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Asia Employment Law: Quarterly Review

2017-2018

ISSUE 19: FIRST QUARTER 2018



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Asia's legal and human resources advisors are often required to function across multiple jurisdictions. Staying on top of employment-related legal developments is important but can be challenging.

To help keep you up to date, our firm produces the **Asia Employment Law: Quarterly Review**, an e-publication covering 14 jurisdictions in Asia.

In this nineteenth edition, we flag and provide comment on anticipated employment law developments during the first quarter of 2018 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2018.

This publication is a result of ongoing cross-border collaboration between 14 law firms across Asia with whose lawyers our firm has had the pleasure of working with closely for many years. For a list of contributing lawyers and law firms, please see the [contacts page](#).

We hope you find this edition useful.

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Fair Work Commission constrains parties' use of 'shadow lawyers' in Fair Work Act ("FW Act") proceedings

In *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797, a Full Bench of the Fair Work Commission ("FWC") determined that the requirement to obtain permission to appear as a legal representative in an unfair dismissal case applies not only to advocacy at the hearing stage, but also where a party obtains legal assistance with preparation of submissions and other pre-hearing steps. The Full Bench ruled that the reference in section 596 of the FW Act to representation 'in a matter' in the FWC means 'the whole of [the] justiciable controversy' brought before the tribunal for adjudication. In this case, a party's attempt to have a lawyer present to assist in the making of submissions at hearing was considered to be 'representation' for which permission under section 596 should have been sought and obtained.

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However in *Stringfellow v Commonwealth Scientific and Industrial Research Organisation* [2018] FWC 1136, the FWC applied a further aspect of the *Fitzgerald v Woolworths* decision to confirm that the representational activity, subject to the requirement to obtain permission to appear as lawyer or paid agent, does not include the provision of legal advice to a party involved in proceedings before the tribunal.

FWC finds Uber driver is an independent contractor, not able to pursue unfair dismissal claim

In *Kaseris v Rasier Pacific VOF* [2017] FWC 6610, the FWC decided that an Uber driver whose account had been deactivated (following poor passenger ratings) was not an employee and therefore could not proceed with an unfair dismissal claim under the Fair Work Act 2009 (Cth) (FW Act). The conclusion that the driver was an independent contractor was reached on the application of the common law multi-factor test, which indicated that he had complete control over the way he provided driving services to Uber; bore the costs of running his vehicle; and was not obliged to perform the services, just as Uber was not required to provide him with work (the absence of the required 'work-wages' bargain).

This is the first determination of the employment status of 'gig economy' workers under Australian law, an issue which is increasingly attracting the attention of legislators (through federal Parliamentary inquiries), unions and regulators. However, no legislative changes are likely to emerge in this area under the current Coalition Government.

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High Court confirms power of federal courts to impose personal payment orders for civil remedy breaches

The High Court of Australia decided that when a federal court orders an individual to pay a pecuniary penalty under section 546 of the FW Act, it may also order that the penalty must be paid personally by the individual (*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union* [2018] HCA 3). In this case, a union and one of its officials had been found in breach of the prohibition upon coercion in section 348 of the FW Act, when they organised a blockade of a building site. In enforcement proceedings brought by the construction industry regulator, the Federal Court of Australia ordered that the union could not indemnify its official in respect of a penalty it had imposed upon him for the breach.

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In its decision on the union's appeal, the High Court found that section 546 does not support the making of the non-indemnification order imposed by the Federal Court, because a pecuniary penalty order may only be directed at the contravener (and not another party such as the union). However, the provision does authorise an order requiring the subject (in this case, the union official) to pay the penalty personally.

This ruling is expected to have important implications in the construction industry, where unlawful behaviour on the part of union officials has been the subject of widespread judicial criticism in recent years. It will also apply, though, to breaches of any civil remedy provisions of the FW Act, which include those relating to underpayments and other breaches of minimum employment standards by employers and their managers.

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All Australian employees to obtain unpaid domestic violence leave, following FWC Full Bench decision

The Australian Government has announced that it will amend the FW Act to provide five days' unpaid domestic violence leave to all federal system employees. This follows a decision by an FWC Full Bench decision to extend the five day entitlement to award-covered workers (*4-Yearly Review of Modern Awards – Family and Domestic Violence* [2018] FWCFB 1691).

The new leave entitlement is intended to assist employees in dealing with abusive domestic relationships, and is available “in the event that the employee needs to do something to deal with the impact of the family and domestic violence and it is impractical for them to do it outside their ordinary hours of work”. The Full Bench decided that this non-cumulative leave entitlement should be available to employees at the start of each year of service, and would not be pro-rated for part-time or casual employees.

The commencement date for the award-based entitlement is yet to be determined by the FWC, while its extension to all federal system employees will be the subject of legislation yet to be introduced into Parliament

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Victorian Government introduces legislation providing portable long service entitlements in certain sectors

The Victorian Government introduced the Long Service Benefits Portability Bill 2018 into State Parliament. The Bill proposes to establish a scheme through which service by workers in the contract cleaning, security and community services sectors is portable, with the result that workers who work for multiple employers can have their service recognised and qualify for long service entitlements. This would overcome the problem that in these sectors, contract/project-based work is common, so that workers regularly change employers. Instead, workers will be entitled to long service leave having completed seven years' service in the relevant industry (rather than seven years with one employer). Employers will be required to register under the scheme, and pay a levy (not more than 3% of ordinary pay payable to employees) to a government fund from which workers' long service entitlements will be paid.

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There are no significant policy, legal or case developments within the employment space during 2018 Q1.

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Hong Kong amends Employment Ordinance to tighten regulatory oversight of recruitment agencies

Hong Kong recently amended part 12 of the Employment Ordinance (Cap. 57) relating to employment agencies and the Employment Agency Regulations (Cap. 57A) to provide job-seekers with greater protection. The amendments came into force on 9 February 2018. The main changes are as follows:

- a. To increase the maximum penalty for unlicensed operation of an employment agency and overcharging commission to job-seekers from a fine of HK\$50,000 to HK\$350,000 and imprisonment for three years;
- b. To increase the time limit for lodging a complaint in respect of the two offences stated above in (a) to 12 months;
- c. To broaden the scope of the offence of overcharging job-seekers to include not only the licensee, but also the recruitment agency's associates (which includes director, manager, secretary and employee of a licensee); and
- d. To provide new grounds for the Commissioner for Labour to refuse to issue, renew or revoke a licence, including non-compliance of the Code of Practice for Employment Agencies.

The amended Ordinance...

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Promulgation of Code of Practice for Employment Agencies

In light of the aforementioned amendments to the Employment Ordinance (Cap. 57), the Commissioner for Labour also promulgated a revised Code of Practice for Employment Agencies (the "**Code**") which supersedes the previous version dated January 2017. The Code mirrors legislative updates to the Employment Ordinance and specifies the following in detail:

- Statutory requirements in relation to operating employment agencies;
- Standards the Commissioner for Labour expects from employment agencies, including but not limited to the following aspects:
 - o Outlining responsibilities of senior management;
 - o Acting honestly and exercising due diligence;
 - o Maintaining transparency in business operations;
 - o Drawing up of service agreements with job-seekers and with employers; and
 - o Adopting good record management practices;
- Emphasis on compliance with the Prevention of Bribery Ordinance (Cap. 201); and
- Sample forms for employment agencies.

The Employment Agencies Administration of the Labour Department conducts regular inspections of Employment Agencies and issues warning letters to Employment Agencies for contraventions of the Code.

The Code...

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District Court strikes out a sex discrimination claim

In *Tan, Shaun Zhi Ming v. Euromoney Institutional Investor (Jersey) Ltd* [2018] HKDC 185, an employee's sex discrimination claim was struck out as the employee failed to show his dismissal by his former employer was due to his gender.

