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Asia Pacific Employment & Compensation Quarterly Update

Quarter 4: 2020

Introduction

Our Asia Pacific Employment & Compensation Team is pleased to provide you with our fourth quarterly update for 2020 highlighting key employment law changes across the Asia Pacific region.

Many jurisdictions are currently experiencing further waves of COVID-19 infections and many employees worldwide continue to work remotely from home. News of developments of COVID- 19 vaccines provides some optimism that a return to "normality" may be on the horizon in the not too distant future.

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 and Compensation Webinar site and the Resilience, Recovery & Renewal: A Podcast** Series for our latest webinars and podcasts in the region.

I wish you all the best for a healthy and happy 2021.

Stay safe,

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AUSTRALIA

Fair Work Act amended to improve unpaid parental leave for parents of stillborn babies

IN BRIEF

- The Fair Work Act 2009 (“Act”) has been amended to improve access to the unpaid parental leave (UPL) entitlements in the National Employment Standards for new parent employees who experience traumatic events during or in anticipation of UPL, including stillbirth and premature birth.
- The Act clarifies that parents with stillborn children or children who do not survive the first 24 months following birth will still be able to access unpaid parental leave, but may also choose to cancel this leave with their employer.
- The Act also provides for employees who are eligible to take UPL to take up to 30 days of their 12-month entitlement to UPL flexibly, including on a single-day basis, within 24 months of the birth or adoption of a child.

Recommended action

Review parental leave arrangements.

Fair Work Ombudsman Annual Report

IN BRIEF

- The Fair Work Ombudsman's (FWO) annual report released in October reveals it has more than tripled the amount recovered for workers and significantly increased its compliance activities after revising its strategy.
- The FWO recovered more than AUD 123 million in unpaid wages for more 25,000 workers, compared with AUD 42.2 million in 2018-2019, according to its 2019-2020 annual report.
- A strengthening of its "compliance and enforcement posture" in the middle of last year also led to the FWO tripling its use of compliance notices and recovering more than AUD 7.8 million in unpaid wages via this mode, up from AUD 1 million the previous financial year.
- Employers should be aware that the FWO has been significantly increasing its regulatory focus on large companies, especially in respect of underpayments and modern award compliance.

Recommended action

For information.

High Court grants WorkPac special leave to challenge *Rossato* casual employment ruling

IN BRIEF

- The High Court has granted labor hire company, WorkPac, special leave to challenge the full Federal Court's ruling regarding casual employment in labor hire arrangements.
- Justices Virginia Bell and Geoffrey Nettle granted the application at a hearing on 26 November 2020.
- WorkPac is seeking to overturn the judgment that held applicant, Rossato, to be a permanent employee rather than a casual employee, based on a multifactorial test that centered on the overarching characterization of the employment arrangements.
- The previous decision of the court enabled Rossato to claim back payment of certain leave entitlements available to permanent employees.

Recommended action

Watch for developments.

Fair Work Ombudsman has won its first "serious contravention" penalties

IN BRIEF

- The Fair Work Ombudsman (FWO) in Fair Work Ombudsman v Tac Pham Pty Ltd & Anor [2020] FCCA 3036 has won its first "serious contravention" penalties three years after the provisions were added to the Fair Work Act 2009.
- The employer company and its former general manager were fined a total of AUD 230,000 in relation to systemic and deliberate underpayments of workers.
- The underpayments were revealed by a follow-up audit conducted by the FWO after Tac Pham Pty Ltd and the general manager were in March 2018 fined a total of AUD 45,000 for pay slip breaches and underpaying 22 workers by AUD 27,920 over two years.
- The FWO has also sought to bring higher penalties against employers in three other matters currently before the courts.
- This prosecution by the FWO highlights its regulatory focus on employers underpaying employees, and signals that the FWO will be stepping up not only its investigations, but also increasing the range of penalties sought against breaching employers.

Recommended action

For information.

Variations to 97 Modern Awards

IN BRIEF

- The Fair Work Commission (FWC) has varied 97 awards in respect of overtime rates of pay for casuals.
- The determinations amending the awards are the conclusion of the "overtime for casuals" common issue that was being considered by the Commission as part of the "four yearly" review.
- The decision was made on 30 October 2020 and the changes come into effect from the first full pay period after 20 November 2020.
- The aim of the changes is to clarify confusion in awards regarding the calculation of overtime rates of pay for casuals.
- Please see here for the full list of affected awards.

Recommended action

Review arrangements for award-covered employees to ensure they are compliant with the variations.

Updated Modern Awards and Wage Increase

IN BRIEF

- The Fair Work Commission (FWC) issued updated Group 2 awards on 31 October 2020.
- The minimum wage for Group 2 awards was also increased by 1.75% from 1 November 2020.
- Please see here for the list of Group 2 Awards

Recommended action

Review arrangements for award covered employees to ensure they are compliant with the variations.

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

IN BRIEF

- The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 ("Bill") was introduced into Federal Parliament on 9 December 2020. If passed, this "omnibus" Bill will represent the most change to our workplace relations laws since the introduction of the Fair Work Act 2009 (Cth) ("FW Act").
- The Bill represents the culmination of a process which began (formally) in May 2020, when the Prime Minister announced the establishment of five working groups. These working groups were made up of employer and employee representatives and were given the task of tackling key issues in Australia's workplace relations system.
- Please see here for an update we released with further details of the Bill.

Recommended action

Watch for developments.

