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# Asia Employment Law: Quarterly Review

2017-2018

ISSUE 22: FOURTH 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 15 jurisdictions in Asia.

In this twenty-second edition, we flag and provide comment on anticipated employment law developments during the fourth quarter of 2018 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2019.

This publication is a result of ongoing cross-border collaboration between 15 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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This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.

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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).

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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.

[More...](#)

## 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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## United Voice v Berkeley Challenge: Federal Court determines dismissed employees entitled to redundancy pay

In *United Voice v Berkeley Challenge Pty Ltd* [2018] FCA 224, the Federal Court of Australia determined that a contract services provider's dismissal of employees, following an unsuccessful tender for a new contract, did not fall within the 'ordinary and customary turnover of labour' exemption from the requirement to make redundancy payments.

Section 119 of the *Fair Work Act 2009* (Cth) establishes the right of an employee, whose employment is terminated because the employer no longer requires the employee's job to be done by anyone, to be paid an amount of redundancy pay determined in accordance with the employee's length of continuous service with the employer.

Berkeley sought to rely on the exception to this obligation set out in section 119(1)(a): that is, where the redundancy “is due to the ordinary and customary turnover of labour” (**OCTL**). It argued that the loss and gain of client contracts were normal features of its business, with a consequent fluctuation of employee numbers.

Justice Reeves of the Federal Court did not accept this argument, taking the view that the OCTL exception is confined to a ‘narrow set of circumstances’. The relevant redundancies in this case were, for Berkeley, ‘uncommon and extraordinary and not a matter of long-continued practice’.

The decision has implications for businesses in that employers will now be exposed to making redundancy payments in a range of situations that may not previously have triggered this obligation. The legal and industrial landscape will remain unsettled for the next 6-12 months as we understand that Berkeley have appealed the decision to the Full Court of the Federal Court.

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## Victorian Government introduces legislation providing for long-service leave portability for cleaning, security and community sector workers

The Victorian Parliament is currently considering the *Long Service Benefits Portability Bill 2018* (Vic) (**Bill**), which would entitle workers in traditionally transient sectors to be able to carry across their service entitlements between different employers.

Employers in the contract cleaning, security and community sectors will be required to register their business, and employees, as part of the scheme and pay a levy in order to fund it. There will be significant penalties for employers that fail to register within the three months of this Bill becoming law.

If passed, the law will bring the state of Victoria in line with Queensland, New South Wales and the Australian Capital Territory which have similar schemes.

Presently, under the *Long Service Leave Act 1992* (Vic), in order for a worker to be entitled to paid long service leave, they are required to be employed with an employer continuously for at least seven years.

Under the proposed scheme, workers in the covered industries will be entitled to long service leave entitlements after seven years' working in the *industry*, regardless of the number of employers they have worked for during that period. This would overcome the problem that in these sectors, contract/project-based work is common, so that workers regularly change employers.

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## Victoria's long service leave legislation updated to increase flexibility and early access to long service leave

In May 2018 the Victorian Parliament enacted the *Long Service Leave Act 2018* (Vic) (**Act**). The Act repeals and replaces the *Long Service Leave Act 1992* (Vic). The Act was passed by Parliament on 8 May 2018, and made law on 15 May. It will come into effect on a date to be proclaimed or 1 November 2018.

The new regime allows employees to apply to take pro rata long service leave after seven years of continuous employment (rather than 10 years previously), and provides greater flexibility in how that leave can be taken. Employees can apply under the Act to take long service leave in increments of one day at a time. Previously employees could only take long service leave in longer blocks. This change is consistent with the way in which annual leave operates and is designed to encourage flexible work practices for carers or those transitioning into retirement.

The rate at which entitlements accrue (1/60th of the employee's total period of continuous employment, less any period of long service leave taken) is unchanged.

Long service leave entitlements depend on the employee's 'continuous employment'. Changes in the new Act have the greatest impact on parental leave, which is now treated consistently with other types of leave for purposes of determining long service leave entitlements. Previously continuity of employment would be broken after an employee took more than 12 months of parental leave. Under the Act, casual and seasonal workers are now afforded up to two years' parental leave (paid or unpaid) without breaking their continuity of employment for long service leave purposes.

Further, a person is entitled to long service leave after completing seven years of continuous employment with 'one employer'. The Act expands the definition of 'one employer' to capture all cases where a business is transferred by asset sale. Previously the concept of assets (for these purposes) was limited to 'land, plant and equipment' and did not capture intangible assets. This will mean that employee entitlements will transfer in a broader range of business transfer situations.

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## National Minimum Wage Annual Review 2017-18

The Minimum Wage Panel of the Fair Work Commission has handed down its decision in its annual review of the national minimum wage and wage rates under modern awards in the *Annual Wage Review 2017-18* [2018] FWCFB 3500. It has granted a 3.5% wage increase to Australia's lowest-paid workers.

The resulting wage rates are as follows:

- the minimum hourly wage has been increased by 64 cents to \$18.93 per hour
- the minimum weekly wage has been increased by \$24.30 to \$719.29 per week (based on a 38 hour work week)

The number of employees whose pay is set by an award is estimated to be 2.3 million (or 22.7% of all employees). The proportion of employees paid at the adult minimum wage rate is estimated at 1.9%. The wage increase will affect all these employees. The decision will also affect employees paid close to the national minimum wage and modern award rates, and those whose pay is set by an enterprise agreement linked to the outcome of the Annual Wage Review.

The new wage rates will come into effect on 1 July 2018.

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## Why 'Start Up' Enterprise Agreements Remain Under Intense Scrutiny

In recent years some employers have utilised the capacity to make an enterprise agreement with a small group of employees, but include a coverage clause that enables the agreement to apply to broader groups of workers in the future. This was originally legitimised in a series of cases involving John Holland and more recently endorsed by the High Court in the Aldi case.

In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2017] FCA 77, however, the Full Federal Court (**FFC**) largely upheld a decision made by Flick J at first instance, overturning the Fair Work Commission's approval of this kind of agreement.

The decision found that an agreement voted up by a small group of employees – which was not representative of the larger group of employees to whom the agreement would ultimately apply – was not genuinely agreed to in accordance with section 186(2)(a) of the *Fair Work Act 2009* (Cth) (**FW Act**).

Despite 'yes' votes from each of the three employees who voted on it, the FFC found that the requirement for genuine agreement imposes a standard of authenticity on employee approval: that is, 'mere agreement will not suffice' and 'consent of a higher quality is required'. The FFC agreed with Flick J that One Key failed to comply with the requirements in section 180(5) of the FW Act to take all reasonable steps to ensure the terms of the agreement and their effect had been explained to the relevant employees.

The decision does not necessarily prohibit the 'start up' agreement model made with a small number of employees. Rather, it turned on the facts of the case: the agreement was made between three employees with very confined employment experience (and two of whom were casual), was underpinned by 11 modern awards, and was agreed to without any bargaining. It is not surprising that the FFC found the 'protective' agreement making provisions in the FW Act had been compromised by the employer.

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## Federal Government introduces legislation implementing 12 month amnesty for superannuation guarantee compliance

The Federal Government has introduced the Treasury Laws Amendment (2018 *Superannuation Measures No 1*) Bill into Parliament, which will provide for a 12 month amnesty for superannuation guarantee compliance (**Amnesty**).

During the Amnesty, employers will be given the opportunity to pay any overdue superannuation contributions to workers' superannuation (i.e. pension) funds without being liable for additional penalties. If passed, the Amnesty will be backdated to apply from 24 May 2018 to 23 May 2019.

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In Australia, employers are required to make minimum superannuation contributions of 9.5% of ordinary time earnings in respect of their employees. Normally, where an employer does not make the minimum contribution they must pay the superannuation guarantee charge (**SGC**), which includes interest on the unpaid amount and an administration fee. The Australian Taxation Office (**ATO**) may also impose further penalties (e.g. an additional 25% of the SGC).

If an employer has an undeclared superannuation guarantee shortfall (**shortfall**) relating to a time period between 1 July 1992 and 31 March 2018, it may disclose the shortfall to the ATO between 24 May 2018 and 23 May 2019 by completing and lodging an 'SG Amnesty Fund' payment form.

Employers will still be required to pay the shortfall amounts and interest, but will not be liable for the administration fees or any further penalties. However, employers who fail to disclose a shortfall during the Amnesty period will be subject to a minimum 50% penalty if the shortfall is discovered by the ATO.

[ATO information about the Amnesty](#)

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### Federal Court confirms substance over form when assessing casual employment

In a significant decision which has widespread implications for the labour hire industry, users of labour hire services and employers with 'casual' employees alike, *WorkPac Pty Limited v Skene* [2018] FCAFC 131 (**WorkPac v Skene**), the Full Court of the Federal Court (**Court**) upheld a decision finding that an employee—who was described as a casual but worked a regular roster set a year in advance—was a permanent employee. As a consequence, the employee was entitled to annual leave under both the National Employment Standards (**NES**) and the enterprise agreement which applied to his employment.

The Full Court held that casual employment is characterised by 'no firm advance [mutual] commitment to continuing and indefinite work according to an agreed pattern of work'. This lack of a firm commitment is reciprocal, with the employee similarly not providing a commitment to ongoing employment. This is 'the essence of casualness'.

The description of an employee in their contract, payment of casual loading, submission of timesheets and right to terminate on an hour's notice were relevant but not decisive factors. The Court noted that these factors often reflect the parties' subjective intention at the commencement of the employment, and may not reflect the objective reality of that employment over time. The relevant inquiry is focused on the real substance, practical reality and true nature of the relationship between employer and employee. Importantly, the Court observed that an employer may be able to make a claim for 'set-off' against an employee who is paid a specified casual loading and later successfully argues that he or she is entitled to annual leave on the basis that he or she is not a casual.

The Court's decision in *WorkPac v Skene* highlights the need for employers to review the substance of their employment relationships, and how their casual employees are engaged in practice, to minimise exposure to paying both casual loadings and annual (or other) leave entitlements.

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### Victorian Parliament passes legislation providing for long-service leave portability for cleaning, security and community sector workers

Further to our update of May 2018, the Victorian Parliament has passed the *Long Service Benefits Portability Act 2018* (Vic) (**Act**), which entitles workers in traditionally transient sectors to carry across their long service leave entitlements between different employers.

From 1 July 2019 employers in the contract cleaning, security and community sectors will be required to register their business, and employees, as part of the scheme and pay a levy in order to fund it. There will be significant penalties for employers that fail to register by 30 September 2019 (three months after commencement).

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Under the *Long Service Leave Act 2018*, in order for a worker to be entitled to paid long service leave, they must demonstrate 'continuous employment with one employer' for at least a seven-year period. Under the new Act, workers in prescribed covered industries will be entitled to long service leave entitlements after seven years' working in the *industry*, regardless of the number of employers they have worked for during that period.

This is intended to overcome the problem that in these sectors, contract/project-based work is common, so that workers regularly change employers. Importantly, the portable long service leave scheme cannot be excluded by agreement between an employer and its workforce.

Portable long service leave entitlements will be recorded and managed by a new statutory authority. When a worker reaches the seven year milestone, they will be able to apply to their employer for long service leave and then apply to the authority for a payment.

Under the Act, employers in covered industries will be required to register with the authority and also register their employees. A corporate employer in a covered industry that fails to register by 30 September 2019 will be subject to fines of up to A\$19,028.40 per day that the offence continues.

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### Update to Modern Awards in relation to termination payments

The Full Bench of the Fair Work Commission confirmed that from 1 November 2018, 89 of the 122 modern awards will be varied to include a clause that requires an employer to pay an employee any termination payments no later than 7 days after the day on which the employment ends. The following model clause took effect in the relevant modern awards:

Payment on termination of employment

- a. The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:
  - i. the employee's wage under this award for any complete or incomplete pay period up to the end of the day of termination; and
  - ii. all other amounts that are due to the employee under this award and the NES.
- b. The requirement to pay wages and other amounts under paragraph (a) is subject to further order of the Commission and the employer making deductions authorised by this award of the [Fair Work] Act.

[A full list of awards that have been varied is available here](#)

[Fair Work Commission Statement is available here](#)

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### Australian Government Announces Changes to Working Holiday Maker Visa Program

The Federal Government has announced changes to the Working Holiday Maker (WHM) visa program to address workforce shortages in regional and rural farming. The visa subclasses affected are the 462 and 417 visas.

Holders of a 12-month '462 Work and Holiday visa' (available to people 18 to 30 years old from eligible countries) are able to obtain a second 12-month 462 visa if they have completed 3 months of specified agricultural work in plant and animal cultivation. Prior to this announcement only those who worked in Northern Australia (which included the Northern Territory and parts of Queensland and Western Australia) were eligible for this extension on a one-year visa. From 5 November 2018, the geographical area was extended to agricultural work in specified regional areas of New South Wales, Queensland, Victoria and Western Australia, and all of the Northern Territory, South Australia, and Tasmania.

From 5 November 2018, the length of time a 462 visa holder can stay with the same agricultural employer was extended from 6 months to 12 months.

After 1 July 2019, second year 462 visa holders will be eligible to obtain a third year on their visa if they complete 6 months of specified work in a specific regional area in their second year.

The program will also be offering an increase in the annual caps to a number of countries who participate in the 462 visa program.

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Holders of a 12-month 417 Working Holiday visa are also able to obtain a second 12-month 417 visa if they have completed 3 months of specified agricultural work in plant and animal cultivation.

From 5 November 2018, the length of time a 417 visa holder can stay with the same agricultural employer was extended from 6 months to 12 months.

After 1 July 2019, second year 417 visa holders will be eligible to obtain a third year visa if they complete 6 months of specified work in a specific regional area in their second year.

The maximum eligible age for the 417 visa has been extended from 30 years old to 35 for Canadian and Irish citizens.

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### Update to Modern Awards in relation to requests for flexible working arrangements

The Full Bench of the Fair Work Commission confirmed that from 1 December 2018, the model term for requests for flexible working arrangements will be inserted into all modern awards. The model term is intended to supplement the rights of employees to a process for requesting flexible work currently found in section 65 of the Fair Work Act 2009 (Cth) (FW Act).

Employers will be required to provide reasoning for denying any worker's request for flexible work arrangements and assess alternative arrangements if a flexible work request is denied.

[A full list of awards that will be varied is available here](#)  
[20 November 2018 Decision is available here](#)

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### Federal Government unveil regulatory response to WorkPac v Skene decision

The Australian Government has unveiled its plan to codify the right of casual employees to convert to permanent employment, while also ensuring that casual employees are unable to 'double dip' by receiving both casual loading rates and permanent employee entitlements. This is in response to the Full Court of the Federal Court's decision in *WorkPac Pty Limited v Skene* [2018] (*WorkPac v Skene*).

*WorkPac v Skene* (discussed in the Q3 update) upheld a decision that a labour hire worker – who was described as a casual but worked a regular roster set a year in advance – was a permanent employee. As a consequence, the employee was entitled to annual leave under both the National Employment Standards (NES) and the enterprise agreement which applied to his employment.

Following this decision, there was concern amongst employers that employees found to be wrongly classified as casual could receive both permanent employee entitlements and casual loading intended to be paid in lieu of these entitlements. The Government's proposed regulation will provide that where an employer has paid an identifiable casual loading to an employee, it may be potentially offset against any subsequent claim for NES entitlements.

The Government has also announced that they will legislate to provide casual employees the right under the NES to request a move to full-time or part-time employment.

The new regulation could be subject to a disallowance motion in the Parliament when it reconvenes early in 2019.

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### Businesses with \$100m+ turnover required to report on risks of 'modern slavery' in operations and supply chains

On 10 December 2018 the Modern Slavery Act 2018 (Cth) (Act) came into force requires certain entities with revenues over \$100 million per financial year to provide a 'modern slavery statement' to the Minister for Home Affairs (**Minister**) within six months of the end of each financial year. The entities required to report are:

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- companies that are Australian residents;
- trusts, where the trust entity is a resident trust estate;
- corporate limited partnerships that are Australian residents; and
- other partnerships or entities that are either:
  - o formed or incorporated within Australia; or
  - o the central management or control of the entity is in Australia.

The Act requires that the modern slavery statement describe:

- the entity's structure, operations and supply chains;
- the risks of modern slavery practices in the entity's operations and supply chains, and those of any entities that the reporting entity owns or controls;
- the actions taken by the reporting entity (and any entity that the reporting entity owns or controls) to assess and address those risks, including due diligence and remediation processes;
- the effectiveness of the actions taken;
- the consultation process with other entities that the reporting entity owns or controls; and
- any other relevant information.

The statement must be approved by the principal governing body of the entity (i.e. a company's board of directors) and signed by a responsible member of the entity.

Under the Act, the Minister may request an explanation for an entity's failure to provide a modern slavery statement and/or request that the entity undertake remedial action, including to provide a modern slavery statement. If the Minister's request is not complied with, the Minister may publish information about the non-complying entity on the Modern Slavery Statements Register, or in any other way considered appropriate.

By contrast, the Modern Slavery Act 2018 (NSW) (NSW Act), which passed through NSW Parliament earlier this year, contains a \$1.1 million penalty provision for various forms of non-compliance.

[More...](#)

[Modern Slavery Act 2018 \(Cth\)](#)

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### New statutory entitlement to unpaid family and domestic violence leave

A new entitlement providing five days of unpaid domestic violence leave to all federal system employees has been inserted into the National Employment Standards (NES) under the Fair Work Act 2009. This entitlement was already granted to workers covered by a modern award but the amendment extends the leave entitlement to a further six million workers in Australia not working under an award.

As part of the changes introduced as the Fair Work Amendment (Family and Domestic Violence Leave) Act 2019 (Cth) all federal system employees are now entitled to a minimum of 5 days of unpaid family and domestic violence leave in a 12 month period, but this does not accumulate from year to year. The leave is available in full to part-time and casual employees and is able to be taken continuously or in separate periods. If an employee is a casual employee or is working for a specified period of time the start of the employee's employment is taken to be the start of the employee's first employment with that employer.

An employee will be eligible to take the leave if:

- The employee is experiencing family and domestic violence; and
- The employee needs to do something to deal with the impact of the family and domestic violence; and
- It is impractical for the employee to do that thing outside the employee's ordinary hours of work.

Examples of actions necessary to deal with the impact of family and domestic violence given in the Bill include arranging for their safety or that of a close relative, attending urgent court hearings and accessing police services.

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The new entitlement also includes a requirement that employers take steps to ensure information concerning any evidence an employee has given to demonstrate their eligibility for the leave is treated confidentially.

*Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Cth) – Final text as passed by both Houses*

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Changes to the Fair Work Commission's review of modern awards, approval of enterprise agreements and complaint-handling procedure

On 11 December the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2017 (Cth)* ("the Act") came into force making changes to the operation and procedures of the Fair Work Commission (FWC) as set out in the Fair Work Act 2009 (Cth). These changes include removing the requirement that the FWC conduct 4 yearly reviews of modern awards and, significantly for employers, enables the FWC to overlook minor procedural or technical errors when approving enterprise agreements. The Act also makes changes to the complaint-handling procedures of the FWC.

*Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2017 (Cth)*

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**Circular of the Ministry of Housing and Urban-rural Development, the Ministry of Finance and the People's Bank of China on Optimizing the Housing Provident Fund Payment Mechanism to Further Curtail Corporate Costs**

The Ministry of Housing and Urban-rural Development, the Ministry of Finance and the People's Bank of China have jointly issued the Circular on optimizing the housing provident fund payment mechanism to further curtail corporate costs on 28 April 2018 which came into force as of the promulgation date. The Circular states that the validity of the phased policy, under which the ratio of housing provident fund payments made by enterprises is reduced to a proper extent, will be extended, adding that efforts shall be made to practically standardize the upper limit of the base on which the housing provident fund is contributed, widen the floating range of ratios of housing provident fund payments, and improve efficiency in assessing and approving applications for curtailing the rate of housing provident fund payments or delaying such payments. According to the Circular, the phased policy introduced in all regions in 2016, whereby enterprises are enabled to make contributions to the housing provident fund at an appropriately lower rate, will be extended to 30 April 2020, upon the expiry of its previous validity. Moreover, the Circular explicitly states that the monthly salary base on which the housing provident fund is paid, shall not exceed three times of the employees' average monthly salary announced by the department of statistics of the city with districts where these employees work. Furthermore, the Circular stipulates that the housing provident fund payment shall be made at a rate of no less than five percent, and the maximum rate shall be determined by each region under procedures set out in the Administrative Regulations for the Housing Provident Fund and shall be capped at 12 percent.

[More...](#)

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**Decision on Abolishing the Administrative Provisions on the Employment of Taiwan, Hong Kong and Macao Residents in the Chinese Mainland and Circular on Matters Concerning the Employment of Hong Kong, Macao and Taiwan Residents in the Chinese Mainland**

The Ministry of Human Resources and Social Security ("MOHRSS") issued the Decision on Abolishing the Administrative Provisions on the Employment of Taiwan, Hong Kong and Macao Residents in the Chinese Mainland and the Circular on Matters Concerning the Employment of Hong Kong, Macao and Taiwan Residents in the Chinese Mainland (the "Circular") on 23 August 2018. According to the Circular, beginning from 28 July 2018, residents from Hong Kong, Macao and Taiwan are no longer required to obtain the Employment Permits for Taiwan, Hong Kong and Macao Residents if they are employed in the Chinese Mainland. From 23 August 2018, all regions do not accept applications for Employment Permits for Taiwan, Hong Kong and Macao Residents any longer; where applications filed for this purpose have been accepted but the permits have not been issued yet, the employers concerned shall be notified in time that there is no need to apply for permits anymore. Also, according to the Circular, before 31 December 2018, the Employment Permits for Taiwan, Hong Kong and Macao Residents within the validity period may still be used as the proof of employment for Hong Kong, Macao and Taiwan residents in the Chinese Mainland; the government will stop using these permits from 1 January 2019, and thereafter, the business licenses issued by administrations for industry and commerce, labour contracts (employment contracts), vouchers of salary payments or records of social insurance contributions may be used as the proof to attest employment.

[More...](#)[More...](#)

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There are no significant policy, legal or case developments within the employment space during 2018 Q4.

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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:

- 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;
- To increase the time limit for lodging a complaint in respect of the two offences stated above in (a) to 12 months;
- 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
- 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:
  - Outlining responsibilities of senior management;
  - Acting honestly and exercising due diligence;
  - Maintaining transparency in business operations;
  - Drawing up of service agreements with job-seekers and with employers; and
  - 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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2018

## 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.

### 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.

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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...*

#### Senior employee liable for breach of fiduciary duties and non-solicitation covenant

In the decision of *South China Media Limited and others v. Kwok, Yee Ning and others* [2018] HKDC 194, the District Court (the “**Court**”) held a senior employee liable as a de facto director for breach of her fiduciary duties and a non-solicitation covenant in a letter of undertaking. The employee’s husband and his companies were also found to have dishonestly assisted and procured the breach.

#### Facts:

Kwok, Yee Ning (“**Kwok**”) was employed by South China Media Management Limited (“**SCM Management**”) as its advertising director, primarily responsible for the publishing of a magazine by Whiz Kids Express Weekly Limited (“**Whiz Kids**”). It was alleged that Kwok (1) allowed unauthorized use of the magazine’s logo and name to be used in promotional materials free of charge, (2) diverted away maturing business opportunities and (3) solicited business to her husband’s companies after termination of Kwok’s employment.

#### Issues and Reasoning:

##### A. Whether Kwok owed and breached her fiduciary duties

The Court stated those who assume to act as directors and thereby exercise the powers and discharge the functions of a director must accept the responsibilities of the office. One must look at what the person actually did to determine whether there was an assumption of responsibilities. It is an objective test irrespective of the person’s motivation or belief.

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Kwok held the title of and was held out to clients as the “advertising director”. She also had the authority to negotiate the terms of and enter into contracts for and on behalf of Whiz Kids. The Court held that Kwok was a *de facto* director who assumed the responsibilities of a company director even though not formally appointed as one.

A *de facto* director, like any other director, owes fiduciary duties to the company. Such duty includes a duty not to divert to another associated person or company a maturing business opportunity which the employer is actively pursuing.

From the facts, the Court inferred that Kwok had provided her husband details of negotiations and a copy of a draft contract, such that her husband could subsequently make a similar offer to the target client on behalf of his company. Additionally, Kwok allowed her husband’s company to use Whiz Kids’ logo and name for a campaign free of charge. The Court held Kwok acted in breach of her fiduciary duties by (1) failing to act with single-minded loyalty to Whiz Kids, (2) acting for the benefit of a third person without the informed consent of Whiz Kids and (3) placing herself in a position of conflict by failing to act in the best interest of Whiz Kids.

### B. Whether Kwok breached the non-solicitation covenant

Covenants in restraint of trade are generally unenforceable unless they can be shown to be reasonable in the interests of the parties and in the public interest. The party seeking to enforce the restrictive covenant must show the restrictions are no greater than are reasonably necessary for the protection of its business.

Kwok entered into a letter of undertaking and agreed she would not “... during a period of 12 months from the Termination Date, solicit any customer or client whether on [her] own account or on behalf of any other person, firm or corporation who or which was a customer or client of any one of the member companies of [the Group] at any time during the period when [she] was employed by one of the member companies of [the Group]” (the “**Non-Solicitation Clause**”).

The Court was of the view the Non-Solicitation Clause was reasonable and enforceable as restrictive covenants were necessary to protect Whiz Kids’ trade connections, especially when Whiz Kids has acquired substantial goodwill in the children event planning business. Upon assessment of the factual circumstances, the Court found Kwok breached the Non-Solicitation Clause by soliciting a potential customer of Whiz Kids to her husband’s company.

### C. Whether Kwok’s husband and his companies (the “Accessories”) dishonestly assist and procure Kwok to breach her contract

To establish dishonest assistance, the Court examined the following requirements:

- (1) Breach of trust or fiduciary duty by someone other than Kwok;
- (2) The Accessories’ assistance;
- (3) Dishonesty; and
- (4) Resulting loss.

