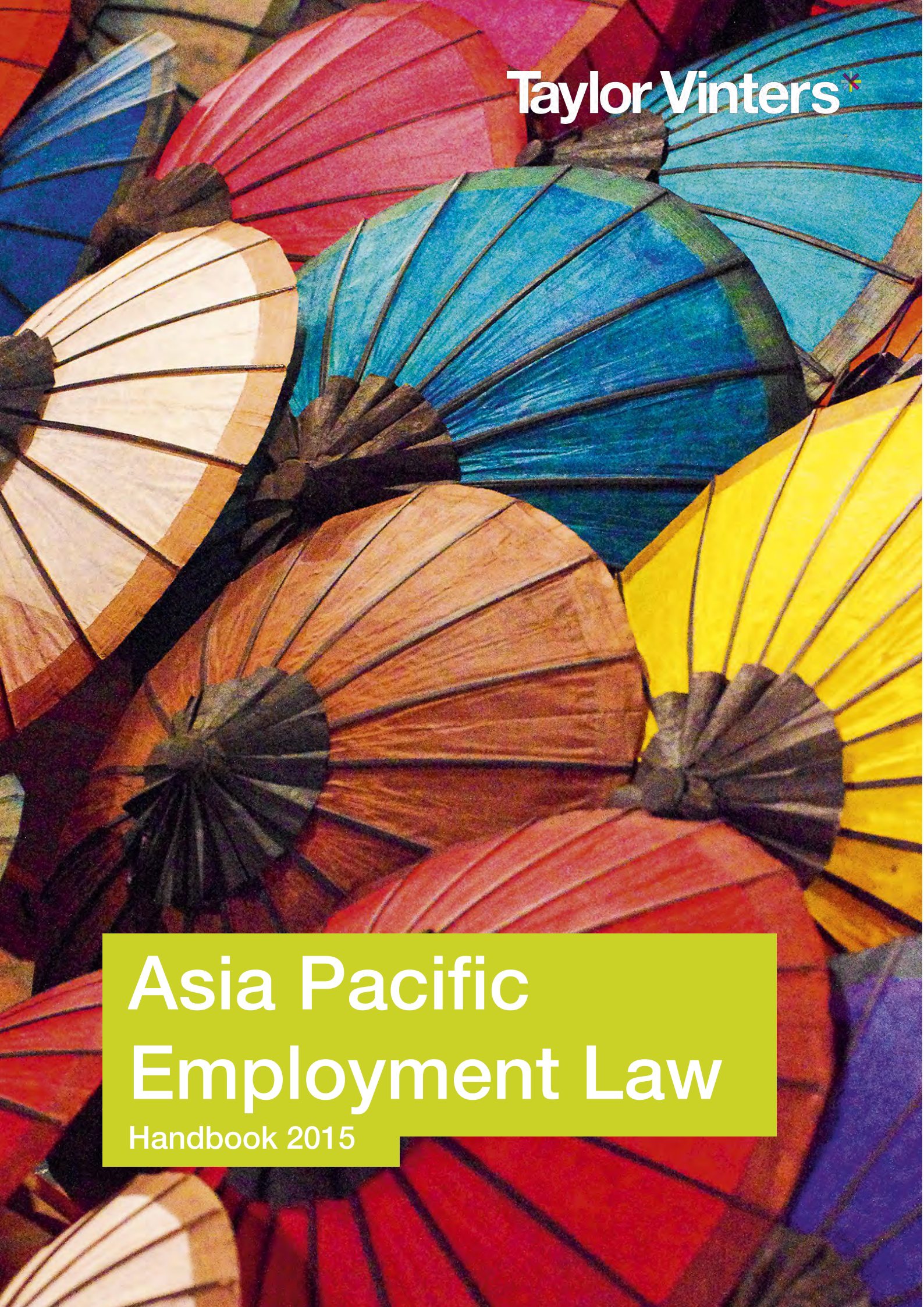

Taylor Vinters

Asia Pacific Employment Law

Handbook 2015

Thank you for choosing to use the Taylor Vinters Asia Pacific Employment Law Handbook 2015.

Inside you will find a useful overview of the key employment laws in 15 jurisdictions in the Asia Pacific region.

Employment laws differ greatly across the various jurisdictions in Asia Pacific, and what can be sensible and legal in one country can be impractical or illegal in another. Even countries sharing a common heritage, such as Singapore and Malaysia, have developed different approaches to regulating employees and labour matters. We recognise that it can be time-consuming and often confusing to manage employees across the Asia Pacific region, and it is hoped that this handbook offers a helpful starting point when considering employment law issues in the region.

The Taylor Vinters' team of dedicated employment lawyers is also on-hand to assist you to resolve any employment law issues you may have. We have our roots in the innovation space, founding our business 30 years ago in Cambridge, UK, Europe's leading technological hub. Taylor Vinters continues to be an innovative firm, and combines legal and commercial knowledge with an entrepreneurial approach.

Our Asia Pacific business is managed out of our Singapore hub office, and the Singapore team acts as a central point of coordination and advice. Our lawyers have extensive experience dealing with HR issues in the Asia Pacific region, and we work hard to ensure our clients receive clear, commercial and cost-effective advice for any issue, in any jurisdiction. Many of our lawyers have in-house experience and know, first-hand, the practical, legal and commercial issues facing companies operating in Asia Pacific.

Our team is supplemented by our relationships with hand-picked "local counsel" from highly rated law firms, whom we instruct and manage to provide global legal advice to our clients. We thank our local counsel for their high-quality contributions to this handbook.

Please note that the information contained in this handbook is correct as at summer 2015, though laws are subject to change and the information is not legal advice. We suggest you obtain formal legal advice before relying on any aspect of this handbook.

Taylor Vinters aims to make your life easier, and we hope that this handbook assists you in understanding and managing employment law issues in the Asia Pacific region. We would be delighted to help should you require any further assistance.

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The employment team at Taylor Vinters works hard to simplify matters for its clients. Using its International Counsel model, Taylor Vinters offers:

A single point of contact: Clients have access to a lawyer in their time-zone who understands their business, and they will only need to explain an issue once. Taylor Vinters will manage multi-jurisdictional issues and present consolidated advice that meets a client's business needs.

Assumption of responsibility: Taylor Vinters takes responsibility for matters to ensure that all work is done efficiently and to a high standard. The firm works closely with local counsel, and will choose the best lawyers to deal with a particular issue.

Experience: Taylor Vinters has wide-ranging experience in international employment matters and can offer valuable insights and analysis to HR managers.

Cost control and fee management: Our experience means we ask local counsel only the right questions, and we know what reasonable costs are for a matter. Furthermore, the volume of international work Taylor Vinters undertakes means we are an important account to our partner firms, unlocking favourable rates and response times. Clients also have just one billing and fee information point – Taylor Vinters.

Flexibility: Taylor Vinters will manage matters in whatever way works best for a client. We devote time to understanding what suits a particular client, and we constantly strive to offer innovative solutions to business needs.

Importantly, Taylor Vinters invests in understanding its clients' regional (and global) strategy and objectives. This involves getting to know a client's rules, policies and practices, its stance on matters such as severance levels and exits, what is important to it and what is not, its values and principles and the behaviours that it expects its employees to have, wherever they are.

Please do not hesitate to contact us if we can be of assistance.

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AUSTRALIA

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

This chapter does not discuss the law in relation to employees in the public sector.

1.1 Laws applicable to foreign nationals

Generally, Australia's statutory employment laws apply to foreign nationals working in Australia, regardless of the governing law of their employment contract or the location of their employer. However, the governing law of the contract probably has some effect on the remedies for breach of contract (including enforcement of post-termination restraints).

The federal Fair Work Act 2009 (Cth) (Fair Work Act) regulates the employment of almost all private sector employees throughout Australia. The main exception is some limited classes of employees in Western Australia: for example, employees of partnerships and sole traders. However, there is also state and territory legislation, which operate in conjunction with the Fair Work Act, such as discrimination, long service leave, workers' compensation, and work, health, and safety legislation.

Most state public sector employees are not covered by the Fair Work Act but by the employment legislation of the particular state. Industrial awards establish minimum terms and conditions for employees who are covered by them, and operate in conjunction with the statutory National Employment Standards (NES). Awards cover many things that can also be covered by employment contracts, including:

- Minimum rates of pay.
- Job classifications.
- Entitlements to overtime payments, shift loadings and penalty rates.

Modern awards are either industry-based (for example, the Banking, Finance and Insurance Award 2010), occupation-based (for example, the Clerks - Private Sector Award 2010) or sometimes both. It can sometimes be difficult to easily identify which modern award (or awards) applies to an employer and its employees.

The terms of a modern award will not apply to employees who have a guarantee of earnings (in the required form) above the relevant income threshold (that is, for the period 1 July 2015 to 30 June 2016, a base salary of A$136,700.00). This income threshold figure increases in July of each year.

1.2 Laws applicable to nationals working abroad

In some circumstances, various parts of the Fair Work Act (such as the NES, provisions about modern awards, minimum wages and unfair dismissal provisions) apply outside Australia to an Australian employer in relation to Australian-resident employees. Australian-resident employees include employees who are employed by an Australian employer, but work outside Australia.

Key issues in determining whether Australian laws continue to apply to an Australian employee working outside Australia include:

- Whether the employee remains an Australian resident.
- Where the contract of employment is made.
- The terms of the contract of employment.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

The primary categories of workers in Australia are:

- Employees.
- Independent contractors.
- Agency employees.

An employee is engaged directly by an employer to provide their personal labour to the employer. Independent contractors may be engaged personally or through their own company to provide services to a business generally to achieve a specified result. A court will use a number of factors to determine whether a worker is an employee or an independent contractor, including:

- Whether the contractor is truly conducting its own business (with a range of clients).
- The control exercised by the business over the worker.
- The mode of remuneration.
- The conditions of engagement.

Employees of an agency are employed by the agency to provide their personal services to another business. Absent any allegation of sham contracting (where an employer sets up an arrangement to disguise that a worker is actually their employee) the worker will typically be (and remain) the employee of the agency. The concept of dual employment (where an employee is simultaneously employed by two employers to do that same work) has been judicially determined to not exist in Australia. Generally, Australia's employment legislation applies to employees, not independent contractors. However, the Fair Work Act 2009 does include certain prohibitions on companies entering into "sham" independent contracting arrangements with employees.

2.2 Entitlement to statutory employment rights

Employees (including agency employees as employees of the agency) are entitled to a minimum rate of pay and minimum legislative entitlements under the National Employment Standards, including leave entitlements, notice of termination and redundancy pay. Employees may also be entitled to other benefits under industrial instruments (including modern awards) which include various penalties and loadings, for example, for working overtime or casually. Independent contractors cannot access these employee entitlements.

Under the superannuation legislation, employees are entitled to have their employer make superannuation contributions on their behalf (calculated as a percentage of their remuneration). In some cases, independent contractors (engaged personally, not through a company) may be considered a "deemed employee" for the purposes of superannuation guarantee legislation (that is, if they are engaged under a contract principally for their labour).

Certain classes of employees also have the right to make an unfair dismissal claim, whilst 'genuine' independent contractors do not (although they do have access to other statutory claims, including adverse action claims).

2.3 Time periods

In Australia, there is no statutory maximum time period that any category of work may be engaged for.

Generally speaking, however, the longer an independent contractor is engaged by the same business, the greater the risk that a court will find them to be an employee (entitled to the various employee entitlements noted above).

RECRUITMENT

3 Do any filings need to be made when employing people?

Generally, there is no requirement to make any filings when employing employees in Australia (although there are certain requirements that must be complied with in relation to formal apprenticeships).

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country?

4.1 Visa

Foreign nationals wanting to work in Australia must hold a valid visa permitting them to do so. The most commonly used visa is the Temporary Work (Skilled) visa (Subclass 457), which allows the visa holder to work in Australia for up to four years for their sponsoring employer (or, in some cases, an associated entity of the sponsor). Other visas, for example, working holiday visas, student visas, and business visitor visas, also allow employees to work in Australia for varying periods.

There is also a permanent employer nominated visa (Subclasses 186 and 187) option available if the applicant either:

- Undergoes a skills assessment and has at least three years' work experience (anywhere in the world) in their nominated occupation (the "Direct Entry Stream").
- Works in Australia on a Subclass 457 visa for their nominating employer for at least two years (the "Temporary Residence Transition Stream").

There are a few exemptions from the skills assessment requirement under the Direct Entry Stream. The main ones in practice are:

- Where the applicant does, or will, receive a salary at least equivalent to the ATO top individual tax bracket (currently A$180,001).
- Where the position is located in a "regional" area of Australia, in which case some additional criteria apply.

It is often easier to first apply for the Subclass 457 visa and then apply for the permanent visa after working for the nominating employer in Australia for two years. The main reasons for this include that fact that the Subclass 457 visa is quicker to obtain and is therefore the visa of preference for employers and most, if not all, applicants will meet the eligibility requirements for the permanent residence application at the end of the two-year period.

4.1.1 **Procedure for obtaining approval.** The Subclass 457 is the most commonly used visa for work purposes. Below is a brief outline of the application process. Applications are lodged online with the Department of Immigration and Citizenship (DIAC):

4.1.2 **Stage one: sponsorship approval.** To obtain sponsorship approval, a sponsor must be lawfully operating a business. Businesses can obtain sponsorship even if not yet operating in Australia, though slightly different requirements apply. Both onshore (Australian-established) and offshore (overseas established only) sponsor applicants are required to show that they are "lawfully and actively operating". Evidence may include:

- Company registration certificates or other documents showing that the business is legally established and registered; and
- Documents which show that the business is actively operating, such as annual reports for the most recent financial year, profit and loss statements and balance sheets, leases and tax returns.

If the business has not yet established operations in Australia, it can still apply for sponsorship but will need to provide a business plan containing information demonstrating a genuine and realistic commitment to establishing a business in Australia.

It will also need to provide evidence that it is actively operating, even though it may only be in "start-up" mode (for example, business bank account statements, evidence of employment of staff, lease of equipment and/or premises, and so on).

Onshore sponsors additionally need to demonstrate commitment to employing and training Australians. This is done by providing evidence that they meet one of two training benchmarks, namely:

- Evidence of expenditure on training equivalent to at least 1% of payroll; or
- Evidence of expenditure of at least 2% of payroll to an industry training fund.

Start-up businesses within the first 12 months of operation can meet the training requirements by providing an auditable plan addressing one of these two benchmarks.

Offshore sponsors do not need to meet the training requirements but must demonstrate that they need to nominate Subclass 457 visa holders, either to establish a branch or subsidiary of the business in Australia or to fulfil contractual obligations in Australia.

Sponsorship approval allows the sponsoring entity to nominate Subclass 457 visa holding employees for the duration of the approval. Start-up businesses within the first 12 months of operation will receive an approval for 12 months only. All other sponsorships will be granted for three years. However, DIAC will, upon grant of the sponsorship, specify the number of positions the sponsor may nominate under the sponsorship and the sponsorship will cease when all the positions have been filled.

4.1.3 **Stage two: nomination.** This stage involves the sponsor nominating the particular position to be filled by the proposed Subclass 457 visa holder. The nominated activity must correspond with an occupation on the list of approved occupations eligible for sponsorship under the Subclass 457 visa program. To match the position that needs to be filled with the corresponding occupation on the list of approved occupations, the employer needs to provide a copy of the signed employment contract and a position description.

The sponsor must also establish that the terms and conditions of employment provided to the employee are no less favourable than terms and conditions that would be provided to an Australian performing equivalent work (including payment of market salary rates). Additionally, the market salary rate (and therefore the Subclass 457 visa holder's nominated salary) must be at or above the Temporary Skilled Migration Income Threshold (TSMIT) which at the time of writing is A$53,900 exclusive of superannuation.

One important thing to note is Subclass 457 holders sponsored by onshore sponsors may be employed in an associated entity of the sponsoring business. This does not apply to Subclass 457 visa holders sponsored by offshore sponsors, who must be directly employed by the sponsor.

4.1.4 **Stage three: visa application.** This final stage of the process involves the nominated employee(s) providing personal information and documents to demonstrate that they have the skills and experience required to fill the nominated position, and that they are of good health and character. This will include copies of the employee's passport, CV and qualifications, and passports, birth, and marriage certificates for any accompanying family members.

The employee can be either inside or outside Australia when the application is lodged with the DIAC but cannot generally start work with the sponsoring employer until the application is approved. As the visas are issued electronically, visa holders do not need to obtain visa labels and can leave and enter Australia at any time while they hold the visa.

Family members included in the application receive their own visas that enable them to live in Australia, and contain unlimited work and study rights.

Subclass 457 visas can be renewed before they expire. However, the renewal process comprises a brand new application process and applicants must meet the eligibility requirements for the visa at the time they apply for the new visa. There is no limit on the number of Subclass 457 visas an overseas worker can hold. In addition:

- **Health checks.** Depending on country of origin, where they have lived over the last five years and the intended activity in Australia, the employee and accompanying family members may need to undergo medical examinations by an approved panel doctor;
- **Character checks.** The employee and accompanying family members are assessed against certain character requirements, and may be asked to provide police certificates for each country they have lived in for 12 months or more over the last 10 years since turning 16 if they have a criminal history;
- **Health insurance.** All Subclass 457 visa holders are required to maintain private health insurance for the duration of their stay in Australia, unless they are eligible for Medicare under a reciprocal healthcare arrangement with the country for which they hold a passport;

- **English language requirements.** The employee must meet criteria relating to English language proficiency. This requires testing unless the employee is exempt because:
    - They hold a UK, Canadian, USA, Irish or New Zealand passport; or
    - Their base salary will be higher than the DIAC threshold (currently A$96,400); or
    - They have studied for at least five consecutive years at an institution where English was the medium of instruction.

4.1.5 **Cost.** The cost of obtaining a visa varies greatly depending on the visa type and its duration. For a Subclass 457 visa, the application fees for all three stages is currently a minimum of A$1,600 for a single Subclass 457 applicant, with additional charges applying for each family member included in the application, and where the Subclass 457 applicant(s) are applying for subsequent visas. The fees change on a regular basis and are listed on DIAC's website (*https://www.immi.gov.au/fees-charges/visa-pricing-table.htm*).

4.1.6 **Time frame.** The length of time for obtaining a visa depends greatly on:

- The type of visa being applied for.
- The extent and accuracy of supporting documentation.
- The priority given to the application by DIAC.
- The number of similar applications lodged with DIAC at the time.

Processing times can range from a few days for working holiday visas to six months for permanent working visas. Standard processing times for each visa category are published on DIAC's website (*http://www.immi.gov.au/about/charters/client-services-charter/standards/2.1.htm*). The current advertised processing time for a Subclass 457 visa is up to three months.

4.1.7 **Sanctions.** Most Australian visas, including Subclass 457 visas, contain conditions with which the visa holder must comply. Failure to comply with a visa condition may lead to cancellation of that visa and possible issues in obtaining further Australian visas. The Subclass 457 visa requires the primary visa holder to work in Australia for their sponsoring employer (*Condition 8107*). If they wish to change employers, the new employer needs to hold or obtain sponsorship status with DIAC and submit a nomination application to transfer sponsorship of the Subclass 457 visa holder's visa to the new employer. Condition 8107 provides that a Subclass 457 visa holder will be in breach of the condition once they have not been employed with their sponsoring employer for more than 90 consecutive days. The Migration Act also contains a number of provisions (the Employer Sanctions Provisions) imposing possible strict civil and criminal sanctions on any Australian employer which employs workers who are either:

- Working in breach of their visa conditions.
- In Australia unlawfully with no work rights.

4.2 Permits

There are no separate work permits required to work in Australia. The visas referred to above provide the holders with permission to work in Australia.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

There is no statutory requirement to issue a written employment contract or a written statement of particulars to an employee. However, it is very unusual (and inadvisable) for an employee not to be issued with a written employment contract (or letter of appointment).

Regardless of any written employment contract, employees are generally entitled to:

- A minimum hourly wage (plus loading for casual employees).
- The 10 statutory minimum entitlements set out in the NES.
- The minimum employment terms provided for in any award or collective/enterprise agreement that applies to them.

Employers must provide all new employees with a copy of the federal government's Fair Work Information Statement, which summarises the key provisions of the Fair Work Act including information about the:

- NES.
- Modern awards.
- Enterprise agreements.
- Employee rights on termination of employment.

5.2 Implied terms

A range of terms can be implied into an employment contract (written or unwritten).

For example, terms:

- Imposing a duty of care owed by the employer to the employee, which effectively requires the employer to take care of the employee's safety by providing a safe place of work.
- Imposing a duty of fidelity and good faith on an employee.
- Providing for reasonable notice of termination from the employer. This is particularly problematic in relation to senior employees (and can arise where employees are promoted and have out of date contracts, or there is no express notice of termination provision in the employment contract).

5.3 Collective agreements

Australia's employment legislation has, for some time, provided for the making of collective agreements with employees or unions. Under the Fair Work Act, new collective agreements (known as enterprise agreements) are made with employees. However, unions will typically play a significant role in the bargaining process as bargaining representatives for employees in unionised workplaces.

The Fair Work Act contains detailed rules relating to the negotiation, approval, registration and operation of enterprise agreements. Where an enterprise agreement applies, it excludes any award that would otherwise apply (except in relation to minimum award wages) or any previous enterprise agreement. However, it must pass a test (called the Better Off Overall Test) to ensure the employees are not disadvantaged against an applicable award.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Generally, an employer does not have the right to unilaterally change an employee's contractual terms and conditions of employment. If the terms are contained in a collective/enterprise agreement, there is no scope to make changes unless a statutory procedure is followed.

However, to some extent, the employer can reserve the right in the employment contract to make changes to an employee's terms (for example, to their place of work, duties, reporting line, and so on). That said, it is unlikely that a unilateral right to change fundamental terms (such as salary) would be effective.

If the employment contract does not include a right to change terms, the employer will need the employee's agreement to give effect to the change. Express agreement is preferable (by way of a signed variation), but in some cases, agreement may be evidenced by the employee's conduct (for example, continuing to work without objection, having been advised of the change and its consequences for the employee). Consideration for the change (an increased salary) will usually be required to create an enforceable agreement (unless, possibly, the change is recorded in a deed).

If the employee refuses to agree, a unilateral change would likely amount to a breach of contract, which could result in the employee resigning (which would be a constructive dismissal) or continuing to work and claiming damages.

If the employee resigns, they could make a breach of contract claim or unfair dismissal claim (or possibly an adverse action claim).

HOLIDAY ENTITLEMENT

7 Is there a minimum holiday entitlement?

7.1 Minimum holiday entitlement

Under the NES, full-time employees are entitled to four weeks' paid annual leave each year (in effect this is pro-rated for part-time employees). Untaken annual leave accumulates from year to year and is paid out on termination of employment. Shift workers (as defined) are entitled to an extra week's paid annual leave. Casual employees are not entitled to annual leave under the NES.

7.2 Public holidays

In addition to paid annual leave, most employees are entitled to paid public holidays. There are eight national public holidays:

- New Year's Day.
- Australia Day (26 January).
- Good Friday.
- Easter Monday.
- Anzac Day (25 April).
- The Queen's birthday.
- Christmas Day.
- Boxing Day.

There are also additional public holidays in each state and territory. For example, there is an additional two public holidays in New South Wales:

- Labour Day.
- Bank Holiday (broadly speaking, this only applies to employees in the banking industry).

An employee can (subject to certain limitations) be required to work on a public holiday.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

8.1 Entitlement to time off

Entitlements to time off are dealt with under the NES (*see below 8.2, Entitlement to paid time off*). In some cases, employers may provide additional leave benefits (for example, under a collective/enterprise agreement), although this is relatively unusual in Australia.

8.2 Entitlement to paid time off

Under the NES, full-time employees are entitled to 10 days' paid personal/carers' leave per year. Untaken personal/carer's leave accumulates from year to year but is not paid out on termination of employment. Casual employees are not entitled to paid personal/carer's leave. Personal/carer's leave can be taken when the employee is unwell or to allow the employee to care for a family member who is unwell or affected by an unexpected emergency (*see Question 9*).

8.3 Recovery of sick pay from the state

None of this paid leave can be recovered from the state. It is entirely employer funded. It is unusual for employers to offer paid sick leave in addition to these statutory arrangements.

If an employee suffers a work-related injury they may be eligible for payments under their employer's workers compensation scheme. Workers compensation insurance must be put in place by all employers (including those based overseas) for their Australian employees. Workers compensation schemes are state/territory based.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

Eligible employees are entitled to unpaid parental leave under the NES in connection with the birth or adoption of a child as follows. These rules also apply to same sex couples.

9.1 Maternity rights

Mothers who have 12 months' service at the date of the birth or placement of the child are entitled to 12 months' unpaid parental leave if they have responsibility for the care of the child (the primary carer). They can also request an extension of up to an additional 12 months' unpaid leave, which an employer can only refuse if it has reasonable business grounds. A pregnant employee:

- Will also be entitled to unpaid special maternity leave if she is not fit for work during a period because of a pregnancy-related illness, or she loses her child within 28 weeks of the expected date of birth.
- May be entitled to be transferred to a "safe job" where she is fit for work, but it is inadvisable for her to continue in her present position because of illness or risks arising out of her pregnancy or hazards connected with that position. If no safe job exists, the employee may be eligible for paid leave.

9.2 Paternity rights

Fathers who have 12 months' service at the date of birth or placement of the child are entitled to 12 months' unpaid parental leave if they are the primary carer. However, if the mother has taken any extended parental leave (above their initial 12 months), the amount of leave the father can take is reduced by an equivalent amount.

A father can also seek an extension of up to 12 months' unpaid leave (subject to the amount of any leave taken by the mother).

Other than eight weeks' leave which may be taken by a father in up to four separate periods following the birth or placement of a child, leave cannot be taken by both parents at the same time and must be taken consecutively.

9.3 Surrogacy

A surrogate will be eligible for the maternity rights outlined above if she meets the eligibility requirements, including that she will have responsibility for the care of the child. When this responsibility ceases, her entitlement to unpaid leave will cease. Prospective parents of a surrogate child are only entitled to parental leave rights under the Fair Work Act if they adopt the child.

9.4 Adoption rights

Employees who adopt a child under the age of 16 have the maternity and paternity rights outlined above (*see above 9.1, Maternity rights and 9.2, Paternity rights*), plus up to two days' unpaid pre-adoption leave, to attend interviews and so on relating to the adoption.

9.5 Parental rights

9.5.1 **Returning from parental leave.** An employee returning from parental leave (birth or adoption leave) is entitled to return to their pre-leave role or, if it no longer exists, to an available position for which they are qualified and suited, and that is nearest in status and pay to the pre-leave position.

9.5.2 Be aware that under the Fair Work Act parental leave employees (as well as other classes of employee - for example, employees 55 years of age or older, employees with a disability etc) - may request a change in working conditions, including a change in their hours of work. In such a case, an employee can only refuse such a request if justifiable in 'reasonable business grounds'.

9.5.3 **Paid parental leave.** Under the government funded paid parental leave scheme, eligible employees are entitled to up to 18 weeks' paid leave at the federal minimum wage (currently A$656.90 per week). In broad terms, to be eligible, the employee must:

- Have earned less than A$150,000 (indexed) in the previous financial year.

- Have worked continuously for at least 10 of the past 13 months (breaks of up to eight weeks between work days are permitted).
- Have worked at least 330 hours in those 10 months.
- Satisfy an Australian residency requirement.

The paid parental leave scheme is available to the primary carer of a newborn or recently adopted child.

9.5.4 **Dad and partner pay.** From 1 January 2013, a "dad and partner" pay scheme, funded by the federal government, has operated. The scheme provides eligible working fathers or partners with two weeks of government-funded pay at the federal minimum wage (currently A$656.90 per week).

9.6 Carers' rights

9.6.1 Under the NES, full-time employees are entitled to 10 days' paid personal/carers' leave per year which can be taken when the employee needs to care for a family member or a member of their household who is unwell or affected by an unexpected emergency. In addition, an employee is entitled to:

- Two days' unpaid carer's leave on each occasion when a family or household member requires care or support because of a personal illness, injury, or an unexpected emergency. This entitlement is only available if they have used all their paid personal carer's leave (this unpaid leave is available to casual employees).
- Two days' paid compassionate leave on each occasion when a family or household member dies or contracts or sustains a life threatening illness or injury (this paid leave is not available to casual employees).

An employee who has responsibility for the care of an under school age child (under five years old), or a disabled child under 18, can request a flexible work arrangement (for example, part-time work, job share or varied start or finish times). Employers can only refuse this type of request on reasonable business grounds.

From 1 July 2013, the categories of employees who may request a flexible working arrangement were increased to include an employee who is 55 or older, an employee who has responsibility for the care of a school age child or younger, an employee who is a carer (within the meaning of the Carer Recognition Act 2010) and an employee who is providing care to a family member who is experiencing violence from their family.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

The following statutory entitlements are all calculated or determined by length of service:

- Annual leave.
- Personal/carer's leave.
- Parental leave.
- Notice of termination.
- Redundancy pay.
- Long service leave.

It is not uncommon for other contractual or policy-based entitlements to be calculated in the same way. In addition, employees are unable to make unfair dismissal claims unless they have been employed for six months (or 12 months if their employer has fewer than 15 employees) at the time of their dismissal or receiving notice of dismissal (whichever is earlier).

10.2 Consequences of a transfer of employee

Employees retain their service for all the above benefits (including the right to make an unfair dismissal claim) if their employment transfers to a related entity. If their employment transfers to a

new employer due to an asset sale, outsourcing or insourcing, the new employer can choose not to recognise service for the NES entitlements relating to annual leave, redundancy and unfair dismissal (the new employer must advise the employee of this in writing). However, service must be recognised by the new employer for:

- Personal/carer's leave.
- Parental leave.
- Notice of termination.
- In most cases, long service leave.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

If a temporary worker is a casual employee they are not eligible for:

- Paid annual leave.
- Paid personal/carer's leave.
- Compassionate leave.
- Notice of termination.
- Redundancy.

However, if they have worked on a regular and systematic basis, and have an expectation of ongoing employment, they may be eligible for unpaid parental leave and to bring an unfair dismissal claim. In certain cases, long-term regular and systematic 'casual' employees may be regarded under the law as permanent employees notwithstanding contractual terms to the contrary.

11.2 Agency workers

Agency workers are not entitled to any benefits from their host employer. However, where agency workers are employed by the labour hire agency, they are treated in the same way as any other employee.

11.3 Part-time workers

Part-time employees are entitled to the same benefits as full-time employees generally on a pro-rata basis according to the hours that they work.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Australia's anti-discrimination legislation exists at state, territory and federal level. The legislation prohibits discrimination on the basis of defined attributes, not only in employment but in other areas of business activity. Most complaints and litigation relate to employment.

It is unlawful to discriminate (directly or indirectly) based on a prescribed attribute in all aspects of the employment relationship, including recruitment, terms and conditions, career opportunities and termination. There are no qualifying periods for making claims, although claims must generally be brought within 12 months of the discrimination having occurred.

There are some differences between federal, state and territory legislation. However, most legislation prohibits discrimination based on:

- Sex (or gender).

- Marital or relationship status.
- Pregnancy.
- Parental status.
- Breastfeeding.
- Age.
- Race.
- Impairment.
- Religious belief or religious activity.
- Political belief or activity.
- Trade union activity.
- Lawful sexual activity.
- Gender identity.
- Sexuality.
- Sexual orientation.
- Intersex status.
- Family responsibilities.
- Association with a person identified on the basis of one of the above attributes.

There is no qualifying period that must be worked before an employee can make a claim.

Harassment because of one of the attributes specified above is generally unlawful. In addition, sexual harassment is specifically prohibited under Australia's anti-discrimination legislation. Sexual harassment is usually defined (in summary) as unwelcome conduct of a sexual nature. It includes a range of conduct, including:

- Obvious, such as sexual assault, indecent propositioning, and discussion of an employee's sex life.
- Less obvious, such as exposure to sexually explicit or semi-explicit photographs and material, repeated unwelcome requests for social contact out of hours, and so on.

Again, there is no qualifying period that must be worked before an employee can make a claim.

DISMISSAL OF EMPLOYEES

13 What rights do employees have when their employment contract is terminated?

An employer must provide employees with the minimum statutory notice, which is based on the employee's service as follows:

- Less than one year's service: one week's notice.
- Between one year and three years' service: two weeks' notice.
- Between three years and five years' service: three weeks' notice.
- More than five years' service: four weeks' notice.

The notice period is increased by one week if the employee is over 45 years of age and has completed at least two years of service with the employer. The NES allows the statutory notice to be paid in lieu.

Employment contracts often provide for longer notice. As a contractual matter, an employee may be entitled to reasonable notice of termination (which can be as much as 12 months) if an express notice term is not included within their contractual terms.

13.1 Severance payments

Where an employer does not give the employee actual notice of termination in accordance with the above, the employee must be paid an amount equal to what would have been paid to (or on behalf of) them had they worked during the notice period.

13.2 Procedural requirements for dismissal

The relevant NES statutory period of notice must be given in writing. The NES allows the statutory notice to be paid in lieu. Most employment contracts also provide for this (although care should be taken if the contract is silent on this point - *see Question 13.1*).

There are no statutory procedural requirements in respect of dismissal (other than for some public sector employees). However, procedural requirements can apply indirectly as a result of the unfair dismissal laws. If an employer does not provide procedural fairness to an employee (including an opportunity to respond to allegations), the employee may be able to successfully bring an unfair dismissal claim (assuming the employee has access to the jurisdiction (*see Question 14*)).

In considering whether a particular dismissal was "harsh, unjust or unreasonable" the Fair Work Commission (the Australian employment tribunal) must have regard to the following factors:

- Whether there was a valid reason related to the person's capacity or conduct.
- Whether the person was notified of the reason.
- Whether the person was given an opportunity to respond to any reason given.
- Any unreasonable refusal to allow the employee to have a support person present in any discussions relating to dismissal.
- If the reason for dismissal is unsatisfactory performance, was the person warned before the dismissal.

Where a dismissal is for unsatisfactory performance, the Fair Work Commission will expect an employee to have been given reasonable opportunities to improve, which may include providing some training and/or support.

As at 1 July 2015, the maximum compensation that can be awarded in respect of a successful unfair dismissal claim is A$68,350.00 (*see Question 14, protection against dismissal*).

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

Employees with more than six months' service (or 12 months' service if their employer has fewer than 15 employees) are eligible to make unfair dismissal claims if either:

- They are covered by a modern award or enterprise agreement (regardless of how much they earn and even if they have signed a high income guarantee).
- They are award or agreement free and they earn less than the relevant income threshold (A$136,700.00 base salary for 2015/2016).

The primary unfair dismissal remedy is reinstatement. If that is not appropriate, compensation of up to six months' pay can be awarded (capped at half the income threshold, currently A$68,350.00).

14.2 Protected employees

In addition, there are also protections against dismissal if an employee is dismissed because of (among others):

- A discriminatory reason (for example, gender, race, religion or disability).
- Temporary absence from work because of illness or injury.
- Having exercised, or not exercised, a workplace right. Workplace rights are broad ranging, and include:
    - Rights under employment legislation (including to belong to a union);
    - Benefits under modern awards or enterprise agreements;
    - The ability to initiate legal proceedings; and
    - Making complaints or inquiries to the employer or an external body.

An employee dismissed for any of these reasons can be reinstated. Compensation or penalties can also be imposed. In addition, an injunction can be sought preventing a dismissal because of a workplace right.

There are also protections against dismissing employees who are ill or injured in some circumstances. These restrictions vary between states and territories.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs?

15.1 Definition of redundancy/layoff

Essentially, a redundancy is where an employer no longer requires the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise.

15.2 Procedural requirements

Modern awards include consultation obligations in the event of redundancy. Although redundant employees are generally exempted from making unfair dismissal claims, that exemption does not apply if the employer fails to:

- Consult and provide information about the proposed redundancy in accordance with a modern award or collective/enterprise agreement.
- Act reasonably in considering redeployment opportunities for a redundant employee.

An employer's policies, contracts or any applicable collective/enterprise agreement can impose additional procedural requirements.

15.3 Redundancy/layoff pay

An employee dismissed because of redundancy is entitled to notice of dismissal and, possibly, a redundancy payment. From 1 January 2010, the NES introduced the following universal redundancy pay entitlement for employees (subject to some limited exceptions, for example casual, fixed term or seasonal workers). The scale, which is based on an employee's service, is:

- Less than one year's service: zero.
- Between one year and two years' service: four weeks' pay.
- Between two years and three years' service: six weeks' pay.
- Between three years and four years' service: seven weeks' pay.
- Between four years and five years' service: eight weeks' pay.
- Between five years and six years' service: 10 weeks' pay.
- Between six years and seven years' service: 11 weeks' pay.
- Between seven years and eight years' service: 13 weeks' pay.
- Between eight years and nine years' service: 14 weeks' pay.
- Between nine years and 10 years' service: 16 weeks' pay.
- Ten years' or more service: 12 weeks' pay.

There are some exceptions from the requirement to make redundancy payments, including on a transfer of business. It is not unusual for employers to also have redundancy policies which provide for redundancy pay.

15.4 Collective redundancies

In addition to the other procedural requirements outlined above, if 15 or more redundancies are proposed, an employer may be obliged to notify and consult with the employees' unions (*see Question 16, Consultation*) and notify relevant public authorities.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

Employees are not entitled to management representation on the board of directors or otherwise, and there is generally no legislation in Australia dealing with works councils.

16.2 Consultation

Consultation obligations are triggered under modern awards and enterprise agreements if an employer proposes major changes in production, programme, organisation, structure or technology that are likely to have significant effects on employees (for example, restructuring of jobs, relocation or dismissals).

In these circumstances, the employer must notify the affected employees (and their representatives) of the proposed changes and hold discussions with them with a view to averting or mitigating any adverse effects of those changes.

