

People and Reward

Asia-Pacific employment law bulletin 2023



Freshfields Bruckhaus Deringer

Welcome to the 2023 edition of our Asia-Pacific employment law bulletin.

Since the beginning of the pandemic in December 2019, global employers have had to adapt to rapidly changing regulations, legal requirements and restrictions. In 2022, however, most jurisdictions around the world started to relax pandemic related measures and focused their attention on co-existence with Covid-19. In particular, the dramatic shift away from the “zero-Covid” strategy in China (which was one of the last countries to still maintain strict Covid measures) at the end of last year signaled a clear “post-pandemic” era.

The pandemic caused an unprecedented shift in the way that we work and our mindsets, which in turn led to a new focus on certain areas of law and regulation. For example, interest in and awareness of human rights issues and protection from discrimination has certainly increased in the past few years. There is also a renewed focus on flexible / agile working and mental health and wellbeing.

For this bulletin, we have once again collaborated with our StrongerTogether colleagues to identify key employment law developments in the Asia-Pacific region. Important amendments and new legislation have been enacted in many jurisdictions in the past few months, addressing remote and hybrid work or enhancing protections against discrimination and harassment. The recent trend towards regulating gig workers is also of particular importance.

As always, we hope you enjoy this update. Please get in touch with us or reach out to your usual Freshfields contact if you would like to discuss any of the issues in our bulletin in more detail.



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01

Australia

2022 was a significant year for employment law in Australia, with a change of Federal Government following Labor's success in the May election, along with the ongoing impact of Covid-19. Although by the second-half of 2022 most of Australia had loosened public-health measures and border restrictions, and largely moved to a 'post-pandemic' environment, the impact of these restrictions is still being felt as many employers experience acute labour shortages. While migration levels are expected to increase in 2023, labour shortages will remain an ongoing issue.

The 'new' federal Labor Government has moved quickly to introduce reforms to employment and labour laws in line with its commitments regarding job security, wages and gender equality. The Secure Jobs Better Pay Act 2022 (Cth), which amends the Fair Work Act 2009 (Cth) (**FW Act**) (the primary employment legislation in Australia), was passed on 2 December 2022, and brings about some of the most significant industrial relations reforms in decades, including changes to enterprise bargaining, limits on the use of fixed term contracts, and a raft of changes intended to decrease the gender pay gap (including a ban on pay secrecy clauses in contracts).

Restrictions on fixed-term contracts

Under these reforms, employers' ability to engage employees via fixed-term (or maximum-term) contracts for the same role is limited to two consecutive contracts or a maximum duration of two years. There are exceptions to these limitations, including where the employee has a specialised skill, is engaged during a peak demand period, or the employee's earnings exceed the high-income threshold for the first year of the contract (currently AUD 162,000 (approx. USD 113,000)). The fixed-term contract reforms will come into effect from December 2023, unless proclaimed earlier. Broadly speaking, the reforms will not affect pre-existing contracts, unless an employee is offered a subsequent fixed-term contract after the reforms commence. Breach of these limitations will attract a civil penalty.

Ban on pay secrecy clauses

In an effort to promote pay transparency, reduce constraints on employees bargaining for pay rises and remove what has been seen as an inhibitor to women being paid equitably, the new reforms largely restrict, or render unenforceable such clauses.

Employees are now lawfully permitted to disclose their remuneration and to ask any other employee about their remuneration (and are protected from retaliation for doing so). It is now unlawful for employers to include a pay secrecy clause in a new contract. Such clauses that are in existing contracts will continue to have effect until such time as the contract is varied. Breach of these prohibitions will attract a civil penalty.

Gender equity and sexual harassment reforms

Gender equity is now included as a formal objective of the FW Act. The reforms also include additional 'protected attributes' of breastfeeding, gender identity and intersex status, meaning it will generally be unlawful for employers to discriminate against employees on the basis of those characteristics.

Employees' rights to pursue formal flexible working arrangements (FWAs) have also been strengthened. Although employers retain the right to refuse a request on 'reasonable business grounds', there are now more onerous procedural obligations for responding to such requests. Employees will also have the right to refer disputes about an FWA or an employer's refusal to the Fair Work Commission (**FWC**).

The reforms also create a new jurisdiction in the FWC for sexual harassment disputes, as well as the ability to apply for specific 'stop sexual harassment' orders.

Significantly, in addition to reforms introduced to the FW Act, separate amendments to the Sex Discrimination Act 1984 (Cth) create a 'positive duty' upon employers to take reasonable and proportionate measures to eliminate, as far as possible, "sex discrimination, sexual harassment, victimisation, or conduct that creates a 'hostile work environment'". This

latter term refers to an environment that is “offensive, intimidating or humiliating” to a person by reason of the person’s sex or related characteristic, including, for example, environments where sexual banter, innuendo or offensive jokes are made. What actions the ‘positive duty’ requires will vary for each company, but it will be expected that employers with more resources do more to discharge the duty.

While the positive duty now exists, provisions pertaining to enforcement and compliance will not take effect until 13 December 2023. It is therefore important in 2023 that employers spend time reviewing and, if necessary, improving their practices, policies, and procedures, in order to be prepared for the commencement of the enforcement powers at the end of the year. While there is no ‘one size fits all’ approach to this process, undertaking a detailed risk assessment to identify risks of gender-based harms in the employer’s specific working environment is likely to be an appropriate starting point.

As of 1 February 2023 (1 August 2023 for employers with less than 15 employees), employees are also entitled to 10 days of paid family violence leave each year.

Bargaining

The state of the enterprise bargaining system (and the effective ‘opting-out’ of bargaining by many large employers) was a cause for concern for the union movement and the Labor Party, so the reforms provide employees and unions with an increased ability to force employers to the bargaining table, whether for single or multi-employer agreements (between ‘reasonably comparable’ employers). The greatly expanded scope for multi-employer bargaining is the most controversial reform, particularly given the ability for unions to organise protected industrial action across multiple businesses to support their claims, and to apply to effectively force an employer to be added to an ‘agreement’ which has already been negotiated with other employers (if a majority of the employer’s employees agree). Further, the reforms allow for intractable bargaining disputes to be resolved by the FWC through

compulsory arbitration. The full impact of these reforms remains to be seen, but there is little doubt we will see more single and multiple employer enterprise agreements and an increased arbitral role for the FWC in the new bargaining regime.

Looking ahead to 2023

Looking ahead to 2023, the Labor Government has promised further rounds of reform, with the expected introduction of ‘Same Job, Same Pay’ legislation, which is principally designed to ensure that labour hire workers are paid the same as direct employees of the principal business. The form of this legislation will remain unknown given the significant practical difficulties likely to arise in its implementation. The Labor Government has also promised to give the FWC power to regulate ‘employee-like’ forms of work (such as contracting models in the gig economy), including by prescribing minimum terms and conditions of engagement. It is also expected that the ‘wage theft’ legislation will be introduced to criminalise the deliberate underpayment of wages. All in all, 2023 should be another year of significant regulatory reform which will bring challenges and opportunities for employers.