FWC backs bespoke hours for home-based workers covered by the Clerks - Private Sector Award

IN BRIEF

- In a decision handed down on 22 December 2020 (see here), the Fair Work Commission will allow home-based workers covered by the Clerks - Private Sector Award ("Clerks Award") to negotiate their preferred hours and breaks under COVID-19-related award flexibilities.
- The pre-existing flexibilities in the Clerks Award introduced in March 2020 with Schedule I will also be extended until June 2021.

Recommended action

Review arrangements for award-covered employees to ensure they are compliant with the newly introduced flexibilities.

PEOPLE'S REPUBLIC OF CHINA

National notice on shared employment

IN BRIEF

On 30 September 2020, the Ministry of Human Resources issued a notice to support and guide the sharing of employees between companies that require employees and companies that have a surplus of employees (the original employer). The main takeaways in relation to the notice are:

- Companies that require employees should promptly pay the labor remuneration to the original employer, and the original employer will pay the labor remuneration to the employees and make social insurance contributions. The original employer will not deduct any labor remuneration nor collect any fees in respect of the arrangement. This indicates that such shared employment should be on a not-for-profit basis.
- Companies sharing employees should sign a cooperation agreement. The cooperation agreement should stipulate the terms and conditions of the shared employment arrangement, such as the number of employees, duration of the arrangement, work location, work content, rest periods, labor protection conditions, pay standards, accommodation arrangements, circumstances for return of the employee, the division of liabilities and compensation methods in the event of a work injury, transportation expenses, etc.
- A company should not arrange for its dispatched workers to work in another company in the name of shared employment.
- Shared employment does not change the employment relationship between the original employer and the employee. The original employer should amend the employment contract with the employee to reflect the shared employment arrangement and the company requiring the shared employees should provide the employee with details of the employment/work terms and conditions under the shared employment arrangement.
- Employee consent is required for the shared employment arrangement.

Recommended action

A shared employment arrangement may be mutually beneficial where one entity has a surplus of employees and another is in need of additional labor.

Beijing promotes use of electronic employment contracts

IN BRIEF

- On 27 October 2020, the Beijing Municipal Human Resources and Social Security Bureau promulgated a notice regarding promoting the use of electronic employment contracts ("Notice").
- The Notice confirms that an employment contract can be concluded by electronic means, provided it meets certain requirements (such as the employer and employee's agreement on concluding an electronic employment contract) and complies with certain technical, content and qualification requirements under the PRC Electronic Signature Law, Labor Law, Employment Contract Law, etc.
- The Notice also sets out the respective obligations of employers, employees and third-party signature agencies in the conclusion of an electronic employment contract.

Recommended action

The Notice provides welcomed clarity on the Beijing requirements for concluding electronic employment contracts. However, in the event of an employee challenging the authenticity of the electronic signature, the requirements to prove authenticity could be burdensome, so it remains to be seen how many companies will start using electronic signatures for employment contracts.

Social insurance contributions to be collected by local tax authorities in various cities including Beijing, Shanghai and Shenzhen

IN BRIEF

According to various government notices, in many cities (e.g., Beijing), local tax authorities will assume responsibility for collecting social insurance contributions, while local social insurance authorities will still be responsible for calculating and verifying the contribution amounts, etc. By contrast, in some locations (e.g., Hunan), the local tax authorities will be responsible for not only the collection of social security contributions, but also the calculation and verification of contribution amounts.

Recommended action

For information only. Because tax authorities have information on employees' salaries and have relatively strong regulatory capability, once the tax authorities take over the collection (and even verification in some places) of social insurance contributions, companies may be exposed to higher compliance risks in the event of underpayment of social insurance contributions for employees.

Guangdong to further regulate labor dispatch

IN BRIEF

- The Human Resources and Social Security Bureau of Guangdong Province issued opinions on the regulation of labor dispatch ("Opinion"), which came into force on 1 December 2020 and will expire on 30 November 2025.
- The Opinion is intended to address certain issues relating to labor dispatch practices such as tax fraud, "disguised outsourcing, actual dispatch" arrangements, violation of equal pay for equal work principle social insurance noncompliance, avoidance of signing open-term contracts, etc.
- To tackle these issues, the Opinion sets out a series of measures, including without limitation: strengthening the regulation of cross-region labor dispatch, promoting a real-name registration system, pushing host companies to strictly comply with legal requirements for labor dispatch, preventing "disguised outsourcing, actual dispatch" arrangements. The Opinion sets forth several factors to determine whether there has been a misclassification.

Recommended action

The promulgation of the Opinion suggests that labor dispatch arrangements in Guangdong are likely to be regulated more heavily in the future. Employers that have operations in Guangdong should be aware of these developments.

Shenzhen — alternative working hours system reform

IN BRIEF

- On 11 October 2020, it was announced that Shenzhen will embark on a comprehensive pilot reform plan for 2020-2025, designed to attract foreign investment and to enhance business in the region.
- As part of this reform plan, Shenzhen will implement a pilot working hours reform scheme. By way of background, in Shenzhen, most employers adopt the Standard Working Hours System. Under this system, employees will typically work eight hours per day (40 hours per week). Employees are entitled to a weekly rest day and there are specific rules attached to caps on overtime and overtime payment requirements. Employers may apply to the local authorities for approval of other working hour systems, such as a Flexible Working Hours System or Comprehensive Working Hours System. Under the Flexible Working Hours System, employees are generally not entitled to overtime pay, except in certain cities (such as Shenzhen) employees may claim overtime pay for overtime worked on public holidays. Under the Comprehensive Working Hours System, an employee's total hours over a certain period of time (e.g., a month, quarter or year) are totaled up to see if any overtime pay is due, rather than calculating overtime on a daily basis.
- With effect from 1 January 2021, qualified employers in Shenzhen may be exempted from the government approval requirement for implementing an alternative working hours system.
- Based on this new local rule and subject to consultation with the relevant employees, an employer may directly implement an alternative working hours system by making a commitment that it will duly follow the working hours and related requirements.