The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes. Although the employer must provide all relevant information about the changes (in writing), it is not required to disclose confidential information where the disclosure would be contrary to the employer's interests.

Additional obligations also exist under the Fair Work Act if an employer proposes to make 15 or more employees redundant, whereby it must notify and consult with any union representatives of the affected employees (assuming the employer knows, or ought reasonably to know, the employees are members of a union). Court orders can be made to put the parties in the position they would have been in had the employer complied (which includes the possibility of injunctions but not reinstatement orders). The employer must also notify the relevant government department.

Consultation obligations with employees on parental leave are also triggered if changes are proposed that would affect the employee's pre-leave position. There are also consultation obligations under occupational health and safety legislation.

Since 1 January 2014 employers have also been required to consult with employees covered by modern awards about changes to their roster or ordinary hours of work.

16.3 Major transactions

An employer is not required to consult about the fact of a major transaction, that is, either a share sale or business sale. However, if the sale will result in significant effects on employees (for example, redundancies or workplace relocation), the above consultation obligations are triggered. In practice, a business sale is more likely to involve significant effects on employees (as their employment will invariably terminate even if they are offered employment by the buyer). The position on a share sale is different, as the employees remain employed by their employer: only the employer's shareholder has changed.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

If an employer fails to comply with consultation obligations and breaches a requirement under a modern award or enterprise agreement, it can be fined (up to A$10,200 for individuals and A$51,000 for corporate entities) and injuncted (to allow consultation to take place). Applications for injunctions in this context are quite rare, although more common in highly unionised workplaces.

17.2 Employee action

An employee has standing to seek an injunction for breach of consultation obligations under a modern award or enterprise agreement. If granted, this prevents any proposals going ahead until the consultation requirements have been complied with. An employee made redundant may also have a right to bring an unfair dismissal claim in some circumstances.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

Employees are not automatically transferred on the sale of a business, an outsourcing, or an insourcing. If the buyer wishes to employ any of the employees who work in the business, it must make new employment offers to them. The employees only transfer if they accept the employment offer. If offers are not made, or not accepted, the seller must find alternative employment for the employees or make them redundant.

18.2 Protection against dismissal

There is no specific protection against dismissal, either before or after the disposal or transfer of the business. However, an employee can potentially make an unfair dismissal claim if they are dismissed by the seller (unless the dismissal is a genuine redundancy (*see Question 15*)).

18.3 Harmonisation of employment terms

Because employees do not automatically transfer with the business, a buyer can generally choose what terms and conditions to offer, including those that match the terms of its existing workplace.

However, there is an important qualification to this. If the transferring employees are covered by an enterprise agreement (or certain employer specific awards), that agreement will transfer with the employees and continue to apply (until they are replaced or terminated). In limited circumstances, that agreement could also cover new employees the buyer recruits after the transfer.

It is possible to apply to the Fair Work Commission for orders that the enterprise agreement not transfer (for example, if the buyer is covered by its own enterprise agreement that provides more favourable terms for the transferring employees). Notwithstanding the above, from a commercial perspective, the seller will usually insist that the buyer's employment offers are on the same, or substantially the same, terms and conditions.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

19.1.1 **Income tax.** Employers must withhold income tax on taxable salary and certain other payments, and comply with related obligations under the Pay-As-You-Go tax withholding system (PAYG).

In general, these payments are taxable in Australia if the employee is a tax resident of Australia or the payments relate to employment in Australia, unless the employee qualifies for tax relief under an applicable international double taxation agreement.

19.1.2 The Australian Taxation Office (ATO) considers a foreign national, who is working in Australia and intends to be in Australia for as little as three to six months, to be a tax resident of Australia during that period, depending on their particular circumstances. PAYG includes 2% Medicare levy for residents and temporary residents who are not exempt from the Medicare levy.

19.1.3 **Fringe benefits tax (FBT).** Employers (not employees) must pay tax on expense payments/reimbursement and non-cash employment benefits provided to employees under the FBT system. This includes, for example, the private use of a company car.

The taxable value of a fringe benefit is generally the cost incurred by the employer, though there are special valuation rules for motor vehicles.

The FBT tax rate (47%) is applied to the grossed-up value of the fringe benefit (in effect, the tax payable is equal to 88.7% of the taxable value of the benefit, or approximately 101% where the employer is entitled to a GST input tax credit). FBT is a deductible expense for the employer against its assessable income for corporate income tax purposes.

There are a number of FBT exemptions and tax reductions available, including in relation to work-related mobile phones and laptop computers. Foreign nationals on a fixed-term assignment to Australia typically qualify for these concessions, and for certain "living away from home"

concessions, for example, leased accommodation (though for most expatriate employees, this concession ceased to apply from 1 October 2012), child education costs and up to a 50% reduction for annual home leave travel costs. Each exemption or reduction is subject to specific conditions.

19.2 Nationals working abroad

19.2.1 **Income tax.** Australia taxes employment income related to overseas employment where the employee is a resident of Australia, unless the payments are exempt from Australian tax or the employee qualifies for tax relief under an applicable international double taxation agreement. An individual working overseas is an Australian resident if one of the following applies:

- They continue to reside in Australia (for example, where the employee is travelling overseas on business rather than taking up foreign employment).
- They are domiciled in Australia, unless they can satisfy the ATO that their permanent home is overseas (typically, a person does not have a permanent home overseas unless they are residing in permanent accommodation for at least two to three years while on foreign assignment, with no fixed intention to return to Australia at the end of the assignment).
- They are an active member of the government's superannuation schemes (typically government employees).

There is a limited exemption for foreign employment earnings where the resident employee is working overseas for at least 91 days either:

- On "approved" foreign development projects.
- As a member of a "disciplined force" of broadly an Australian government or government authority (for example, the Australian defence forces, Australian police force).
- As an employee of certain charities.
- Delivering Australian official development assistance for their employer.

19.2.2 **PAYG and FBT.** PAYG and FBT can also apply where the employee works outside Australia and the employment earnings are not exempt from Australian tax (*see above 19.2, Nationals working abroad*).

The ATO has issued a tax determination that PAYG and FBT do not apply to income and benefits unless the employer/payer has a sufficient connection with Australia (for example, where it has an Australian branch). This does not mean the employee is not taxable on the income or benefits, but rather the employee must disclose the income and benefits in their Australian income tax return and pay the income tax on assessment (reduced by a tax credit for any foreign tax paid on the foreign source income and benefits). This can result in additional tax for the employee, as there is no Australian income tax deduction for an employee for certain "living away from home" costs such as assignment housing, relocation cost to the foreign location, child education costs, and so on.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Income tax

Income tax is calculated under a progressive marginal rate scale, up to 45% for taxable income over A$180,000. Tax residents are also subject to 2% Medicare levy (collected as income tax), with a potential additional 1.0% to 1.5% Medicare levy surcharge if the employee's adjusted taxable income exceeds a threshold and the employee does not have sufficient private hospital cover. For the year ended 30 June 2014:

- The 1% Medicare levy surcharge thresholds are A$90,000 for singles and A$180,000 for couples and families.
- The 1.25% Medicare levy surcharge thresholds are A$105,000 for singles and A$210,000 for couples and families.
- The 1.5% Medicare levy surcharge thresholds are A$140,000 for singles and A$280,000 for couples and families.

20.2 Social security contributions

An employer may be obliged to make superannuation contributions for its employees (currently 9.5% of ordinary time earnings), or otherwise be subject to a tax called a superannuation guarantee charge. Certain exceptions apply. For foreign nationals working in Australia, there are exceptions:

- For holders of certain work visa categories (for the duration of the visa).
- Under a number of reciprocal social security totalisation agreements (generally for up to five years, where (broadly) a seconded employee remains covered by their home country pension regime).

For employees working overseas, there are exceptions where, for example, either the employee or the employer is not a tax resident of Australia.

20.3 Payroll tax

Payroll tax is imposed by the various states and territories (with different thresholds and rates applicable). Employers are required to pay payroll tax (a percentage of their total wages bill) if their wages exceed the relevant thresholds. Payroll tax also extends to payments to contractors, unless (broadly) those contractors are providing services to the public generally (there are a range of relevant exemptions which vary between jurisdictions).

There are also grouping provisions that can apply to group sets of employers (and impose joint and several obligations to pay payroll tax) in a wide range of circumstances. Where applicable, employer obligations include registration, monthly payments, and annual returns with annual reconciliation payments. Payroll tax does not generally apply where the employee is working overseas for more than six months.

20.4 Rate of taxation on employment income

The following rates apply for the year commencing 1 July 2015 to tax residents of Australia:

- Taxable income of A$0 to A$18,200: nil.
- Taxable income of A$18,201 to A$37,000: 19 cents for each A$1 over A$18,200.
- Taxable income of A$37,001 to A$80,000: A$3,572 plus 32.5 cents for each A$1 over A$37,000.
- Taxable income of A$80,001 to A$180,000: A$17,547 plus 37 cents for each A$1 over A$80,000.
- Taxable income of A$180,001 and over: A$54,547 plus 45 cents for each A$1 over A$180,000.

These rates do not include the Medicare levy nor the Medicare levy surcharge (if applicable).

The following rates for the year commencing 1 July 2015 to foreign residents:

- Taxable income of A$0 to A$80,000: 32.5 cents for each A$1.
- Taxable income of A$80,001 to A$180,000: A$26,000 plus 37 cents for each A$1 over A$80,000.
- Taxable income of A$180,001 and over: A$63,000 plus 45 cents for each A$1 over A$180,000.

Foreign residents are not required to pay the Medicare levy nor the Medicare levy surcharge.

20.5 Superannuation contributions

Superannuation guarantee contributions are payable, at a rate of 9.5% of "ordinary time earnings" (OTE) up to an OTE cap of A$50,810 per quarter.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common for employers to adopt performance-based bonus schemes, which often tend to be described as discretionary. There are no statutory restrictions or guidelines that apply to bonuses

or bonus arrangements. Therefore, employers are free to determine the rules of their bonus schemes.

Care needs to be taken when drafting bonus schemes to avoid uncertainty. In addition, it may be advisable to reserve the right to alter (or even withdraw) a bonus scheme from time to time. In some cases, cash bonuses that are calculated by reference to the value or amount of something else (for example, profitability and sales) could possibly be considered a derivative under Australia's financial services regime (which could trigger licensing and other obligations).

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

Under common law it is possible to restrict an employee's activities both during and after termination. During employment, employees are subject to a range of duties that can be enforced to restrict their activities and/or protect the employer's business. For example, these include fiduciary duties to prevent competitive behaviour and implied obligations to protect confidential information.

In addition, express terms can be (and usually are) included in the employment contract. For example, terms that require exclusive service, the protection of confidential information and intellectual property. A breach of an employee's obligations during employment can provide grounds for dismissal and form the basis of an injunction application or a damages claim.

22.2 Post-employment restrictive covenants

An employer can also include a post-employment restraint in an employee's contract. However, at common law, a restraint of trade is *prima facie* void. To enforce it, an employer must prove that the restraint is no wider than is reasonably necessary to protect the employer's legitimate business interests. There are two main types of restraints:

- Non-compete restraints, preventing a former employee from working in a specified field.
- Non-solicitation restraints, preventing a former employee from soliciting customers, employees and sometimes a supplier.

The common law position is modified in New South Wales, where the courts have a discretion under the Restraints of Trade Act 1976 (NSW) to, broadly speaking, rewrite an unenforceable restraint clause to make it reasonable and enforceable. Employers do not have to pay employees during the restraint period. However, such payments may tip the balance in favour of an injunction being granted.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

23.1 Productivity Commission Review - 2015

In December 2014, the Australian Government announced that a Productivity Commission Review would be undertaken to conduct a comprehensive assessment of the operation of the Australian Fair Work Laws and an opportunity for independent considerations for improvement.

The Productivity Commission is the Australian Government's independent research and advisory body. Based on the terms of reference published by the Australian Government on 19 December 2014, it is expected that the Productivity Commission Fair Work Laws review will have a keen focus on delivering long term benefits to the Australian economy. It is likely that the review will:

- Reject an ongoing reliance on modern award inflexibilities;
- Support rationalising modern award conditions; and
- Reintroducing greater flexibility to have an employee individually bargain with each of its employees to displace or override modern award inflexible conditions.

The Productivity Commission's Report is due to be tabled in November 2015. It is a process supported by peak business groups in Australia but heavily criticised by the Australian Union movement.

23.2 Work health and safety

From 1 January 2012, a harmonised system of WHS legislation came into force in a number of states and territories. However, harmonisation remains an ongoing process. At the time of writing harmonised legislation (and regulations and codes of practice) have been passed in the Commonwealth, New South Wales, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory. Western Australia has foreshadowed that it will adopt the harmonised legislation but this is not expected to occur until at least 2015. At present, Victoria has opted out of harmonisation due to implementation costs.

Although the system is broadly the same as that under previous OHS legislation, there are differences in the states' and territories' legislation (particularly in Western Australia). In addition, the harmonised legislation imposes new duties (including duties on "officers" to exercise due diligence to ensure an entity complies with its WHS duties).

23.3 Bullying

From 1 January 2014, employees and other workers have a right to make a claim to the Fair Work Commission for orders to stop bullying.

For these purposes, "bullying" means repeated unreasonable behaviour towards a worker or group of workers that creates a risk to health and safety. However, it does not include "reasonable management action carried out in a reasonable manner".

The Fair Work Commission can make orders to stop bullying, but these cannot include monetary or compensation orders in favour of employees or workers. However, an employer that breaches an order can be subject to a financial penalty (up to A$51,000).

23.4 Superannuation

The Federal Government has passed legislation which:

- 'Freezes' the superannuation guarantee rate at 9.5% until 1 July 2018. After 1 July 2018 the superannuation guarantee rate will increase gradually to 12% on 1 July 2022.

During 2009-2010, the Federal Government undertook a review of the superannuation system (the "Cooper review"). The Federal Government responded to the Cooper review by announcing a significant package of superannuation reforms known as the "Stronger Super" reforms. Key reform proposals included:

- Creating a new simple, low cost default superannuation product called "MySuper".
- Making the processing of everyday transactions easier, cheaper and faster, through the "SuperStream" package of measures.
- Strengthening the governance, integrity and regulatory settings of the superannuation system, including in relation to self-managed superannuation funds.

The legislation giving effect to the MySuper regulatory framework was released in tranches, all of which have now been passed. In order to offer a MySuper product, superannuation funds are required to obtain a special authorisation from the industry regulator, APRA. From 1 July 2013, appropriately authorised superannuation funds are able to offer a MySuper product. Since 1 January 2014, employers have been required to pay all default superannuation contributions into a superannuation fund that offers a MySuper product.

In addition, the Federal Government has introduced a set of modern awards.

Each modern award contains a superannuation clause specifying a select number of superannuation funds which an employer in that industry can use as their default fund. As part of the Stronger Super reforms, since 1 January 2014, only superannuation funds offering a generic MySuper product approved by an expert panel of the Fair Work Commission may be listed in a modern award.

Accordingly, where a modern award applies, the ability of the employer to select a default fund is limited (unless there is an enterprise agreement which overrides the award, though it is not common for small business to have enterprise agreements). The Choice of Fund rules still apply to allow eligible employees to choose the superannuation fund for their superannuation guarantee contributions.

The superannuation clauses in most modern awards generally contain a grandfathering rule for superannuation arrangements in existence as at 12 September 2008. The grandfathering rules essentially permit an employer to continue to, in respect of new and existing employees, contribute to any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund.

However, the grandfathering rules will not apply where there is a corporate restructuring or amalgamation that results in a transfer of employees from one employer to another, as the receiving employer would not have been contributing to the former employer's fund before 12 September 2008. This causes particular issues where the superannuation arrangement in existence as at 12 September 2008 is a defined benefit arrangement.

Further, as part of the Stronger Super reforms which requires superannuation funds listed on a modern award from 1 January 2014 onwards to be authorised to offer a generic MySuper product, the grandfathering rules in most modern awards will be removed from 1 January 2014 (or such subsequent transitional date approved by the Fair Work Commission).

This overview was written by Henry Skene, Darren Perry and Melissa Bulat of Seyfarth Shaw. It has been updated for the Taylor Vinters' Asia Pacific Employment Law Handbook by Herbert Fischbacher of MST Lawyers.

September 2015

Cambodia

Cambodia

CAMBODIA

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Employment relationships are governed by the Labour Law dated 13 March 1997 ("**Labour Law**") and other related regulations (including Sub-Decrees, Prakas, Notifications and Circulars) issued by the Government and the Ministry of Labour and Vocational Training ("**MLVT**"). Cambodian labour laws and regulations apply to both local workers and foreign workers in respect of employment contracts performed in Cambodia, regardless of where the contract was concluded and the nationalities and residence of the parties.

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

The Labour Law categorises the different types of workers depending on the length of the employment, the type of work, and how they are paid.

Based on the nature of the work, the workers are defined as follows:

- **Employees:** those who are contracted to assist a person in return for remuneration, but who do not perform manual labour fully or who do so incidentally; and
- **Labourers:** those who perform mostly manual labour in return for remuneration, under the direction of the employer.

Based on the nature of employment, the workers are categorised into:

- **Regular workers:** those who regularly perform a job on a permanent basis; or
- **Casual workers:** those who are contracted to perform a specific work that shall normally be completed within a short period of time, or perform a work temporarily, intermittently and seasonally.

In addition, based on how they are paid, workers are classified as follows:

- Workers paid on the basis of time worked (monthly, daily, hourly) and those paid daily or at intervals not to exceed two weeks or one month;
- Workers paid by task; and
- Workers paid on commission.

According to their of employment contracts, the workers are also distinguished by the length of employment, ie fixed duration contracts ("**FDCs**") or unfixed duration contracts ("**UDCs**"), which are further addressed in Section 5 of this Employment Law Guide.

2.2 Entitlement to statutory employment rights

Despite the distinctions by the types of work, employees and labourers receive the same rights and benefits under the Labour Law.

Casual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for some specific provisions.

In respect of employment contracts, workers have different rights and benefits, specifically related to termination rights and benefits, which are addressed in details in Sections 5, 11 and 13 of this Employment Law Guide.

2.3 Time periods

A casual employment contract is a type of flexible employment contract. It is used for those who perform a non-permanent job and are contracted to perform specific work that should normally be

completed within a short period or to perform work that may be temporary, intermittent or seasonal in nature. As such, a casual employment contract is defined as:

- Temporary (for a period of less than 30 continuous days); or
- Intermittent (for a period of less than three months in any 12 month period).

In respect of employment contracts, the total duration of a FDC must not exceed two years. When the entire duration of the contractual relationship exceeds two years, a FDC shall be deemed to be converted to a UDC regardless of the original intent of the contractual parties. On the other hand, the total duration of a UDC may be more or less than two years and it may contain no end date and be with or without a clear starting date. The differences between the two contracts are detailed in Section 5.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

When employing people, the enterprise must complete the following obligations.

3.1 Initial filings

Before the registration of the workers, initial labour registration is required for all enterprises and must be done through the MLVT or Department of Labour and Vocational Training ("**DLVT**"):

3.1.1 Declaration of enterprise

Every enterprise covered by the Labour Law must submit to the MLVT or DLVT a declaration of opening of an enterprise before it commences its operations and this declaration must be undertaken even if an enterprise does not employ any staff in Cambodia. An exception applies to enterprises employing less than eight workers who do not use machinery, whereby they may submit this declaration to the MLVT or DLVT within 30 days following the commencement of operations.

3.1.2 Declaration of personnel

As a part of initial registration, an initial declaration of workers must be filed with the MLVT or DLVT together with the application for declaration of opening of an enterprise. The declaration must include the name, gender, nationality, salary, employment starting date and other relevant information for each worker. This declaration need not include workers with casual employment.

3.1.3 Establishment book and payroll ledger

An enterprise must possess a MLVT standardised establishment book and a payroll ledger, which shall be numbered and initialled on all pages by a labour inspector.

The establishment book includes the name of the organisation, type of permitted activity and contact information. The payroll ledger contains information about each worker, including the work performed, wage rate and leave taken.

With approval from the labour inspector, an enterprise may decide to make a payroll ledger by a different method (including by electronic means), as long as it contains the same basic information as described above.

3.2 Recruitment filings

3.2.1 Registration (in)

The employer must register a worker with the MLVT or DLVT within 15 days of the date the worker commences work. The registration is done through a written declaration of staff movement (in) to the MLVT or DLVT.

3.2.2 Work permit and employment card (together forming "Work Permit")

The enterprise is required to assist workers (both local and foreign workers) to file a worker's application for a Work Permit with the MLVT or DLVT.

3.2.3 Health certificate

As a prerequisite for a Work Permit application, a local worker is required to undertake a health check and obtain a health certificate from the Labour Medical Department of the MLVT. A local worker is required to undertake a health check only at the commencement of their employment at

a new enterprise. The health certificate for foreigner is addressed in Section 4.4.

3.3 Other filing obligations

3.3.1 Changes in salary or position

An enterprise is required to record any promotion, demotion or change in a worker's position and change in salary on the worker's Work Permit, and obtain a stamp from the MLVT or DLVT within seven days of the date of the changes.

3.3.2 Registration (out)

When a worker leaves an enterprise, the enterprise is required to make a written declaration to the MLVT or DLVT within 15 days of the date of the worker's departure. Further, the enterprise is required to record the departure of the worker in the worker's Work Permit and obtain a stamp from the MLVT or DLVT within seven days of the worker's date of departure.

3.4 Filing obligations for large number of workers

3.4.1 Internal work rules ("**IWRs**")

In accordance with Article 22 of the Labour Law, an enterprise employing eight or more workers must establish internal work rules to be reviewed and approved by a labour inspector of the MLVT or DLVT. Prior to submission to the MLVT or DLVT, the internal work rules must be signed by a director/representative of the enterprise, accompanied by a certification letter signed by the elected staff representative(s) (shop stewards) and assistant staff representative(s), as elected in accordance with the Labour Law.

The internal work rules must address (amongst others) employment conditions, application procedures, salary information, leave policies and disciplinary matters.

3.4.2 Staff representative

Under Article 283 of the Labour Law, a staff representative is defined as the sole representative of the workers who are eligible to vote in the enterprise. Employers employing eight or more workers are required to hold elections for worker representatives, submit the election minutes to the MLVT or DLVT within eight days following the date of the election, and post a copy of the official report of the election result within the enterprise for workers to access.

The requirements of the number of staff representatives will vary depending upon the precise number of workers.

All employers are required to hold the election within six months of the opening or from the date on which the enterprise employs eight or more workers.

3.4.3 National Social Security Fund ("**NSSF**")

An enterprise employing eight or more workers is required to register all of its workers with the NSSF within 45 days after the date of its actual opening. The NSSF scheme covers three pillars: (a) health insurance; (b) retirement pension; and (c) work-related insurance. At present, the implementation of both the health insurance and retirement pension components of the scheme are yet to be implemented, although implementation of the health insurance scheme is expected in 2015 or 2016.

3.4.4 Training of apprentices

All enterprises employing more than 60 workers shall train apprentices based on the following quotas proportional to the enterprise's total workforce:

- 10%, for enterprises that employ between 60 to 200 workers;
- 8%, for enterprises that employ between 201 to 500 workers; and
- An additional 4% for every further 500 workers at enterprises that employ more than 501 workers, provided that a maximum of 110 apprentices may be trained by an enterprise in one year.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

To work in Cambodia, foreign workers are required to fulfil the following:

4.1 Ordinary visa or E type visa ("Visa E")

Foreign nationals intending to undertake ordinary work in Cambodia must obtain a Visa E in advance from the Embassies and Consulates of Cambodia in foreign countries, or "on arrival" when entering Cambodia. This visa has an initial validity of 30 days but can be extended for periods of up to one year following arrival in Cambodia.

In order to obtain a Work Permit, a prospective foreign worker is required by the MLVT or DLVT to apply for a Cambodian Visa E of at least six months validity from the date of application for the Work Permit.

4.2 Foreign worker quota

Enterprises employing or intending to employ foreign workers are required to apply for a quota from the MLVT. This application must detail the number of foreign workers and a description of each foreign worker's position. All subsequent quota applications must be submitted by 30 November each year and, upon receipt of approval, cannot be changed during the course of a year.

Under the quota system, a maximum of 10% of an employer's local workforce may be foreign (based on a calculation of foreign workers/local workers), including: office workers (3%), skilled labour workers (6%) and unskilled labour workers (1%). This quota may be increased (subject to DLVT/MLVT approval) if the enterprise requires workers with specific skills that are currently unavailable in Cambodia.

4.3 Work Permit

A Work Permit for a foreign worker is issued by the MLVT. Work Permits are valid for one year. No matter when the MLVT or DLVT issues the Work Permit for a foreign worker, it expires on 31 December every year. If an enterprise continues to employ foreigners in Cambodia for the following year, the enterprise needs to apply for an extension to their foreign Work Permits by 31 March of the following year.

The official timeline for issuing the foreign Work Permit is eight days. However, in practice, it usually takes about two to three months from the date of submission of full and complete documents to obtain the Work Permit.

In accordance with the recent introduction of several Prakas and notifications, the MLVT and the Ministry of Interior have increased their investigations, and are actively applying monetary sanctions against enterprises that have not complied with the foreign Work Permit requirements.

4.4 Health certificate

As a prerequisite for a Work Permit application, a foreign worker is required to undertake a health check and obtain a health certificate from the Labour Medical Department of the MLVT. Unlike a local worker, who is required to only undertake a health check at the commencement of his/her employment at a new enterprise, a foreign worker is required to undergo a health check every year, regardless of whether he/she changes workplace.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

The Labour Law provides for two main types of employment contracts: an FDC or UDC.

An FDC must be in writing and have a duration of no more than two years. It must specify the date on which employment is to commence. As stated in Section 2.3 of this Employment Law Guide, an FDC can be renewed, but its total duration must not exceed two years. When the entire duration of contractual relationship exceeds two years, whether renewed or not, the FDC shall be deemed to be converted to a UDC regardless of the original intent of the contractual parties. As for a UDC, the Labour Law does not require it to be in writing. However, in practice, a UDC should be concluded in writing, to avoid any possible disputes.

Main terms and conditions included in a typical employment contract include:

- Duration;
- Scope and conditions of work;
- Place of work;
- Working hours;

- Confidentiality;
- Salary and other benefits such as leave entitlement;
- Bonuses; and
- Disciplinary procedures and termination.

The terms agreed by the parties in an employment contract must contain at least the minimum standards provided by the Labour Law, related regulations and any collective agreement for the relevant enterprise. These standards prevail over the employment contract, if they are more advantageous to the workers.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The employer cannot unilaterally change the terms and conditions of employment. The worker may terminate the employment contract immediately if the working conditions differ from those specified in the employment contract. If the employer would like to change the terms and conditions of the employment contract, the employer shall inform the worker and seek his/her consent.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

The Labour Law provides the benefits of annual leave to the workers. All workers are entitled to paid annual leave, accrued at the rate of one and a half working days of paid leave per month of continuous service. The annual leave, therefore, consists of 18 working days, unless there are provisions more favourable to workers in collective bargaining agreements ("**CBA**") or individual employment agreements. The amount of annual leave shall be increased according to the seniority of workers at the rate of one additional day for every three years of service.

7.2 Public holidays

Each year the MLVT issues a schedule setting out the mandatory paid public holidays for workers of all enterprises. In 2015, there are 19 public holidays with a total of 27 days. Where a public holiday falls on a Sunday, such holiday is recognised on the following business day.

ILLNESS AND INJURY OF WORKERS

8 What rights do workers have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

There is no specific period of short-term sick leave as stated under the Labour Law. It is usually addressed in the IWRs of the enterprise. As for long-term sick leave, it is allowed for no more than six months.

8.2 Entitlement to paid time off

The employer is not required to provide payment for sick leave. However, at the discretion of the employer, sick leave may be permitted, and compensated for, under the following conditions:

- The first month of sick leave is fully paid;
- During the second and third month of sick leave, 50% of the salary is paid; and
- From the fourth to the sixth months, the employment agreement is suspended without pay.

8.3 Recovery of sick pay from the state

Sick leave is treated differently from work-related accidents or injuries. The Labour Law defines a work-related accident as any accident befalling a worker due to work, during working hours, or while they are traveling directly to or from home and work. The employer must pay the medical and health care costs of any worker who has a work-related accident unless the accident is

intentionally caused by the worker. However, the workers of an enterprise registered with the NSSF as stated in Section 3.4.3 of this Employment Law Guide have the right to receive compensation when experiencing injury or disability due to a workplace-related accident, which is compensated by the NSSF in accordance with relevant regulations.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of workers who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Female workers shall be entitled to maternity leave of at least 90 days. During maternity leave, female workers are entitled to half of their regular wages, plus certain other benefits, provided they have completed at least one year of uninterrupted service with the enterprise.

Employers are prohibited from terminating female workers during their maternity leave, or at the date when the end of the notice period would fall during their maternity leave.

For one year from the date of child delivery, mothers who breastfeed their children are entitled to one hour per day during working hours to breastfeed their children. This hour may be divided into two periods of 30 minutes each, one during the morning shift and the other during the afternoon shift. The exact time of breastfeeding is to be agreed between the mother and the employer. If there is no agreement, the periods shall be at the midpoint of each work shift.

Employers shall not deduct breaks for breastfeeding from other normal breaks provided for in the Labour Law, internal work rules of the enterprise or a CBA.

Employers employing a minimum of 100 female workers are required to install within their establishment or nearby, a nursing room and childcare centre for their babies. If the enterprise is not able to install a nursery on its premises for children over 18 months of age, female workers can place their children in any day care centre, and the charges incurred there must be covered by the employer.

9.2 Paternity rights

Please note that the Labour Law does not refer to paternity rights. In the event, male workers would like to take leave during their child's birth, they can apply for a special leave.

9.3 Surrogacy

The Labour Law does not address surrogacy rights. In any case, surrogate mothers shall receive the same rights and benefits as for maternity.

9.4 Adoption rights

The Labour Law does not address adoption rights.

9.5 Parental rights

Please refer to the comments in Sections 9.1 and 9.2.

9.6 Carers' rights

The Labour Law does not address carers' rights.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for workers? If a worker is transferred to a new entity, does that worker retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Continuous employment creates many statutory rights for a worker including the following:

- The increase of annual leave entitlement (as addressed in Section 7.1);

- Entitlement to maternity payment (as addressed in Section 9.1);
- Eligibility to be a candidate for staff representative (as addressed in Section 3.4.2);
- Seniority bonus as specified by relevant labour regulations if the worker is employed in the garment, textile and footwear manufacturing sectors; and
- Greater termination entitlements (as addressed in Section 13).

10.2 Consequences of a transfer of worker

In order to strictly comply with the Labour Law, the transitioning of workers of one enterprise to another requires the termination of the workers by the current employer followed by the hiring of the workers by the new employer. In such a scenario, the current employer is required to provide termination compensation to each terminated worker in accordance with the Labour Law. The workers, once hired by the new employer, begin working as new workers with no seniority or continuity of service unless recognized by the new employer. If the new employer recognizes the seniority of employment of the workers from the previous employer, the new employer will be responsible for all the statutory rights attached to the seniority as addressed in Section 10.1.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent workers? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Casual (or temporary) workers shall have the same rights and benefits as regular (or permanent workers).

11.2 Agency workers

Agency workers shall enjoy the same rights and benefits as regular workers as stated under the Labour Law. The only distinction with agency workers is that they are hired by the outsourcing company or agency. Therefore, their actual employer is the outsourcing company or agency. However, if the enterprise has direction and supervision over the agency workers, those workers may be considered as the workers of the enterprise and can claim all the rights and benefits from the enterprise.

11.3 Part-time workers

The Labour Law does not mention part-time workers. In any case, such workers should be entitled to the same rights and benefits as full-time workers (on a pro-rata basis).

DISCRIMINATION AND HARASSMENT

12 What protection do workers have from discrimination and harassment, and on what grounds?

Pursuant to Article 12 of the Labour Law, an employer must not take into account race, colour, sex, religion, political opinion, origin, ancestry, social origin or union membership as a basis for making decisions with regard to hiring, training, promotion, compensation, discipline or termination of a worker.

With respect to the employment of disabled persons, an employer with 100 or more workers must have 1% of its total workforce as qualified disabled persons.

While the Labour Law does not specify penalties for employee acts of discrimination, under Article 83 of the Labour Law, an employee may be summarily dismissed for serious misconduct if he/she uses threats, abusive language, violence or assault.

TERMINATION OF EMPLOYMENT

13 What rights do workers have when their employment contract is terminated?

The conditions for termination of individual employment contracts depend on the type of employment contract.

For an FDC, the contract cannot be terminated before its expiration date, except with cause as follows:

- Upon mutual agreement by way of a separate termination agreement, signed by both worker and employer in front of a labour inspector;
- When there is an event of force majeure, such as an earthquake, flood or fire; or
- When there is 'serious misconduct' by the worker (to the extent proven by the employer).

An FDC normally terminates at the specified end date. Failure by the employer to give prior termination notice before its expiration date results in either:

- Automatic renewal of the employment contract, for the same terms and conditions and same period as the original contract.
- The contract becoming a UDC, if the total length of service provided by the worker exceeds two years.

For an FDC, the following notice periods are required from the employer only, for the following service periods:

- Less than six months: no prior notice required.
- Between six months and one year: 10 days.
- Between one year and two years: 15 days.

If an FDC:

- Is terminated at the end of the term, the worker is entitled to the prior notice of termination (or compensation in lieu), severance pay, compensation for unused annual leave (if any) and the last unpaid salary.
- Is prematurely terminated by the employer with cause (in the absence of serious misconduct) as explained above, the worker is entitled to prior notice (or compensation in lieu), severance pay, compensation for unused annual leave (if any) and the last unpaid salary.
- Is prematurely terminated by the employer without cause, the worker is entitled to prior notice or compensation in lieu of prior notice, severance pay, compensation at least equal to the remuneration the worker would have received up to the expiration date of the contract, compensation for unused annual leave (if any) and the last unpaid salary.

If terminated due to the worker's serious misconduct, no salary of the remaining period or severance pay is payable. The employer is only required to pay compensation for any unused annual leave and the final unpaid salary. For a UDC, the employment contract can be terminated at will by either party, provided termination is made in writing with proper prior notice given to the other party. On termination by the employer, a valid reason must be provided (justified dismissal or termination with cause).

A UDC is terminated with cause when it is terminated on any of the following grounds:

- With a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise;
- As a result of an event of force majeure; or
- As a result of serious misconduct of the worker.

For a UDC, prior notice from the party initiating the termination is required for the following service periods:

- Less than six months of service: seven days.
- Between six months to two years: 15 days.
- Between two years to five years: one month.

- Between five years to 10 years: two months.
- 10 years or more: three months.

If a UDC:

- Is terminated by the employer with cause (in the absence of serious misconduct), the worker is entitled to prior written notice (or compensation in lieu), two days of paid leave per week to look for a new job during the notice period, severance pay, compensation for any unused annual leave (if any) and the final unpaid salary.
- Is terminated by the employer in the event of serious misconduct by the worker, the employer is only required to pay compensation for any unused annual leave (if any) and the final unpaid salary.
- Is terminated by the employer without cause, the workers is entitled to two days of paid leave per week to look for a new job during the notice period, prior notice (or compensation in lieu), severance pay, damages equal to the amount of severance pay, compensation for unused annual leave (if any) and the final unpaid salary.

The severance pay for a UDC is equal to seven days of salary and fringe benefits if the worker has worked in the enterprise from six to 12 months consecutively; 15 days of salary and fringe benefits per year of service if the worker has worked in the enterprise for longer than one year (to a maximum of six months of salary and fringe benefits).

If termination of the employment contract is initiated by the worker, the worker must also give proper prior notice to the employer. The law does not specify any compensation if the worker fails to give proper notice. In practice, the worker must compensate the employer (on proof of damage suffered by the employer).

Please note that an employer must initiate disciplinary actions within 15 days after it ascertains that a worker has committed misconduct that forms the basis for dismissal. For serious misconduct, the employer shall be considered to have waived its right to dismiss the worker for serious misconduct, if this dismissal is not effected within seven days from the date on which the employer first learns of the serious misconduct in question.

Upon termination of employment contract, the employer is also required to give the Work Permit to the worker and issue the employment certificate for the worker.

14 What protection do workers have against dismissal? Are there any specific categories of protected workers?

14.1 Protection against dismissal

Under Article 27 of the Labour Law, any disciplinary action to be taken against a worker (including the dismissal) must be proportional to the seriousness of the misconduct. The labour inspector is empowered to decide the appropriateness of the disciplinary action.

The workers have the right to bring a case to the labour authorities and competent court on a collective basis if any unjustified termination occurs. If the court finds that the termination is unjustified, the Arbitration Council may order the employer to provide termination compensation in accordance with the Labour Law (for workers under FDCs and UDCs) and possibly reinstate the workers (for workers under UDCs).

14.2 Protected workers

The following workers are entitled to special protection:

- Staff representatives;
- Unelected candidates for staff representative elections;
- Three elected union leaders of legally registered unions;
- Founding union members or normal union members; and
- Candidates for union elections, unelected candidates for union elections.

The termination of workers entitled to special protection requires prior approval from the labour inspector.

In case of serious misconduct, prior approval from the MLVT is required before termination may be effected. If the labour inspector disagrees with the ground for termination, the suspension shall be deemed invalid and the employer shall be reinstated and back-paid for the period of suspension.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Mass layoffs are regulated in the Labour Law. Mass layoff is subject to the following procedures:

- The employer must establish the order of termination in light of professional qualifications, seniority within the establishment and the family responsibilities of its workers;
- The employer must inform the staff representatives and workers of the proposed collective termination;
- The first workers to be terminated must be those with the least professional ability, followed by the workers with the least seniority, noting that a worker's seniority is increased by one year for a married worker and by an additional year for each dependent child;
- The employer shall inform the labour inspector of the MLVT or DLVT of each step in the collective termination process and, at the request of the staff representatives, the labour inspector can call concerned parties together one or more times to examine the impact of the proposed collective termination and assess the measures to be taken to minimise its effects. In exceptional cases, the MLVT or DLVT can (on up to two occasions) issue a Prakas/ruling to suspend the mass layoff for a period not exceeding 30 days in order to help the concerned parties find a solution; and
- The employer is required to give priority to terminated workers if there is any job similar to their prior job within two years after the collective termination. The employer must inform the terminated workers through a registered letter when such job becomes available. After receiving the letter, the worker(s) must appear at the enterprise within one week of receipt or be deemed as having renounced their right to be re-hired.