Corrs Chambers Westgarth: Shea Wilding



02

Cambodia

Over the past year, key employment law developments were enacted in Cambodia, which impact all businesses in the country.

Labour inspectorate

Under the Cambodian labour law, labour inspectors from the Ministry of Labour and Vocational Training (*MLVT*) are vested with power to oversee the enforcement of the Cambodian labour law and its implementation on enterprises, and to provide information and recommendations on technical issues to employers and employees.

In Cambodia, there were two types of labour inspection: ordinary inspection and special inspection. The ordinary inspection is carried out once per year with prior notice to enterprises. The special labour inspection, on the other hand, is carried out without prior notice. The special labour inspections are conducted to monitor progress in rectifying compliance issues identified in past inspection reports that have been issued in response to a complaint or information about an alleged violation of the labour law or otherwise when a labour inspector deems necessary.

Since January 2022, a self-declared labour inspection process has been introduced in addition to the special and ordinary inspections. The MLVT now requires that all enterprises conduct self-declared labour inspections to evaluate their compliance with the labour law by themselves, which can be completed online. A self-declaration must be made twice a year, in June and in December.

While there are numerous compliance matters to be addressed on the self-declaration, the followings are the key aspects covered by the self-declaration:

- internal work rules and compliance;
- general working conditions and environment, including minimum wages, seniority indemnity payments, termination payments, overtime work, discrimination, child labour, sexual harassment, protection of pregnant women, foreign employee quotas, employment books and work permits;
- occupational health and safety;
- social security; and
- employee representation.

Non-compliance with any of the specified 31 prioritized compliance matters will result in immediate administrative fines in accordance with the labour law and applicable regulations.

The implementation of this self-declaration is designed to enhance the compliance culture within an enterprise. It allows an enterprise to assess its level of compliance with the labour law and rectify any non-compliance areas prior to any physical inspection by a labour inspector.

To enhance labour inspectors' powers, an amendment to the labour law in 2021 granted labour inspectors with the status of a judicial police officer. Under the amendment, they are empowered to examine offenses under the labour law in accordance with the provisions of the Code of Criminal Procedure. The formalities and the procedures for the empowerment as a judicial police officer will be determined by a forthcoming Inter-Ministerial Prakas (official proclamation) from the Minister of Justice and the Minister of the MLVT.

Pension Scheme

Next to occupational risk and health care insurances, Cambodia now has a mandatory pension scheme, funded by employers and employees.

The Law on Social Security Schemes introduced three social security schemes for employees, specifically: (a) occupational risk insurance scheme (for work-related accidents and occupational diseases); (b) health care insurance scheme; and (c) pension scheme. While occupational risk insurance and health care insurance were already implemented in 2008 and 2016, respectively, the implementation of the pension scheme was delayed until 2022.

In 2021 and 2022, however, several regulations were adopted to clarify the conditions, procedures, benefits and implementation date for the pension scheme. The pension scheme finally took effect in July 2022 and from

October 2022 both employers and employees are required to make contribution payments to the pension scheme.

For the first five years of its implementation, employers and employees must contribute to a mandatory pension scheme at the same rate of 2% (combined total of 4%) of the contributable wage. The contributable wage ranges from the minimum obligated wage of 400,000 riels (approx. USD 100) to the highest obligated wage of 1,200,000 riels (approx. USD 300) per month. As such, the monthly contribution of 4% of the employee's contributable wage ranges from USD 4 to USD 12 per month per employee.

Benefits under the mandatory pension scheme include old age pension, disability pension, survivor's pension and funerary grant.

What is next?

Although the Cambodian labour law states that the labour court is vested with jurisdiction over labour disputes, no such specialised labour court has actually been established at the moment. Labour disputes are currently heard by civil courts in Cambodia. However, the Ministry of Justice has recently been discussing with stakeholders the process of establishing a specialised labour court. The discussion covered a wide range of topics, including the court's human and financial resources, necessary assistance from stakeholders, including the International Labour Organizations, as well as the legal framework required to ensure the court's transparency and efficiency.

In light of the recent developments, we expect the labour court to be established soon, allowing labour disputes to be resolved in a timely, efficient and transparent process. Until then, however, the current practice continues: a labour dispute can be brought to the Cambodian labour authorities for conciliation. If not resolved, subject to certain conditions, it may be forwarded to the Arbitration Council and then to any competent civil court.

DFDL: Raksa Chan, Vansok Khem and Chris Robinson



03 China

Due to the sharp abandonment of the “zero-Covid” policy at the end of last year, various requirements and restrictions have now been relaxed in China. In accordance with the new policy, employers are required to review and update their internal policies and employment practices. There were also significant enhancements in relation to the protection of women’s rights in the workplace effective from 2023.

Developments in the light of Covid-19

On 26 December 2022, China’s National Health Commission (*NHC*) announced the downgrade of Covid-19 from a Class A to Class B infectious disease. Following this change, the State Council further issued a more specific plan for implementation of the new Covid policy. The announcement and the implementing plan together marked a significant shift from the “zero-Covid” approach that has lasted in China for almost three years. In particular, effective as of 8 January 2023, mandatory quarantine would not apply to people infected with Covid or their close contacts, and testing requirements and travel restrictions have been relaxed. Employers need to take immediate actions to adapt to the new policy with respect to employee management, such as to update their travel policies, to remove requirements for testing results, etc.

Among others, one important aspect is around the treatment of infected employees with respect to leave and pay. Previously, employers were required to provide full pay to any employee who cannot perform work during quarantine due to testing positive (or being determined as a close contact). This is no longer the case starting from 8 January 2023, with employers being allowed to put infected employees on sick leave and to pay sick leave wages instead of full pay.

More specifically, during sick leave, employees may be paid lower wages. The calculation of sick leave wages may vary from region to region, and companies may pay sick leave wages in accordance with the relevant local regulations and their own internal policies. For

example, in Beijing, the sick leave wage shall not be less than 80% of the minimum wage standard of Beijing. Employers are recommended to actively communicate with employees to clarify the change so as to avoid any misunderstandings and disputes.

Amendments to women’s protection law

On 30 October 2022, China made significant changes to the Law on the Protection of the Rights and Interests of Women, which has taken effect from 1 January 2023. Several key points are worth noting for employers during recruitment and employment of the employees:

- **enhanced protections against sexual harassment:** Prior to the amendments coming into force, the 2018 revision of the Law along with Article 1010 of the Civil Code have already made references to sexual harassment and the penalties that such violations would bear. However, these provisions were rather general.