The Court was aware dishonesty is an objective standard judged according to the standards of an ordinary honest person, who would have the same knowledge of the circumstances and personal attributes as the Accessories. Taking into account the husband and wife relationship, the nature and timing of the business set up by the Accessories and the contemporaneous evidence showing transactions with clients or potential clients of Whiz Kids, the Court found the Accessories dishonestly assisted in Kwok’s breaches of fiduciary duties. By being willing parties to Kwok’s solicitation of businesses and turning a blind eye to existence of dealings between Whiz Kids and clients that were solicited, the Court also found the Accessories liable for procuring breach of Kwok’s contract.

### Takeaways for employers

This decision serves as a useful reminder that the court looks at substance over formality in establishing whether an employee has assumed directorship. The court will look at the overall circumstances of the case, including the role and job duties of the employee, to determine whether he or she is a *de facto* director.

*Judgment*

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## 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...](#)

## 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.

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## 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 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...*

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## 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 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.

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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.

### 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*

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### **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*

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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:

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](#)

## 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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## Competition Commission publishes Advisory Bulletin for employers

In its recent advisory bulletin, the Competition Commission (the "**Commission**") advises on potential competition risks with regard to employment practices, particularly in the determination of employment terms and conditions and the hiring of employees.

The Commission considers the following practices between undertakings are at risk of contravening the First Conduct Rule of the Competition Ordinance (Cap. 619) (the "**Ordinance**"):

- Wage-fixing agreements: Undertakings that reach an agreement between themselves on any element of compensation are in effect fixing the price of labour. Compensation includes salaries and other allowances such as insurance benefits, housing allowances, relocation support, severance payments or long service payments.
- Non-poaching agreements: Undertakings that reach an agreement or exchange information for the purposes of solicitation, recruitment or hiring of each other's employees.
- Exchange of sensitive information: Sharing of competitively sensitive information between undertakings about their intentions in employees' compensation or hiring, whether done directly or through a third party.

Employers should keep details regarding the compensation they pay to employees confidential. They should not be disclosed to a competitor.

Employers who wish to participate in salary surveys should ensure that adequate measures are in place so that the person conducting the survey complies with the Ordinance, including ensuring that they do not disclose the results of the survey in such a way that may give rise to concerns of breaching the Ordinance.

*The bulletin*

## Hong Kong court decision dismisses claim to enforce non-solicitation clause

In *Winta Investment (Hong Kong) Limited v. Ng Kam Chit* [2018] HKDC 342, the District Court (the "**Court**") took the opportunity to recapitulate the principles on enforcement of restrictive covenants. In this case the Court determined that found the employer failed to prove solicitation of customers by the former employee.

### Facts

Winta Investment (Hong Kong) Limited ("**Winta**") is a company with its main business in the sale of edible ice cubes under the brand of "Shiu Pong Ice". Ng Kam Chit ("**Ng**") was employed by Winta as a delivery worker from October 2007 to November 2010 and from January 2011 to January 2012 to mainly deliver edible ice cubes to restaurants and cafes.

The employment contract contained the following clause translated from Chinese (the "**Clause**"):

"... employee is willing and guarantees that during the employment with the company or after leaving employment, within ten months he cannot use company's commercial customers information within Hong Kong area for similar ice cube and manufacture company to engage (including joining others, sole trading, being employed, selling, and delivering goods etc.); or cause harm, betray, or steal or leak the company's customer list etc. being confidential information, interfere and solicit the company's existing customers from acquiring goods etc., if in breach of agreement agrees to compensate company all losses, and responsible for legal compensation responsibility under the employment agreement signed by both parties."

Ng subsequently resigned and was employed by Noble Gainer Ltd ("**Noble Gainer**"), an affiliate company of The Hong Kong Ice & Cold Storage Company Ltd, as a "Helper & Sales". It is Winta's case that when employed by Noble Gainer, Ng had been soliciting Winta's customers to purchase ice cubes at a reduced price from Ng instead of purchasing from Winta. Hence, Winta commenced an action against Ng for breach of the Clause which purported to prevent Ng from soliciting or interfering with Winta's existing customers within 10 months after Ng's employment ceased.

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The Court considered the following issues:

1. Whether Ng had been working all along as a substitute worker and it was part of his job to promote sale in addition to making deliveries; and
2. Whether Ng had in fact solicited business from 13 customers after he joined Noble Gainer.

### Legal Principles and Decision

A covenant in restraint of trade between an employer and an employee is on its face unenforceable unless the employer seeking to rely on it can show that the clause is reasonable with reference to the legitimate interests to be protected and to the public interest. The protection must not be excessive whether in terms of duration, scope or geographical restriction. It is also generally recognized that an employer is entitled to protect its trade secrets and customer connections as they are assets of the business and form part of the employer's property.

The Court first assessed the factual disputes. In particular, the Court considered (1) factual inconsistencies within Winta's evidence which undermined credibility and reliability, (2) Winta's assertion that the major responsibility of Ng was to sell ice as opposed to mere delivery was not reflected in the employment documents and (3) the commission simply reflected the number of bags of ice delivered by Ng rather than to promote business. The Court came to the view there was no need to contemplate on the enforceability of the Clause as Winta failed to prove the act of solicitation factually in the first place.

Even if the enforceability of the Clause were to be considered, the Court recognized the position of delivery workers would not assist Ng to gain any meaningful influence over customers or cultivate loyalty among them. This was further supported by the fact that Ng would only have very brief and limited contact with the customers. Therefore, no protectable interest in the form of customer connections arose and Winta's claim was dismissed.

### Takeaways for Employers

To enhance the prospect of enforceability of restrictive covenants in employment contracts, employers should ensure that they can demonstrate a legitimate interest to protect and that the clause is reasonable in doing so. Employers should also review individual employment contracts regularly to prevent discrepancies should the title or job duties change for employees.

*The judgment*

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### Working-hour guidelines for 11 sectors to be drawn up by 2020

The Hong Kong Government has decided not to proceed with any legislation to regulate working hours and overtime compensation in employment contracts. Instead, non-binding guidelines for 11 industries set by working groups comprising government officials and representatives from the business and labour sectors will be drawn up by 2020.

It is reported that on top of the existing committees for nine industries, including catering, construction, theater, warehouse and cargo transport, property management, printing, hotels and tourism, cement and concrete and retail, the Government will also set up committees for cleaning services and elderly homes. Such guidelines will specify policies for proper working time management, including the recommended working hours for selected occupations in different industries, the definition of overtime work and guidance on overtime work compensation.

With the guidelines having no legal effect, labour unions urged the Government to set the standard working hours at 44 hours per week and an overtime rate of 1.5 times regular wages as compensation. However, the effectiveness of such guidelines will be reviewed in 2023, upon which the Government will reassess the policy direction.

*The press release (Chinese version only)*

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## Privacy Commissioner for Personal Data issues booklet on how Hong Kong businesses should prepare for GDPR

The European Union (“**EU**”) General Data Protection Regulation 2016 (“**GDPR**”) came into force on 25 May 2018. A brief summary of the GDPR can be found [here](#).

Organizations in Hong Kong may need to comply with the GDPR if it (1) has an establishment in the EU, where personal data is processed in the context of the activities of the establishment, regardless of whether the data is actually processed in the EU, or (2) does not have an establishment in the EU, but offers goods or services to or monitors the behaviour of individuals in the EU.

As some requirements in the GDPR are not found in the existing Personal Data (Privacy) Ordinance (Cap. 486), the Privacy Commissioner for Personal Data issued a booklet (the “**Booklet**”) to outline the possible impact of the new regulatory framework on organizations or businesses in Hong Kong.

A number of features of the GDPR are highlighted in the Booklet, including the following:

- Extra-territorial application
- Personal data covered
- New data privacy governance, data mapping and impact assessment
- Sensitive personal data
- Consent
- Mandatory breach notification
- Data processors’ obligations
- New and enhanced rights for individuals
- Data protection seals, codes of conduct and cross-jurisdiction data transfer
- Sanctions

*The press release of PCPD and the Booklet*

## Hong Kong amends Employment Ordinance to empower the Labour Tribunal to make compulsory reinstatement or reengagement orders

The Employment (Amendment) (No.2) Ordinance 2018 (the “**Amendment Ordinance**”) was passed by the Legislative Council on 17 May 2018 and gazetted on 25 May 2018.

The Amendment Ordinance provides for the Labour Tribunal to order compulsory reinstatement or reengagement of an employee in the event of unlawful termination and it is reasonably practicable to do so. The Amendment Ordinance will come into operation on 19 October 2018.

Under the Employment Ordinance (“**EO**”), unreasonable and unlawful dismissal refers to the situation where an employee is dismissed other than for a valid reason and is in contravention of the EO. Valid reasons for dismissal include the conduct of the employee, the capability or qualifications of the employee for performing his or her work, redundancy or other genuine operational requirements of the business, compliance with statutory requirements, or other substantial reasons. On the other hand, dismissals in the following circumstances contravenes the law:

- dismissal of a female employee who has been confirmed pregnant and has served a notice of pregnancy to her employer;
- dismissal whilst the employee is on paid sick leave;
- dismissal by reason of an employee giving evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work safety legislation;
- dismissal of an employee for trade union membership and activities; or
- dismissal of an employee entitled to compensation under the Employees’ Compensation Ordinance (Cap. 282) before having entered into an agreement with the employee for employee’s compensation or before the issue of a certificate of assessment.

Before making order for reinstatement or reengagement, both the employer and the employee must be given an opportunity to present each of their cases in respect of

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the making of an order for reinstatement or reengagement. The court or the Labour Tribunal must take into account the circumstances of the claim before making such order, including:-

- (i) the circumstances of the employer and the employee;
- (ii) the circumstances surrounding the dismissal;
- (iii) any difficulty that the employer might face in the reinstatement or reengagement of the employee; and
- (iv) the relationship between the employer and the employee, and between the employee and other persons with whom the employee has connection in relation to the employment.

The court or Labour Tribunal may also, upon the agreement of both the employer and the employee, request the Commissioner to provide a report containing information that (1) relates to the circumstances of the claim and (2) was obtained in connection with conciliation held under the Labour Tribunal Ordinance (Cap. 25).

Upon an application by the employer, an order for reengagement may be varied such that engagement of the employee by a successor or associated company of the original employer is to be treated as reengagement by the original employer in compliance with the order. An order of variation will only be made if the court or the Labour Tribunal is satisfied that the terms on which the alternative employer is to engage the employee are comparable to the terms of the original employer.

If the employee is reinstated, the continuity of the period of employment between the date of the employee's absence from work and the date of reengagement is not broken and the employee's existing and future entitlements under the EO and the employment contract will continue to be recognized. The court or the Labour Tribunal may also, if it considers just and appropriate, order the employer to pay the employee any arrears of pay and statutory entitlements under the EO which the employee would have accrued if he has not been dismissed or the employment contract has not been varied. Conversely, the employee may be ordered to pay the employer any amount that the employer has paid him because of the dismissal or the variation of the employment contract.

If the employee is not reinstated on the terms specified in the order, the employer is required to, on top of the usual terminal payments and compensation, pay the employee a further sum set at three times the employee's average monthly wages subject to a maximum of \$72,500. This amount is on top of the usual terminal payments and compensation payable to the employee as currently provided under the EO. An employer who wilfully and without reasonable excuse fails to make such further payment also commits a criminal offence and is liable on conviction to a fine of \$350,000 and to imprisonment for 3 years.

*The Amendment Ordinance*

## Employer could be held liable for compensation for injury suffered by an Illegal employee

In the case of *Tahir Kashif v Safdar Nasar Mahmud* [2018] HKDC 600, the District Court (the "Court") rejected the claim made by the Applicant, who was prohibited by law from taking employment, for compensation under the Employees' Compensation Ordinance ("ECO") for the Applicant had failed to demonstrate that he was employed by the Respondent. The Court opined that should the Applicant succeeded in establishing an employment relationship with the Respondent, it would exercise its discretion to allow the Applicant's claim for compensation under the ECO.

### Facts

The Applicant was an asylum seeker who was prohibited by law from taking employment. On 23 November 2009, he had an accident which resulted in the crushing and amputation of his right forearm. The Applicant claimed that he was employed by the Respondent to work in a workshop at the time of the accident. The Respondent denied that he was the Applicant's employer.

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**Issues and Reasoning****A. Was the Applicant's injury sustained in a traffic accident or in an industrial accident?**

The Court accepted the evidence of the Applicant's witness and found that the Applicant's injury was sustained in an industrial accident.

**B. Was the injury sustained in the course of and arising from the Applicant's employment with the Respondent?**

The Applicant and the Respondent provided conflicting evidence. But having carefully scrutinized the evidence given by the parties, the Court preferred the evidence of the Respondent. The Applicant failed to establish that he was employed by the Respondent hence the accident which resulted in the Applicant's injury did not arise out of and in the course of the Applicant's employment with the Respondent.

**C. Should the Court exercise its discretion under section 2(2) of the ECO to award the Applicant employees' compensation despite that the contract of employment is illegal?**

Section 2(2) of the ECO provides that if the employment contract concerned is illegal, the Court may have the discretion to deal with the matter as if the injured person had been a person working under a valid employment contract.

Following the case of *Yu Nongxian v Ng Ka Wing* [2008] HKEC 99, where the Court ruled that for public policy reasons, discretion under section 2(2) of the ECO should be exercised if unemployable person is performing lawful work, the Court would have exercised the discretion in favour of the Applicant if he could demonstrate that that he was employed by the Respondent.

**Takeaways for Employers**

This case serves as a reminder to the employers of the circumstances where a Court may exercise its discretion under section 2(2) of the ECO. An unemployable person who sustained a work injury while performing lawful work for the employer could be granted compensation under the ECO.

*Judgment***Homosexual immigration officer's claim for spousal benefit and joint tax assessment rejected by the Court of Appeal**

The Court of Appeal in *Leung Chun Kwong v Secretary for Civil Service* [2018] HKCA 318 held that the denial of the Applicant's spousal benefit and the refusal of the Applicant's election for joint assessment of salary tax were justified for the purpose of upholding and protecting the status of marriage in the societal context of Hong Kong.

**Facts**

The Applicant is an immigration officer and is subject to Civil Service Regulations ("CSR"), which provides for certain employment benefits to the spouse of a civil servant. In 2014, the Applicant entered into a same-sex marriage with his partner in New Zealand where same-sex marriage was legally recognised. The Applicant sought to update his marital status so as to allow his spouse to enjoy the medical and dental benefits provided under the CSR. The Secretary for the Civil Service refused his request on the ground that the Applicant's same-sex marriage was not a marriage within the meaning of Hong Kong law (the "Benefits Decision").

In 2015, the Applicant completed the tax return and elected for joint assessment with his partner. The Commissioner of Inland Revenue refused his election as the Applicant and his partner were not husband and wife for the purpose of the Inland Revenue Ordinance (Cap. 112) ("IRO") (the "Tax Decision").

**Issues and Reasoning****A. Whether the Tax Decision is contrary to the provisions of the IRO**

The Court concluded that the proper meaning of "marriage" in section 2(1) of the IRO refers only to a heterosexual marriage. As such, only a husband and a wife as parties to a marriage

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are entitled to elect joint assessment under section 10 of the IRO. The Tax Decision is therefore in accordance with the provisions of the IRO.

### **B. Whether the Benefits Decision and the Tax Decision are in violation of Basic Law Article 25?**

The Court started the analysis by stating the importance of the protection of heterosexual marriage in Hong Kong given that it is the only form of marriage recognized in Hong Kong and is deeply imbedded in our legal system.

However, as the Benefits Decision and Tax Decision may constitute an indirect discrimination against homosexual couples under same sex marriage, there is a need for the Court to scrutinize both the Benefits Decision and Tax Decision with the use of the justification test. To justify such discriminatory treatment, the difference in treatment (1) must pursue a legitimate aim, (2) must be rationally connected to the legitimate aim and (3) must be no more than is necessary to achieve the legitimate aim.

The legitimate aim concerned here was the protection of the status of marriage in light of the prevailing social-moral views of the community on marriage. The spousal benefits provided under the Civil Service Regulation and the joint assessment provided in the IRO have been constantly associated closely with marriage. If homosexual couples were entitled to receive such spousal benefits or could have their salary tax jointly assessed, many would perceive the status of marriage to be undermined. As such, the use of the marital status as the basis of differentiation of treatment is rationally connected to the legitimate aim.

Furthermore, the Court held that the restriction imposed on the homosexual couples is no more than necessary to protect the status of marriage as accepted in the local context. The Court gave a heavy weight to the public interests for protecting marriage, concluding that this public interest can reasonably balance the financial prejudice that the Applicant can suffer because of the differential treatment.

#### **Takeaways for Employers**

The decision may come as a surprise as the three judges of this case had previously ruled in favour of a pair of same-sex couples in *QT v Director of Immigration* [2017] 5 HKLRD 166. Here, the Court attaches much importance to the legitimate aim of the protection the status of marriage, which was not addressed in the *QT* case. As the Applicant has taken the case to the Court of Final Appeal, it remains to be seen how the top court will address the issue of the protection of marriage in the societal context in Hong Kong, particularly in light of the decision of the Court of Final Appeal in the *QT* case (*see below*).

*Judgment*

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### **Employment (Amendment) Bill 2018 gazetted to increase paternity leave from 3 days to 5 days**

The Employment (Amendment) Bill 2018 (the "**Bill**") was gazetted on 15 June 2018. Currently, a male employee will be entitled to three days' paid paternity leave in accordance with the Employment Ordinance (Cap. 57) (the "**EO**") for each confinement of his spouse or partner if he (i) is the child's father, (ii) has been employed under a continuous contract immediately before taking the leave and (iii) has given the required notification to the employer.

The Bill aims to amend the EO by increasing the paternity leave from 3 days to 5 days. The Bill was introduced into the Legislative Council for debate on 20 June 2018.

*The Bill*

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### **Distressed teacher's claim for employees' compensation dismissed as there was no "accident"**

In *楊艷娥 v 保良局第一張永慶中學* [2018] HKDC 766, the District Court (the "**Court**") dismissed the Applicant's claim for compensation under the ECO on the ground that her injury was not a result of "an accident" within the meaning of section 5(1) of the ECO.

#### **Facts**

In a meeting held on 12 January 2010 in which the examination paper prepared by the Applicant was discussed, the Applicant and some other teachers of the school had

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conflicting views on the answers to a question prepared by the Applicant (the “**Examination Paper Incident**”).

On 13 January 2010, the Applicant was late for the examination which she was the invigilator. Before entering the examination hall, the Applicant was asked to have a short conversation with the headmaster (the “**Lateness Incident**”).

On 16 January 2010, the headmaster and the deputy headmaster had a follow up meeting with the Applicant to discuss the Lateness Incident (the “**Meeting**”). During the Meeting, the headmaster requested the Applicant to submit a written report of the Lateness Incident, but the Applicant refused to do so. Subsequently, the Applicant was feeling unwell. She went to the hospital and was diagnosed as suffering from “situational stress reaction, mood disturbance”. According to the Certificate of Compensation Assessment issued by the Labour Department, the Applicant was assessed to be suffering from “situational stress reaction resulting in psychiatric impairment”.

### Issues and Reasoning

#### A. Whether the Meeting alone, or the combination of the Examination Paper Incident, Lateness Incident and the Meeting, could constitute an “accident” under section 5(1) of the ECO

“Accident” under section 5(1) of the ECO refers to an unwelcome and unexpected mishap. This had to be interpreted in its natural everyday sense. Unexpected or inappropriate words used by the employer during a conversation with an employee are capable of causing an “accident”. The crux of the issue therefore hinges on how the employer manages that particular incident with the employee.

In the present case, the Court found that calling a meeting to investigate into the Lateness Incident was a normal administrative procedures of an education institution. Also, the headmaster did not say anything inappropriate during the Meeting. Neither the Meeting alone nor the combination of the Examination Paper Incident, Lateness Incident and the Meeting demonstrated the element of an unwelcome and unexpected mishap. As such, the Court ruled that there was no “accident”.

#### B. Whether the psychiatric impairment was caused by the Meeting

On this issue, the Court found that the Applicant was emotionally unstable. The “situational stress reaction, mood disturbance” was likely to be resulted from the emotion vulnerability of the Applicant but not the Meeting.

#### Takeaways for employers

When employers meet with the employees to discuss some unpleasant issues, such as issuing a warning to them, they must take note that they should conduct and carry out the meeting in accordance with the usual procedures. Furthermore, employer should pay particular attention to the words spoken during such meeting. Any inappropriate words used in the course of conversation between an employer and employee may be considered as causing an “accident”, enabling the claim for employees’ compensation provided that that other elements under the ECO are satisfied.

*Chinese judgment*

### Court of Final Appeal delivered landmark same-sex spouse visa application judgment

In the landmark case of *QT v Director of Immigration* [2018] CFA 28, the Court of Final Appeal confirmed the ruling of the Court of Appeal, holding that it was unlawful for the Director of Immigration (the “**Director**”) to exclude same sex couples from the policy of granting dependant visas to the spouses of employment visa holders.

#### Facts

QT, a homosexual British national, entered into a same-sex civil partnership with her partner, SS, in England in May 2011. SS was employed in Hong Kong and was granted an employment visa to come and work in Hong Kong. However, QT’s application for a dependant visa was unsuccessful. The grounds of refusal given by the Director was that it was “outside the existing policy”, which provides that the admission of spouse as a

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dependant is based on the concept of a married couple consisting of one male and one female (the “**Policy**”).

Subsequently, QT commenced the judicial review proceedings to challenge the Director’s decision.

### Issues and Reasoning

#### A. Whether there has been discriminatory treatment

The Director argued that given the status of marriage is plainly special and different from the status conferred by a civil partnership, the Policy required no justification. The Court disagreed that this could be used as a basis for precluding scrutiny of the Policy’s justification.

After rejecting the Director’s argument above, the Court accepted the Director’s concession that the Policy involved indirect discrimination on the basis of QT’s sexual orientation. Under the Policy, homosexual persons could not apply for dependant visas by reason of their sexual orientation as they could not meet the criterion of a dependant having to be a party to a marriage which satisfies the requirements of a valid marriage under Hong Kong law. QT therefore suffered from discriminatory treatment.

#### B. Whether such discriminatory treatment can be justified

To justify such discriminatory treatment, the difference in treatment (1) must pursue a legitimate aim, (2) must be rationally connected to the legitimate aim and (3) must be no more than is necessary to achieve the legitimate aim.

The aims of the Policy was twofold. First, to encourage persons with needed skills and talent to join the workforce of Hong Kong; second, to maintain strict immigration control. It was not disputed that these were legitimate aims.

However, the Director failed to persuade the Court how the Policy was rationally connected to the legitimate aims. Persons in deciding whether to move to Hong Kong or not would take into account the ability to bring in their dependant as one of the important factors. By refusing to grant a dependant visa to the spouse of homosexuals persons, the Director was in effect saying that one could only bring in his or her partner provided he or she was straight. This was indeed counter-productive to the legitimate aims that the Director was seeking to pursue. As such, the discrimination treatment by the Director was unlawful and the appeal was dismissed.

### Takeaways for Employers

It is interesting to note that a group of 15 financial institutions and a group of 16 law firms sought leave for intervene in the appeal. They sought to highlight to the Court the negative effect of the Policy, which was the limitation of the employers’ choice of foreign employees. Although in the end the application was not granted, the Court did acknowledge the limiting effect in the judgment. In any event, this is a judgment to be welcomed by employers as it provides greater attraction for talented homosexual overseas employees to work and live in Hong Kong.

Following this landmark case, the Immigration Department has changed the immigration policy to recognise overseas same-sex partnerships when considering eligibility for dependant visas/entry permits.

### *Judgment*

## Owner of a restaurant is sentenced to imprisonment for employing illegal employees

In the decision of 香港特別行政區 訴 江潤松 [2018] HKCFI 1625, the Court of First Instance (the “**Court**”) dismissed an appeal lodged by an owner of a restaurant in relation to his conviction of “being employer of a person who is not lawfully employable”. His appeal on sentencing, however, was allowed and he was sentenced to 6 months’ imprisonment instead of 9.

### Facts

The Applicant employed Ms. Vu Thi Nga (“**Vu**”) to work in his restaurant from January 2016

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to 31 May 2017. Vu was a Vietnamese illegal immigrant who could not work (either paid or unpaid) in Hong Kong.

On 31 May 2017, Vu was discovered by a labour officer working in the restaurant, she. The Applicant was charged with one count of "to be employer of a person who is not lawfully employable", contrary to section 17(1) of the Immigration Ordinance (Cap. 115) ("IO"). He was convicted by the Magistrate at trial and was sentenced to 9 months' imprisonment.

### Issues and Reasoning

Under section 17(1A) of the IO, it is a defence for the person charged with the offence to prove that all practicable steps were taken to determine whether the employee in respect of whom the offence was alleged to have been committed was lawfully employable and that it was reasonable to conclude that the employee was lawfully employable.

At trial, the Applicant sought to rely on the defence by the following factors:

- he asked about Vu's employment records and the reason Vu left her previous employment;
- he requested Vu to show her HKID card. Vu showed a HKID card for non-permanent residents. The face on the HKID card is similar to Vu. Vu also believed he could hire non-permanent residents as a similar situation occurred for his girlfriend;
- he believed the employment records of Vu were lost when moving in September 2016, and he never knew such records were lost until being asked by the police; and
- he denied his failure to make MPF contributions for Vu was because he knew or suspected Vu was a person who is not lawfully employable.

The trial judge found the Applicant guilty because of the following reasons:

- his failure to enquire about the son of Vu and further background of Vu, knowing that Vu is Vietnamese, holds a HKID card for non-permanent residents, is fluent in Cantonese and seeks employment in low-skilled labour work;
- his failure to check Vu's travel documents before hiring her;
- his failure to make MPF contributions, purchase insurance and provide statutory holidays for Vu; and
- his failure to make further enquiries from an objective point of view.

