employee leaves employment: (1) Confidential information which the employee cannot use or disclose during his employment without breaching his duty of fidelity to his employer but which, in the absence of an express restrictive covenant, he would be at liberty to use thereafter and (2) Trade secrets. The First Employer submitted that the evidence demonstrated Mr. Mills was privy to both categories of information associated with the products and services contemplated under the NCC which constituted legitimate interests that the First Employer was entitled to protect.

Conclusion

The court found in favour of the First Employer and granted the injunction.

Based on the evidence, the court found that the First Employer had sufficiently demonstrated that the NCC would protect its legitimate interests and it went no further than reasonably necessary to protect the First Employer's legitimate interests. The court noted that a non-competition clause may be necessary to protect an employer's confidential information even if there is a confidentiality clause in the employment contract because it is often difficult to prove whether the information is or is not confidential. In the circumstances of the case, it was reasonable for the NCC to be included in the contract (despite the confidentiality clause) in order to avoid any potential disagreement between the parties on what would be and what would not be confidential information upon termination of the contract.

Applying the balance of convenience test set out in the case of *American Cyanamid Co v Ethicom Ltd* [1975] AC 396, the court considered the granting of the injunction in favour of the First Employer would carry the lowest risk of injustice and cause the least irreparable damage.

Recommended action

For information. Employers should ensure that any post-termination restrictions are tailored to the relevant employee and go no wider than necessary to protect the employer's legitimate business interests.

Minister of Law And Human Rights issues regulation allowing foreigners to enter Indonesia with certain requirements

IN BRIEF

On 15 September 2021, the Minister of Law and Human Rights (MOLHR) issued Regulation No. 34 of 2021 on Granting of Immigration Visas and Stay Permits during COVID-19 Spread Handling and National Economic Recovery ("Regulation 34"). Regulation 34 became effective on the same day.

Criteria for entering Indonesia

Before the issuance of Regulation 34, even foreigners who already held Visit Visas or Limited Stay Visas (VITAS) were not permitted to enter Indonesia. This has now changed with the issuance of Regulation 34, which allows the following foreigners to enter Indonesia as long as they can fulfill certain health protocols determined by the relevant authorities:

a. Service visa holders
b. Diplomatic visa holders
c. Visit visa holders
d. VITAS holders
e. Service stay permit holders
f. Diplomatic stay permit holders
g. Limited stay permit (ITAS) holders
h. Permanent stay permit (ITAP) holders
i. Conveyance crews
j. APEC card holders
k. Traditional border crossers

Foreigners coming from outside Indonesia must carry with them valid negative COVID-19 RT-PCR results and evidence of having completed the full dose of the COVID-19 vaccine. However, this requirement does not apply for foreign conveyance crew members entering Indonesia using yachts. In addition, foreigners under the age of 12 are also exempt from the obligation to have evidence of having completed the full dose of the COVID-19 vaccine.

The Indonesian government can deny foreigners entry to Indonesia if they are coming from countries with a high rate of COVID-19 transmission.

Granting of visas

The granting of Visa Free Facilities and Visas on Arrival continues to be temporarily suspended until the Indonesian government declares that the COVID-19 pandemic is over.

A sponsor of a foreigner may apply to the Director General of Immigration for a Visit Visa and VITAS, based on the activities to be carried out by the foreigner in Indonesia in line with the applicable laws and regulations. Applications can be submitted electronically along with the following documents:

- Evidence of having completed the full dose of COVID-19 vaccine
- Statement letter of willingness to comply with all applicable health protocols in Indonesia
- Evidence of having health insurance/travel insurance and/or statement letter of willingness to pay independently if affected by COVID-19 while in Indonesia

Granting of new stay permits

Stay permit holders who are currently in Indonesia and unable to return to their home country can be granted a new stay permit after obtaining a new Visit Visa or VITAS (as applicable). The foreigners' sponsors need to submit electronically the relevant application to the Director General of Immigration.

Once issued, the new Visit Visa will serve as a visitor stay permit for the foreigner. If the foreigner is granted a VITAS, the ITAS (which is usually issued upon the foreigner's arrival in Indonesia) will be issued after the foreigner reports to the relevant Local Immigration Office where they reside in Indonesia.