Worker compensation depends on the type of employment contract (FDC or UDC) and the duration of services provided by the workers.

WORKER REPRESENTATION AND CONSULTATION

16 Are workers entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is worker consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

The Labour Law requires every enterprise or establishment with at least eight workers to have staff representative(s) to represent the workers as stated in Section 3.4.2.

Staff representative(s) must be consulted in situations where workers are going to be made redundant due to corporate transactions. The employer must inform the staff representative(s) in writing and ask for their suggestions, mainly on measures to minimise the effects of the redundancies on the affected workers. Other than this, the staff representative(s) must also be consulted with respect to each of the approval of the IWRs of the enterprise and each subsequent amendment and overtime work.

17 What remedies are available if an employer fails to comply with its consultation duties? Can workers take action to prevent any proposals going ahead?

17.1 Remedies

The Labour Law does not address the remedies in case an employer fails to comply with its consultation duties. However, the labour authority will likely determine that the mass layoff procedures do not comply with the Labour Law and (as the case may be) suspend the mass layoff, refuse to give approval on the IWRs, or refuse to approve overtime work.

17.2 Worker action

The workers can bring the case to labour authorities or competent court to demand the employer to fulfil its consultation obligations. If there is sufficient evidence, the Arbitration Council would normally order the employer to consult with the staff representative(s).

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of workers on a business transfer?

18.1 Automatic transfer of workers

Pursuant to Article 87 of the Labour Law, if a change occurs in the legal status of the employer, particularly by succession or inheritance, sale, merger or transfer of funds to form a new company, all employment contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise. This scenario applies only in cases where there is a change in the legal status of the employer, but not the transfer of workers between two different entities.

18.2 Protection against dismissal

Transferring workers (workers to be terminated and rehired) have the right to reject the offer of employment from the new employer if they do not consent to the proposed transfer. The employer would then need to compensate such workers in accordance with the Labour Law.

18.3 Harmonisation of employment terms

The employment terms with the new employer shall be subject to agreement by the new employer and the worker. It can be the same terms as the previous employment with the former employer or different.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**

Employment income of foreign nationals working in Cambodia is subject to Tax on Salary ("**TOS**") and the Fringe Benefits Tax ("**TOFB**"). The Cambodian employer is required to withhold the TOS and TOFB and remit the amounts withheld to the Cambodian tax authority.

- **Nationals of your jurisdiction working abroad?**

A Cambodian national employed by a Cambodian employer to perform employment services abroad is subject to the TOS and/or TOFB which will be paid through the withholding system described above since his employment income will be considered as Cambodian-source income. If the Cambodian national is employed by a non-resident employer to perform service abroad and such Cambodian national has established his tax residency in the foreign country, no tax applies.

19.1 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or workers?

Tax resident workers

A resident worker is subject to the TOS at progressive rates ranging from 0% to 20%. Please see the progressive rates below:

Monthly Salary in KHR	Monthly Salary in USD	Incremental Tax Rate
800,000 or less	200 or less	0%
800,001 to 1,250,000	200 to 312.50	5%
1,250,001 to 8,500,000	312.50 to 2,125	10%
8,500,001 to 12,500,000	2,125 to 3,125	15%
Over 12,500,000	Over 3,125	20%

TOS Rates - (Exchange rate: USD 1 = KHR 4,000)

A resident worker is allowed a monthly reduction of Riel 75,000 (approximately US$19) in his tax base for the following family members:

- Minor dependent children (up to 14 years old, or up to 25 years old if still at school); and
- A dependent housewife.

Any fringe benefits given to the resident worker is subject to TOFB at a flat rate of 20%.

Fringe benefits include:

- Private use of a motor vehicle;
- Meals and accommodation expenses;
- Payment of rent or the provision of rent-free housing;
- Payment of electricity, water and telephone expenses;
- Loans with concessional interest rates;
- Non-employment related educational expenses, including children's education;
- Life or health insurance, where the same insurance is not available to each worker, irrespective of position; and
- Payment for expenses for entertainment and leisure that are not directly related to employment (noting that, in addition to the fringe benefit tax liability, the employer will not receive a deduction for the expenditure).

In 2015, the Ministry of Economy and Finance ("**MEF**") issued Circular 002 dated 20 January 2015 which exempts the following allowances given by factories to their workers from the TOFB and TOS:

- Transportation allowance between workplace and worker's residence and vice versa;
- Housing allowance or the provision of accommodation within the employer's premises in accordance with the Labour Law;
- Meal allowance including meal allowance for overtime that is provided to all workers, irrespective of position;
- Contributions to the social security fund and social well-being fund at the level provided by law;
- Health insurance allowance or insurance premium for life or health insurance that is provided to all workers, irrespective of position;
- Childcare allowance or day-care centre expenses at the level provided the labour by law; and
- Severance pay or layoff indemnities within the limit specified by the labour law.

19.2 Non-tax resident workers

Non-resident workers of Cambodian taxpayers are taxed at a flat rate of 20% for salaries and fringe benefits.

19.3 Employers

During the employment relationship, the employer is obligated to withhold the TOS and the TOFB and remit the taxes to the tax authority on a monthly basis.

In addition, the employer has obligation to pay the contribution to the NSSF at a rate ranging from USD0.40 to USD2 depending on the salary of the worker. The contributions are considered as deductible expenses for the purposes of calculating the employer's profit tax.

BONUSES

20 Is it common to reward workers through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common to reward workers through contractual or discretionary bonuses. The Labour Law allows the employer to provide benefits greater than the Labour Law. However, any agreement or policies providing less benefit for workers or containing any provisions that violate the Labour Law and other laws and regulations shall be void. Please note that once the employer provides benefits above those required by law, the employer may be bound to continue to provide those greater

benefits.

For tax purposes, there is no restriction on the amount of bonus that can be awarded to a worker. Under Cambodia's tax law, the term "salary" is defined as including bonuses. Therefore, bonuses paid to a worker are included in the monthly TOS base for the calculation of the TOS.

RESTRAINT OF TRADE

21 Is it possible to restrict a worker's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former worker while they are subject to post-employment restrictive covenants?

It is possible to restrict a worker from any activities that may impact on the employment relationship and operation of the enterprise during employment. For instance, it is common that the employment contract forbids workers, during employment, from working for another employer, engaging in any activities that appear to have a conflict of interest with the enterprise or disclose any confidential information of the enterprise. The restrictions must be stated in the employment contract and/or internal policies that bind the workers.

However, under Article 70 of the Labour Law, all clauses of an employment contract that prohibit the worker from engaging in any activity after the expiration of the contract are void. In practice, while some employers may insert post-employment restraints in the employment contract, such clauses are likely be challenged by the labour authorities and/or competent court if there was any case brought by the worker.

PROPOSALS FOR REFORM

22 Are there any proposals to reform employment law in your jurisdiction?

From our perspective, while the Labour Law provides a comprehensive legal framework to govern employment relations between employers and workers, it was adopted in 1997, and so some provisions do not address current practice in employment relationships.

Currently, a law on workers' unions and employers' associations is being drafted. The draft law includes certain provisions detailing the governing, registration, and the conduct of workers' unions and employers' associations. The procedures in relation to strike action are also to be specified in this draft law. This law is expected to be enacted by the end of 2015; however, the date is not guaranteed. In addition, the NSSF is moving to implement the health insurance scheme.

Finally, it is possible that the taxation of employment income may be reformed. The tax authorities have issued statements on implementing a general personal income tax regime that would cover both employment and non-employment income, but no concrete proposals have been disseminated to the public to date.

Parts of this overview were written by Heng Chhay of R&T Sok & Heng Law Office. Maly Courtaigne-Op of DFDL Singapore has updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.

September 2015

China

CHINA

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

There are **two** ways foreign nationals can work in the People's Republic of China (PRC):

- The foreign national is directly employed by a PRC entity, which acts as the legal employer of that foreign national (direct hiring).
- The foreign national is employed by a foreign entity and then seconded to work in a PRC entity (secondment).

Under direct hiring, the employment of foreign nationals is subject to all aspects of PRC employment laws, including but not limited to terms concerning:

- Execution of the employment contract.
- Rest and vacation.
- Social insurance.
- Termination.

Under secondment, PRC employment laws are not generally applicable. However, the following matters must still comply with PRC employment law:

- Minimum wages.
- Working hours.
- Holiday entitlement.
- Labour safety and hygiene.
- Work permits and social insurance.

1.2 Laws applicable to nationals working abroad

When a PRC national is seconded to work abroad by a PRC employer, both the individual and the PRC employer are subject to PRC employment laws.

However, the employment relationship between a PRC national working abroad and a foreign employer is not governed by PRC employment laws.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

Under PRC laws, personal services provided by the following persons are categorised as labour services:

- The retired.
- Foreign nationals without a work permit.
- Student interns.

- Freelancers.

Unlike an employment relationship, labour services are not governed by the PRC Labour Law, Employment Contract Law, Social Security Law and other employment-related regulations.

The disputes arising between an employer and a personal labour services provider are not heard by labour arbitration committees as they are not regarded as labour and employment issues.

However, other than that, the law does not classify individuals into employees, workers, the self-employed and independent contractors.

2.1.1 **Labour services vs employment.** Unlike an employee under an employment relationship, a labour services provider is not entitled to:

- Severance pay.
- Social security benefits.
- Overtime pay.
- Statutory working hours limitations.
- Statutory paid annual leave.
- Other employment contract-related rights and benefits.

The termination conditions of a labour services contract can be freely negotiated by the parties, which is not allowed under an employment contract. A labour services contract can take any form: the law does not provide that it should be in writing or made orally.

2.2 Time periods

As the labour services contract is governed by contract law only, its duration can be agreed freely by the parties.

The length of an employment contract can be determined based on the completion of a certain task. Upon the completion of the task, the underlying employment contract expires.

The law does not prescribe a maximum legal duration for any type of employment relationship.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

Employers must file evidence of the employee's recruitment in order to receive tax preferences or special subsidies. In addition, the following documents must usually be submitted to and reviewed by the government authorities also for the purpose of receiving tax preferences or special subsidies:

- Employment contracts executed with disabled employees.
- Records of paying social insurance for disabled employees.
- Records of paying salary to disabled employees.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

4.1 Visa - Z visa

4.1.1 **Procedure for obtaining approval.** Generally, the PRC entity must apply for an employment licence and obtain an official Z visa invitation letter for the foreign national before the foreign national enters the PRC.

After obtaining the employment licence and the Z visa invitation letter, the foreign national must apply for a Z visa at a PRC embassy or consulate in their home country. Usually, the foreign national must undertake a medical examination before entering the PRC.

After obtaining the Z visa, the foreign national can enter the PRC. The foreign national must then apply for a residence permit from the local public security bureau within 30 days after entering the PRC and obtaining a work permit (please refer to 4.4.1 for more details). The duration that the foreign national can stay in the PRC will be dictated by the residence permit. The foreign national can leave or enter China multiple times within the approved period indicated on the residence permit.

4.1.2 **Cost.** The government filing fee for obtaining an employment licence varies from region to region, though its issuance is usually free of charge.

The government filing fee for a Z visa varies depending on the nationality of the person obtaining the visa.

4.1.3 **Time frame.** When correctly completed applications are received by government authorities, the following time frames usually apply (though this can vary from region to region):

- It generally takes approximately 10 working days to issue an employment licence.
- It generally takes four to six weeks to issue a Z visa.

4.1.4 **Sanctions.** Foreign nationals entering China must present their passport or other international travel document and visa to the border inspection authorities. Foreign nationals who do not hold a valid Z visa must not be allowed to work in China.

4.2 Visa - R visa

As the Administrative Regulations of the People's Republic of China on Entry and Exit of Foreigners came into force on 1 September 2013, a new type of visa has been added for "talent introduction". The corresponding visa type is the R visa, issued to high-level foreign national talents and specialised talents sought by China in urgent matters.

As the R visa is a new type of work visa, the authorities have yet to provide a detailed procedure on obtaining one.

4.3 Off-campus work and internship of foreign national students

When a foreign national holding a study residence permit needs to undertake off-campus work or internships, upon obtaining consent from their school, they must apply to the entry/exit administration of a competent public security authority to have their residence permit changed to reflect the place and period of the work or internship.

4.4 Permits - Z visa

4.4.1 **Procedure for obtaining approval.** After obtaining the employment licence and the Z visa, the PRC entity must apply for a work permit within 15 days after the foreign national enters the PRC. Usually, the employment licence, the employment contract and the foreign national's valid passport are required for the application.

The foreign national holding a work permit must apply to the local public security bureau for a residence permit within 30 days after entering the PRC. The length of an employment residence permit is between 90 days and five years.

When the work permit is about to expire, the PRC entity can apply for an extension with the local labour administrative department 30 days prior to the expiry date. When the work permit is extended, the foreign national's residence permit usually needs to be extended accordingly.

4.4.2 **Cost.** The government filing fee for obtaining the work permit varies from region to region, though its issuance is usually free of charge. The application fee for a residence permit depends on its duration. For those granted for one year or less, the fee is RMB400. The fee increases if the residence permit is granted for longer than one year.

There is usually no charge to extend a work permit, though a charge for extension of a residence permit as is charged for its issuance may apply, depending on the length of the extension.

4.4.3 **Time frame.** Processing time varies from region to region, but generally the following time frames apply:

- Obtaining a work permit takes between five and seven working days.
- Obtaining a residence permit takes approximately five working days.
- Extending a work permit takes approximately three working days.
- Extending a residence permit takes between five and 10 working days.

4.4.4 **Sanctions.** Employment of foreign nationals without a work permit and a residence permit is regarded as illegal. The offending employees:

- May be repatriated and forbidden from entering China for one to five years from the date of repatriation.
- Are subject to a fine ranging from RMB5,000 to RMB20,000.
- When the case is serious, will be detained for a period of more than five days but less than 15 days and be subject to the fine above.

4.5 Permits - R visa

As the R visa is a new type of work visa, the authorities have yet to provide a detailed procedure to obtain one.

4.6 Other

The process for obtaining prior approvals for a foreign national who works with a PRC representative office of a foreign company is slightly different.

4.6.1 **Procedure for obtaining approval.** The foreign national must be registered with the local administration for industry and commerce as the representative office's representative or chief representative and obtain a Representative Certificate.

The representative office must also apply to a competent local labour administrative department for an official Z visa invitation letter.

After obtaining the Representative Certificate and the Z visa invitation letter, the foreign national must apply for a Z visa at a PRC embassy or consulate in their home country.

The foreign national can enter the PRC with the Z visa and must then apply for a work permit. The foreign national must also apply for a residence permit at the local public security bureau.

A medical examination is usually required before a foreign national can enter the PRC.

4.6.2 **Cost.** See above Visa: Cost.

4.6.3 **Time frame.** See above, Visa: Time frame.

4.6.4 **Sanctions.** See above, Permit Sanctions.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

A written employment contract must be executed between the employee and the employer when a full-time employee is recruited. The following matters must be included in the employment contract:

- The name, domicile and legal representative or main person in charge of the employer.
- The employee's name, domicile and ID number (or other valid documentary evidence of identity).
- The term of the employment contract.
- The job description and the place of work.
- Working hours, rest and leave.
- Remuneration.
- Social insurance.
- Labour protection, working conditions and protection against occupational hazards.
- Any other matters that are legally required to be included in employment contracts under applicable laws and regulations.

5.2 Implied terms

Certain legal requirements are implied into the employment relationship, irrespective of whether or not they are covered in the written contract, and include but are not limited to:

- Grounds for employment termination.
- Minimum wages.
- Calculation of statutory severance.

5.3 Collective agreements

Currently, collective agreements are more common in enterprises in the manufacturing and retail industries. Recently, the use of collective agreements has been encouraged for all types of enterprises. The PRC government and the All China Federation of Trade Unions (ACFTU) jointly published a "Rainbow Plan", which sets the goal of having all companies that have set up an enterprise-level trade union covered by a collective agreement by the end of year 2012.

Currently, most collective agreements are negotiated at company level between the company's management and its employees. To enhance employees' bargaining power, the ACFTU and the government have promoted the establishment of enterprise-level trade unions, because enterprise-level trade unions can represent employees in collective bargaining.

Though the latest official report and statistics from the ACFTU on the progress of the Rainbow Plan have not been made available, it is a common consideration that this plan is not strictly being carried out.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Generally, an employer cannot unilaterally change the terms and conditions of employment without the employee's written consent. However, an employer can unilaterally change an employee's job position if either:

- The employee is incompetent in performing their role.
- The employee is unable to perform their role after a statutory period of medical treatment has expired (*see Question 8*).

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

An employee who has worked continuously for more than 12 months is entitled to statutory paid annual leave. The amount of statutory paid annual leave is determined by the employee's cumulative working years (which are calculated using the employee's length of time in work as a total, not just for the employer with whom the employee is currently working) and is as follows:

- One year or more but less than 10 years' working time: five working days' statutory paid annual leave.
- 10 years or more but less than 20 years' working time: 10 working days' statutory paid annual leave.
- 20 years or more working time: 15 working days' statutory paid annual leave.

7.2 Public holidays

There are 11 public holidays in total, as follows:

- A one-day holiday for New Year's Day (1 January).
- A three-day holiday for the Spring Festival (New Year's Day of the lunar year, and the second and third days of the first month of the lunar year).
- A one-day holiday for the Tomb-sweeping Festival (the lunar Tomb-sweeping Day).
- A one-day holiday for Labour Day (1 May).
- A one-day holiday for the Dragon Boat Festival (the Dragon Boat Day of the lunar year).
- A one-day holiday for the Mid-Autumn Festival (the Mid-Autumn Day of the lunar year).
- A three-day holiday for National Day (1, 2 and 3 October).

The public holidays are not included in the statutory paid annual leave.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

An employee who needs medical treatment for an illness or non-work related injury can take a medical treatment period of leave, which ranges from three months to 24 months (depending on the employee's total working years and their years of service with their current employer).

During the medical treatment period, the employer cannot unilaterally dismiss the employee, unless the employee falls within one of the circumstances provided in Article 39 of the PRC Employment Contract Law (for example, the employee has committed severe misconduct).

8.2 Entitlement to paid time off

If an employee suffers a work-related injury or occupational disease, the employee is entitled to their normal salary and welfare benefits paid each month by the employer during their medical treatment period. The suspension-of-work-with-pay period should normally not exceed 12 months.

If the employee suffers from a disability after receiving medical treatment, the normal salary and welfare benefits will stop being paid once an appraisal has been made of the employee's disability. The employee will then be entitled to disability payments, including a one-off and/or monthly payment under the Provisions on Work-related Injury Insurance. Different payments are made for varying degrees of disability.

If the illness or injury is not work-related, the employee is entitled to sick pay during the medical treatment period under the employer's internal policy and the local regulations. Sick pay must not be less than a certain percentage of the local minimum wage, which varies from region to region.

8.3 Recovery of sick pay from the state

For work-related injuries or occupational diseases, the employer and the work-related injury insurance fund (operated by the government) assume their liabilities respectively under the Provisions on Work-related Injury Insurance. The costs incurred by the employer in this respect cannot be recovered from the government. Sick pay cannot be recovered if it has been paid for a non-work related illness or injury.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Female employees are entitled to maternity leave of 98 days (which includes 15 days of antenatal leave). An extra 15 days' maternity leave can be granted where there are complications during labour. Female employees who have more than one baby in a single pregnancy will be granted an extra 15 days' maternity leave for each additional baby born. In addition, where a pregnant employee who is at least 24 years old gives birth to her first baby, she will be given additional maternity leave (normally 30 days) subject to local regulations.

For one year after the child is born, the female employee is given a one-hour break each day for breastfeeding. Female employees who bear more than one baby in a single birth are granted an extra one-hour break for each additional baby born.

During the pregnancy, maternity, and breastfeeding period, the employer must not change the female employee's salary. Additionally, the employer cannot unilaterally terminate her employment during these periods, unless one of the circumstances provided in Article 39 of PRC Employment Contract Law applies (for example, the employee's severe misconduct).

9.2 Paternity rights

Some local regulations provide that the father of a newly born child can enjoy a certain number of paid days leave. There is no national provision covering paternity rights.

9.3 Surrogacy

There are no specific regulations concerning surrogacy in China's employment laws.

9.4 Adoption rights

There are no specific regulations concerning adoption rights in China's employment laws.

9.5 Parental rights

The parents of a child who dies are entitled to one to three days' paid bereavement leave.

9.6 Carers' rights

There are no specific regulations concerning carers' rights in China's employment laws.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

A period of continuous employment influences an employee's entitlement with regards to:

- The medical treatment period.
- Statutory paid annual leave.
- Statutory severance.

The longer the period of continuous employment is, the more favourable these entitlements become.

Where an employee has been working with an employer for a consecutive period of 10 years or more, they are entitled to an open-ended contract (an open-ended contract cannot be terminated by the employer upon the expiration of a certain contract term, unlike a fixed-term contract). Where an employee has been working for the employer continuously for at least 15 years and is less than five years away from statutory retirement age, the employer cannot unilaterally dismiss the employee unless one of the circumstances provided in Article 39 of the PRC Employment Contract Law applies (for example, the employee's severe misconduct) (*see Question 14*).

10.2 Consequences of a transfer of employee

Where an employee is transferred to work for a new employer for reasons that are not attributable to the employee, their service period with the former employer also transfers and is counted as part of their years of service with the new employer. However, if the former employer made a severance payment to the employee at the time of transfer, the employee's service period with the former employer will not be taken into account when calculating any severance payments to be made by the new employer.

There are no statutory requirements regarding the method of transfers. The employer can agree with the employee to either:

- Terminate the employment with the former employer and sign a new employment contract with the new employer.
- Enter into a tripartite agreement to change the former employer to the new employer.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Under the PRC Employment Contract law, the employer and employee can execute a fixed-term employment contract upon mutual agreement.

However, a permanent (open-ended) employment contract must be offered if:

- The employee has been working for the employer for a consecutive period of more than 10 years.
- Prior to the renewal of the contract, a fixed-term employment contract had been executed on two consecutive occasions on and after 1 January 2008 with the same employer.

Moreover, when the employer fails to conclude a written employment contract with the employee within one year from the employee's first working day, a permanent employment contract will be implied, beginning on the day following the completion of the one-year period.

Temporary workers are entitled to the same statutory benefits as permanent employees (for example, social insurance and housing fund), and are entitled to the same statutory severance pay in the case of termination.

11.2 Agency workers

Agency workers are entitled to the same statutory benefits as permanent employees, and are entitled to the same statutory severance pay in the case of termination. They are also entitled to receive the same pay as permanent employees engaged in the same position.

11.3 Part-time workers

Part-time employees are paid by the hour and work not more than four hours per day for one employer. They can work for one or more employers and execute more than one employment contracts simultaneously. A written employment contract is not legally required between an employer and a part-time employee.

The employer cannot set out a probation period for part-time employees. The employment is at-will and both parties can unilaterally terminate the employment at any time, with or without cause. The employer is not required to pay severance after the termination of employment to its part-time employees. The hourly wages for part-time employees cannot be lower than the minimum hourly wage set by the local government.

The payment cycle to part-time employees cannot exceed 15 days.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Employees must not be discriminated against based on their:

- Nationality.
- Ethnicity.
- Race.
- Gender.
- Religious belief.

There are also regulations prohibiting discrimination against:

- Female employees.
- Disabled employees.
- Carriers of an infectious disease.
- Immigrant employees from rural areas.

Employers must both prevent and prohibit sexual harassment of female employees in their workplaces. Women who suffer sexual harassment have the right to:

- Bring a civil claim against the harasser.

- Report the harasser to their employer.
- Report the harasser to the relevant authorities.

As a general rule, the statute of limitations on a civil claim against the harasser is two years. If a female employee sues an employer for failure to provide protection from sexual harassment, the statute of limitation is generally one year.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

If the employer unilaterally dismisses an employee for any of the following reasons, it must give 30 days' prior written notice or one month's pay in lieu of notice to the employee:

- The employee suffers from an illness or a non-work related injury and is unable to take up the original work (or any other work) assigned by the employer to them after the statutory medical treatment period expires.
- The employee is incompetent in their job duties and remains incompetent after training or a change of job position.
- A major change to the objective circumstances under which the employment contract was executed has occurred and rendered the contract unable to be performed, and the employer and employee fail to reach an agreement on amending the contract after consultation.

Under the national laws and regulations (excepting the circumstances above) the employer is under no obligation to give prior notice or payment in lieu of notice when dismissing an employee. However, some local regulations (such as those that apply in Beijing) do require the employer to give prior notice or payment in lieu of notice when dismissing an employee upon expiration of the employment contract.

13.2 Severance payments

13.2.1 **Entitlement to severance.** Under the Employment Contract Law (effective 1 January 2008), if the employment contract is terminated for any of the following reasons, the employee will be entitled to severance pay:

- The employee resigns as a result of the employer's infringement of the employee's labour rights.
- The employment contract expires (except that the employee refuses to renew the employment contract after the employer offers to renew it with same or higher conditions).
- The dismissal is agreed to between the employer and employee, and the employer initiates the dismissal.
- The employer unilaterally terminates the employment (unless the termination is for one of the grounds stipulated in Article 39 of the Employment Contract Law, which includes the employee's severe misconduct; *see Question 14*).
- The employment is terminated upon the employer's bankruptcy.
- The employment is terminated because the employer's business licence has been revoked, or the employer has been ordered to close down/deregister, or the employer has opted for voluntary liquidation.

13.2.2 **Calculation of severance.** Generally speaking, statutory severance is one month's salary for every year of service. Since the Employment Contract Law took effect on 1 January 2008, severance pay must be calculated in two parts:

- For the service period before 1 January 2008: severance pay will be calculated in accordance with the applicable laws and regulations before 1 January 2008 (these can vary from the calculations that apply after 1 January 2008).
- For the service period after 1 January 2008 severance pay will be:
    - One month's salary for every year of service (a service period of at least six months but less than a year will be counted as one year); and

- Half a month's salary for a service period of less than six months.

One month's salary will be calculated based on the employee's average monthly salary during the 12 months prior to termination. However, in any event this amount is capped at three times the average monthly salary of local employees, as determined by the local government.

13.3 Unemployment insurance benefit

An employee who is left unemployed upon the termination of the employment contract is entitled to unemployment insurance benefits, provided:

- They have participated in the unemployment insurance scheme.
- They have paid the unemployment insurance contributions for more than one year.
- The termination was not within their control.
- They have registered as unemployed and have been actively seeking work.

13.4 Procedural requirements for dismissal

13.4.1 **Notifying the trade union of the reason for the termination.** An employer unilaterally dismissing an employee must notify its trade union of the reason for the dismissal in advance. If the employer does not have an enterprise-level trade union, the employer must notify and deal with a higher-level trade union regarding the unilateral termination. If the employer fails to fulfil this obligation, the validity of the termination can be challenged and denied by the arbitrator or the judge.

13.4.2 **Delivering the termination notice to the employee in the case of unilateral termination.** A termination notice must be properly delivered to the employee. Both the factual basis and legal grounds for the termination should be clearly stated in the notice. If the employer fails to fulfil this obligation, the validity of the termination can be challenged and denied by the arbitrator or the judge.

13.4.3 **Registering the termination with the authorities if the local regulation so requires.** In certain cities (for example, Tianjin and Shanghai), there is a mandatory filing requirement when terminating/ending an employment relationship, and the employer must, within a specified time period, register with the local labour administrative authority to change the employee's status from "employed" to "unemployed". If the employer refuses to complete this registration without justification, the employee will be entitled to file for labour arbitration against the employer, requiring the employer to complete the registration. If the employer still refuses to do so, then the employee can register the termination with the local authorities in person under the arbitral award.

13.4.4 **Transferring the social insurance account, the housing fund account and the personnel file.** On termination of the employment contract, the employer must transfer the employee's social insurance account, housing fund account and personnel file within 15 days under the PRC laws. Generally, only once the employee's social insurance account and personnel file are successfully transferred to the agent designated by the local labour administrative authority can the employer and the employee apply for unemployment insurance benefits. Where an employer delays or refuses to complete the transfer, and the employee loses unemployment benefits as a result, the employer must compensate the employee for the loss of benefits.

13.4.5 **Issuing a separation certificate.** The employee is entitled to require the employer to issue a separation certificate to them on termination of the employment contract, evidencing the termination of the employment contract. If the employer fails or refuses to issue the certificate, the employee can report the employer to the labour administrative authority, who can request that the employer rectify the matter. The employer may also have to compensate the employee for any loss suffered as a result.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

14.1.1 **Limited statutory ground for termination.** As a general rule, the employer cannot dismiss an employee unless the reason for the termination falls into one of the statutory grounds, which include:

- The employee fails to meet the recruitment requirements during the probation period.
- The employee commits severe misconduct.
- The employee commits a serious dereliction of duty or engages in corrupt practices, causing substantial damage to the employer's interests.

- The employee is subject to criminal liabilities.
- The employee uses means such as deception, coercion, or taking advantage of a vulnerable position, to cause the employer to enter into the employment contract or amend the employment contract contrary to the employer's true intent.
- The employee suffers from an illness or non-work related injury and is unable to take up the original work or any other work assigned by the employer upon the expiration of their medical treatment leave.
- The employee is incompetent in their job duties and remains incompetent after training or a change of their job position.
- A major change to the objective circumstances, under which the employment contract was executed, has occurred and rendered the contract unable to be performed, and the employer and employee have failed to reach an agreement on any amendment to the employment contract after consultation.
- The employment contract expires.
- The employee has commenced receiving their basic retirement pension under PRC law.
- The employee dies, or is declared dead or missing by the Chinese court.
- The employer is declared bankrupt.
- The employer's business licence has been revoked, or the employer has been ordered to close down/deregister, or the employer has opted for voluntary liquidation.

In all other cases, the employer must negotiate with the employee and obtain their consent to terminate employment.

14.1.2 **Supervision of the termination by trade unions.** The employer must notify the trade union when they are intending to unilaterally terminate an employment contract. If the employer violates employment laws or the terms of the employment contract, the trade union can demand that the employer rectify the situation. The employer must consider the trade union's opinions and notify the trade union in writing of the final decision on the termination.

14.1.3 **Legal remedy.** If the employee considers that they have been wrongfully dismissed, they have the right to file labour arbitration against the employer, claiming either:

- A double statutory severance payment.
- Reinstatement.

In order to protect employees, it is national policy that:

- The filing of labour dispute arbitration is free of charge.
- The burden of proof to establish that a termination was legal and justified falls on the employer.

In addition, where the employee disagrees with the arbitral award and that award is not a final ruling, the employee can file a lawsuit with the competent first instance court within 15 days after the award is given. Further appeal can be made (within 15 days of the date the judgment is given) to the second instance court from the first instance court's decision. The second instance court decision is final.

14.2 Protected employees

An employer cannot unilaterally terminate the employment of employees in the following circumstances (unless termination is based on a ground within Article 39 of the Employment Contract Law, which includes the employee's severe misconduct):

- The employee is engaged in operations that expose them to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or is under medical observation.
- The employee has been confirmed as having lost (or partially lost) his capacity to work as a result of contracting an occupational disease or sustaining a work-related injury with their current employer.

- The employee has contracted an illness or sustained a non-work-related injury, and the statutory medical period has not expired.
- The employee is a female employee in her pregnancy, maternity or breastfeeding period.
- The employee has been working for the employer continuously for at least 15 years and has less than five years before their statutory retirement age.

In addition, if an employee falls into any of the above categories when the term of their employment contract expires, the employer cannot terminate the employment at the end of the contract term. Instead, the employment contract must be extended until the relevant circumstance ceases to exist.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

Redundancy is defined as the situation where an employer reduces its workforce by 20 or more people, or by 10% or more of the total number of its employees, under any of the following circumstances:

- The employer is restructuring under the Enterprise Bankruptcy Law.
- The employer is experiencing serious difficulties in production and/or business operations.
- The employer changes production techniques, introduces a major technological innovation or revises its business method, and, after amending existing employment contracts, still needs to reduce its workforce.
- The employer is experiencing other major changes to the economic circumstances that originally formed the basis of the employment contracts at the time when they were executed.

National law does not cover the situation where less than 20 people, or less than 10% of the total workforce, are laid off. As a result, local practice varies in different cities.

15.2 Procedural requirements

Before the redundancies are conducted, the employer must complete the following procedures:

- Explain the circumstances to its trade union or to all of its employees 30 days before making any redundancies.
- Consider the opinions of the trade union or the employees.
- Report the workforce reduction plan to the competent labour administrative authorities.

In addition, the following categories of employees must be retained with priority during the redundancies:

- Those with long fixed-term employment contracts.
- Those with open-term employment contracts.
- Those who are the sole income earners in a family with dependent children or elderly people.

15.3 Redundancy/layoff pay

Employees who are made redundant must be paid statutory severance pay (*see Question 13, Severance payments*).

15.4 Collective redundancies

If an employer has redundancies consisting of 20 or more people or 10% or more of the total number of its employees, the employer must complete the statutory procedures as stated previously (*see above 15.2, Procedural requirement*).

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

16.1.1 **Board of directors.** Limited liability companies invested in and established by two or more state-owned enterprises, or two or more state-owned investment entities, must include employee representatives on their board of directors. The board of directors of other limited liability companies may also include employee representatives. Companies limited by shares may also include employee representatives on their board of directors.

Employee representatives must be company employees who have been democratically elected by congress, assembly or some other similar form.

16.1.2 **Board of supervisors.** Limited liability companies and companies limited by shares must have a board of supervisors, comprised of at least three members (exception: a small scale limited liability company or a limited liability company with small number of shareholders may have one or two supervisors). The board of supervisors must include shareholder representatives and employee representatives, and the employee representatives must comprise at least one-third of the board's membership.

As with the board of supervisors, employee representatives must be company employees who have been democratically elected by congress, assembly or some other similar form.

16.2 Consultation

Under the Company Law (amended in 2013), companies should utilise the employee representatives to practice democratic management in accordance with the law. Companies should seek advice from their trade union when discussing and deciding on important issues concerning the restructuring or operation of the company, or formulating important rules and regulations within the company. Employee representatives should also be utilised to seek advice and suggestions from employees in these circumstances.

The Employment Contract Law also explicitly specifies that employers must have discussions with employees (or the employee representatives) where they intend to formulate, revise or make decisions on internal rules or policies that will directly and substantially affect employees. These policies should be made through consultation with the trade union or the employee representatives.

16.3 Major transactions

Major transactions will be considered to be an important issue affecting the restructuring or operation of the company and will therefore require consultation (though the employees' or employee representatives' consent is not required).

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

There are no specific remedies for employees if their employer fails to comply with their consultation duties, and employees cannot veto the employer's major business/operational matters. However, where there has been a failure to consult before implementing internal policies that are directly related to the employees' major interests, those policies are likely to be deemed invalid and not to constitute a legal basis for taking disciplinary action against the employees (for example, dismissal).

17.2 Employee action

Employees can challenge the validity of the employer's decisions that are made without consultation and concern major business/operational matters, though this is very rare in practice.

Where the employer has failed to consult on internal policies directly related to the employees' major interests, employees can challenge the validity of those policies in labour arbitration or litigation, which can result in the policies being declared invalid as a basis for enforcing disciplinary action against the employees (this is more commonly used).

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

In the event of company merger or division, the employees' existing employment contract remains valid and will continue to be performed by the succeeding employer, who takes on the rights and obligations of the former employer. The employees are therefore automatically transferred to the new employer after the merger or division.

If the business transfer only involves a share transfer, the employer and employees remain the same and there is no automatic transfer of employees.

18.2 Protection against dismissal

Generally speaking, on a business transfer (for example, a merger, division or share transfer) the employees are protected against dismissal.

However, a business transfer other than a merger, division or share transfer (for example, an asset transfer or a sale of a business division) can lead to a major change to the objective circumstances under which the employment contract was executed, rendering the employment contract unenforceable. In that instance, if, after consultations, the employer and the employees are unable to agree on amending the employment contract, the employer can unilaterally terminate the employees by giving 30 days' prior written notice, or one month pay in lieu of notice. In that case, the terminated employees are entitled to statutory severance pay (*see Question 13, Severance payments*).

In addition, where a business transfer results in a redundancy situation (*see Question 15*), the employer can reduce its workforce by following the procedural requirements. Employees made redundant in this situation are entitled to receive statutory severance pay.

18.3 Harmonisation of employment terms

The new employer and the transferred employees can negotiate between themselves on harmonising the terms of employment with that of the new employer's existing employees.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

19.1.1 **Determination of tax liability.** With respect to foreign individuals who are not domiciled in China but are working in China, their tax liability is determined by both:

- The duration of their residence.
- Whether the income originates within or outside of China in a tax year.

Foreign individuals will be liable to taxation on the following basis:

- Where resident for no more than 90 or no more than 183 days:
  - Income originating from within China that is paid by employers within China will be subject to tax, and income paid by employers outside China is exempt from tax; and
  - Income originating outside of China that is paid by employers within China is not subject to tax, and income paid by employers outside of China is not subject to tax.
- Where resident for more than 90 or 183 days, but not more than one year:
  - Income originating from within China paid by employers either within or outside China is subject to tax; and
  - Income originating outside of China paid by employers either within or outside China is not subject to tax.