Recommended action

Employers with operations in Shenzhen may consider relying on this new local rule by directly implementing an alternative working hours system.

HONG KONG

Statutory maternity leave extended from 10 weeks to 14 weeks

IN BRIEF

Statutory maternity leave under the Employment Ordinance has been extended from 10 weeks to 14 weeks with effect from 11 December 2020.

The current statutory rate of maternity leave pay (MLP) will be kept at four-fifths of the employee's average daily wages in respect of the extended maternity leave, subject to a cap of HKD 80,000 for the additional four weeks. Employers can apply to the government for reimbursement of the additional MLP. The total cap is HKD 80,000 per employee. Details of the reimbursement mechanism have yet to be announced.

The amendment ordinance also updates the definition of "miscarriage" under the Employment Ordinance from "before 28 weeks of pregnancy" to "before 24 weeks of pregnancy" to entitle a female employee whose child is incapable of survival after being born at or after 24 weeks of pregnancy to the maternity leave if other conditions are met.

Another amendment accepts a certificate of attendance issued by a medical professional as documentary proof for entitling an eligible employee to sickness allowance for any day on which the employee has attended a medical examination in relation to her pregnancy.

Recommended action

Employers should take note of the update in the legislation and amend their internal policies accordingly. The entitlement to the 14-week maternity leave applies to female employees giving birth on or before 11 December 2020.

Abolition of the MPF offset mechanism on hold

IN BRIEF

The government has decided not to propose the amendment bill, which seeks to abolish the Mandatory Provident Fund (MPF) offsetting mechanism, to the Legislative Council this year. In other words, it is likely that the amendment bill will not be raised until October 2021 at the earliest. The MPF offsetting mechanism allows the employer to offset the statutory long service payment/severance payment paid to the employee with the accrued benefits derived from the employer's contributions to the employee's MPF scheme.

The government promised to abolish the MPF offsetting mechanism by 2024. However, as the government has delayed submitting the amendment bill and the term of office of the current government officials will end in June 2022, the abolition may also be delayed.

Since the government has not yet announced the details of the amendment bill, the full impact of the abolition of the MPF offsetting mechanism cannot be assessed at this stage. However, if the mechanism is abolished completely, employers will not be able to offset the statutory long service payment/severance payment paid to the employee with the accrued benefits derived from the employer's contributions to the employee's MPF scheme.

Recommended action

N/A

The Immigration (Amendment) Bill 2020

IN BRIEF

The Immigration (Amendment) Bill 2020 was gazetted on 4 December 2020. The Immigration Ordinance will be amended to the effect that, in relation to the employment of a person who is not lawfully employable, the employer will be liable to a fine of HKD 500,000 and imprisonment for 10 years if the employee is a person who remains in Hong Kong unlawfully. In addition, where the employer is a body corporate, the director, manager or secretary of the body corporate whose consent or negligence led to the employment of the person not lawfully employable will also be liable.

Recommended action

Employers should note the increase in the penalty for the employment of a person who is not lawfully employable. Employers should implement relevant policies to ensure that any candidates they employ are lawfully employable. Considering the extension of liability to officers of the company, these responsible persons should also take sufficient measures to ensure the company's compliance with the relevant laws.

Proposed gradual increase of statutory holidays from 12 to 17 days

IN BRIEF

According to the Policy Address 2020, the plan to increase the number of statutory holidays to match the number of public holidays is now being discussed within the Labour Advisory Board. Law Chi-kwong, the Secretary for Labour and Welfare, said that it is hoped the decision to increase the statutory holidays from 12 to 17 days can be completed within this legislative period. The pace of the increase is, however, still under negotiation between the employers' and the employees' representatives in the Labour Advisory Board.

Recommended action

Employers should pay attention to the change in the law regarding statutory holidays and make adjustment to their policies accordingly.

INDONESIA

Amendment to the Indonesian Labor Law

IN BRIEF

On 2 November 2020, the president enacted Law No. 11 of 2020 on Job Creation, commonly known as the "Omnibus Law."

The aim of the Omnibus Law is to attract investment, create new jobs and stimulate the economy by, among other things, simplifying the licensing process and harmonizing various laws and regulations, and making policy decisions faster for the central government to respond to global or other changes or challenges.

The Omnibus Law is a breakthrough in itself as it amends or revokes a total 78 laws and covers 27 topics and sectors. It includes the amendment to Law No. 13 of 2003 on Labor ("Labor Law").

The Omnibus Law mainly amends provisions under the Labor Law regarding:

- foreign workers
- definite period employment
- outsourcing
- overtime
- minimum wage
- termination of employment

The Omnibus Law also provides that further requirements on the topics mentioned above will be regulated under the relevant implementing government regulations. As such, the implementation of the changes to the Labor Law mainly depends on the implementing government regulations. Under the Omnibus Law, the implementing government regulations must be issued within three months after the enactment of the Omnibus Law (i.e., by February 2021) at the latest. To date, no draft government regulations in relation to the topics above have been published.

Further, we understand there are at least four applicants that have submitted a judicial review application to the Constitutional Court on the Omnibus Law. Most of the applicants have filed for a judicial review of the Labor Law provisions in the Omnibus Law.