On appeal, the Court agreed with the trial judge and held that the Applicant cannot rely on the defence. The Applicant never asked how did Vu come to Hong Kong or enquired with the Immigration Department to confirm whether Vu can be employed. Furthermore, the Applicant knew that Vu had to work for 6-8 hours everyday without any rest day or statutory holiday. Under such circumstances, the Applicant should have suspected whether Vu was lawfully employed and whether her HKID card was valid or not. The trial judge was therefore correct to decide that it was not reasonable for the Applicant to conclude that the employee was lawfully employable.

### Takeaways for employers

Employers should pay particular attention when they are employing person under circumstances which indicate that the person may not be lawfully employable. Checking the HKID of the person alone is not adequate. The employers should at least enquire about the background of the person, including whether the person is subject to any limit of stay in Hong Kong, how the person acquire the HKID and whether there is any restriction as to her employment status.

*Chinese judgment*

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### Requirements for video conference and representation in the Hong Kong Labour Tribunal

In *Mallorca Joenalyn Domingo v Ng Mei Shuen* [2018] HKCFI 1642, the Court of First Instance (the "Court") allowed an appeal by an Applicant against the decision made by the Presiding Officer who dismissed her application to transfer the Labour Tribunal proceedings to the Technology Court such that the claimant may give evidence in the Philippines via video conferencing facilities and for a union representative to represent her.

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**Facts**

The Applicant was a foreign domestic helper who lodged a claim in the Tribunal in October 2016 against the Respondent, her former employer, for allegedly slapping her and summarily dismissing her without proper grounds.

On 8 December 2016, the Applicant returned to her hometown in the Philippines. The Applicant applied for the proceedings to be transferred to the Technology Court and to give evidence in the Philippines via video conferencing facilities (the “**VCF Application**”) as she was unable to return to Hong Kong to give evidence in person. The Applicant also sought leave from the Presiding Officer to allow Mr. Tang, an officer of the Hong Kong Federation of Asian Domestic Workers Union, to represent her at the hearing on 30 March 2017 (the “**Representation Application**”).

The Presiding Officer dismissed both Applications and struck out the Applicant’s unsettled claims pursuant to section 20A of the Labour Tribunal Ordinance (“**LTO**”).

**Issues and Discussions****A. Whether the VCF Application should be granted**

Practice Direction 29 (“**PD 29**”) provides that parties can apply for the use of Technology Court subject to the direction of the court or tribunal concerned. In particular, paragraph 5 of PD 29 sets out the factors that the court or tribunal should take into account when making its decision.

The applicant should provide a valid reason for the use of Technology Court, but the threshold for valid reason is not high. The ultimate question was what was best calculated to achieve a just result for both parties.

Here, the Court held that the Presiding Officer had erred in law by failing to consider all the matters set out in paragraph 5 of PD 29 and failing to assess the balancing of prejudice as between the parties. The Presiding Officer attached too much importance on the Respondent’s objection to the use of the Technology Court. It was held the Presiding Officer failed to have regard to the fact that the Applicant would be deprived of a fair hearing and her entitlement to bring proceedings to protect her civil right would be prejudiced.

On the other hand, there was no evidence of any prejudice to the Respondent if the Applicant’s application was allowed. The Court therefore held that the Presiding Officer was plainly wrong in the exercise of his discretion.

**B. Whether the Representation Application should be granted**

Section 23(1)(e) of the LTO provides that the Tribunal has the discretion to allow an office bearer of a registered trade union or of an association of employers who is authorised in writing by a claimant or defendant to appear as their representative before the Tribunal.

Apart from section 23 of the LTO, the Tribunal had an inherent jurisdiction to allow a lay representative to present and act as advocate for any party in the proceeding. The exercise of the discretion should not be confined to cases where there is a strict necessity. It should be exercised for the promotion of convenience and expedition and efficiency in the administration of justice.

The Court held that the Presiding Officer had adopted too narrow an approach by looking for “exceptional circumstances” in considering the Representation Application. He failed to take into account the whole of the circumstances that are relevant to the case, such as whether the Representation Application was for the purpose of ensuring that the Applicant’s claim was not struck out. Further, the Presiding Officer’s concern over Mr Tang’s over qualification as a paralegal with experience in handling labour disputes was misplaced. Instead of dismissing the Representation Application, he could have given the Applicant an opportunity to appoint another representative with no legal training to represent her.

**C. Whether the Applicant’s claim should be struck off**

In light of the evidence before the Presiding Officer, the Applicant’s claim did not appear to be entirely without merit. The Presiding Officer was plainly wrong in exercising its discretion to strike out the Applicant’s claim without considering any other options.

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**Conclusion**

The Court remitted both Applications to the Tribunal to be heard before another presiding officer in the restored proceedings.

The giving of evidence by video conferencing and appointing an representative to appear on a party's behalf in the Labour Tribunal is permissible in certain circumstances. Employers should bear these options in mind in developing a strategy for handling proceedings in the Labour Tribunal.

*Judgment*

**The EOC launches the Racial Diversity and Inclusion Charter for Employers**

To further encourage and promote racial diversity and inclusion in workplaces, the Equal Opportunities Commission ("**EOC**") launched the Racial Diversity and Inclusion Charter for Employers (the "**Charter**"), providing a checklist of policies and practices for committed employers to follow.

The Charter is for the following companies and institutions:

- companies registered with Business Registration: the business must be in operation in Hong Kong for at least 1 year;
- charitable organisations that are exempt from tax under;
- section 88 of the Inland Revenue Ordinance;
- education establishments;
- chambers of commerce and professional bodies; and
- other organisations considered appropriate by the organiser.

Covering the areas of policy, culture and work environment, the Charter consist of a list of nine guidelines:

- implement racial equality and diversity policies for the organisation;
- establish fair recruitment, appointment, promotion, staff development and dismissal processes and criteria;
- review the employment processes and policies regularly to remove barriers for people of all races;
- raise awareness of the policies and principles of racial inclusion among staff;
- proactively encourage engagement with racial minorities from underprivileged and under-represented communities;
- provide a safe and collaborative work environment for all employees;
- make employees of all races feel involved and included;
- have in place a formal grievance process for employees to report and receive redress for any discrimination; and
- ensure grievances are dealt with swiftly, effectively and confidentially.

The guidelines are not mandatory or subject to the law, yet they serve as the best practice suggestions to cultivate an inclusive working environment and a culture of racial respect within the organization.

Interested organizations should fill in the online slip to express their interest in adopting the Charter. The EOC will provide more details of the Charter to the organizations.

Organizations can then sign the Charter to formally indicate the adoption of the Charter and can use the dedicated Racial Diversity & Inclusion logo in the organisations' publications as a signatory.

*The Press Release*

*The Racial Diversity and Inclusion Charter*

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## Hong Kong court dismisses an employees' compensation claim as the employee refused to attend medical examination as required by the employer

In *Cheung Sau Lin v. Tsui Wah Efford Management Ltd* [2018] HKDC 941, the District Court (the "**Court**") dismissed an employees' compensation claim for the employee had refused to attend medical examination as required by the employer under section 16 of the Employees' Compensation Ordinance ("**ECO**").

### Facts

The Applicant sustained a work injury. On 11 November 2014, the Applicant received a letter from the Loss Adjusters and a chaser on 17 November 2014 requiring her to attend a medical examination under section 16(1A) of the ECO. However, she failed to attend the medical examination as scheduled. The Applicant alleged that the employer had failed to pay her the periodical payment under section 10(3) of the ECO hence could not require her to undergo a medical examination under section 16(1A) of the ECO.

### Issues and Reasoning

#### A. Interpretation of section 16(4) of ECO

Section 16(4) of the ECO provides that "if the employee fails to undergo a medical examination as required under this section, his right to compensation shall be suspended until such examination has taken place; and if such failure extends over a period of 15 days from the date when the employee was required to undergo the examination, no compensation shall be payable unless the Court is satisfied that there was reasonable cause for such failure".

The Applicant tried to argue that the meaning of section 16(4) of the ECO was that the Applicant's right to compensation would merely be *suspended* but not *extinguished* for failing to attend the medical examination "over a period of 15 days".

The Court disagreed with this argument, holding that the plain meaning of the section is clear that the right to compensation would be extinguished under such circumstances "unless the court is satisfied that there was reasonable cause for such failure".

The Court held that such interpretation does not make section 16(4) of the ECO a draconian provision. The purpose of section 16(4) of the ECO is to provide a protection mechanism to allow the employer to identify early on the "genuine" cases from the others by an expert who should be independent and not a treating doctor. The Court stressed that this protection mechanism is essential as the ECO compensation procedure could potentially be abused by employees who engaged in "doctor surfing" behaviour (i.e. visiting a new doctor each time when the sick leave granted by the previous doctor runs out, aiming to simply prolong sick leave indefinitely without a "genuine" injury). If the employee was severely sick to the extent that he was unable to attend medical examination as required under section 16, he could easily rely on section 16(3) of the ECO and obtain an opinion from the treating doctor stating that the employee was unable, or not in a fit state, to attend the required medical examination.

#### B. Whether there is any reasonable cause for failure to attend

The Applicant claimed that travelling to the designated doctor's clinic in Central from her home in Lantau Island for the medical examination would cause her great pain as she was suffering from persistent and intense bilateral knee pain. However, given that the Applicant admitted in court that she could attend her lawyers in Sheung Wan on at least three occasions, the Court ruled that a medical examination taking place in Central could not be considered as unreasonable. Further, the Applicant should have raised such concern so that the Loss Adjusters could find a more convenient arrangement for the medical examination. There was simply no reasonable cause for failing to attend the medical examination.

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### C. Whether there is a breach of section 10(3) of the ECO

The Applicant also argued that her employer could not require her to undergo a medical examination as the employer failed to pay the periodic payments as specified under section 10(3) of the ECO. After examining the employer's administrative system as well as the conduct of the Applicant and Respondent, the Court found that there was no attempt by the employer not to pay that part of periodic payment. It was held that the employer was not in breach of section 10(3) of the ECO, and hence had the right to require the employee to undergo medical examination.

#### Takeaways for Employers

This decision demonstrates that the Court acknowledges the need to strike a balance between, on one hand, having a simple process to allow quick relief for employees in genuine cases and, on the other hand, having a mechanism to protect the relatively simple compensation procedure from being abused by employees (especially those who engage in "doctor surfing" behaviour). The Court recognizes that section 16(4) of the ECO offers such protection mechanism to employers, which is very important.

Employers are reminded that they must pay periodical payments in compliance with section 10(3) of the ECO in order to have the right to require the employee to undergo a medical examination under section 16 of the ECO in the first place (so that they are then in a position to take advantage of the protection mechanism under section 16(4) of the ECO if the employee refuses to attend the required medication).

*The judgment*

### Privacy Commissioner Issued Best Practice Guide on Privacy Management Programme

The Privacy Commissioner for Personal Data, Hong Kong issued the revised Best Practice Guide on Privacy Management Programme (the "**Guide**"). As an improved version of the 2014 issue, it provides more substantial references which aims at assisting organisations in coming up with a comprehensive Privacy Management Programme ("**PMP**").

The Guide provides different practical advice in various aspects as to the method of constructing a comprehensive PMP, which includes:

- adopting a top-down approach to demonstrate the commitment to person data privacy protection;
- appointment of data protection officer;
- establishment of reporting mechanisms;
- establishment of person data inventory;
- establishment of internal policies on personal data handling;
- adoption of risk assessment tools;
- having adequate training, education and promotion;
- proper handling of data breach incident;
- proper data process management and communication;
- preparation of an oversight and review plan; and
- assessment and revision of programme Controls.

As the European Union's General Data Protection Regulation (GDPR) came into force on 25 May 2018, the adoption of accountability approach in handling personal data through the implementation of a comprehensive PMP has become a global trend. As such, organisations are encouraged to adopt the personal data protection as part of their corporate governance responsibilities rather than just treating them as compliance issues.

*The press release*  
*The Guide*

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## The EOC releases findings of the study on Family Status Discrimination in the Workplace in Hong Kong

On 22 August 2018, the Equal Opportunities Commission ("**EOC**") released the findings of the "Study on Family Status Discrimination in the Workplace in Hong Kong". The study reveals the lack of knowledge about family status discrimination among both employers and employees in Hong Kong. Some of the report findings are as follows:-

- employers were found to have less knowledge about family status discrimination, while Hong Kong born and more educated employees tended to be more familiar with the issue;
- larger companies (with at least 50 employees) that offer regular anti-discrimination training workshops and with anti-discrimination policies implemented are less affected by employees with family caring responsibilities; yet smaller enterprises are more willing to change their policies in the future to accommodate their employees' needs; and
- 7.8% of employees with family caring responsibilities indicated being a victim of discrimination on grounds of family status in the past two years; while employers reported no incidents of family status discrimination;

According to the study, the major concern of employers is the lack of resources and failure to meet deadlines. As such, it is suggested that the government should allocate more resources to enterprises to assist them in the implementation of family leave policies. On the other hand, promotion of the knowledge and awareness of the Family Status Discrimination Ordinance (Cap. 527) is also a crucial measure to foster a discrimination-free environment.

[The press release](#)

## Hutchison Telecommunications fined for failure to comply with cessation request from customer

Hutchison Telecommunications (Hong Kong) Limited (the "**Company**") was charged with the offence of failing to comply with the requirement from the data subject (the "**Complainant**") to cease to use her personal data in direct marketing, contrary to section 35G(3) of the Personal Data (Privacy) Ordinance (Cap. 486) ("**PDPO**"). The Company pleaded guilty to both charges and was fined HK\$20,000.

The Complainant was a customer of 3 Hong Kong, the Company's mobile telecommunications services brand. Although she had made her opt-out request in direct marketing by phone to the Company in May 2016, she still received direct marketing calls from 3 Hong Kong in June and August 2016. She subsequently made a complaint to the Privacy Commissioner for Personal Data.

Section 35G(3) of the PDPO provides the right for a customer to require a data user to cease to use the customer's personal data in direct marketing. Upon receiving such requirement, the data user must comply with it without charge to the data subject. Upon investigation of the matter, the PCPD was of the view that the Company had failed to comply with the requirement from the Complainant.

To comply with the PDPO, companies should ensure that customers' requests for cessation of using their personal data in direct marketing are dealt with effectively. One suggested method is to maintain a list of customers who have indicated that they do not wish to receive any further marketing promotion. The list should then be circulated to the staff of the relevant department. Furthermore, adequate training should also be provided to staff to ensure that they understand the need to comply with such opt-out requests from customers.

[The press release](#)  
[The New Guidance on Direct Marketing](#)

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## Talent List drawn up to attract quality people

With the aim to attract quality people from around the world to support Hong Kong's diversified development, the Hong Kong Government promulgated the first Talent List of Hong Kong, which highlights the specific professions that are most needed for Hong Kong's economic development.

The 11 professions are listed as follows:

- experienced waste treatment specialists/engineers;
- experienced management professionals in asset management including but not limited to trust fund management;
- experienced professionals in marine insurance;
- actuaries;
- experienced professionals in Fintech;
- experienced data scientists and experienced cyber security specialists;
- innovation and technology experts in, but not limited to, the following fields:
  - o (i) pharmaceutical and life science/biotechnology;
  - o (ii) data engineering (e.g. data mining/data analytics), artificial intelligence, robotics, distributed ledger technologies, biometric technologies and industrial/chemical engineering, etc.; and
  - o (iii) materials science/nanotechnology;
- naval architects;
- marine engineers and superintendents of ships;
- creative industries professionals in:
  - o (i) music: recording engineers, mastering engineers, and cutting/pressing engineers for Vinyl LP;
  - o (ii) digital entertainment: game development experts (game designers, game programmers and game graphic designers) and game producers; and
  - o (iii) films: various roles in pre-production, production and post-production and winner of designated renowned international film festivals; and
- dispute resolution professionals specialising in resolving international financial and investor-state disputes, and transactional lawyers with specialised knowledge of and experience in cross-border transactions from investing or host states.

In addition, to provide additional incentive to relevant world talents to come to Hong Kong, immigration facilitation is provided to eligible persons under the Talent List through the Quality Migrant Admission Scheme ("QMAS"). While bonus marks will be awarded under the General Points Test of the QMAS for applicants who satisfy the specifications of the respective profession under the Talent List, it should be noted that the QMAS continues to welcome talents from other industries not included by the Talent List.

[The press release](#)

[Detailed information of the Talent List](#)

[Information regarding the application under the QMAS](#)

## Hong Kong immigration policy now accepts same-sex dependant visa

On 18 September 2018, the Hong Kong government announced a revision to the immigration policy for entry of non-local dependants (the "Policy") to recognise overseas same-sex partnerships when considering eligibility for dependant visas/entry permits. The revision took effect from 19 September 2018.

A person who has entered into a

- same-sex civil partnership,
- same-sex civil union,
- "same-sex marriage",
- opposite-sex civil partnership, or
- opposite-sex civil union

outside of Hong Kong with an eligible sponsor in accordance with the local law in force of the place of celebration and with such status being legally and officially recognised by the local authorities of the place of celebration is now eligible to apply for a dependant visa/entry permit to enter into Hong Kong.

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The other original eligibility criteria of the Policy will also continue to apply unchanged. These original eligibility criteria are:

- (i) there is reasonable proof of a genuine relationship between the applicant and the sponsor;
- (ii) there is no known record to the detriment of the applicant; and
- (iii) the sponsor is able to support the dependant's living at a standard well above the subsistence level and provide him/her with suitable accommodation in Hong Kong.

The change in policy follows the much publicised Court of Final Appeal decision in QT v. Director of Immigration [2018] HKCFA 28 which found against the Immigration Department's former policy of restricting dependant visas to a spouse of a heterosexual couple. The change in policy is a major shift in the Immigration Department's policy and is good news for employers which helps in efforts to attract and retain talent to come to and remain in Hong Kong.

[The Government Press Release](#)

## 2018 Policy Address – Workplace issues

Hong Kong's Chief Executive Carrie Lam delivered her most recent Policy Address a couple of weeks ago. It contained a number of important proposals, some of which will impact the workplace.

### 1. More time off for new dads

The policy address proposes an increase in paternity leave from three days to five days. This proposal has already been fast tracked through the legislative process and will become effective on a day to be notified by the Hong Kong government, which is expected to be early in 2019.

The structure and process for taking paternity leave remains as set out in our update of 6 January 2015 here.

### 2. Increase in maternity leave for new mums

The policy address proposes that statutory maternity leave increase from 10 to 14 weeks.

It is proposed that the additional four weeks maternity leave will be paid, but only up to a limit of **HK\$36,822 (which is 80% of the wages earned by an employee with a monthly income of HK\$50,000 in four weeks)**. Entitlement to maternity leave pay will remain conditional on the mother having worked 40 weeks prior continuous service.

As a sweetener for employers it is proposed that employers may apply for reimbursement of the additional maternity leave pay from the government.

This extension will be debated by the Labour Advisory Board (never a smooth process!) and, as such, there may be twists and turns to the story that are not obvious now.

### 3. The vexed question of MPF Offsetting

After years of to'ing and fro'ing it appears that employers, labour unions and the government may be close to resolving the difficult question of eliminating the Mandatory Provident Fund (MPF) offsetting arrangement which is currently incorporated in the employment protection legislation.

In essence the concern is that an employee's long service or severance pay entitlement under the Employment Ordinance can be reduced (or "offset") by the value of the contributions which an employer has paid to an MPF scheme in respect of that employee. In practice this can almost entirely erode the employee's statutory severance or long service payment entitlement.

For years the labour unions have been screaming that this is unfair, whilst the employer bodies have been arguing that the arrangement has been in place for decades and that it is part of a deal struck in the mid-90s when the MPF was first being established. Both arguments are probably true.

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The government has been stuck in the middle trying to broker a deal to get employers and unions to agree to the removal of the offset (so an employee would get his or her full long service or severance pay and retain his or her full MPF benefits).

Ultimately this is all about money. And the government now appears prepared to put some HK\$29.3 billion into the problem in the form of subsidies for employers. It is proposed that this amount will be paid out over the next three decades.

We won't bore you with the detail. Suffice to say that the parties are certainly moving closer, but it is not anticipated that anything will happen soon.

#### 4. Other incidentals

The policy address paid lip service to a relaxation of the importation of labour in certain sectors. We will wait and see if this actually operates to assist what is a critical problem in many industries.

The address also made incidental comment on an increase in protection of rights for government contractors. Given the large number of government contractors in Hong Kong any material change to the terms on which they are appointed can have a trickle-across impact on the broader manpower environment.

### Court of First Instance's jurisdiction to hear equal opportunities claims confirmed

In *Cheuk Kit Man v FWD Life Insurance Co (Bermuda) Ltd and Others* [2018] HKDC 1234, the District Court (the "**Court**") recognised the jurisdiction of the Court of First Instance to hear equal opportunities claims and exercised its discretion to transfer the equal opportunities claim to the Court of First Instance.

#### Facts

The Claimant was an insurance agent of the 1st Respondent, an authorised insurer in Hong Kong. Pursuant to a letter dated 27 April 2015, an Independent Agency Agreement entered into on 24 July 2015 (the "**IAA**") and the 'Give me Five' Sales Incentive Scheme, the Claimant received a total sum of \$4,187,190.01 during her appointment. However, under the above agreements, the Claimant had to repay the amount received by her if the IAA was terminated before a prescribed time.

On about 5 May 2017, the husband of the Claimant, who was also an insurance agent of the 1st Respondent, notified the 1st Respondent that he would resign. He subsequently worked for a major competitor of the 1st Respondent.

About three days after the resignation of the Claimant's husband, the 1st Respondent notified the Claimant that the IAA would be terminated and requested the Claimant to repay a sum of \$4,070,682.30 pursuant to the above agreements. The Claimant refused to pay. As such, the 1st Respondent commenced a High Court action (the "**High Court Action**") to claim the sum.

On the other hand, the Claimant commenced an equal opportunities claim in the District Court (the "**EO Claim**"). In the notice of claim, she stated the same factual allegations as in her defence to the High Court Action and contented that the termination of the IAA was unlawful under the Sex Discrimination Ordinance, Cap 480 (the "**SDO**") and the Family Status Discrimination Ordinance, Cap 527 (the "**FSDO**") by reason of her marital status and/or family status.

#### Issues and Discussions

##### A. Whether the Court of First Instance has the jurisdiction to hear equal opportunities claims

Sections 3 and 12 of the High Court Ordinance, Cap 4 provides that the High Court, which consists of the Court of Appeal and the Court of First Instance, is a court of unlimited civil jurisdiction and the Court of First Instance is a superior court of record. The presumption of jurisdiction therefore applies.

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In the case of *Lee Kwok Tung Albert v Chiyu Banking Corporation Ltd* [2018] HKCA 123, it was held that when the court has to determine whether an ordinance has provided exclusive jurisdiction to the District Court, the task of the court is to search for “clear and express terms” which have the effect of granting exclusivity on the District Court or ousting the presumed jurisdiction of the Court of First Instance. The court in that case concluded that the District Court does not have exclusive jurisdiction to hear claims brought under the Personal Data Privacy Ordinance, Cap 486.

Here, the Court adopted the reasoning and analysis of the *Lee Kwok Tung* case as the two ordinances have substantially similar wording and overall structure employed in the jurisdiction-conferring section. Given the lack of any “exclusivity” wording in the SDO and the presumption of jurisdiction in favour of the Court of First Instance, the Court held that the District Court’s jurisdiction over SDO claims is not exclusive.

The Court noted that the express references to “the District Court” throughout the text of the SDO and the fact that SDO-related provisions were inserted into the District Court Ordinance clearly suggest that the legislature had contemplated that SDO claims should be heard in the District Court. However, the strong preference to have the District Court to hear SDO claims does not have the effect of ousting the jurisdiction of the Court of First Instance entirely. While the District Court is the natural forum for SDO claims, nothing in the SDO prevents the Court of First Instance from hearing SDO claims where warranted by the circumstances of the case.

The Court held that the above analysis and conclusion also applies to the FSDO.

### **B. Whether the Court should exercise its discretion to order a transfer**

The Court recognised the need to deal with the High Court Action and the EO Claim together based on the following grounds:

- the two actions both arise out of the same set of facts;
- the disposal of the EO Claim will likely dispose of the High Court Action given that the Claimant does not intend to rely on any other defence in the High Court Action; and
- the two actions have been progressing in sync since late 2017 when the Claimant filed the defence in the High Court Action and commenced the EO Claim in the District Court at around the same time.

On the other hand, the Court also noted the conflicted right between the Claimant and the 1st Respondent. While the 1st Respondent commenced the contractual claim in the Court of First Instance as of right as the claim is for over \$4 million, the Claimant has also brought her EO Claim in the District Court as of right. The question faced by the Court is therefore what is the cost-effective and fair way to manage the actions together.

In the absence of consent between the parties, the Court concluded that the practicable and fair disposal of the claims is to have them both heard at the same time in the Court of First Instance. In reaching its decision, the Court took into account the following factors:

- the possibility that after the determination of the EO Claim, the contract claim will have to be litigated nonetheless if parties choose to revisit their positions on the contract claim or raise new points or allegations after discovery and exchange of witness statements;
- the desirability for the two cases to be handled together by the same court and at the same time from now onwards; and
- the ability of the Court of First Instance to make appropriate costs orders covering both claims upon their final adjudication.

### **Conclusion**

The decision confirms that the Court of First Instance has the jurisdiction to hear equal opportunities claim.

*Judgment*

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## Labour Tribunal can now make reinstatement or re-engagement order without the employer's agreement

The Employment (Amendment) (No.2) Ordinance 2018 came into force on 19 October 2018 and amends the provisions of the Employment Ordinance (“**EO**”) on reinstatement or re-engagement order for unreasonable and unlawful dismissal.