- Where resident for more than one year but less than five years:
    - Income originating from within China paid by employers either within or outside China is subject to tax; and
    - Income originating outside of China paid by employers within China is subject to tax, and income originating outside China paid by employers outside of China is exempt from tax.
- Where resident for more than five years, all income, whether received inside or outside of China, by employers inside or outside of China, is subject to tax.

19.1.2 Determination of taxable income. Taxable income includes:

- Wages.
- Salaries.
- Bonuses.
- Year-end additional payments.
- Profit shares.
- Subsidies.
- Allowances earned by individuals by virtue of the holding of any office or employment.
- Other incomes earned by individuals relating to the holding of any office or employment.

The following deductions can be applied to income:

- A total monthly deduction of CNY4,800, including CNY3,500 standard deduction applicable to PRC nationals, and an additional deduction of CNY1,300 for foreign nationals working in the PRC.
- For a taxpayer who has obtained income outside the PRC, the amount of individual income tax already paid outside the PRC may be deducted from the tax amount payable (limited to the tax amount payable for foreign-originated income under PRC laws).

19.2 Nationals working abroad

PRC nationals working abroad are subject to PRC individual income tax on their worldwide income.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

The rate of taxation on employment income depends on which bracket the employee's monthly taxable income falls into. The monthly standard deduction threshold is CNY3,500 for PRC nationals and CNY4,800 for foreign nationals. The corresponding tax rates for different levels of monthly taxable income are as follows:

- Income not exceeding CNY1,500: 3%.
- Income above CNY1,500 but not more than CNY4,500: 10%.
- Income above CNY4,500 but not more than CNY9,000: 20%.
- Income above CNY9,000 but not more than CNY35,000: 25%.
- Income above CNY35,000 but not more than CNY55,000: 30%.
- Income above CNY55,000 but not more than CNY80,000: 35%.
- Income above CNY80,000: 45%.

20.2 Social security contributions

Employers within the territory of the PRC and employees who are PRC nationals are subject to a mandatory PRC social security scheme, which includes payments for:

- Pension insurance.
- Medical insurance.

- Work related injury insurance.
- Unemployment insurance.
- Maternity insurance.
- Housing fund.

Employers and employees make contributions under schedules determined by the local authorities. Except for maternity and work related injury insurance contributions (which are only paid by employers), employers must withhold the employees' social security contributions. Contribution rates vary across different cities and are usually calculated on the basis of the employee's average monthly salary for the previous year (capped at three times the local average monthly salary for the previous year). For example, the rates for Beijing are currently as follows:

- Pension insurance: employer contributes 20%, and employee contributes 8%.
- Medical insurance: employer contributes 10%, and employee contributes 2% plus RMB3.
- Work related injury insurance: employer contributes between 0.2% and 3%, and employee contributes 0%.
- Unemployment insurance: employer contributes 1%, and employee contributes 0.2%.
- Maternity insurance: employer contributes 0.8%, and employee contributes 0%.
- Housing fund: employer contributes 12%, and employee contributes 12%.

There are special rules applicable to foreign nationals working within the PRC. Foreign nationals from countries with bilateral or multilateral social insurance treaties with China are exempt from participating in the PRC social insurance scheme (at the time of writing, Germany and Korea are the two countries with such arrangements). Under a Regulation issued on 6 September 2011 by the PRC Ministry of Human Resources and Social Security, other foreign nationals are subject to mandatory participation in the PRC social insurance scheme (though implementation varies across cities and participation in certain cities remains optional). However, foreign nationals do not have to participate in the PRC housing fund scheme.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common for employers to reward employees through contractual or discretionary bonuses in China. For example, in many companies, employees are entitled to a "13th month salary" at the end of each full year they have worked for the employer. In addition, many companies provide their salespersons with commissions as an extra reward. In practice, employers tend to award employees bonuses based on the result of their performance review.

Generally, the provision of bonuses is solely at the employer's discretion. However, an internal guideline published by the government in September 2009 standardises the granting of performance bonuses to the senior management of central state-owned enterprises (Guidance on Further Standardizing the Remunerations of Central Enterprise Management, published in September 2009). Under the Guideline the overall bonus paid in a given year must not be more than 15 times the previous year's average annual salary of all employees working at the enterprise. As the competent industry authorities calculate the annual salary of the central state-owned enterprises' employees, the enterprise must report the performance bonus to such a competent authority in accordance with the regulations provided in the Guidelines.

Furthermore, once the employer promises to provide a certain bonus to the employee in the employment contract or the employer's internal policies, the employer will be obliged to abide by those provisions.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

The employer can restrict an employee's activities both during employment and after termination (using, for example, non-compete, non-solicitation and confidentiality clauses), and these restrictions are usually incorporated into the employment contract. However, such restrictions must be reasonable.

22.2 Post-employment restrictive covenants

Non-compete clauses are subject to regulatory requirements, for example:

- They cannot be for a time period of more than two years following termination.
- The employer must pay the employee compensation on a monthly basis for abiding by the covenant. In practice, 30% to 60% of the employee's average monthly salary is acceptable. The amount of the compensation should be specifically stipulated in the non-compete clause or agreement in advance. If it is not stipulated, the court may order compensation for the employee in the amount of up to 30% of the employee's average monthly salary of the 12 months preceding the termination.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

The Decision on Modification of PRC Employment Contract Law took effect on 1 July 2013 and its supporting regulation, the Interim Regulations on Labour Dispatch (Regulations), became effective on 1 March 2014 by the Ministry of Human Resources and Social Security.

The Regulations provide that the number of dispatched employees must not exceed 10% of the total number of the company's employees. (Labour Dispatch in China refers to the triangular employment relationship where the employee, hired by a labour dispatch agency (that is, the party who hires the employee with an employment contract and sends the employee to an accepting unit to work based on the commercial dispatch agreement providing unit) as the legal employer, actually provides service to another entity (accepting unit) who pays the employee's remuneration and benefits through the labour dispatch agency. The accepting unit has the right to select, train, control and manage the employee's performance.) The "total number" is the sum of the number of directly-hired employees and the number of dispatched employees.

Additionally, in the event that the dispatched employee suffered an injury at work in the company, the labour dispatch agency should apply for the identification of work-related injury and assume the work-related injury insurance liabilities. However, the labour dispatch agency may reach agreement with the company for reimbursement. The company is responsible for matters relating to the occupational disease diagnosis and identification for the dispatched employee. The company also provides necessary materials such as dispatched employee's history of occupation and exposure to occupational disease hazard, and the testing result of hazardous factors of occupational disease, while the labour dispatch agency provides other necessary materials.

This overview was written by Junlu Jiang and Xiaodan Xu of King & Wood Mallesons. It has been updated for the Taylor Vinters' Asia Pacific Employment Law Handbook by Kevin Xu of Martin Hu & Partners.

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Hong Kong

HONG KONG

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

The Employment Ordinance (EO) is the main employment legislation in Hong Kong. It guarantees certain minimum benefits, including:

- Paid annual leave.
- Paid sick leave.
- Paid maternity/paternity leave.
- Minimum notice of termination and a right to make a payment in lieu of notice.

Subject to limited exceptions, the EO applies to all employees working in Hong Kong, regardless of their nationality. Observing the terms of the EO is generally considered to be mandatory, although it is not specifically expressed to be an overriding statute.

Employees who are employed by foreign employers and seconded to Hong Kong are often employed under contracts expressed to be governed by foreign laws. There are currently conflicting High Court decisions on whether a non-Hong Kong choice of law clause in an employment contract can validly exclude the application of the EO. In *HSBC Bank PLC v Stephen* Wallace *(HCA 2422/2007)* it was held that the EO did not apply to an employee seconded from the UK to work in Hong Kong under an employment contract governed by English law.

The Court in *Cantor Fitzgerald Europe & Ors v Boyer & Ors (HCA 1160/2011)* did not agree with the decision in *HSBC*, and held that an employee seconded to work in Hong Kong from the UK under an employment contract governed by English law was subject to the EO, "save for any mandatory employment laws of Hong Kong". It is therefore currently unclear whether an employment contract for an employee working in Hong Kong can exclude the application of the EO, particularly where the terms of the EO are more generous than the terms of the contract.

Other mandatory laws that are likely to apply to an employment relationship, regardless of the contractual choice of legal provisions are the:

1.1.1 **Personal Data (Privacy) Ordinance (PDPO).** This ordinance regulates an employer's collection or surveillance, use and disclosure of an employee's personal data (including personal data contained in e-mails and phone calls).

1.1.2 **Mandatory Provident Fund Schemes Ordinance (MPFSO).** Subject to very limited exceptions, this ordinance requires employers in Hong Kong to enrol employees in a Mandatory Provident Fund (MPF) Scheme (that is, a retirement scheme), to which the employer and employee must make certain contributions. Foreign nationals are exempt if the permission given to them to work in Hong Kong by immigration authorities does not exceed a period of 13 months or they belong to a retirement scheme outside of Hong Kong similar to MPF. In certain cases, a Hong Kong national working outside of Hong Kong may still be subject to this ordinance if the employment has sufficient connection with Hong Kong.

1.1.3 **Occupational Safety and Health Ordinance (OSHO).** This ordinance imposes a duty on all employers, as far as is reasonably practical, to ensure the safety and health in the workplace of its employees. The OSHO covers most industrial and non-industrial workplaces in Hong Kong.

1.1.4 **Employees' Compensation Ordinance (ECO).** If an employee suffers injury arising out of and in the course of employment in Hong Kong (or overseas, if the travel is authorised by the employer), the employer is usually liable to compensate the employee under the ECO. Eligible family members of an employee killed in an accident at work can also be entitled to compensation. If an employer carries on business in Hong Kong, its employees are protected under the ordinance. All employers must maintain valid employees' compensation insurance policies to cover their liabilities under the ordinance and at common law.

1.1.5 **Companies Ordinance.** Protects employees of a Hong Kong company (including a Hong Kong subsidiary of a foreign company) in relation to wages and other entitlements if the company is wound up. The employees become preferential creditors in the winding-up.

1.1.6 **Sex Discrimination Ordinance (SDO), Disability Discrimination Ordinance (DDO), Family Status Discrimination Ordinance (FSDO) and Race Discrimination Ordinance (RDO).** All legislate against various forms of discrimination (*see Question 12*).

1.1.7 **Basic Law and the Hong Kong Bill of Rights Ordinance.** These safeguard certain rights of individuals, although they have limited application in the context of employment law.

1.1.8 **Labour Tribunal Ordinance.** This ordinance empowers the Labour Tribunal to hear and resolve disputes relating to employment contracts as well as alleged breaches of the EO. It potentially covers disputes involving foreign nationals or Hong Kong residents working abroad (*see below 1.2, Laws applicable to nationals working abroad*).

1.1.9 **Prevention of Bribery Ordinance (POBO).** The POBO applies to employees, prohibiting the receipt or solicitation of bribes from third parties (for example, an employee who receives bribes from a supplier of goods in return for placing orders with that supplier). In some cases, employees may also be subject to anti-corruption legislation in other jurisdictions.

1.2 Laws applicable to nationals working abroad

Hong Kong employment law only applies to nationals working abroad if the employee's employment contract is expressly governed by Hong Kong law or has a substantial connection with Hong Kong. Factors in determining substantial connection include:

- Currency of pay.
- Employee's residency.
- Residency of the employee's family.
- Location of the management.
- Location where the contract was concluded.

The Contracts for Employment Outside Hong Kong Ordinance (CEOHKO) applies to Hong Kong nationals who are recruited by an employer that is neither based in Hong Kong, nor undertakes any business in Hong Kong.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

In Hong Kong, the key distinction in employment law is between 'continuous' and 'non-continuous' employment. To qualify as continuous employment, the employee must have worked for the same employer during each of the previous four weeks for at least 18 hours in each of those weeks. It generally does not matter if the employment relationship was governed by separate, successive employment contracts, only that the employee works the requisite number of hours in each of the weeks.

2.2 Entitlement to statutory employment rights

All employees (whether they are continuously employed or not) are entitled to a basic level of protection. Basic statutory rights include:

- Protection from discrimination.
- Entitlement to statutory holidays.
- Statutory minimum wage.

Employees under continuous employment are entitled to a greater level of statutory employment rights. For example, they are entitled to:

- Rest days.

- Paid annual leave.
- Sickness allowance.
- Severance or long service pay (where other necessary conditions are satisfied).

2.3 Time periods

Hong Kong employees need to have worked for the same employer during each of the previous four weeks for at least 18 hours in each of those weeks, to qualify for additional employment rights under the EO.

There are no maximum engagement periods.

RECRUITMENT

3 Do any filings need to be made when employing people?

Form IR56E needs to be filed with the Inland Revenue within three months of the employee starting his employment.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country?

Generally, unless a person is a Hong Kong permanent resident, has a right to land, or holds a dependent visa, he generally requires a visa to enter Hong Kong for employment purposes. An application for a visa to work can be made under the General Employment Policy (GEP). The GEP does not apply to residents of the People's Republic of China (China).

An overseas Chinese national holding a Chinese passport who meets the GEP criteria may apply under the GEP if he both:

- Has permanent residence overseas; and
- Had been residing overseas for at least one year immediately before the submission of the application.

Other Chinese nationals may apply under the Admission Scheme for Mainland Talents and Professionals (ASMT). The criteria and mode of application under the ASMT are broadly the same as those under the GEP (*see below*).

A non-Hong Kong employee who obtained a degree or higher qualification in a full-time and Hong Kong-accredited programme can apply under the Immigration Arrangements for Non-Local Graduates to work in Hong Kong. This application is relatively straightforward. The processing time under this scheme is around three weeks.

4.1 Visa

4.1.1 **Procedure for obtaining approval.** A visa under the GEP can be obtained by application to the Hong Kong Immigration Department, or through a Chinese embassy abroad. The employer must demonstrate that:

- The employee:
  - Possesses special skills, knowledge or experience of value which is not readily available in Hong Kong;
  - Has no known criminal record;
  - Has a good educational background in the relevant field; and
  - Has a confirmed offer of employment and is employed in a job relevant to that employee's skills, which cannot be readily taken up by the local workforce.
- There is a genuine job vacancy.
- The remuneration package is broadly commensurate with the prevailing market level for professionals in Hong Kong.

The relevant application forms can be downloaded from the website of the Hong Kong Immigration Department. Completed application forms, together with the relevant supporting documents, can be submitted in person or by post. Each application must also be supported by a sponsor, which is generally the Hong Kong based employer.

The visa can be renewed. The employee must be physically in Hong Kong when submitting the renewal application.

There is no requirement in Hong Kong to obtain a "work permit" as well as a visa.

4.1.2 **Cost.** The cost of a GEP work visa application is currently HK$190.

4.1.3 **Time frame.** The processing time for a GEP work visa is usually around six to eight weeks from receipt of all relevant documents.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

The law does not require an employment contract to be in writing, so it is possible to have an oral employment contract.

5.2 Implied terms

The EO and the common law imply a number of terms into employment contracts. Certain statutory entitlements apply to all employment contracts, whether written or oral. The statutory benefits conferred on employees cannot be reduced or excluded by the terms of an employment contract, and a contract term purporting to do so is void. Common law entitlements can generally be varied or excluded entirely by agreement.

Some of the key terms implied by the EO that cannot be contracted out are:

- The right to pay wages in lieu of notice of termination.
- Restrictions on the employer's right to suspend the employee.
- The employee's entitlement to rest days, statutory holidays, annual leave and sick leave.

Some terms implied by the common law are the employee's duty:

- To obey lawful orders within the scope of employment.
- Of good faith towards the employer.
- Not to disclose trade secrets or confidential information.

Terms may also be implied into an employment contract through industry practice or prior conduct.

5.3 Collective agreements

Collective agreements are rare in Hong Kong, due to the low incidence of trade union membership among employees.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The law does not recognise the automatic right of the employer to unilaterally vary the employment contract. If the employer unilaterally varies a term of the employment contract without the express right to do so, it is in breach of the contract. If the variation amounts to a serious breach of contract, the employee can terminate the employment contract without notice and seek compensation from the employer for constructive dismissal.

An employee who has been constructively dismissed is entitled to all applicable statutory benefits (*see Question 13, Severance payments*) including:

- Long service payment (if conditions are satisfied).
- Accrued annual leave.
- Proportional end of year payment.

If there is no valid reason for the variation of the terms and conditions of employment, an employee employed continuously may also make a claim for unreasonable dismissal (*see Question 14, Protection against dismissal)*).

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

The EO prescribes certain minimum holiday entitlements.

In addition to rest days, statutory holidays, sick leave and maternity/paternity leave, employees who have been employed under a continuous contract for one year have a right to paid annual leave. The amount of leave depends on the length of service, from seven days after one year's employment up to a maximum of 14 days for nine or more years' service.

7.2 Public holidays

The EO specifies 12 statutory holidays that must be granted to all employees. These include Christmas, Lunar New Year and HKSAR Establishment Day (when Hong Kong celebrates the handover to Chinese sovereignty). There are five additional general holidays specified in the General Holidays Ordinance, which are only guaranteed to certain employees (such as civil servants). However, many employers also grant general holidays as paid holidays.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

8.1 Entitlement to time off

The EO provides that employees that are employed continuously accumulate paid sick leave at the rate of two paid sick days for each completed month of employment in the first year of employment, and four paid sick days for each completed month after this. The maximum sickness days that can be accumulated is 120 days.

8.2 Entitlement to paid time off

Employees are entitled to sickness allowance at 80% of their average daily wages (as calculated over the previous 12 months) provided they are:

- Off sick for four consecutive days (unless for any day off taken by a female employee for pregnancy/post-confinement related check-ups, which would be counted as a sick day even if it is less than four days), and
- Have accrued enough sick days to cover the period in question and the leave is supported by an appropriate medical certificate.

The EO defines what types of remuneration constitute wages. An employee who is on statutory paid sick leave cannot be lawfully dismissed except in very limited circumstances.

8.3 Recovery of sick pay from the state

Employers are not able to recover sickness allowance from the government.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

A female employee who has been employed continuously for at least 40 weeks before the expected date of birth and who has given notice of her intention to take maternity leave is entitled to 10 weeks' paid maternity leave, and an additional period of not more than four weeks on the grounds of illness or disability resulting from the pregnancy (*EO*). The remuneration payable is 80% of the employee's average monthly wages calculated over the previous 12 months. Maternity leave can begin between two and four weeks before the expected date of birth of the child. If the female employee has been continuously employed for less than 40 weeks, the 10 weeks is granted without pay.

An employee who is pregnant and who has given notice of her pregnancy to her employer cannot generally be lawfully dismissed from the date on which she is confirmed pregnant by a medical certificate until the expiry of her maternity leave. Wrongful termination results in liability for compensation and amounts to an offence. If a pregnant employee is dismissed by her employer before she notifies the employer of her pregnancy, the employer must withdraw the dismissal if she gives such notice immediately thereafter.

It is unlawful to discriminate against an employee because of pregnancy (*see Question 12*).

9.2 Paternity rights

Male government employees employed under a continuous employment contract are eligible to take five days paternity leave on full pay on the birth of each child.

Male private sector employees are entitled to paternity leave as follows:

- Three days of unpaid paternity leave if they are employed under a continuous employment contract prior to the date of leave; and
- Three days of paid paternity leave if they are employed under a continuous employment contract for at least 40 weeks prior to the date of leave. The rate of payment is 80% of the daily average of the wages earned by the employee during the 12 months preceding the commencement of the leave.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Benefits created

Continuous employment confers certain benefits on employees (*see Question 2, Employment status*). For example:

- Rest days, paid annual leave, sickness allowance and minimum notice of termination.
- Pro rata contractual end-of-year payments if the employee has worked for at least three months (excluding probation) in the relevant bonus year.
- Maternity/paternity leave.
- Severance payment on redundancy applies once there has been continuous employment for two years.
- Long service payment on termination applies once there has been continuous employment for five years.

An employee is not entitled to receive both severance and long service pay.

Continuous employment is broken by absences unless for example, the absence is due to:

- Sickness or injury.
- Strikes and lock-outs.
- Mutual arrangement.

10.2 Consequences of a transfer of employee

A change in ownership of a business normally ends the employee's employment. However, the EO provides for a procedure under which, if the employee is employed by the new owner, the employee's continuity of employment is effectively preserved and the period of service with the original employer counts as service with the new employer. There is a similar procedure for retaining continuity in situations where employees become employees of associated companies (*see Question 18, Harmonisation of employment terms*).

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Temporary employees have the same protections under the labour laws in Hong Kong as permanent employees provided they satisfy the minimum requirements (*see Question 10, Benefits created*).

Provided they satisfy the minimum requirements, the cost of terminating the employment of a fixed term employee is the same as a permanent employee (*see Question 10, Benefits created and Question 13*).

11.2 Agency workers

There are no specific laws relating to protections for agency workers in Hong Kong. Agency workers (if they are considered as employees) will receive the same protections as permanent employees, provided they satisfy the minimum requirements (*see Question 10, Benefits created*).

Contractors, who do not amount to employees, do not have the same protections as employees under the labour laws. In the event that a contractor is deemed to be an employee, this may lead to a claim by the individual for unpaid entitlements, for example paid annual leave entitlements and employer MPF contributions.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

The DDO, SDO, FSDO and RDO (*see Question 1, Laws applicable to foreign nationals*) prohibit an employer from discriminating against any employee or an apprentice by reason of the employee's sex, marital status, pregnancy, disability, family status, and race. There are, however, several exceptions. For example:

- The SDO allows a gender to be specified where that particular job requires a man or a woman because it is likely to involve the performance of duties outside Hong Kong in a place where the local laws or customs are such that the job cannot, or cannot effectively be performed by the opposite gender.
- The RDO allows a race to be specified in the context of recruitment where the essential nature of the job calls for a person of a particular race for reasons of physiology or, in dramatic performances (or other entertainment), for reasons of authenticity.

These Ordinances apply throughout the recruitment process and so it is also unlawful for a prospective employer to discriminate against job applicants on these prohibited grounds. An employer can be vicariously liable for an employee's action that breaches discrimination legislation.

Anyone who believes that they may have been discriminated against in contravention of the provisions of the SDO, DDO, FSDO or RDO has two options to bring a formal complaint:

- Lodge a complaint with the Equal Opportunities Commission (EOC).
- Commence proceedings in the district court against the employer.

Once a complaint is lodged with the EOC, the EOC has the power to conduct an investigation into the complaint, issue a report into its findings regarding the complaint and encourage the parties to settle the complaint by way of conciliation. The EOC is also empowered to offer legal assistance to persons who have lodged complaints with the EOC where conciliation has failed.

The EOC may decide to not conduct an investigation if more than 12 months have elapsed since the alleged discriminatory act.

It is not necessary for a complainant to lodge a complaint with the EOC first before commencing proceedings in the district court, but in practice most actions are commenced by complaint to the EOC.

The district court has broad powers to award remedies including:

- Making an order that the employer not repeat or continue the discriminatory act or conduct.
- Making an order that the employer pays damages for loss and injury to feelings.

The time limit for bringing a claim in the district court under the SDO, DDO, FSDO or RDO is within 24 months from the date of the discriminatory act (excluding any periods of conciliation with the EOC).

The above ordinances also protect employees against:

- Victimisation.
- Sexual, disability and racial harassment.
- Vilification.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

The EO stipulates minimum notice periods for various situations where a termination of employment occurs, however, the parties can agree to longer notice periods. In each case, either of the parties can make a payment to the other of wages in lieu of notice (that is, a payment equal to the wages that would have accrued during the relevant notice period). On summary dismissal (where one or more of the grounds for summary dismissal in the EO is satisfied), no notice or payment in lieu of notice is required.

13.1.1 **During probation.** During the first month of probation either party can terminate the employment without notice or payment in lieu of notice.

13.1.2 **After probation.** After the probation period (if any), either party can terminate by giving the agreed period of notice, but this must not be less than seven days. If there is no agreed notice period, one month's notice is required for employees who are employed for at least 18 hours a week for four weeks (ie employed under a continuous contract of employment).

Employees who are not employed under a continuous contract of employment generally have no minimum notice period if there is no agreed notice period.

13.1.3 **Summary dismissal.** Under the EO, an employer is entitled to dismiss an employee summarily (without notice), where the employee:

- Wilfully disobeys lawful and reasonable order;
- Is guilty of misconduct;
- Is guilty of fraud or dishonesty; or
- Is habitually neglectful in his duties.

Certain employees are protected from dismissal (*see Question 14*, Protected employees).

13.2 Severance payments

The term severance payment has a specific meaning in the EO (*see below*). The payments due on termination to continuous employees include the following:

13.2.1 **Accrued wages.** On termination of employment, employees are entitled to any wages owed for work performed up to the date of termination.

13.2.2 **A payment in lieu of notice.** This is payable if the employment relationship is terminated by either the employer or employee 'buying out' their notice period in circumstances where notice is required.

13.2.3 **A payment for any accrued annual leave (relating to a completed leave year) that is untaken.** This includes both statutory minimum leave and any additional leave to which the employee is entitled under the employment contract.

13.2.4 **A payment for any pro rata annual leave.** This is annual leave that relates to the current leave year in which the employee's **contract** is terminated and for which annual leave accrued has not yet been taken (provided that the employee has worked for at least three months in the leave year).

13.2.5 **Any accrued contractual end-of-year payment.** This is payable on a pro rata basis, provided the employee has worked for at least three months of the year in relation to which the bonus is payable and has not been summarily dismissed. The employee is also entitled to be paid for a bonus which accrued in respect of the previous bonus year but which remained unpaid at the date of dismissal (regardless of the reason for dismissal).

13.2.6 **A severance payment.** This is payable to employees who are made redundant after having been employed continuously for at least two years. The amount is calculated using a statutory formula by reference to the employee's monthly wages and the period of continuous employment. Monthly wages above HK$22,500 are disregarded for the purposes of this calculation, and the maximum payment is HK$390,000.

The severance payment can be reduced by gratuities based on length of service paid to the employee, and employee benefits accrued in an MPF or ORSO scheme attributable to contributions that the employer has made to the scheme to the extent that they relate to the employee's years of service for which the severance payment is payable. A severance payment may not be payable in certain cases if the employee who is made redundant unreasonably refuses a re-employment offer or has their contract of employment terminated, without notice or payment in lieu of notice in circumstances that justified summary dismissal.

13.2.7 **A long service payment.** This is payable to employees who are dismissed after having been employed continuously for at least five years (and in some limited situations where the employee terminates the employment, including on retirement at the age of 65 years). The formula for calculating a long service payment is the same as the formula for calculating a severance payment. No long service payment is payable if the employee is entitled to a severance payment, unreasonably refuses a re-employment offer in certain cases, or has their contract of employment terminated, without notice or payment in lieu of notice in circumstances that justified summary dismissal.

An employer must pay all sums due to the employee on termination as soon as is practical (and in any event within seven days) after dismissal. This includes long service payments. However, a severance payment must be made within two months after the employee claims it, although most employers pay the severance payment at the same time as other termination payments.

13.3 Procedural requirements for dismissal

Other than the requirement to give the relevant notice of termination, there are no formal procedures that must be observed to dismiss an employee lawfully. However, a 2013 Court of First Instance decision highlighted the importance of procedural fairness for employees in the processes leading up to summary dismissals. This includes conducting a comprehensive disciplinary investigation into any allegations of misconduct.

There is no requirement for the notice of termination to be in writing, but most employers give notice in writing, and employment contracts often require written notice. The employer must provide a written statement of the employee's severance payment or long service payment (this is generally, but not invariably, included in the notice of termination).

It is not necessary to give an employee any reasons for dismissal. If employees have been employed continuously for two years, the employer must show a valid reason under the EO for terminating the employee's employment (*see Question 14*).

Employers must notify the Inland Revenue Department at least one month before the dismissal (or in case of short notice of termination, as soon as possible). If an employee's working visa is sponsored by the employer, the employer must also notify the Immigration Department of the dismissal.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

The EO enables any employee who has been employed continuously for two years and who is dismissed or whose contract is varied without his consent to make a claim for unreasonable dismissal to the Labour Tribunal. Once this claim is made, the employer must produce a valid reason for the dismissal or variation. Valid reasons include:

- Conduct.
- Capability or qualifications.
- Redundancy.

The remedies available to the employee for unreasonable dismissal are relatively limited. The Labour Tribunal can only make an order for re-instatement or re-engagement if the parties agree. Otherwise, the Labour Tribunal may only make an award for Terminal Payments which are, in effect, the unpaid statutory and contractual entitlements which the employer should have paid on termination.

14.2 Protected employees

There are a limited number of situations in which employers are prohibited from dismissing employees, including:

- A female employee who has given notice of her pregnancy cannot be dismissed unless it is for a summary dismissal reason, or if the employee is on probation not exceeding 12 weeks (as long as the dismissal is not for a pregnancy-related reason) (*see Question 9*, *Maternity rights*).
- An employee on statutory sick leave cannot be dismissed unless it is for a summary dismissal reason.
- An employee who has suffered incapacity within the meaning of the ECO, before the appropriate claim has been resolved in accordance with the ECO (*see Question 8*).

Employees must not be dismissed for any of the following reasons:

- Co-operating in an inquiry of their employer (for example, in relation to safety at work);
- Involvement in trade union activity;
- Jury service;
- Involvement in strike action; and
- Discriminatory reasons (*see Question 12*).

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

Redundancy is defined in the EO as one of the following:

- An employer has ceased (or intends to cease) to carry on business for the purpose for which the employee was employed.
- An employer has ceased (or intends to cease) to carry on business in the place where the employee was so employed.
- The requirements of the business for employees to carry out work of a particular kind either generally or in the place where the employee was employed have ceased, diminished, or are expected to cease or diminish.

15.2 Procedural requirements

The statutory regulation of redundancies in Hong Kong is limited to an employee's entitlement to receive a statutory severance payment (*see Question 13, Severance payments*). There are no

specific procedural rules in relation to consultation requirements or any other procedures in relation to collective redundancies.

15.3 Redundancy/layoff pay

See Question 13, Severance payments.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

Employees are not entitled to management representation on the board of Hong Kong companies.

16.2 Consultation

16.2.1 **Share sales.** Employers are not required to consult with employees before transactions such as acquisitions, disposals or joint ventures.

16.2.2 **Asset sales.** In a transaction that involves a transfer of business, the employer should consider consulting with the employees whose employment is to be transferred to the new owner. This is because the employees can only be transferred to the new owner if the employees accept the employment offer from the new owner (*see Question 18, Harmonisation of employment terms*).

However, this consultation is not a legal requirement.

16.3 Major transactions

Employers are not required to consult with employees about major transactions.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

There is no requirement to consult with employees, and therefore no available remedies if an employer fails to consult them.

17.2 Employee action

Employees cannot take action to prevent any proposals going ahead.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

Employees are not transferred automatically on a business transfer. If there is a change of ownership of a business, the employment contracts between the seller and his affected employees remains in place unless the employees:

- Are terminated by the seller and accept an offer of new employment with the buyer;
- Choose to resign; or
- Are terminated by the seller on grounds of redundancy.

The EO provides that the employee's preceding period of employment with the seller will count as a period of employment with the buyer (that is, the business transfer will not break the employee's continuity of employment if the termination and re-employment of the seller's employees is done in accordance with the provision of the EO and the employee accepts an offer of new employment offer by the buyer).

18.2 Protection against dismissal

If an employee's employment was not terminated in accordance with the transfer of business provision in the EO, on the transfer of a business, that employee may claim for unreasonable

dismissal (*see Question 14, Protection against dismissal*) and can be entitled to a severance payment (*see Question 13, Severance payments)*.

The employee cannot make a claim for severance payment if the buyer makes a re-employment offer which is unreasonably refused by the employee. For the re-employment offer to be valid, it must comply with all of the following:

- Be made not less than seven days before the termination by the seller.
- Comprise terms of employment that are no less favourable to the employee than those in force immediately before the termination.
- Take effect on or before the date of termination.

18.3 Harmonisation of employment terms

The new owner of the business usually wishes to employ any employees of the newly acquired business on the same terms as its existing employees. The new owner can offer the incoming employees terms that are different to their existing terms, and ensure uniformity. However, if the terms offered are less favourable than the existing terms, the employees:

- Can refuse to accept them.
- May be able to claim a severance payment if they are dismissed by the seller.

Therefore, many employers who acquire employees of a business through a transfer continue to employ them on their previous terms.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

Foreign nationals working in Hong Kong are subject to Hong Kong salaries tax, if their employment income is derived from Hong Kong. Income is generally derived from Hong Kong if the employee has a Hong Kong employment. Some of the factors that will be taken into account in determining whether the employee has a Hong Kong employment are:

- The employment contract was negotiated, entered into, and is enforceable in Hong Kong.
- The employer is resident in Hong Kong.
- The employee is remunerated in Hong Kong.

If the employee has a Hong Kong employment, but parts of the duties are performed outside Hong Kong, certain year-by-year relief or exemptions may be available. For example:

- If the employee mainly works outside Hong Kong and only visits Hong Kong for 60 days or less in the relevant year, the employee may be granted exemption from tax on his employment income.
- Where the employee works outside Hong Kong, the employee may be granted exemption from salaries tax on any income that is taxable outside Hong Kong of substantially the same nature as salaries tax, as a result of the employee's provision of services in the country imposing the tax.

19.2 Nationals working abroad

Nationals working abroad will be subject to salaries tax on their employment income if they have a Hong Kong employment. If the employee has a Hong Kong employment, but mainly works outside Hong Kong and only visits Hong Kong for 60 days or less in the relevant year, the employee may be granted exemption from tax on his employment income.

In addition, where the employee works outside Hong Kong, the employee may be granted exemption from salaries tax on any income chargeable to tax outside Hong Kong of substantially the same nature as salaries tax, as a result of the employee's provision of services in the country imposing the tax.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

Salaries tax is calculated on the employees' net chargeable income, that is, assessable income after deductions and allowances. In the tax year 2014/15, the net chargeable income is charged at progressive rates of up to 17%. However, the total amount taxed is subject to a ceiling of 15% of the net total income, which is assessable income after deductions but before allowances.

20.2 Social security contributions

Both the employer and employee must make contributions under the MPF scheme.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

In Hong Kong, an annual bonus for employees is common. As it is paid around the Lunar New Year, it is known as a "13th month payment", "Chinese New Year bonus", "double pay" or "end-of-year payment". This is common even among relatively senior employees in many business sectors, although high level employees in some sectors (such as investment banking) are more likely to be paid a discretionary bonus calculated by reference to their performance and/or the employer's financial performance.

The EO applies to the payment of an end-of-year bonus that is "non-discretionary". In general, there is no restriction on the:

- Size of the bonus (which may comprise other elements, such as share options).
- Method of calculation.
- Time for payment.

Pursuant to the EO, upon termination of employment, an employee is entitled to be paid their:

- Contractual end-of-year bonus for the previous bonus year if that bonus is unpaid at the date of termination.
- Contractual end-of-year bonus on a pro rata basis for the bonus year in which the termination of employment took place. This is provided that the employee had been employed for at least three months of that bonus year and did not resign and was not summarily dismissed.

Such bonus payments are required to be paid along with the employee's other termination payments (*see Question 13, Severance payments*).

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

It is possible to restrict an employee's activities during employment and after termination.

During employment, employees owe various implied duties to their employer, including:

- A duty of loyalty, which requires an employee to act in the employer's best interest at all times.
- A duty to keep confidential sensitive business information such as trade secrets and so on (subject to whistleblowing rules).

An employer can also reinforce the implied duties by express contractual provisions. For example, an employer can expressly prohibit an employee from being involved with other businesses or similar occupations during employment.

22.2 Post-employment restrictive covenants

Restrictions on an employee's conduct may be extended beyond the term of employment by contract. Such restraints can be in relation to the misuse of property belonging to the employer, including certain customer connections, goodwill, and proprietary information such as confidential information and trade secrets or trade lists.

However, the courts have been reluctant to uphold any attempt to restrict the use of an employee's "ordinary stock of information" gained in the course of employment. What amounts to an ordinary stock of information can be information as to the general practice, business dealings or affairs of the employer or of its customers. Any attempt on the part of the employer to protect itself against mere competition is also generally unenforceable.

Employers also commonly seek to prevent an employee enticing other employees to leave, or going to work for a competitor for a period of time.

Post-employment restraints are often difficult to enforce. Generally speaking, they must do no more than is necessary to protect the legitimate proprietary interests of the employer. The restrictions must also be reasonable in scope, duration and geographical boundaries. Reasonableness is a matter of fact to be assessed on a case-by-case basis.

It is not necessary to provide any remuneration to an ex-employee who is subject to post-employment restrictions.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law or pensions law in your jurisdiction?

Amendments have been proposed to allow the Labour Tribunal to order the reinstatement or re-engagement of an employee found to have been dismissed unlawfully and without a valid reason without the employer's consent. The current position is that the employer's consent is required in order for the employee to be reinstated.

There are also current proposals to introduce a "standard working hours" policy in Hong Kong. Public consultation on this subject commenced in January 2014.

This overview was written by Gareth Thomas and Helen Beech of Herbert Smith Freehills. It has been updated for the Taylor Vinters' Asia Pacific Employment Law Handbook by Cynthia Chung and Gladys Ching of Deacons.

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India

INDIA

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

All labour laws regulating employment relationships in India also apply to foreign nationals working in India. These include the Employees' Provident Fund and Miscellaneous Provisions Act 1952 ("**EPF Act**"), Industrial Disputes Act 1947 ("**ID Act**"), Maternity Benefit Act 1961 (MBA) State Specific Shops and Establishments Acts etc.

1.2 Laws applicable to nationals working abroad

Indian labour laws do not apply to Indian nationals who are employed by foreign entities abroad. However, Indian labour laws do apply to Indian nationals employed by Indian entities but sent abroad on specific arrangements.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

Different statutes protect different categories of employees, and the applicability of the statute and the protection available is to be assessed on a case-by-case basis.

The ID Act seeks to protect 'workmen', which term has been defined to mean persons employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. An employee employed in a managerial or administrative capacity; or in a supervisory category drawing wages exceeding INR 10,000 per month is excluded from the scope of 'workman'.