These latest amendments provide enhanced protections for women in society and in the workplace. In particular, it explicitly lists out requirements with which employers must comply to prevent sexual harassment of women in the workplace, including establishment of policies against sexual harassment, provision of training, adoption of necessary security measures, set-up of complaint hotlines or emails, formulation of investigation procedures, etc. Failure of taking these necessary measures may expose the employers to lawsuits initiated by procurators and/or administrative penalties from labour authorities. Employers are expected to take these enumerated requirements as a practical guideline to formulate or update their existing policies and practice, in order to ensure a comprehensive anti-sexual harassment system is in place.

- **equal opportunities in the workplace:** The amendments lay out specific measures for employers to adopt to eliminate gender discrimination.

In particular, during the recruitment process, the amendments prohibit restricting jobs to men or giving male applicants priority, and forbids employers from inquiring about or investigating the marital and parenting status of female applicants. Additionally, pregnancy tests or conditions on marriage or maternity status for the job are also forbidden. The labour authorities will take a more proactive role in inspection and investigation of gender discrimination during recruitment and in the workplace, and may impose penalties (including a fine up to RMB 50,000 (approx. USD 7,369)) on employers in breach. Prosecutors may also bring public interest litigation against employers for violation of equal employment requirements.

The amendments also provide other new requirements for employers to comply with, such as workplace health and safety. Employers will need to update their internal procedures, policies, and effectively implement them to ensure sufficient protection of the rights of women employees in compliance with the amended law.



04

Hong Kong

In the past year, there have been some notable changes to the employment law regime in Hong Kong, including amendments to the Sex Discrimination Ordinance to prohibit discrimination against breastfeeding and to finally abolish the offsetting mechanism under the Mandatory Provident Fund Schemes Ordinance.

Breastfeeding Discrimination Law Amendment

Effective on 19 June 2021, Sex Discrimination Ordinance (SDO) was amended to prohibit breastfeeding discrimination. The protection extends to a woman: (i) who is breastfeeding a child; (ii) who is expressing breast milk; and (iii) who feeds a child with her breast milk. Under the new SDO, employers are required to take necessary measures to make sure that breastfeeding discrimination does not occur within the company.

The prohibited breastfeeding discrimination includes both direct and indirect discrimination:

- **direct discrimination:** Direct discrimination occurs when an employee treats a breastfeeding woman less favourably than another person (a woman not breastfeeding or a man) in the same or similar circumstances on the ground of breastfeeding. For example, if an employee requests to use an unused room during her lunch break because she needs to express milk to her child but the employer refuses to let her use the room without justifiable reasons, this could be direct breastfeeding discrimination.
- **indirect discrimination:** Indirect discrimination occurs when a requirement or condition is applied to all employees, but the proportion of breastfeeding women who can comply with it is considerably less than the proportion of non-breastfeeding persons, and a breastfeeding woman suffers detriment without justification. An example could be a company having a requirement that if any employees wish to take additional breaks during their working hours, they must still ensure that the number of billable

working hours per day is the same as all other employees. Such a requirement could have a disproportional detrimental impact on breastfeeding employees and may be unlawful indirect breastfeeding discrimination.

Further, under the new SDO, victimisation and instructions and pressure to discriminate will also constitute unlawful breastfeeding discrimination.

Under the SDO, employers may be vicariously liable for the discriminatory acts of their employees done in the course of their employment, unless they can show that they took reasonably practicable steps to prevent the employee from doing the acts. What this means for employers in practice will depend on the circumstances, but at a minimum, employers are advised to have appropriate policies in place to prevent discrimination and to provide periodic training to employees and managers on such policies.

Another important update in Hong Kong is that the Employment and Retirement Schemes Legislation (Offsetting Arrangement) (Amendment) Bill 2022 was finally passed in June last year, after years of consultation and debate. The bill abolishes the right for employers to use their mandatory contributions under the Mandatory Provident Fund (MPF) system to offset statutory severance and long service payment payable to employees. The abolition of the offsetting arrangement will take effect the transition date, which has not yet been appointed. After the transition date, employers can no longer use the accrued benefits derived from their mandatory MPF contributions to offset employee's statutory severance or long service payment, but there will be grandfathering arrangements to reduce the financial impact for employers. The statutory severance or long service payment of employees who were already employed before the transition date will be split into two portions – the pre-transition portion relating to employment before the transition date and the post-transition portion relating to the employment from the transition date. Employers can continue to use the accrued

benefits derived from their MPF contributions to offset any pre-transition portion of statutory severance or long service, but cannot offset against any post-transition portion. In any event, the maximum amount of statutory severance or long service payment is still capped at \$390,000, so if an employee's total statutory severance / long service payment exceeds HK\$390,000 (approx. USD50,000), the amount in excess of the cap will be deducted from the post-transition portion.



05

India

In India, many companies are facing challenges in the “post-pandemic” era. Moonlighting is one of the challenges that IT firms are now experiencing and struggling to handle, and we are also witnessing massive layoffs in the global BigTech companies. These challenges have many implications that employers can learn and make use of for their employment practices and employee management in the post-pandemic era.

Moonlighting

In the wake of the “post-pandemic” era, whilst it seems that the ‘work from home’ trend is here to stay, companies are abuzz with issues stemming from this new working environment. One of the issues that has emerged as a key challenge - spurred in part by the socioeconomic necessities caused by the pandemic - is “moonlighting” i.e., employees taking up dual or multiple employments especially in the information technology, software development, marketing, human resources, and operations sectors. Though moonlighting as a concept is not alien to India (especially in the unskilled sector), it was only in the latter half of 2022 that it came under scrutiny when a leading IT firm discovered a number of its employees were taking up dual employment.

Indian organisations largely, have an expectation of exclusive employment for myriad reasons ranging from loyalty and efficiency to data security and competition. As a result, this practice has triggered strong reactions from Indian IT sector. Leading IT companies have moved to take disciplinary actions against employees who were found to be moonlighting. On the other hand, some companies have lent support to their moonlighting employees subject of course to transparency and necessary approvals.

At present, the legal position in India is not very clear – with Indian law neither expressly permitting nor prohibiting moonlighting in the white-collar sector. In the absence of an explicit regulation on moonlighting, the employment contract between an employer and employee becomes determinative. Accordingly, employers seeking to curtail moonlighting will need to

ensure that their employment contracts are watertight and explicitly prohibit parallel employment and also include detailed provisions around conflict of interest, confidentiality, non-compete, non-solicitation and protection of intellectual property.

How the front runners in the business address this issue (i.e., whether they choose to prohibit and/or regulate, or alternatively adopt a more laissez-faire approach till the business and operations are not impacted) will be interesting to watch.

Big-ticket layoffs

In line with global trends and as a domino effect of the global BigTech cost cutting agenda, India witnessed massive layoffs last year. As of December 2022, 18,000 employees were laid-off by around more than 50 Indian start-ups – many of which were, or were poised to be, unicorns. The sectors which saw the most layoffs were edtech, social media, ecommerce and other consumer services companies. This has mostly come as a result of a decline in business for these organisations in the “post-pandemic” era (for instance reopening of schools wreaked havoc on the edtech companies which had modelled their business around online classes), over-hiring during the pandemic and most importantly an overall liquidity crunch with the onset of a “funding winter” for the industry.