Recommended action

Employers will need to review and understand the implementing regulations of the Omnibus Law (when issued) and then keep abreast of the judicial review to understand further the implementation of the changes made to the Labor Law. For further information on the Omnibus Law please see our previous client alert on this topic:

Supreme Court decisions on "Same Pay for Same Work"

IN BRIEF

In October 2020, the Supreme Court of Japan laid down several decisions on the issue of “same pay for same work." In these cases, the court considered whether it was reasonable for employers to treat bonuses, retirement allowances, family allowances and other benefits differently for regular employees and non-regular employees (such as fixed-term contract employees and part-time employees). The courts considered similar factors when determining these cases, namely: (i) the relevant job assignments; (ii) the level of flexibility of the employer in changing the job assignments/work location; and (iii) other relevant circumstances.

A summary of the decisions in relation to the respective benefits is set out below:

- Bonuses and retirement allowances:

  It was not unreasonable for the employer not to provide bonuses or retirement allowance to non-regular employees primarily because the duties of such employees were different to regular employees. The regular employees had some additional duties and more responsibilities than the non-regular employees, and the non-regular employees, unlike the regular employees, were not subject to the possibility of relocation or transfer. (Note that the court also considered various other factors that were unique to the case.)

- Family allowances, leave (summer/winter holidays, sick leave) and other benefits:

  It was unreasonable for the employer not to provide these allowances and benefits to non-regular employees primarily because the nature and purpose of those allowances and benefits could equally apply to the non-regular employees and there were no other reasonable reasons to believe that these allowances and benefits should not be provided to the non-regular employees.

Recommended action

While these cases give us some indication as to how the court will assess the difference in treatment between regular and non-regular employees, the unique circumstances of each case is crucial. Nevertheless, if an employer employs any non-regular employees, the employer should ensure that the non-regular employees are treated equally in light of these cases. Different treatment of regular and non-regular employees will be permissible only if the employer has clear justifiable reasons for the difference in treatment.

Amendment to prescribed forms to be submitted to the Labor Standards Inspection Office

IN BRIEF

It was announced on 22 December 2020 that the Ministerial Ordinance of the Labor Standards Act will be amended and from 1 April 2021, it will be possible to submit various forms to the Labor Standards Inspection Office without having any stamps affixed thereto.

The most notable impact in practice as a result of this change will relate to the labor-management agreement regarding overtime and holiday work. In Japan, if employers have their employees working overtime or working on holidays, they need to enter into a written labor-management agreement (the so-called "Article 36 agreement") with a union consisting of a majority of all employees or an employee representing a majority of all employees (if a company does not have a union). The notification that this agreement has been concluded must be filed with the relevant Labor Standards Inspection Office (in most cases, annually).

Currently, the seals of the employer and the union or the employee representative are required when submitting the notification to the Labor Standards Inspection Office. However, this will no longer be required on or after 1 April 2021 as a result of this amendment.

Please note, however, that the seals may still be necessary (albeit not a requirement) to enter into a labor-management agreement itself and it is only regarding the notification for which the seals are no longer required. Therefore, if the company uses the prescribed notification form concurrently as an Article 36 agreement by putting stamps of both parties on it, the stamps may still be necessary.

Recommended action

Employers should be aware that the stamps will no longer be required in various forms to be submitted to the Labor Standards Inspection Office on or after 1 April 2021.

MALAYSIA

Amendments to the Employees' Provident Fund Act ("EPF Act")

IN BRIEF

The Employees' Provident Fund (Amendment of Eighth Schedule) Order 2020 ("Order") was gazetted on 17 September 2020 to amend the EPF Act with effect from 1 October 2020 to 31 December 2020.

Under the EPF Act, a male member of the Employees' Provident Fund (EPF) may elect to transfer part of his portion of the EPF contributions (which is 11% of the employee's monthly wages) to the account of his lawful wife or wives, at the rate of 2% of his 11% (monthly wages) contribution. However, pursuant to the Order, the transfer rate has been amended to 2% of his 7% (monthly wages) contribution, from 1 October 2020 to 31 December 2020.

This amendment is aligned with the reduction in the minimum statutory EPF contribution rates for employees below the age of 60, from 11% to 7%, effective from 1 April 2020 until 31 December 2020 and pursuant to the EPF (Amendment of the Third Schedule) Order 2020.

Recommended action

Employers to note.

Modifications to the Industrial Relations Act (IRA)

IN BRIEF

On 23 October 2020, the government gazetted the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ("COVID-19 Act"), which introduces retrospective modifications to the IRA that are deemed to have come into operation on 18 March 2020.

The COVID-19 Act excludes the period between 18 March 2020 and 9 June 2020 ("Excluded Period") from the calculation of the following timelines under the IRA:

a) Timeline for employers to accord recognition to a trade union or notify the union in writing of the grounds for not according recognition ("Notification") is within 21 days after service of the union's claim for recognition on the employer.

b) Timeline for trade unions to make a written report to the Director General of Industrial Relations (DGIR) to claim for recognition from an employer is within 14 days of (i) receipt of the employer's Notification or (ii) the expiry of the 21-day timeline above.

c) Timeline for employees to file a written representation for unfair dismissal to the DGIR is within 60 days of their dismissal.

The exclusion of the Excluded Period from the timelines above addresses the disadvantages arising from an inability to travel or make the relevant applications or filings under the IRA, during the enforcement of the Movement Control Order and Conditional Movement Control Order in Malaysia.

Recommended action

Employers to note. As of December 2020, the above limitation periods (even with the Excluded Period) have already passed.