Recommended action

For information; as immigration requirements may frequently change, employers are advised to stay abreast of the changes.

MALAYSIA

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

IN BRIEF

On 15 July 2021, the Employees Provident Fund (Addition and Modification to the Purposes for Withdrawal under subsection 54(6)) Order 2021 and the Employees Provident Fund (Amendment) (No.4) Rules 2021 came into effect, amending the EPF Act to allow a member to withdraw an amount not exceeding MYR 5,000, subject to the total combined balance in both Accounts 1 and 2 to increase their income, due to the implementation of the Malaysia' National Recovery Plan (in respect of the pandemic) to control or prevent the spread of COVID-19.

The initiative is being made following the announcement of the National People's Well-Being and Economic Recovery Package ("Pemulih") by Prime Minister Tan Sri Muhyiddin Yassin on 28 June 2021, as a temporary relief measure to help tide EPF members over during the COVID-19 pandemic. The application for withdrawal will be available to all EPF members aged 55 years and below, who maintain a minimum balance of MYR 150 in their account at the time of application. The withdrawal amount must not exceed MYR 5,000 and will depend on the current balance of their account at the time of application. The individual must also have at least MYR 100 remaining in Account 1 after withdrawal. The approved withdrawal amount will be paid to the EPF members over a period of up to five months.

Recommended action

Employers to note

Exemption from requirement to pay levy pursuant to Pembangunan Sumber Manusia Berhad Act ("HRDF Act") for certain groups of employers

IN BRIEF

Pursuant to the Human Resource Development Fund (HRDF) Act, employers with 10 or more employees in industries prescribed under the First Schedule of the Act are required to contribute a levy to the HRDF to promote the training and development of employees, apprentices and trainees.

In light of the pandemic, the government has granted levy payment exemptions to the following groups of employers:

a) Employers falling under the Exempted Industry or Sectors

The Pembangunan Sumber Manusia Berhad (Exemption of Levy) (No. 3) Order 2021 ("HRDF Order No.3") was promulgated on 26 July 2021, to exempt certain types of employers registered with the HRDF from payment of the levy to the Human Resource Development Fund (HRDF) in respect of each employee effective from 1 January 2021 to 30 June 2021 ("HRDF Exemption No.3").

An employer must meet the following criteria to qualify for HRDF Exemption No.3:

- Not have been given an exemption under the Pembangunan Sumber Manusia Berhad (Exemption of Levy) (No.4) Order 2021
- Registered with the HRDF
- Falls within the prescribed list of industries or sectors under the HRDF Order ("Exempted Group")

The Exempted Group are as follows:

- Tourism and recreation industry within the following sectors:
  - Sea and coastal water transport
  - Inland water transport
  - Passenger air transport
  - Tourist accommodation
  - Travel agency and tour operator
  - Library, archive, museum and cultural activities
  - Amusement and recreation activities
- Trading, business and wholesale
  - Sale of motor vehicles
  - Sale of motor vehicle parts and accessories
  - Maintenance and repair of motor vehicles, and sale of related parts (including spare parts) and accessories
  - Retail sale in non-specialized stores
  - Retail trade not in stores, stalls or markets

b) Employers impacted by the COVID-19 Pandemic

The Pembangunan Sumber Manusia Berhad (Exemption of Levy) (No. 4) Order 2021 ("HRDF Order No.4") was promulgated on 26 July 2021, to exempt certain types of employers registered with HRDF who are affected by the COVID-19 pandemic from payment of the levy to the Human Resource Development Fund (HRDF) in respect of each employee effective from 1 January 2021 to 30 June 2021 ("HRDF Exemption No.4").

An employer must meet the following criteria to qualify for HRDF Exemption No.4:

- Not been provided with an exemption pursuant to the HRDF Order No.3
- Registered with the HRDF
- Fulfill the following conditions
  - The application for the exemption has been received by HRDF before 5 March 2021.
  - It has incurred a reduction in annual revenue of more than 30% based on the latest certified financial statement or financial report, or it is currently receiving the latest incentives relating to its business as announced by the federal government at the time the application for such exemption is made.