In terms of the regulatory position, whilst retrenchments are highly regulated in the blue-collar sector, this is not the case for white collar employees where the termination of employments is governed largely by contractual arrangements. Whilst Indian courts have found certain “white-collar” employees such as IT professionals to fall within the ambit of blue-collar employees, the judicial precedents in this regard are not very well settled and vary on a case to case basis.

As a result, in India, barring cases of gross misconduct, consensual separation is the norm in order to mitigate the possibility of any future claims by disgruntled employees. A consensual separation essentially involves the employer agreeing upon a ‘termination package’ with the

employee, whereby the employee is paid a lump sum termination amount (which is typically something more than the employee's statutory and contractual entitlement) as full and final settlement in return of the employee consenting to the termination, waiving all future claims against the employer, agreeing to be bound by confidentiality etc. For instance, a leading edtech unicorn offered a fast-track full-and-final settlement to its retrenched employees. The employee exit package also included extended medical insurance coverage for employees and their family members and outplacement services led by some of the industry's finest recruitment specialists. Another edtech start-up offered severance pay equivalent to the employees' respective notice periods with additional 2 months' salaries, an accelerated one year vesting period for stock options, medical insurance coverage for an additional one year along with dedicated placement and career support. However, it is interesting to note that as per recent newspaper reports, following a complaint from an employee welfare organisation, a notice has been issued by the local labour authority to a multinational tech company, in relation to its voluntary separation program offered to employees in November 2022. It remains to be seen how this will pan out and whether it may have any impact on the consensual separation route typically adopted by employers.

Stunted implementation of the new consolidated regime

In 2019 and 2020, the Indian parliament had passed four new labour codes (which consolidate the existing plethora of laws relating to industrial relations, wages, social security and safety). The expectation was that these codes would be implemented by early 2021. However, the roll-out of these Codes has been delayed for almost two years now on account of delay by the state governments to formulate detailed rules and regulations under the codes and stiff opposition from the trade unions who view these codes as being "anti-workmen". One of the main contentions of the trade unions has been the ability of employers with up to 300 workers (which was earlier limited to 100 workers) to execute layoffs, retrenchment and closure without government permission. It remains to be seen if the central government will be able to build consensus and bring the codes to fruition soon since there is concern that if the codes are not implemented by the first half of this year, they may be put on the backburner again because of the general elections in India next year.

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06

Indonesia

On 30 December 2022, the Government of Indonesia (**GOI**) passed Government Regulation in-lieu of Law No.2 of 2022 on Job Creation (**Emergency Regulation**). The Emergency Regulation replaces Law No.11 of 2020 on Job Creation (locally known as the **Omnibus Law**), which was the subject of much controversy ever since it came into force on 2 November 2020. The controversy had many bases, including that the Omnibus Law ambitiously attempted to revise over 70 laws, including many key provisions of Law No.13 of 2003 on Employment (the **Employment Law**).

Background to the Emergency Regulation

On 25 November 2021, the Indonesian Constitutional Court (**Constitutional Court**) declared the Omnibus Law “conditionally unconstitutional”. The Constitutional Court further declared that:

- the law-making procedure needs to be amended to provide for an “omnibus law” methodology (so that one law can amend many laws) and the Omnibus Law must be corrected by ensuring meaningful public participation, all within two years of the Constitutional Court’s ruling (i.e., by 25 November 2023);
- failure by the lawmakers to make such amendments and corrections would cause the Omnibus Law to become permanently unconstitutional and therefore have no binding force, causing the laws that were revoked or amended under the Omnibus Law to be automatically reinstated;
- the lawmakers are not permitted to issue any new laws in relation to the Omnibus Law; and
- all “strategic and significant-impact actions/policies” in relation to the Omnibus Law are to be suspended.

Given the need for an urgent response to the Constitutional Court’s two-year deadline to make the required amendments and corrections to the Omnibus Law and law-making procedure law (and the potential

economic disaster if the Omnibus Law were to become permanently unconstitutional), the GOI issued the Emergency Regulation. Immediately following its issuance, public protests erupted from various sectors, including legal practitioners who have criticised the GOI’s apparent refusal to respect the Constitutional Court’s ruling.

However, the GOI maintains that there was in fact an emergency to justify the Emergency Regulation’s issuance, since there would likely be an economic crisis if the Omnibus Law were to become permanently unconstitutional. The GOI has argued that if it had followed the normal course of law-making, the process for the Indonesian Parliament (**DPR**) to approve a replacement of the Omnibus Law (satisfying the Constitutional Court’s requirements) would have exceeded the two-year deadline, potentially plunging the country into economic uncertainty and chaos.

Employment law under the Emergency Regulation

Most of the amendments to the Employment Law that are set out in the Emergency Regulation are the same as the amendments introduced under the Omnibus Law. However, one of the most significant employment-related amendments in the Emergency Regulation now permits the government to limit the scope of work that a company can outsource.

Before the Emergency Regulation was issued, the Omnibus Law had lifted the outsourcing restrictions, thereby enabling a company to outsource all or part of a company’s employment requirements. But before the Omnibus Law came into force in November 2020, the outsourcing rules were quite strict. Before November 2020, the Employment Law restricted outsourcing to only a part of a company’s activities.

Under the Emergency Regulation, however, a company may only engage another company to perform part of its work by way of an outsourcing agreement. Which “part” of a company’s work can be outsourced is still unknown and we will need to await the

implementing government restriction to understand the extent of the new limitation.

It would be prudent for any company currently contemplating outsourcing any of its activities, to wait until the new implementing government regulation has been issued to clarify the outsourcing limitations' scope. If a company has already entered into outsourcing arrangements for any of its activities, the company should contemplate the possibility that it may be required to amend such arrangements to comply with the future implementing regulation.

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07

Japan

There are three key developments in Japanese employment law to note:

- enhancements of the childcare and family care leave;
- employers' new obligations with respect to power harassment; and
- changes to the calculation of overtime work premiums.

These amendments require employers to take necessary measures to update their internal policies and employment practices to comply with the new regulations.

Changes to childcare and family care leave

One of the key developments in employment law is the changes to the childcare and family care regulations. The amendments to the “Act on Childcare Leave, Family Care Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members” (**Act**) took effect in 2022.

Under the amended Act, a new type of childcare leave, known as “Childcare Leave at Birth” was introduced. This new type of leave, which is essentially the Japanese version of “paternity leave”, allows employees (those who do not give birth) to take up to 4 weeks of leave, in 2 installments, within the first 8 weeks after birth. Employers are not required to pay salary during Childcare Leave at Birth; however, a special benefit which covers around two-thirds of the employee's salary is provided through the statutory employment insurance.