If an employee has been unreasonably and unlawfully dismissed on or after 19 October 2018 and the employee requests for reinstatement or re-engagement, the Labour Tribunal has the power to make such an order even without the consent of the employer if the Labour Tribunal considers that it is appropriate and reasonably practicable to give such order.

If the employee is reinstated, the continuity of the period of employment between the date of the employee's absence from work and the date of reengagement is not broken and the employee's existing and future entitlements under the EO and the employment contract will continue to be recognised.

If the employee is not reinstated on the terms specified in the order, the employer is required to pay the employee a further sum set at three times the employee's average monthly wages subject to a maximum of \$72,500. This amount is additional to the terminal payments and compensation payable to the employee as ordered by the Labour Tribunal as currently provided under the EO. Failure to make such payment without reasonable excuse is a criminal offence punishable with a fine of up to \$350,000 and up to 3 years of imprisonment.

[The government press release](#)

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## Hong Kong statutory paternity leave to be increased to 5 days

Statutory paternity leave will be increased from three days to five days. The Legislative Council passed the Employment (Amendment) Bill 2018 (the “**Bill**”) increasing the statutory paternity leave on 25 October 2018.

The Bill makes no amendment in respect of other aspects of the statutory paternity leave. The daily rate of statutory paternity leave pay remains at 80% of the daily average wages of the employee.

The Gazette date for the Bill has not yet been confirmed, but it is expected that the Bill will come into force earliest at the beginning of next year.

[The Bill](#)

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## Discrimination Legislation (Miscellaneous Amendments) Bill 2018 Gazetted

The Hong Kong government gazetted the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 (the “**Bill**”) on 30 November 2018.

The Bill seeks to amend the Sex Discrimination Ordinance (Cap. 480) (“**SDO**”), the Disability Discrimination Ordinance (Cap. 487) (“**DDO**”), the Family Status Discrimination Ordinance (Cap. 527) (“**FSDO**”) and the Race Discrimination Ordinance (Cap. 602) (“**RDO**”) to implement eight of the prioritised recommendations provided in the Equal Opportunities Commission's Report on the Discrimination Law Review.

The proposed amendments are:

1. To provide for express provisions in the SDO to make discrimination on the ground of breastfeeding unlawful;
2. To extend protection from harassment and direct racial discrimination to cover on the ground of the race of an associate;
3. To expand the meaning of race and racial group in the RDO to include a race that is imputed to a person;
4. To provide express provisions in the SDO, DDO and RDO expanding the scope of protection from sexual, disability and racial harassment at a workplace;
5. To strengthen the protection to service providers against disability and racial harassment by customers under the DDO and RDO;

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6. To prohibit certain acts of disability and racial harassment between service providers and customers which take place outside Hong Kong but on Hong Kong registered aircraft and ships;
7. To add provisions in the SDO and DDO to make sexual and disability harassment against members or applicants for membership of a club unlawful; and
8. To remove the intention requirement for an award of damages for certain acts of indirect discrimination under the SDO, FSDO and RDO.

The First Reading of the Bill and the commencement of Second Reading Debate are scheduled to take place on 12 December 2018.

*The Bill*



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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...](#)

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## 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.

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## 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...](#)

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## 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...](#)

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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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## 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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## 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.

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## 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.

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## 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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**Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 ("SO Amendment Rules") are in force.**

Under the SO Amendment Rules, the Central Government has recognised 'fixed term employment' for all types of employment. The SO Amendment Rules provide that existing permanent workmen cannot be converted to fixed term employment. Further, the amendments also introduce certain changes to the model standing orders contained in the schedule to the rules. These amendments include provisions that the fixed-term workmen will be entitled to the same benefits, allowances, and conditions of work as the permanent workmen; and that fixed-term employees are not entitled to notice or payment in lieu in case of non-renewal or expiry of the contract. The model standing orders have also been amended to contain provisions relevant to temporary workmen. While temporary workmen are ordinarily not entitled to notice or payment in lieu during termination, temporary workmen who have been in service for more than 3 months would be entitled to the same. Further, temporary workmen who have been terminated prior to three months must also be given reasons for the same. However, these changes are applicable only to establishments for which the Central Government is the appropriate government, which include establishments under the control of the Central Government or railway administrations and establishments in major ports, mines and oil fields. It does not ordinarily apply to establishments in the private sector.

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**The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2018 ("Maharashtra S&E Rules") are in force**

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017, came into force in December 2017. Under this law, the Maharashtra government has drafted and implemented the Maharashtra S&E Rules, which have now come into force. The Maharashtra S&E Rules provide for the definition of 'managerial functions'. It also sets out general conditions for employing women, issuing of ID cards in soft-copy, and an obligation to display information such as hours of work, rest intervals etc. on the company website. The Maharashtra S&E Rules further provide for setting up a Health, Safety and Welfare Committee.

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**Notifications under the Payment of Gratuity (Amendment) Act, 2018 ("Gratuity Amendment")**

The Central Government, through a notification under the Gratuity Amendment has increased the cap on gratuity payable to INR 2,000,000 from INR 1,000,000. It has also increased the period of maternity benefit that will be considered as continuous service from 12 weeks to 26 weeks (which is in line with the provisions of the Maternity Benefit Act, 1961).

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**Delhi amendments to the Minimum Wages Act, 1948 ("MW Act")**

The Government of Delhi has amended the MW Act. The amendment provides that employees would be entitled to overtime wages at the rate of at least twice the amount of normal wages. Further, penalties for offences relating to paying less than the statutory minimum wages to an employee or a contravention of obligations such as fixing hours of work, providing a rest day etc., have been raised to INR 50,000 and/or imprisonment for 3 years. For general non-compliances under the MW Act, the penalty has been raised to a fine of INR 20,000 and/or imprisonment for 1 year.

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**Amendment to the Pradhan Mantri Rojgar Protsahan Yojana Scheme**

Under the Pradhan Mantri Rojgar Protsahan Yojana Scheme, the Government of India has decided to pay the entire employer's share (12% of the employees' basic wages) of provident fund contribution (as set out in the Employees' Provident Fund and Miscellaneous Provisions Act, 1952) for new employees in all sectors. Prior to the amendment, the government was contributing 8.33% of the basic wages of new employees (in all sectors) on behalf of the employers. For new employees in the apparel and textile manufacturing sectors, the government was contributing the entire 12% on behalf of the employer. New employees are those who joined the Employees' Provident Fund Organisation ("EPFO") after 1 April 2016 and are earning up to INR 15,000 per month. A circular issued by the EPFO on 12 April 2018 indicates that the government will pay the entire portion of the employer's contributions with effect from 1 April 2018 for a period of 3 years for new employees in all sectors.

[More...](#)

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**Punjab introduces professional tax**

The Government of Punjab has notified the Punjab State Development Tax Act, 2018, which provides for the payment of professional tax in the state of Punjab. Under this law, all persons engaged in any profession, calling or employment who earn income under the head of 'salary and/or wages' or 'business and/or profession' as per the Income Tax Act, 1961, are liable to pay professional tax. This tax is chargeable at INR 200 per month and is payable by income-tax payees. Employers have an obligation to deduct the relevant amount from the employees' wages/salary and pay the same.

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**Fixing administrative charges under Employee Provident Fund Scheme, 1952**

With effect from 1 June 2018, the administrative charges payable by the employer under the Employees' Provident Fund Scheme, 1952, has been reduced to 0.50% of the basic pay being paid to employees. This has been changed from 0.65%. The charges are subject to a minimum of INR 75 per month for every non-functional establishment having no contributory member and INR 500 per month per establishment for other establishments.

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**Tamil Nadu Industrial Establishments (National, Festival and Special Holidays) Amendment Act, 2018 ("Holidays Amendment Act")**

The Tamil Nadu Government notified the Holidays Amendment Act on 13 July 2018 to increase the penalties prescribed under the Tamil Nadu Industrial Establishments (National, Festival and Special Holidays) Act, 1958 ("**Holidays Act**"). The Holidays Amendment Act has amended the provision on penalty for non-compliance of the Holidays Act, which has been increased from INR 1,000 (USD 15 approximately) to INR 5,000 (USD 70 approximately) for first offence and INR 5,000-10,000 (USD 70-140 approximately) for subsequent offences. Further, the Holiday Amendment Act has increased the penalty prescribed for obstructing inspectors from INR 1,000 (USD 15 approximately) to INR 5,000 (USD 70 approximately).

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**Tamil Nadu Shops and Establishments (Amendment) Act, 2018 ("S&E Amendment Act")**

The Tamil Nadu Government notified the Tamil Nadu S&E Amendment Act on 13 July 2018 to amend a few provisions of the Tamil Nadu Shops and Establishments Act, 1947 ("**TN S&E Act**"). These amendments include –

- **Introduction of a provision in the TN S&E Act on registration of shops and establishments:** Employers of new establishments in Tamil Nadu having 10 or more workers will be required to register their establishments within 6 months from the date of commencement of the S&E Amendment Act. Existing establishments with 10 or more workers will be required to inform the inspector of the details of

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their establishments along with a self-declaration form within 6 months from the commencement of S&E Amendment Act. Establishments with less than 10 workers will also be required to inform the inspector of their business within 6 months of commencement of business. Non-compliance with the registration requirements is punishable under the TN S&E Act.

- **Increase in the number of overtime hours:** The TN S&E Act currently permits employees in shops and establishments to work overtime for 2 hours per day and 6 hours per week. The S&E Amendment Act will increase these thresholds to permit employees in shops and establishments to work overtime for 2.5 hours per day and 9 hours per week.
- **Filing of Annual Return and Prohibition on Discrimination:** Once the S&E Amendment Act comes into effect, employers of establishments will be required to file an annual return in the prescribed form to the authorities. Further, no employer would be allowed to discriminate against female employees in matters of recruitment, training, transfers, promotions or wages.

The amendments under the Tamil Nadu S&E Amendment Act will come into force on a day yet to be appointed by the Government.

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### Draft Trade Unions (Amendment) Bill, 2018 ("Draft TU Bill") proposed.

The Ministry of Labour and Employment has proposed to amend the Trade Unions Act, 1926 ("**TU Act**") and has published the Draft TU Bill on 20 July 2018 in this relation to invite public comments and suggestions. The TU Act, which is a central law currently provides for 'registration' of trade unions and defines the law relating to them – it does not contain provision on 'recognition' of trade unions. In the absence of a specific statute governing the recognition of trade unions at the central level and in most states, the Draft TU Bill proposes to incorporate provisions for recognition of trade unions / federation of trade unions at the Central and State levels by the respective Governments where the concerned Government would have the ability to grant recognition to a particular trade union or a federation of trade unions by conducting a secret ballot.

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### Board of Directors Report to include a Statement on Compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("SH Act").

The Central Government notified the Companies (Accounts) Amendment Rules, 2018 ("**Rules**"), with effect from 31 July 2018. According to the amended Rules, all companies, other than one-person companies or small companies, are required to include a statement in their board's report, confirming that the company is compliant with the provisions relating to the constitution of an 'internal committee' ("**IC**") under the SH Act. While there is already an obligation on employers under the SH Act to include details of the number of cases filed with and disposed of by the IC, the Rules impose an additional obligation on companies to include a confirmatory statement in the report of their board of directors. Failure to do so or including an incorrect statement is punishable by way of a monetary fine ranging from INR 50,000 (USD 690 approximately) to INR 2,500,000 (USD 35,000 approximately) or imprisonment for a prescribed term or both.

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### Draft of the Karnataka Maternity Benefit (Amendment) Rules, 2018 ("Draft Karnataka Rules").

The Maternity Benefit Act, 1961 ("**MB Act**") was amended in 2017 to impose certain obligations on the employers including the obligation to provide for a creche facility within a prescribed distance. In relation to this, the State Governments are required to frame and notify rules prescribing the distance of the creche facility. Accordingly, the Karnataka State Government published the Draft Karnataka Rules on 30 August 2018 inviting comments and suggestions from the general public in relation to the provision on crèche facilities. As per the Draft Karnataka Rules, every establishment having 50 or more employees is required to

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have 1 crèche for every 30 children (below 6 years of age). The Draft Karnataka Rules also lays down specific requirements with respect to location, infrastructure, staff in the facility, working hours, medical records of the children, milk and refreshment facilities, outdoor play facilities and other facilities such as first aid, clean clothes, soap and oil.

[More...](#)

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

The Ministry of Labour and Employment has notified the BOCW Amendment Rules on 4 September 2018 to amend the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998 ("**the Rules**"). The Rules are applicable to establishments such as ports, docks, public sector undertakings and other establishments that are carried on by or under the authority of the Central Government. The BOCW Amendment Rules have digitized the process of registration of these establishments by doing away with the physical submission of application for registration to the registering officer. Such establishments can now submit their applications online on the Shram Suvidha Portal of the Ministry of Labour and Employment. The payment along with the application has to be made online, and the acknowledgment of receipt of application as well as the certificate of registration will be generated electronically. Such establishments are also required to submit information regarding change in ownership or management of establishment on the portal.

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### Draft Contract Labour (Regulation and Abolition) Central (Amendment) Rules, 2018 ("Draft CLRA Rules")

The Ministry of Labour and Employment has published the Draft CLRA Rules on 4 September 2018 inviting suggestions and comments from the general public. The Draft CLRA Rules propose to amend the Contract Labour (Regulation and Abolition) Central Rules, 1971 which are applicable to establishments such as ports, docks, public sector undertakings and other establishments that are carried on by or under the authority of the Central Government. The Draft CLRA Rules aim to digitize the process of registration and licensing of these establishments. Specifically, the Draft CLRA Rules propose to shift the process of application, payment, grant of acknowledgement/certificate of registration/license and any amendments with respect to such certificates/licenses online on the Shram Suvidha Portal of the Ministry of Labour and Employment.

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### Draft Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Central (Amendment) Rules, 2018 ("Draft ISMW Rules")

The Ministry of Labour and Employment has published the Draft ISMW Rules on 4 September 2018 inviting suggestions and comments from the general public. The Draft ISMW Rules propose to amend to the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Central Rules, 1998 which are applicable to establishments such as ports, docks, public sector undertakings and other establishments that are carried on by or under the authority of the Central Government. The Draft CLRA Rules aim to digitize the process of registration and licensing of these establishments. Specifically, the Draft CLRA Rules propose to shift the process of application, payment, grant of acknowledgement/certificate of registration/license and any amendments with respect to such certificates/licenses online on the Shram Suvidha Portal of the Ministry of Labour and Employment.

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## The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 ("HIV AIDS Act")

On 10 September 2018, the Ministry of Health and Family Welfare notified the HIV AIDS Act. It aims to prevent and control the spread of HIV and AIDS, and to protect the human rights of persons affected by HIV and AIDS. It requires informed consent to be taken from a person (or her/his representative) prior to conducting an HIV-test, and mandates establishments to adopt data protection measures to maintain confidentiality of records relating to HIV information of 'protected persons'. The HIV AIDS Act also requires establishments with 100 or more employees to designate a complaints officer to dispose of complaints of violations under the HIV AIDS Act.

Some of the key highlights of the HIV AIDS Act are:

- Any person who is HIV-positive or who ordinarily lives/has lived with an HIV-positive person is a 'protected person'.
- Discrimination against a protected person is prohibited on any grounds, including denial of or termination from employment, unfair treatment in employment or requiring an HIV test as a prerequisite for obtaining or continuing employment.
- The HIV AIDS Act requires an Ombudsman to be appointed by every State Government for inquiring into complaints of discrimination. A failure to comply with the order of an Ombudsman could attract a fine of up to INR 10,000 (approximately \$140) and in case of a continuing failure, an additional fine of INR 5,000 (approximately \$70) per day of continuing failure.

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## The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Rules, 2018 ("HIV AIDS Rules")

On 17 September 2018, the Ministry of Health and Family Welfare notified the HIV AIDS Rules in furtherance of the HIV AIDS Act. The HIV AIDS Rules prescribe that (a) the appropriate authority under the Central Government is required to notify the HIV and AIDS policy; (b) such model HIV and AIDS policy is applicable to establishments with 100 or more persons; and (c) such establishments are required to implement the grievance redressal mechanisms as set out under the HIV Rules. Further, such establishments are required to prominently display the policy in English and the local language on the special boards at the premises, and also conduct annual training programs for those working in the establishment to understand the HIV and AIDS policy.

[More...](#)

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## The Kerala Shops & Commercial Establishments (Amendment) Ordinance, 2018 ("Kerala S&E Ordinance")

On 4 October 2018, the Kerala S&E Ordinance was passed (given that the Kerala legislative assembly was not in session) to amend the Kerala Shops & Commercial Establishments Act, 1960 ("Kerala S&E Act"). Some of the key changes are:

- **Increase in the working hours for women and children**, whereby persons younger than 17 years and women are now permitted to work up to 9 p.m. (previously, allowed to work only up to 7 p.m.). Further, women can be employed between 9 p.m. and 6 a.m., after obtaining their consent, and ensuring that (a) at least 5 employees are present at those hours, of which at least 2 shall be female employees, and (b) adequate protection is provided to protect their dignity and safety.
- **Significant increase in the penalties**, whereby contravention of the provisions on daily and weekly working hours, rest intervals, leave, etc. under the Kerala S&E Act is now punishable with a fine of up to INR 1,00,000 (approximately \$1400).
- **Ability to maintain registers and records in electronic form**, as long as a hard copy of the same is given to the inspector during inspections.

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**Amendment to the Tamil Nadu Shops and Establishments Act, 1947 ("S&E Act Amendment")**

On 14 November 2018, the Tamil Nadu Government amended the Tamil Nadu Shops and Establishments Act, 1947. The S&E Act Amendment has increased the limit on accumulation limit of unused privilege leaves from 24 days to 45 days. Therefore, with this S&E Act Amendment, employees will be able to accumulate and encash their privilege leave at higher rates. As this was brought into effect in November 2018, the employees' leave accumulation limit in Tamil Nadu up to 31 December 2018 will need to be capped at 45 days (and not 24 days).

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**The Atal Bimit Vyakti Kalyan Yojana ("ABVKY Scheme")**

On 26 November 2018, the Employees' State Insurance Corporation ("ESIC") notified a welfare scheme known as 'ABVKY Scheme', on a pilot basis for a period of 2 years. The ABVKY Scheme has been given retrospective effect from 1 July 2018. The ABVKY Scheme intends to provide a one-time cash compensation to unemployed person up to 90 days, which may be claimed after three months of unemployment in 1 or more years. However, such compensation is available under the ABVKY Scheme only if the claimant under that Scheme has completed 2 years of insurable employment, and made ESI contributions for at least 78 days in the 4 contribution periods, immediately preceding the claim of relief.

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**Employees' Provident Fund (Amendment) Scheme, 2018 ("Amendment")**

On 6 December 2018, the Ministry of Labour and Employment amended the Employees' Provident Funds Scheme, 1952 ("EPF Scheme"). By virtue of the amendment, members of the Employees' Provident Funds Organization, who cease to be employed, could be given (by the Commissioner or authorized person) a non-refundable advance of up to 75% of the amount standing to his credit in her/his provident fund account. This would be permitted only if the member has not been employed in any establishment for more than one month, preceding the date on which she/he makes an application for the advance.

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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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## Rules on Recruitment of Foreign Workers Amended

Presidential Regulation No. 20 of 2018 regarding the Use of Foreign Workers was issued on 29 March, 2018, introducing several changes related to the employment of foreign workers. These changes include:

1. A Foreign Worker Utilization Plan (“RPTKA”) is now considered a valid work permit that functions similar to an Expatriate Work Permit (“IMTA”). Employers were previously required to submit a RPTKA as the basis to obtain an IMTA.
2. Expands the scope of employers allowed to employ foreign workers by adding other businesses as long as such businesses are not prohibited to employ expatriates under the prevailing laws and regulations.
3. Employers in some business sectors can now hire an expatriate who is already employed by another company in a similar position. The second employer can hire such expatriate for a duration until the employment contract of the expatriate with the initial employer expires.
4. For work that is considered urgent and of an emergency nature an employer can immediately recruit a foreign worker and then seek approval of the RPTKA no later than two working days after the foreign worker has been hired.

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## Scope of Administrative Sanctions for Employers Consistently Failing to Comply with Social Security Obligations has been Expanded

The Minister of Manpower (“MOM”) on 11 April, 2018, issued MOM Regulation No. 4 of 2018 regarding Procedures for the Imposition and Revocation of Administrative Sanctions in the Form of Certain Public Access Restrictions for Employers other than State Administrators. This new regulation contains references to the Social Security Law, which includes the previously omitted Health Social Security Program (BPJS Kesehatan). It is therefore clear that administrative sanctions will now also apply in circumstances where employers do not comply with their obligations under the Health Social Security Program.

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## New Rules on Work Health and Safety

Minister of Manpower Regulation No. 5 of 2018 regarding Health and Safety in the Work Environment was issued on 27 April, 2018, to revise several regulations related to occupational safety and health. The changes were said to be in response to technological and legal developments. The main thrust of this regulation is that employers and/or company management are obligated to comply with and implement occupational health and safety requirements to create a safe, healthy and comfortable work environment, and to prevent work accidents and work-related illness.

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## New Task Force Established to Supervise Foreign Workers

As the name suggests, Minister of Manpower Decree No. 73 of 2018 regarding Task Force for the Supervision of Foreign Workers, dated 16 May, 2018, provides for the establishment of a task force to supervise foreign workers in Indonesia. Task force members will be drawn from different government ministries and will supervise and enforce the various laws and regulations related to the employment of expatriates.

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## Utilization of foreign workers

Minister of Manpower (“MOM”) Regulation No. 10 of 2018 regarding Guidelines for the Utilization of Foreign Workers was issued on July 11, 2018. This regulation specifies the requirements to be fulfilled by employers that wish to employ foreign workers and sets forth the mandatory qualifications for foreign workers. It also provides the mechanisms for the online submission of an application for a Foreign Manpower Utilization Plan (*Rencana Penggunaan Tenaga Kerja Asing* or “RPTKA”) and its authorization by the Director General for Employment Placement and Expansion. Following the authorization of the RPTKA, employers are required to pay into a fund (*Dana Kompensasi Penggunaan Tenaga Kerja Asing*) to be used for the development of local workers’ skills. The regulation also contains provisions on training for Indonesian employees assigned as counterparts, or shadows, for foreign workers.

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## Transition of licensing services for the use of foreign workers to the Online Single Submission (“OSS”) system

Pursuant to Ministry of Manpower Circular Letter No. 5 of 2018, the ministry is building a system to integrate the old TKA Online licensing system with the new Online Single Submission (“OSS”) system, particularly for the authorization of Foreign Manpower Utilization Plans (*Rencana Penggunaan Tenaga Kerja Asing* or “RPTKA”). However, until this integration is complete, RPTKA authorization shall continue to be through the TKA Online system. This Circular Letter also affirms that the current mechanisms for the renewal of RPTKA and the authorization for the renewal of Work Permits for Foreign Manpower (*Izin Mempekerjakan Tenaga Kerja Asing*) are still valid.

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## Public holidays and collective leave for 2019

Joint Regulation of the Minister of Religious Affairs No. 617 of 2018, Minister of Manpower Decree No. 262 of 2018, and Minister of Administrative and Bureaucratic Reform No. 16 of 2018 regarding Public Holidays and Collective Leave for the Year 2019 was issued on November 2, 2018.

Public holidays in 2019 will be as follows:

Day	Date
New Year’s Day	January 1
Chinese New Year	February 5
Hindu Day of Silence (Nyepi)	March 7
Ascension Day of Prophet Muhammad	April 3
Good Friday	April 19
International Labor Day	May 1
Buddhist Waisak Day	May 19
Ascension Day of Jesus Christ	May 30
Pancasila Day	June 1
Idul Fitri	June 5 - 6, plus 3-day bridge holiday
Idul Adha	August 11
Independence Day	August 17
Islamic New Year	September 1
Birth of Prophet Muhammad SAW	November 9
Christmas Day	December 25, plus 1-day bridge holiday

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## Minimum wage calculation

Minister of Manpower (“MOM”) Regulation No. 15 of 2018 regarding Minimum Wage was issued on November 23, 2018. This regulation clarifies the formula to calculate regional minimum wage. This new minimum wage formula is based on the sum of Indonesia’s inflation and GDP growth over the past 12 months. Minimum wage is calculated using the formula as follows:

**New minimum wage = current minimum wage + [current minimum wage x (Inflation + % GDP annual increase during the year)]**

This new regulation replaces Minister of Manpower Regulation No. 7 of 2013 regarding Minimum Wage.

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## 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...*

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## 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.

*More...*

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## Bill of so-called Work-style Reform Legislation

On 6 April 2018, a package of the bills of so-called Work-style Reform Legislation was submitted to the Diet. This package of bills intends to reform the current working hours regulations to prevent from working long hours and to enable flexible working styles. In this regard, employers will be obliged to implement certain additional measures to keep working environment healthy (collectively “Reformation of Working Hour Regulations”). Further, in order to correct unreasonable differences between employment conditions of regular employees and those of non-regular employees (i.e. non-full-time employees, fixed-term employees and dispatched employees), their employers will be obliged to keep a balance between employment conditions of regular employees and those of non-regular employees (“Balancing of Employment Conditions”). It is expected that this package of the bills will be passed soon and in principle, the Reformation of Working Hour Regulations part will be enforced on 1 April 2019 and the Balancing of Employment Conditions part will be enforced on 1 April 2020.

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## The Supreme Court Reached Decisions regarding Differences in Working Conditions between Regular Employees and Non-regular Employees

Article 20 of the Labor Contract Act prohibits unreasonable differences in working conditions between regular employees and non-regular employees. On 1 June 2018, the Supreme Court reached decisions in two cases involving interpretation of Article 20 of the Labor Contract Act. Those 2 decisions will serve as quite important precedents for Article 20 of the Labor Contract Act as well as Article 8 of the new Part-time and Fixed-time Employment Act.