Facts:

Tan, Shaun Zhi Ming ("**Tan**") was terminated by Euromoney Institutional Investor (Jersey) Ltd ("**Euromoney**"). Tan alleged the termination was due to a false, unsubstantiated and improbable sexual harassment allegation made against him by a colleague without proper investigation. Tan claimed the dismissal was a result of direct sex discrimination because of his gender and commenced the action against Euromoney based on sections 5(1)(a) and 11(2)(c) of the Sex Discrimination Ordinance (Cap. 480) ("**SDO**").

Euromoney denied the allegations and applied to strike out the claim by reason of Tan's lawful termination through payment in lieu of notice in accordance with the employment contract.

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The Law and Discussion:

The legal principles in striking out applications are well established. Actions should only be struck out in plain and obvious cases, where the claim is incontestably bad and obviously unsustainable.

The Court recited the “but for” test on sex discrimination, namely that there is unlawful sex discrimination if the relevant woman would have received the same treatment as men but for their sex. Neither the intention to discriminate nor the conduct of a hypothetical reasonable employer is relevant in determining whether there was discrimination. Instead, the Court should look at whether there was less favourable treatment on the ground of sex.

Tan contended he was not given a proper investigation to the sexual harassment allegation, such as an opportunity to face the accusers or to cross-examine witnesses. Euromoney has thus taken an easy way out to dismiss him, resulting in direct sex discrimination.

However, the Judge, quoting from a case authority, stated “all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory”. Applying to the present scenario, the fact that Tan was treated unreasonably or unfairly in the investigation process did not mean Euromoney had committed any act of discrimination under the SDO.

In evaluating the strike-out application, the Judge considered various sources of information such as the (1) employment agreement, (2) transcript of a covert recording and (3) email correspondences. The Judge was of the view although the sexual harassment allegation was mentioned in the above sources of information provided to the Court, Tan’s employment was terminated by payment in lieu of notice in accordance with the employment agreement.

The Court concluded there was simply no direct evidence to satisfy the “but for” test, and an inference of sex discrimination could not be drawn simply from the fact Tan was a male. Therefore, the strike out application was successful.

Takeaways for Employers:

This is good news for the employers. Although the strike out application by the employer in the present case was successful, this case serves as a reminder to employers to have proper processes in place for handling harassment and discrimination complaints.

Typically an employer may not include a reason for termination of employment and the basis is a letter of termination. However, where there can be potential arguments of discrimination, an employer may wish to pre-empt any potential discrimination complaint by including a (legitimate) reason

Judgment...

Labour Department rejects employment agency’s licence renewal

The Labour Department announced through a press release its first refusal in 2018 in renewing the licence of an employment agency (the “EA”). The relevant EA had failed to meet the standards set out in the Code of Practice for Employment Agencies (the “Code”) in many aspects, such as its failing to draw up service agreements with foreign domestic helpers and their employers. No rectification was made by the EA concerned after warning letters were repeatedly issued by the Employment Agencies Administration. The Commissioner for Labour hence refused to renew the EA’s licence on the grounds that the licensee concerned was not a fit and proper person to operate an employment agency under section 53(1)(c)(v) of the Employment Ordinance (Cap. 57).

In addition, the Labour Department reminded employment agencies they must observe the Code since it sets out the legislative requirements which they must observe in operating their businesses, as well as the minimum standards which the Commissioner for Labour expects from employment agencies.

The Press Release...

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Consideration required when varying the terms of a contract of employment

An employer may need to change the terms of employment, such as to introduce post-termination restrictions, to change contractual leave arrangements or other benefits, and less commonly, to demote an employee or reduce salary. Where the change is to improve an employee's benefits, the employee will readily accept the change without complaint. However, where the change seeks to reduce an employee's entitlements or impose additional obligations on the employee, it will be much trickier to get the employee to agree to the contractual change. Even if the employee agrees to the change, an important element in making a contractual change binding on both employer and employee is needed to ensure that there is legal consideration (or bargain) for the change.

In *Wu Kit Man (胡潔敏) v. Dragonway Group Holdings Limited (龍威集團控股有限公司)* [2018] HKCA107, the Court of Appeal provides a useful reminder for parties to think about whether legal consideration is provided when varying a contract of employment. The case also discusses what can amount to legal consideration in an employment context, particularly, where an employee does not seemingly provide any consideration for an employer's promise of an additional benefit.

The Law

The legal requirements to create a binding contract, including a contract of employment, is that there must be an offer, acceptance of that offer, and legal consideration. Consideration is something of value given by one party in return for the other party's promise. If there is no legal consideration, or real benefit, then the purported contract, even if signed by both parties, will be unenforceable. The same principles apply to a variation to a contract of employment.

Facts

Dragonway Group Holdings Limited ("**Dragonway**") employed Ms. Wu under a contract of employment made on 12 May 2015. The only provision in relation to bonus in the contract was a discretionary bonus payable in January if Ms. Wu was still employed and had not tendered her resignation before the payment date.

On 19 October 2015, Dragonway issued an addendum to the contract (the "**Addendum**"), offering a cash bonus of either (1) HK\$1,500,000 after the completion of listing of Dragonway or its holding company on or before 31 December 2016, or (2) if those companies ceased the listing plan or the employee left Dragonway for whatever reason before 31 December 2016, HK\$350,000 would be offered to the employee within 10 days after the cessation or termination and in any event no later than 31 December 2016.

Dragonway terminated Ms. Wu's employment in December 2015. Ms. Wu brought a claim for the cash bonus of HK\$350,000 in the Labour Tribunal. The Presiding Officer in the Labour Tribunal found in favour of Ms. Wu. On appeal the Court of First Instance reversed the decision on the basis that the Addendum was not supported by consideration and thus Ms. Wu was not entitled to the cash bonus. Ms. Wu appealed to the Court of Appeal.

Court Findings

The Court of Appeal confirmed that the ultimate test for consideration to a contract for the variation of the terms of employment is whether or not there is a "real benefit". In circumstances where the employee continues to be employed under the contract of employment and is already obliged to work under that contract, the question of legal consideration for a variation to that contract is whether the employer has secured a benefit and avoided a detriment.

Counsel for Ms. Wu relied on an earlier line of cases, including the Court of Appeal case of *Chong Cheng Lin Courtney v. Cathay Pacific Airways Ltd* [2010] HKCA 338 as authority for the proposition that the non-exercise by an employee of his/her right to terminate under the contract of employment is good consideration. However, the Court of Appeal in the present case was quick to say that it is important to look at the circumstances of the case and the context in which the variation took place. They said that the variation in the Chong case was in the context of a variation of standard terms across the board to all cabin

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attendants employed by the defendant when there was competition from other airlines offering similar packages. It was in such special contexts that the courts held that consideration for the variation was provided by the employee refraining from resigning. This was a real benefit to the employer.

The state of the law in this area is neatly summarised by the Court of Appeal citing an earlier English decision of *Williams v. Roffey Brothers & Nicholls (Contractors) Ltd* [1991] 1 QB 1 as follows:

"the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promisee will be legally binding"

The Court of Appeal held that as there was a lack of citation of the relevant legal authorities it considered that the Court of First Instance Judge did not focus on the issue of whether there was any "real benefit" provided in the context of the case. Given the way that the matter had developed, there was inadequate material before the Court of Appeal to make a determination of whether there was any consideration for the Addendum. The Court of Appeal remitted the matter to the Labour Tribunal for retrial on the question of consideration.

As a postscript, the approach in the *Williams* case was recently applied in *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2017] QB 604, which is on appeal to the UK Supreme Court. That appeal was heard on 1 February 2018. The judgment in that Supreme Court case (which will only be of persuasive value) should be taken into consideration.