In addition to the introduction of Child Care Leave at Birth, some requirements relating to the entitlements of childcare leave and family care leave were relaxed, as described below:

- the requirement that fixed-term employees must have been employed for at least one year to become eligible has been removed (however, this requirement can be modified with a labor management agreement).
- childcare leave in relation to a child up to the age of 1 can now be taken in up to 2 installments.

- childcare leave in relation to a child aged 1 year old or older can now be reacquired in special circumstances even after the first childcare leave ended.

Finally, under the new Act, in an effort to encourage the taking of childcare leave, employers are now required to take at least one of the following measures:

- conduct training sessions regarding employee rights on childcare leave;
- set up a consultation system whereby employees are able to learn about their rights on childcare leave;
- collect and provide information to its employees on case studies of other employees taking childcare leave;
- notify employees of the company's system and policies in place for taking childcare leave

HR personnel will be required to fully understand the changes listed above to appropriately conduct the necessary measures and respond to its employees' requests for various types of leave. Additionally, employers will be required to update their internal policies regarding childcare leave and family care leave.

New obligations related to “power harassment”

Another important change to Japanese employment law in 2022 are the changes to the rules related to “power harassment”. Power harassment is essentially “workplace bullying”, and we have been witnessing an increase in the number of power harassment complaints from employees in Japan in recent years.

Under the “Act on Comprehensive Promotion of Labor Measures”, “power harassment” is defined as “any behavior that is based on dominant relationships in the workplace and exceeding the scope necessary and reasonable in the course of business which damages the work environment of the employer's workers”. According to the guidelines published by the government, power harassment includes behaviours such as: (i) physical abuse; (ii) mental abuse; (iii) separation from colleagues; (iv) excessive demands; (v) insufficient

demands; and (vi) invasion into private matters.

Starting from April 2022, all employers, regardless of their size, are required to take the following measures against power harassment:

- explicitly define “power harassment” in their internal policies and make clear that power harassment is not acceptable, and make employees aware of such policies; and stipulate in internal policies that power harassment will be treated seriously and make employees aware of such consequence;
- establish a system enabling employees to report power harassment issues and make employees aware of the system; and ensure that the person in charge of the reports is able to take appropriate action with regard to any harassment claims;
- promptly and accurately confirm any facts surrounding any harassment claims raised; take appropriate measures with regard to the harassed employee;
- after conducting fact-finding, take appropriate measures with regard to the harasser; and take measures to prevent any reoccurrence of such harassment; and
- take measures to protect the privacy of any person who reported harassment; explicitly state in internal policies that disadvantageous treatment such as termination against those who reported any harassment, cooperated with the fact-finding process, or used services related to harassment provided by the Labor Bureau is prohibited; and make employees aware of such prohibitions.

In response to these new rules, companies would be required to revise their work rules or other internal policies (including whistleblowing policies and procedures). Many companies would also find it useful to conduct power harassment training to their employees (especially managers) to prevent power harassment and to respond appropriately when power harassment is reported.

Increase in premiums for overtime work

The statutory overtime premiums for overtime work have been increased in Japan. Previously, the Labor Standards Act (*LSA*) required employers to pay overtime allowance with a 25% premium. However, with the recent changes to the LSA, the premiums have been increased to 50% for any overtime work done in excess of 60 hours per month (premiums for overtime work up to 60 hours in a month will remain the same, at 25%). Such changes have already been applied to large companies, but as of April 2023, all companies will be subject to the new premiums.

Companies will be required to amend their work rules or salary regulations to reflect this change and must make sure that their employees’ salaries are paid in accordance with these new rules.

Vanguard Lawyers Tokyo; Akiko Yamakawa, Hiroshi Yabunaka



08

South Korea

On 10 May 2022, the South Korean people elected a new president. In contrast to the former administration, which was very supportive of employee and labour union rights, new President Yoon Seok-Yeol and his party have announced plans to introduce more business-friendly initiatives with respect to labour and employment laws and their enforcement.

Possible changes to overtime regulations

One of the business-friendly initiatives the new administration is contemplating is to provide flexibility with respect to overtime regulations. Korea currently operates a 52-hour work week system, out of which 40 are standard working hours and 12 hours fall under the statutory cap for weekly overtime work. In addition, the new administration is discussing changing the period for calculating overtime restrictions from one week to a longer period (e.g., one month). If implemented, we expect this change to allow more flexibility on managing overtime work.

Objections by labour organisations

President Yoon has also emphasized that he will strictly enforce the rule of law between labour and management. In connection with this, in November 2022, the Cargo Truckers Solidarity Union, under the wing of the militant labour umbrella Korean Confederation of Trade Unions (*KCTU*), launched a nationwide strike, urging the government to meet its demand to make minimum freight rates permanent to improve their working conditions. As the strike entered its sixth day, President Yoon issued an executive order for striking cement-field cargo truck drivers to return to work. He also specifically denounced any attack by strikers on their fellow truckers refusing to participate in the walkout as an “unacceptable criminal behavior,” stating, “I will firmly establish the rule of law between labour and management during my tenure. I’ll never compromise with illegalities. Responsibility for illegal acts will be strictly pursued to the end.”

This stance of dealing with labour unions represents a significant departure from his predecessor and may be a sign of his stance going forward with respect to labour strikes that have the potential to impact the national economy.

Notwithstanding the above, as various labour organizations have objected to President Yoon’s announced plans and given the reality that President Yoon’s party occupies only a minority in the National Assembly, we will have to wait and see how much change President Yoon is able to make in reality.

What is next?

Korea still remains a relatively employee-friendly employment jurisdiction and failure to comply with Korean employment laws can often result in criminal liability on the company and its representative. The new administration has also stated that it will enforce the basic labour law principles, such as the 52 hour work week, payment of overtime allowances, among other things considering the ongoing criticism his administration has received from the labour side. Therefore, Korean employers should continue to be careful to fully evaluate candidates before hiring them and complying with Korean employment laws.

Kim & Chang: Matthew Jones and Cho Beom Kon



09 Malaysia

After a period of some uncertainty, the amendments made to the Employment Act 1955 (*EA*) over the course of 2021 and 2022 finally took effect on 1 January 2023. The amendments contained some of the most drastic changes made to Malaysian employment laws to date.

Scope of Employment Act 1955

While the EA had previously adopted a monetary threshold among other factors to determine its applicability to certain individuals, that monetary threshold has been removed. The EA now applies to “any person who has entered into a contract of service.” This change to the definition means that all employees who are engaged by way of an employment contract are now covered by the EA. However, the EA also sets out provisions that only apply to a certain category of employees. Under the EA, employees who earn a monthly wage of RM4,000 (approx. USD 900) or less per month (and some other types of employees specified in the EA) are deemed non-exempt employees. Some regulations are only applicable to these non-exempt employees such as: (i) overtime payments for work on rest days/public holidays; (ii) overtime payments for work exceeding normal work hours; (iii) allowance for shift-based work; and (iv) termination/lay-off benefits.