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## Act on the Arrangement of Related Acts to Promote Work Style Reform

Effective 6 July 2018, the “Act on the Arrangement of Related Acts to Promote Work Style Reform” has been promulgated. This act intends to reform the current working hours regulations to prevent from working long hours and to enable flexible working styles. In this regard, employers will be obliged to implement certain additional measures to keep working environment healthy (collectively “Reformation of Working Hour Regulations”). Further, in order to correct unreasonable differences between employment conditions of regular employees and those of non-regular employees (i.e. non-full-time employees, fixed-term employees and dispatched employees), their employers will be obliged to keep a balance between employment conditions of regular employees and those of non-regular employees pursuant to the new Part-time and Fixed-time Employment Act (“Balancing of Employment Conditions”). Most parts of the Reformation of Working Hour Regulations part will be enforced on April 1, 2019 and the Balancing of Employment Conditions part will be enforced on April 1, 2020, in principle.

[More...](#)

There are no significant policy, legal or case developments within the employment space during 2018 Q4.

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required**Looking  
Back****Looking  
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LOOKING BACK

MALAYSIA

**1  
FEB**

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...](#)

MALAYSIA

**7  
JUN**

2018

## Spouses of Business owners to be covered under Social Security and Employment Insurance System

Malaysia's Social Security Organisation (SOCSO) functions as a form of an insurance organisation which is responsible in providing financial protection to all registered contributors in the event of emergencies, injuries or death in the course of discharging their duties under the Employees' Social Security Act 1969. The Employment Insurance System (EIS), also under the purview of SOCSO, is a system set out to financially assist employees who were made redundant pursuant to a retrenchment exercise. As it stands, the spouses of employers, who may be under the employment with their partners, are exempt from both plans.

Recently, the Minister of Human Resource is looking to expand the scope of SOCSO and EIS to allow spouses who work for their partners to be included into the coverage of SOCSO and EIS. The Minister of Human Resource has expressly said that the amendments are expected to come into force with effect from 1st July 2018.

[More...](#)

MALAYSIA

**5  
SEP**

2018

## Minimum Wage to be increased across the board

On 5th September 2018, the Prime Minister's Office has announced that the minimum wage for all employees in the private sector will be increased to RM1,050 effective 1st January 2019. As it stands, the Minimum Wage Order 2016 provides the minimum wage for employees in Peninsular Malaysia to be of RM1,000 whereas employees in Sabah, Sarawak and Labuan to be at RM920. On 1st January 2019, the minimum wage for employees nationwide shall be increased to RM1,050.

[More...](#)

MALAYSIA

**5  
OCT**

2018

## Liability under Employment Insurance System

The Employment Insurance System is a financial scheme intended to assist employees who ceased employment on the grounds of retrenchment. The Employment Insurance System (Registration And Contribution) (Amendment) Regulations 2018 (the "EIS Regulations 2018") was gazetted on 5 October 2018. Under the Regulations, employers who fail to pay contributions in accordance with the Employment Insurance System (Registration and Contribution) Regulations 2017 will thereby be guilty of an offence and upon conviction, be liable to:-

- i. A fine up to a maximum of ten thousand ringgit; or
- ii. imprisonment for a maximum of two years; or
- iii. both.

The EIS Regulations 2018 will take effect 1 November 2018.

MALAYSIA

**12  
NOV**

2018

## Pre-employment screening of Employees

The Deputy Minister of the Ministry of Women, Family and Community Development of Malaysia announced that the Ministry is in the midst of developing a complete screening system to be effective 2019 which will allow the public to examine an individual's records before the said individual is employed. The system is aimed to mainly address the growing concerns in the number of child abuse cases, namely in operators dealing with children.

[More...](#)

2018

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MALAYSIA

**21  
NOV**

2018

**Foreign Workers to be covered under Social Security**

Wording: With effect from 1 January 2019, all foreign workers will under the Social Security Organisation (SOCSO). As it stands, SOCSO only applies to Malaysian citizens and does not extend to foreign workers. With effect from 1 January 2019, all employers who employ foreign workers with valid documents shall have to register the employees with SOCSO and make the necessary statutory contributions under SOCSO.

[More...](#)

MALAYSIA

**29  
NOV**

2018

**Workmen Compensation Act 1952 to be repealed**

Wording: As foreign employees will be covered under SOCSO effective 1 January 2019, the Malaysian Cabinet has announced that it will repeal the Workmen's Compensation Act 1952 ("WCA 1952"). The Workmen's Compensation Act 1952 covers personal injury arising in the course of employment for foreign workers who :-

- i. earn less than RM500 per month; or
- ii. employed for manual labour more than RM500 a month.

Given the recent announcement that foreign workers will be covered under SOCSO effective 1 January 2019, the Minister of Human Resource has announced that the WCA 1952 will be abolished to facilitate the transfer from the WCA to SOCSO.

[More...](#)

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2018

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ZEALAND**1  
DEC**

2017

## 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](#)

NEW  
ZEALAND**4  
DEC**

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...](#)

LOOKING BACK

NEW  
ZEALAND**1  
FEB**

2018

## 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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ZEALAND**1  
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2018

## 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*

NEW  
ZEALAND**22  
FEB**

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  
FEB**

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*

NEW  
ZEALAND**22  
FEB**

2018

## Health and Safety at Work (Volunteer Associations) Amendment Bill

This Bill amends the Health and Safety at Work Act 2015 to allow volunteer associations that employ a person or persons for not greater than 100 hours per week to be excluded from the definition of a person conducting a business or undertaking (PCBU).

The Bill underwent its first reading on 2 May 2018 and submissions are due to the select committee on 29 June 2018.

*Find a copy of the Bill here*

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ZEALAND**20  
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2018

## Privacy Bill

This Bill is very likely to be passed later in the year, and will repeal and replace the Privacy Act 1993, as recommended by the Law Commission's review of the Act in 2011. Its key purpose is to promote people's confidence that their personal information is secure and will be treated properly.

Fundamental aspects of the Privacy Act, such as the information privacy principles which regulate the collection, use and disclosure of personal information, are retained, but the Bill introduces new ways to enforce those principles, including more substantive fines and greater powers for the Privacy Commissioner.

The key changes include:

- Mandatory reporting of privacy breaches;
- Ability for the Privacy Commissioner to issue compliance notices that require an agency to do something, or stop doing something, in order to comply with privacy laws;
- Strengthening of cross-border data flow protection;
- New criminal offences introduced under the Bill;
- Ability for the Privacy Commissioner to make binding decisions on access requests; and
- Strengthening of the Privacy Commissioner's information gathering power.

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

NEW  
ZEALAND**20  
APR**

2018

## First sentencing under the Health and Safety at Work Act 2015 for fatigue related failings

The first sentencing under the Health and Safety at Work Act 2015 for fatigue related failings has been handed down by Judge Denise Saunders in the Huntly District Court in *WorkSafe New Zealand v Michael Vining Contracting Limited* [2018] NZDC 6971.

Agricultural Contractor, Michael Vining Contracting Limited (**MVCL**) was charged in relation to the death of a young farmer, Joshua David Parker, after he crashed the tractor he was driving home at 2.45am, having logged a 16.75 hour day and having worked 197.25 hours in the two weeks leading up to the incident.

In handing down the sentence, Judge Denise Saunders found that the culpability of MVCL fell into the medium band of culpability, attracting a fine of between \$400,000 and \$800,000. The Judge set a starting point of \$650,000 as the least restrictive outcome. In doing this, the Judge accepted that the type of work was weather dependent and added to demands for work to be completed on a tight timeframe. However, ultimately the Judge found that:

*[30] MVCL ought to have done more to protect Mr Park from the dangers of excessive working hour's fatigue.*

Had MCVL had the financial capacity to pay a fine; this fine would have been set at \$325,000. An adjustment on a proportionality basis was found to be warranted and MCVL was fined \$10,000 and order to pay reparation of \$80,000.

NEW  
ZEALAND**8  
MAY**

2018

## Important decision on unpaid work

In *A Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Limited* [2018] NZEmpC 43 the Court has found that employees were entitled to be paid for daily 15 minute meetings that they were expected to attend prior to their shift starting.

For at least 15 years, every Smith City store held meetings of sales staff each morning before opening the business. Sales staff were not paid for their time attending these meetings, only once the store opened. The Court had to consider whether the morning meetings were work for the purposes of section 6 of the Minimum Wage Act. In finding that the morning meetings were work the Court had regard to the fact that the meetings were:

- organised by Smiths City;
- only attended by sales staff because they were employed by Smiths City;
- only to discuss matters pertinent to selling Smiths City's merchandise;

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2018

- solely for Smiths City's purposes to enable sales staff to earn revenue for the company, and be more effective in doing so;
- to inform sales staff about the business, sales figures, promotions, sales comparators and equipped sales staff to undertake their jobs; to sell Smiths City's merchandise; and
- only attended by sales staff because the subject matter was sales.

Applying these facts to the three factors developed in *Idea Services* the Court was satisfied that the employees were:

- Under a **constraint** to attend morning meetings and listen;
- Had **responsibilities**, in that they were obliged to sit and listen to the work related information that was being imparted and to absorb it; and
- There was a **benefit to the employer** because it had a cost-free opportunity to prepare its staff for the working day.

Applying these three factors the Court conclude that the morning meetings constituted work within the meaning of section 6 of the Minimum Wage Act.

The Court also ruled that Smiths City Group Limited could not use the payment of commissions and incentives to satisfy their non-compliance with the Minimum Wage Act, as this was additional income earned outside the contractual hourly rate, and not a substitution for it.

First Union, who represents retail workers, has reported having received nearly 2000 complaints regarding similar issues, including from large companies and retail chains. The Labour Inspectorate has reported a 15% increase in its call volume since the Smiths City decision. The Ministry of Business, Innovation and Employment has also said that if the activity are integral to a worker's role and that there is an expectation to attend, then that is considered work and employees should be paid for it.

*Find a copy of the decision here*

NEW  
ZEALAND**29  
MAY**

2018

### Holidays Act review announced

Workplace Relations Minister, Ian Lees-Galloway, has announced a working group to recommend changes to the Holidays Act, chaired by Gordon Anderson. The group is due to report back with recommendations in mid-2019 and Lees-Galloway has said they will "consult widely".

The taskforce will report back with recommendations on options for a clear and transparent set of rules for providing entitlements to, and payment for, holidays and leave that can be readily implemented in a payroll system and is applicable to an increasingly diverse range of working and pay arrangements.

The review will not consider the issue of remediation of historical underpayments of holiday and leave pay. A new regime is likely to be two or three years away.

*For more information on the Holidays Act review visit here*

NEW  
ZEALAND**5  
JUN**

2018

### Government establishes Fair Pay Agreement working group

The Government has set up a working group to develop a plan to introduce Fair Pay Agreements across entire industries. The group will be led by former National Prime Minister, Jim Bolger, and will report back by the end of the year on the design of a Fair Pay Agreement system.

Workplace Relations Minister, Iain Lees-Galloway, says that the aim of the Fair Pay Agreements is to "prevent a race to the bottom, where some employers are undercut by others who reduce costs through low wages and poor conditions of employment. Fair Pay Agreements will help lift wages and conditions and ensure good employers are not disadvantaged by paying reasonable, industry-standard wages."

*Continued on Next Page*

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Through the working group, the Government intends to introduce legislation to allow employers and unions to create Fair Pay Agreements that set minimum employment terms and conditions for all workers in the industry or occupation. Industrial action (strikes and lockouts) will not be permitted in negotiations for Fair Pay Agreements.

*Find the Terms of reference for the Fair Pay Agreement Working Group here*  
*Find the Minister's media release on the beehive website here*

NEW  
ZEALAND**1  
JUL**

2018

**Parental Leave and Employment Protection Amendment Act 2017**

Paid parental leave extended from 18 weeks to 22 weeks on 1 July 2018. The number of Keeping in Touch days has also increased from 40 to 52 hours. This allows parents to do limited work while on parental leave, if they choose to.

*A copy of the Act*

NEW  
ZEALAND**30  
JUL**

2018

**Domestic Violence – Victims' Protection Act 2018**

The Domestic Violence – Victims' Protection Bill has passed its third reading in Parliament. The new law entitles 10 days of leave a year to victims of domestic violence or people caring for affected children. It also provides employees who are victims of domestic violence a statutory right to request a flexible working arrangement. The changes will come into force on 1 April 2019.

*A copy of the Act*

NEW  
ZEALAND**30  
AUG**

2018

**Holidays Act Issues Paper Released**

The Holidays Act Taskforce, established in May 2018, has now released an Issues Paper and has invited feedback by 12 October 2018. This Issues Paper sets out the Taskforce's understanding of the key issues employers, employees and payroll providers face in trying to implement the Act. The Taskforce, is seeking input from key stakeholders about:

- whether the issues set out in the Issues Paper are described accurately?
- whether you have experienced any other issues working with the Act that are not captured in the Issues Paper? If so, what are these issues?
- any suggestions or proposals for change.

*The Issues Paper*

NEW  
ZEALAND**7  
SEP**

2018

**The Education and Workforce Select Committee has reported back on the Government's proposed amendments to the Employment Relations Act 2000**

The Select Committee's recommendations do not appear to have significantly altered the draft Bill that was first introduced in January this year. The Bill will now return to Parliament for its second reading and is expected to pass later this year with support of Labour, NZ First and the Greens. Once the Bill is enacted, some changes will come into force the day after Royal Assent, and others four months later (including when employment agreements may provide for trial periods).

*A copy of the Report*

NEW  
ZEALAND**16  
OCT**

2018

**Equal Pay Amendment Bill**

The Equal Pay Amendment Bill was introduced on 19 September 2018 and had its first reading on 16 October 2018. The purpose of this bill is to improve the process for raising and progressing pay equity claims, and to eliminate and prevent discrimination on the basis of sex in the remuneration and employment terms and conditions for work done within female-dominated jobs.

*Read a copy of the bill*

NEW  
ZEALAND**17  
DEC**

2018

**Employment Relations (Triangular Employment) Amendment Bill**

The Education and Workforce Committee has released its report on the Employment Relations (Triangular Employment) Amendment Bill, recommending that it be passed with certain amendments.

*A copy of the report*

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2018

**Department of Labor and Employment (DOLE) Labor Advisory No. 10, Series of 2018**

Entitling Domestic Helps to labor standards and other statutory leave benefits such as Solo Parent Leave, Violence Against Women and their Children leave provided the domestic help meets all the conditions for entitlement.

[More...](#)

PHILIPPINES

27 JUL

2018

**DOLE Department Order No. 195, Series of 2018**

Rule Amending Section 10 of Rule VIII of the Labor Code Implementing rules allowing deduction from wages of employees for payment to THE EMPLOYER or a third person and the employer agrees upon written authorization of the employee provided the Employer does not receive, directly or indirectly, any pecuniary benefit from the transaction.

[More...](#)

PHILIPPINES

19 DEC 2017 published only on

31 JUL

2018

**National Wages and Productivity Commission (NWPC) Resolution No. 1, Series of 2017**

Mandating the Entitlement of Family Drivers to Minimum Wage and other statutory labor standards benefits.

PHILIPPINES

13 SEP

2018

**Labor Advisory No. 14, Series of 2018**

Entitlement of Qualified Employees with Disability to Labor Standard and Other Statutory Benefits including mandatory coverage under the Social Security System, Philhealth and PAG-IBIG

[More...](#)

PHILIPPINES

6 DEC

2018

**Department of Labor and Employment Department Order No. 198, Series of 2018**

Implementing Rules and Regulations of Republic Act No. 11058 entitled “An Act Strengthening Compliance with Occupational Safety and Health Standards and Providing Penalties for Violations Thereof”

[More...](#)

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SINGAPORE

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2018

## 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

**4  
JAN**

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

**19  
JAN**

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...](#)

SINGAPORE

**4  
MAR**

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...](#)

SINGAPORE

**5  
MAR**

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.

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## 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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## 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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## Tan Kok Yong Steve v Itochu Singapore Pte Ltd [2018] SGHC 85

This case concerned the enforceability of a two-year non-compete clause in the employment contract of the plaintiff, Mr Tan Kok Yong Steve (“**Employee**”) with the defendant, Itochu Singapore Pte Ltd (“**Employer**”), which extended to Vietnam and the Philippines. The Employer is a multinational conglomerate with its headquarter in Japan and operates around the world with over 200 affiliates. The Employee was in the Employer’s cement trading business. The restrictive covenant restricted the Employee from competing with the Employer and/or its affiliates in the countries and in the products that the Employee was concerned with, for two years after leaving employment. After leaving the Employer, the Employee continued to trade in cement and specifically targeted the Employer’s clients in Vietnam and the Philippines, whom the Employee had formerly dealt with while employed with the Employer.

The Singapore High Court upheld the enforceability of the restrictive covenant, holding that the Employer had a legitimate interest to protect. The Employee had a “strong base of customers” over which he had “knowledge and influence” – this is because the Employee’s job at the Employer was to build rapport with the Employer’s customers and establish trade connections on behalf of the Employer. With regard to the geographical restriction, the Court held that it was reasonable; as the Employee had traded in the principal trading cities in Vietnam and the Philippines, a restriction in those countries is justified. The Court held that the restrictive covenant did not prevent the Employee from competing with all of the Employer’s affiliates, but merely those which he had dealt with in Vietnam and the Philippines. The inclusion of the Employer’s affiliates in the non-compete clause did not make it unreasonably wide. The court also found that the temporal restriction is reasonable. The cement trading business is a specialised industry (the employee himself had taken 4 years to build up his customer connections). If the Employee could compete with the Employer, it would be difficult for a newcomer to the Company to build up his own customer connections.

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Finally, the Court held that an injunction is necessary as the Employee had exhibited a “blatant disregard” for his contractual obligations, with a clear intention to breach the non-compete clause. He was employed as an exclusive agent of the Employer’s competitor merely one day after leaving the Employer. Therefore, the Court ordered an injunction against the Employee.

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### *Minichit Bunhom v Jazali bin Kastari and another* [2018] 1 SLR 1037; [2018] SGCA 22

This case concerned the issue of whether the appellant (“**Appellant**”), a foreign worker who suffered injuries from an accident which occurred when he was travelling in a lorry driven by the respondent (“**Respondent**”), was entitled to claim his medical expenses as a special damages against the Respondent whose tortious act occasioned such expenses, in light of the fact that the Appellant was a foreign employee holding a work permit under the EFMA and hence a beneficiary of certain obligations relating to medical expenses and insurance imposed on his employer under the EFMR. The Court of Appeal held that while there was a general rule under the EFMA that the employer of a foreign employee is to be responsible for the provision of the latter’s medical treatment, this did not have any bearing on the separate question of whether a victim-foreign employee could recover the medical expenses occasioned by a third-party tort from the tortfeasor. There was nothing in the EFMA which suggested that it was intended to abridge the recovery of medical expenses by a victim from tortfeasor and the victim. The court highlighted the distinction between the employment and the tortious relationship. The duty of the employer to provide medical coverage for his foreign employee is an incident of the employment relationship and is governed by the EFMA. This was a distinct issue from the entitlement of the victim to seek recovery from the tortfeasor, which is an incident of the tortious relationship and is governed by the common law. As such, the Appellant was not precluded from recovering damages from the Respondent simply because of the obligations of his employer to pay his medical expenses under the EFMA.

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### MOM advisory to employers of Indonesian foreign domestic workers on Indonesian Embassy’s new performance bond requirement

On 8 May 2018, the MOM issued a press release explaining the new requirement for a SGD 6,000 performance bond (“**Performance Bond**”) imposed by the Embassy of the Republic of Indonesia (“**Embassy**”) in Singapore on employers who hire Indonesian foreign domestic workers (“**FDWs**”). The MOM clarified that this was not a requirement imposed by the Singapore Government and is separate from the SGD 5,000 security bond which MOM requires all employers to purchase for every FDW hired. According to the MOM, if notified by the employment agency in question, employers of new Indonesian FDWs or who renew the passports of their current Indonesian FDWs will be asked to purchase a Performance Bond guarantee from an insurer approved by the Embassy, and sign a standard employment contract issued by the Embassy. An employer could be liable to pay the insurer a sum of up to SGD 6,000 if the Embassy forfeits the Performance Bond, but the specific conditions under which this would take place are unclear. The MOM has told the Embassy and the Indonesian Ministry of Manpower that the Performance Bond requirement is unnecessary. Employment agencies are required to provide explanations and obtain written acknowledgement from affected employers of Indonesian FDWs that they understand the implications of purchasing the Performance Bond guarantee or signing the Embassy’s standard employment contract. The MOM will also be sending an advisory to all existing employers of Indonesian FDWs to encourage them to read and understand the terms and conditions before committing to the Performance Bond guarantee or signing the standard employment contract, and to direct any questions to the Embassy.

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**Hauque Enamul v China Taiping Insurance (Singapore) Pte Ltd and another [2018] SGHC 118**

This case concerned a claim made by a worker against his employer for work injury compensation under the Work Injury Compensation Act (“**WICA**”). The worker was injured and sent to the hospital when carrying pipes weighing 50 to 69 kilograms with a co-worker. The MOM found in favour of the worker and awarded him compensation for his injury. This decision was overturned on appeal by the employer before the Commissioner for Labour (“**Commissioner**”), who dismissed the worker’s claim. The worker appealed against the Commissioner’s decision before the High Court. In particular, to establish an employer’s liability for compensation under the WICA, the worker has to prove that he has suffered a personal injury that has been caused by an accident, and that the accident arose out of and in the course of employment. It was not disputed that the worker had suffered a personal injury in this case. The main issue on appeal was whether the worker’s injury was caused by an accident, which arose out of and in the course of employment.

On the question of what amounts to an “accident” under the WICA, the High Court cited previous cases which held that an injury by accident within the meaning of the WICA contemplates an injury that was unexpected by the workman, which was caused or contributed to by something done by or to the workman in the course of his employment. In this regard the court found that the evidence is consistent with the fact that the injury was suffered while the worker was carrying out the task of moving the pipes as he felt a sharp pain in his lower back while performing the task. The court highlighted that the point that an “accident” under the WICA is not limited to visually perceptible events such as where the worker falls down a lift shaft or where a crane drops its load or where a spillage of corrosive liquids occurs, as the WICA contemplates that an “accident” is not limited to a case where the incident and the physical aftermath can be readily perceived by the naked eye. On the facts, the court held that the present case amounted to an accident within the meaning of the WICA.

On the issue of whether the accident arose out of the worker’s employment, the court noted that the WICA established a rebuttable presumption that, an accident arising in the course of an employee’s employment will be deemed to have arisen out of that employment. The court held that there was a distinction between an accident arising in the course of employment (i.e. it occurs while the employee is at work) and arising out of the employment (i.e. it arises because of some intrinsic risk in the nature of the employment). With the rebuttable presumption under the WICA, the court held that a claimant only bears the burden of proving on a balance of probabilities that his injury was caused by an accident that arose in the course of his employment, which can be fulfilled by showing that the accident occurred while he was at work. Once that is shown, the burden of proof shifts to the employer to prove otherwise. On the facts, the court found that there was no evidence to suggest that the worker did not carry out the work or that he did not sit down in pain while carrying a pipe, a fact supported by medical reports. As such, the court held that the worker had established on a balance of probabilities that the accident arose in the course of employment and, by way of presumption, that the accident arose out of the employment.

For the above reasons, the court held that the employer was liable to compensate the worker under the WICA.

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**Director jailed and fined for illegal labour importation and kickback offences**

On 24 May 2018, a director of Aik Heng Contracts and Services Pte Ltd was sentenced to 20 months’ imprisonment and a total fine of SGD 158,750 in the State Courts for illegal importation of labour and collecting kickbacks. The MOM has also permanently barred the director from employing foreign workers. The investigations revealed that the director committed multiple EFMA offences from December 2014 to December 2016, including fraudulently obtaining work passes for 10 foreign workers despite knowing that there was no work for them, and subsequently collecting kickbacks from 8 of these workers as a condition to maintain the validity of their work passes valid. The director collected kickbacks amounting to approximately SGD 119,000. The court has made an order to confiscate these illegal proceeds.

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**Public Prosecutor v Benny Liu [2018] SGMC 31**

This case concerned the appropriate sentence to be imposed on the Defendant for two charges of (i) furnishing information to an employee of the Ministry of Manpower (“**MOM**”) that was false in a material particular in connection with an application for a work pass for a foreign employee and of (ii) making a statement to an MOM employee that he knew was false in a material particular. The Defendant was a director of Siam Shambala (Pte. Ltd.) at the material time. In March 2016, he submitted to MOM an application for a work pass for the company to employ Mr Noochpolintra Ratanachai (“**Mr Noochpolintra**”). MOM rejected the application, and when Mr Liu appealed against the rejection, he was informed to conduct his own verification of Mr Noochpolintra’s educational qualifications using Dataflow. He then sent copies of Mr Noochpolintra’s educational qualifications to Dataflow for verification and, in August 2016, he received a reply that they were not genuine. In September 2016, Mr Liu altered the Dataflow report to reflect that Mr Noochpolintra’s educational qualifications were genuine and sent the altered report to Mr Lee Chong Piow (“**Mr Lee**”) from MOM. Checks by MOM with Dataflow revealed that the report submitted by Mr Liu had been altered. On 10 October 2016, Mr Liu made a statement to Ms Ng Yen Ting (“**Ms Ng**”) and confirmed that he had not altered, edited or amended the contents of the Dataflow report that he had sent to Mr Lee. On 7 March 2017, Mr Liu confessed that the statement given to Ms Ng was false. He made the false statement in the hope that Mr Noochpolintra’s application would be approved and he would not get in trouble with MOM. His false statement caused MOM to spend unnecessary time and resources investigating the matter.