Lessons for Employers

1. Consider what legal consideration is provided for a variation to the contract of employment. From the case discussed above, it can be seen that even in scenarios where the employer is offering "more for the same" in the change of employment terms, it may be necessary to show what consideration is provided by the employee. An agreement by the employee not to exercise his/her right to terminate the contract of employment may be good consideration. However, the context must be such that there is a real benefit to the employer. It will not apply in all circumstances.
2. Where the consideration being provided is not obvious, consider expressly stating the consideration is being provided in the variation agreement.
3. Depending on the variation, consider executing the variation of contract as a deed. A deed is a written form of binding promise or commitment of one party to perform a certain act. If only one party under an agreement is receiving a real benefit, it may be worth considering whether the benefit is one that can be conferred by way of executing the agreement in the form of a deed so that it is not void for the lack of consideration.

Judgment...

Former employees liable for pocketing inflated prices in breach of their fiduciary duties

The Court of First Instance held in *Promo International Limited v. Chae Man Tock and Chow Ting Hei also known as Chow Shuk Mei* [2018] HKCFI 284 two former employees liable for inflated prices of suppliers' products and tooling costs they have pocketed in breach of their duties owed to the employer.

Facts:

Chae Man Tock ("D1") was initially employed by Promo International Limited ("P") as a merchandiser in the Shenzhen office. The Shenzhen office ceased its business operations in March 2007. Thereafter, D1 worked as Office Manager in the Hong Kong office set up in

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May 2007. Upon setting up of the Hong Kong office, D1 was paid in GBP. P did not make MPF contributions or file salaries tax return for D1. Chow Ting Hei also known as Chow Shuk Mei (“D2”, together with D1, “Ds”), wife of D1, was then employed to work in the Hong Kong office. It was not disputed Ds’ duties were to source products from suppliers in Mainland China for the benefit of P.

Ds were subsequently found to be involved in a fraudulent scheme, whereby invoices to P were inflated such that price differences were paid to Ds’ personal bank accounts, and some payments were made to D2 by suppliers without P’s knowledge and consent.

Ds were charged and convicted with multiple charges of fraud and accepting advantage in 2012 and were both sentenced to 3.5 years’ imprisonment. Their applications for leave to appeal were dismissed in 2013.

In this action, P claimed against Ds for breach of express and implied terms of their employment contracts and sought recovery of price differences paid by P and the amounts quoted by the suppliers to Ds. On the other hand, D1 insisted he was an independent contractor in the Hong Kong office who employed D2 himself, and hence counter-claimed against P for agreed expenses of the Hong Kong office based on an oral agreement.

Issues and Court Findings:

1. Whether Ds were P’s employees

It is well established the approach to whether a person is an employee is to examine all the features of the relationship against the background to determine whether, as a matter of overall impression, the relationship is one of employment.

The Court considered multiple sources of communication between P and Ds, such as alleged employment contracts, oral agreements, email correspondences and actions and drew the following inferences:

- a. Whether payments to D1 were made in HKD or GBP did not matter as it would still be salary payments to an employee;
- b. The change in description of payment to D1’s Payroll Account from “salary” to “wages” made no difference as only an employee would receive salaries or wages;
- c. The email exchanges indicated D1 had:
 - i. sought P’s approval in relation to employment and sent employment contracts to P; and
 - ii. written to Mr Townsend, managing director of P, when taking leave and requesting for bonuses;
- d. Though D1 was in charge of his own MPF contributions and tax obligations, these of itself would not be determinative factors in the overall assessment; and
- e. The fact that D2 reported to D1 as Office Manager over her work would not necessarily mean the manager was her employer.

As Ds were previously convicted, section 62 of the Evidence Ordinance (Cap. 8) shifted the evidential burden from P to Ds to prove they were not employees of P. The Court held Ds were unable to discharge the burden and Ds were both held to be employees of P.

2. Whether Ds were in breach of their duties owed towards P

It is recognized that an employee, during the course of employment, owes a duty of good faith to his employer, and such duty includes a duty not to make any secret profits. The Court observed while there were situations where an employee was allowed to earn profits using his employer’s assets and not account for the said profits, it would depend on the facts of each case.

Applying to the present facts, the Court accepted it would be in the best interest of P to source goods of acceptable quality at the lowest price to maximize profits. Since Ds inflated prices of suppliers and pocketed the differences, the Court held Ds were clearly in breach of their duties.

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3. Assessment of Damages

The Court took this opportunity to consider the grounds for awarding (1) exemplary and aggravated damages and (2) compound interest.

On the issue of exemplary and aggravated damages, P asserted D1's actions were deliberate and premeditated and sought for an additional of 20% of the sum claimed as an award of exemplary damages. The Court observed there has been no authority directly relevant to quantum of exemplary damages or application of a percentage of compensatory damages as exemplary damages. In applying the "if, but only if" test i.e. the Court can award some larger sum to mark disapproval of the defendant's conduct and to deter the defendant from repeating the conduct if, but only if, compensatory damages are inadequate, the Court was of the opinion it was inapplicable in this context as compensatory damages were adequate to punish and deter Ds for their conduct.

Additionally, on the issue of compound interest, the claim was only made at the closing submissions but not in the Statement of Claim. The Court emphasised though there was equitable jurisdiction to award compound interest in cases of fraud, since P did not specifically claim for compound interest, such claim was not allowed.

P's claim was successful and Ds were ordered to pay for damages arising out of their breach of duties as P's employees.

Takeaways for Employers:

Employers should document their employment of employees in writing to avoid dispute as to the employment and the terms of employment.

Employers should also ensure that it has adequate processes in place to control, monitor and detect breaches by employees of their duties.

*Judgment***Launching of public consultation on fourth CEDAW report**

The Government issued a draft outline of its fourth report under the United Nations Convention on the Elimination of All Forms of Discrimination against Women ("**CEDAW**") to seek views from the public. The report will be submitted to the Central People's Government for incorporation into the ninth national periodic report.

The CEDAW is an international convention which defines what constitutes discrimination against women and outlines international standards in protecting the rights of women. The CEDAW was extended to Hong Kong in October 1996 and the Government has been implementing the CEDAW through provisions of the Basic Law, local legislation and other administrative measures.

In accordance with Article 18 of the CEDAW, Hong Kong is required to submit a report on measures taken to give effect to the provisions of the CEDAW. The fourth report mainly consists of the following:

- Updates on the legal, administrative and any other significant developments since the previous report in 2012;
- Progress of ongoing developments when the United Nations Committee on the Elimination of Discrimination against Women (the "**Committee**") considered the previous report in 2014; and
- Responses to concerns and recommendations made by the Committee's concluding observations on the previous report.

The consultation period will last for two months until 30 April 2018.

*An outline of the report*HONG
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Equal Opportunities Commission announced its comparison study on sexual harassment against Mainland Chinese immigrants and locally-born women

The Equal Opportunities Commission ("**EOC**") published its report "A Study on knowledge of sexual harassment and experience of being sexually harassed in the service industries:

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Comparing recent female Mainland Chinese immigrants with locally-born women".

In this study, a total of 603 questionnaires were completed by 302 recent female Mainland Chinese immigrants and 301 locally-born women. Seven focus group interviews comprising 36 participants were additionally conducted.

Findings from the study revealed locally-born women were significantly more able to identify sexual harassment behaviours than recent female Mainland Chinese immigrants. Among the respondents, 14.6% of locally-born women and 9.6% of recent female Mainland Chinese immigrants have been sexually harassed in the service workplace. These figures are likely an under-estimation because of the small proportion of employers (17.9% of the respondents) who have developed workplace sexual harassment policy and/or provided training to their workers. Most respondents who experienced workplace sexual harassment also indicated they were dismissive of official channels of complaint and did not take actions towards the harassers.

In light of the above findings, the following non-exhaustive recommendations were made:

- Provide more resources to small to medium sized organizations to increase their willingness to establish anti-sexual harassment policies and training;
- Enhance greater collaboration between the Government, the EOC and non-governmental organizations to provide sexual harassment education programmes;
- Educate recent female Mainland Chinese immigrants and their families;
- Educate the public on workplace sexual harassment to change sub-cultures which normalize and justify such behaviours; and
- Publicize and streamline procedures for reporting workplace sexual harassment.