Proposed amendments to the Occupational Safety and Health Act (OSHA)

IN BRIEF

The Occupational Safety and Health (Amendment) Bill 2020 ("Bill") was tabled for its first reading in the Dewan Rakyat (House of Representatives) on 2 November 2020, and it proposes amendments to the OSHA that include but are not limited to:

a) Widening of scope of the OSHA to cover all workplaces (as opposed to prescribed industries), save for domestic employment, armed forces and work on board ships

b) Requiring employers to develop and implement procedures for dealing with emergencies that may arise while employees are at work

c) Requiring principals to ensure the safety and health of contractors, subcontractors, employees of contractors and any person who may be affected by any undertaking carried out by the principals at the workplace. "Principal" means any person who in the course of or for the purposes of their trade, business, profession or undertaking contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal

d) Requiring employers to conduct a risk assessment in relation to the safety and health risk at the workplace

e) Prohibiting the dismissal of an employee for assisting an officer or assessor from the Department of Occupational Safety and Health with an inquiry

f) Widening of scope of individuals who may be held jointly and severally liable with a body corporate for offences under the OSHA

g) Increase in fines for offences under the OSHA

Recommended action

Once this Bill comes into effect, an employer (regardless of the industry they are involved in) will be required to consider their obligations imposed under the OSHA, as well as the additional duties that will be introduced by the Bill.

Reduction in employee's statutory contribution rate to the EPF for 2021

IN BRIEF

During the national budget announcement on 6 November 2020, the finance minister announced that from 1 January 2021 to 31 December 2021 ("Relevant Period"), an employee's statutory contribution rate to the EPF will automatically be reduced from 11% of their monthly wage to 9%.

According to the EPF, employees may elect to maintain their contribution rate of 11% during the Relevant Period ("Exempted Employees") by submitting Form 17A to their employers.

Recommended action

An employer that receives Form 17A from their Exempted Employees will be required to effect the maintenance of the 11% contribution rate by completing an online registration process for the Exempted Employees through 'i-Akaun,' the EPF online portal, from 14 December 2020. Employers will also be required to maintain a record of the form submitted by the Exempted Employees.

New fees for special program for handling pass holders

IN BRIEF

On 15 December 2020, the Fees (Employment Pass, Visit Pass (Temporary Employment) and Work Pass) (Amendment) Order 2020 was gazetted to require an employer of a Visit Pass (temporary employment) holder or Work Pass holder (collectively, "Pass Holder") who participates in a special program for the purpose of managing the Pass Holder (i.e., the Labor Recalibration Program to hire undocumented migrants for work in specific sectors) to pay an additional fee of MYR 1,500 for the issuance of the pass. This additional fee arrangement took effect from 15 December 2020.

Recommended action

Employers of the above-mentioned Pass Holders to take note. The fee above will not be payable for foreign workers or expatriates who are employed outside of the Labor Recalibration Program.

PHILIPPINES

Social Security System (SSS) issues a new schedule of SSS contributions effective from January 2021

IN BRIEF

On 7 December 2020, the SSS issued SSS Circular No. 2020-033. This provides the scheduled increase in the social security contribution rate to 13% from the current 12%. The SSS is set to implement the foregoing one percentage point hike on the members' monthly contributions starting with the contributions for January 2021. Republic Act No. 11,199, otherwise known as the Social Security Act of 2018, allowed the Social Security Commission to increase the contribution rate by one percentage point every other year starting in 2019 until it reaches 15%. Alongside the increase in the contribution rate, in 2021 the SSS will also implement the mandatory hike in the minimum monthly salary credit (MSC) to PHP 3,000 from the current PHP 2,000, and the maximum MSC to PHP 25,000 from PHP 20,000.

Recommended action

Employers should be aware of the new schedule of SSS contributions, and ensure compliance with the corresponding obligation to remit correct amounts of employer and employee contributions to SSS.

Department of Labor and Employment (DOLE) issues rules and regulations governing recruitment and placement of industry workers by private employment agencies for local employment

IN BRIEF

On 27 October 2020, the DOLE issued Department Order No. 216, Series of 2020. This provides the rules and regulations governing the recruitment and placement of industry workers by private employment agencies for local employment. Industry worker refers to any person not engaged in domestic work within an employment relationship. The issuance aims to protect the welfare of jobseekers while providing them equal access to employment opportunities as well as to promote employment facilitation through private entities as one of the principles under the decent work agenda.

Recommended action

Covered persons, sole proprietors, partnerships or corporations intending to engage or engaged in the recruitment and placement of industry workers for local employment should secure (or possess) the appropriate license to operate a private employment agency, and they should be aware of the other requirements, duties and responsibilities surrounding the recruitment and placement of industry workers for local employment.

DOLE issues rules and regulations for recruitment and placement of domestic workers by private employment agencies for local employment

IN BRIEF

On 27 October 2020, the DOLE issued Department Order No. 217, Series of 2020. This provides the rules and regulations governing the recruitment and placement of domestic workers by private employment agencies for local employment. Domestic worker refers to any person engaged in domestic work within an employment relationship, whether on a live-in or live-out arrangement, such as, but not limited to, general house help, "yaya," cook, gardener or laundry person. The issuance aims to protect the welfare of jobseekers while providing them equal access to employment opportunities as well as to promote employment facilitation through private entities as one of the principles under the decent work agenda.

Recommended action

Covered persons, sole proprietors, partnerships or corporations intending to engage or engaged in the recruitment and placement of domestic workers for local employment should secure (or possess) the appropriate license to operate a private employment agency, and they should be aware of the other requirements, duties and responsibilities surrounding the recruitment and placement of domestic workers for local employment.