The Court found that a sentence of 10 weeks’ imprisonment for the first offence, and 2 weeks’ imprisonment for the second offence are appropriate and ordered that the sentences run concurrently.

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**Hasan Shofiqul v China Civil (Singapore) Pte Ltd [2018] SGHC 128**

This case concerned a dispute between a foreign worker (“**Employee**”) and his ex-employer (“**Employer**”) over the rate of pay for work done on rest days and public holidays, the calculation of the actual number of hours worked by reference to which overtime could be assessed, and the Employee’s right to one-month notice for the termination of his employment. During his employment, the Employee took on the role of a site supervisor at a construction site. The dispute was heard before the Assistant Commissioner for Labour (“**ACL**”), whose decision the Employee appealed against before the High Court.

On the applicable rate of pay for work done within the normal hours of work on rest days and public holidays, the Employer’s position was that the Employee is only entitled to the flat contractual rate pay, whereas the Employee asserted that he was entitled to the rates under Part IV of the Employment Act (“**EA**”). The ACL found for the Employer on the basis that the Employee was employed in an executive position and could not rely on Part IV of the EA. The court found that the applicability of Part IV turned on the question of whether the Employee was employed in an executive position, which is to be determined by looking at all the circumstances of the case. On the facts, the court stated that the fact that the Employee was a site supervisor is insufficient by itself to conclude that he was an executive, and a worker has a supervisory role does not necessarily remove his status as a workman. The court noted that the Employee did not have a diploma or possessed any specialised skills or training, and the tasks that he performed did not go beyond regular on-site routine administrative work. The court also found that the Employee was not in a position to make decisions over firing, promotion etc of other workers. Hence, the court held that the Employee was not employed in an executive position and Part IV of the EA will apply to the calculation of his overtime pay.

On the actual number of overtime hours the Employee had worked, the ACL relied on the Employer’s bored pile records (as the Employee was involved in bored piling work), instead of the Employee’s own record of his overtime work to assess the amount of overtime pay. The court noted that the ACL only took into account the additional hours worked on a rest day or public holiday (i.e. work beyond the 8th hour of work), which the Employee submitted was inconsistent with the EA. In this regard, the court suggested that the actual

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number of overtime hours may be calculated with reference to the actual bored pile records, and to apply an uplift to the hours of work by running through the time cards of other workers, toolbox meeting forms (where available) and to compare them with the time cards of the Employee.

On the Employee's right to one-month notice for the termination of his employment and his claim for salary in lieu of such notice, the court found, on the facts, that the Employee was indeed entitled to such notice, and the Employer had provided the requisite notice. Hence, the court dismissed the Employee's claim for salary in lieu of notice.

In light of the foregoing, the court remitted the matter back to the ACL for him to reconsider the Employee's claims.

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### Government accepts National Wages Council's recommendations for 2018/2019

On 31 May 2018, the National Wages Council ("**NWC**") published its guidelines which apply from 1 July 2018 to 30 June 2019, with the following recommendations on the wages of workers, amongst others:

1. Wage Recommendations for All Workers:
  - a. employers who have performed well and have good business prospects should reward workers with built-in wage increases and variable payments commensurate with their performance;
  - b. employers who have performed well but are uncertain about business prospects may exercise moderation for built-in wage increases, but should reward workers with variable payments commensurate with their performance; and
  - c. employers have not performed well and face uncertain prospects may impose wage restraints, with the management leading by example, and should put in greater efforts to improve business processes and productivity.
2. Wage Recommendations for Low-Wage Workers:
  - a. employers should grant built-in wage increases to low-wage workers in the form of a dollar quantum and a percentage, to give low-wage workers a higher percentage built-in wage increase;
  - b. employers should grant a built-in wage increase of SGD 50 to SGD 70 for low-wage workers earning a basic monthly wage of up to SGD 1,300; and
  - c. employers should grant a reasonable wage increase and/or a one-off lump sum payment based on skills and productivity for low-wage workers earning more than SGD 1,300 a month.

The NWC's recommendations have been accepted by the government.

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### Jurong Shipyard Pte Ltd fined for fatal accident at workplace

Wording: Jurong Shipyard Pte. Ltd. ("**Jurong Shipyard**") was fined SGD 230,000 under the Workplace Safety and Health Act for failing to take reasonably practicable measures to ensure the safety of its workplace, which resulted in a fatal incident where a worker was struck and caught between a gantry crane and a manifold. On 20 March 2015, a safety coordinator and patrol man employed by a subcontractor of Jurong Shipyard was conducting safety checks near the manifolds located along the track of a gantry crane which was in operation. The same employee was found unconscious between a utility water supply manifold and the gantry crane's track by a co-worker, and passed away from his injuries on the same day. MOM's investigations showed that there were systemic failures in how Jurong Shipyard performed the lifting operation using the gantry crane, which ultimately resulted in the fatal accident.

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**Businessman jailed for eight months for molesting job applicant**

On 18 June 2018, a businessman was sentenced to eight months' jail for molesting a potential employee. 47-year old Md Gias Uddin Sarker who was showing a potential employee how to use computer software told her how much he loved his wife and kids and was not looking for "hot sex". He went on to molest the woman four times at his Woodlands Link office before paying her a \$200 "salary" for the day, and leaving her "frozen, stunned and scared". The Deputy Public Prosecutor said that the victim had found out about the job vacancy through her sister, and her mother had told her that Gias was "trustworthy" and a "very good man". She then contacted Gias, a Bangladeshi 19 November 2015, and went on to meet him at Yishun MRT station at around 2.30pm the next day. The woman testified that there was no one else in the office when they reached there, and that later he sat beside her so he could show her how to make entries to worker payroll timesheets on a computer. Gias denied molesting the housewife, claiming that the victim and her husband implicated him in the offences over a financial dispute. He was convicted after an eight-day trial.

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**850 enforcement actions taken against companies in enforcement operation targeting machinery safety and amputation hazards**

In April and May 2018, the MOM conducted an enforcement operation targeting machinery safety to address hand and finger injuries at the workplace. During the operation, 380 inspections were conducted at 350 companies in the manufacturing, construction and marine sectors. The inspections revealed that the main contraventions were the lack of machine guarding, failing to implement lock-out procedures during maintenance and repair, and inadequate risk assessment relating to machinery safety. The MOM took 850 enforcement actions against 276 companies, including 6 Stop-Work Orders and 78 composition fines amounting to SGD 91,000.

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**Directors and companies convicted for foreign workers housing offences discovered during Geylang fire incident**

On 22 June 2018, three directors and their respective companies were convicted under the Employment of Foreign Manpower Act ("EFMA") for housing foreign workers in overcrowded private residential premises that did not comply with the Urban Redevelopment Authority's ("URA") guidelines. The said employers had housed their foreign workers at a shop house in Geylang since August 2014. On 6 December 2014, a fire broke out at the shop house, resulting in the death of 4 workers, with several others injured. Investigations conducted by the Ministry of Manpower ("MOM") revealed that there were 22 foreign workers residing in the shop house, which exceeded the URA's then prevailing occupancy cap of 8 persons. As such, the employers had breached the Employment of Foreign Manpower (Work Passes) Regulations, where they are required to provide accommodation that comply with applicable regulations for their foreign workers. The court imposed a total fine of SGD 153,000 on the employers, and MOM barred them from employing foreign workers.

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**Salad Stop Pte Ltd v Simply Wrapps Express Pte Ltd and another suit [2018] SGDC 174**

This case concerned a claim by Salad Stop Pte Ltd ("Plaintiff") against Simply Wrapps Express Pte Ltd ("Simply Wrapps") and two of the Plaintiff's former employees, Antonio and Sarili, who have since joined Simply Wrapps. Antonio was employed by the Plaintiff as a kitchen supervisor, and was subsequently promoted to operations supervisor. He was later employed by Simply Wrapps as F&B Outlets Chief Officer. Sarili was employed by the plaintiff as a salad artist and was promoted to assistant kitchen supervisor. The Plaintiff's claim against the defendants were for breach of confidence/trade secrets, solicitation of its employees, of whom 14 had joined Simply Wrapps, by Antonio and Sarili, with Simply Wrapps being vicariously liable for their alleged solicitation, and conspiracy by the use of unlawful means.

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The Court found that there was no “confidential information” as there were no customers lists, suppliers lists or contractors lists. The Court also found that the price lists, the raw materials and ingredients of the salads were really public information for all customers, who relied on the information to make purchase decisions. As regards the solicitation claim, the Court found that the Plaintiff suffered no loss. Finally, the Court found that even if the Plaintiff had succeeded in the proof of the factual elements of any of the claims (particularly that for breach of confidence), the Plaintiff had failed to lead any substantive evidence of any damages suffered by it.

**Leiman, Ricardo & anor v Noble Resources Ltd & anor [2018] SGHC 166**

This case concerned the issue of whether an employer’s exercise of discretion over the award of benefits such as bonuses, shares and share options to the employee can be challenged. The 1st plaintiff, Mr Ricardo Leiman, was employed by the 1st defendant, Noble Resources Limited (“**NRL**”), as Chief Operating Officer and later Chief Executive Officer of the 2nd defendant, Noble Group Limited (“**NGL**”). During his employment, he was awarded shares and share options in NGL as part of his remuneration and was also paid an annual discretionary bonus. The award of those benefits was determined by NGL’s Remuneration and Options Committee (“**R&O Committee**”). Following disagreements between Mr Leiman and the defendants, Mr Leiman resigned in October 2011. NRL and Mr Leiman later entered into an Advisory Agreement (“**AA**”) and a Settlement Agreement (“**SA**”).

Under the AA, Mr Leiman was appointed as an adviser of NRL for a minimum term of nine months in exchange for a retainer fee. The SA contained clauses which provided that (a) Mr Leiman would be entitled to exercise the outstanding share options he held in NGL provided that prior to the exercise, he had not acted in any way to the detriment of NRL, and (b) the restricted shares in NGL held by Mr Leiman and all accrued dividends would vest and become free of transfer restrictions provided that Mr Leiman did not act in any way to the detriment of NRL. Both clauses provided that the R&O Committee would make a final determination in the event of any dispute. The SA also amended the duration of the noncompetition clause in Mr Leiman’s employment agreement with NRL such that he was restricted from competing with the defendants as long as the AA remained in force or for nine months from 1 December 2011, whichever was longer.

In March 2012, due to evidence that Mr Leiman had engaged or was engaging in acts which were in competition with, and detrimental to the interests of, the defendants, the R&O Committee refused to approve the plaintiffs’ request to exercise share options and to release any restricted shares to the plaintiffs. Mr Leiman then sued NRL and NGL in the High Court where he asked for, among other things, declarations that the R&O Committee’s decisions were invalid and that NRL was in breach of the SA as well as substantial damages.

The Singapore High Court held that where one party to a contract is given the power to exercise a discretion, the Courts will seek to ensure that such contractual powers are not abused by implying a term as to the manner in which such powers may be exercised. It held that contractual discretion in employment contract is subject to an implied term that the discretion is exercised rationally, not arbitrarily or capriciously, in good faith, and consistent with its contractual purpose. The Court found that the R&T Committee’s decisions were validly made because, amongst others, there were evidence and material relating to Mr Leiman’s engaging in acts of competition against the interests of NRL as well as misuse of confidential information.

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**Ng Chin Siong v MTU Asia Pte Ltd [2018] SGDC 250**

This case concerned an employee (“**Plaintiff**”)’s claim against its former employer (“**Defendant**”) for loss of salary, year-end bonus and performance bonus. The Plaintiff was employed by the Defendant as a Senior Manager, Gas Engines, under a Letter of Appointment dated 23 February 2010 (“**the Letter of Appointment**”). The Plaintiff worked for the Defendant for almost seven years, before his employment was terminated. Under a letter of termination dated 10 February 2017, the Defendant terminated the Plaintiff’s employment, with his last day of employment being on the same day. Clause 5 of the Letter of Appointment provides for three months’ notice of termination or payment in lieu of notice, and the Defendant has paid the Plaintiff three months’ salary in lieu of notice.

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The Plaintiff claimed that:

- (a) The Defendant had acted in breach of the employment agreement, had breached the duty of trust and confidence between employer and employee and had wrongfully terminated the Plaintiff's employment. The Plaintiff claimed that he was unfairly rated as an under performer, even though the Plaintiff's team members had met their performance targets for the year 2016 and that the Plaintiff had constantly been a good performer and had met his sales targets for the years 2011 to 2015.
- (b) The Defendant failed to comply with the Corrective Action Procedure and the Grievance Procedure in the Employee Handbook, which constitutes an integral part of the employment contract. The Corrective Action Procedure sets out the procedure for verbal and written warnings to be given to poor performing employees before they are terminated. The Grievance Procedure may be used by an employee who wishes to appeal after receiving a written warning under the Corrective Action Procedure.

With regard to the loss of salary, the Court held that even if it were to accept the alleged breaches claimed by the Plaintiff against the Defendant, the most the Plaintiff is entitled to would be the salary payable for his contractual notice period. That sum has already been paid by the Defendant to the Plaintiff and the Plaintiff is not entitled to any future salary beyond that. As for the Plaintiff's claim for loss of year-end bonus and performance bonus, the Court held that as the Defendant terminated the Plaintiff's employment before the payment date for both bonuses, no year-end bonus and performance bonus are payable to the Plaintiff

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### Li Cuidao v TTM Construction Singapore Pte Ltd and Figtree Projects Pte Ltd [2018] SGDC 243

This case concerned whether a main contractor is liable for the injuries sustained by an employee of a sub-contractor at a construction site. The Plaintiff's claim against the Defendants is for injuries suffered by the Plaintiff arising from an accident at a construction site, where the 2nd Defendant was the main contractor and the 1st Defendant was the Plaintiff's employer. This case only concerned the Plaintiff's claim against the 2nd Defendant, as judgment in default of defence had already been entered against the 1st Defendant.

The Plaintiff submitted that the 2nd Defendant had failed in its duty to supervise the works of the Plaintiff which were being carried out. The Plaintiff's evidence is that there was no supervisor assigned to observe the Plaintiff and his co-workers at that time, when regulation 60 of the Workplace Safety and Health (Construction) Regulations 2007 ("WSHCR") provides that the employer or principal under whose direction any person carries out any work involving the construction or dismantling of formwork shall appoint a formwork supervisor and that no formwork structure shall be constructed or dismantled except under the immediate supervision of a formwork supervisor.

The Court disagreed with the Plaintiff's submission, holding that the Plaintiff and his co-workers were employed by the 1st Defendant and the work that was being carried out by the Plaintiff and his co-workers at the time of the accident was on the instructions of the Plaintiff's team leader who was also employed by the 1st Defendant. Accordingly, the 2nd Defendant does not fall under the limb of "employer" in regulation 60, WSHCR. There is also no evidence to show that the 2nd Defendant falls under the limb of "principal under whose direction" in that regulation. The Court concluded that there is no evidence of any act or omission of the 2nd Defendant that caused the object to fall on the Plaintiff. There is no evidence that the work that was being carried out by the Plaintiff and his co-workers was under the control or direction of the 2nd Defendant. There is no evidence that the 2nd Defendant rather than the 1st Defendant, was to supervise the work that was being carried out by the Plaintiff and his co-workers. Nor is there any evidence that the presence of a supervisor could have prevented the object from falling on the Plaintiff.

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## Changes to the Employment Act from 1 April 2019 to cover all employees and enhance dispute resolution and provide business flexibility

On 20 November 2018, the Employment (Amendment) Bill was passed in Parliament, with changes to the EA and Employment Claims Act (“**ECA**”) to take effect from 1 April 2019. The amendments were made to keep pace with changes to Singapore’s labour force profile and employment practices. In this regard, professionals, managers, executives (“**PMES**”) and technicians now make up more than half the local workforce, with this proportion expected to increase to two-thirds by 2030.

- 1. Removal of salary cap for PMEs:** The changes to the EA will see the removal of the salary cap of S\$4,500 a month for PMEs, thereby extending coverage of the EA to all employees. This will benefit an additional 430,000 PMEs who will be covered for core provisions such as minimum 7-14 days of annual leave, paid public holidays and sick leave, timely payment of salary and statutory protection against wrongful dismissal. Public servants, domestic workers and seafarers will continue to be excluded as they are covered separately under other laws, due to the nature of their work.
- 2. Raising the Salary Threshold of Employees Entitled to Part IV Benefits:** Besides the core provisions, Part IV of the EA provides additional protection of working hours, payment for overtime work and rest days. Currently, non-workmen earning more than S\$2,500 in basic monthly salary are not covered by Part IV of the EA. Under the changes to the EA, the salary cap for an employer’s payment of overtime to non-workmen will be revised upwards from S\$2,500 to S\$2,600. This amendment will benefit an additional 100,000 workers.
- 3. Dispute Resolution Process:** Under the changes to the EA, the Employment Court Tribunal (“**ECT**”) will be empowered to hear, in addition to salary-related disputes, wrongful dismissal claims. Currently, wrongful dismissal claims are adjudicated by the MOM. This will provide a one-stop service to both employers and employees in resolving their disputes, as employees are no longer required to go through two different routes to resolve their employment disputes. In addition, the service qualifying period for PMEs to qualify for wrongful dismissal protection will be reduced from 12 months to 6 months. With the transfer of the adjudication function to the ECT, the MOM will publish a set of Tripartite Guidelines on Wrongful Dismissal to illustrate what is considered wrongful dismissal.
- 4. Definition of dismissal expanded to cover forced resignation:** The definition of employee dismissal will also be expanded to cover situations involving the involuntary resignation of an employee. Currently, dismissal is defined as an employer terminating an employee’s contract of service, with or without notice and for misconduct or otherwise. With the proposed changes, an employer may be taken to task if an employee can show that he did not resign voluntarily but was forced to do so because of the employer’s conduct or omission.
- 5. Consent required for certain salary deductions:** Currently, the EA limits the type of salary deductions that employers can make, such as absence from work or damaging or losing goods entrusted to the employee. Under the amendments to the EA, salary deductions will be allowed if it fulfils two conditions: (i) the employee must consent to the deduction in writing, and (ii) the employer enables the employee to withdraw his consent at any time, without penalty. This change gives employers flexibility while safeguarding employees’ interests.
- 6. Extended option of time off for working on public holiday to more employees:** The amendments to the EA also give employers greater flexibility to give time off to more employees for work on public holidays, while ensuring that those with lower bargaining power will continue to get either their extra day’s salary or a full-day off. Like other core provisions, compensation for work done on public holidays has been extended to all employees. For workmen earning a monthly salary of up to S\$4,500, and non-workmen earning up to S\$2,600 per month, employers have the option of giving an extra day’s salary or a full-day off as compensation for working on a public holiday.

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**MOM prosecutes employment agency and personnel for advertising foreign domestic workers on Carousell**

The MOM prosecuted SRC Recruitment LLP (“**SRC**”) and one of its employees for placing insensitive online advertisements of FDWs on online marketplace, Carousell, which cast the FDWs in an undignified light.

SRC and the employee each faces 49 charges under the Employment Agencies Act (“**EAA**”) for advertising FDWs in a manner akin to a commodity, as well as another 50 charges under the EAA for failing to ensure that SRC’s name and licence number were reflected in the advertisements. SRC also faces 4 charges under the EAA for submitting incomplete authorisation forms signed by employers for authorising work pass transactions, 4 charges under the EAA for failing to administer FDW safety agreements and 37 charges under the EAA for failing to issue itemised receipts to FDWs. If found guilty, SRC and the employee may be fined up to S\$5,000 and/or imprisoned for a term of up to six months. SRC’s licence has been suspended, while the employee, who was responsible for uploading the advertisements, has been deregistered as an employment agency personnel under the EAA.

The MOM said that it expects all employment agencies to exercise sensitivity when marketing their services, and to exercise a duty of care towards their clients (including FDWs). The MOM added that there are established guidelines on responsible advertising which are well publicised, some of which can be accessed from the MOM website, which employment agencies are expected to adhere to.

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**Employers will not be allowed to safekeep FDWs’ salaries from 1 January 2018**

From 1 January 2019, employers will not be allowed to hold on to the salaries and other money belonging to their FDWs, due to the introduction of a new work permit condition by the MOM to protect both employers and FDWs from money-related disputes. The MOM said the practice of employers safekeeping the money of maids poses inconveniences and risks to both parties, as FDWs who have no direct access to their money will have to approach their employers whenever they need the money. Employers will also have to keep track of the correct amount of money to be returned to their FDWs. Other risks include employers not having proper documentation and facing claims lodged by FDWs who may not be comfortable to ask for the return of their money. Employers found guilty of keeping money belonging to their FDWs can face a maximum penalty of a S\$10,000 fine and/or imprisonment for up to 12 months.

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**Training centre principal sentenced to 10 months’ imprisonment for selling and falsely certifying course certificates**

Abduljafar s/o Abdulkuthose (“**Abduljafar**”), the principal of a training centre, Vsafe Training Consultant Pte Ltd (“**Vsafe**”), was sentenced to ten months’ imprisonment for fraudulently issuing 17 Building Construction Supervisor Safety (“**BCSS**”) course certificates and safety passes between January 2016 and March 2016 without conducting any lessons or assessments. BCSS is a compulsory training course for workers who are assigned as supervisors in the construction industry. Under the law, an employer or the principal should not allow any person to carry out oversight or supervisory work in a worksite unless they have received adequate safety and health training to do so.

The MOM conducted investigations on Vsafe after it received information in March 2016 that Vsafe was involved in certificate milling activities, which revealed that Vsafe had an unusually high volume of BCSS records uploaded on MOM’s Training Records System between January 2016 and March 2016. The investigations also revealed that during the said period, Abduljafar decided to sell BCSS certificates and safety passes to workers. Apart from walk-ins by interested workers, Abduljafar also colluded with agents to reach out to workers who were interested in purchasing the certificates and safety passes. The workers each paid between S\$200 and S\$700 for these certificates and safety passes.

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As the BCSS course provides the necessary workplace safety and health training for supervisors-to-be in the construction industry, the MOM takes a serious view against such conduct and will press for custodial sentences against any perpetrators.

[More...](#)**Powerdrive Pte Ltd v Loh Kin Yong Philip and others [2018] SGHC 224**

Powerdrive Pte Ltd (“**Powerdrive**”) is in the business of training military armour vehicle drivers on training simulators and actual vehicles. Powerdrive commenced an action against five of its former employees (the first to fifth defendants) for taking up employment with Singapore Technologies Kinetics Ltd (“**ST Kinetics**”), a competitor of Powerdrive, in breach of a restraint of trade clause (“**ROT Clause**”).

In relation to the first four defendants, Clause 5 of each of their letter of employment states:

*“5. Confidentiality*

*You shall not, during the continuance of this Agreement or after its termination, disclose, divulge, impart or reveal to any person or company any of the Company’s clients’ information or confidential reports, processes, dealings or any information concerning the business, finance, transactions or affairs of the Company which may come to your knowledge during your employment hereunder and shall not use or attempt to use any such information in any manner which may injure or cause loss directly or indirectly to the Company or its business or may likely to do so.*

*Notwithstanding the above, you cannot work for a rival company and/or direct competitor for two (2) years from your termination. Management reserves the right to pursue on legal grounds if there is a breach of this condition.”*

According to Powerdrive, the fifth defendant had similarly been informed and had agreed to a similar ROT Clause found in an email which Powerdrive had allegedly sent to all its employees.

The Court was of the view that the wide scope of the ROT Clause was not reasonable in the interest of the public, even if it could be argued that it was reasonable as between each of the first five defendants and Powerdrive. It also found that the ROT Clause was unreasonably wide in terms of the scope of work it sought to restrain the first to fifth defendants from doing when employed by a rival. On the face of the ROT Clause, each employee was prohibited from working for a rival regardless of the scope of his work with his new employer, as the ROT Clause was not confined to working for a rival in the same or a similar capacity as that in which the employee was working when employed by Powerdrive.

With regard to the duration of the ROT Clause, the Court noted that the two-year duration appeared to be arbitrarily selected by Powerdrive. Powerdrive had also not provided any explanation for the period of restraint.

Having regard to the above, the Court was of the view that the ROT Clause was too wide to be enforceable and struck out the claim by Powerdrive.

[More...](#)**M P Rama Rao A/L Padiyah v TCG Rengo (S) Limited [2018] SGDC 261**

The Plaintiff commenced employment with the Defendants on 29 February 1988. On 9 December 2016, after more than 28 years of service, his employment was terminated with the payment of two weeks of salary in lieu of notice. The Plaintiff commenced an action for wrongful termination on 2 February 2017 and also claimed for retrenchment benefits.

By an offer of employment from the Defendants dated 29 February 1988, the Plaintiff was placed on a three months’ probation. During the probation, the employment may be terminated by either party giving one week’s notice or salary in lieu thereof. The clause further provided that “*On satisfactory completion of the probationary period, termination of service would require two (2) week’s written notice by either party or payment in lieu thereof.*” By a letter of confirmation dated 23 May 1988 from the Defendants, the Plaintiff was notified that he was to be confirmed with effect from 29 May 1988 and that “*As from the date of your confirmation, the period of notice of termination of employment by either party will be two (2) weeks, or salary in lieu of such notice.*”

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In relation to the Plaintiff's claim for wrongful dismissal, the Court found that the Plaintiff was terminated in accordance with the terms of his valid employment contract that provided for two weeks' notice or pay in lieu of notice. The Court held that save for his own assertions, the Plaintiff did not furnish any credible evidence to establish that his termination constituted wrongful dismissal, such as any breach of contract or lack of due processes mandated by the law. The Plaintiff also did not call any witnesses other than himself to support his assertions of wrongful dismissal. The Court further held that in any event, even if there was a breach of contract, the Plaintiff was not entitled to payment of further sums beyond the two weeks' salary he received in lieu of notice.