Recommended action

Employers falling within the criteria above to note

PHILIPPINES

Labor Advisory issued for the protection of food delivery riders

IN BRIEF

On 23 July 2021, the Department of Labor and Employment (DOLE) issued a Labor Advisory prescribing the working conditions of delivery riders in food delivery and courier activities using digital platform.

For delivery riders who are deemed employees of the digital platform company, they are entitled to the applicable minimum benefits under the Labor Code of the Philippines and related laws, including minimum wage, holiday pay, overtime pay, retirement pay, occupational safety and health standards, and social benefits. In addition to these benefits, employees also enjoy right to security of tenure, self-organization, and collective bargaining.

For delivery riders who are deemed independent contractors or freelancers, the terms and conditions of their engagement shall be governed by their respective contract or agreement with the digital platform company. Nevertheless, The contract or agreement should stipulate, among other items,: (1) payment of fair and equitable compensation which shall not be lower than the prevailing minimum wage rate, and (2) compliance with applicable safety and health standards such as using a standard protective helmet and personal protective equipment, and regular road safety training arranged by the digital platform company.

Lastly, the Labor Advisory states that any complaint or grievance either by the delivery riders or digital platform company shall be settled through arbitration, mediation, conciliation, or inspection, whichever is applicable.

Recommended action

For information.

Relevant digital platform companies must comply with the standards issued by the DOLE.

Expediting the passage of the Freelancers Protection Act

IN BRIEF

On 24 August 2021, a Philippine senator announced that the Philippine Senate is expediting the passage of the proposed Freelancers Protection Act (Act), which will provide protection to gig economy workers and freelancers who may be at risk of exploitation or abuse.

The Act aims to provide:

- that freelancers and gig economy workers will receive payment within 30 days of completing the task
- equal remuneration for work of equal value
- safe working conditions
- promotion of worker welfare with regards to rights and interests
- protection from discrimination
- social welfare benefits

Recommended action

Watch for developments, albeit it is unlikely that the Act will become law soon.

Philippines: DOLE issues advisories regarding alien employment permit (AEP) requirements

IN BRIEF

The DOLE issued Advisories 4, 6, 7 and 8-2021 regarding the requirements for the issuance and cancellation of alien employment permits (AEPs) for foreign employees in the Philippines.

Please read the full Baker McKenzie alert here.

Recommended action

Applications for the issuance and cancellation of AEPs must comply with the foregoing DOLE advisories.

SINGAPORE

Singapore: Employment investigations and suspensions - What are an employer's duties and obligations?

IN BRIEF

When allegations of misconduct are leveled against employees, employers are often left with the task of conducting internal investigations to get to the bottom of the matter. Employment legislation in Singapore does not prescribe specific standards or processes for such investigations. This has given rise to a number of practical questions for both employers and employees, including questions relating to:

- The minimum standards an employer has to adhere to when conducting investigations
- Whether there is an obligation to disclose the outcome of investigations to the employee
- Whether employers must safeguard an employee's economic interests and reputation or combat misinformation about an employee in the market

The Singapore High Court (SGHC) in *Dong Wei v Shell Eastern Trading (Pte) Ltd and another* [2021] SGHC 123 addressed these issues. The case involved termination of an employee's employment following investigations into allegations of conflicts of interest, and the decision provides helpful guidance to employers on how to strike a balance between managing their businesses as they see fit and the employee's interest in being treated fairly during the course of internal investigations.

Please read the full Baker McKenzie alert here.

Recommended action

For information.