DOLE issues guidelines on the payment of 13th month pay

IN BRIEF

On 16 October 2020, the DOLE issued Labor Advisory No. 28, Series of 2020. This reiterates that rank-and-file employees are entitled to their 13th month pay regardless of their position, designation or employment status or the method by which their wages are paid provided they have worked for at least one month during the calendar year. The 13th month pay should be paid on or before 24 December 2020. The labor advisory also states that no request or application for exemption from the payment of the 13th month pay or for deferment of the payment thereof would be accepted.

Recommended action

Employers in the private sector must pay the 13th month pay to their covered rank-and-file employees on or before 24 December 2020, and file a report of their compliance to the nearest DOLE regional office with jurisdiction over the workplace on or before 15 January 2021.

DOLE amends rules on suspension of employment relationship

IN BRIEF

On 23 October 2020, the DOLE issued Department Order No. 215, Series of 2020. The department order states that the suspension of an employee's employment relationship with an employer due to the suspension of operations may be extended for a period not exceeding six months in case of declaration of war, pandemic and similar national emergencies. In such case, the employer should report the extension of suspension of employment to the DOLE regional office with jurisdiction over the workplace at least 10 days prior to the effectivity of the extension.

Recommended action

Employers extending the suspension of the employment relationship due to existence of war, pandemic and similar national emergencies should first meet in good faith with the employees to discuss the proposed extension; and, any extension should be timely reported to the DOLE. Employers should also be aware of other employment conditions during the period of extended suspension of the employment relationship.

SINGAPORE

New tripartite advisory on mental well-being in workplaces

IN BRIEF

- Mental health is a growing concern in Singapore. In a study conducted between 2016 and 2018, the results showed that 1 in 7 people in Singapore have experienced a mental disorder in their lifetime.[1] This is an increase from 1 in 8 compared to a 2010 study.[2]
- In view of the increased awareness regarding mental health, the Ministry to Manpower (MOM), the National Trades Union Congress and the Singapore National Employers Federation (collectively, "Tripartite Partners") jointly issued an advisory that sets out practical guidance on measures that employers can adopt to support their employees' mental well-being. It also provides some useful resource references for employers, employees and self-employed persons.
- The Tripartite Partners suggest that employers implement the recommendations at three levels: individual employees, team and department level and organization level, to avoid a negative working environment that could lead to physical and mental health challenges, or work stressors that could adversely affect, or even harm, employees' mental well-being.

Please refer to our previous alert that summarizes the recommendations.

A link to the Tripartite Advisory can be found here.

Recommended action

The MOM recommends that employers adopt the practical guidance set out in the Tripartite Advisory on Mental Well-Being at Workplaces. The Tripartite Partners recognize that work stressors (possibly contributed to by work-from-home and split-team arrangements) as a factor associated with poor mental and note the year on year increase in Singaporeans experiencing a mental disorder in their lifetime.

1. Please see paragraph 1 of the Tripartite advisory on mental well-being at workplaces (https://www.mom.gov.sg/covid-19/tripartite-advisory-on-mental-well-being-at-workplaces).
2. Please see paragraph 1 of the Tripartite advisory on mental well-being at workplaces (https://www.mom.gov.sg/covid-19/tripartite-advisory-on-mental-well-being-at-workplaces).

New pass to attract top global tech talent

IN BRIEF

On 12 November 2020, the Economic Development Board (EDB) announced its plans to launch Tech.Pass, a targeted program for attracting founders, leaders and technical experts with experience in established or fast-growing tech companies, to contribute to the development of Singapore's tech ecosystem.

The new scheme is billed as an extension to the Tech@SG program launched in 2019, as part of Singapore's efforts to attract tech talent to Singapore and develop Singapore's tech ecosystem.

- Tech.Pass will allow pass holders flexibility to participate in activities such as starting and operating a business; being an investor, employee, consultant or director in one or more Singapore-based companies; mentoring startups; and lecturing at local universities.
- Tech.Pass will be open for application in January 2021, with 500 places available upon launch.
- It will be valid for two years in the first instance, with a one-time renewal for a subsequent two years, if the renewal criteria are met.
- It will be administered by the EDB, with support from the Ministry of Manpower (MOM).
- Individuals can apply for Tech.Pass directly. Details of the application process will be announced in due course.

Please refer to our recent client alert for eligibility and renewal criteria.

Recommended action

For information only.

Tightening of employment pass regulations for overseas intracorporate transferee

IN BRIEF

The Ministry of Manpower (MOM) has included an additional question in 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 (i.e., an intracorporate transferee (ICT)). An ICT is allowed entry into Singapore on a temporary basis, for a period strictly limited to the provision under the applicable free trade agreement. An ICT is generally not eligible for future employment or for permanent residency in Singapore upon the expiry/termination of their work pass.

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

If the candidate is expected to be transferred to Singapore from an overseas entity on a permanent basis and/or to be joined by their family in Singapore, the employer should consider applying for the EP via the job advertising route, or by relying on other applicable grounds for exemption from the job advertising requirement (e.g., company size, salary).

Please refer to our client alert for more information.

Recommended action

For information only.

TAIWAN

New act in force to facilitate employment of senior workforce

IN BRIEF

The Middle-aged and Senior-aged Employment Promotion Act came into force on 4 December 2020 and is designed to promote the employment of middle-aged and senior-aged workers.

Key points:

- The act prohibits unjustified differential treatment of middle-aged (aged 45-65) and senior-aged people (aged over 65) who are applying for jobs or are in employment, on the grounds of their age.