In relation to the Plaintiff's claim for retrenchment benefits, the Court held that retrenchment benefits could not be implied into an employment contract. Further, payment of any retrenchment benefit was at the unfettered discretion of the employer, there being no statutory provision or any written law or any contractual term compelling such payment. In light of the above, the Court found that the Plaintiff had failed, on a balance of probabilities, to prove his case against the Defendants.

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### Government Accepts Recommendations to Implement PWM Bonus and Scheduled Increases to PWM Wage Levels for Cleaning Sector

Wording: The Government has accepted the Tripartite Cluster for Cleaners ("TCC")'s recommendations to implement the PWM Bonus for the cleaning sector, as well as scheduled wage increases to the PWM wage levels from 2020 to 2022. These recommendations will benefit over 40,000 resident cleaners who are employed by more than 1,300 cleaning businesses.

The recommended PWM Bonus quantum comprises at least two weeks of basic monthly wages to be paid out to eligible resident workers from 2020 onwards, to help uplift workers' total income levels and their savings and motivate them to stay with the same employer. Employers will be better able to attract and retain workers, and to invest in their training when there are better retention rates. In addition, the Government also supports the TCC's recommendation to implement the scheduled 3% annual wage increases to the PWM wage levels from 2020 to 2022, across all three cleaning sub-sectors under the PWM. This will ensure that cleaners enjoy sustained wage growth.

From 1 January 2020, the Commissioner for Labour will enforce the PWM Bonuses for eligible resident cleaners. The TCC's recommendations on the annual adjustments to the PWM from 2020 to 2022 will be implemented for all licensed cleaning businesses via an Order of the Commissioner for Labour for resident cleaners under all contracts from 1 July 2020.

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### Dinesh s/o Rajantheran v Public Prosecutor [2018] SGHC 255

Evotech (Asia) Pte Ltd ("**Plaintiff**") claimed against its former directors for breach of fiduciary duties in authorising payments to various parties after their removal as directors of the Plaintiff. One of the defendants ("**First Defendant**") brought a counterclaim against the Plaintiff for salary and housing allowance payable for the notice period of his termination as an employee of the Plaintiff.

The First Defendant was appointed as general manager of the Plaintiff pursuant to a contract of employment dated 1 April 2016. Under the terms of the contract of employment, the Plaintiff may terminate the employment of the First Defendant with three months' notice on grounds of redundancy or with two months' notice if his performance is not satisfactory and not up to the Plaintiff's expectations or if the First Defendant is found to be, inter alia, guilty of misconduct.

On 28 September 2016, the First Defendant received a notice of termination ("**Notice**"), giving him two months' notice of termination. The Notice alleged numerous serious misconducts committed by him, including unauthorised disposal of fixed assets, invalid authorisation of payment/fund transfer, and improper accounting treatment on the disposal of fixed assets. After receiving the Notice, the First Defendant did not turn up

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for work, and filed a counterclaim for salary and housing allowance owed to him up to 28 December 2016 (taking his last day of employment as three months from the date of the Notice).

The Court affirmed the common law position that where a contract of employment is silent on the issue of salary in lieu of notice, the employer is entitled to terminate the contract of employment by paying salary in lieu of notice. The Court held that if the First Defendant had turned up for work during the notice period, then he would be entitled to salary for that period. However, it was clear that the First Defendant did not turn up for work upon receiving the Notice, and hence could not possibly claim for such salary. For the same reason, the First Defendant was not entitled to claim housing allowance during that period. Finally, given the circumstances, it was irrelevant whether the First Defendant was entitled to two or three months of notice. Therefore, the First Defendant's counterclaim failed.

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### Public Prosecutor v Chiew Kok Chai [2018] SGMC 70

Chiew Kok Chai ("**the Accused**") faced 61 charges under the Employment of Foreign Manpower Act (Cap 91A) (EFMA) and the Employment Act (Cap 91) ("EA"). During the material period, the Accused and one Tan Yock Jeen ("**TYJ**") were jointly managing the operations of two companies called Wee Chong Construction ("**Wee Chong**") and Wan Fu Builders Pte. Ltd. ("**Wan Fu**"). The Accused was one of the registered directors of Wan Fu. Wee Chong is a sole-proprietorship belonging to TYJ.

At the relevant time, the Accused was in charge of the operations of Wee Chong, including the payment of workers' salaries. However, the Accused intentionally facilitated Wee Chong's failure in paying the salary of one of its employees, amounting to S\$1,400 for the period between 1 January 2015 to 31 January 2015. The employee subsequently terminated his contract of service with Wee Chong. The Accused knew that the employee terminated his contract of service with Wee Chong but did not ensure that Wee Chong paid the salary due to the employee on the termination date.

The Accused also contributed to Wan Fu's failure to pay its employees their salaries. During the material period, Wan Fu faced financial difficulties and had defaulted in its salary payments to its employees, with the consent of the Accused. The employees terminated their contracts of service with Wan Fu for this reason, which resulted in the revocation of their work permits by the MOM.

Additionally, the Accused, in his capacity as a director of Wan Fu, had arranged for Wan Fu to deduct salaries payable to four foreign employees as a condition for their continued employment by Wan Fu.

Sometime in September 2014, the accused engaged in a conspiracy with TYJ for TYJ to sign and submit work permit applications in connection with the employment of three foreign employees. It was agreed that TYJ would declare in the applications that the foreign employees would be employed by Wee Chong when both the Accused and TYJ knew it was not the case. The Accused and TYJ had intended for the foreign employees to be employed by Wan Fu instead. At that time, Wan Fu needed construction workers for its construction projects, but did not have the requisite foreign manpower quota. The Accused and TYJ agreed to make false declarations in the applications of the foreign employees so that they could successfully obtain work permits as employees of Wee Chong but in fact perform work for Wan Fu.

The Accused was sentenced to six weeks' imprisonment and fined S\$15,500. He was also ordered to pay compensation in the global sum of S\$18,000 (or in default of that, 6 weeks' imprisonment), to the six foreign employees who were victims of the offences.

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**Government accepts recommendations for basic wage increase and mandatory bonus for landscape maintenance workers from 2020**

The Government has accepted the Tripartite Cluster for Landscape Industry's ("TCL") recommendations on yearly adjustments and a schedule of increases to the Progressive Wage Model ("PWM") basic wage levels from 2020 to 2025, as well as a mandatory PWM Bonus for the landscape maintenance sub-sector from 2020. These recommendations will benefit around 3,000 resident landscape maintenance employees.

The TCL's recommendations seek to ensure that wages increase in tandem with the skills, productivity and job responsibility of employees in the sub-sector. Since 30 June 2016, compliance with the PWM has been a mandatory requirement for landscape companies registering for the National Parks Board (NParks) Landscape Company Register.

The recommendations by the TCL will be implemented according to the following timelines:

- Yearly Adjustments to PWM Basic Wage Levels from 2020 to 2022:** The TCL recommended a total increase of S\$350 to the PWM basic wage levels across all PWM job roles, starting with an increase of S\$150 in July 2020, followed by an increase of S\$100 per year in July 2021 and July 2022. To allow sufficient lead time for landscape companies and service buyers to incorporate the wage adjustments in their new service contracts, the implementation of the yearly adjustments to the PWM basic wage levels will take effect from 1 July 2020. This is in line with the schedule of PWM wages in the cleaning sector.
- Schedule of Increases to PWM Basic Wage Levels from 2023 to 2025:** The recommended annual increment of minimum 3% (subject to review) to the PWM basic wage level across all PWM job roles will be implemented from July 2023 to July 2025.
- Mandatory PWM Bonus from 2020:** The mandatory PWM Bonus to be paid to landscape maintenance employees who are Singapore Citizens and Singapore Permanent Residents will be implemented from 2020. It would be paid to employees who have worked with the same employer for at least 12 months as at the cut-off date of bonus computation.

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**Employment agency owner fined S\$8,500 for bringing in underaged maids**

On 6 December 2018, an employment agency owner, Sherlyn Tay Li Wen ("**Tay**"), was fined S\$8,500 for bringing in two foreign teenagers to work as maids in Singapore. She pleaded guilty to two counts of breaching employment licensing conditions.

The Ministry of Manpower ("**MOM**") mandates that foreign domestic workers ("**FDWs**") in Singapore have to be at least 23 years old, but the teenagers were aged 15 and 18, respectively, at the material time. During its investigations, the MOM found that the teenagers had sought the help of an agent in Myanmar to source for work in Singapore. The said agent instructed them to say that they were 24 years old, among other things, took a video of each of them, and forwarded the videos to Tay. The agent also helped the teenagers forge new passports with false dates of birth. During their medical check-ups and the Settling-In-Programme (a mandatory one-day orientation for first-time domestic workers), suspicions were raised about their ages due to their appearance. They were then interviewed by MOM officers, who discovered that they were both underage. As such, the MOM imposed a fine on Tay, who brought in the maids.

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## 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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SOUTH  
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2018

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on the size  
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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...](#)

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## 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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SOUTH KOREA

**29 MAY**

2018

### Increase to Annual Leave Entitlement

The Labor Standards Act has been amended to require employers to accrue 1 day of leave per month for employees with less than one year of service, which shall not be offset against paid annual leave days provided to the employee in the subsequent year's annual leave entitlement. As a result, employees will be entitled to up to 26 days of paid annual leave during the first 2 years of employment (up to 11 days in the first year of employment and 15 days in the second year of employment).

SOUTH KOREA

**29 MAY**

2018

### Continued Accrual of Annual Leave during Childcare Leave

The Labor Standards Act has been amended such that an employee's childcare leave period will be considered to constitute attendance at work for purposes of calculating the number of an employee's paid annual leave entitlements. The paid annual leave days for employees reinstated after childcare leave are also fully guaranteed.

SOUTH KOREA

**29 MAY**

2018

### Guaranteed Leave for Fertility Treatment

The Gender Equality Employment Act has been amended to provide mandatory Fertility Treatment Leave of up to 3 days of paid leave per year (and up to 2 additional days of unpaid leave) to assist employees in receiving medical fertility treatment, such as artificial insemination and in vitro fertilization.

SOUTH KOREA

**29 MAY**

2018

### Increased Obligations to Respond to Sexual Harassment Complaints in the Workplace

The Act on Employment Promotion and Vocational Rehabilitation for Disabled Persons has been amended to require annual training to improve employees' awareness of disabled persons to eliminate bias in the workplace, to create stable working conditions and expand employment of the disabled. Violation of this training obligation may be subject to an administrative fine of up to KRW 3 million.

The Ministry of Employment and Labor may also identify companies as good employers in the employment of disabled persons. Such companies would then enjoy favorable treatment when entering into contracts with the state, local governments, and public institutions for construction work, or to provide goods or services.

SOUTH KOREA

**27 DEC**

2018

### Decision to Amend Industrial Safety and Health Act

The Cabinet of Ministers passed an amendment to revise and reorganize the Industrial Safety and Health Act. The key points of the amendment are as follows.

- The purpose of the law has been expanded to include "workers" and "working persons," which encompasses special categories of workers such as delivery workers.
- Companies with a certain minimum number of employees must establish a plan for industrial safety and health for board approval.
- Strengthened liability for contractors in cases of outsourcing where contractors have substantial control over workplace hazards.
- Manufacturers or importers of certain chemicals must submit materials safety data sheets and submit to the Ministry of Employment and Labor.

The amendments will become effective after 1 year from the date of promulgation.

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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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SRI LANKA

**18  
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### Shop And Office Employees (Amendment) Act, No. 14 Of 2018 Maternity Benefits (Amendment) Act, No. 15 Of 2018

Two Acts passed by the Sri Lankan Parliament on the 18th of June, 2018 amending the law governing maternity benefits/leave. As provided for in the Maternity Benefits Ordinance [MBO] and the Shop and Office Employees Act [S&OEA] respectively.

The amending Acts are the Shop and Office Employees (Regulation of Employment and Remuneration) (Amendment) Act, No. 14 of 2018 (“S&OEAA 2018”) and also passed the Maternity Benefits (Amendments) Act, No. 15 of 2018 (“MBAA 2018”).

The law prior to the amendments provided leave for a total of 12 weeks under the MBO and the S&OEA, where the confinement results in the birth of a live child and the employee has, at that date no child or one child. In the case of any subsequent children, the entitlement was to six weeks [MBO] and/or forty-two days [S & OE A].

The major amendment is to provide for entitlement to the same amount of maternity benefits/leave, regardless of the number of children the employee has at the date of her confinement/birth of the child.

The amendments to the MBO also entitle a woman worker’s leave, in consequence of any confinement, to be in addition to any holiday or leave to which she would be entitled.

The amended laws now provide for maternity leave of a total of 12 weeks under MBAA 2018 and eighty four (working) days under the S&OEAA 2018.

Furthermore, the amendments to the S&OEA provide for two nursing intervals, in any period of nine hours, if the child is under the age of one. The interval must be no less than thirty minutes if a place for nursing is provided, or at least one hour if no place for nursing is provided. This will be in addition to any other intervals provided to the employee.

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### Amendment to Minimum Wages in various trades

There are several Wages Boards decisions amending the minimum wages payable in the six trades were notified, respectively, by Gazettes Extraordinary nos. 2080/20 to 2080/25 of 16 July 2018. They are in respect of the following trades:-

1. Rubber (including tyre manufacture and rebuilding), Plastic, and Petroleum Resin Products Manufacturing;
2. Baking;
3. Janitorial Services;
4. Security Services;
5. Textile Manufacturing and
6. Printing.

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In addition to the above six trades, amendments to the minimum wages payable in three more trades were notified, respectively, by Gazettes Extraordinary nos. 2081/48, 2081/49 and 2081/50 all of 26 July 2018. They are in respect of the following trades:-

1. Garment Manufacturing;
2. Hotel and Catering; and
3. Retail and Wholesale.

**Asian Hotels and Properties PLC (Formerly known as Asian Hotels Corporation Ltd.) – Respondent – Respondent – Petitioner v. H.D.N.S. Karunaratne – Applicant -Appellant – Respondent. SC (HC) LA 36/10**

In this case, the Applicant (Employee) sought reinstatement by way of relief from the Labour Tribunal on the ground that his services had been unjustly terminated by his employer (the Respondent - Respondent - Petitioner).

At the conclusion of the inquiry, the Tribunal found that the termination was unjust but did not make order for reinstatement – since the employer had lost confidence in the employee – and instead awarded a sum of Rs. 189,156 (being 44 months’ salary – i.e. 4 months’ salary, which was Rs.4, 299 per month, for each year of service of 11 years) as compensation.

The Applicant appealed to the High Court for an order of reinstatement or, in the alternative, enhancement of compensation and the High Court, stating that the criteria relied upon by the Tribunal were not clear, ordered that the Applicant be compensated by payment of 12 times the salary he would have earned for a year and also that he be paid the salary he would have earned until the judgment of the High Court. The sum awarded by the High Court was Rs. 662,046 – the computation of which, the Supreme Court observed, “appears to be mathematically inaccurate”. The Supreme Court, however, did not find it necessary to “delve” further into that matter – no doubt in view of its finding, which is referred to below.

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The Supreme Court held that the enhancement (by the High Court) of the compensation awarded by the Labour Tribunal was erroneous and observed, *inter alia*, as follows –

*“...in an appeal against a Labour Tribunal decision on compensation there can be no question that the Appellate body has two questions to answer. Firstly, whether the appellant has discharged the burden of proving financial losses; Secondly, whether there is a glaring failure on the part of the Labour Tribunal to evaluate the said evidence to the effect that compensation remains substantially unsupported. It is only if both questions are answered in the affirmative, .... could the appellate body venture to review and substitute the compensation, where substitution is necessary.”*

The Court, having noted that the Applicant had not established losses before the Labour Tribunal further observed that :-

*“..the burden is squarely on the employee to adduce sufficient evidence to enable the Tribunal to decide the loss the employee had incurred. It is only when the employee discharges the burden could the Tribunal proceed to determine the equitable amount of compensation based on the whole gamut of evidence led by both parties.”*

The Supreme Court, however, (possibly since the employer had not appealed against the quantum of compensation awarded by the Tribunal), did not make any observations on the question of compensation of four months’ salary per year of service awarded by the Tribunal itself, despite the fact that the employee had not established any loss suffered by him in consequence of the termination of his services.

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## W.A. K. Sanjeeva Kumara v. Kuruppu – Supreme Court SC Appeal 202/2015

The Applicant-Appellant (“the Applicant”) had been employed by the Respondent-Respondent (“the Respondent”) from August 2006 until his services were terminated by the Respondent on 1st March 2011.

The Applicant made an application for relief in respect of the alleged unlawful termination of his services to the Labour Tribunal under section 31B(1) of the Industrial Disputes Act in terms of which an employee whose services have been terminated by his employer could make an application for relief in respect of such termination.

The Respondent’s position was that the Applicant was an independent contractor and not an employee and that, as such, he could not maintain the application.

The Labour Tribunal held that the Applicant was an employee and not an independent contractor, that the termination of his services was unlawful, and awarded a sum of Rs. 337,500 as compensation. The Respondent appealed to the High Court which allowed the appeal and set aside the order of the Labour Tribunal.

The Applicant, (having obtained special leave to do so), appealed to the Supreme Court, which noted the following facts:

- a) it was common ground that there was no written contract between the parties.
- b) the Respondent’s position was that he worked as a contractor for the Ceylon Electricity Board; that when he did obtain such contracts, he sub-contracted the work to 3rd parties and shared the profit and that, in the circumstances, the Applicant too was an independent contractor.
- c) On the other hand, the Applicant asserted that he and other “workmen”, (i.e. employees), who worked for the Respondent gathered at the house of the Respondent every morning to obtain instructions regarding their daily work – whether they were clearing the main lines or giving connections to houses - and also reported back to the Respondent at about 5.30 p.m. Further, the equipment used by them was supplied by the Respondent. The Applicant’s position was that he was subject to the directions and control of the Respondent.
- d) The Applicant also produced a document which was, admittedly, in the handwriting of the Respondent, which referred to payments made for clearing electrical lines and supplying electricity during the period 2006-2007. The name at the top of the document was “Sanjeewa”. The Respondent’s position was that this document had no connection to the Applicant but referred to monies reserved for the vehicles.
- e) The President of the Labour Tribunal had considered the positions of both parties and had rejected the Respondent’s position and had also observed that the Respondent had kept no proper record of payments made to his employees till July 2011 – after the termination of the Applicant’s services.

On the central issue of whether the Applicant was an employee or an independent contractor, the Supreme Court having referred to several of its own previous decisions and also one decision of the Court of Appeal, held that the Applicant was an employee. In arriving at this decision, the Supreme Court was mindful of the degree of control found by the Labour Tribunal to have been exercised by the Respondent over the Applicant. It (the Supreme Court) further stated that:-

“The Appellate Courts are reluctant to interfere with the findings of Trial Courts including the Labour Tribunal, unless a serious miscarriage of justice has taken place when the Tribunal was analyzing the evidence and the law relating to its findings”.

As regards the judgment of the High Court, the Supreme Court observed that the learned High Court Judge had failed to appreciate the role of the High Court in an appeal process and had merely given his interpretation to the evidence led before the Labour Tribunal and interfered with the finding on mere questions of fact.

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## Agarapatane Plantations Limited v. G. Kothandan - Supreme Court SC Appeals 164/2011 and 165/2011

The Applicant-Respondent-Respondent (“the Employee”) had been initially employed by the Respondent-Appellant-Appellant (“the Employer”) as a Secretary (Security) by the Employer and was subsequently promoted to the post of Assistant Manager in 1995. He was thereafter sent on retirement on reaching the age of 55 years.

The Employee sought relief from the Labour Tribunal in respect of the aforesaid termination of his services and the Tribunal awarded one year’s salary as compensation.

Both parties, being dissatisfied with the order of the Tribunal, then appealed to the High Court – which allowed the appeal of the Employee and enhanced the compensation to five years’ salary. The Employer sought leave to appeal against both the dismissal of its own appeal against the award of one year’s salary by the Labour Tribunal and enhancement of the compensation to five years’ salary by the High Court. Leave to appeal being granted, both appeals were then taken up by the Supreme Court together (as one appeal).

Before the Supreme Court, the Employer relied heavily on the letter of appointment (A9) issued to the Employee when he was promoted to the post of Assistant Manager in 1995, which letter stipulated (in clause 11 thereof) as follows :-

- “Retirement: You will stand automatically retired on reaching the age of 55.”

The Employee, on the other hand, relied on two documents marked A3 and A5 respectively.

As regards A3, the Employer contended that that document, issued in January 1994, one and a half years prior to letter of appointment A9 could not supersede the specific condition contained in the latter and that, in any event, the Employee could not claim the benefit under paragraph 2 of A3 due to his own omission to give the required notice (of request for extension) six months prior to the date of retirement. As regards A5, the Employer argued that it had no bearing since it had been issued by the State Plantations Corporation.

The Supreme Court, in considering A3 and A5, noted in particular the following matters:-

- A5, issued by the State Plantations Corporation in October 1991, had reference to the outcome of a discussion between the Minister-in-Charge of Plantation Industries and some Trade Unions in the same sector which stated, inter alia, that “Estate workers” would be allowed extensions up to the age of 60, and “other members of the staff” would be given extensions beyond the age of 55, if their work and conduct had been satisfactory and they were in good health, and provided there was no surplus in the relevant grade. It further stated that request for extension should be made six months prior to the date on which it fell due.
- Observing that the matters referred to in A5 with regard to extensions of service had been adopted by the Employer by A3, dated 16.01.1994, the Court rejected the Employer’s contention that A5 had no bearing on the issue of extensions for Employees of the Company.
- The Court then went on to observe that while A5 referred to many matters – one of which was extensions – A3 was the more important document, since it was specific to extensions of service. It was further observed that even though A3 contained a mandatory requirement for the Employee concerned to make application for extension six months prior to the date of retirement, the same document also provided in the next paragraph that, (irrespective of whether an application was made by the Employee), the Management should give the Employee one year’s notice of termination on reaching the age of retirement and informing him of the need to hand over vacant possession of official quarters on or before the due date or, if it was intended to limit the extension to one year only, such intention should be intimated in writing to the Employee.

The Supreme Court held that the Labour Tribunal had rightly concluded that since such notice of intention to terminate and the need to hand over official quarters etc. had not been given by the Employer, there was a legitimate expectation by the Employee that his services would be extended for one year when he reached the age of retirement and that, accordingly, the award of one year’s salary was correct.

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As regards the enhancement of compensation to five years' salary by the High Court, the Supreme Court observed that the High Court had decided to do so merely for the reason that the appeal had taken more than four years and the Employee, having by then reached the age of 60 years, would not be able to find alternate employment. The Supreme Court noted that the provision for extension in both A3 and A5 was limited to one year and that further extensions would be considered only thereafter.

In the result, the Supreme Court set aside the order of the High Court and affirmed the judgment of the Labour Tribunal.

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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

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

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

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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## The Ministry of Labor amends the “Guideline Principles for Labor Dispatch Rights” and “Matters to be Contracted or Prohibited from Contract in Dispatch Labor Agreements”

The Lao-Dong-Guan-2-Zi-1070125576 Order issued by the Ministry of Labor dated March 9, 2018 announced the amendments of the “Guideline Principles for Labor Dispatch Rights” and “Matters to be Contracted or Prohibited from Contract in Dispatch Labor Agreements”.

The key points of the amendments are:

1. To protect the freedom of employment of employees, and to prevent the dispatching entity from forcing employees to stipulate “minimum service” and “post-departure non-compete obligation” agreements and thereby limiting the employees’ ability to find a more fixed position, if the dispatching entity does not meet the legal requirements for the above terms, it cannot require the employee to pay a penalty for breach during the time the employee is dispatched if the employee chooses to become an official employee of the entity that he/she is dispatched to; nor shall the dispatching entity prohibit the employee from taking a position at the entity that he/she was dispatched for a certain period of time after the termination of the labor agreement.
2. Requiring employees to work on rest days shall require the employee’s consent to protect the employee’s rights. The wages and hours of such work shall be stipulated in the dispatch agreement.
3. The entity that the employees are being dispatched shall take responsibility in setting up the safety and sanitation equipment around the workplace and providing compensation/damages through insurance planning to protect the employees’ labor rights.

## Explanations on the calculation of wages and work hours in the event employees working on a rest day on the employer’s request encounter natural disasters, incidents or other unexpected emergencies

Key points:

1. In the event employees had previously agreed to work on a rest day per the request of the employer, but on that rest day, there occurred a natural disaster which caused the head of the district where the work site, the employee’s residence or any place that the employee must travel through in his/her commute is located to declare the suspension of business according to the Regulations Governing the Suspension of Businesses and Classes because of Natural Disasters, the employee does not have to arrive at work, and the employer should not treat employees as absent from work, late for work or force employees to take personal leave or other kinds of leave, or take any sanctions against the employee, including requiring the employee to do make-up work, withhold bonuses for attendance, terminate the employment agreement, etc. If the employee had already started work at the work place on a rest day and, due to the natural disaster, the employee decided to stop working or the employer requested the employee to stop working, as such suspension is not attributable to employees, the employer must still pay the overtime wages for the hours that the employee has already worked as specified under Article 24, Paragraph 2 of the Labor Standards Act; those hours that the employee has already worked shall be calculated as part of the total overtime working hours in a month (which is subject to the restrictions of Paragraph 2 of Article 32 of the Labor Standards Act).
2. If the occurrence of a natural disaster, incidents or other unexpected emergencies causes an employer to request an employee to work on a rest day, in addition to paying wages for the hours that the employee has already worked pursuant to Article 24, Paragraph 2 of the Labor Standards Act, those working hours are not counted under the statutory cap stated in Article 32, Paragraph 2 of the same.
3. As working on a rest day is by nature an extension of working hours, if the employer requested such work due to a natural disaster or other unexpected event, the employer is required to notify the union, or if there is no union, the local competent authority, within 24 hours of the commencement of work, as well as provide the employee with appropriate time of rest afterwards.