Parents of stillborn babies to qualify for paid benefits

IN BRIEF

On 2 August 2021, several amendments to the Child Development Co-Savings Act (Act) were passed. Amendments to the Act include:

- Eligible parents of stillborn Singaporean babies to qualify for paid benefits such as maternity and paternity leave. Currently, "stillborn" is a miscarriage after the 28th week of pregnancy but there have been discussions to change this to after the 22nd week of pregnancy.
- Those who have had to give up their remaining parental leave and who are retrenched will be paid benefits.
- Adoptive mothers and working fathers who previously would not have qualified for adoption or paternity leave respectively by reason of their employment arrangements (i.e. they are on short term contracts or had their contracts expire shortly before the adoption of the child) can now receive cash benefits. A condition is that the parent must have worked as an employee/self-employed person for at least 90 days in the year before the child's birth or their eligibility date to adopt a child. Those who have worked longer than 90 days will receive higher benefits.
- Fathers are not entitled to leave for children born from extramarital affairs
    - The mothers will still receive paid childcare and unpaid leave for the well-being of the child.
    - If the birth parents marry, then the father will become eligible for childcare leave.

Recommended action

Employers must comply with the new family-related leave amendments.

Singapore: Mandatory notifications extended to all retrenchments

IN BRIEF

The Ministry of Manpower (MOM) currently requires that it be notified when an employer with at least 10 employees retrenches five or more employees within a six-month period. The notification to the MOM must be made via the online mandatory retrenchment notification within five working days after the employer provides notice of retrenchment to the affected employee(s).

From 1 November 2021, the scope of notification will be revised and extended to cover all retrenchments, regardless of the number of employees affected. This development follows the assurance earlier provided by the Minister for Manpower that the MOM and related partners and agencies will do their best to help displaced workers — particularly professionals, managers and executives (PMEs) — find jobs in growth sectors.

Please read the full Baker McKenzie alert here.

Recommended action

Employers must now notify the MOM of retrenchments regardless of the number of employees affected.

Singapore: Policies announced to support the Singapore workforce, deter nationality discrimination

IN BRIEF

Singapore's Prime Minister Lee Hsien Loong, at his recent National Day Rally speech, acknowledged the anxiety felt by middle income Singaporeans over foreign work pass holders, especially with the economic uncertainty heightened by COVID-19.

Addressing what he described as personal and emotional arguments by Singaporeans over perceived foreign competition for jobs and opportunities, the prime minister signaled that the government will introduce new anti-discrimination laws with a range of penalties extending beyond the current administrative penalties, such as restrictions on an employer from hiring foreign workers.

Please read the full Baker McKenzie alert here.

Recommended action

For information.

TAIWAN

Taiwan: Government issues first guidelines on work from home – What employers need to know

IN BRIEF

On 23 June 2021, Taiwan's Ministry of Labor (MOL) issued the "Occupational Safety and Health References Guidelines on Working from Home" ("Guidelines"), indicating that working from home (WFH) has become a mainstream work model regulated by the labor authority.

By way of background, prior to the COVID-19 pandemic, WFH was not common practice in Taiwan. Even during the early stages of the pandemic outbreak, few organizations implemented WFH arrangements and there were minimal regulations governing this issue since the outbreak of COVID-19 was well contained in Taiwan. However, due to a surge of COVID-19 cases in May 2021, Taiwan's COVID-19 warning level was heightened to level 3 effective 15 May 2021 (later lowered to level 2 on 27 July 2021), and most employees were forced to WFH overnight. To cope with this significant change, the MOL issued the Guidelines in late June 2021.

We foresee that even after the end of the COVID-19 pandemic, WFH or at least a hybrid working model will continue to be the new normal in Taiwan. The shift to remote work raises some complicated legal issues for employers.

Please read the full Baker McKenzie alert here.

Recommended action

For information while many employees continue to work from home.

Taiwan: Epidemic Warning lowered to level 2 - What employers need to know

IN BRIEF

Taiwan's epidemic level was lowered to level 2 as of 12 October 2021.

Notwithstanding that a considerable number of restrictions were eased under Level 2, local governments and the general public remain cautious and conservative about the relaxed measures.

Please read the full Baker McKenzie alert here for the main points employers should be aware of.

Recommended action

For information.

Taiwan: Issues Regarding Office Closure Due to COVID-19

IN BRIEF

As a result of the COVID-19 pandemic, many organizations have upgraded their pandemic countermeasures. Many companies have implemented work-from-home or a remote work plan in response to the pandemic to reduce the potential impact caused by COVID-19 and to ensure continuity of business operations.