In certain states, persons holding positions of management are excluded from protections available under the state-specific legislations governing shops and commercial establishments ("**S&E Acts**"). In addition, the Industrial Employment (Standing Orders) Central Rules 1946 classify workmen as permanent workmen, probationers, badli workmen and temporary workmen based on the nature of their employment.

2.2 Entitlement to statutory employment rights

The entitlement to statutory employment rights depends on various factors such as the category of employee, nature of work undertaken, remuneration, location of employee, and type of industry.

2.3 Time periods

While the law does not specifically prescribe for any maximum time periods for which each category of employee can be engaged, it is to be noted that the employment of a probationer or a temporary employee is limited to a particular time period.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

3.1 Filings

The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 requires an employer employing 25 or more employees to notify the local employment exchange of any employment vacancy in the organisation. An Amendment Bill to this statute was introduced in one of the houses of the Indian Parliament on 22 April 2013. It proposes extending the applicability of this statute to private establishments that employ 10 or more persons. However, the requirement to notify the prescribed Employment Guidance and Promotion Centres of any vacancies by all employers in the private sector would continue to apply to such establishments in the private sector that employ 25 or more employees.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

4.1 Visa

4.1.1 **Procedure for obtaining approval.** For the purpose of entering India for being employed with an Indian entity, a foreign national is required to apply for an Indian employment visa to the Indian Embassy/High Commission in his country of residence. The employment visa must be issued from the foreign national's country of origin, or from the foreign national's country of domicile.

If the purpose of visit is relating to business activities, such as to explore opportunities for setting up business venture in India, attending board meetings or other general meetings for providing business service support, the foreign national may apply for a business visa. If the foreign national intends to stay in India for more than 180 days, he/she must, in such cases, register with the Foreigners Regional Registration Offices (FRRO) or the Foreigners Registration Offices (FRO) within 14 days of arrival.

The foreign national must have a valid travel document and a re-entry permit (if required under the law of the country concerned). An employment visa may be extended on a yearly basis for a maximum period of five years.

4.1.2 **Cost.** The fee for an employment visa may vary between US$125 and US$1,000, depending upon the nationality of the person applying for the visa, and the duration for which the visa has been applied. The fee is subject to periodic amendments by the government.

4.1.3 **Time frame.** It is difficult to give a precise time frame as the process is at the discretion of the Indian Embassy/High Commission concerned.

4.1.4 **Sanctions.** If the employment visa is not granted, the foreign national cannot travel to India for employment related activities. If the visa is granted for a particular purpose and the foreign national does not adhere to that purpose, the foreign national's visa will be cancelled and he will be deported. He may also attract sanctions of imprisonment and/or fines.

4.2 Permits

Generally, except for the employment visa, no other permits are required from an immigration perspective. However, prior Government of India clearance from the Ministry of Home Affairs and the Ministry of External Affairs would be required with respect to foreign nationals of a few countries including China, Pakistan, and Afghanistan.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

Legislations including the ID Act, Factories Act, Industrial Employment (Standing Orders) Act ("**SO Act**") and S&E Act, prescribe minimum employment terms such as work hours, wages, leave entitlement, notice and termination entitlements, health and safety standards, etc. Employers are mandated to provide the statutorily minimum entitlements to employees.

Certain state specific S&E Acts require an employer to issue an 'appointment order' containing basic information including employer name and address, employee details, rates of wages, joining date and designation. Most employers issue appointment letters to, or execute employment agreements with, their employees, which set out the terms and conditions of employment.

It is recommended that all important terms of employment be reflected in the employment contract.

In addition, industry-specific laws also prescribe certain terms of employment. For example, industry-specific laws regulate the terms of employment for employees working in industries such as cinema, docks, building and construction, journalism, motor transport, sales promotion, and plantation. Certain special laws also apply to migrant workers.

The SO Act also prescribes Model Standing Orders containing certain terms and conditions of employment in the workplace.

5.2 Implied terms

Terms of employment can be implied into a contract of employment by way of custom, usage or practice. Certain courts have also acknowledged that an employee's duty of good faith towards the employer, confidentiality and non-disclosure obligations may be considered as implied terms of an employment relationship.

5.3 Collective agreements

In case of industries in which employees are unionised, the terms of employment are negotiated and agreed to through collective bargaining. While most labour unions are formed at company level, there are also regional and industry specific unions. It is pertinent to note that the SO Act requires the employer to consult with the employees or their representatives to finalise the terms of employment contained in the organisation's standing orders.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

There are certain procedural requirements to be complied with in case of change of terms of employment.

Where an employer wishes to change the conditions of employment (for example, wages, working hours, and annual leave) of an employee who falls within the definition of "workman" under the ID Act, the employer must give either 21 or 42 days' notice of the change in the prescribed form to the employees affected by such change (the length of notice depends on which jurisdiction in India the employee is located in).

The employee can then either agree to the change, or object and raise an industrial dispute. Where an objection is raised, the dispute must be resolved by the relevant tribunal, and the change cannot be made until the dispute is resolved.

For employees not covered by the ID Act, the employment contract will determine whether or not the employer can make unilateral changes.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

Holiday entitlement is generally covered by the employment contract. However, where the employer is involved in a commercial activity, the state-specific shops and establishments statutes will apply and these determine the minimum thresholds concerning holiday entitlement. The thresholds usually range from 12 to 21 days of holiday per year. Certain state-specific shops and establishments statutes also contain provisions concerning sick leave and casual leave (which generally ranges from 12 to 24 days).

Further, the Factories Act provides that every adult worker who has worked in a factory for at least 240 days in a calendar year is entitled to one day's leave with wages for every 20 days of work.

7.2 Public holidays

These holidays differ from region to region and range from between four to 10 days' holiday each year. However, the mandatory public holidays that are to be given to employees are:

- January 26 (Republic Day);
- August 15 (Independence Day); and
- October 2 (Gandhi Jayanti).

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Where the employer is involved in a commercial activity, some of the local shops and establishments statutes provide that employees are entitled to leave on account of illness or injury. Factories that employ the requisite number of workmen must also provide sick leave to their employees (in accordance with the Factories Act). These periods of sick leave are paid.

The local shops and establishments statutes apply to all categories of employees except where the government has issued specific exemptions in relation to certain classes of employees.

8.2 Entitlement to paid time off

Where an employee is entitled to time off for illness or injury, the period of leave will be paid (*see above 8.1, Entitlement to time off*).

8.3 Recovery of sick pay from the state

The Employees' State Insurance Act 1948 ("**ESI Act**") envisages benefits to employees in case of sickness, maternity and employment injury.

Employees who are covered by the ESI Act can claim sickness or disablement benefit (which is paid by the government). The employer cannot recover any sick pay from the government.

Where the employee is entitled to benefits under his conditions of service that are similar to benefits under the ESI Act, the employer can discontinue or reduce those benefits under the conditions of service to the following extent:

- Sick leave on half pay to the full extent.
- Such proportion of any combined general purposes and sick leave on half pay as may be assigned as sick leave (but not exceeding 50% of the combined leave).

Further, if the employee avails himself of any sick leave from the employer under his conditions of service, the employer will be entitled to deduct from the employee's leave salary the amount of benefit he is entitled to under the ESI Act.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

The Maternity Benefit Act 1961 ("**MB Act**") envisages provision of maternity leave, maternity bonus and other benefits with respect to childbirth.

A female employee is entitled to paid maternity leave of 12 weeks, of which not more than six weeks shall precede the date of her expected deliver.

In the event of a miscarriage or medical termination of pregnancy, a female employee is entitled to leave with wages for a period of six weeks immediately following the day of her miscarriage. The MB Act also provides for paid leave if the employee undergoes a tubectomy, or in cases of any illness arising out of pregnancy, delivery, or premature childbirth.

A female employee is entitled to salary and benefits during maternity leave. She is also entitled to a medical bonus of INR 3,500. The employer cannot require the employee to do any work during the maternity leave.

During pregnancy, a female employee also has the right to request that she not be required to do any work which is:

- Of an arduous nature, or which involves long hours of standing;

- Is in any way likely to interfere with her pregnancy or the normal development of the foetus;
- Or is likely to cause her miscarriage; or
- Otherwise to adversely affect her health.

It is unlawful to discharge or dismiss a woman employee on account of being on maternity leave, or to issue a notice of discharge or dismissal expiring during the period of maternity leave. It is also unlawful to vary the terms of employment to her disadvantage during the period of maternity leave.

The MB Act requires an employer to provide two breaks, in addition to the regular interval for rest, for nursing the child until the child attains the age of 15 months. The Factories Act and certain state specific S&E Acts also mandate the employer to provide crèches at the workplace.

9.2 Paternity rights

Indian employment laws do not provide for paternity leave. However, as good HR practice, some organisations allow their employees paternity leave.

9.3 Surrogacy

The MB Act is silent on the rights to the parents or surrogate mothers under a surrogacy arrangement. However, recently, courts have held in a case involving an employee of a government department, that surrogate mothers (female employee who is the commissioning mother) are entitled to maternity leave under the MB Act.

9.4 Adoption rights

Indian employment law does not provide for adoption rights.

9.5 Parental rights

Indian employment laws do not prescribe any parental leave rights.

9.6 Carers' rights

Indian employment laws do not specify any such work flexibility. A flexible work schedule is generally at the employer's discretion and would be subject to terms prescribed by the employer.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Eligibility for notice and severance compensation at the time of termination of employment, leave entitlement, and payment of gratuity are all dependent upon an employee remaining in continuous employment of the employer for certain specified durations of time.

Gratuity amounts are payable only if an employee has worked with an establishment for five years. Leave entitlement in a particular calendar year is also dependent on the employee's length of service for that year.

10.2 Consequences of a transfer of employee

In the case of a transfer of an undertaking, the ID Act provides that workmen are deemed to be dismissed unless the buyer fulfils certain conditions, including providing the workmen with continuity of service (*see Question 18.1, Automatic transfer of employees)*.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

A temporary worker is one who is engaged for a limited time period and/or for a specific purpose. The definition of "workman" under the ID Act does not exclude temporary workers and they are

entitled to the same benefits as full-time permanent workers subject to the provisions of the ID Act.

11.2 Agency workers

The arrangements for engaging of agency or contract workers are regulated by the Contract Labour (Regulation and Abolition) Act 1970. It is applicable to:

- Every establishment that is not seasonal in character which employs 20 or more workmen as contract labour in the preceding 12 months.
- Every agency employing 20 or more workmen in the preceding 12 months.

Agency workers are not treated as the employees of the establishment, and hence they are not eligible to any statutory benefits typically received by the principal employer's employees. They will be eligible to receive all such statutory benefits from the agency since they are direct employees of the agency.

Courts have considered the aspect of control and supervision as the single most important factor that determines the relationship between the principal employer and agency. A misclassification risk may arise if the agency's employees work under the direct control and supervision of the principal employer. In such a case the agency's employees may claim to be employees of the principal employer and thereby eligible to receive statutory benefits from the principal employer.

11.3 Part-time workers

See above Question 11.1, Temporary workers.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 ("**SH Act**") prescribes a mechanism for prevention and prohibition of workplace sexual harassment and for redressal of grievances pertaining to workplace sexual harassment.

The Constitution of India guarantees equality before law and prohibits discrimination of citizens on the grounds of religion, race, caste, sex or place of birth. The Constitution also envisages equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

The Equal Remuneration Act 1976 ("**ER Act**") provides for the payment of equal remuneration to male and female workers for the same or similar work. The statute also prohibits discrimination against women in recruitment or in any condition of service such as promotions, training or transfer. The ID Act also categorises acts of favouritism or partially to one set of workers, regardless of merit as an unfair labour practice.

The MB Act restricts the employer from terminating employment during maternity leave. Certain laws also require employers in select categories to provide equal opportunities to disabled persons.

There are no standard defences to a discrimination claim. The defences available to an employer may include health and safety requirements and affirmative action.

Ordinarily, anti-discrimination policies are contained in the policy manual/employee handbook. Certain organisations also have ethics helplines and grievance redressal committees to hear and resolve complaints pertaining to discrimination. Discrimination on grounds protected by law are often categorised as misconduct, punishable with disciplinary action.

Employers can settle claims before or after the employees have initiated them.

In the event of a successful claim of discrimination, where employment has been terminated on that basis, the employee may be entitled to reinstatement of employment.

Violation of the ER Act, ie discriminating against women in connection with recruitment and employment, is punishable with a fine of up to INR 20,000 and/or with imprisonment for a term which shall be not less than three months but which may extend to one year.

Unfair labour practices under the ID Act are punishable with imprisonment for a term of up to six months and/or with a fine of up to INR 1,000.

"Atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) do not have any additional protection against workplace discrimination.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

Indian employment law does not recognize "at-will" employment. Employment may be terminated only for a reasonable cause or an account of employee misconduct. In case of termination of employment for reasons other than misconduct, employees have to be provided prior notice of termination or wages in lieu thereof. The minimum notice period is stipulated under the ID Act and applicable S&E Act and is ordinarily one month. A longer period of notice can be prescribed under the employment contract. The act of misconduct is to be established in a disciplinary enquiry to be held by the employer in accordance with the principles of natural justice.

Employers can require employees to be on 'garden leave' during the term of employment. It is recommended that such a right be included in the employment contract or HR policies.

13.2 Severance payments

Payments to be made by an employer in case of termination of employment include:

- Severance: retrenchment (termination) compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months. Only a "workman" who has been in continuous employment with the employer for more than one year is entitled to retrenchment compensation.
- Gratuity: this is to be paid in accordance with the Gratuity Act, which entitles an employee who has rendered continuous service of at least five years to gratuity, upon termination of employment. Gratuity is calculated at the rate of 15 days' wages for every completed year of service or part thereof in excess of six months, subject to a limit of INR 1,000,000.
- Accrued leave encashment: the employee shall be entitled to payment of wages for accrued and untaken leave days up to the date of termination of employment.

The employer ordinarily has the option of paying wages in lieu of the termination notice.

13.3 Procedural requirements for dismissal

Employment may be terminated only for a reasonable cause or an account of employee misconduct. In case of dismissal on account of misconduct, the act of misconduct is to be established in a disciplinary enquiry to be held by the employer in accordance with the principles of natural justice.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

An employee can bring claims of unfair dismissal or wrongful termination of employment. In certain situations, an employee can also allege unfair labour practice on the part of the employer.

The remedies for a successful claim typically include reinstatement of the employee with back wages. Alternatively, the courts may award damages for illegal or wrongful termination.

14.2 Protected employees

Female employees are protected from dismissal during the term of their maternity leave. Employees receiving sickness benefit, maternity benefit or disablement benefit under the Employees' State Insurance Act 1948 ("**ESI Act**") are protected from dismissal during the period in which they are receiving the benefit.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

Under the ID Act, the services of a workman can be terminated by redundancy. The redundancy definition under the ID Act is quite wide and refers to the termination of workmen's services by the employer for any reason other than the following reasons:

- Dismissal as a result of disciplinary action.
- Retirement (whether voluntary or otherwise).
- Termination on grounds specified in a fixed term-contract (or the non-renewal of a fixed term contract).

15.2 Procedural requirements

The ID Act stipulates that a workman who has been in continuous service for at least one year (defined to mean 240 days) may be terminated only if the workman has been:

- Given at least one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice; and
- Paid retrenchment compensation (severance) equivalent to 15 days of average pay for every completed year of continuous service or any part thereof in excess of six months.

If the termination of employment is in an 'industrial establishment', defined under the ID Act to be a factory, mine or plantation employing at least 100 workmen, the employer has an obligation to provide a minimum notice of three months or wages in lieu thereof. They also need to obtain prior government approval to terminate employment. Such requirement is irrespective of the terms of the employment.

The above requirements are in addition to notifying or obtaining prior government approval for termination, as the case may be.

The ID Act also prescribes the last-in-first-out process to be followed at the time of retrenching employees, where any workman belonging to a particular category of workmen in the establishment is to be terminated, except:

- In case of any agreement between the employer and the workman in that behalf; or
- For reasons to be recorded by the employer in writing, the employer should ordinarily retrench the workman who was the last person to be employed in that category.

Further, where workmen are entrenched and the employer proposes to recruit, the employer is required to provide an opportunity to the retrenched workmen to offer themselves for re-employment and such workmen are to be given a preference over others.

15.3 Redundancy/layoff pay

A workman who is made redundant is entitled to compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months.

15.4 Collective redundancies

The statutes don't prescribe any additional obligations in case of termination of a number of employees at the same time.

Collective bargaining is the most popular mechanism adopted by employees to enforce their rights in connection with mass dismissals. Aggrieved employees can raise an industrial dispute under the ID Act or approach the appropriate forum prescribed under the state specific S&E Act. Non-compliance with the statutory requirements could result in the termination being treated as invalid and the employee being reinstated with back wages. Also, wrongful terminations are, under certain circumstances, considered unfair labour practices under the ID Act, which is punishable with imprisonment for a term of up to six months and/or with a fine of up to INR 1,000.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

Employees are not entitled to representation at the board level. The Companies Act 2013 mandates every public company having a paid up capital of INR 100,000,000 or more to appoint a managing director, who is to be in the full-time employment of the company.

An industrial establishment employing 100 or more workmen is mandated to set up a "Works Committee". The Works Committee is to consist of representatives of the employer and workmen engaged in the establishment. The number of representatives of workmen on the Works Committee should not be less than the number of representatives of the employer.

The representatives of the workmen on the Works Committee are to be elected in the manner prescribed under the rules framed under the statute and in consultation with the relevant trade union.

The main responsibility of the Works Committee is to promote measures for security and amity between employers and workmen, to comment upon matters of their common interest/concern, and to mediate any material difference of opinion in respect of such matters.

In addition, there are also certain requirements to set up a Grievance Redressal Committee and Internal Complaints Committee under the ID Act and SH Act respectively.

The ID Act has envisaged the Works Committee as an initial mediation mechanism. Unless otherwise reflected in the collective bargaining agreements, the committee does not have any co-determination rights.

16.2 Consultation

The law does not envisage any consultation requirements on a business transfer *(see Question 18 below)*. That said, consultation requirements, if any, may arise based on the terms of the collective bargaining agreements.

16.3 Major transactions

See Question 16.2 above and *Question 18 below*.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

An employer only has a duty to consult if this is expressed in the employment contract or in the terms of a collective bargaining agreement. If the employer has contractually agreed to consult the employees on certain issues and if it fails to do so, the employees can refer the matter to the courts/tribunals to enforce those rights.

17.2 Employee action

There is no statutory right for employees to be consulted on major transactions and to that extent employees may not able to take any action under the law to prevent any transactions from going ahead.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

The ID Act provides for notice and compensation payable to employees when an undertaking is transferred. It stipulates that where the ownership or management of an undertaking is transferred to a new employer, every workman who has been in continuous service for at least one year in that undertaking immediately before such transfer is entitled to notice and severance compensation from the previous employer, as if the employee has been terminated.

The transferor entity is exempt from providing such notice and compensation if:

- The service of the workman has not been interrupted by the transfer;
- The terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable immediately before the transfer; and

- In the event of retrenchment of the workman, the new employer is legally liable to pay compensation as if the workman had been in service with the new employer from the time that he was in original employment with the older employer.

18.2 Protection against dismissal

Employment can only be terminated for a reasonable cause or on grounds of misconduct. Elimination of a job role pursuant to a business transfer leading to redundancy could be considered as a reasonable ground for termination of employment.

18.3 Harmonisation of employment terms

In the event the transferee entity has agreed to provide the employees service credit and the terms of employment are not less favourable than those with the transferor entity, benefits that are linked to the duration of employment, such as severance compensation, shall be transferred.

So as to avail of the exemption from payment of severance dues at the time of transfer, the terms of the employment with the transferee entity should not be less favourable than the terms of employment with the transferor entity.

The law allows an employer to change the terms of employment as long as the employer notifies the impacted employees, in the prescribed manner, 21 days prior to implementing the change. A copy of the notification is also to be submitted to the government (including the labour department).

The terms of the collective bargaining agreement, if any, may also govern the transfer of employment and employee rights.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

Foreign nationals are subject to income tax in India on all their income derived from a source in India or received in India during the relevant tax year (subject to any exceptions under a double taxation treaty).

This income also includes income deemed to be received or deemed to accrue/arise in India. Generally, income from salaries is deemed to accrue or arise in India if the services are rendered in India.

However, for an individual who is not a citizen of India, section 10(6)(vi) of the Income Tax Act 1961 (ITA) provides that the remuneration received by him as an employee of a foreign enterprise for services rendered by him during his stay in India will be exempt from income tax, subject to the following conditions being fulfilled:

- The foreign enterprise is not engaged in any trade or business in India.
- The foreign national's stay in India does not exceed in the aggregate a period of 90 days during the relevant tax year.
- The remuneration received by the said foreign national is not liable to be deducted from the income of the foreign enterprise chargeable to tax in India.

Where a foreign national comes to India and is present in India for a period of 182 days or more during the relevant tax year, he will be considered resident in India. However, for the initial few years (two or three years, depending on his date of arrival and the number of days stay in India), he will be considered as not ordinarily resident for tax purposes and the following income will be subject to tax in India:

- Income received, or deemed to be received, in India.
- Income accrued or arising, or deemed to accrue or arise, in India.
- Income accrued or arising outside of India in relation to a business controlled, or a profession set up, in India.

Thereafter, once he becomes "ordinarily resident" in India, his global income is taxable in India.

19.2 Nationals working abroad

As a general principle, the global income of an individual who is "ordinarily resident" in India (*see above 19.1, Foreign nationals*) is chargeable to tax in India, including all incomes which accrue or arise outside India during the relevant tax year.

However, if this person's stay in India is for less than 182 days in aggregate during the relevant tax year, such person would be considered a non-resident in India for that year. In this case, the person would be liable for tax in India only for income derived from a source in India or received in India during the relevant tax year, including income deemed to be received or deemed to accrue or arise in India (subject to any exceptions under an applicable double taxation treaty).

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

The following rates of income tax apply to individuals as of 1 April 2015 (different tax rates are levied on income received by persons aged above 60 years and 80 years):

- Income of INR250,000 or less: nil.
- Income above INR250,000 but not more than INR500,000: 10% on the amount exceeding INR250,000.
- Income above INR500,000 but not more than INR1 million: INR25,000 plus 20% on the amount exceeding INR500,000.
- Income above INR1 million but not more than INR10 million: INR125,000 plus 30% on the amount exceeding INR1 million.
- Where the income exceeds INR10 million: INR125,000 plus 30% on the amount exceeding INR1 million (as increased by a surcharge at the rate of 10% of the amount of income-tax so computed).

In addition to the above, an education cess at a rate of 3% is also payable.

20.2 Social security contributions

The EPF Act applies to specified factories and establishments employing 20 or more employees. The EPF Act provides for the following three schemes:

- Provident Fund Scheme (PF Scheme).
- Pension Scheme.
- Employee Deposit Linked Insurance Scheme (EDLI Scheme).

The PF Scheme is applicable to all employees earning a salary of not more than INR15,000 per month, unless:

- They have been members of the fund during their previous employment.
- The employer and concerned employee voluntarily seek coverage.
- The employee is an "international worker" (that is, a foreign national working in India), where the EPF Act is applicable regardless of the salary threshold.

See also Question 23.

The statutory rate of contribution under the PF Scheme is 12% of the statutory defined wages, which is paid by both the employer and employee (that is, the total payable is 24%). The employer must pay both, its own and its employees' contribution, but can recover the employees' contribution by deducting the amount from the employees' salary. A portion of the employer's contribution (equating to 8.33%, which is capped at wages of INR15,000 per month) is diverted from the PF Scheme into the Pension Scheme (unless the employee is an international worker, where the INR15,000 cap does not apply).

Under the EDLI Scheme, the employer must contribute 0.5% of basic wages. The wages on which this amount is calculated is capped at INR15,000 per month for all employees. *See also Question 23*.

The ESI Act is applicable to establishments employing 20 or more employees (though in some states this threshold is reduced to 10 employees). Under the ESI Act (which applies to employees whose salary does not exceed INR15,000 per month), both employee and employer must make

contributions to the Employees' State Insurance Corporation at the rate of 1.75% and 4.75% respectively. The employer must pay both its own and its employees' contributions, but can recover the employees' contributions by deducting the amount from the employees' salary.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Yes, it is fairly common in India to reward and incentivize employees through payment of contractual or discretionary bonuses. There are no restrictions or guidelines under Indian law pertaining to the payment of contractual or discretionary bonuses to employees.

The Payment of Bonus Act 1965 ("**POBA**") provides for payment of compulsory statutory bonus to persons (earning a salary of up to INR 10,000) employed in certain establishments under defined circumstances. The POBA envisages that the payment of statutory bonus may be in the range of 8.33% to 20% of the salary payable to the employee.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

During the term of employment, an employer can restrict the employee from working for a third party including its competitors.

22.2 Post-employment restrictive covenants

The freedom to exercise any trade, business or profession has been assured as a fundamental right to all Indian citizens by the Constitution of India 1950. The Indian Contract Act 1872 stipulates that an agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. A restrictive covenant, in the nature of a non-compete, extending beyond the term of service is void, irrespective of reasonability of such restriction, except in cases involving a sale of goodwill.

Accordingly, courts have determined that a post-termination non-compete restriction is void and unenforceable. Courts have held that restrictive covenants with respect to non-solicitation after employment ends, or cases of unauthorised disclosure of confidential information, may be enforced.

The law does not prescribe any specific timeline for restrictive covenants to be enforced after employment termination.

There is no statutory requirement to provide financial compensation in return for covenants. These covenants are ordinarily included in the employment contract.

Employers can enforce certain restrictive covenants by seeking injunctions or damages in a court of law.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

Certain important proposed regulatory changes are:

- Consolidation of important labour laws - The Ministry of Labour and Employment in India, in its effort to consolidate the laws pertaining industrial relations, wages and benefits, has proposed:
    - Labour Code on Industrial Relations Bill 2015; and
    - Labour Code on Wages Bill 2015.

- Some of the changes proposed under the Labour Code on Industrial Relations Bill 2015 are:
    - Exempting employers employing up to 50 workmen from notice and severance compensation requirements under the applicable law;
    - Increase in the amount of severance compensation payable on termination of employment; and
    - Increase in the headcount threshold relating to triggering of the requirement of obtaining governmental permission for termination of employment or closure of an establishment.
- Some changes proposed under the Labour Code on Wages Bill 2015 are:
    - A uniform, comprehensive definition of 'wages' in relation to calculating compensation and benefits;
    - Replacing the existing (labour) 'inspector' with a 'facilitator' who will monitor as well as provide guidance regarding effective ways of compliance with law; and
    - Inclusion of transgender persons within the provisions relating to prohibition of discrimination in payment of wages on the grounds of sex.
- Child Labour (Prohibition and Regulation) Bill 2012 - This Bill proposes to render unlawful the employment of children below 14 years of age in any occupation. This will bring the law in line with the Right to Children to Free and Compulsory Education Act, 2009.
- Small Factories (Regulation of Employment and Conditions of Services) Bill 2014 - The Bill seeks to regulate small factories (factories employing up to 40 workers) but at the same time facilitate them to carry out business. The proposal is to cut down on cumbersome procedures by:
    - Providing for online registration of units;
    - E-filing of compliance returns by employers through a single unified form; and
    - Making certain laws inapplicable to small factories.
- Apprentices Bill 2014 - The changes proposed under this Bill are:
    - Prescribing a minimum age for apprenticeships in hazardous industries;
    - Requiring the central (national) government to prescribe the number of apprentices to be engaged by an employer in a designated trade and optional trade;
    - Amendments relating to practical training and the provision of a syllabus and equipment for such training; and
    - Removal of provisions relating to imprisonment for certain offences.
- Amendments to the EPF Act - Certain proposed key amendments to the EPF Act include:
    - Reducing the employee threshold for applicability of the EPF Act from 20 to 10;
    - Revising the definition of 'wages';
    - Allowing small establishments deploying up to 40 workers to contribute between 9% to 12% of wages, instead of the mandatory 12%; and
    - Providing an option to the employees to choose between EPF Scheme and the New Pension Scheme.

Parts of this overview were originally prepared by Nishith Desai Associates for the International Comparative Legal Guide to Employment & Labour Law 2015 published by the Global Legal Group. Vikram Shroff and Ajay Singh Solanki of Nishith Desai Associates have updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.

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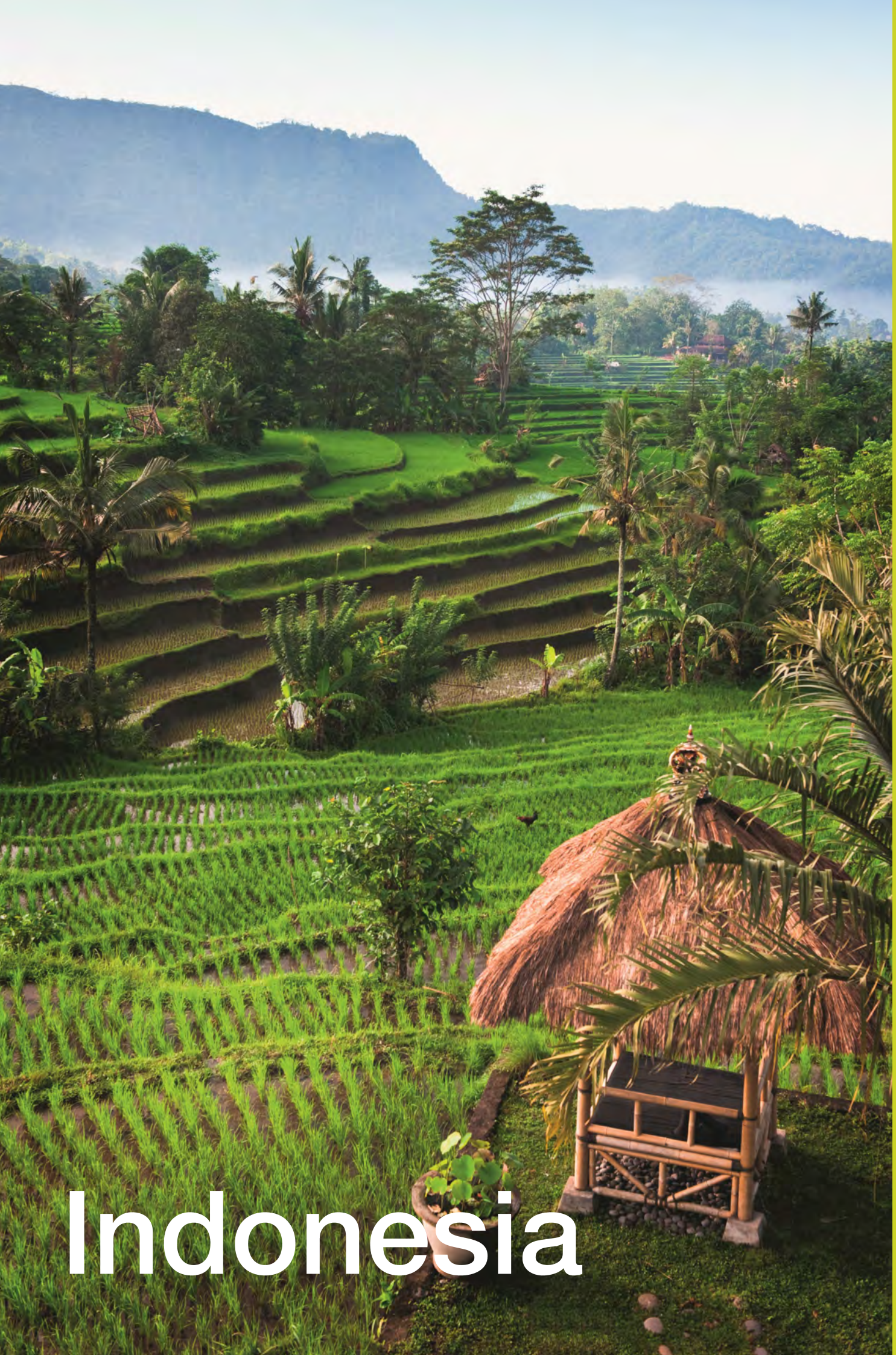

Indonesia

Indonesia

INDONESIA

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

The following laws and regulations apply to foreign nationals who work in Indonesia:

- Law No 13 of 2003 on Manpower (Labour Law).
- Ministry of Manpower and Transmigration Regulation No 16 of 2015, which provides guidance on using foreign workers.
- Ministry of Manpower and Transmigration Decision No 40 of 2012, which states that certain positions cannot be held by foreign workers.
- Presidential Regulation No 72 of 2014 on the Recruitment of Foreign Workers and the Implementation of Education and Training for Accompanying Workers.

Indonesian labour laws and regulations do not expressly differentiate between regulations imposed on foreign nationals and regulations imposed on Indonesian nationals. The principal legislation governing employment relations in Indonesia is the Labour Law. This law outlines the principal rules for:

- Establishing an employment relationship.
- Employment terms and conditions.
- Employment termination.

Generally, foreign nationals can work in Indonesia, provided that the work to be performed cannot be performed by Indonesian nationals, and the work is not of the type that foreign nationals are prohibited from performing under the prevailing laws and regulations. This requirement is further subject to additional regulations in a number of industries. Where a company cannot hire an Indonesian national with the appropriate skills, the company is allowed to employ foreign employees, provided that at least 10 Indonesian nationals are simultaneously employed and trained by the company.

The Ministry of Manpower and Transmigration of the Republic of Indonesia currently known as the "Ministry of Manpower" has determined, as set out in the Labour Law, that the employment of foreign nationals falls under the category of employment for a definite period (*Perjanjian Kerja Waktu Tertentu*) (PKWT) because of the following:

- Not all positions in Indonesia can be held by foreign nationals.
- Foreign nationals are required to obtain a work permit and other related permits and these permits are only valid for a one-year period (even though an extension can be applied for at its expiration).

Therefore, not all the provisions of the PKWT apply to foreign employees. For example, the provision of the Labour Law that stipulates the period of PKWT can be extended or renewed does not apply to foreign national employees, because these employees can only hold certain positions for a specific period of time.

1.2 Laws applicable to nationals working abroad

The following laws and regulations apply to Indonesian nationals working abroad:

- Law No 39 of 2004 on the Placement and Protection of Labour Workers.
- Government Regulation No 3 of 2013 on the Protection of Overseas Indonesian Workers.
- Presidential Regulation No 81 of 2006 on National Board on the Placement and Protection of Indonesian Manpower.

- Minister of Manpower and Transmigration Regulation No PER.14/MEN/X/2010 on the Implementation of the Placement and Protection of Indonesian Manpower Overseas.
- Law No 39 of 2004 and its implementing regulations cover nationals working abroad through a government-appointed agent. The agent may be a government institution or a private entity. Private entity agents for Indonesian nationals working abroad are required to have a licence from the Ministry of Manpower.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

The Law No 13 of 2003 on Manpower (Labour Law) divides employees into the following two categories:

2.1.1 **Definite term employees (*Pekerja Waktu Tertentu*).** A definite term employee is employed under a definite term employment agreement. This type of worker is also known as a "contract worker". Based on the Labour Law, the types of work which may be performed by a definite term employee under a definite term employment agreement are as follows:

- Work to be performed and completed at once, or work which is temporary;
- Work which is estimated to be accomplished within three years;
- Seasonal work; and
- Work that is related to a new product, new activity or additional product which is still in the experimental stage.

2.1.2 **Indefinite term employee (*Pekerja Waktu Tidak Tertentu*).** These are employees who do not fall into the category of definite term employees. This type of worker is also known as a permanent worker.

2.2 Entitlement to statutory employment rights

Except for statutory termination benefits available to a permanent employee, the Labour Law does not make a distinction between the statutory employment rights of a definite term employee and those of an indefinite term employee. Both types of employees have the same statutory employment rights (that is, the right to obtain a salary, to receive holiday allowances, and any other rights provided under the prevailing laws and regulations).

2.3 Time periods

The Labour Law only stipulates the legal duration for a definite term employment agreement. A definite term employment agreement can only be performed for a maximum period of two years (with a further possible extension up to a maximum of one year, or a one-time-only possible renewal for a maximum period of two years).

RECRUITMENT

3 Does any information/ paperwork need to be filed with the authorities when employing people?

In general, there is no official information or paperwork that needs to be filed when employing people. However, an employer must register the employment contract for employees who work for a definite period with the relevant Ministry of Manpower.

Pursuant to Article 6 paragraph 2 of Law No 7 of 1981 Regarding Obligatory Manpower Reports (31 July 1981) ("Law 7/1981"), a company is required to file an annual report on employment matters for each location in which its employees work with the local MOM office. This report provides statistical information on the number of employees at the location, how many employees work overtime, the number of expatriates working at the location and other general matters.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

4.1 Visas

4.1.1 **Limited stay visas.** A foreign national must obtain a limited stay visa (*Visa Tinggal Terbatas*) (VITAS) to be able to work in Indonesia. This visa has a minimum validity period of six months and a maximum validity period of two years.

The procedure for obtaining approval is the same as for obtaining approval of permits (see below 4.2.1, Permits: Procedure for obtaining approval).

The cost for obtaining a VITAS is about US$150.

Obtaining a VITAS takes about one month.

The following is a brief guide concerning the permits required for entry into Indonesia. The permits are classified on the basis of the purpose of the entry.

4.1.2 **Visas for non-business visitors (tourists).** A foreign national who wishes to enter into Indonesia for a purpose other than business may apply for either a tourist visit visa, or a social and cultural visit visa. For citizens of certain countries the tourist visit visa may be obtained at the immigration desk at the point of entry on arrival. The social and cultural visit visa can be applied for from the home country at the Indonesian Consulate. Under the terms of the tourist visit visa (which is valid for two months and is non-extendable), the holder is not allowed to perform any form of official business activities. The social and cultural visit visa is valid for one month and is extendable four times.