Sexual harassment is a civil offence under the Sex Discrimination Ordinance (Cap. 480). A person sexually harasses a woman if the person makes an unwelcome sexual advance or an unwelcome request for sexual favours to her or engages in other unwelcome conduct of a sexual nature in relation to the woman.

[The Press Release](#)

[The Report](#)

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2018

Action plan to tackle trafficking in persons and enhance protection of foreign domestic helpers

An inter-bureau/departmental steering committee set up by the Government has endorsed an action plan ("**Action Plan**") to tackle trafficking in persons ("**TIP**") and enhance the protection of foreign domestic helpers ("**FDH**") working in Hong Kong. TIP includes the recruitment, transportation, transfer, harbouring or receipt of persons by illegitimate means for the purpose of exploitation. Conducts of TIP, such as physical abuse, illegal employment, child abduction and various sexual related offences etc., are prohibited by local legislation.

To further combat TIP and protect FDHs, the Action Plan comprises, but is not limited to, the following major initiatives:

- Extending the victim screening mechanism to the Labour Department;
- Setting up a new FDH division in the Labour Department to ensure the effective implementation of measures;
- Strengthening support for the designated co-ordinator of human exploitation cases in the Department of Justice; and
- Setting up a dedicated hotline with interpretation services to provide support services to FDHs.

[The Press Release](#)

[The Action Plan](#)

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Maharashtra Shops and Establishments (regulation of Employment and Conditions of Service) Act, 2017 ("Maharashtra S&E Act")

The Maharashtra S&E Act came into force on 19 December 2017 replacing the existing shops and establishment legislation. Some of the key changes in the new Maharashtra S&E Act are increase in the overtime limit, increase in number of leaves that may be accumulated from 42 to 45 and requirement to have crèche facilities for establishments having 50 or more employees. In light of this, the Maharashtra government also notified the local regulatory body responsible for enforcement of the Maharashtra S&E Act and hours of opening and closing of specific establishments under separate notifications on 19 December 2017.

[More...](#)

INDIA

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2017

The Rationalization of Forms and Reports under Certain Labour Laws (Amendment) Rules, 2017

The Ministry of Labour and Employment has notified the Rationalization of Forms and Reports under Certain Labour Laws (Amendment) Rules, 2017 on 29 December 2017, introducing digitization of forms submissions as prescribed under the principal rules and also introducing combined forms for filing the registration and annual returns of establishments employing contract labour, migrant workmen and building workers.

[More...](#)

INDIA

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2018

Draft Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 proposed. ("SO Amendment Rules")

The central government has notified the draft SO Amendment Rules on 8 January 2018 for comments and suggestions from the general public. These draft SO Amendment Rules aim to amend the provisions of the Industrial Employment (Standing Orders) Central Rules, 1946 to allow all sectors to hire fixed term employment workmen under the Industrial Employment (Standing Orders) Act, 1946 and the Rules made thereunder. Currently, the central government permits fixed-term employment only for the apparel manufacturing industry.

[More...](#)

INDIA

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2018

Haryana Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Amendment Rules, 2018 ("Haryana BOCW Amendment")

The Haryana Government has notified the Haryana BOCW Amendment on 24 January 2018 to mainly amend the provisions relating to registration of building workers, disability pension, payment of death benefit and medical assistance. These amendments include a revised list of government bodies who's certificates can be considered in the absence of a certificate from the employer at the stage of registration of the building workers, increase in the amount of disability pension and ex-gratia payment to those workers who are permanently disabled, increase in the financial assistance provided in the instance of death of a worker and financial assistance to those workers who are hospitalized due to illness cause by accident or any disease.

[More...](#)

INDIA

29
JAN

2018

Draft of the Rajasthan Rationalization of Forms and Reports under Certain Labour Laws Rules, 2018 ("Rules") are proposed.

The Rajasthan government on 29 January 2018 has published the draft Rajasthan Rationalization of Forms and Reports under Certain Labour Laws Rules, 2018 for comments and suggestions from the general public. These draft rules aim to simplify, consolidate all the forms required to be maintained or filed by establishments employing contract labour, migrant workmen and building workers, and also allow the forms to be maintained in the electronic form.

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2018

Draft of The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 ("**Rules**") are proposed.

The Industries, Energy and Labour department of the Maharashtra Government on 2 February 2018 has published the draft Rules under the Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 for comments and suggestions from the general public. Some of the key introductions in the draft Rules include definition of 'Managerial Functions', consent form to be used to obtain consent from woman employees before allowing them to work in the night, menstrual leave for those woman employees working in the night shift, filing a prescribed form with details of persons in managerial position with the relevant facilitator, compliances to be moved online, requirement for small establishments to only intimate commencement of business, establishments allowed to remain open 24/7 and requirement to set up a health and safety committee.

[More...](#)

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2018

The Apprentices (Maharashtra Amendment) Act, 2017

The Maharashtra Government has notified the Apprentices (Maharashtra Amendment) Act, 2017 on 9 February 2018 to mainly amend the termination of apprenticeship contract provisions, number of apprentices for a designated trade, payment provision, grant of certificate provisions in the Apprentices Act, 1961, in its application to the state of Maharashtra. These amendments introduce payment of one-month stipend to the apprentices in the event of termination of their contracts by the employer. Similarly, where the apprentice terminates the contract he/she is obligated to pay one-month stipend. The amendment also provides for minimum and maximum of threshold on the number of apprentices that establishments must engage, a list of minimum rates of stipend payable to an apprentice per month and eligibility of the apprentices to appear for tests conducted by the relevant state government agency and grant of certificate of proficiency upon passing the relevant tests.

INDIA

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FEB

2018

Draft of the Maternity Benefit (Crèche in the Mine Establishments) Rules, 2018 are proposed.

The Ministry of Labour and Employment on 12 February 2018 has published the draft Maternity Benefit (Creche in the Mine Establishments) Rules, 2018 for comments and suggestions from the general public. As per the proposed rules the Mines Crèche Rules, 1966 issued under the Mines Act, 1952 shall mutatis mutandis be the rules made under Maternity Benefit Act, 1961 with a few modifications. These modifications include a threshold on the number of employees working in the establishment that would trigger the requirement of providing crèche facilities, categories of workers who will have access to the crèche facilities, and a minimum distance of crèche facility from the entrance gate of the establishment, which is 500 metres.

[More...](#)

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2018

Payment of Gratuity (Amendment) Bill, 2017 ("**Gratuity Amendment**") passed by the Lok Sabha.

The Lok Sabha (lower house of the Indian parliament), on 15 March 2018, has passed the Gratuity Amendment. This Gratuity Amendment aims to increase the limit on maximum gratuity amount payable from INR 10,00,000 (USD 15,520) to INR 20,00,000 (USD 31,039) for private sector employees who have completed at least 5 years of continuous employment with the employer. The Bill will have to be passed by the Rajya Sabha (upper house of the Indian parliament) and get President's assent before it becomes the law.

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Supreme Court Issues New Guidelines on Expatriate Employees

On 19 December 2017, the Supreme Court issued Circular Letter No. 1 Year 2017 regarding the Implementation of the 2017 Supreme Court Meeting as a Guideline for the Indonesian Courts (“SEMA No.1”). SEMA No. 1 is a 41-page document that contains new policies to be applied by courts in Indonesia when handling criminal, civil, religious and military matters.

Of particular interest here is the section on labor court policies, found on page 13 of SEMA No. 1. Here, the Supreme Court has issued new labor court guidelines as follows:

1. Foreign employees can be employed in Indonesia only for certain positions and for a certain period of time under a fixed-term employment agreement (*Perjanjian Kerja Waktu Tertentu* or PKWT).
2. Legal protections for foreign employees only apply if such foreign employees have obtained a work permit (*Izin Mempekerjakan Tenaga Kerja Asing* or IMTA).
3. If the work permit of a foreign employee has expired but their fixed-term employment agreement is still valid, the remaining period of the fixed-term employment agreement will not be protected by law.