One of the critical issues for work-from-home arrangement is how to keep an employee attendance records. According to the latest ruling issued by the Ministry of Labor (MOL), companies may follow the 'Guiding Principles for Employees Work Time Away from the Business Premises' to determine the working hours and maintain attendance records. Previously the Principles applied to only four categories of workers: news media employees; teleworkers; outside salespersons; and drivers of public transportation vehicles. Now the MOL has confirmed its application to other types of employees, including work-from-home employees.

Please read the full Baker McKenzie alert here.

Recommended action

For information

THAILAND

Updated COVID-19 relief measures for employers and employees issued on 19 July

IN BRIEF

- Starting 13 July 2021, employers and employees who are financially affected by measures to contain COVID-19 can temporarily suspend or postpone their contributions and savings to the provident fund from July until December 2021.
- In addition, the Cabinet on that same date approved in principle the following relief measures for employers and employees registered with the Social Security Fund who are in the dark red zone provinces (i.e., Bangkok, Nakhon Pathom, Nonthaburi, Pathum Thani, Samut Prakan, Samut Sakhon, Narathiwat, Pattani, Yala and Songkla) and operate in certain businesses (e.g., construction, lodging and food services, art, entertainment and recreational activities, and transport and warehousing businesses):
  - Employees Relief Measure – Thai employees who are unpaid due to the COVID-19 outbreak will be entitled to receive additional compensation of THB 2,500 for one month, subject to the prescribed conditions. This measure is in addition to the employees' entitlement to receive 50% of their wages, capped at THB 7,500 per month, for up to 90 days. As a result, Thai employees registered with the Social Security Fund will be entitled to receive compensation of not more than THB 10,000 from the government.
  - Employers Relief Measure – Employers will be entitled to receive compensation of THB 3,000 for each employee, but not for more than 200 employees in total and for one month only.

Recommended action

- This can be done by notifying the registrar and submitting the required documents, including the employer's letter confirming the difficulty in operating its business as a result of the COVID-19 situation.
- For the cash relief measures, employers and employees can verify their eligibility from the Social Security Office website.

COVID-19 relief measure for pregnant workers issued on 26 August

IN BRIEF

- The Ministry of Labour has issued a notification requesting cooperation from employers in implementing measures to help protect pregnant workers.
- Since such measures are not mandatory, it remains to be seen how employers will comply with them in practice. It should also be noted that termination of pregnant employees due to their pregnancy is illegal.

Recommended action

- For pregnant workers with a medical certificate confirming their pregnancy, employers are requested to consider implementing a work-from-home policy or assigning work with minimal physical contact or interaction with a large group of people.
- Employers should also arrange for pregnant workers to take leave with full pay during the COVID-19 outbreak.
- The leave days in this situation should not be considered statutory holidays or annual vacation days of the workers in question.

Different retirement ages solely based on gender may violate the LPA

IN BRIEF

- The concept of equal treatment is recognized by Thai labour laws and is evident in the Thai Labour Protection Act (LPA), in which Section 53 clearly states that when performing the same work or work of a similar nature, the employer must give their employees equal wages, overtime pay, holiday pay and overtime on a holiday pay, whether the employee is male or female.
- Section 53 was amended to include work of the same value. In other words, if the value of work done by a male employee and a female employee is the same, both shall be treated equally in terms of the wage, overtime pay and holiday pay.
- Section 15 of the LPA requires an employer to treat male and female employees equally in employment, unless the description or nature of work prevents such treatment. As seen from its provision, Section 15 does not limit the equal treatment requirement to only specific statutory payments, but also sets the broader requirement that in employment, employers must not treat employees differently based on their gender, unless it falls under the exceptions mentioned above.
- The Supreme Court previously ruled that Section 15 of the LPA also extends to the issue of retirement age for different genders. In this regard, the LPA does not prescribe a mandatory retirement age.

Recommended action

Based on this court precedent, if employers set a retirement policy for different ages based solely on the gender of the employees, they may be in violation of the LPA.