4.1.3 **Visas for business visitors.** A foreign national who wishes to come to Indonesia for business purposes may apply to the Indonesian Embassy in the country of his residence for a business visit visa with no permit to work. This business visit visa is valid for a maximum period of two months and expires as soon as the holder leaves the country. As long as the holder is still in the country, the business visit visa may be extended in Jakarta up to four times, each time with a maximum validity of one month.

The holder of this visa may visit offices and attend business meetings, but is not allowed to perform actual work. If, during the initial two-month period, the holder wishes to interrupt his stay in Indonesia, it is more efficient for him to apply for a multiple visit visa. The multiple visit visa is valid for 12 months, with a maximum duration of two months for the initial visit and a maximum duration of one month for subsequent visits. With this multiple visit visa, a foreign national can travel in and out of Indonesia as many times as he or she wishes or needs to in any 12 month period, and can undertake all activities that a holder of a business visit visa with no permit to work would be entitled to.

This type of visa is not renewable upon its expiry or upon the exit of the holder from Indonesia. If the VITAS has expired, the employee must physically leave Indonesia and will need to apply for a new visa.

4.1.4 **Sanctions.** Under Article 121 of Law No 6 of 2011 concerning immigration (Immigration Law), a foreign national can be subject to imprisonment for a maximum period of five years and a maximum fine of IDR500 million if they:

- Knowingly make a fake or falsified visa, entry permit or stay permit for their own or another person's use to enter or leave or stay in the Indonesian territory.
- Knowingly use a fake or falsified visa, entry permit or stay permit to enter or leave or stay in the Indonesian territory.

The following individuals may be subject to imprisonment for a maximum period of five years and a maximum fine of IDR500 million (*Article 122, Immigration Law*):

- A foreign national who knowingly abuses or carries out an activity that is against the purpose and aim of their stay permit.
- Any person who orders or allows a foreign national to abuse their stay permit or carry out an activity which is against the aim and purpose of their stay permit.

The following individuals can also be subject to imprisonment for a maximum period of five years and a maximum fine of IDR500 million (*Article 123, Immigration Law*):

- Any person who knowingly gives a fake or falsified letter, data or wrong information when applying for a visa or stay permit for themselves or another person.
- Any foreign national who knowingly uses that visa or stay permit to enter and/or stay in the Indonesian territory.

4.2 Permits

4.2.1 **Procedure for obtaining approval.** The employer must first apply to the Ministry of Manpower for the Ministry's approval of its Expatriate Manpower Utilisation Plan (RPTKA), which is the master document for processing individual work permits for foreign employees. The RPTKA contains information on the number, functions and employment periods of the foreign employees.

Following the approval of the RPTKA, the employer must submit an application for the recommendation of the Ministry of Manpower for its plan to employ foreign nationals. The Ministry of Manpower may also require the employer to seek a recommendation from the technical department that relates to the activity of the company.

After obtaining the RPTKA and the above-mentioned recommendation, the employer can submit a VITAS application to the Immigration Office. If the VITAS application is accepted, the Immigration Office will send a telex confirming the approval to the Indonesian embassy in the foreign national's country of domicile. The foreign national must then collect the approval at the Indonesian embassy and get the VITAS stamp on their passport.

The cost related to the RPTKA is about IDR1.25 million.

Processing an RPTKA approval takes around 10 to 15 working days.

4.2.2 **Sanctions.** The **sanctions** for failing to comply with the obligation to obtain the written permit to employ foreign nationals from the Ministry of Manpower are:

- Imprisonment for a minimum period of one year up to a maximum period of four years.
- A minimum fine of IDR100 million and a maximum fine of IDR400 million.

4.3 Other

4.3.1 **Procedure for obtaining approval.** The foreign worker must submit the application for the limited stay permit to the Immigration Office no later than seven days after their arrival in Indonesia (verified by the entry permit). If the application is approved, the Immigration Office issues a Limited Stay Permit Card (**KITAS**). The KITAS is valid for one year.

An employer must further obtain a work permit (IMTA) from the Minister of Manpower and Transmigration for its foreign employees. The IMTA is valid for one year.

In certain regions, foreign nationals who work in Indonesia must also obtain a number of other permits.

Obtaining an IMTA and KITAS from the Immigration Office costs approximately IDR1.6 million. Foreign workers must also pay an annual contribution of US$1,200 to the Skill and Expertise Development Fund (*Dana Pengembangan Keterampilan dan Keahlian*) (DPKK).

The time frame for processing the required permits takes about two to three months.

For sanctions *see above 4.1.4, Visas: Sanctions*.

4.3.2 **Filings when foreign nationals start work.** There are no official filings which need to be made when the foreign nationals start working in **Indonesia** except for an extension of the work permit and stay permit and other related documents, since they are valid for 12 months.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

Employment agreements can be made for a definite or indefinite period of time (*Law No 13 of 2003 on Manpower (Labour Law)*). Specifically, a fixed-term employment agreement must be made in writing, in the Indonesian language using the Latin alphabet (some Indonesian dialects do not use the Latin alphabet) (*Article 57, Labour Law*). If an employment agreement is in both Indonesian and a foreign language, the Indonesian version prevails in the event that there are differences in interpretation.

Employment agreements of an indefinite term can be made either orally or in writing (*Article 51, Labour Law*).

Any written employment agreement (fixed-term or indefinite) must state the following as a minimum:

- Name, address and line of business of the employer.
- Name, sex, age and address of the employee.
- Position of the employee or type of work.
- Place where the work is to be carried out.
- Amount of wages and how they will be paid.
- Terms and conditions of employment stating the rights and obligations of both the employer and the employee.
- The effective date of the employment agreement and the period of the employment agreement.
- Place and date of the execution of the employment agreement.

In addition, it must be signed by the parties to the agreement.

Employment agreements of an indefinite term can be made orally or in writing (*Article 51(1), Labour Law*). However, in practice, employment agreements should be made in writing. An employment agreement can be made orally only if circumstances do not permit it to be made in writing.

5.2 Implied terms

There are no implied terms in employment agreements under the Labour Law or other applicable laws and regulations.

5.3 Collective agreements

If a company has a registered labour union, the labour union can enter into a collective labour agreement (CLA) with the management of the company. A labour union can be established by at least 10 employees in any business industry. The CLA is valid for two years but can be extended. Only a duly registered trade union with a registration number has the right to negotiate a collective labour agreement with the employer's management.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

An employment agreement is a contract. Under the Indonesian Civil Code, a contract cannot unilaterally be changed and, therefore, an employment agreement cannot be unilaterally changed or revoked.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

Workers who work a five-day week have Saturday and Sunday off. Workers who work six days a week are entitled to Sunday off. All employees are entitled to 12 working days of paid vacation per year after one year's uninterrupted service.

7.2 Public holidays

Workers are not obliged to work on formal public holidays (*Law No 13 of 2003 on Manpower (Labour Law)*). Employers who require their employees to work on formal public holidays must pay the concerned employees for overtime work. The Minister of Manpower together with the Minister for Religious Affairs and the Minister for the Utilisation of State's Apparatus issue a Joint Ministerial Decree every year, stipulating the specific date for each public/national holiday. Most public holidays are religious dates and as most religious concessions function by a different calendar, for example, the lunar cycle, the exact dates vary from year to year. Public holidays are included in the minimum holiday entitlement.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Employees are entitled to paid sick leave in the case of illness or injury that is evidenced by a medical certificate or statement.

Employees are also entitled to long-term paid medical leave, provided that such leave is recommended in writing by a doctor, and lasts for a period greater than one year.

Female employees are also entitled to two days of menstrual leave (the first and second day of menstruation).

8.2 Entitlement to paid time off

An employee who is experiencing a prolonged sickness continues to be entitled to the payment of wages, as follows (*Law No 13 of 2003 on* Manpower *(Labour Law)*):

- First four months: 100% of the wages.
- Second four months: 75% of the wages.
- Third four months: 50% of the wages.
- Subsequent months: 25% of the wages until the employment is terminated.

The employer pays these wages.

8.3 Recovery of sick pay from the state

The employer cannot recover any of the costs from the government.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Pregnant employees are entitled to take three months' paid maternity leave, of which one and a half months are taken in the pre-natal period and one and a half months are taken in the post-natal period (*Law No 13 of 2003 on Manpower (Labour Law)*). In this period, employees receive their full salary. A pregnant employee is entitled to receive her full salary during her pregnancy.

An employee who has had a miscarriage is entitled to a one and a half month rest period, provided this is recommended in a medical statement issued by an obstetrician or midwife.

Employers must provide proper opportunities to female employees, whose babies still need breastfeeding, to breastfeed their babies if this must be performed during working hours (*Labour Law*).

9.2 Paternity rights

Male workers are entitled to two days' paid paternity leave if his wife gives birth or miscarries.

9.3 Surrogacy rights

The labour laws are silent on the rights of a surrogate mother or parents under a surrogacy arrangement to leave, pay and other benefits. As a threshold issue, it is not clear whether surrogacy is permitted under Indonesian law.

9.4 Adoption rights

Labour Law does not recognise this type of leave. As long as all legal documents are given to the employer, parents of an adopted child will have the same maternal and paternal rights as parents

of a naturally born child.

9.5 Parental rights

An employee is entitled to paid family leave in the following circumstances:

- Marriage of the employee's child: two days' paid leave.
- Circumcision of the employee's child: two days' paid leave.
- Baptism of the employee's child: two days' paid leave.
- Death of the employee's child: two days' paid leave.

All the above-mentioned leaves are paid leave, which means that the employee is paid his full salary for the period of his leave. However, the employer is not obliged to pay the allowances that require the attendance of the employee such as transportation and meals allowances.

9.6 Carers' rights

Indonesian labour laws are silent on carers' rights. In practice, leave may be granted by an employer as unpaid leave. This also applies for emergency care for dependants, a spouse or a close family member. An employee may be given permission for unpaid leave. Likewise, an employee may be given emergency care for himself and his immediate family members.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

A worker becomes entitled to annual leave after working for 12 consecutive months (*see Question 7, Minimum holiday entitlement).* An employee who has been working for the same employer for six consecutive years may also be entitled to a leave of at least two months in the seventh and eighth year of work. Termination and retirement benefits also accrued based on length of service.

10.2 Consequences of a transfer of employee

If employees are transferred from one company to another without dismissal, the new company must provide at least the same remuneration as the previous company. The new company must also recognise the length of service of the employees. This applies to all types of employee transfer.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

The Law No 13 of 2003 on Manpower (Labour Law) and other applicable regulations do not differentiate between the rights of temporary and agency workers and the rights of permanent employees. Temporary workers' terms and conditions, including salary, cannot be lower than what is provided for under the existing laws in relation to permanent employees.

An agreement for a definite or specified period can be an agreement for a specified period of time or an agreement for a specified job.

Under Indonesian labour laws, an agreement for a definite or specified period can only be extended once. Generally, it can only be made for a maximum period of two years (with the possibility for a one-time extension for a maximum period of one year, or a one-time renewal for a maximum period of two years). Employees who are hired for a definite period, or temporarily, are entitled to the remaining amount of pay if their employment is terminated before the end of the specified period of the job.

In relation to agency workers who are seconded to another company, protection and working conditions provided to the workers at the other company must be at least the same as the protection and working conditions provided at the previous company.

11.2 Agency workers

See above 11.1, Temporary workers.

11.3 Part-time workers

The Labour Law and other applicable labour regulations do not recognise the concept of a part-time worker. Therefore, a part-time worker will be entitled to the same rights as a permanent worker.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

All persons that are qualified to perform a job have the same opportunity to obtain the job without discrimination (*Article 5, Law No 13 of 2003 on Manpower (Labour Law)*). The interpretation of Article 5 provides, among other things, that all persons who are qualified to perform a job cannot be discriminated against on the grounds of:

- Sex.
- Ethnicity.
- Race.
- Religion.
- Political orientation.

In addition (Article *6, Labour Law*):

- All workers have the right to receive equal treatment without discrimination from their employer.
- Employers must provide workers with equal rights and responsibilities with no discrimination based on:
    - Sex;
    - Ethnicity;
    - Race;
    - Religion;
    - Skin colour; or
    - Political orientation.

Indonesia has also ratified the following International Labour Organisation (ILO) Conventions:

- No 111 of 1958 on Discrimination in Employment and Occupation.
- No 80 of 1957 on Equal Remuneration for Male and Female Workers for Work of Equal Value.

The Labour Law does not regulate protection from harassment for employees. However, the company's manual or collective labour agreement will normally contain a provision regarding harassment and its sanction. Indonesian case law also provides protection for workers from harassment. However, the Indonesian court system is based on a civil law system and does not follow the rule of *stare decisis* (a legal principle under which judges must respect the precedents established by prior decisions).

Employees wishing to take action against sexual harassment they have experienced in the workplace can file a claim on the basis of the civil tort law. The labour laws and regulations are silent on the period of claim for this matter.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

The law does not set out notice periods for ordinary dismissals and unfair dismissals. However, in practice a 30-day notice must be given to terminate an employment contract.

The Law No 13 of 2003 on Manpower (Labour Law) regulates individual employment termination and provides for:

13.1.1 **Dismissal without cause (not due to the employee's fault).** Where dismissal of employees cannot be avoided, such as in the case of a merger, a reorganisation of the company, or bankruptcy of the employer, the employer should explain the circumstances to the related Ministry of Manpower office in advance if there will be a mass employment termination.

13.1.2 **Dismissal with cause (due to the employee's fault).** Dismissal with cause can arise in the following circumstances, bearing in mind that most terminations of employment, even for cause, will require the approval of the Labour Court or a mutual termination agreement between the employer and employee:

- The employee's violation of the employment contract or company regulation; and
- The employee's gross wrongdoing or committing of a major fault. However, dismissal can only be effected if a final and binding verdict confirming the employee's wrongdoing has been obtained from a criminal court judge (Decision of the Manpower Minister No 13 of 2005). For termination based on criminal conviction, no Labour Court approval is required.

In addition, an employer can dismiss an employee if:

- The employee has been unable to work for over six months due to legal proceedings brought against them (Article 160(3), Labour Law). If the court finds the employee not at fault, the employer must re-employ the employee.
- The employee has been absent from work for five or more consecutive working days without providing reasons or evidence (Article 168, Labour Law).

13.2 Severance payments

The labour law sets out the dismissal and severance payment requirements. The amount and type of severance to be paid to an employee can vary depending on the basis of the dismissal. If the dismissal is due to the employee's fault, the employee is typically entitled to the following:

13.2.1 **Standard severance pay.** One month's salary for every year of service, up to nine months' salary.

13.2.2 **Service appreciation pay.** Two months' salary for the first three years of service, followed by an additional one month's salary for every three years of service thereafter, up to a maximum of 10 months' salary for 24 years of service.

13.2.3 **Compensation.** Monetary **compensation** must be paid to cover the following (*Labour Law*):

- Annual leave that has not expired or been taken;
- Relocation expenses (that is, expenses to return the employee and their family to the place from which they were recruited);
- Medical and housing allowance: 15% of the total severance pay and service appreciation pay, if any;
- Other benefits provided under the respective employment agreement, the company regulations or the CLA; and
- Other compensation amounts as determined by the Industrial Relations Court (this can include special arrangements between the employer and employee).

If the dismissal is not due to the employee's fault (dismissal without cause), the employee is typically entitled to two times the severance pay amount plus the standard service appreciation pay and compensation. The Labour Law does not provide separate provisions on severance payment for ordinary dismissals and unfair dismissals. However, it provides different formula of severance pay for the different reasons of the dismissal/employment termination.

13.3 Procedural requirements for dismissal

If the employee violates the provisions under the employment agreement, company regulations or CLA, then the employer can terminate the employment after it issues three consecutive disciplinary (warning) letters (*Article 161, Labour Law*), subject to the caveat that the termination must be approved by the Labour Court, or a mutual termination entered into and registered with the Labour Court. Furthermore, until termination is approved or mutual agreement is reached, the employer is required to continue to pay salary to the employee.

In all other cases, the employer must attempt to negotiate the proposed dismissal with the employee or applicable labour union. In addition, all employment termination plans (except where dismissal is caused by the resignation of the employee) require approval, in the form of a decision of authorisation of the Industrial Relations Court. If the employee and the employer agree to the employment termination, they must enter into a mutual employment termination agreement. This must be done simultaneously with the payment of the severance package (*see above 13.2, Severance payments*). The entire transaction must be registered with the Industrial Relations Court, after which the court issues a deed of registration of the employment termination.

The long and expensive procedures involved with employment termination have induced employers to try and conclude an amicable settlement with employees.

If procedures are not followed or the parties do not reach a termination agreement, each party can bring the case to a mediator (officials from the Manpower Department). If the case cannot be settled through mediation, the mediator will forward the case to the Industrial Relations Court and the losing party may appeal to the Supreme Court.

Law No 13 of 2006 on the protection of witnesses and victims (*Law No 13/2006*) provides protections for witnesses and victims in all stages of court proceedings within court jurisdiction. The protection to witnesses and victims is aimed at providing a sense of safety to witnesses and/or victims in presenting their testimony in a court proceeding.

Article 10 sets out that witnesses, victims and people who report an offence should not be prosecuted on criminal or civil code on the report or testimony which they will give, are giving or have given. The above provisions are not applicable to witnesses, victims and people who provide information without a good intention.

Under this Law No 13/2006, whistle-blowers cannot be discriminated against. Based on the principle of equality before the law, witnesses and victims in a court proceeding must be given a guaranteed legal protection.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

An employee cannot be dismissed under certain conditions, including the following (*Article 153(1), Law No 13 of 2003 on Manpower (Labour Law)*):

- The employee is ill (the employee must have this validated in writing by a doctor), provided the employee is not absent for a period of greater than 12 months.
- The employee is fulfilling state obligations, as defined in valid legislation.
- The employee is fulfilling religious obligations (for example, praying, taking part in a religious ceremony).
- The employee is getting married. This should be taken to mean that an employee cannot be fired the day that they are getting married. In addition, an employee is entitled to three days' paid family leave when getting married (Article 93, Labour Law).
- The employee is pregnant, breastfeeding, giving birth or has recently had a miscarriage.
- The employee is related by blood to another worker, unless the dismissal is required by a collective bargaining agreement.
- The employee belongs to a trade union.
- The employee has reported a crime committed by their employer.
- The dismissal is due to discrimination on any basis.
- The worker is disabled or ill due to a work-related accident and the period of recovery is indeterminable.

Dismissal under one of the circumstances listed above will be declared null and void and the employer will then be obliged to re-employ the employee concerned.

14.2 Protected employees

See above 14.1, Protection against dismissal.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

The labour regulations do not contain provisions on redundancy notification. There is no specific definition of redundancy or layoff in Indonesian labour law. Redundancy or layoff would be treated as dismissal without cause (*see Question 13*). An employer should provide evidence as grounds for the redundancy. In particular, the evidence is needed if the case is brought to a government institution that handles labour cases.

15.2 Procedural requirements

Employers who wish to dismiss employees must first obtain approval from the Industrial Relations Court. Following this, consultation or discussion with the employee or labour union is required prior to mass or individual dismissal (*see Question 13, Procedural requirements for dismissal)*.

15.3 Redundancy/layoff pay

The redundancy pay/severance package is calculated on the basis of the employee's:

- Monthly salary.
- Period of service.
- Allowance and benefits such as leave, and medical and housing entitlements.

Since redundancy/layoff is treated as dismissal without cause, the employee is entitled to two times the severance pay amount plus the standard service appreciation pay and compensation.

15.4 Collective redundancies

Under the Ministry of Manpower and Transmigration's Decision No 150/MEN/2000 (as amended by the Ministry of Manpower and Transmigration's Decision No KEP-111/MEN/2001 regarding the settlement of termination of employment and the determination of severance pay, service appreciation pay and compensation pay), "collective redundancies" means:

- The termination of the employment of 10 or more employees in a company within one month.
- The serial termination of the employment of employees of a company that indicates the company's intention to conduct collective redundancies.

Collective redundancies require the permission or approval of the Labour Dispute Settlement Committee. Labour law in Indonesia does not differentiate between the termination of a single employee and collective termination. Any termination requires Labour Court approval, unless secured by a Mutual Termination Agreement.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

There is no requirement under law that employees be represented at management level. Management representation is regulated by the Company Law No 40 of 2007 (Company Law). A company's articles of association can provide a procedure and requirements relating to the management team's selection (*Company Law*).

16.2 Consultation

An employer whose company is engaging in a merger or acquisition, or whose company is changing ownership, must notify its employees of the merger or acquisition, or change of ownership (*Articles 127(1) and (2), Company Law*). Notification must be made at least two weeks before the respective transaction (and 30) days prior to the notice of the General Meeting of Shareholders), to allow employees to decide whether they want to continue their employment following the transaction. This procedure (sale of share) including an announcement in a newspaper only applies for a change in shares of the controlling shareholders. In relation to an asset sale, the announcement to employees is not mandatory but in practice this is done.

Employee opinion can be voiced and can have an impact on the stakeholders' decision, and if the employees are not satisfied with the planned action or change, they have the opportunity to resign.

16.3 Major transactions

Employee consent is not required for major transactions (*see above 16.2, Consultation*). However, employees, particularly those who are organized, can attempt to leverage a bonus or other payment from employers by threatening to exercise their statutory right to terminate their employment and receive a statutory payment in connection with certain major transactions including an acquisition or a merger.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

An employee can voice their concerns with the Ministry of Manpower and Transmigration appointed mediator. However, there is no requirement for an employer to consult their employees on major transactions. Despite there being no consultation requirement, the employer is required to notify the employees in the event that such a transaction will result in termination of their employment.

17.2 Employee action

Employees cannot take any action other than voicing their concerns (*see Question 16*).

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

Employees are not automatically transferred on a business transfer, ie a sale of shares in a company or merger (in an asset sale, the employee's consent to transfer is required and there is no employer right to terminate employment). The following three options are possible in relation to permanent employees:

- The employee is not willing to continue their employment with the new employer (meaning the new owner of the acquired or merged company), in which case they must be paid a severance payment.
- In the case of a merger, the new employer is not willing to accept the employee, in which case the employee concerned is entitled to two times the stipulated severance pay, plus the other standard remuneration (that is, compensation pay and service appreciation pay). This does not apply in an acquisition.
- Both the new employer and the employee are willing to continue the employment as if no business transfer has occurred. In this case, the employment relationship continues on the basis of the same terms and conditions as before the transfer.

A non-permanent worker whose employment is not continued by the new employer is entitled to receive the wages for the remaining period of his contract.

18.2 Protection against dismissal

There is no protection against dismissal for employees on a business transfer (*see above 18.1, Automatic transfer of employees)*. However, as with all dismissal claims, the Industrial Relations Court (ie, Labour Court) approval is required before an employee can be dismissed (*see Question 13, Procedural requirements for dismissal*).

18.3 Harmonisation of employment terms

If the employment continues following the business transfer, the terms and conditions of employment must be the same as before the transfer, unless the Industrial Relations Court approves the change. The new employer must also recognise the employee's continuous length of service.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

Resident foreign employees are taxed on the part of their salary earned in Indonesia and other remuneration the employee earns during their stay in Indonesia (for example, bonus, and religious holiday allowance). The Indonesian portion of the salary is taxed at source, and the employer must withhold the tax.

Non-resident employees (that is, an individual who does not reside in Indonesia and is present in Indonesia for less than 183 days in any 12 month period, or an entity that is not domiciled in Indonesia and is not conducting business or carrying out activities in Indonesia through a permanent establishment) are generally subject to a withholding tax of 20% of their gross income from Indonesia.

Indonesia has concluded several tax treaties and agreements with other states. Taxation rates and deductions can be altered under these treaties. Double taxation treaties offer a lower withholding tax rate, usually 10% or 15%. In addition, most treaties provide an exemption from withholding tax where interest is paid to the government or other specified authority of the other country. The treaties also provide a "time test" for determining when a permanent establishment is deemed to exist. By the end of 2008, Indonesia had negotiated and implemented tax treaties with 57 countries.

Deductions can be made for dependant spouses and children. In addition, foreign nationals may be able to claim for some expenses that are paid for by the employer, such as accommodation or vehicles. However, this depends on how the employer has classified these payments. Items such as healthcare costs which may be covered by the employer are classed as income.

19.2 Nationals working abroad

Indonesia exempts the portion of the employee's salary that is attributable to a foreign company from taxation.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

Non-resident individuals are subject to a withholding tax of 20% on their gross income from Indonesia, unless the provisions of a double taxation treaty provide otherwise.

Tax resident individuals are subject to the following rates of income tax:

- Up to IDR50 million: 5%.
- From IDR50 million up to IDR250 million: 15%.
- From IDR250 million up to IDR500 million: 25%.
- Over IDR500 million: 30%.

20.2 Social security contributions

On 25 November 2011, the Indonesia Government issued Law No 24 year 2011 regarding the Social Security System (Law No 24). This Law regulates the provision of the social security system for Indonesian workers, as well as for foreign nationals who have worked in Indonesia for at least six months. A special institution named the Social Security Management Board (known locally as *Badan Penyelenggara Jaminan Sosial* or BPJS) was set up to administer the social welfare system.

BPJS is a non-profit institution. Law No 24 distinguishes between two different types of social security programmes for employees, which BPJS manages:

- The Manpower (labour) Social Security programme.
- The Health Social Security programme.

Law No 24 states that employers must register their employees in both these programmes.

The manpower social security programme was formerly known as the *Jamsostek* programme. Until the implementing regulations on the manpower social security programme are issued, certain provisions of the *Jamsostek* programme are still applicable. Employees who are already members of the *Jamsostek* programme will automatically become members of Manpower Social Security programme.

The following contributions must be made by both the employer and employee for both social security programmes:

- Manpower Social Security programme:
    - Occupational accident security contributions are between 0.24 to 1.74% of the employee's monthly pay, depending on the type of industry in which the employee works (there are five types of industry under the Government Regulation No 44 of 2015 regarding occupational accident and death security programme). Occupational accident security contributions are to be fully paid by the employer;
    - Death security is 0.3% of the employee's monthly pay, to be paid by the employer;
    - Old age security is 5.7% of the employee's monthly pay. The employer pays 3.7% and the employee pays 2%.
    - Pension security will be implemented no later than 1 July 2015. The employer pays 2% and the employee pays 1%.
- Health Security programme:
    - From 1 January 2014 to 30 June 2015 this will be 4.5% of the employee's monthly pay. The employer pays 4% and the employee pays 0.5%.
    - From 1 July 2015 onwards, this will be 5% of the employee's monthly pay. The employer will pay 4% and the employee will pay 1%.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

The only recognised bonus under the Law No 13 of 2003 on Manpower (Labour Law) is the *Tunjangan Hari Raya* (THR) or religious allowance. The THR is paid to workers who have been working for longer than three months. Workers who have been working for a consecutive 12 month period are entitled to a minimum THR amount of one month's salary. The THR must be paid no later than seven days before the *Idul-Fitr* holiday. In practice, contractual or discretionary bonuses can be provided to employees.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

Indonesian laws do not restrict an employer's ability to impose non-competition and non-solicitation covenants on an employee provided the employer and employee have entered into a formal agreement regarding this matter. However, such agreements have not been extensively tested, if at all, in the Indonesian courts, and it is not certain that a court would uphold them based on an employee's right to work and earn a living.

22.2 Post-employment restrictive covenants

The employer is not required to continue paying the former employee while they are subject to post-employment restrictive covenants.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

The government is planning to reform the Law No 13 of 2003 on Manpower (Labour Law) to address:

- Complaints from employers regarding the formula set out to calculate severance pay.
- Complaints from employees regarding outsourcing. Labour outsourcing has become popular with Indonesian employers but it is not clear what the rights of the outsourced employees are.

In 2010, the government established a committee to review and redraft the Labour Law. The government hoped that the review would be completed and a new draft produced by 2013. However, so far the new Labour Law has not yet been issued.

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September 2015

Japan

JAPAN

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

In principle, Japanese laws apply to all employees working in Japan regardless of their nationality. However, in cases where a foreign employer assigns one of its employees to its Japan branch or subsidiary, the foreign employer and the employee often agree that the relevant foreign law will govern the employment contract, either explicitly or implicitly. The choice of foreign law is generally recognised in Japan: however, Japanese public policy and mandatory employment statutes, such as the Labour Standards Act ("**LSA**"), will prevail in the event of conflict (*Act Stipulating General Rules for the Application of Laws of Japan*).

1.2 Laws applicable to nationals working abroad

If an employer and a Japanese national working abroad agree on a governing law in an employment contract, such law will govern their employment relationship to the extent they regulate their relationship. If no such agreement is in place, the law of the place most closely related to the employment contract will apply. The "most closely related" place is generally interpreted as the place where the employee provides work. Regardless of the agreed governing law, if the employee expresses that a specific mandatory provision of the law of the place with which the employment contract is the most closely related be applied, such mandatory provision will apply in that respect.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of workers? If so, what are the material differences in entitlement to statutory employment rights?

2.1 Categories of workers

Only workers that fall under the category of "employees", as defined by the LSA and the Labour Contract Law ("**LCL**"), are protected by Japanese employment law. Whether a worker is deemed an "employee" depends on the actual working conditions and especially whether:

- He/she is under the instruction of the employer; and
- His/her wages are paid by the employer.

Employees are classified into the following four broad categories:

- Indefinite-term contract employee (permanent employee);
- Fixed-term contract employee, whose term of employment is at most three years (or five years in extraordinary cases stipulated under the LSA);
- Part-time employee, whose prescribed working hours are shorter than those of regular employees; and
- An agency worker (also known as a dispatched worker (*haken*)), a worker employed by an agency to be dispatched to work for that agency's clients for a specific purpose on a temporary basis.

2.2 Entitlement to statutory employment rights

Permanent employees enjoy the overall protections of the employment law. Fixed-term employees and part-time employees also enjoy almost the same protection as indefinite-term contract employees. However, certain statutory rights do not apply to part-time employees, by virtue of their shorter working hours. For instance, the number of days of annual paid leave granted to part-time

employees is lesser than that of full-time employees under the LSA. (Only those part-time employees (i) whose designated working days are four or more per week and 216 or more per year or (ii) whose designated working hours are 30 or more per week are entitled to receive the same number of annual paid leave days as full-time employees.)

RECRUITMENT

3 Do any filings need to be made when employing people?

Employers hiring foreign nationals (except for special permanent residents and those with a resident status of "foreign affairs" and "official") must notify the Ministry of Health, Labour and Welfare, through the local Employment Security Bureau, of the foreign nationals' name, date of birth, gender, nationality, status of residence and term of residence, and other key information.

Employers are also required to file with the relevant authorities the documents relating to the social insurance (Health Insurance and Welfare Pension Insurance) and Unemployment Insurance for the newly hired employees.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country?

4.1 Visa

4.1.1 Procedure for obtaining approval

To enter and work in Japan, a foreign national must follow the following procedure:

- Apply for and obtain a certificate of eligibility (*Zairyu Shikaku Nintei Shomei Sho*) in Japan from the immigration authority. No application fee is required, and the processing time required is around four to 12 weeks.
- Upon obtaining the certificate of eligibility, apply for and obtain a visa from the Japanese consulate or embassy in the country where the foreign national resides.
- When arriving at an airport in Japan, show the certificate of eligibility and the visa at immigration control, and receive a seal of landing permission stamped in his passport and, at the major airports or ports, also receive a residence card (*Zairyu Kaado*).

Once he/she starts living in Japan, the foreign national must notify the local city office of his/her place of residence within 14 days.

When the employee continues to stay in Japan under the same visa, the employee must apply to renew the period of stay, before expiration of the current period of stay.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

Japanese law does not require a written employment contract. However, on hiring an employee, an employer must notify an employee in writing of certain employment terms and conditions such as matters pertaining to:

- Wages;
- The duration of contract;
- The working hours (start/end time) and break;
- The workplace and work contents; and
- The termination of employment, retirement and dismissal (including the grounds thereof).

5.2 Implied terms

The minimum employment standards provided in the LSA and any other relevant employment statutes are incorporated as terms and conditions of the employment agreement.

Further, if a certain term between an employer and employee is treated the same way repeatedly and continuously for a long period of time, that term may be implied into employment contracts as "common labour practice" or "implied agreement".

5.3 Collective agreements

A collective labour agreement with a labour union generally applies only to the members of such labour union. However, if 75% or more of the employees at a workplace are members of such labour union, this agreement also applies to the rest of the regularly employed employees of the same class at such workplace.

In Japan, over 40% of the large-sized companies (with 1,000 or more employees) have intra-company unions and most of such companies have collective labour agreements in place. Mid or small-sized companies are unlikely to have intra-company unions and have no collective labour agreements. When certain employment terms and conditions are provided in a collective labour agreement, in principle, they become the employment terms and condition of the employee to whom the collective labour agreement applies.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

An employer cannot change the terms and conditions of employment unilaterally in a manner detrimental to employees, except where the change takes place by amendment of the work rules and where the content and the procedures taken for such change is reasonable. In considering such reasonableness, the court takes into account if the content of the change is socially acceptable, the degree of detriment that the employees will be exposed to, the necessity to implement such change, the setting up of a grace period to alleviate the effect of such change, and discussions with the employees and/or the labour union.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

An employer is required under the LSA to grant a stipulated minimum number of days of annual paid leave in accordance with the length of service of an employee, up to a maximum of 20 days, provided that such employee has been employed continuously for certain period of time stipulated in the LSA and has worked at least 80% of the total working days.

The days that have accrued can be used for a period of two years (ie, the annual paid leave days that have remained unused at the end of the first year (as counted in accordance with the work rules) can be carried over for another year).

7.2 Public holidays

There are currently 15 public holidays a year. It is not a legal requirement that public holidays are specified as days off.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

8.1 Entitlement to time off

Work-related injury or illness:

Employees are statutorily entitled to time off for medical treatment with respect to the work-related injuries or illnesses. An employer is prohibited as a rule from unilaterally terminating an employee during the period of such medical treatment and for a period of 30 days following the same. Exceptions to this rule are:

- Where the employer pays to the employee compensation for discontinuance (*uchikirihosho*) equivalent to 1,200 days of the employee's average wages if he/she fails to recover from the injury or illness within three years; or
- Where the employee receives an injury compensation pension under the Workers' Accident Compensation Insurance Act (*shogaihoshonenkin*) on or after the day on which three years have elapsed from the commencement of the leave for medical treatment; or
- Where the continued operation of the enterprise has been made impossible due to a natural disaster or other unavoidable reason.

Non-work related injury or illness:

Employers are not statutorily required to grant leave of absence to employees who are unable to work due to non-work-related injuries or illnesses. However, in order to rule a validity of a dismissal of employees, Japanese courts normally take into account whether employers have granted enough leave of absence to such employees prior to the dismissal. As such, employers generally grant paid or unpaid leave of absence to employees suffering from non-work related injury or illness, pursuant to their work rules or employment contract.

8.2 Entitlement to paid time off

If an employee is unable to work due to:

- Work-related injury or illness:

  An employer must compensate the employee with 60% of the employee's average daily wage for the first three days of his/her absence. From the fourth day and thereafter for the period during which the employee is unable to work due to work-related injury or illness and is not being paid, the government will pay the employee a total of 80% of the employee's daily basic pay should the employee remain unable to work (comprising: long-term injury and sickness leave compensation under the WACIL (*kyugyohoshokyufu*) (60% of the daily basic pay) and long-term injury and sickness leave (20% of the daily basic pay)).

- Non-work related injury or illness:

  Unlike work-related injuries or illnesses, employers are not required to pay compensation to employees unless otherwise agreed. In the case of unpaid leave of absence, the government or a health insurance association will pay long-term injury and sickness benefits (*shobyoteatekin*) (ie, two-thirds of the employee's average index daily wage) to such employee from the fourth day and thereafter for a period of 18 months as counted from the first day of payment of such benefits should the employee has become unable to work.

8.3 Recovery of sick pay from the state

See 8.2, Entitlement to paid time off.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

A pregnant employee who is due to give birth within six weeks (or 14 weeks, in cases of a multiple birth) is entitled to take maternity leave by making such a request to her employer. An employer is not allowed to have a female employee work within eight weeks after giving birth, except where the employee requests to work after six weeks from giving birth and where a medical doctor has approved that the employee may resume her work.

In the event that a female employee who is either pregnant or gave birth within the preceding one year period requests, an employer may not make her work overtime, on days-off, and during late-night hours.

Further, a female employee who is raising a child under one year old is entitled to take two unpaid 30-minute breaks for childcare each day.

An employer does not have to pay the employee her salary during the period of her maternity

leave, unless the employment contract or work rules provide otherwise. During the period of maternity leave (for a period of 42 days on or before the delivery (98 days in the case of a multiple birth) and for a period of 56 days after the delivery), a female employee who has given birth and who is insured under the Health Insurance is entitled to receive maternity allowance in the amount of two-thirds of her average index daily wage, provided that she receives no wages from her employer for this period.

9.2 Paternity rights

Male employees, similarly to female employees, are entitled to take childcare leave (*see 9.5, Parental rights*).

9.3 Surrogacy

Japan has no law regarding surrogacy.

9.4 Adoption rights

Parents with adopted children can benefit from parental rights (*see 9.5, Parental rights*).

9.5 Parental rights

An employee (a mother or father, excluding day workers; hereinafter the same in this section) who is caring for a child (biological child or adopted; hereinafter the same in this section) under one year of age is entitled to childcare leave, in principle, up to the time the child reaches one year old. (If certain conditions are satisfied, an employee on childcare leave can request for an extension of his/her leave until the child reaches 14 months old or 18 months old.) Principally, an employee may only take a childcare leave once for each child. However, an employee is entitled to a second childcare leave for the same child, if the first leave period ended within eight weeks from the birth date of the employee's child.