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2018

Conversion Right from Fixed-term Employment to Indefinite-term Employment

Under the Labor Contract Act (“LCA”), if the aggregate employment period of a fixed-term employee working with the same employer exceeds 5 years as a result of renewal of fixed-term employment contracts, such fixed-term employee has a right to unilaterally convert his/her fixed-term employment contract to an indefinite-term employment contract (“Conversion Right”) if he/she requests the employer to do so before the expiration of the term of the existing fixed-term employment contract (LCA, Art. 18). If an employment term is 1 year, 6 months or 3 months, these Conversion Rights can be exercised on or after 1 April, 2018.

If such Conversion Right is duly exercised by a fixed-term employee, the employer and the fixed-term employee are deemed to execute a new indefinite-term employment contract starting from the date immediately after the expiration date of the existing fixed-term employment contract. Its terms and conditions are the same as those of the current fixed-term employment contract (other than the contract period) unless otherwise agreed or stipulated in the Rules of Employment.

Employers need to be well prepared in advance for the exercise of Conversion Right by, for example, reviewing and revising the rules of employment.

[More...](#)

Amendments to the Act on the Promotion of the Employment of Disabled Persons

The Act on the Promotion of the Employment of Disabled Persons (the “APEDP”) was amended in 2013, for the purpose of prohibiting discrimination on the basis of disability, ensuring comfort and convenience for disabled persons in the workplace, and creating employment opportunities for disabled persons, and the following reforms will take effect on 1 April, 2018.

- a. All employers are required to employ disabled persons in numbers equal to or above the disabled persons’ employment quota. The quota applicable to private employers, which is expressed as a percentage of the total number of employees of a given employer, has been increased from 2.0% to 2.2% on 1 April, 2018, meaning for example, that employers must employ at least one disabled person per 45.5 employees whom they employ. The quota will be increased from 2.2% to 2.3% on or before April 2021.
- b. The number of persons with a specified mental illness is also incorporated into the calculation of the quota.

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2018

Wholesale changes to Private Employment Agencies Act

The Private Employment Agencies (Amendment) Act 2017 came into force with effect from 1st February 2018. Apart from expanding enforcement provisions on private employment agencies in recruiting foreign workers including foreign domestic maids, the new amendments also cover recruitment and job placements of local job seekers. The amendments also involved the classification of licenses. Agencies are given a six month transition period until 30th July 2018 to enable private employment agencies currently in operation to continue to recruit and conduct job placements until the expiry of their licences without being subjected to the revised guarantee bond imposed.

[More...](#)

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Minimum Wage Order 2017

The Government has enacted a new order raising the minimum wage to \$16.50 NZD an hour, from 1 April 2018. The Government has signalled that the minimum wage will be lifted further, to \$20 an hour, by 2021 as part of Labour's coalition agreement with NZ First.

[Find the order here](#)

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2017

Parental Leave and Employment Protection Amendment Bill

Parliament has passed the Government's paid parental leave bill. It has given royal assent on 4 December 2017. From 1 July 2018 the number of weeks of parental leave payments eligible employees are entitled to will rise from 18 weeks to 22. From 1 July 2020, that will increase to 26 weeks.

[More...](#)

Employment Relations Amendment Bill

This Bill is very likely to be passed later in the year, amending the Employment Relations Act 2000. The stated purpose of the Bill is to restore key minimum standards and protections for employees, and to implement a suite of changes to promote and strengthen collective bargaining and union rights in the workplace. The Minister in charge, Ian Lees-Galloway, has stated that "the changes are intended to introduce greater fairness in the workplace... and promote productive employment relationships."

This Bill proposes to change the Employment Relations Act (**ERA**) in a range of important areas. Some of these include:

- Reinstatement becoming the primary remedy in unjustifiable dismissal cases;
- A new duty of good faith for parties in collective bargaining, to conclude a collective agreement unless there is a "genuine reason" not to (a return to a pre-2011 state of the ERA);
- Reinstating the ability of unions to initiate collective bargaining 20 days before an employer in certain circumstances (also a return to pre-2011 state of the ERA);
- Employers may no longer be able to opt out of multi-employer collective bargaining, or to deduct pay as a response to partial strikes;
- Union representatives may no longer need consent from an employer before entering a workplace;
- A restoration of statutory prescription for rest breaks and meal breaks, with a limited exemption for "essential services";
- Unions may gain the ability to provide an employer with information about the role and functions of the union that the employer must then pass on to new employees, with only narrow exceptions; and
- New grounds for discrimination to include an employee's union membership status or involvement in union activities.

The proposed change that has garnered the most media attention, and criticism from opposition parties, is to 90-day trial periods.

- The Bill proposes to limit the use of 90-day trial periods to only those employers who employ fewer than 20 employees
- Employers with more than 20 employees will be able to use probationary periods instead

The Bill passed its first reading on 1 February 2018 and has been referred to the Education and Workforce Select Committee. The Select Committee is due to report back on the Bill by 1 August 2018. Submissions are being accepted currently, with a closing date of 30 March 2018 (NZ time). The Bill is likely to be implemented in September 2018.

[Follow the Bill's progress here](#)

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Employment Relations (Triangular Employment) Amendment Bill

This Bill is likely to be passed later in the year, amending the Employment Relations Act. The stated purpose of the Bill is to ensure that employees employed by one employer, but working under the control and direction of another business and organisation, are “not deprived of the right to coverage of a collective agreement, and to ensure that such employees [are able] to allege a personal grievance.”

This Bill will largely affect labour hire companies. In particular, it changes the interpretation section of the Employment Relations Act to include “primary employers” and “secondary employers” and delineates between the two later in the Act in terms of collective agreements and personal grievances.

The Bill is currently at first reading, with no set dates for the select committee process as this stage.

Follow the Bill's progress

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2018

Employment (Pay Equity and Equal Pay) Bill

This Bill is unlikely to be passed. It is a Member's Bill from Denise Lee of the National Party, essentially re-introducing the previous Government's pay equity legislation which was withdrawn from Parliament in November last year by the Labour Government.

The Minister for Women Julie Anne Genter released a statement saying that “the changes in Lee's bill had already been rejected by unions and other stakeholders”. The Government is preferring their own working group process, which has advised amending the existing Equal Pay Act 1972 (see below).

The Bill is currently at first reading.

Follow the Bill's progress

NEW
ZEALAND**22
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2018

Joint Working Group on Pay Equity principles

The Minister for Workplace Relations and Safety, Iain Lees-Galloway, and Minister for Women Julie Anne Genter, reconvened a Joint Working Group on Pay Equity Principles to develop a set of principles to guide the implementation of pay equity. The group included Government representatives, unions, and employers. The key issues the working group was asked to consider are:

1. Determining the merit of a claim as a pay equity claim
2. How to select appropriate mail comparators when assessing the work subject to a pay equity claim

The group has now reported back to the ministers with a set of recommendations, which include a clarification and simplification of the process for initiating a pay equity claim, retaining the principles of comparators, and amending the Equal Pay Act to implement the principles.

Julia Anne Genter has suggested that the Government aims to introduce legislation “mid-year”.

See recent coverage

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There are no significant policy, legal or case developments within the employment space during 2018 Q1.