New long-term resident visas for wealthy and highly skilled foreigners as an economic and investment stimulus

IN BRIEF

- On 14 September 2021, the Cabinet approved in principle a new economic and investment stimulus to bring in investment and specialized workers into the country by attracting wealthy and highly skilled foreigners to reside in Thailand on a long-term basis.
- New types of long-term resident visas will be issued to accommodate high-potential foreign nationals wishing to stay in Thailand on a long-term basis. Qualifications required in order to apply and the benefits offered under the new types of visa are as follows:
  - Wealthy global citizens
    - Criteria:
      - Having at least USD 500,000 investment in Thai Government bonds, foreign direct investment, or real property;
      - Having an annual salary or pension of at least USD 80,000 in the last two years; and
      - Having assets of at least USD 1 million
  - Wealthy pensioners
    - Criteria
      - Having at least USD 250,000 investment in Thai government bonds, foreign direct investment or real property, and having at least USD 40,000 annual pension; or
      - Having at least USD 80,000 annual pension, in absence of investment
  - Work-from-Thailand professionals
    - Criteria
      - Having an annual personal income (e.g., salary, investment income) of at least USD 80,000 in the last two years; or
      - Having an annual personal income of at least USD 40,000 in the last two years, provided that the applicant also meets the following requirements:
        - Holding a master's degree or higher
        - Possessing intellectual property or being granted Series A investment; and
        - Having at least five years of working experience

- High-skilled professionals
  - Criteria
    - Having an annual personal income (e.g., salary, investment income) of at least USD 80,000 in the last two years; or
    - Having an annual personal income of at least USD 40,000 in the last two years, provided that the applicant also meet the following requirements:
      - Holding a master's degree or higher; and
      - Having at least five years of working experience in Targeted Industries*

    *Targeted industries include, among others, new-generation automobiles, smart electronics, quality tourism, agriculture and biotechnology, high-value-added food processing, robotics.

- Revision of existing laws and regulations related to the visa
  - In order to implement this economic and investment stimulus, the relevant government agencies have now been assigned to consider various work permit and visa relaxation measures and related actions, including the following:
    - The Ministry of Interior to consider issuing new types of visas and related exemptions and benefits for the following:
      - Exemption for Visa and Smart Visa holders from the requirement to report to officials if the stay period exceeds 90 days
      - Amendment of laws relating to land possession/ownership
    - The Ministry of Labour to consider allowing foreigners to have the right to work for both employers based in Thailand and other countries by granting an automatic work permit together with the visa
    - The Royal Thai Police to consider excluding the visa holders from the permit to stay requirement to hire four Thai employees for one foreigner
    - The Board of Investment to consider setting up a service center to specifically support and facilitate the visa measures

Recommended action

For information

Extended relief measure for Social Security Fund approved by the Cabinet issued on 23 September

IN BRIEF

- The eligible period for reduction of the contribution rates to the Social Security Fund (SSF) from 5% to 2.5% of wage applicable for three months concluded in August 2021.
- The Cabinet on 21 September 2021, approved in principle the new draft regulation to reduce monthly contribution rates of employers and employees to the SSF from 5% to 2.5% of employee's wages.
- The reduced rates will be applicable for three months, from 1 September 2021 to 31 November 2021. From 1 December 2021, the rates will be reverted to the original rate of 5%.
- The regulation has already been issued, and the reduced rates are already effective.

Recommended action

Employers to use new reduced contribution rate for the SSF

Vietnam: How to reopen and maintain factory operations during COVID-19

IN BRIEF

Vietnam has been experiencing a "fourth wave" of COVID-19 cases since the end of April 2021. With the aim of maintaining the dual goals of economic growth and epidemic prevention, manufacturing enterprises, especially in industrial zones, are encouraged, or in some cases required, to arrange for employees to temporarily work, eat and sleep on-site if they want to continue operations. This model is called "three-on-the-spot", or "3T". Alternatively, these enterprises must arrange one transportation route between the accommodation location and the workplace, which is called "one route, two destinations." These are applicable options for the concurrent isolation and production arrangement ("concurrent isolation and production arrangement") and have been respectively applied in Bac Ninh and Bac Giang since May and early June this year, when the province was substantially impacted by COVID-19.