Those employees within the following categories may have limited entitlement to some of the parental rights stipulated in this section:

- Who have entered into a fixed-term employment contract with employers;
- Whose continued years of service is less than one year (or six months as the case may be);
- Whose employment contract will end within one year (or six months as the case may be) from the day on which they requested to exercise their parental rights hereunder;
- Whose designated working days per week is two days or less;
- Who have a family member living with them that are able to take care of their children during the late-night hours;
- Whose entire designated working hours are in the late-night hours; or
- The nature of whose work and the like does not fit with shortened working hours.

An employee who is raising a child who is not old enough to go to a primary school (ie six years and below) is also entitled, in principle, to a nursing leave of up to five days (10 days, if more than one child) a year, to care for a sick or injured child. An employee living with and raising a child who is not old enough to go to primary school is also entitled, in principle, to request an employer not to make him/her work beyond the overtime work of 24 hours per month or 150 hours per year or work during late-night hours, except in a case where the normal operation of the employer's business will be adversely affected.

An employee who is caring for a child of under three years of age is also entitled, in principle, to a reduced working hours arrangement (down to six hours a day), provided that he/she has not taken the aforementioned childcare leave.

An employee living with and raising a child of less than three years old is entitled to be exempt from overtime work beyond his/her designated working hours upon request, except in a case where the normal operation of the employer's business will be adversely affected.

An administrative guideline issued by the Ministry of Health, Labour & Welfare stipulates that employers should give consideration to assigning employees who have taken child-care leave or nursing-care leave to their original position when they resume work after their leave. Treatment such as the assignment of female employees to a different position or a reduction of their wages for the reason that they have taken these leaves may be considered unlawful without reasonable and justifiable reasons.

An employer is not required to pay wages during the period of a childcare leave or hours not worked for childcare, unless the employment contract or the work rules provide otherwise. During

the period of childcare leave, an employee who has given birth and who is insured under the Unemployment Insurance is entitled to receive childcare leave compensation benefits on the condition that certain requirements are satisfied. The amount of such benefits is 67% of the employee's wages immediately before the commencement of the childcare leave for a period of 180 days during the leave and 50% of the same for the rest of the period during the leave (with minimum and maximum amount designated as being payable).

9.6 Carers' rights

An employee (excluding day workers; hereinafter the same in this section) with a family member (spouse, parents, children, parents-in-law; hereinafter the same in this section) requiring care is, in principle, entitled to a family care leave of up to a total of 93 days per circumstance. However, the following classes of employees may have limited entitlement to some of the parental rights stipulated in this section:

- Employees who have entered into a fixed-term employment contract with employers;
- Employees whose continued years of service is less than one year (or six months as the case may be);
- Employees whose employment contract will end within 93 days or one year (or six months as the case may be) from the day on which they requested to exercise their family care rights hereunder;
- Employees whose designated working days per week is two days or less;
- Employees who have a family member living with them that are able to take care of their family members requiring care during the late-night hours;
- Employees whose entire designated working hours are in the late-night hours; or
- Employees whose nature of work does not feasibly permit shortened working hours.

In addition to the family care leave, an employee who takes care of a family member requiring care is entitled to take a nursing leave of up to five days a year per family member requiring care (10 days, in the case of multiple family members requiring care).

An employee who takes care of a family member requiring care is entitled to the same rights as those employees raising a child who is not old enough to go to primary school, with respect to the restrictions to overtime work and late-night work. An employee who is caring for a family member is also entitled to a reduced working hours arrangement and other arrangements, provided that he/she has not taken the aforementioned family care leave.

The employer is not required to pay wages during the period of a family care leave or hours not worked by virtue of family care, unless the employment contract or the work rules provide otherwise. However, during such period, the employee, if insured under the Unemployment Insurance, is entitled to receive family care leave compensation benefits on the condition that certain requirements are satisfied. The amount of such benefits is 40% of the employee's wages immediately before the commencement of the family care leave (with minimum and maximum amount designated as being payable).

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any benefits for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Benefits created

Employees are entitled to annual paid leave, the quantum of which depends on their period of continuous employment (*see Question 7*, *Minimum holiday entitlement)*.

Although not statutorily required, many employers offer employees a retirement allowance payable at the end of employment, calculated based on their period of continuous employment.

10.2 Consequences of a transfer of employee

If employees are transferred to a new entity, they do not retain their period of continuous employment, unless they are transferred by way of a corporate transaction such as merger or company split *(see Question 18, Automatic transfer of employees*).

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are fixed-term and part-time employees, and agency workers entitled to the same rights and benefits as permanent employees?

11.1 Fixed-term Employees

Overall, fixed-term contract employees enjoy almost the same protection as permanent (indefinite-term contract) employees. In some respect, they are more protected than permanent employees. For instance, fixed-term contract employees may only be terminated during the duration of the contract on "unavoidable grounds". The scope of the "unavoidable grounds" is interpreted to be narrower than the scope of the "objectively reasonable grounds" which is required as grounds for termination of a permanent employee.

With contract periods of over five years in total, fixed-term employees may convert their employment contract to an indefinite-term contract, upon request to their employers.

However, since the duration of their contract is fixed, fixed-term contract employees have limited entitlements to some employee rights, such as the parental rights and carers' rights (*see 9.5, Parental rights*, *and* 9.6, *Carers' rights*). In practice, terms and conditions of fixed-term contract employees are often differentiated from those of permanent employees, typically through the remuneration system (eg, no retirement allowance for fixed-term contract employees) and personnel system (eg, no mandatory retirement system and/or relocation for fixed-term contract employees). Note, however, that the terms and conditions of employment of fixed-term contract employees shall not be unreasonably different from those of permanent employees solely due to the fixed duration of their contract.

11.2 Part-time workers

Part-time employees are typically subject to different employment terms and conditions from permanent employees. However, discrimination against part-time workers vis-à-vis full-time employees is prohibited. Specifically, an employer is prohibited from engaging in discrimination against a part-time worker with respect to wages, implementation of education and training, utilisation of welfare facilities and any other treatment of workers by reason of their being a part-time worker, if the part-time worker is contractually or substantially subject to an employment agreement with an indefinite term, and if both of the following items are equivalent with respect to the part-time worker and full-time workers:

- Job descriptions and levels of responsibility; and
- Possibility of a change in job description and assignment, and if such change is possible, the range of change.

However, part-time employees have limited entitlements to some employee rights compared to permanent employees, such as the number of days of annual paid leave (*see 2.2, Entitlement to statutory employment rights*).

In addition, part-time employees are eligible for Welfare Pension Insurance and health insurance only if:

- Their daily or weekly designated working hours are equal to or exceed approximately three-quarters of those of regular employees; and
- Their monthly designated working days are equal to or exceed approximately three-quarters of those of regular employees. Further, they are eligible for Unemployment Insurance only if they work 20 hours or more per week, and who are expected to be continuously employed for not less than 31 days.

11.3 Agency workers

Agency workers (workers dispatched based on the Worker Dispatching Law; hereinafter, the "**Dispatched Workers**") enjoy the overall protections of the employment law. Note that although worker dispatching agencies ("**Agencies**") are majorly responsible as employer of Dispatched Workers, worker accepting agencies ("**Receivers**") also share certain responsibilities.

Agencies must give consideration to balancing the wages of the Dispatched Workers with the employees of the Receivers who engage in the same work as the Dispatched Workers, when determining the agency worker's wages.

For the purpose of stable employment of Dispatched Workers, Receivers of Dispatched Workers

are required to offer direct employment to Dispatched Workers, in either of the following circumstances:

- With respect to those kind of work for which no statutory cap exists for a period of dispatch, if a Receiver has used a Dispatched Worker for same work at the same workplace for a continuous period of over three years, and if the Receiver intends to hire a worker for the same work at the same workplace, the Receiver must offer a direct employment to the same Dispatched Worker; or
- With respect to those kind of work for which there is a statutory cap for a period of dispatch, after receiving a request from the Agency, if the requested Receiver plans to recruit a Dispatched Worker for a workplace where such Dispatched Worker has worked, the Receiver must offer a direct employment to the same Dispatched Worker, provided that the Dispatched Worker desires to be directly employed.

In addition to the abovementioned two obligations, under the rules to come into effect on 1 October 2015, in cases where an illegally Dispatched Worker is accepted by a Receiver who is aware of such illegality (eg if the Receiver has knowingly used a Dispatched Worker who has been dispatched from a non-registered Agency), the Receiver will be deemed to have offered the Dispatched Worker direct employment. In such cases, if the Dispatched Worker manifests his/her intention to accept such offer within a certain period of time, an employment contract between the Receiver and the Dispatched Worker will be formed.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Any discriminatory treatment relating to wage, working hours and other working conditions due to an employee's nationality (which includes race), creed, or social status is prohibited under the LSA. Under the Employment Security Law, it is forbidden to discriminate against a person in employment placement, vocational guidance or the like by reason of any previous profession or membership in a labour union, as well as by reason of race, nationality, creed, sex, social status and family origin.

Further, the Act on Securing, etc of Equal Opportunity and Treatment between Men and Women in Employment ("**Equal Opportunity Treatment Act**") prohibits discriminatory treatment based on sex in relation to the following matters:

- Discrimination at the recruitment and hiring stage;
- Assignment, promotion, demotion and training of employees;
- Loans for housing and certain other similar fringe benefits;
- Change in job type and employment status of employees; and
- Encouragement of retirement, mandatory retirement age, dismissal, and renewal of the employment contract.

It is also explicitly prohibited to treat female employees disadvantageously by reason of marriage, pregnancy and childbirth. Moreover, an employer is also prohibited from taking certain measures on the basis of conditions other than gender, if such measures are effectively discriminatory by reason of a person's gender, taking into consideration the proportion of men and women who satisfy the criterion and other matters (such as including certain physical conditions in applications for recruiting and hiring).

Remedies available to employees in discrimination cases vary depending on the circumstances. For example, a discriminatory dismissal, assignment or disciplinary action against an employee by an employer will become null and void. As a result, the subject employee will be reinstated to his/her original position or state, and will also receive back pay. An employee may also be entitled to receive compensation for the damage that he/she suffered.

Employers are required under the Equal Opportunity Treatment Act to establish specific measures to prevent sexual harassment, provide appropriate counseling to employees, and otherwise deal with the sexual harassment issue, so that:

- Employees do not suffer any disadvantage in their working conditions by reason of being subject to sexual harassment in the workplace; and

- The working environment is not disturbed by any sexual harassment.

The government has developed guidelines that specify the abovementioned measures that employers are required to take in preventing sexual harassment. Employers who fail to take these measures face the risk of administrative action for non-compliance, such as corrective orders or public announcement of non-compliance by the Ministry of Health, Labour and Welfare.

Employers assume an obligation to keep workplaces safe and orderly for employees and ensure a good working environment. Based on this obligation, employers are obliged to provide a workplace free from other type of harassment as well (including, as an example, bullying). Breach of this obligation may result in the payment of compensation for damage. In this relation, the government has developed guidelines that specify examples of measures to prevent and/or solve workplace bullying.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

An employer must give 30 days prior notice or make a payment in lieu of notice. An employee may be dismissed without this advance notice in any of the following cases:

- If the employee is on probation, and is dismissed within 14 days from the hiring date.
- Where there is a serious misconduct (with the prior approval of the head of the competent Labour Standards Inspection Office).
- In the event of cessation of business operations due to a natural catastrophe, an Act of God or other unavoidable circumstances (with the prior approval of the head of the competent Labour Standards Inspection Office).

13.2 Severance payments

There is no statutory requirement for severance payments. However, in many cases, such retirement allowances form part of the employment contract. Although there is no concept under Japanese employment law that allows employers to lawfully dismiss employees by paying a specified amount of money, employers generally make severance payment to persuade employees to voluntarily resign. There is no scale of payment for such severance pay, although the amount is often calculated by taking into account the employees' years of service, background leading to the termination of employment, and the like.

13.3 Procedural requirements for dismissal

Advance notice has to be given (*see 13.1, Notice periods)*. In addition, any termination procedures stipulated under the employment contract, work rules or collective labour agreement must be followed.

Further, it is highly desirable for employers to notify the employees subject to dismissal of the reasons of dismissal and provide them with the opportunity for self-vindication. Employers are also required to follow due process in dismissing employees (such as good faith communication with labour unions and employees) as part of their effort to fulfil a requirement of "socially acceptable reason" (*see Questions 14 and 15*).

Moreover, if requested by the employee, employers are required to provide a terminated employee with a certificate certifying the period of employment, the type of work of the employee, the employee's position, the wages, or the cause of retirement (if the cause for retirement is dismissal, the reason of the dismissal must also be provided.)

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

A dismissal requires an objectively justifiable reason and socially acceptable reason to justify that dismissal. Dismissal without such objectively justifiable cause and socially acceptable reason is illegal and void. Any agreement contrary to this principle is void.

What constitutes a justifiable cause varies, and depends on the circumstances of the case. Objectively justifiable reasons for dismissal may include incapacity (due to health or performance-related reasons) and lack of qualification, misconduct, performance issue (where the employee

has been given opportunities to improve, but his poor performance continues to cause damage to the employer), and operational necessity. The LSA requires employers to stipulate causes for unilateral dismissal in their work rules, and prohibits the dismissal of employees based on any other cause.

In order to establish operational necessity as a ground for dismissing an employee, an employer generally must be able to show all of the following *(see Question 15, Definition of redundancy/layoff*):

- A financial need to reduce the number of employees;
- Exhaustion of all reasonable efforts to avoid dismissal (cost reduction, early retirement programme, reduction of remuneration of management personnel, and the like);
- Fair and objective selection of employees to be dismissed (procedure and standards); and
- Due process for dismissal (for example, good faith communication).

Generally, a court would only consider a dismissal to be "socially acceptable" if the cause of dismissal is significant, while there is no other way to avoid the dismissal and there is almost no circumstance on the side of the employee which could be taken into consideration in favour of the employee. Employees may challenge such dismissals in court, and the court strictly examines the validity thereof, based on the above-mentioned criteria.

If a collective labour agreement has a provision that obligates an employer to obtain consent from a labour union upon dismissal of employees, a dismissal without such union consent will be considered null and void.

14.2 Protected employees

An employer may not dismiss certain categories of employee, such as:

- An employee during a period of absence from work for medical treatment with respect to injuries or illnesses suffered in the course of employment or within 30 days after his/her recovery;
- A female employee during a period of absence from work before and after childbirth which is taken in accordance the LSA or within 30 days after her recovery;
- An employee due to the reason of nationality, creed or social status of the worker;
- An employee due to the reason that he/she is a labour union member or has performed justifiable acts of a labour union and the like;
- An employee for reasons of sex, and of a female worker's marriage, pregnancy, childbirth or having taken absence from work before and after childbirth;
- An employee due to the reason of his/her having exercised rights granted with respect to childcare or family care under the Act on the Welfare of Workers who Take Care of Children or Other Family Members Including Child Care and Family Care Leave;
- A part-time employee who is considered to be equivalent to ordinary workers, only due to the reason that he/she is a part-time worker;
- An employee due to the reason that he/she has reported the employer's breaches of certain employment protection laws to the competent government agencies;
- An employee due to the reason that he/she has sought the advice of, or filed an application for, mediation by the head of the Prefectural Labour Offices; and
- An employee due to the reason that he/she has reported a violation in accordance with the Whistleblower Protection Act.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

Under Japanese law, dismissals for redundancy (business reasons) are seldom deemed legally

enforceable. Court precedents have required that the following four criteria be present in order to show objectively reasonable grounds:

- Necessity for a reduction in the workforce;
- All efforts to avoid dismissal have been exhausted;
- The existence of objective standards, and a fair application of them to a selection of the targeted employees; and
- Adequacy of the termination procedure, eg sincere talks with the employees and/or labour unions.

15.2 Procedural requirements

Employers are expected to discuss with the employees and/or the labour unions to explain the reasons for dismissal and the standards for choosing the employees to be dismissed. (Due process, See 13.3, *Procedural requirements for dismissal*).

Further, if 30 or more employees (or five or more employees above 45 years old) are dismissed or cease to be employed within one month, notification regarding such dismissal or cessation should be made to the competent public employment security office, together with a plan setting out how the employer proposes to support such employees with finding new jobs, one month before the day when the first employee will leave.

15.3 Redundancy/layoff pay

Redundancy or layoff pay is not legally required. However, given the difficulty of enforcing a lawful redundancy-based dismissal, the recommended approach is to propose voluntary resignation in exchange for a monetary package. (*See 13.2*, *Severance payments*.)

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

There is no statutory entitlement to management representation for employees.

16.2 Consultation

In principle, the employee's consent is required if an employer transfers his/her employment or makes a disadvantageous change to its terms and conditions. Therefore, advance individual consultation is required.

When reassigning or relocating an employee, advance individual consultation may be required, in particular to ensure that the employee has an opportunity to make arrangements for his/her family members. There are also consultation obligations if so provided in a collective labour agreement.

16.3 Major transactions

There is no statutory requirement for employers to consult with employees in the case of major transactions, except for a transaction involving a corporate split.

An employer contemplating a corporate split must provide its employees and its labour union, if any, with advance notice (generally two weeks before the shareholders resolution approving the split) of certain mandatory statutory matters. The splitting company must then consult with its employees, and make efforts to obtain the employees' understanding of and co-operation with the corporate split and related employee transfers.

An employer may be required to have advance consultation with a union, if provided in a collective labour agreement with the union or if requested by the union, if the transaction will affect the employees.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

If an employer fails to consult with or obtain consent from employees, employees can only generally claim on an individual basis that the change to their employment terms and conditions is

not effective *(see Question 16.2, Consultation).*

In the case of employees transferred by a corporate split, there is an argument that the corporate split itself would be void due to a failure to comply with the statutory employee consultation process *(see Question 16.3, Major Transactions)*. However, it is generally considered that while employees can claim that an individual transfer of their employment on a corporate split is void, the corporate split itself would still be effective.

17.2 Employee action

Employees cannot legally prevent an employer's proposed transaction from proceeding. However in practice, an employee can force the employer not to proceed by asking a labour union to start a collective bargaining process. An employee can seek to be represented by a union, whether unionised in or outside the employer, at any time, and a majority of employees is not needed for collective bargaining.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

In an asset transfer, that amounts to the transfer of business (hereinafter the same in this guide), employees do not automatically transfer to the assignee entity. In principle, if either the assignee entity or an employee refuses to give consent to the transfer of employment, then the assignee entity does not succeed the employment between the assignor entity and the relevant employee.

In a share sale, the identity of the employer remains the same before and after the sale.

18.2 Protection against dismissal

In an asset transfer, there are two ways by which an employment will be transferred to the buyer, namely:

- Transfer of position as an employer ("Case 1"); or
- Resignation of employees from the seller followed by a new employment of the same employees by the buyer ("Case 2").

In Case 1, the existing employment conditions of the employees will be transferred to the buyer as is, unless otherwise agreed between the buyer and the employees. In Case 2, the new employment conditions of the buyer will apply, unless otherwise agreed. Collective labour agreements will not be transferred, unless otherwise agreed in the business transfer agreement.

Even when the seller dismisses an employee due to an asset transfer, the general rules of dismissal for business reasons apply *(see Question 14*). Specifically, the fact that an employee's job will no longer remain after the asset transfer is not itself a legitimate and justifiable cause for dismissal. When determining the legitimacy of the dismissal, the following factors are considered, among other factors:

- Whether the seller's decision to transfer the business was necessary or reasonable.
- Whether it had offered the employee a reasonable opportunity to resign voluntarily, by offering a reasonable package as an alternative to the transfer.
- Whether it had tried to retain the employee by reassigning the employee to another position.
- To what extent it had communicated with the employee in good faith about the background to the business transfer and the need to request the employee to transfer or otherwise resign.

18.3 Harmonisation of employment terms

In Case 1 of an asset transfer or a share sale, an asset transfer or a share sale in and of itself would not justify the changing of employment conditions to the employee's detriment; in principle, individual consent has to be obtained from the employees to effect such changes.

Note that harmonisation of employment conditions may be implemented by amending the work rules. Change of employment conditions to the disadvantage of employees by amending the work rules (ie, without obtaining individual consent of employees) is possible, provided that the change is reasonable, when balancing the disadvantage to the employee with the need to make such change, reasonableness of the amended work rules, and good faith communication with the labour union and/or employees. Generally, any significant change in the employment conditions resulting

in a major disadvantage to the employees, such as a reduced base salary and retirement allowance, is likely to be considered unreasonable and therefore invalid, unless the employees have given sincere consent to the change.

In Case 2 of an asset transfer, due to the reason that the employees will be subject to the employment conditions of the buyer, employees may be subject to employment conditions that are different from those of the seller. The seller should fully familiarise its employees with the new employment conditions and obtain their consent.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

Income tax payable by an individual depends on the individual's taxpayer status, regardless of his/her nationality. A taxpayer is classified primarily as either:

- Resident (further classified as permanent resident or non-permanent resident).
- Non-resident.

In broad terms, a resident is a person who has a domicile in Japan or who has resided in Japan continuously for one year or more.

A non-permanent resident is a resident who both:

- Does not have Japanese citizenship.
- Has a domicile or residence in Japan for a continuous period of no more than five years out of the preceding 10 years.

A foreign national who enters Japan to start employment requiring him/her to stay in Japan continuously for one year or more is presumed to be a resident, from the date of his/her entry into Japan. The foreign national is presumed to be a permanent resident if he/she possesses a permanent residence visa.

A foreign national is treated as a permanent resident if he/she has been residing in Japan for more than five years out of the preceding 10 years.

Japanese income tax will be imposed on a foreign national who is a permanent resident. As for a non-permanent resident, Japanese income tax will be imposed on income generated in Japan, foreign source income and money remitted from overseas. With respect to a non-resident, Japanese income tax will apply only on income generated in Japan.

19.2 Nationals working abroad

A Japanese national who has left Japan to assume a job requiring a stay outside Japan continuously for one year or more is presumed to be a non-resident, from the date of his/her exit from Japan. With respect to a non-resident, Japanese income tax will apply only on income generated in Japan. (*See 19.1, Foreign Nationals.)*

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

Employment income, such as salary income, is subject to national income tax and local inhabitant tax.

National income tax applies at progressive rates of 5%, 10%, 20%, 23%, 33%, 40% and 45% for income for fiscal year 2015 (as of July 1, 2015), depending on the income amount (for example, 45% applies to an income exceeding JPY40 million).

Prefectural inhabitant tax applies at a flat rate of 10% per income levy, and municipal inhabitant tax applies at a certain amount set at a uniform rate per capita, which is set locally.

Special reconstruction income tax is also imposed at the rate of 2.1% of the standard income tax amount.

20.2 Social security contributions

Employers must participate in the following mandatory programmes for their employees:

- Social insurance (Health Insurance, Nursing Care Insurance and Welfare Pension Insurance).
- Labour insurance (Worker's Accident Compensation Insurance and Unemployment Insurance).

The employer and the employee share the burden of the premium contributions. The amount of contributions is statutorily determined based mainly on the employee's remuneration.

The current rates of contributions are as follows (as of 1 July 2015):

- Health Insurance: the rate varies depending on each local region (prefecture). For Tokyo, the rate is either 9.97% (for employees younger than 40 years old) or 11.55% (for employees 40 and 65 years old, exclusive of those who have reached 65 years old) in principle, and is basically shared equally between employer and employee.
- Nursing-care Insurance: the rate is 1.58% in principle, basically shared equally between employer and employee.
- Welfare Pension Insurance: the rate is 17.474% in principle, basically shared equally between employer and employee.
- Worker's Accident Compensation Insurance: the rate varies depending on the type of business concerned, from 0.25% to 8.8%, with the entire amount of premium payable by employers.
- Unemployment Insurance: the rate varies depending on the type of business concerned. The rate for most business (ie, excluding agricultural business, sake brewing business and construction business) is 1.35%, with 0.5% payable by employees and 0.85% payable by employers.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

There are no statutes requiring employers to pay bonuses in Japan. However, it is relatively common to pay bonuses considering factors such as employers' and employees' performance and employees' years of service, with employers having a discretionary right to determine the amount (unless otherwise stipulated in the employment contract or the work rules).

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

It is generally possible to restrict an employee's activities during employment, to the extent necessary to protect the employer's business. Restrictive covenants typically include a covenant not to compete with, not to solicit employees of, and not to disclose confidential information of a former employer.

22.2 Post-employment restrictive covenants

Post-employment restrictive covenants are generally difficult to enforce. In particular, a post-employment non-competition covenant is, in principle, void and unenforceable, as contrary to the freedom to choose one's occupation under the Constitution. However, where the employer and the employee explicitly agree, or where the work rules allow an employer to make such a restriction, such a restriction may be enforceable depending on the seniority of the employee, the purpose of the non-competition obligation, the time limit and geographical area of such restriction, and the financial compensation provided by the employer. Typically, such restriction typically lasts for up to two years at a maximum, and the restriction is more likely to be considered null and void if

the time limit is longer.

With respect to a non-solicitation obligation, employees are generally not restricted to solicit employees of their former employers, since their duty of loyalty is deemed to have ceased to exist with the end of their employment relationship. However, a former employee's solicitation of his/her former employer's existing employees may constitute an action in tort, if, for example, the employer's business is seriously affected due to such solicitation.

A confidentiality obligation will be considered valid if there is an agreement with an employee or a provision in the employment rules, which is not against public order and morality in respect of the necessity and reasonableness thereof. Under the Unfair Competition Prevention Act, an employer may file an injunction against an employee during and after the duration of employment with respect to the employee's unlawful use or disclosure of a trade secret acquired from or disclosed by the employer.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law or pensions law in your jurisdiction?

One of the proposed labour reforms is the introduction of "limited regular employees" as a way to introduce flexibility and mobility in the labour market. Regular permanent employees are those whose job scope, work location and working hours are unlimited (ie defined by their employer).

In contrast, while their wages are lower than regular permanent employees, limited regular employees are able to agree with the employer on limits for their work location, job scope or working hours. This move is aimed at catering to both male and female employees' need for parenting and aged care as well as life balance. It is also aimed at stabilising employment of increasing non-regular employees. As this reform may involve a radical change to the existing employment rules, including the stringent rules on dismissal, it is still uncertain as to whether or not the reform will take place.

Other suggested changes include reforming of the Unemployment Insurance system, where funds typically used for supporting unemployed workers would be directed to retraining young and unemployed workers/non-regular workers so that they may be redeployed.

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September 2015

Malaysia

Malaysia

MALAYSIA

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Employment relationships are regulated by the following legislation:

- **Employment Act 1955 (EA)**

  The EA applies to Malaysian employees and foreign nationals employed in West Malaysia:

  - With monthly wages of MYR2,000 or below; or
  - Any person who (irrespective of salary) is employed:
    - As manual labourers or their supervisors;
    - To maintain or operate mechanically propelled vehicles operated for transport of passengers or goods or reward or commercial purposes; and
    - For domestic servants and persons in certain positions on sea-faring vessels, certain parts of the EA are not applicable.

  Equivalent legislation exists for employees in East Malaysia under the respective States' Labour Ordinances, although the provisions may differ.

- **Industrial Relations Act 1967 (IRA)**

  The IRA applies to Malaysian and foreign nationals employed in Malaysia and provides:

  - The protection of rights of the employers and employees including trade unions;
  - The process by which a trade union may claim recognition;
  - The process for collective bargaining;
  - The mechanism for resolution of trade disputes; and
  - Protects against the unjust dismissal of employees.

- **Trade Unions Act 1959**

  This Act applies to both foreign and Malaysian employees. It regulates the registration and constitution of trade unions and their rights and liabilities.

- **Employees Provident Fund Act 1991 (EPF)**

  The EPF Act is a compulsory savings scheme with a primary objective of providing a measure of security to employees during retirement. Employers must register with the EPF in order to ensure that both employers and their employees make contributions to the fund, monthly.

Employee's contribution	11% of monthly wages.
Employer's contribution	12% of employee's monthly wages if the employee earns above RM5,000.00. If employee earns RM5,000.00 and below per month, the rate is 13% of the monthly wages.
If the employee is aged between 60-75 years	Contributions by both employer and employee shall be half (50%) of the statutory contribution rates.

Failure to comply with the provisions of the EPF Act is an offence and may result in a fine of up to RM10,000.00 or imprisonment of up to three years or both.

Foreign employees are not obligated, but have an option, to contribute. If a foreign employee has opted to make a contribution, both the foreign employee and employer shall be liable to contribute and the option may not be revoked.

- **Employees' Social Security Act 1969 (SOCSO)**

The SOSCO provides for the payment of benefits for employees who contract occupational diseases or are injured or killed in the course of employment, for all employees whose gross monthly income is below MYR3,000. Once an employee is a registered contributor, his entitlement to SOCSO contributions does not cease simply because his salary exceeds MYR3,000 a month.

All employers are required to register with the SOCSO. The SOCSO coverage and protection is only limited to Malaysian citizens and permanent residents.

The fund is split into two categories:

(i) Invalidity and employment injury (both employer and employee contribute to it)

Employer's contribution	1.75% of employee's monthly wages
Employee's contribution	0.5% of employee's monthly wages

(ii) Employment injury only (only the employer contributes)

- Employer's contribution: 1.25% of the employee's monthly wages.

An employer cannot contract out of the obligations imposed by the EA, EPF and SOCSO. Regardless of any choice of law clause, in adjudicating an unjust dismissal case, the Industrial Court is likely to refuse to be guided by the laws of another jurisdiction that are less favourable to the employee than the IRA.

Other legislations:

(i) Workmen's Compensation Act 1952 (Act 273);
(ii) Workers' Minimum Standards of Housing and Amenities Act 1990 (Act 446);
(iii) Holidays Act 1951 (Revised 1989) (Act 369);
(iv) Children and Young Persons (Employment) Act 1966 (Act 350);
(v) Employment (Restriction) Act 1968 (Act 353);
(vi) Private Employment Agencies Act 1981 (Act 246);
(vii) Labour Ordinance (Sabah CAP. 67);
(viii) Labour Ordinance (Sarawak CAP. 76);
(ix) Factories and Machinery Act 1967;
(x) Minimum Retirement Age Act 2012;
(xi) Income Tax Act 1967;
(xii) Occupational Safety and Health Act 1994;
(xiii) Minimum Wages Order 2012; and
(xiv) *Pembangunan Sumber Manusia Berhad* Act 2001 (ie Human Resources Development Berhad Act).

1.1 Laws applicable to foreign nationals

1.1.1 Work Permits

In Malaysia, the entry of foreign employees is governed by the Immigration Act 1963, which also determines the types of employment passes that can be applied for. The relevant authority is the Immigration Department of Malaysia ("**IDM**"), which comes under the jurisdiction of the Ministry of Home Affairs.

IDM may issue any of the three types of Passes as follows:

No	Types of Passes
(a)	**Professional Visit Pass ("PVP") – Experts** - The PVP is issued to foreigners with specialist skills. An application must be made outside Malaysia. Applicants' skills may include: o Installation or maintenance or repair of machinery and installation of new products. o Foreign expert in mining activities.

No	Types of Passes
	○ Simulator tester for airplane. ○ Lecturer. ○ ICT expert. ○ Provide training to local / overseas staff. ○ Auditor. ○ Post-doctoral fellow / invited professor / invited lecturer. - Valid for a short period, not more than 12 months. - Application for PVP to be done at Companies Commission/ Expatriate Service Department and at Visa, Pass and Permit Division of the IDM.
(b)	**Visitor's Pass (Temporary Employment)** - Foreign unskilled or semi-skilled workers in the following approved sectors can apply for a Visitor's Pass (Temporary Employment): ○ Manufacturing. ○ Plantation. ○ Agriculture. ○ Construction. ○ Services. - Criteria for application for a Visitor's Pass: ○ Workers must be between 18 and 45 years old. ○ They may not bring their family to Malaysia. ○ They may not change jobs without permission from the Ministry of Home Affairs. ○ They may not work in Malaysia for longer than five years. ○ They may not marry a local resident or migrant worker who works in Malaysia. - Quota approval is required from the Local Centre of Approval, Ministry of Foreign Affairs.
(c)	**Employment Pass ("EP") - Expatriates** - Foreigners may work in Malaysia via the expatriate programme. An expatriate is classed as a foreigner qualified to fill the following type of posts: ○ A top managerial position in a foreign owned company based in Malaysia. ○ A professional or mid-level managerial post. ○ A highly skilled non-executive post. - An expatriate must hold a job offer in the country from a sponsoring company. Approval is given to applicants who meet the above criteria and are paid above RM8,000.00 a month. The job offer must be for employment that lasts for a minimum of two years and meets the minimum salary requirement. There is no age limit. Applicants must hold a passport which is valid for at least 18 months. - The EP is valid for a minimum period of two years. - Approval is to be given by the Expatriate Committee ("EC") at the IDM. - Required documents: ○ Application letter and letter of employment/employment contract. ○ Relevant visa application forms. ○ Letter of approval by Ministry of Home Affairs. ○ Original receipts of payment of application. ○ Copy of employee's passport. ○ Passport photos. ○ Copies of employee's CV and qualifications. ○ Medical report and approval from Malaysian Ministry of Health.

No	Types of Passes
	- Holders of EP also need to register for an i-Pass (an official identification document which allows the holder to travel around without a passport) at the local Immigration office.

1.1.2 Requirement of Paid-Up Capital for Companies to Employ Expatriates

The Malaysian Industry Development Authority sets out the following guidelines on the employment of expatriates as follows:

- Manufacturing companies with foreign paid-up capital of USD$2 million and above:
  - Automatic approval is given for up to 10 expatriate posts, including five key posts.
  - Expatriates can be employed for up to a maximum of 10 years for executive posts, and five years for non-executive posts.
- Manufacturing companies with foreign paid-up capital of more than USD$200,000.00 but not less than USD$2 million:
  - Automatic approval is given for up to five expatriate posts, including at least one key post.
  - Expatriates can be employed for a maximum of 10 years for executive posts, and five years for non-executive posts.
- Manufacturing companies with foreign paid-up capital of less than USD$200,000 will be considered for both key posts and time posts based on current guidelines which are as follow:
  - Key posts can be considered where the foreign paid-up capital is at least RM500,000. This amount, however, is only a guideline and the number of key posts to be allowed depends on the merits of each case.
  - Time posts can be considered for up to 10 years for executive posts that require professional qualifications and practical experience, and five years for non-executive posts that require technical skills and experience. For these posts Malaysians must be trained to eventually take over the posts.
  - The number of key posts and time posts to be allowed depends on the merits of each case.
- For **Malaysian-owned** companies who have a minimum paid-up capital of RM250,000.00, approval for the employment of expatriates for technical posts, including R&D posts, will be given subject to the fulfilment of other requirements.

1.1.3 Expatriates

Foreign workers must be qualified to fulfil the following positions in order to be classified as '**Expatriate**':

- **Key Post**

  These are high level (first level) managerial posts in foreign-owned private companies and firms operating in Malaysia. Key posts are posts which are essential for companies to safeguard their interests and investments. The expatriates are responsible for determining the company's policies in achieving its goals and objectives.

  Example: Executive Chairman, Chief Executive Officer, Managing Director, General Manager, Factory Manager.

- **Executive Post**

  These are intermediate level (second level) managerial and professional posts. The posts require academic qualifications, practical experience, skills and expertise related to the respective jobs. The expatriates are responsible for implementing the company's policies and supervision of staff.

  Example: Management functions such as Marketing Manager, Logistics Manager, Professional such as Chief Engineer, Engineering Manager, Lecturer, Architect etc.

- **Non-Executive Post**

  Highly skilled relevant working experience and technical skills related to the respective jobs.

  Example: Welder, Mould Maker, Mould Designer, Tool and Die Maker, Manufacturing Systems Designer, Fashion Designer, Specialist in Furniture Design and Ergonomics, Sewing Specialist.

1.1.4 Key Approving Authorities for the Employment of Expatriates

No	Authorities	Industry/sector
(i)	**Malaysian Industrial Development Authority ("MIDA")**	- Expatriate post in the following fields in the private sector: o Manufacturing company (new or existing) involved in expansion plans. o Manufacturing Related Services: Regional Office, Operational Headquarters, Overseas Mission, International Procurement Centre etc. o Hotel and Tourism Industry. o Research and Development Sector.
(ii)	**Multimedia Development Corporation**	- Expatriate and skilled foreign workers in Information Technology based companies that have been granted "Multimedia Super Corridor" (MSC) status.
(iii)	**Public Service Department**	- Doctors and nurses working in government hospital or clinics. - Lecturers and tutors employed in Government Institutes of Higher Education. - Jobs offered by the Public Service Commission or government-related agencies.
(iv)	**Central Bank of Malaysia**	- Expatriate posts in the following sectors: o Banking. o Finance. o Insurance.
(v)	**Securities Commission**	- Expatriate posts in securities and share market.
(vi)	**Expatriate Committee**	- Expatriate posts in private and public sectors other than those under the jurisdiction of the above agencies/authorities.

1.1.5 Statutory Restrictions on foreign employees

Employment of non-citizens without a valid pass is an offence under Section 55B of the Immigration Act 1959/63 which provides for the imposition of fine not less than RM10,000, up to a maximum of RM50,000, or a prison term not exceeding one year, or both.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

Categories of worker	Description	Employment Rights
(i) Employment Act Employee	The EA applies to Malaysian employees and foreign nationals employed in West Malaysia:	• Section 7 of EA – terms and conditions of a contract of service that is less

Categories of worker	Description	Employment Rights
	○ Whose monthly wages are MYR2,000 or below; or ○ Any person who (irrespective of salary) is employed: ▪ As manual labourers or their supervisors; ▪ To maintain or operate mechanically propelled vehicles operated for transport of passengers or goods or reward or commercial purposes; ▪ For domestic servants and persons in certain positions in sea-faring vessels, certain parts of the EA are not applicable.	favourable than that provided by the EA shall be void. • Section 10 of EA – contracts to be in writing and to include provisions for termination. • Section 8 of EA – contracts of service shall not restrict rights of employees to join trade unions.
(ii) Non-EA Employee	Employees who does not fall under First Schedule of the EA.	• Terms and conditions are determined by the contract of service.
(iii) Fixed Term Employee	Contracts with fixed periods such as two years or three years.	• Must be "Genuine Fixed Term Contract".
(iv) Part-Time Employee	A person included in the First Schedule of EA whose average hours of work per week as agreed between him and his employer are more than 30% but do not exceed 70% of the normal hours of work per week of a full-time employee employed in a similar capacity in the same enterprise.	• Employment (Part-Time Employees Regulations 2010.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

3.1 Section 60K of the EA provides that:

- An employer who employs foreign employees shall furnish and deliver the particulars of the foreign employees to the Director General of Labour.
- When the services of a foreign employee are terminated by the employer or by the foreign employee or upon the expiry of the employment pass issued by the Immigration Department of Malaysia to the foreign employee or by the repatriation or deportation of the foreign employee, the employer shall within 30 days of the termination of service, inform the Director General of the termination.