Amendments to the EA

With the widening of the scope of the EA, employers are now required to ensure compliance with the EA for all of its employees. This includes obligations that have always existed under the EA as well as new provisions introduced through amendments to the EA over the course of 2021 and 2022.

Key obligations on and issues for employers under the amended EA include the following:

- increased maternity leave entitlement from 60 days to 98 days;
- introduction of 7 days paternity leave;
- maximum working hours per week has been reduced from 48 hours to 45 hours;
- the number of hours an employee can work in a day has been increased to 12 hours;
- overtime hours must be limited to 104 hours per month;
- with exceptions expressly permitted under the EA, any deductions of wages must be made with the consent of the Director General of Labour;
- statutory minimum annual leave entitlement is now applicable to all employees;
- statutory minimum sick leave entitlement is now applicable to all employees;
- employees can apply for flexible work arrangements – though the employer may reject such applications with reasons;
- the Director General of Labour became entitled to hear and make decisions on complaints of discrimination in the workplace;
- prohibition of “forced labour” is now an offence embodied in the EA with penalties of fines, imprisonment or both;
- approval from the Director General of Labour is required before an employer hires foreign employees in addition to other relevant approvals and requirements;
- when receiving labour from a third party who supplies its employees, a contract must be concluded with the third party; and
- obligation to raise awareness of employees on sexual harassment.

Although the amendments to the EA are now effective and employers are expected to be compliant with all obligations under the new EA, there are still some areas of uncertainty. For example:

- it remains unclear whether the Director General of Labour can issue “orders” in relation to discrimination disputes;
- there is also a question as to whether a position for an expatriate also requires the approval of the Director General of Labour when this kind of position already requires necessary approvals from other relevant authorities and regulators; and

- the definition of forced labour also seems quite wide and employers need to be cautious when they require their employees to stay back in the workplace to complete their tasks. This in theory could potentially be considered “forced labour”.

In any case, while there are still some uncertainties with respect to some of the provisions, employers are required to revisit their employee handbooks and internal policies and ensure that they are in compliance with the amended EA.

*Zaid Ibrahim & Co. (a member of ZICO Law) -
Advocates & Solicitors: Yong Hon Cheong*



10

Philippines

The gradual reopening of the Philippine economy in 2022 brought the promise of a better year. However, with global inflation, aggravated by the effects of the Ukraine war, much of the optimism has been dampened. The proliferation of the new Omicron variant, threatening a surge of Covid-19 in different parts of the world including the Philippines only deepened the anxiety amongst the general public. Towards the last quarter of the year, the looming threat of a global recession has precipitated an increase in the number of queries relating to company reorganizations and possible implementation of redundancy programs in 2023.

There were several developments in the field of employment law in the Philippines in 2022. With the Covid-19 pandemic settling down and workers returning to onsite work, the Philippines continued to transition and adapt to the new normal with policies that benefitted employees and employers alike.

In 2023, we look forward to the steps that the new administration of Ferdinand Marcos, Jr., who took his oath of office as the 17th President of the Philippines in June 2022, will take to spur a full recovery of the Philippine economy.

Regulation changes on working from home arrangements

Although Covid-19 restrictions were already being lifted, many employers still opted to continue their remote work arrangements, allowing employees to work from home on a full-time basis or adopting a hybrid work setup where employees report to work onsite only on specific days of the week. This trend is likely to continue considering the benefits of remote or hybrid work setups where employers realize savings on operational expenses (e.g., electricity, water, and rent), while employees enjoy increased work-life balance. Because of the increased demand for hybrid work arrangements, even the Government has become flexible, particularly towards many PEZA (Philippine Economic Zone Authority) registered companies operating in the country. Thus, PEZA-registered companies that enjoy tax incentives only if they perform the qualified

services within the special economic zones have been allowed to transfer their registrations from the agency administering the special economic zones to the Board of Investments so that they are able to continue enjoying tax incentives even if the qualified services are performed by their employees outside the special economic zones.

For its part, the Department of Labor and Employment saw it fit to revise the Implementing Rules and Regulations of Republic Act No. 11165 or the Telecommuting Act (**Revised IRR**), to better protect the rights of employees who are permitted to telecommute or to “work from an alternative workplace with the use of telecommunications and/or computer technologies.” The term alternative workplace is now more clearly defined under the Revised IRR to refer to as “any location where work through the use of telecommunication and/or computer technology, is performed at a location away from the principal place of business of the employer, including but not limited to the employee’s residence, co-working spaces, or other spaces that allow for mobile working.” The mandatory contents of a telecommuting agreement between the employer and employee are also better specified under the Revised IRR. Furthermore, the distinction between work performed in the regular workplace and alternative workplace is removed as the Revised IRR specifies that “[w]ork performed in an alternative workplace shall be considered as work performed in the regular workplace of the employer.” As regards the hours worked by telecommuting employees, the Revised IRR now provides that “all time that an employee is required to be on duty, and all time that an employee is permitted or suffered to work in the alternative workplace shall be counted as hours worked.” Lastly, the Revised IRR clarifies that “[t]elecommuting employees are not considered field personnel except when their actual hours of work cannot be determined with reasonable certainty.”

Although there are certain benefits to telecommuting arrangements, there are also disadvantages prompting the filing of bills in Congress to try to address them. One of these

bills is Senate Bill No. 2475 or the Worker's Rest Law. As stated in its explanatory note, this bill was filed because "technology and work-from-home arrangements distort the idea of work and home from the point of view of the employees" and because of "advances in technology, employees are now virtually always at the beck and call of their employers." What is notable under this bill is that it imposes certain prohibitions on employers, with corresponding penalties for their violation, which include requiring employees to work and contacting them during their rest hours. House Bill No. 5620 also tries to address a downside of working from home arrangements, particularly the transfer of some of the costs from employers to employees. If this bill is passed, it would give telecommuting employees additional tax deductions from their taxable income and tax exemption for "allowances or other benefits granted by employers to their employees to cover expenses necessary for telecommuting."

Enhanced benefits for solo parents

Another significant development in 2022 is the passage of Republic Act No. 11861 or the Expanded Solo Parents Welfare Act (Act) which increases the benefits provided to solo parents. Aside from reiterating the prohibition of work discrimination against solo parents, the amendments provide that employers may enter into telecommuting programs with solo parents and that employers must give priority to solo parents in entering into such programs. The Act also reduces the required period of service from one year to six months in order to be eligible to avail of the seven-day parental leave. There is also an expansion of the categories of solo parents entitled to solo parent benefits. An employee whose spouse is detained for three months will now qualify as solo parent. The required period of legal separation, de facto separation, or abandonment from the other spouse in order to qualify as solo parent is now six months instead of one year. New categories of solo parent are:

- any relative within the fourth civil degree of consanguinity or affinity of the parent or legal guardian who assumes parental care and support of the child or children as a result of the death, abandonment, disappearance or absence of the parents or solo parent for at least six months; and
- a pregnant woman who provides sole parental care and support to her unborn child or children.