  The prohibition on differential treatment on the basis of the person's age is wide and extends to the following areas:

  a) recruitment, screening tests, employment, assignment, staffing, performance evaluations, promotion, etc.

  b) education, training or other similar activities

  c) payment of wages or welfare

  d) retirement, leave with severance pay, employment termination and discharge

  Differential treatment on the grounds of age without justification can render an employer liable to a fine of NTD 300,000 to NTD 1.5 million.
- Competent authorities may grant subsidies to employers that contribute to the employment of middle-aged and senior-aged people such as where employers provide vocational training or job accommodations to such people.
- An employer may enter into a fixed-term contract with employees over the age of 65.

Recommended action

Employers should conduct internal compliance checks to ensure there is no unjustified differential treatment of such people on the grounds of age, and explore whether the company can benefit from the subsidies or extra flexibility.

Regulation regarding payment in lieu of notice

IN BRIEF

In October 2020, the Ministry of Labor issued a regulation regarding the calculation of a payment in lieu of notice (PILON).

- Under the Labor Standards Act (LSA), the employer is required to provide prior notice or a PILON to the employee if the employer terminates the employee based on redundancy or through a performance improvement plan.
- The duration of the notice period depends on the service year(s) of the employee, and the calculation of the PILON is the number of days of the notice period multiplied by the daily wage of the employee.
- According to the regulation, if the employee receives a monthly salary, the calculation of the employee's daily wage will be the higher of following:
  a) monthly salary divided by 30
  b) the total wages for the past six months divided by the total number of days in that period

Recommended action

Where employers opt to make a payment in lieu of notice, they must ensure that the employee receives at least the employee's minimum entitlements under the LSA.

Ministerial Regulation regarding the Standard of Conducting Health Checkups of Employee Performing Risk Factor-related Work, B.E. 2563 (2020) issued on 5 October 2020

IN BRIEF

On 5 October 2020, the Ministerial Regulation regarding the Standard of Conducting Health Checkups of Employees Performing Risk Factor-related Work, B.E. 2563 (2020) was issued.

This ministerial regulation will govern the standard of conducting health checkups of employee who perform work in an environment with risk factors. Examples of such risk factors include:

- heat, cold vibration, atmospheric pressure, light or noise
- a microbiome that is toxic (e.g., mold, bacteria or virus)
- radiation
- work in relation to hazardous chemicals as prescribed by the Director-General
- other environments that may have a detrimental effect on an employee's health

Recommended action

Employers should be aware of and ensure compliance with the ministerial regulation.

If an employee who performs work in an environment with risk factors becomes sick as a result of the work or the result of their health checkup is abnormal, the employer must immediately arrange medical treatment for such employee and must also verify the reason for such abnormality for the purpose of prevention. Moreover, the employer must submit the result of the health checkup, the medical treatment and the prevention and remedy provided to the Safety Inspector within 30 days from the date the employer becomes aware of the abnormality of the employee's health checkup or the employee's sickness.

New work permit forms for foreign workers

IN BRIEF

On 20 October 2020, the Notification regarding the Form and Supporting Documents or Evidence for the Application and the Notification according to the Ministerial Regulation regarding the Application for Permission to Work, the Granting of Work Permit, and the Notification of Foreigner's Work, B.E. 2563 (2020) (“Notification”) was issued.

The Notification prescribes the new forms required in relation to work permits (effective 1 November 2020), and the list of supporting documents for each form, including:

- the work permit application and renewal application form
- the work permit application form for an application made on behalf of a foreigner
- the notification form for a foreigner commencing work that can be characterized as necessary, urgent or ad hoc

One of the main changes introduced is the specification of certain required supporting documents in the form, e.g., a copy of the list of shareholders (only if the soon-to-be employer is a company limited) / copy of corporate income tax return form / copy of social security fund contributions payment form.

Please refer to this link for the new work permit forms (the language can be changed to English at the top right corner of the page).

Recommended action

Employers who employ non-Thai nationals should be familiar with the requirements of the Notification.

Notification Prescribing Types of Work Which are Necessary or Urgent or Ad Hoc in Nature

IN BRIEF

Foreigners who perform certain types of necessary or urgent work may be able to apply for an urgent duty work permit without having to apply for a general work permit.

On 29 October 2020, a Notification Prescribing Types of Work Which are Necessary or Urgent or Ad Hoc in Nature ("Notification") was issued.

- The Notification prescribes 16 types of work that are considered necessary, urgent or ad hoc. These include:
  1. organizing meetings, trainings, seminars, exhibitions or trade fairs work
  2. special academic lectures work
  3. aviation management work
  4. internal audit work from time to time
  5. follow-up and solving of technical problems work
  6. product or goods quality inspection work
  7. manufacturing process inspection or improvement work
  8. machinery and electric generator equipment system inspection or repair work
  9. machinery repair or installation work
  10. electricity vehicle system technician work
  11. aircraft or aircraft equipment technician work
  12. machinery repair or machinery controller system consultancy work
  13. machinery demonstration and testing work
  14. filming motion pictures and still photography work
  15. selecting recruitment persons for sending workers to work overseas
  16. testing skills of technicians for sending them to work overseas

  However, in order for such work to be considered as necessary, urgent or ad hoc, the foreigner must complete the work within 15 days.

  Foreigners who engage in such work without having obtained an urgent duty work permit will be liable to a maximum fine of THB 50,000.

Recommended action

Employers who employ foreign workers should be familiar with the requirements of the Notification in the event they require such work to be performed by a non-Thai national on an urgent basis.