Many provinces in southern Vietnam have recently also required this arrangement for enterprises that wish to reopen in the area.

Please read the full Baker McKenzie alert here.

Recommended action

For information

Amendments and supplements to regulations on compulsory social insurances

IN BRIEF

On 7 July 2021, the Ministry of Labor, War Invalids and Social Affairs (MOLISA) issued Circular 06/2021/TT-BLDTBXH to amend and supplement Circular 59/2015/TT-BLDTBXH detailing and guiding implementation of several provisions of Law on Social Insurance regarding compulsory insurance ("Circular No. 06").[1] Significant amendments and supplements include:

- In terms of maternity regime:
  - A childbirth allowance equal to two months' basic salary will be available to the father of a newborn child the month their child is born if the mother is not eligible for maternity benefits.[2]
  - Where a female employee is pregnant with twins or more infants and her baby (babies) is stillborn, she will enjoy maternity allowance for childbirth and lump-sum allowance upon childbirth for her babies, including in respect of the stillborn baby.[3]
  - When calculating the maternity leave period, if the employee is taking annual leave, personal leave, or unpaid leave, any maternity leave period coinciding with their annual leave, personal leave, or unpaid leave shall not be counted as for the purposes of determining entitlement to the maternity leave benefits.[4]
- In terms of monthly salary for social insurance contributions:
  - Since 1 January 2021 onwards, the monthly salary on which social insurance premiums are based is the employee's base salary, salary allowances and other additional amounts prescribed in Circular No. 10/2020/TT-BLDTBXH dated 12 November 2020[5] (specifically Point a, Item b1 of Point b, and Item c1 of Point c, Clause 5, Article).

Recommended action

Employers should review Circular No. 06 to ensure compliance.

[1] https://luatvietnam.vn/bao-hiem/thong-tu-06-2021-tt-bldtbxh-205784-d1.html
[2] Article 1.5, Circular No. 06
[3] Article 1.6, Circular No. 06
[4] Article 1.7, Circular No. 06
[5] http://english.molisa.gov.vn/Pages/Document/Detail.aspx?Id=40656

Guidance on protection of employees who make a labor denunciation

IN BRIEF

In Vietnam, if the employee is of opinion that the employer's decisions or behaviour has breached labor laws and infringed the employee's rights, the employee can make a claim or "labor denunciation" to the employer or the labor inspectors to protects the employee's rights.

On 07 September 2021, the Ministry of Labor, Invalids and Social Affairs issued Circular No. 09/2021/TT-BLDTBXH amending and supplementing several provisions of Circular No. 08/2020/TT-BLDTBXH on 15 October 2020 which covers protection of employment for denouncers who are workers under labor contracts ("Circular No. 09"). Specific points to note are:

- Procedures for protection must comply with the provisions of the Law on Denunciation.
- Where the employer fails to comply with the employment protection measures for the person entitled to the protection, the executive board of the grassroots trade union or the management board of the employees' organization at the enterprise of which the employee is a member, will give written opinions to the employer, concurrently report the case to the authority that issued the decision to apply protection measures and report on the matter to the immediate upper-level of the employees' representative organization (if any) so that such organisations settle the issue timely and ensure employment protection measures are in place for the such persons.

Recommended action

Employers should familiarise themselves with this Circular.

New policies on supporting employees and employers facing difficulties due to the COVID-19 pandemic

IN BRIEF

Resolution No. 68/NQ-CP regarding several policies on supporting employees and employers facing difficulties due to the COVID-19 pandemic, was issued by the Government on 1 July 2021 ("Resolution No. 68")[7], along with Decision No. 23/2021/QD-TTg[8] implementing Resolution No. 68, which was issued by the Prime Minister on 7 July 2021. These have collectively provided for policies to support employees and employers facing difficulties due to the COVID-19 pandemic, including:

- Policies to reduce contribution of insurance for labor accidents, occupational diseases;
- Policies for temporary suspension of contribution to pension and survivorship fund;
- Policies to support trainings to maintain jobs for employees;
- Policies to support employees who temporarily suspend labor contract, take unpaid leave;
- Policies to support employees who suspend work;
- Policies for employees who terminate labor contracts;
- Policies for loan of payment of salary for work suspension, for production recovery;
- Policies for workers without labor contract.