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Explanations for the calculation of leaves, work hours and wages in the event the employer had previously obtained consent from an employee to work on a rest day, but the employee turned out to be unable to provide service on that day

Key points:

- Whether an employee should work on a rest day, and for how long, are matters to be decided between the employer and the employee as a business internal management matter. Once the employee had consented to provide service, he/she has the obligation to provide service on that day. If the employee turned out to be unable to do so on the agreed day for personal reasons, the employee must inform the employer. Unless otherwise agreed by the parties to discharge the obligation to provide service on a rest day, the hours that the employee could not provide service may be taken as a leave depending on the reason for the absence pursuant to the Regulations of Leave-Taking of Employees and other laws and regulations.
- It is highly suggested to stipulate the rules for the above situation (including the notice procedures and whether the employee shall take leaves, etc.) in the collective agreement, employer agreement or work rules so that the parties may have a written reference.
- Unless the absence was caused by a natural disaster or unexpected incident, the total extended work hours as stipulated under Article 32, Paragraph 2 of the Labor Standards Act shall be calculated based on the actual hours that the employee had provided service on the rest day. For wages, in addition to regular pay, the hours that the employee had provided service on the rest day shall be calculated per Article 24, Paragraph 2 of the Labor Standards Act, and the pay for the leave taken shall be calculated on the rest day extra pay standard.

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### Explanations regarding the time limit of annual leave deferrals

Key points:

- The employer may discuss with a union or at a labor-management conference regarding the time limit of deferrals or how deferrals may work, or to negotiate a general rule. However, each individual request for deferral shall still require the consent of both the employer and the employee before it may be carried out. A decision by the employer to defer without exception all untaken annual leave to the following year at that time is not consistent with the law.
- A negotiated arrangement to defer annual leave for a term of less than a year is acceptable (e.g., a 3-month deferral); it is also acceptable to further defer for the same duration (e.g., a second 3-month deferral negotiated upon the expiration of the first 3-month deferral), provided that the leave must be used by the last day of the following year. Leave that has been deferred to the following year but remains untaken at the last day of the following year can no longer be further deferred, and the employer shall pay wages to the employee in compensation for such untaken leave.

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### Explanations regarding whether the wages for deferred leaves not taken should be included in the calculation of average wages

Key point:

While deferred leave that has yet to be taken even at the end of the following year or because of the termination of the employment agreement shall be converted by the employer to wages, how such wages are regarded in the calculation of average wages shall first depend on whether “the end of the original year for the annual leave” took place within 6 months of the date of the calculation of average wages as such wages are in nature the compensation (for annual leaves not taken) in the original year. If it does fall within 6 months, as the law is silent on how much of the wages in lieu of leave not taken in the original year shall be included in the calculation of average wages, it is up to the employer and the employee to negotiate an arrangement. If it falls outside of the 6-month period, then such wages shall not be included in the calculation of average wages.

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## Interpretation of “transnational enterprise” in Article 5, Item 3 of the “Work Eligibility Requirements for Foreigners Engaging in the Occupations Under Article 46, Paragraph 1, Subparagraphs 1-6 of the Employment Service Act and the Review Guidelines”

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Fa-Guan-Zi-1070508252

Issue date: 2 July 2018

According to Article 5, Item 3 of the “Work Eligibility Requirements for Foreigners Engaging in the Occupations Under Article 46, Paragraph 1, Subparagraphs 1-6 of the Employment Service Act and the Review Guidelines”, as the foreigners having worked at a transnational enterprise for at least one year before coming to work in Taiwan are eligible for the specialized or technical occupations under Subparagraphs 1 of Article 46, Paragraph 1 of the Employment Service Act, the term “transnational enterprise” is hereby defined as an economic entity with branch offices or subsidiaries in two or more countries, on which the parent company can effectively control and manage in conducting its productions and business operations that spans across countries. While the parent company may be located in another country, Hong Kong or Macao with branch offices or subsidiaries in Taiwan, or that the parent company may be located in Taiwan, such entity would further need to meet any one of the following:

1. Global assets of more than US\$2 billion in the year prior to the application
2. Holds a certification letter from the Industrial Development Bureau, MOEA concerning the scope of business operations conducted by the headquarters entity
3. 100 or more employees in Taiwan, with at least 50 holding a vocational school degree or higher
4. Net annual domestic operational income of more than NT\$1 billion
5. Net annual regional operational income of more than NT\$1.5 billion
6. Other conditions specifically agreed to by the Central Competent Authority and the central competent authority for the industry that the enterprise is in.

This circular is effective from 2 July 2018.

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## Interpretation of the conditions that are “specifically agreed to by the Central Competent Authority and the Central Competent Authority for the industry that the enterprise is in” in Article 36, Subparagraph 5 of the “Work Eligibility Requirements for Foreigners Engaging in the Occupations Under Article 46, Paragraph 1, Subparagraphs 1-6 of the Employment Service Act and the Review Guidelines”

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Fa-Guan-Zi-10705092461

Issue date: 24 July 2018

According to Article 36, Subparagraph 5 of the “Work Eligibility Requirements for Foreigners Engaging in the Occupations Under Article 46, Paragraph 1, Subparagraphs 1-6 of the Employment Service Act and the Review Guidelines”, if an employer is known to have made actual contributions to the domestic economic growth, or has been specifically recognized as a sui generis case by the Central Competent Authority and the Central Competent Authority for the industry that the enterprise of the employer is in, the employer may hire foreigners to engage in certain professions (such as foreigners can be employed in the real estate agencies, immigration service organizations, environmental protection work, manufacturing industry and wholesale business). As a result, the term “specifically agreed to by the Central Competent Authority and the Central Competent Authority for the industry that the enterprise is in” means that the enterprise meets any one of the following conditions:

1. Is recognized as a business which meets “the principle of recognizing startup businesses with innovation capabilities” within the HeadStart Taiwan Project, and can provide supporting documents evidencing that it has been established under Taiwan Company

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Act or Business Registration Act for less than 5 years as well as meeting any one of the following:

- (1) Has received domestic or foreign venture capital investment of more than NT\$2 million
  - (2) Is listed among the Go Incubation Board for Startup and Acceleration Firms (GISA) setup by the Taipei Exchange (GreTai Securities Market)
  - (3) Has obtained an invention patent in Taiwan, or has received the invention patent through a transfer by the holder of a Taiwan invention patent, or is licensed to practice the patent by the patent holder, and such license has been registered with the TIPO
  - (4) Has established a presence in the International Taiwan Startups Stadium permitted by the Executive Yuan or any incubator institution directly operated or cooperated by the MOEA, or any other incubator institution that has been recognized as in good standing by the MOEA in the past three years
  - (5) The applying enterprise or its responsible person has received awards in a recognized domestic or international innovative design contest
2. Is an enterprise in the Asia Silicon Valley, biotechnology, green energy, smart machinery, national defense, new agriculture, sustainable development or other “5+2” industries and can provide relevant supporting documents.

This circular is effective from July 24, 2018.

### Amendment to the businesses under Paragraph 4 of Article 36 of the Labor Standards Act.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Tiao-3-Zi-1070131130

Issue date: 6 August 2018

Article 36, Paragraphs 4 and 5 of the Labor Standards Act provide for a special exception to certain employers with the consent of the Central Competent Authority with jurisdiction over the business designated by the Central Competent Authority, and with consent of a labor union, or if there is no labor union exists in a business entity, with the approval of a labor-management conference (when an employer has 30 or more employees, he/she shall report it to the local competent authority for record), in making adjustments to regular leaves within a seven day period. This amendment was made to widen the types of employers, and the relevant special circumstances, that entitle them to apply for such exception after representatives from the relevant industries and sectors presented their comments regarding Article 36, Paragraphs 4 and 5 of the Labor Standards Act to the Ministry of Labor in person.

The additional types of employers and the relevant special circumstances are:

1. Employees of maritime contractor shippers and maritime transport companies that are overseas, on vessels or engaged in periodical ship repair.
2. Employees of news publishers, magazine (including periodical) publishers and broadcast TV that are conducting interview work overseas and are restricted by the professional and interview conditions (such as field of expertise, language, equipment, technique, designated interview, limited number of press pass, and quota control).
3. Employees of maritime transport companies, shipping agent companies, ground transport container terminals operations of ground transport management companies and companies providing service activities incidental to water transportation (excluding tally companies) responding to inclement weather, sea conditions or cargo transport operations.
4. Employees of butcheries in response to animal vaccination measures or adjustments to sales of livestock (such as the adjustment in cooperation with the agricultural authority due to overproduction).

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## Regarding the availability of unpaid child care leave stipends for parents raising two or more children under the age of three

Issued by: The Ministry of Labor  
Ref. No. Lao-Dong-Bao-1-Zi-1070140346  
Issue date: 8 August 2018

Article 11, Paragraph 1, Subparagraph 4 of the Employment Insurance Act regarding parental leave stipend allows the insured employee with one year of insurance enrolment or more to apply for unpaid child care leave stipend if he/she has children under three years of age, and is on parental leave without pay according to the regulation of the Gender Equality in Employment Act. Article 19-2, Paragraph 3 of the same further states that if both parents are insured, they must separately apply for the unpaid child care leave stipend instead of simultaneously. However, in consideration of balancing the needs of the insured parents on unpaid leave for child care and the principle of not providing duplicate social insurance, if the parents are employed individuals enrolled in employment insurance and are raising two or more children under the aged of three (such as twins or multiple births), if they meet the conditions to receive the unpaid child care leave stipend and are applying for unpaid child care leave at the same time, an exception is made to allow the parents to apply at the same time for receiving the unpaid child care leave stipend for different children and still remain enrolled in social insurance; parents raising one child under the age of three must still comply with Article 19-2, Paragraph 3 of the Employment Insurance Act with regard to the unpaid child care leave stipend.

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## The Ministry of Labor announces an amendment to the “Common Principles for Imposition of Fines on Violations of the Labor Standards Act”

Issued by: The Ministry of Labor  
Ref. No. Lao-Dong-Tiao-1-Zi-1070131223  
Issue date: 4 September 2018

Effective 1 October 2018, a company listed on the Taiwan Exchange or OTC that is found in violation of Articles 32, 34 or 36 of the Labor Standards Act (provisions regarding overtime, rest periods and the rotation of shifts for workers on shifts, and rules regarding regular leaves and holidays), a fine shall be imposed, pursuant to Paragraph 1 and Paragraph 4, Article 79 of the Labor Standards Act, between NT\$50,000 to NT\$1,000,000 based on the amount of capital of the company (in contrast to a fine between NT\$20,000 to NT\$1,000,000 under law), as well as the potential for additional fines of up to one-half of the maximum fine under law.

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## Revision of the minimum wage to be effective on 1 January 2019.

Issued by: The Ministry of Labor  
Ref. No. Lao-Dong-Tiao-2-Zi-1070131233  
Issue date: 5 September 2018

The minimum wage is revised to be NT\$150 per hour and NT\$23,100 per month, pursuant to Paragraph 2, Article 21 of the Labor Standards Act, effective 1 January 2019.

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## The calculation method for the period of time defined under Article 4 of the Act for Worker Protection in Mass Redundancy

Issued by: The Ministry of Labor  
Ref. No. Lao-Dong-Guan-3-Zi-1070128385  
Issue date: October 16, 2018

Article 4, Paragraph 1 of the Act for Worker Protection in Mass Redundancy specifies that the period of time to notify the competent authority of the mass redundancy shall start rolling from the day the provisions under Article 2 of the same law are met, inclusive of that day. The term “60 days prior” is calculated according to Article 48 of the Administrative Procedure Act, thus the mass redundancy plan shall be submitted the working day before the date of the deadline at the latest.

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Article 4, Paragraph 1 of the Act for Worker Protection in Mass Redundancy specifies that “To implement mass redundancy of workers, the business entity shall, at least 60 days prior to the occurrence of any of the conditions in accordance with Article 2, inform the officials /personal of the competent authority and other relevant agencies of its redundancy plan...” Given the proviso of Article 48 of the Administrative Procedure Act, the day the occurrence of any of the conditions under Article 2 shall also count in the 60-day period. As a result, the “60 days prior” means it will end on the “day before” the 60th day going forward, and if the “day before” ends on a weekend, a holiday or other rest days, then the employer must submit the plan by the last business day prior to the “day before”.

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The Ministry of Labor announces that the election and recall day for the President and the Vice-President, the election and recall day for public officials, and the citizens’ election day shall be considered as holidays under Article 37, Paragraph 1 of the Labor Standards Act.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Tiao-2-Zi-1070131393

Issue date: November 8, 2018

Key points of the Circular:

The Ministry of Labor has announced that the election and recall day for the President and the Vice-President, the election and recall day for public officials, and the citizens’ election day are to be deemed as a holiday per the definition under Article 37, Paragraph 1 of the Labor Standards Act. Workers with the right to vote who were originally required to work on the day shall be given a day off, and workers who were not required to work will not be given additional wages or day of leave. A day off here shall mean a continuous 24 hours from 0 am to 24 pm. If the employer has obtained consent from the worker to work on that day, it shall pay the worker wages based on the time worked, and it may not interfere with the worker heading to the polls for voting. Workers with the right to vote who were not required to work on the day as it is a rest day or regular leave shall not be given a day off. If the employer has obtained consent from the worker to work on that rest day, it shall pay the worker wages based on Article 24, Paragraph 2 of the LSA, and it may not interfere with the worker heading to the polls for voting.

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2018

Presidential Order to amend the “Act for Protecting Worker of Occupational Accidents”

The Presidential Hua-Zhong-Yi-Yi-Zi-10700125341 Order promulgated on November 21, 2018 announced the amendments to Articles 6, 8, 23, 24, 34 and 41. The amendments enter into effect on the day of promulgation.

Amended provisions:

1. For compliance with the Convention on the Rights of Persons with Disabilities (“CRPD”) and its implementation laws, the potentially discriminatory term “crippled” to refer to persons with disabilities shall be adjusted to “disabled” (amending Article 6, Paragraphs 1 and 3; Article 8, Paragraph 1, Subparagraph 2)
2. As the type of disability for disability benefits is not limited to limbs and organs and may involve mental issues, the term “remaining body disabilities” is adjusted to “remaining disabilities” to prevent confusion. (amending Article 6, Paragraph 3; Article 8, Paragraph 1, Subparagraphs 2 and 4)
3. To realize the rule on equality and non-discriminatory treatment in the CRPD, the term “loss of mental faculties or crippled body” is adjusted to “physical and mental disabilities”. (amending Article 23, Subparagraph 2; Article 24, Subparagraph 1)

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## Presidential Order to amend the “Labor Standards Act”

The Presidential Hua-Zhong-Yi-Yi-Zi-10700125351 Order promulgated on November 21, 2018 announced the amendments to Articles 54, 55 and 59.

Amended provisions:

1. To realize the rule on equality and non-discriminatory treatment in the CRPD, the term “loss of mental faculties or crippled body” is adjusted to “physical and mental disabilities” (amending Article 54, Paragraph 1, Subparagraph 2; Article 55, Paragraph 1, Subparagraph 2)
2. To realize the rule on equality and non-discriminatory treatment in the CRPD, the term “crippled” in the relevant provisions is adjusted to “disabled” or “challenged” (amending the main text of Article 59 and Subparagraphs 2 and 3)

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## The Ministry of Labor’s collection of regulations in relation to Article 43 of the Employment Services Act and summarizing the engagements under which foreigners are not required to apply for a work permit

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Fa-Guan-Zi-1070507378

Issue date: November 27, 2018

Do to globalization and change of economic and social conditions, the activities foreigners conducted in Taiwan has become diversified. In order to relax relevant regulations and to advocate foreigners coming to Taiwan for cultural exchange, to the extent that job opportunities for Taiwanese citizens are unaffected, the Ministry of Labor has collected opinions and determined that the following types of activities or engagements do not fall under Article 43 of the Employment Services Act and do not require a work permit; for activities that are not listed, whether a work permit is needed shall be determined on a case-by-case basis in accordance with the Lao-Zhi-Wai-Zi-0950502128 Circular issued by the Council of Labor Affairs (predecessor of the current Ministry of Labor).

The types of engagements that do not require foreigners to apply for work permits are re-organized as follows:

1. Commercial activities: Foreigners based on commercial purposes arriving in Taiwan to engage in operations inspections, business negotiations, establishment of commercial location, execution of commercial agreements or participation in the relevant commercial bids or tenders; foreign shareholders or directors arriving in Taiwan to act on behalf of a company pursuant to the Company Act as its shareholder or director, or otherwise represent the company.
2. Study, intern or research activities: Foreigners engaged as a research assistant or teaching assistant as a result of an academic relationship
3. Supplemental services activities: Foreigners voluntarily engaging in acts that contribute to the public and not seeking compensation as an objective; engaging in voluntary service activities that do not provide compensation.
4. General social engagement activities: Foreigners already holding a work permit and providing short-term or free performances in a public area on their own accord outside of work.
5. Any other provision of labor not to anyone within the territory of Taiwan and without interfering with job opportunities for Taiwanese citizens (e.g., foreigner under the employment of a foreign government or private institution arriving in Taiwan to conduct news interviews, reports, photography sessions, filmmaking, theatrical productions, etc.)

*More...*



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**Presidential Order to amend the “Employment Services Act”**

The Presidential Hua-Zhong-Yi-Yi-Zi-10700128031 Order promulgated on November 28, 2018 announced the amendments to Articles 5, 24, 40, 46, 54, 56, 65-68 and 70.

Key points of the amended provisions:

1. A new item of “astrological sign and blood type” that the employer may not discriminate employees or job applicants on is added. Violators shall be fined, ordered to rectify within a certain period of time, and their names announced to the public. Failure to rectify by the deadline will result in additional fines (Article 5, Paragraph 1; Article 65, Paragraph 3)
2. For greater wage transparency and informational symmetry between employers and employees, employers may no longer refrain from disclosing the actual range of wages paid for a position if the ordinary wages for the position is lower than NT\$40,000/month. In other words, if the ordinary wages for the position is lower than NT\$40,000/month, the actual range of wages paid should be disclosed. (Article 5, Paragraph 2)
3. A private employment services institution and its employees must now report to the relevant competent authority within 24 hours if they became aware that a certain employer has caused a foreign employee to suffer sexual assault, human trafficking, false imprisonment, serious injuries or death by homicide. (Article 40, Paragraph 1, Subparagraph 19)
4. Greater scope of potential employment for foreigners in Taiwan: The previous “full-time teacher teaching course(s) on foreign language(s) at a short-term class registered for supplementary schooling in accordance with the Supplementary Education Act” is now “full-time teachers teaching course(s) at a short-term class registered for supplementary schooling in accordance with the Supplementary Education Act”. (Article 46, Paragraph 1, Subparagraph 4)

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**Presidential Order to promulgate the “Labor Affairs Act”**

The Presidential Hua-Zhong-Yi-Yi-Zi-10700129441 Order promulgated on December 5, 2018 announced all 53 articles of the new law; the Judicial Yuan shall set the date the new law is implemented.

A labor dispute puts workers at a disadvantageous position in a variety of aspects: impact on personal rights, impact on livelihood, inability to effectively gather supporting evidence, the level of expertise and specialized knowledge required in labor affairs, etc. As a result, a specialized civil procedure for workers is needed to address such issues so that disputes may be quickly and fairly resolved.

1. Professional review: Each level of court shall establish a specialized labor court and select judges with expertise in the Labor Standards Act and other labor laws to handle labor-related affairs.
2. Greater scope of definition of “labor affairs”: Disputes between cooperative education students and cooperative education institutions, and torts arising from a labor relationship are now considered labor affairs.
3. Formation of a labor mediation committee: A 3-man committee with a labor court judge and 2 labor mediation committee members with experience in labor matters shall engage in mediation and cause the disputing parties to reach an agreement to settle the dispute.
4. Reduction of obstacles for civil litigation by workers: Adjustment to jurisdiction of courts over labor affairs and allow a worker to file suit in the court located at where labor services are provided; reasonable reduction of the burden of proof on workers, statutory required documents that the employer must now submit, etc.
5. Speedy procedure: Mediation shall be concluded over three instances in three months; labor affairs disputes shall in principle only require a single oral arguments session to conclude the proceedings

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6. Strengthening the ability for consolidated resolution of disputes: To consolidate the resolution of disputes, if a labor union is filing suit on behalf of its members under Article 44-1 of the Code of Civil Procedure, an additional claim may be made for a declaratory decision to confirm that there does exist prerequisite conditions that are commonly underlying the claims or legal relationships between the designated labor union and the defendant.
7. Immediately effective securing of rights: Reduction of the burden on workers petitioning for preservation of the status quo; provisional enforcement shall be ordered if the worker prevails in court.

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## Amendments to the Labor Protection Act (LPA)

Thailand's National Legislative Assembly passed a new act on December 13, 2018, which will amend the current Labor Protection Act (LPA). The new law will become effective 30 days after its publication in the Government Gazette, which is expected to be in early 2019.

The key amendments to the LPA are as follows:-

- The amount of statutory severance pay for an employee who has worked for at least 20 years has been increased to 400 days at the employee's last wage rate (from 300).
- Employers must grant pregnant employees 98 days' maternity leave, which includes leave taken for pre-natal exams before the delivery date, and holidays that fall during the maternity leave period. The employer must pay up to 45 days' wages during maternity leave.
- Employers must grant employees three days of "necessary business leave" with wages paid.
- If an employer relocates its current workplace to a new establishment, or to another of its existing work locations, the employer must post a conspicuous announcement at the current work place for a continuous period of at least 30 days in advance of the relocation. The announcement must include the details of the new workplace and the timing of the relocation.
- Where a change in employer results in any employees being transferred, those employees must consent to that transfer before it can take effect.
- Employers are required to pay 15 percent interest on money that they owe to employees for:-
  - payment of wages in lieu of advance notice;
  - wages, overtime payments, payment for working on holidays, and payments for working overtime on holidays;
  - wages during temporary cessation of the employer's operations; or
  - severance pay and special severance pay.
- Where an employer terminates an indefinite term employment contract without notifying the employee at least one payment cycle in advance, the employer must pay wages in lieu of advance notice to the employee on the termination date.
- Employers must pay wages, overtime payments, payments for working on holidays, and payments for working overtime on holidays, at the same rate for both male and female employees who undertake work of the same type, quality, and quantity.
- Several penalties for employers that fail to comply with the provisions in the LPA have also been amended.

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**Decree No. 121/2018/ND-CP**

Decree 121/2018/ND-CP (“**Decree 121**”) dated 13 September 2018 amends and supplements a number of articles of Decree 49/2013/ND-CP on implementation of salary regulations for labour, which take effect 1 November 2018.

Decree 121 has a significant amendment that enterprises employing less than 10 employees are exempted from submission of their salary scales and labor norms with the labor authorities in the districts where such enterprises are located.

This Decree takes effect as 1 November 2018.

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**Decree No. 143/2018/ND-CP**

Decree 143/2018/ND-CP dated 15 October 2018 stipulates the details of compulsory social insurance for foreign employees in Vietnam (“**Decree 143**”).

- Under Decree 143, any foreigners granted with work permits, practice certificates, or practice licenses to work in Vietnam and under indefinite-term labour contracts or contracts with a term of at least full 12 months shall be subject to compulsory social insurance. Accordingly, they will be entitled to the social insurance regimes, sickness, maternity, workplace accident, occupational disease, retirement, and survivor benefits if they meet conditions set out in the relevant laws. However, compulsory social insurance is not applicable to any foreigners who (i) are temporarily transferred from their offshore parents companies to their subsidiaries in Vietnam to work as managers, managing directors, experts or technicians and work for such offshore parents companies for at least 12 months; or (ii) reach retirement age.
- From 2020, the employers and foreign employees must contribute 14% and 8% respectively of the employee’s monthly salary to the retirement and survivor benefits fund in Vietnam. In addition, from December 2018, the employers also must contribute (i) 3% of the foreign employee’s monthly salary to the sickness and maternity funds; (ii) 0.5 per cent to the occupational accidents and hazards.
- Any foreigners, who are eligible to receive retirement pensions and social insurance benefits but no longer residing in Vietnam, may authorize any person to receive it monthly or request for one-off payment.

This Decree takes effect as 1 December 2018

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**Decree No. 148/2018/ND-CP**

Wording: Decree 148/2018/ND-CP dated 24 October 2018 amends and supplements to a number of articles of Decree 05/2015/ND-CP (“**Decree 148**”), which will take effect on 15th December 2018. The key amendments include:

- Authorized persons to enter into labour contracts is limited to enterprises, cooperatives or heads of agencies, units and organizations having legal status. However, under the Decree 148, such authorization is not required in the form prescribed by the Ministry of Labour, War Invalids and Social Affairs as stipulated in Decree 05/2015/ND-CP (“**Decree 05**”);
- Certain of labour contract contents on salary review, working time, rest time, labour equipment protection, social insurance, unemployment insurance and health insurance are no longer mandatory to be detailed in the labour contracts. Instead, such contents may be referred to the employers’ policies, internal labour regulations, collective agreements and relevant laws;
- Period of probation, apprenticeship or internship to work for an enterprise will not be calculated as the actual working time of employees to serve as a basis for calculating severance allowances or retrenchment allowances. However, leave period for treatment and recovery after labour accidents/occupational diseases or paid leave periods for implementing citizen’s obligations will now be included in the actual working time;

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- Both employers and employees have responsibility for fulfilling their benefit-related payments within 7 working days from the termination of labour contracts. Previously, this regulation is only applicable to the employer;
- Salary used as the basis for compensation in case of illegal and unilateral termination of employment contract will be salary stated in the labour contract at the time when the employer or the employee illegally and unilaterally terminates the labour contract.
- Retrenchment notice to the provincial labour authority must be made in writing and include certain prescribed information while these contents are not specified in Decree 05.

Labour disciplinary procedures in holding disciplinary hearing meetings and make disciplinary measures are simplified and more enforceable.

This Decree takes effect as 15 December 2018.

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