SyCipLaw: Leslie C. Dy, Emmar Benjoe B. Panahon and Aaron Daryl P. Marquez

- [s]pouse or any family member of an Overseas Filipino Worker (**OFW**), or the guardian of the child or children of an OFW;



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Singapore

There has been a discernible trend in Singapore of conferring greater rights on employees for some years now, which accelerated in 2019 when Singapore's Employment Act 1968 was amended to essentially cover all private-sector employees. We expect this trend to continue into 2023 and the years to come.

Discrimination and workplace equality

2022 already saw increased attention on discrimination-related matters, with specific initiatives, both in the public and private sectors, aimed at bolstering the rights of women and disabled persons in the workplace. In 2023, the key development to look out for would be the introduction of new anti-workplace discrimination legislation.

We expect this legislation to protect specific characteristics from discrimination, such as nationality, age, race, religion, disability, and likely gender. Specialist discrimination tribunals are also expected to be established. Once in force, employers will need to direct greater attention to interactions within the workplace – it will no longer suffice to just ensure that no discrimination happens at hiring and on termination of employment.

Increased scrutiny and enforcement

In tandem with growing employee protections, employers should also take note that enforcement and policing measures appear to be on the rise.

An increase in inspections by the Ministry of Manpower (*MOM*) further to its 'Workright' initiative has been noticed. Intended to raise awareness of employment rights (through educational campaigns and media publicity) and ensure compliance with the primary employment statutes, the MOM can, of its own accord or upon being contacted by a whistleblower, conduct 'Workright' inspections to identify any breaches of law or regulations by an employer, and require rectification or impose penalties.

The MOM has also stepped-up enforcement operations concerning workplace safety and health (WSH) beginning from September 2022,

in response to disturbingly high workplace fatalities and injuries (many in the construction sector, though the trend could also be seen across other industries) in 2022 as economic activity opened up post-pandemic. This increased scrutiny is expected to continue into 2023 and beyond. The MOM has already imposed harsher penalties where WSH lapses are found, and may now require company chief executives and directors to personally account for and be responsible for such lapses.

Gig economy workers

The Singapore Government has accepted recommendations to enhance the rights of gig workers (e.g. private hire drivers and food delivery riders). The stage is now set for the statutory recognition of a new interim class of gig economy workers – a class that sits in between the traditional classes of employees and independent contractors.

Legislation is not expected to be introduced until 2024, but employers in this sector should look out for announcements in this area in 2023 to prepare for the upcoming changes. What is already clear is that gig economy workers will receive work injury compensation protection, and a significant number of them will also receive Central Provident Fund contributions (Singapore's mutually-funded social security scheme) – rights that are presently only accorded to employees. Gig workers will also be able to be collectively represented under new or amended legislation.

Foreign employment

Immigration is a key feature of Singapore employment law, given that about a third of the workforce comprises foreign nationals. In 2022, Singapore's approach to foreign employment changed quite dramatically. In the past, qualifying salaries for S Passes (for mid-level skilled staff) and Employment Passes (for foreign professionals, managers and executives) would be periodically updated. Moving forward, the qualifying salaries will be benchmarked against the top 1/3 of local salaries in comparable positions and sectors. Therefore, foreign talent was expected to be better than

the average local talent, otherwise employers should look towards the local workforce.

A significant change will also take place from 1 September 2023 when new Employment Pass candidates must, in addition to meeting the qualifying salary, pass the new Complementarity Assessment (**COMPASS**) Framework. The COMPASS framework will assess both the individual (in terms of salary level, qualifications, and skills) and the prospective employer (in terms of nationality diversity, local employment support, and activities). The new framework brings clarity to the assessment process, but also signals the expectation on employers to support local employment and strategic economic priorities, amongst other things.

High level talent and executives should also take note that Singapore's new Overseas Networks & Expertise (**ONE**) Pass was launched on 1 January 2023. Designed for the top talent across multiple sectors, the ONE Pass does not need to be renewed as often, and will critically also afford holders the flexibility of working for multiple companies in Singapore at any one time, in addition to allowing the pass holder's partner to work as well with a letter of consent and without needing a work pass – flexibility not afforded by most other passes.

TSMP Law Corporation: Ian Lim and Nicholas Ngo



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Taiwan

In Taiwan, there have been two recent key developments in employment law: the expansion of the labour insurance coverage and the recent decision of the Taipei High Administrative Court with respect to gig workers.

The Labor Occupational Accident Insurance and Protection Act

The Labor Occupational Accident Insurance and Protection Act (**Act**) was promulgated and took effect on 1 May 2022. The Act is a more complete regulation for occupational accident insurance and expands the scope of coverage of labour insurance.

Previously, only employers with more than five employees were required to enroll employees in the government's labour insurance. After the Act, all employers, regardless of the number of employees they employ, are required to insure all of their employees aged 15 or above under labour occupational accident insurance. As before, the employer shall pay the insurance premium in full.

If an employer fails to participate in labour occupational accident insurance for its employees, the employer will face a fine of NT 20,000 - 100,000 (approx. USD 650 - 3300) and may be fined for each such violation found. The competent authority will also publish the name of the employer and the name of the representative of such employer as a "name and shame".

Relationship between a food delivery platform and its delivery drivers

As in many other places, Taiwan has seen the rise of food delivery platforms. Although food delivery platforms typically argue that food delivery drivers are merely independent contractors, the Ministry of Labor (the labour competent authority in Taiwan), has previously taken the view that food delivery drivers should be considered to be employees of the food delivery platform. Recently, the Taipei High Administrative Court affirmed the view of the Ministry of Labor that the contract between a food delivery platform and its delivery drivers can be considered as an employment relationship if it has the following characteristics:

- a personal subordination relationship exists between the food delivery platform and its delivery drivers (i.e., a delivery driver must follow detailed specifications of the food delivery platform and cannot make independent decisions on how they should perform the service);
- an economic subordination relationship exists between the food delivery platform and its delivery drivers (i.e., the food delivery platform unilaterally calculates the revenue and bonus of the delivery driver, and the delivery driver does not need to bear any financial risks);
- an organizational subordination relationship exists between the food delivery platform and its delivery drivers (i.e., when delivering food, the delivery driver solely represents the food delivery platform brand instead of himself or herself. The delivery driver is also required to work with other personnel of the food delivery platform to complete the delivery work); and
- delivery drivers are required to personally fulfill the delivery services (i.e. the service contract mainly asks for the provision of labour services from the delivery drivers, and the delivery driver is required to personally fulfill the delivery services and cannot delegate the work to others).

Based on the court ruling, a food delivery platform with the above-mentioned characteristics should be classified as an employer under Taiwan labour laws and relevant regulations. For example, a delivery platform shall participate in labour insurance, labour occupational accident insurance, and national health insurance for its delivery drivers, allocate certain percentages of employee salary for the labour pension fund, grant statutory leave, and comply with working hour regulations. Service contracts must also follow labour regulations' requirements for termination and payment of severance. These developments will have key implications not only for food delivery platforms, but also other platforms in the growing gig economy.