Recommended action

Employers should review the resolution to understand what types of supports they may be entitled to from the government

[7] https://thuvienphapluat.vn/van-ban/lao-dong-tien-luong/nghi-quyet-68-nq-cp-2021-chinh-sach-ho-tro-nguoi-lao-dong-su-dung-lao-dong-gap-kho-khan-dich-covid19-479816.aspx
[8] https://luatvietnam.vn/lao-dong/thong-tu-09-2021-tt-bldtbxh-208861-d1.html

Policies to facilitate the entry of foreign employees to support enterprises, cooperatives and business households amid the COVID-19 pandemic

IN BRIEF

Resolution No. 105/NQ-CP[9] issued by the government on 9 September 2021 introduces adjustment regulations with an aim to assist foreign national employees and help support enterprises during the COVID-19 pandemic. These new regulations include the following notable points:

- To determine that a foreign national employee is an expert/technical worker, the government now accepts any work experience that is suitable for the person's job in Vietnam instead of requiring the employee to have a trained major that is directly relevant to the job;
- The government now accepts the issued work permit as one of the documents proving the person to be an expert/technical worker;
- The government no longer requires a copy of a foreign national employee's passport to be certified; and
- The government now allows a foreign national employee with a valid work permit to be temporarily transferred/assigned to work in another province for a period up to six months without having to apply for a new work permit.

Recommended action

For information only.

[9] https://luatvietnam.vn/doanh-nghiep/nghi-quyet-105-nq-cp-chinh-phu-209034-d1.html

Resolution to support employees and employers using the Unemployment Insurance Fund

IN BRIEF

Resolution No. 116/NQ-CP regarding policies supporting employees and employers in difficulty due to COVID-19 pandemic from the Unemployment Insurance Fund, issued by the Government on 24 September 2021 ("Resolution No. 116")[10] together with Decision No. 28/2021/QD-TTg[11] issued by the Prime Minister on 01 October 2021 - which implements Resolution No. 116, details the following policies:

- For employees: Allowance amounts to support employees will be taken from the Unemployment Insurance Fund's surplus balance. The following employees will be entitled to a lump-sum allowance in cash ranging from VND 1,800,000 (approx. 78 USD)/person to 3,300,000 (approx. 144 USD)/person, depending on the time period of unemployment insurance contribution:
  - Employees who had been participating in the unemployment insurance scheme as of 30 September 2021 (with their names in the list of persons paying unemployment insurance premiums of social insurance authorities), and
  - Employees who had stopped participating in the unemployment insurance scheme due to the termination of their employment contract within the period from 1 January 2020 until the end of 30 September 2021 with the period of unemployment insurance contribution reserved in accordance with the law on employment, excluding persons who already are entitled to receive monthly pensions.
- For employers: Employers who had been participating in the unemployment insurance scheme before 01 October 2021 will be entitled to a reduction of the amount of contribution into the Unemployment Insurance Fund. Specifically, employers are allowed to reduce the contribution rate from 1% to 0% of the monthly salary fund of employees obliged to participate in the unemployment insurance. The time period for the reduction will be 12 months (01 October 2021 to 30 September 2022).

Recommended action

For information only.

[10] https://thuvienphapluat.vn/van-ban/Bao-hiem/Nghi-quyet-116-NQ-CP-2021-chinh-sach-ho-tro-nguoi-lao-dong-bi-anh-huong-boi-dai-dich-COVID19-489120.aspx
[11] https://thuvienphapluat.vn/van-ban/Lao-dong-Tien-luong/Quyet-dinh-28-2021-QD-TTg-thuc-hien-chinh-sach-ho-tro-nguoi-lao-dong-bi-anh-huong-boi-COVID19-489758.aspx

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