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Jurong Shipyard Fined for Fatal Accident Leading to Death of Two Workers

Jurong Shipyard Pte Ltd (“**JSPL**”) was engaged to perform repair works on a vessel, and it engaged Shipblast Marine Pte Ltd, the employer of the two deceased workers, to conduct grit blasting work. The workers used a cherry picker (an aerial platform used to access work areas at height) owned by JSPL to perform the work. However, the workers were fatally injured when they fell about 30 metres to the bottom of a dry dock as a result of the collapse of the boom of the cherry picker. The investigations revealed that JSPL had failed to refer to the manufacturer’s guidelines which would have required JSPL to replace the boom in question (which was corroded), and did not detect the defective sections of the boom due to its failure to conduct comprehensive checks on the boom. As a result, JSPL was fined S\$230,000 under the Workplace Safety and Health Act (Cap. 354A) for failing to ensure that the cherry picker was maintained in a safe condition.

[More...](#)

SINGAPORE

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2018

China Taiping Insurance (Singapore) Pte Ltd and another v Low Yi Lian Cindy and others

This main issue in this appeal was whether the dependants of a deceased worker who passed away intestate can make a valid claim for compensation under the Work Injury Compensation Act (Cap. 354) (“**WICA**”), without first obtaining letters of administration to represent the estate of the deceased worker. The High Court observed that the dependants had brought proceedings under the WICA at a time when they could have brought proceedings, in their own name, under common law for damages against a tortfeasor who caused the death of the victim pursuant to Section 20 of the Civil Law Act (Cap. 43) (“**CLA**”). In this regard, the High Court took the view that it was the dependants’ entitlement to choose to bring a claim under the WICA as opposed to under the CLA. Given that Section 20 of the CLA allowed the dependants to bring the action in their own name if there is no executor or administrator of the deceased or if no action is brought within six months after the death by and in the name of an executor or administrator of the deceased, the High Court held that it was not necessary for the dependants to have obtained letters of administration before bringing a claim under the WICA.

[More...](#)

SINGAPORE

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2018

Company Fined \$200,000 for Fatal Workplace Electrocutation Incident

MW Group Pte Ltd (“**MW**”) was imposed a fine of S\$200,000 for a fatal workplace incident involving a worker who died from electrocution when testing and calibrating an Arc Reflection System (“**ARS**”) machine. During the investigations, it was found that prior to the incident, MW conducted a generic risk assessment and identified electrocution as the only hazard. However, there were no safety measures put in place to prevent the risk of electrocution and no risk assessment conducted for the testing and calibration of the ARS machine. Following a five-day trial, MW was convicted and fined for its workplace safety and health lapses.

[More...](#)

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2018

Enhanced Work-Life Grant

The existing Work-Life Grant (“**WLG**”), which provides funding and incentives for companies to offer flexible work arrangements (“**FWAs**”) for employees, will be enhanced and will take effect from 1 July 2018. To qualify for the enhanced WLG, an employer must have adopted the Tripartite Standard on FWAs and must not have claimed for FWA Incentive under the current WLG. Under the enhanced WLG, the following incentives will be provided:

1. An employer can receive up to S\$2,000 for each employee on FWAs, up to a maximum of 35 employees. Currently, employers receive S\$2,000 per employee for the first 5 employees and S\$1,500 for the subsequent 20 employees;
2. An employer can receive up to S\$3,500, as opposed to the current S\$2,000, for each employee who is a professional, manager, executive or technician, who is under job sharing arrangements.

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The enhanced WLG also relaxed the eligibility criteria for application of the grant, as instead of requiring at least 20% of all employees to be on FWAs, it only requires each company to have 1 employee working on such arrangements.

[More...](#)

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2018

Tightening Rules on Hiring Foreign Employees

During his Committee of Supply speech on 5 March 2018, Ministry for Manpower Mr Lim Swee Say announced that the rules relating to hiring foreign employees will be tightened in the following ways:

1. The minimum qualifying monthly salary for application of an S Pass, a work pass for mid-skilled foreign employees, will be increased from S\$2,200 to S\$2,400 over the next two years. The increase will take place in two phases – increase from S\$2,200 to S\$2,300 per month from January 2019, and increase from S\$2,300 to S\$2,400 per month from January 2020.
2. More employers will be required to advertise jobs on the national Jobs Bank for at least 14 days prior to making applications for Employment Passes. Currently, employers are exempted from this requirement where, amongst others, the company has 25 or fewer employees or the job position pays a fixed monthly salary of S\$12,000 and above. Starting from 1 July 2018, these grounds for exemption will be changed such that companies with 10 or fewer employees and job positions which pay a fixed monthly salary of S\$15,000 and above will be exempted from the advertising requirement. Please note that the other grounds for exemption remain the same.

[More...](#)

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2018

Tripartite Standards on Contracting with Self Employed Persons

On 5 March 2018, the Tripartite Standards on Contracting with Self Employed Persons (“**Tripartite Standards**”) were launched. The Tripartite Standards set out the benchmark which service buyers are encouraged to adopt when contracting with self-employed persons (“**SEPs**”). Specifically, under the Tripartite Standards, businesses are encouraged to:

1. Discuss the terms of products or services to be delivered with SEPs, and document the key terms agreed upon in writing;
2. Set out the written key terms clearly and include the following information:
 - a. names of contracting parties;
 - b. parties’ obligations, such as nature of services to be provided (e.g. outcome; duration; location);
 - c. payment – amount and due date of payment(s);
 - d. if terms on variation of the agreement are provided for, how either party can vary the key terms or terminate the agreement; and
 - e. if terms for resolving disputes are provided for, the option for mediation should be made available, without preventing either party from bringing any dispute directly to the Small Claims Tribunals.

Separately, with effect from 5 March 2018, the Tripartite Alliance for Dispute Management will also be extending voluntary mediation services to all SEPs who have payment disputes with businesses.

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2018

Changes to the Employment Act

On 5 March 2018, Minister for Manpower Mr Lim Swee Say announced in Parliament that changes will be made to the Employment Act (Cap. 91) (“**EA**”) to cover more employees in Singapore with effect from 1 April 2019. This follows from the public consultation held by the Ministry of Manpower (“**MOM**”) from January 2018 on proposed changes to the EA.

Importantly, the S\$4,500 salary cap that excluded employees from core EA coverage will now be removed such that professional, managers and executives (“**PMEs**”) in Singapore earning more than S\$4,500 will be covered by the core provisions of the EA. The expanded coverage of the EA will, amongst others, allow all PMEs to enjoy protections relating to timely payment of salary, holiday and sick leave entitlements, and the ability to appeal against wrongful dismissals.

More employees will also be afforded additional protections targeted at more vulnerable employees under the EA (e.g. overtime payment and annual leave entitlements), as non-workmen earning a monthly salary of up to S\$2,600 (as opposed to S\$2,500 previously) will be protected following the amendments to the EA.

Further, calculation of overtime payments, which is dependent on the basic monthly salary level of the employee, will be revised upwards. While the existing EA limits calculation of overtime payments to a basic monthly salary of up to S\$2,250, the new changes will allow overtime payments to be calculated for a basic monthly salary level of up to S\$2,600.

Finally, the changes will also streamline the forum for hearing employer-employee disputes. Under the current legislative framework, statutory and contractual salary-related disputes are heard by the Employment Claims Tribunals (“**ECT**”), while wrongful dismissal claims are heard by the MOM. Following the amendments, the ECT will be hearing both salary-related and wrongful dismissal claims.

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Forward****Amendment to Reduce Working Hours**

On 27 February, 2018, the Environment and Labour Committee of the National Assembly approved an amendment to the Labor Standards Act (the "Amendment") to reduce the number of total permissible working hours per week. The Amendment was reviewed by the Legislation and Judiciary Committee, and on 28 February, 2018, was approved by a vote at a National Assembly plenary session.

Under the Amendment, the maximum total working hours per week, including Saturdays and Sundays, will be reduced from 68 hours to 52 hours.

Key Aspects of the Amendment:

The amendment clarifies that "one week" consists of seven days, including public holidays, so that the current maximum working hours of 68 hours per week will be reduced to 52 hours per week. The effective dates for compliance will be based on the size of the business, as follows:

- Businesses with 300 or more employees and public agencies: 1 July 2018;
- Businesses with 50 or more employees, but fewer than 300 employees: 1 January 2020; and
- Businesses with five to 50 employees: 1 July 2021.