Ministerial Regulation regarding the Contribution Rate to the Social Security Fund, B.E. 2563 (2020) issued on 30 December 2020

IN BRIEF

- On 30 December 2020, the Ministerial Regulation regarding the Contribution Rate to the Social Security Fund, B.E. 2563 (2020) was issued.
- According to this Ministerial Regulation, effective from 1 January 2021 onward, the monthly contribution rates of employers and employees to the Social Security Fund will be reduced from 5% to 3% of the wage applicable for the period between 1 January 2021 and 31 March 2021 (i.e., three months).

Recommended action

Employers should be aware of this Ministerial Regulation and submit a monthly contribution of 3% of the applicable wage to the Social Security Fund for these three months.

Vietnam's National Assembly passes the new law on Vietnamese employees working abroad under contracts

IN BRIEF

On 13 November 2020, the National Assembly passed Law No. 69/2020/QH14 on Vietnamese employees working abroad under contracts ("Law No. 69"). Law No. 69 regulates rights and obligations of Vietnamese employees who work abroad under contracts as well as the relevant organizations/agencies that engage such workers. Law No. 69 also covers issues such as professional skills training, orientation education for employees, overseas employment support fund and policies for employees.

Notably, Law No. 69 provides additional rights and benefits for employees working overseas. For example:

- The employees' legitimate rights and benefits as per the relevant contract are protected during the working period abroad in accordance with the laws of Vietnam, the foreign country and international practices.
- Vietnamese employees working abroad under contracts do not have to contribute social insurances or personal income tax in both Vietnam and the foreign country if Vietnam and such country have entered into an agreement on social insurance or a double taxation agreement.
- Employees have the right to unilaterally terminate the contract if they are being maltreated or sexually abused, in circumstances of forced labor or if the employee receives directly explicit threats to the employee's health or life while working overseas.

Law No. 69 will take effect from 1 January 2022.

Recommended action

Vietnamese companies sending Vietnamese employees to work abroad, i.e., (i) those providing guest worker services, (ii) those awarded with contracts for overseas construction work and projects, (iii) those sending Vietnamese workers abroad for professional skills training, and those investing overseas, should carefully review Law No. 69 to ensure compliance with the new requirements.

Vietnamese government issues the main decree guiding the implementation of the 2019 Labor Code on working conditions and labor relations

IN BRIEF

On 14 December 2020, the Vietnamese government issued Decree No. 145/2020/ND-CP detailing and guiding the implementation of the Labor Code on working conditions and labor relations ("Decree No. 145").

This 126-page decree covers various important labor matters, including:

- employers' responsibilities in managing employees
- content, termination, and invalidity of labor contracts
- labor outsourcing
- dialogue and democracy policy at the workplace
- salary payment and calculation
- working time and rest time
- labor discipline and material responsibility
- female employees
- settlement of labor disputes

Decree No. 145 will take effect from 1 February 2021 and replace several decrees under the current Labor Code.

Recommended action

Employers should timely update their internal labor regulations, HR policies, labor contracts and relevant templates to ensure compliance with the new requirements under Decree No. 145.

Our previous alert on the New Labor Code can be accessed here:

New regulations on retirement ages

IN BRIEF

On 18 November 2020, the government passed Decree No. 135/2020/ND-CP on retirement age ("Decree No. 135"). Decree No. 135 elaborates on the relevant regulations on retirement age under Article 169 of the Labor Code 2019, and both took effect from 1 January 2021.

In particular, Decree No. 135 provides specific schedules for the increase of retirement ages as provided in the new Labor Code No. 45/2019/QH14, as follows:

- For employees working in normal conditions, from 1 January 2021, the retirement age is 60 years and three months for males and 55 years and four months for females. For males, each subsequent year the retirement age will increase by three months up to a retirement age of 62 in 2028. For females, each subsequent year the retirement age will increase by four months up to a retirement age of 60 in 2035.
- The retirement age can be up to a maximum of five years lower than the retirement age of employees working in normal conditions, if the employee falls into one of the categories below:
  i. The employee has completed 15 years or more of performing heavy, hazardous or dangerous work, or extremely heavy, hazardous or dangerous work.
  ii. The employee has worked for 15 years or more in areas with extreme socio-economic difficulties, including working periods in areas with a region-based allowance coefficient of 0.7 or higher before 1 January 2021.
  iii. The employee suffers a working capacity decrease of 61% or more.
  iv. The employee has completed 15 years of service comprising (a) the period of performing the job as described in item (i) above and (b) the period of working in areas with extreme social economic difficulties as described in item (ii) above.
- Employees performing mining jobs in coal pits can retire a maximum of 10 years earlier than employees working in normal conditions. Decree No. 135 also provides the list of mining jobs in coal pits.

Recommended action

Employers should review policies for elderly employees and pension regimes to ensure compliance with new regulations under Decree No. 135.

New regulations regarding protecting jobs of whistleblowers who work under labor contracts

IN BRIEF

On 15 October 2020, the Ministry of Labor, Invalids and Social Affairs issued Circular No. 08/2020/TT-BLDTBXH on protecting jobs of whistleblowers who work under labor contracts ("Circular No. 08"). Circular No. 08 took effect from 1 December 2020.

In particular, Circular No. 08 provides procedures for protecting jobs of whistleblowers who work under labor contracts. Measures for protecting jobs of such accusers include:

i. requesting employers not to discriminate, retaliate, slam or threaten to affect the whistleblowers' job position, income and other legitimate interests

ii. taking actions against violations according to the law or requesting that a competent organization/individual do so

Recommended action

Employers should review Circular No. 08 to familiarize themselves with these requirements.

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