LCS & Partners: Yu Kai-Hua



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Thailand

Although the impact of the Covid-19 pandemic gradually subsided over the course of 2022 and most of the workforce in Thailand have now returned to the workplace, Thai labour law remained largely unchanged in 2022. Despite the absence of any material legislative developments in Thai labour law in the past twelve months (apart from the abortive attempt to amend the law in relation to working from home), a common issue that continues to receive attention is unfair termination.

Deconstructing unfair termination

Partly as a result of Covid-19, 2022 saw far more instances of companies dismissing employees in order to save costs or to restructure, which has led to the terminated employees (i.e., employees who did not voluntarily sign a “separation agreement” and accept a mutually agreed payment in relation to the termination of their employment) bringing claims in the Thai Labour Court on the ground of unfair termination.

Although employers have a right to terminate employees under Thai law with the obligation to pay severance (a statutory amount based on the employee’s aggregate months of service), what remains unclear and a significant source of uncertainty is what constitutes “unfair” termination and the quantum of additional compensatory damages which may be awarded to an unfairly terminated employee.

Termination for cause vs without cause

Termination under Thai law can be either “for cause” or “without cause”.

Termination for cause is where termination is based on one or more of the statutory grounds, including the employee willfully disobeying or habitually neglecting lawful commands of the employer, absenting himself or herself from service, being guilty of gross misconduct (Section 583 of the Civil and Commercial Code), performing duties dishonestly or intentionally committing a criminal offence against the employer, willfully causing damage or negligently causing serious damage to the employer, violating work regulations or lawful

orders of the employer or being sentenced to imprisonment by a final court judgment (Section 119 of the Labour Protection Act).

In case of termination for cause, the employer is required by law to only pay the employee wages until his or her last working day and accrued but unused annual leave. In other words, the employer is not required to pay severance or payment in lieu of notice of termination.

In the case of termination without cause, where the termination of an employee in Thailand does not fall within any of the above statutory grounds, the employer is required to make all of the above payments to the terminated employee (i.e. salaries until the last working day, severance payment, payment in lieu of notice, and salaries for accrued but unused annual leave).

It should be noted that the concept of termination “for cause” under Thai law is narrow relative to what may be considered “cause” in other jurisdictions. For example, poor performance of an employee in itself is generally not a basis for terminating an employee in Thailand “for cause,” and thus the employer would be required to make all the payments set out above.

Compensatory damages for unfair termination

Section 49 of the Act on Establishment of Labour Courts and Labour Court Procedures, B.E. 2522, empowers the Labour Court to determine that a termination is unfair and to order the employer to pay compensatory damages to the employee for unfair termination, taking into account the employee’s age, service period, hardship and reason for dismissal.

Such compensatory damages are in addition to the amounts an employer must pay by law to employees who are terminated without cause (as set out above).

When is a termination without cause “unfair”?

What constitutes unfair in the context of a termination without cause remains unclear under Thai law. For example, if an employer dismisses an employee on the basis that the employer deems it necessary to prevent further deterioration of its financial condition (but the employer has not yet suffered financial losses), Thai courts have typically regarded termination in such circumstances as “unfair”. On the other hand, there are court precedents that indicate that termination of an employee in such circumstances may not necessarily be unfair if the employer has other valid reasons for the termination and the employer has followed a fair and transparent procedure before dismissal.

Can termination for cause be “unfair”?

Typically, termination for cause under Thai law will preclude the terminated employee from claiming damages for unfair dismissal, assuming the Court agrees that the employee was terminated for cause. However, this is not always the case as a termination for cause may be regarded as “unfair” if the employer has not complied with the required procedures for terminating an employee for “cause”. For example, where an employer wishes to terminate an employee for cause, it must specify the facts which are the cause of termination in a letter of termination of employment or inform the employee of the “cause” of termination at the time of termination.

What is the exposure in respect of unfair dismissal claims?

In our experience, the Thai Labour Court typically grants compensation for unfair termination based on the number of years of service by the employee at the rate of one month’s wages per one year of service. For example, if the employee has been employed for three years before termination, a “rule of thumb” is that the Labour Court would generally order three months’ wages as compensatory damages for unfair termination. However, this is just a “rule of thumb” and the lack of legislative guidance and/or limitations continues to leave room for substantially larger claims by employees in the Labour Court and/or in negotiating exit packages.

Hunton Andrews Kurth: Stephen John Bennett and Wipanan Prasompluem



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Vietnam

It has been a relatively quiet year for the employment sector in Vietnam, in terms of both legal and market practice developments. However, there have been [two developments][a development] of note in relation to [minimum wages and] data protection.

Increase of the minimum wages

There are two kinds of minimum wages in Vietnam.

The first type of minimum wage is Regional Minimum Wage used for employees in all non-State enterprises. There are 4 different levels of Regional Minimum Wage in Vietnam applicable to four groups of administrative zones, with the highest level applicable to urban zones in Hanoi and Ho Chi Minh city, and the lowest level applicable to the most rural areas in Vietnam. After a couple of delays since 2019 due to the Covid-19 pandemic, the Government has finally issued a new Decree 65/2022/ND-CP dated 12 June 2022 increasing the Regional Minimum Wage levels from VND 3,070,000 - 4,420,000 (approx. USD 133 - 192) a month to VND 3,250,000 - 4,680,000 (approx. USD 141 - 203) a month, applicable from 1 July 2022.

The second type of minimum wage is the Common Minimum Wage which is used to calculate salaries for employees working in State sector but is also used to calculate threshold for mandatory social insurance contribution for all enterprises (i.e., the maximum contribution is 20 times the minimum wage). Like for the Regional Minimum Wage, after discussions, the National Assembly decided to increase Common Minimum Wage in Vietnam from VND 1,490,000 (approx. USD 65) a month to VND 1,800,000 (approx. USD 78) a month as of 1 July 2023. This is the largest Common Minimum Wage increase in Vietnam since 2004. This increase will need to be formalised by the Government's decree which is expected to be issued soon.

Draft decree on personal data protection

As mentioned in our 2022 bulletin, the Government of Vietnam has been in the process of drafting a decree on personal data protection which is the first ever overarching regulation on personal data in Vietnam. Unfortunately, after rounds of internal discussions and collection of public opinions, the Government has not been able to officially issue such regulations. It is still uncertain on when such regulations will be finally issued.

Based on the latest draft, this decree would include certain detailed guidance on the forms and substance of "consent" provided by a data subject required for the collection of his or her personal data as well as requirements/conditions for the cross-border transfer of personal data of Vietnamese citizens to foreign countries. As such, it may (once implemented) affect the management of employees and their personal data by multinational companies in Vietnam.



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