For businesses with 30 or fewer employees, special extensions to working hours (up to eight hours) may be permitted upon written agreement with the employees' representative until 31 December 2022.

Also, cumulative or double premiums (i.e., overtime or night time, and holiday) will not apply for work performed on holidays. However, the Amendment provides for an additional 50% overtime pay premium for up to 8 hours of work on holidays, and an additional 100% overtime pay premium in the case over 8 hours are worked on holidays.

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Amendment to Expand the Scope of Application of Public Holiday Regulations

The amendment expands the scope of application of public holiday requirements to include private companies (which previously only applied to public agencies), to ensure that public holidays are treated as paid holidays. The schedule for compliance will be based on the size of the business, as follows:

- Businesses with 300 or more employees and public agencies: 1 January 2020;
- Businesses with 30 or more employees, but fewer than 300 employees: 1 January 2021; and
- Businesses with five to 30 employees: 1 January 2022.

[More...](#)

Amendment to Reduce the Scope of Businesses Exempt from Working Hours Restrictions

The amendment reduces the scope of businesses which are exempt from the maximum working hours limits from 26 types to 5 types.

The only remaining business types which are exempt from maximum working hours limits are: land transportation (excluding passenger vehicle transportation with service routes), water transportation, air transportation, other transportation services businesses, and health services. However, with respect to these 5 special business categories, at least 11 continuous hours of rest must be ensured. The 21 types of businesses that are no longer subject to the exemption will be required to comply with the maximum working hours requirements.

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SC Appeal 79/2013 Sri Lankan Airlines Limited Vs Sri Lankan Airlines Aircrafts Technicians Union [SLAATA] and Others

This was an appeal to the Supreme Court by the Petitioner against the Judgment of the Court of Appeal which affirmed the award/order of an Arbitrator on an industrial dispute raised by the SLAATA (a Trade Union).

The issue referred to arbitration was whether the non-payment of what was referred to in a collective agreement entered into by the parties in 1999 as the “13th month incentive bonus” for the year 2001 to the employees of the company who were members of the Union was justified and if not, to what relief they were entitled.

The Arbitrator held that the non-payment of the “bonus” was not justified and directed payment to be made.

The company sought to quash the order of the Arbitrator by way of writ of certiorari but Court of Appeal refused to issue the writ and in the result the award stood affirmed. In appeal to the Supreme Court from this judgment, the employer’s position was that the collective agreement entered into in January 1999 between the employer and the Union expressly stated that “A 13th month incentive bonus may be payable each year in the end December payroll as per the rules and regulations that are announced each year at the sole discretion of the management of the company to all employees.”

The company’s position was that the bonus was only payable at the discretion of the employer that given the financial problems of the company it could not pay the said bonus (and it was legally entitled to not do so) and that it could not do so due to the extremely difficult economic conditions which prevailed in the year 2001 even though it had been paying bonus until then for over 20 years.

The position of the Union was that after the change of the name of the employer from “Air Lanka” to “Sri Lankan Airlines Limited” in 1997, the Chief Executive Officer by letter dated 29/7/1999 informed the employees of the company that the terms and conditions of employment they enjoyed with Air Lanka and also the already negotiated collective agreement would remain unaltered by the change of name. The Union also contended that the 13th month incentive had been paid continuously from 1979 for a period of 20 years and that it was a customary payment from the employer to the employee. It was further contended that this was because, in fact, in the course of any year the employees concerned actually worked 13 roster cycles. As regards the matter of losses, the Union pointed out that the relevant year was the period 1/4/2000 to 31/3/2001 during which time there had not been any loss of income or any drastic economic downfall of the Company. It was contended that the employer had not used its discretion reasonably and on the contrary had acted unreasonably and unjustly.

The Supreme Court having referred to the relevant provisions of the Industrial Disputes Act noted that any terms of the collective agreement become implied terms in the contract of employment between the employer and the workmen.

The Court then went on to refer to the fact that in terms of the Act, when an industrial dispute was referred to arbitration by an Arbitrator, the Arbitrator was obliged to “make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute and thereafter make such award as may appear to him to be just and equitable”. In this connection, the Court cited with approval a previous judgment of a bench of seven judges in which it was held that “an Industrial Arbitrator is not tied down and fettered by the terms of a contract of employment between the employer and the workmen”.

The Court noted in particular that the payment for an extra month for each financial year was paid at the end of each calendar year and that it was called the “13th month incentive bonus” or named as such only after the collective agreement came into existence. While salaries were paid in respect of each month for only 12 months to every employee, the members of SLATAA being workers on roster cycles of 28 days in each month worked 13 lunar months.

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Having considered these matters, the Supreme Court opined that that “this payment which SLAATA has prayed for from the Arbitrator cannot be recognized as a payment on which the employer can use its discretion and avoid payment because it is a payment the employee has earned with his sweat having worked on a roster.”

The Court held that “even though Clause 13.1 of the collective agreement reads ‘at the sole discretion of the management of the company’ the just and reasonable interpretation of the use of the discretion of the employer should be in favour of the employee. It is nothing but reasonable for the employer to recognize that that payment was something the employee had worked for and earned.” It (the Court) further noted that even if the employer was not in a position, economically, to pay the dues at that particular time of the year - i.e. December 2001 - it was something that the workers had earned by the end of the financial year by April 2001, payment of which was only put off by practice by the employer. The 13th month payment was in fact not an incentive bonus but a payment which the employees had earned.

In conclusion, the Supreme Court affirmed the judgment of the Court of Appeal - holding that that Court had quite correctly affirmed award of the Arbitrator - and dismissed the appeal of the employer.

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The Executive Yuan promulgated in its Yuan-Tai-Jiao-Zi-1070002554 Order the “Act for the Recruitment and Employment of Foreign Professionals” that was announced on 22 November 2017, which entered into effect on 8 February 2018.

The key points of the law is as follows:

I. Loosening of employment, visa and residence rules

1. Foreign professionals

1. Issuance of “employment-seeking visas”: A stay of up to six months for foreigner needing an extended period of time to look for professional work in Taiwan (Article 19).
2. Once the foreigner has obtained permanent resident status from the National Immigration Agency, Ministry of the Interior, he or she is no longer required to stay at least 183 days per year in Taiwan (Article 18).

2. Foreign professionals in particular fields

1. Foreign professionals in particular field may apply to the National Immigration Agency, Ministry of the Interior for an Employment Gold Card, which combines a work permit, resident visa, Alien Registration Card and a re-entry permit, for a term of one to three years, which may be renewed upon expiry. This provides greater convenience in the freedom to seek employment, enter into employment and switch employment (Article 8).
2. Extension of the term of work permit for foreign professionals in particular fields: The term of work permits for foreign professionals in particular fields has been extended from a maximum of three to five years, with renewal possible upon expiration (Article 7).

II. Relaxed rules on parents, spouses and children visits and obtaining resident rights

1. Loosened rules on spouses and children applying for permanent residence: In reference to international norms and human rights protection, for a foreign professional who has obtained permanent resident status, his or her spouse, minor children and adult children with disabilities may apply for permanent residence after continually residing in Taiwan for five years, with no financial capability certification required (Article 16).
2. Relaxation on rules for joint application of permanent residence by the spouse and children of high-level professionals: Pursuant to the amendment suggestions in Article 25 of the Immigration Act, for the spouse, minor children and adult children with disabilities of a high-level professional, they may all jointly apply for permanent residence at the same time (Article 15).
3. Work permits for adult children staying in Taiwan: For a foreign professional who has obtained permanent resident status, if his or her adult children are eligible for extended stay, they may apply for their own work permits pursuant to Article 51 of the Employment Service Act (Article 17).

III. Pension, health insurance and tax benefits.

1. Strengthen protection of the pension of workers.
 1. Foreign professionals who have received permanent resident status may apply the new pension scheme under the Labor Pension Act (Article 11).
2. The spouse, minor children and adult children with disabilities of a foreign professional are no longer subject to the six-month wait period for national health insurance once they have obtained residence documents (Article 14).
3. Tax benefits: First-time foreign professionals in particular fields who also earned NT\$3 million per year may, for the next three years, enjoy tax exemptions for portions of income above the threshold to be calculated in half of its amount (Article 9).

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Presidential order to amend the Labor Standards Act

The Hua-Zhong-1-Yi-Zi-10700009781 Presidential Order dated 31 January 2018 announced the amendments to Articles 24, 32, 34, 36-38 and 86 of the Labor Standards Act and the addition of Article 32-1. All changes entered into effect on 1 March 2018.

Summary of amendments made:

1. Work hours on days of rest is now changed to the number of actual hours worked, and the employer's decision to have employees work on days of rest reverts to being based on the actual needs of the employer (amending Article 24)
2. The need for more flexibility between the employer and employees regarding overtime leads to the following system: Once the labor union agrees, or if no labor union is present, the consent of the employer-employee conference, overtime hours may be counted on a quarterly (3-month) cycle, with allowable overtime increased to 54 hours per month, up to a maximum of 138 hours over the three months. For employers with more than 30 employees, it shall report to the local competent authority for recordation (amending Article 32).
3. To set down the rules for makeup leaves in law, for the extended hours worked or work provided on rest days, if the worker chooses to take makeup leave and the employer consents, the makeup leave shall be calculated based on the number of such hours worked (new Article 32-1)
4. While the current rule for at least an 11-hour rest period gap between shifts is beneficial for the worker's health, such regime applied uniformly throughout may have an impact on some industries with the three-shift arrangement. As such, in addressing the nature of some positions or other particular reasons, in industries announced by the central competent authority (per the request of the competent authority in the industry with a central objective), an employer may, with the consent of the union or the employer-employee conference where there is no union, separately stipulate to an appropriate amount of rest hours that is no less than a contiguous 8-hour period. Recordation to the local competent authority is required for employers with more than 30 employees (amending Article 34).
5. Arrangement of official day off: Other than the business units with a 4-week flexible working hours arrangement, which shall still apply the original rules, for industries designated by the central competent authority and with the consent of the competent authority in the industry with a central objective, an employer may, with the consent of the union or the employer-employee conference where there is no union, adjust the day of the official day off in the 7-day period. Recordation to the local competent authority is required for employers with more than 30 employees. Balance shall be considered in the arrangement of the official day off for the need of workers to connect to other leave days on one side, and the employer's need to make the adjustment to the official day off for manpower arrangement reasons on the other (amending Article 36)
6. For the days of annual leave not taken by the end of the year, the employer and the employee may negotiate as to whether those days may be deferred to the next year to comply with the purpose of annual leaves. However, to ensure that the worker's right to those annual leave days are not infringed upon as a result of the deferral, if those deferred days are still not used up by the end of next year or the termination of employment, the employer shall provide compensation for those days not taken (amending Article 38).

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A worker's request to an employer for unpaid child care leave because of the need to raise two or more children personally is considered to be a "proper reason" under the proviso Article 22 of the Act of Gender Equality in Employment.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Tiao-4-Zi-1070130162

Issue date: 12 February 2018

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Key points:

Article 22 of the Act of Gender Equality in Employment provides that a worker whose spouse does not work cannot apply for unpaid child care leave unless there is a proper reason as the spouse who does not work is able to take care of his/her families. It is recognized that because a single parent may not be able to take care of multiple children alone, if the worker also needs to take unpaid child care leave in assisting to raise the children, then the worker's request for unpaid child care to the employer shall be deemed as a "proper reason" under the above proviso to Article 22 of the Act of Gender Equality in Employment.

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Regarding the transfer of pension reserves of the Taiwan branches of two foreign companies who are engaged in a merger overseas

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Fu-3-Zi-1060136515

Issue date: 14 February 2018

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Key points:

When two foreign companies engaged in a merger overseas, their Taiwan branch companies will also merge. Because Article 15 of the Business Mergers and Acquisitions Act do not apply when two foreign companies are involved, the pension reserves of the dissolved Taiwan branch company may not be simply transferred for the surviving or the new company to assume accordingly. If there are any amounts remaining after paying the pensions and severances to employees not retained decided by the new and old employers, the new and old employers shall negotiate to have the old employer transferred the amount in its pension reserves to the pension reserves established by the surviving or new company.

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Explanations regarding the preferential retirement plan enacted by a business entity to an employee moving between affiliate companies by combining the seniority accumulated, as well as the handling of a request to access the pension reserves to make such pension payments.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Fu-3-Zi-1070135081

Issue date: 21 February 2018

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Key points:

A preferential pension program in which an employer combines the past position seniorities of an employee who uses the new pension system so that it pays pension to such employee based on the old pension system results in an issue: While the system is more favourable to the employee than the law requires as a result of private law contract negotiations over the pension payment, the employer is not obliged to perform the duty under public law to contribute to the pension reserve, and if consent to using the funds in the pension reserves is approved, it may affect the rights of workers under the old pension system. As a result, the employer should make payment from other funding sources and not pay from the pension reserves from the current or previous positions.

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In order to strike a balance between the rights and interests of the retiring worker and the purpose of Article 56, Paragraph 2 of the Labor Standards Act, when local competent authorities receive an application from a business entity for permission to enact a preferential pension plan by combining an employee's seniorities in past positions and the access to its pension reserves, they shall:

1. If the competent authority has already approved of such a plan, for reasons of reliance, the originally approved preferential pension may be paid out from the pension reserves, but the amount remaining shall still be compliant with Article 56, Paragraph 2 of the Labor Standards Act.
2. From this point on, any application of a preferential pension plan by combining seniorities shall only be approved to the extent of the calculation of seniorities. The employer shall be responsible to secure another source of funding to the pension amount, and it may no longer use the pension reserves to do so.

[More...](#)

The Ministry of Labor announces amendments to several provisions of the Enforcement Rules of the Labor Standards Act.

The Lao-Dong-Tiao-3-Zi-1070130354 Order dated 27 February 2018 announced the amendments to Articles 20, 22, 24-1 and 37 of the Enforcement Rules of the Labor Standards Act and the addition of Articles 22-1 through 22-3.

Summary of amendments made:

1. In accordance with the new extended working hours proviso in the Labor Standards Act, the cycle shall be over three consecutive calendar months (amending Article 22).
2. Regarding the new recordation mechanism for the extended working hours, time between shifts and exceptions to the one day rest over seven day arrangement, the following matters are stipulated: the calculation method to determine whether an employer has 30 or more employees, the definition of a local competent authority, and the requirement on employers to report to the local competent authority for recordation at the very latest one day before the implementation of extended working hours, the change to resting periods, and adjustments to official days off. (new Article 22-1)
3. In accordance with the new makeup leave arrangements for overtime, the method such makeup leaves may be implemented is stipulated, as well as the time limit on the makeup leave and the deadline for payment in consideration of makeup leave not taken. (new Article 22-2)
4. Clearly setting out the details regarding the one day off every seven days arrangement. The cycle shall be over seven calendar days, and unless the employer makes adjustments pursuant to Article 36, Paragraphs 4 and 5 of the Labor Standards Act, it cannot cause employees to continuously work for more than six days in a row (new Article 22-3).
5. Regarding deferral of annual leave not taken in the year to the next year by negotiations between the employer and employee, it is specified that when the worker takes annual leave in the next year, it should be taken out first from the deferred annual leave days left from the last year (amending Article 24-1).
6. Clearly setting out the calculation method to determine whether an employer has 30 or more employees (amending Article 37).

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