3.2 Section 61 of the EA and Regulation 6 of the Employment Regulations 1957 provides that every employer shall prepare and keep registers containing information regarding each employee employed.

3.3 Equivalent legislation exists for employees in East Malaysia under the respective States' Labour Ordinances, although the provisions may differ.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

Please refer to section 1.1 above.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract, and the Company's policies and regulations.

5.2 Implied terms or customs/practices of the Company.

5.3 Collective agreements between union and the employer.

5.4 Employment Act (EA) – the minimum terms and conditions in the EA would apply to all employees under the scope of the EA.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Generally, an employer cannot unilaterally change the terms and conditions of employment. However, any amendments may be made unilaterally if there is a provision in the contract for such amendments provided the amendments are not detrimental or less favourable to the employees.

Consent of the employees would usually be advisable if amendments are made on fundamental terms of the employment contract.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

Section 60D of EA provides that employees are entitled to 11 gazetted public holidays in Malaysia plus any public holiday appointed under Section 8 of Holidays Act 1951. For the 11 days gazetted public holidays, five of which shall be:

- The National Day, 31 August.
- The Birthday of the Yang Dipertuan Agong.
- The Birthday of the State Ruler or the Yang Dipertua Negeri or the Federal Territory Day.
- The Worker's Day, 1 May.
- Malaysia Day, 16 September.

7.2 Public holidays

The First Schedule of Holidays Act 1951 (Act 220) provides Public Holidays as follows:

- Birthday of the Prophet Muhammad (s.a.w).
- National Day.
- Chinese New Year (1 day in the States of Kelantan and Terengganu, two days in all other States).
- Wesak Day.
- Birthday of the Yang Dipertuan Agong.
- Hari Raya Puasa (two days).
- Hari Raya Haji (two days in the States of Kelantan and Terengganu, one day in the other States).
- Deepavali.
- Christmas Day.
- Malaysia Day - 16 September.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

An employee is entitled to sick leave after being examined by a registered medical practitioner duly appointed by the employer, or by any other registered medical practitioner or medical offer, as well as a dental surgeon under Dental Act 1971. (Section 60F of EA)

8.2 Entitlement to paid time off

An employee's entitlement to paid sick leave varies according to his/her years of service with the company. When **no hospitalisation** is necessary:

Years of Service	Number of Days Sick Leave
Less than 2 years	14 days in each calendar year
2 years or more but less than 5 years	18 days in each calendar year
5 years or more	22 days in each calendar year

An employee is entitled to paid sick leave of up to 60 days in each calendar year when hospitalisation is required, provided that the total number of days of paid sick leave (hospitalisation and non-hospitalisation) shall be 60 days in the aggregate.

8.3 Recovery of sick pay from the state

Employers are not entitled to recover sick pay from the government.

However, local employees covered under SOCSO are able to claim for the payment of benefits if they contract an occupational disease or are injured or killed in the course of employment. Foreign employees are covered by the Workmen's Compensation Act 1952, which requires employers to obtain an insurance policy for their workers.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

- Part IX of EA

  Female employees are be entitled to maternity leave of 60 days and receive a maternity allowance at her ordinary rate of pay during such period.

  A female employee is not entitled to receive maternity allowance if she has five or more surviving children at the time of her confinement.

9.2 There are no statutory provisions on:

- Paternity rights.
- Surrogacy.
- Adoption rights.
- Parental rights.
- Carers' rights.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Employees covered by the EA enjoy some benefits from continuous employment. For example, under the Employment (Termination and Lay-Off Benefits) Regulations 1980, an employer shall be liable to pay a termination or lay-off benefits payment calculated in accordance with regulation 6 to an employee who has been employed under a continuous contract of employment for not less than 12 months ending on the termination date or lay-off date.

10.2 Consequences of a transfer of employee to new entity

Section 12(3) of EA stipulates that where there is termination of service because of a change in ownership of business, the selling entity must give the employee the minimum statutory notice period under section 12(2) of EA. Likewise, for non-EA employees, the notice of termination is as provided in the contract of employment.

To avoid payment of termination benefits, the selling entity and the purchaser will have to comply with the terms of Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations, 1980 for employees within the scope of the Employment Act 1955.

Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations, 1980 stipulates (emphasis added):

"**8. Change of ownership of business**

(1) Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purpose of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, if **within seven days of the change of ownership**, the person by whom the business is to be taken over immediately after the change occurs, **offers to continue to employ the employee under terms and conditions of employment not less favourable** than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer."

FIXED TERM AND PART-TIME

11 To what extent are casual workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Casual Workers

Casual workers are not under a contract of employment because they lack the necessary mutuality of obligation considered an essential pre-requisite for establishing an employment relationship. These workers have the right to decide whether or not to accept work and the company has no obligation to provide any work.

11.2 Part-time workers

Part-time workers are persons included in the First Schedule of the EA whose average hours of work per week as agreed between the individual and his employer are more than 30% but do not exceed 70% of the normal hours of work per week of a full-time employee employed in a similar capacity in the same enterprise. The part-time workers terms and conditions are governed by Employment (Part-Time Employees Regulations 2010.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

12.1 Discrimination

All employees have a right to be treated fairly and with mutual trust and respect. Employees who are discriminated or victimized may claim constructive dismissal under Section 20 of IRA.

Discrimination by an employer in respect of any person's involvement with a trade union is prohibited. (Section 5(1) of IRA)

The Director General of Labour may inquire into any complaint from a local employee that he is being discriminated against in relation to a foreign employee, or from a foreign employee that he is being discriminated against in relation to a local employee, by his employer in respect of the terms and conditions of his employment; and the Director General may issue to the employer such directives as may be necessary or expedient to resolve the matter. (Section 60L of EA)

12.2 Sexual Harassment

Part XVA of Employment Act 1955 & Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace.

- Sexual harassment comes in various forms. There is verbal harassment, non-verbal/gestural harassment, visual harassment, psychological harassment and physical harassment.
- Upon receipt of sexual harassment complaints, the employer shall inquire into the complaint. When the employer finds the sexual harassment is proven, the employer shall take disciplinary actions. When the wrongdoer is an employee, the following may be imposed:
    - Dismiss the employee who committed sexual harassment;
    - Downgrading the employee; or
    - Imposed any lesser punishment as the employer deemed fit.
- However, when the perpetrator is not an employee, the employer may recommend the perpetrator to be brought before an appropriate disciplinary authority.
- Non-compliance with provisions of Part XVA amount to an offence which carry a fine of not exceeding MYR10,000 upon conviction.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

The IRA provides for, among other things, the security of employment. An employee can only be dismissed for a just cause or excuse, such as:

- Poor performance.
- Redundancy.
- Misconduct.

The burden is on the employer to prove that the dismissal was with just cause or excuse. There is no minimum statutory notice period or severance payment for termination on grounds of poor performance or conduct but in certain circumstances, such as redundancy or termination of the contract, there is an obligation to meet the minimum statutory/contractual notice period and/or severance payment.

If an employee is dismissed without just cause or excuse, The Industrial Court may order one of the following forms of relief:

- Reinstatement with full back wages from the date of dismissal to the date of reinstatement (limited to 24 months); or
- Full back wages (limited to 24 months) and compensation in lieu of reinstatement (calculated at one month's salary for every year of service).

For probationers, back wages is limited to 12 months' wages.

Pursuant to Second Schedule of the IRA, in awarding the award sum to the employee, the Industrial Court shall take into consideration the following:

- Post-dismissal earnings; and
- Contributory misconduct of the employee.

Alternatively, an employee may bring a civil claim for breach of contract against the company. Ordinarily, the remedy available is limited to damages that are equivalent to the salary that would have been paid during the termination notice period.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

Protection against dismissal is provided to female employees on maternity leave (Section 42 of EA). In addition employees who have been unfairly dismissed may make representations under Section 20 of the IRA to be reinstated to their former employment.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

The Code of Conduct for Industrial Harmony 1975 regulates redundancies. The courts view retrenchment by reason of redundancy as the employer's last resort. The employer is under an obligation to consider and carry out alternatives that may assist the situation, such as a reduction of overhead expenses, working hours, or other solutions, before embarking on the retrenchment exercise. Selection for redundancy must also be in accordance with the following established principles:

- Employees who have attained their retirement age must be selected over other employees.
- Casual workers and fixed term employees must be selected over permanent employees.
- Within the same job scope, foreign workers must be selected over local employees.
- The employee with the least number of years' service must be the first employee to be identified for selection (the "last in-first out" principle).

Employees who are dismissed on redundancy grounds are entitled to termination notice (as prescribed in their contracts) and fair severance benefit which, for employees who fall within the EA, must be no less than the minimum termination notice period and termination benefit prescribed by the EA.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Employees are only entitled to management representation or consultation if it is a term of their contract or a collective agreement.

As a matter of good labour practice, employers are encouraged to inform the employees and trade unions prior to the transaction being made public.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

The employee may file for representation under Section 20 of the IRA or a trade dispute under Section 26 of the IRA.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

There is no automatic transfer of employees. By law, employees' contracts of employment will be deemed terminated upon a sale of business. Such termination would give rise to liability on the employer to give notice of termination, or pay salary in lieu of notice, pay termination benefit and unutilised annual leave. The employees may also claim unfair termination under section 20 of the IRA.

18.2 Protection against dismissal

By law, all employees are deemed terminated upon a business sale. They will be entitled to termination benefits (as provided by statute for EA employees, and if provided by contract for non-EA employees) unless they are offered continued employment with the acquirer (with full recognition for years of service with the selling entity) on terms and conditions of employment that are no less favourable.

18.3 Harmonisation of employment terms

Harmonisation of terms and conditions of employment has to be made with no less favourable terms. A change that is less favourable to the employee will entitle the employee to termination benefits payable by the selling entity.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Individuals are tax resident if they reside in Malaysia for 182 days or more in a year.

The salary earned from working abroad would not be taxable unless the income received is incidental to the Malaysian employment.

Subsection 13(1) of the Income Tax Act 1967 explains the types of income that is included as gross income from employment. Under subsection 13(2) of the ITA, income from an employment is deemed derived from Malaysia if the income arises for any period during which:

- The employment is exercised in Malaysia;
- Leave is attributable to the exercise of the employment in Malaysia;
- The employee performs outside Malaysia duties incidental to the exercise of the employment in Malaysia;
- A person is a director of a company resident in Malaysia; or
- The employment is exercised aboard a ship or aircraft used in a business of a person resident in Malaysia.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Tax resident employees

Tax resident employees must pay:

20.1.1 **Income tax.** This is payable at rates of between 0% and 25% (with effect from year of assessment 2014) of gross income (after deducting tax reliefs).

20.1.2 **Contributions to the employees' provident fund**. Please refer to section 1 above.

20.1.3 **Social security contributions.** Please refer to section 1 above.

20.2 Non-tax resident employees

Non-residents do not qualify for tax relief and must pay tax at 25% on their Malaysia-source income, unless a double tax treaty applies.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common to reward employees through contractual or discretionary bonuses. There are generally no restrictions or guidelines on what bonuses can be awarded.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

- An employee's activities during employment may be restricted by contractual provision and company policies.
- Section *28 of Contracts Act 1950*

  An agreement in restraint of trade is void. Therefore, an employee cannot be restrained from competing in the same business as his employer or from joining a competitor. However, the Malaysian Courts would apply contract law and common law to protect the employer's confidential information or trade secrets from being exploited by a former employee. ***(Faccenda Chicken Ltd v Fowler [1986] IRLR 69; Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling [2008] 7 MLJ 903)***

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law or pensions law in your jurisdiction?

There are no current proposals to reform employment law or pensions law in Malaysia.

Parts of this overview were written by Lim Koon Huan, Faizah Jamaludin, Selvamalar Alagaratnam and Kuek Pei Yee of SKRINE. Keat Ching and Teoh Alvare of Zul Rafique & Partners have updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.

September 2015

New Zealand

New Zealand

NEW ZEALAND

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

The Employment Relations Act 2000 (ERA) is the principal Act governing employment relationships in New Zealand.

Other relevant legislation includes the:

- Holidays Act 2003.
- Human Rights Act 1993.
- Parental Leave and Employment Protection Act 1987.
- Health and Safety in Employment Act 1992.
- Minimum Wage Act 1983.
- Wages Protection Act 1983.
- Privacy Act 1993.

New Zealand employment laws regulate all employment relationships in New Zealand including foreign employees working in New Zealand, and New Zealand nationals working abroad where New Zealand law is the proper law of the employment agreement (contract).

The proper law of the contract will be the expressly selected choice of law by the parties, so long as the choice is bona fide and legal and there are no public policy reasons to avoid the choice. If the choice of law has no real connection with the employment relationship, it is unlikely the courts will allow New Zealand legislation to be avoided as the proper law (such as where both the employer and employee are based in New Zealand).

Where there is no (or no valid) express choice of law in the employment agreement, the Court will look at the circumstances surrounding the contract and may be able to conclude that the parties have, by implication or inference, come to an agreement as to what should be the proper law. In cases where this is not possible the Court will look for the law with which the transaction has the closest and most real connection with the agreement, based on objective grounds. The Court may consider factors such as, where the contract was signed, where the contract is performed and where the parties are domiciled.

Where an employee is working in New Zealand under an employment agreement that has expressly stipulated that it is governed by the law of another jurisdiction, some New Zealand statutes may still apply (known as "mandatory rules" under conflict of laws policies). These may include minimum wage obligations, human rights laws, health and safety obligations and possibly holiday provisions.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

There are four main categories of workers that are recognised by New Zealand law.

- Permanent employees: full-time and part-time employees who are employed on an on-going basis.

- Fixed term employees: employees who are employed for a fixed period ending on the close of a specific date or period, on the occurrence of a specific event or on the conclusion of a specific project.
- Casual employees: employees who are employed on an as and when required basis and have no expectation of on-going employment.
- Independent Contractors: independent contractors are not employees and are engaged under a contract for services.

2.2 Entitlement to statutory employment rights

Permanent employees are entitled to all statutory employment rights.

Fixed term employees are entitled to all statutory employment rights except those leave entitlements that require a minimum period of continuous service. Whether a fixed term employee qualifies for these leave entitlements will be dependent on the length of the fixed term.

Casual employees are entitled to all statutory employment rights except those which:

- Are dependent on minimum periods of continuous service (such as in relation to leave); or
- Are only relevant to permanent employees (such as employment rights relating to termination).

Independent contractors are not employees and have no rights, benefits or protections under the ERA and related employment legislation.

2.3 Time periods

There are no maximum time periods for which any category of employee may be engaged.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

When a new employee begins employment the employee and employer must complete relevant Inland Revenue Department (IRD) and KiwiSaver forms (in relation to tax obligations and New Zealand's retirement savings scheme). These forms must be filed with the IRD.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

All employees must be legally eligible to work in New Zealand by either:

- Citizenship.
- Residency.
- The grant of a work permit issued by Immigration New Zealand.

Work permits sometimes only allow a foreign national to work in a specific location, for a limited number of hours or for a specific employer. In this instance, if the employee wishes to change locations or employers they will need to apply for a change to their permit conditions.

The time it takes to obtain a work and/or residency permit varies depends on the amount of verification required. Usually, when an application is accepted, a decision is given or the applicant is told within 14 days how long the processing time is expected to be. Fees payable for a work and/or residency permit depend on the applicant's country of citizenship.

Employers are not required to keep or file any additional information or paperwork in relation to foreign nationals other than for the purposes of IRD and KiwiSaver (*see question 3*).

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

The employment relationship is governed and regulated by statute and the relevant individual employment agreement or collective agreement.

The ERA is the main statute governing the employment relationship. The ERA requires all parties to an employment relationship, whether they are employers, employees, or unions, to act in good faith towards each other. This requires parties not to mislead or deceive each other, to be active and constructive, and to be responsive and communicative in their employment relationship.

Under the ERA, all employment agreements must be in writing and must include:

- The names of the employee and employer.
- A description of the work to be performed.
- The location of the work being performed.
- Hours of work.
- Wages or salary.
- Employment relationship problems resolution procedure.
- Details regarding Holidays Act 2003 entitlements.
- An employee protection provision in case of the transfer of the business.

The employer must retain a copy of the employment agreement, even if the employee has not signed it.

Holidays, wages, parental leave, privacy and health and safety are also regulated by statute (*see question 1*).

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

In general, an employment agreement may only be varied with the consent of both the employer and employee. Unilateral variations are only permissible so far as they are technical and inconsequential, or if the agreement reserves some discretion for the employer to make reasonable amendments. In most cases, if an employer wants to vary an employee's terms and conditions of employment, the employer must consult with the employee and then obtain the employee's consent.

Further, an employer cannot contract out of the requirements of the ERA and related legislation. Parties to an employment relationship can however agree to terms and conditions of employment that are no less favourable than the benefits or entitlements conferred by law, or that essentially provide the same obligations or entitlements of the ERA.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

Under the Holidays Act 2003, employees with at least 12 months' continuous service are entitled to four weeks' paid annual leave per year.

7.2 Public holidays

The Holidays Act provides that there are 11 designated public holidays per year. Employees are entitled to be absent from work on public holidays and are to be paid for their ordinary hours of work on that day. Employees may be required to work on a public holiday and if they are, they must be paid for time plus one half (150%) of the hours actually worked. If the public holiday would "otherwise have been a working day" for the employee, they must also be provided an alternative day's holiday.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Under the Holidays Act, employees are entitled to sick leave of five days per year after six months' continuous employment.

8.2 Entitlement to paid time off

The five days of sick leave provided for under the Holidays Act are to be paid by the employer at the employee's relevant or average daily pay.

8.3 Recovery of sick pay from the state

The employer cannot recover the cost of sick leave from the government.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

The Parental Leave and Employment Protection Act 1987 (PLEPA) prescribes minimum entitlements to parental leave. Parental leave includes both maternity leave and paternity leave.

Female employees with at least six months' continuous service with an employer are entitled to 16 weeks' paid maternity leave (paid by the government). From 1 April 2016, this entitlement will increase to 18 weeks' paid maternity leave (paid by the government).

Female employees with 12 months' continuous service are entitlement to up to 52 weeks' unpaid "extended parental leave". Up to 16 weeks of these 52 weeks may be paid maternity leave (paid by the government).

A female employee with these entitlements may choose to transfer any portion of her maternity leave or extended parental leave to her partner or spouse.

Expectant mothers are also entitled to up to 10 days' unpaid special leave prior to any parental leave period for reasons connected with the pregnancy.

9.2 Paternity rights

A partner or spouse with 12 months' continuous service who intends to assume care of the child is also entitled to up to 52 weeks' unpaid "extended parental leave." If both parents are entitled to extended parental leave, the combined total taken by each parent may not exceed 52 weeks.

A partner or spouse with at least 12 months' continuous service is entitled to an additional two weeks' unpaid paternity leave that is to be taken around the time that the child is born.

A partner or spouse with at least six months' continuous service is entitled to one week's unpaid paternity leave.

9.3 Surrogacy

In a surrogacy arrangement, under New Zealand Law, the woman who gives birth to the child (the surrogate mother) and her partner (if she has one) will be the legal parent(s) of the child. The parent(s) who intend to assume the care of the child after birth must legally adopt the child after birth whether or not they are genetically related to the child.

The PLEPA does not expressly deal with surrogacy rights in employment and it has only been dealt with in a few cases. However it is likely that the parties to a surrogacy arrangement would have the following rights:

- A surrogate mother would be entitled to 10 days' special leave for reasons connected with the pregnancy.
- The adoptive mother (who intends to assume the care of the child) would be entitled to paid maternity leave and extended parental leave (*as at 9.1*).
- The adoptive father (who intends to assume the care of the child) would be entitled to parental leave (*as at 9.2*).
- It is likely that the surrogate mother would also be entitled to paid maternity leave (*as at 9.1*). However, she would not be entitled to extended parental leave (because she is not intending to assume the care of the child).

9.4 Adoption rights

Employees who assume the care of a child under the age of five with a view to adoption have the same parental leave entitlements as if the child was a child of pregnancy.

9.5 Parental rights

Employees are entitled to use their sick leave entitlements to take care of a sick child.

If an employee is breastfeeding and wishes to breastfeed at the workplace, employers are obliged to ensure so far as is reasonable and practical that appropriate facilities and breaks are provided.

9.6 Carers' rights

Employees are entitled to use their sick leave if a person who depends on the employee for care (such as their spouse or partner) is sick or injured.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Leave entitlements (including annual, sick, bereavement and parental) are dependent on minimum periods of continuous service.

10.2 Consequences of a transfer of employee

An employee who falls within a category of protected employees commonly known as "vulnerable employees" who elect to transfer in the event of a restructuring (which includes a transfer of business situation) will retain their period of continuous service (*see 18.2 and 18.3*). Any other employee who transfers to a new entity will not retain their period of continuous service, unless it is agreed between the parties.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

An employee cannot be employed on a temporary basis unless there is a genuine reason based on reasonable grounds for this arrangement. A fixed term employment agreement will only be valid if it specifies that employment will end at the close of a specific date or period, on the occurrence of a specific event, or on the conclusion of a specific project.

In general, fixed term employees are entitled to the same rights and benefits as full-time workers. However, because leave entitlements are dependent on minimum periods of continuous employment, the entitlement of a fixed term employee to leave will depend on the length of the fixed term.

In relation to annual leave (holiday leave), if the term is for less than 12 months, an employer must either pay the employee 8% of his/her gross earnings at the end of the employment, or at the end

of each pay period (less any payment that the employee has received for leave taken during their employment). Where the fixed term is for 12 months or more, a fixed term employee becomes entitled to annual leave in the same way that a permanent employee does.

11.2 Agency workers

Generally, agency workers are employees or independent contractors of the relevant agency, and there will not be an employment relationship between the principal contracting the agency and the agency worker. In general, the agency worker will not have the same rights and benefits as full-time employees in respect of the principal for which he or she is performing work (because it is not his or her employer), but the agency worker will enjoy full employment rights in relation to the agency that employs them. In some cases, there may be an employment relationship between the agency worker and the principal or a joint employment relationship between the principal and agency and the agency worker (depending on how the relationships operate in practice).

11.3 Part-time workers

Part-time employees have the same rights and benefits as full-time employees. However to be eligible for parental leave, sick leave and bereavement leave an employee must have worked for an average of at least 10 hours per week, and at least one hour in every week or 40 hours in every month for the six or 12 months.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

The Human Rights Act 1993 prohibits discrimination on the grounds of: sex, marital status, religious or ethical belief, colour, race, age, ethnic or national origin, disability, political opinion, employment status, family status, and sexual orientation. The ERA also prohibits discrimination on the grounds of union membership.

In an employment context, discrimination on any of these grounds is unlawful in the following circumstances:

- Refusing or omitting to employ an applicant.
- Offering an employee less favourable terms of employment or opportunities in employment.
- Terminating an employee or subjecting an employee to any detriment.
- Retiring an employee or causing an employee to retire or resign.

The ERA also protects employees from both sexual harassment and racial harassment:

- Sexual harassment is defined as the use of language, visual material, or behaviour, which is of a sexual nature that is unwelcome or offensive to that employee, and which either by its nature or through its repetition has a detrimental effect on an employee's employment, job performance, or job satisfaction. Sexual harassment also includes a direct or indirect request of sexual activity that contains an implied or overt promise of preferential or detrimental treatment in that employee's employment.
- Racial harassment is defined as the use of language, visual material, or behaviour, which expresses hostility, contempt or ridicule on the basis of race, ethnicity, colour or nationality, that is hurtful or offensive to that employee and which either by its nature or through its repetition has a detrimental effect on an employee's employment, job performance, or job satisfaction.

Discrimination and harassment are types of personal grievances under the ERA.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

Termination of an employment agreement is typically regulated through the agreement's termination provisions. There is no statutory minimum notice period or severance payment.

Regardless of the wording of an employment agreement, the ERA confirms that dismissals must be substantively and procedurally justified. The applicable test is whether the dismissal (or action causing disadvantage) was, objectively, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or disadvantage occurred.

The use of the word "could" reflects the principle that it is not for the Employment Relations Authority (Authority) or Employment Court to substitute its judgement for that of the employer, and that there may be a range of reasonable disciplinary sanctions in any situation.

An employee can raise a personal grievance within 90 days of the dismissal or disadvantage, and the employee can file papers at the Authority to seek a determination about their claim. Mediation occurs in the majority of cases. If mediation is unsuccessful and the Authority makes a determination following an investigation, its decision is binding and enforceable (although it can be appealed to the Employment Court).

Available remedies to an employee for an unjustified dismissal include:

- Reinstatement, where practicable and reasonable.
- Payment of lost wages.
- Damages for humiliation, loss of dignity and injury to feelings.
- Penalties.
- Payment of costs.

Employees' contracts cannot be terminated "at will" unless the contract provides for a 90-day trial period, which runs from the start of their employment. In that case, the employer must follow the notice provisions in the employment agreement. Employees that are dismissed during a trial period cannot bring a claim for unjustified dismissal (although discrimination and other such claims are still possible). For a trial period to be enforceable it must be expressly written into the employee's employment agreement (it is not implied) and the employment agreement must be signed before the employee commences work.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

An employer may only dismiss an employee for good cause and must carry out a dismissal in a procedurally fair manner. If an employee considers that their dismissal is either procedurally or substantively unjustified, an employee may raise a personal grievance in the Authority (*see question 13*).

Good cause for dismissal may include:

- Serious misconduct such as theft, fighting, dishonesty and misuse of drugs and alcohol may justify summary dismissal without notice;
- Misconduct following adequate formal warnings;
- Redundancy where there is a genuine commercial reason to restructure and as a result the employee's position is disestablished;
- Poor performance after counselling and formal warnings;
- Medical incapacity; and
- Abandonment.

Employers are required to give notice of dismissal to employees (except in the case of summary dismissal for serious misconduct). If the relevant employment agreement does not specify the period of requisite notice, the employer must give a period of notice that is reasonable in the circumstances. Payment in lieu of notice and/or garden leave is permissible if it is expressly provided for in the relevant employment agreement (or otherwise agreed with the employee).

14.2 Protected employees

There are no specific categories of protected employees in relation to dismissal except in relation to a proposed restructuring (such as contracting in or out of parts on an employer's business, or the sale or transfer of an employee's business to another person) as explained at *18.2*.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

There is no statutory definition of redundancy. However, redundancy is generally understood to be a situation in which a position has become superfluous to the employer's commercial requirements.

The statutory duty of good faith in the ERA (*described at question 16 below*) imposes various procedural obligations on an employer who is considering a "proposal" that may impact on the continuation of an employee's employment. However, there is no statutory requirement to pay redundancy compensation (compensation is only payable if this is provided for in the employee's employment agreement).

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

The duty of good faith under the ERA imposes consultation obligations on an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more employees. An employer must provide affected employees with relevant information, giving them an opportunity to comment on that information before making a decision.

This duty to consult applies to major transactions where the outcome of the transaction could be a change to the employees' employer (such as a business sale or amalgamation). However, an employer is not obliged to obtain the employees' consent to such a transaction.

Employees are not entitled to representation on the board of directors of their employer. However, they are entitled to involve a representative in consultation meetings.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

If an employer fails to comply with its consultation duties and no decision has yet been made in relation to its proposal, an employee may seek a compliance order under the ERA requiring the employer to comply with its good faith duty to consult. Although such an order could slow down a transaction, there are no orders available under the ERA that would prevent a transaction from going ahead at all.

After the event, the employee could raise a personal grievance for a procedurally unjustified dismissal arising from the employer's failure to properly consult. The Authority may make an order requiring the employer to pay compensation to the employee for humiliation, loss of dignity and injury to feelings. The employer could also be required to contribute to the costs incurred by the employee in taking the matter to an Authority hearing.

17.2 Employee action

As above, an employee may seek a compliance order requiring an employer to comply with its good faith duties (as above) however this would only delay the transaction rather than prevent the proposal going ahead.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

In the case of a business transfer or sale, the employing business entity changes and therefore all employment agreements are terminated by the vendor by reason of redundancy. There is no automatic transfer of employees to the new employer (the purchaser).

18.2 Protection against dismissal

The ERA requires all employment agreements to include an employee protection provision to protect the employment of affected employees in the event of a business restructuring (for example where a business transfers, sells or contracts out all or part of its business). This provision must describe the process that the employer will follow in relation to negotiating whether affected employees will transfer to the new employer on the same terms and conditions, and to determine what entitlements (if any) are available for employees who do not transfer. If the employer and new employer come to an agreement for the transfer of employees then each employee has a right to elect whether to transfer or not.

The ERA provides special protection to specific categories of employees commonly referred to as "vulnerable employees". Where a "vulnerable employee's" work is no longer required by his or her employer and is to be performed on the behalf of another person as a result of a proposed restructuring, that employee has a right to transfer their employment to the new employer with continuity of service and on the same terms and conditions. In addition, if the employee's work is to be made redundant by the new employer for reasons relating to the transfer, the vulnerable employee has a right to bargain for redundancy payments with the new employer. If redundancy entitlements cannot be agreed the parties may refer the matter to the Authority for determination.

Employees who receive the protection described above include employees providing cleaning services and food catering services in any place of work, laundry services in the education, health and residential care sectors, caretaking services in the education sector, and orderly services in the health and residential care sectors. The employees must work for an employer with 20 or more employees at the time of the transfer to qualify for this protection.

18.3 Harmonisation of employment terms

"Vulnerable employees" who elect to transfer will transfer on the same terms and conditions and with continuity of service (including for the purpose of all leave related entitlements). The terms and conditions of employment of other employees post-transfer will depend on any agreement between the current and new employer regarding the terms and conditions to be offered to employees by the new employer, as well as agreement between the new employer and employees.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

An employee is New Zealand tax resident under domestic law if they have a permanent place of abode in New Zealand and/or spend more than 183 days in total in New Zealand in any continuous 12 month period.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Tax resident employees

Tax resident employees are generally subject to New Zealand income tax on their worldwide income. There is a limited exemption for new residents under domestic law. Relief may also be available under a double tax treaty (DTT).

The basic rates of income tax applicable to an individual's taxable income for an income tax year are as follows:

- Up to NZ$14,000: 10.5%.
- NZ$14,001 to NZ$48,000: 17.5%.
- NZ$48,001 to NZ$70,000: 30%.
- NZ$70,001 and above: 33%.

Tax on employment income is principally collected in the first instance by the employer withholding the tax payable under the pay as you earn (PAYE) withholding tax regime. The standard balance date for the income tax year is 31 March. Not all employees are required to file a return but if a return is required, or if an employee opts to file a return, the due date is generally 7 July.

20.2 Non-tax resident employees

Non-tax resident employees are subject to New Zealand income tax on their New Zealand source income, including New Zealand employment income, subject to possible relief under domestic law and/or any applicable DTT.

The basic income tax rates applicable to tax resident employees also apply to non-tax resident employees (*as above at 20.1)*. Tax on employment income is principally collected under the PAYE regime.

20.3 Employers

Employer tax liabilities in relation to New Zealand employees principally include:

- PAYE (inclusive of accident compensation earner premiums) in respect of payments to employees (PAYE also applies to payments to some independent contractors).
- Fringe benefit tax (FBT) in respect of most non-cash benefits provided to employees.
- Employer superannuation contribution tax (ESCT) in respect of certain employer superannuation contributions.

The rates of these taxes reflect but do not necessarily exactly match the basic rates of income tax applicable to individuals (*as above at 20.1)*.

Further notable employment-related liabilities include:

- Accident compensation employer levies to cover the cost of work-related injuries.
- Obligations under New Zealand's KiwiSaver retirement savings regime, including facilitating employee contributions to their chosen savings schemes and making employer contributions to such schemes.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Some employers choose to reward contractual or discretionary bonuses and there are no restrictions or guidelines on what an employer may award.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

During employment employees owe an implied duty of fidelity to their employer which includes obligations to: act in the employer's best interests; not disclose confidential information; and not perform work for competitors. The statutory duty of good faith also includes a mutual duty of trust and confidence. While these duties restrict an employee's activities during employment they do not extend beyond the termination of employment (apart from the duty of confidentiality, which applies for so long as the information remains confidential).

It may be possible to restrict an employee's activities after they have given or been given notice of termination in the following ways: garden leave; enforcing the duty of confidentiality; and restraints of trade.

Garden leave

On notice of termination, an employer may place an employee on garden leave (if provided for in the employee's employment agreement or otherwise agreed with the employee). During a period of garden leave the employment agreement stays in force as the employee is still employed, but the employee ceases performing work for the employer. The employer must continue to pay the employee during a period of garden leave, and the employee remains bound by their contractual and statutory duties and obligations.

Confidentiality clauses

Confidentiality clauses can be used to prevent an employee from disclosing any confidential information obtained in the course of their employment both throughout the employee's employment and following termination.

Restraints of trade

Restraints of trade can be used to restrain an employee's activities for a period of time post-employment. A restraint of trade clause may prevent an employee from:

- Soliciting other employees to leave their employment;
- Soliciting clients of the employer;
- Dealing or interacting with clients of the employer; or
- Engaging in business in competition with the employers business.

However, because they are contrary to public policy (as they can prevent an employee from gaining new employment in their chosen profession) the Authority or Court will only enforce a restraint of trade to the extent that it is reasonably necessary to protect an employer's proprietary interests. Factors that will be considered by the Authority or Court in determining whether to enforce a restraint may include the duration of the restraint, the geographic scope of the restraint, the nature of the employer's business and the employee's position and experience. Under the Illegal Contracts Act 1970 the Authority or Court can modify a restraint of trade clause that is too broad, to the extent that is necessary to make the clause reasonable and therefore enforceable.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

In 2013 the New Zealand government announced a new "Working Safer" package that involves repealing and replacing the Health and Safety in Employment Act with a new Health and Safety at Work Act. The Health and Safety Reform Bill (Bill) is currently before Parliament, and is expected to be enacted later this year. The Bill is based on the Australian Model Law and introduces significant changes to the current health and safety regime in New Zealand.

The key changes proposed by the Bill are:

- The Bill introduces the new concept of a "person conducting a business or undertaking" (or PCBU) as the principal duty holder.
- PCBUs will owe a primary duty of care to ensure "so far as is reasonably practicable" the health and safety of its workers. The term "worker" is widely defined and includes the PCBU's workers, contractors, and contractors' employees and subcontractors.
- At any time there may be a number of duty-holders that owe concurrent, overlapping duties under the Bill. Duty holders will have an obligation to consult, cooperate and coordinate their actions.
- The Bill imposes a new due diligence duty on "officers", which means that those persons in governance roles must proactively manage workplace health and safety to ensure that the PCBU complies with its health and safety duties.

The Bill proposes a new, tiered liability regime. There will also be an overall significant increase in the maximum penalty levels. The maximum penalty for an individual for reckless conduct will be $600,000 or five years' imprisonment, or both. For a body corporate, it will be $3 million.

Parts of this overview were written by Kevin Jaffe, Michael Pollard, Greg Towers and Stephen Ward of Simpson Grierson. Rob Towner and Anna Codlin of Bell Gully have updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.

September 2015

Philippines

PHILIPPINES

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

The Labour Code of the Philippines (Labour Code) is the general labour law that regulates employment relationships in the Philippines. It also applies to foreign nationals working in the Philippines.

Labour laws and statutory labour standards are deemed to be incorporated into all employment contracts, and the terms and conditions of all employment contracts cannot fall below the applicable labour standards provided by the Labour Code. Employers cannot use employment contracts to avoid complying with the labour laws, and any contractual terms and conditions which violate the labour laws will be considered null and void.

Philippine labour arbiters, tribunals, and courts will uphold implied amendments to employment contracts when certain benefits granted to employees are found to have modified the terms and conditions of employment, provided there is no diminution or elimination by the employer of the employee's existing benefits.

1.2 Laws applicable to nationals working abroad

Republic Act No 8042 (*the Migrant Workers and Overseas Filipinos Act of 1995, as amended*) is the governing law regulating the overseas employment of Filipino workers. The provisions of the Migrant Workers and Overseas Filipinos Act of 1995 apply regardless of a choice of law provision in the employment contract (particularly the provisions concerning illegal recruitment).

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

Under Article 295 of the Labour Code, there are four kinds of employment arrangement. These are:

- Regular employment.
- Project employment.
- Seasonal employment.
- Casual employment.

2.1.1 **Regular employment.** There are two kinds of regular employees (*Labour Code, Article 295*):

- Regular employees by nature of work, that is, those who are engaged to perform activities that are usually necessary or desirable in the usual business or trade of the employer.
- Regular employees by years of service, that is, those who have rendered at least one year of service, whether continuous or broken, with respect to the activity in which they are employed.
- The primary standard to determine regular employment is the reasonable connection between the particular activity performed by the employee in relation to the usual business or trade of the employer. The test is whether the activity of the employee is usually necessary or desirable in the usual business or trade of the employer.

2.1.2 **Project employment.** A project employee is one whose employment has been fixed for a specific project or undertaking, the completion or termination of which has been determined at the time the employee is engaged (*Labour Code, Article 294*). It is not sufficient that an employee is hired for a specific project or phase of work. There must also be a determination of, or a clear agreement on, the completion or termination of the project at the time the employee is engaged.

The services of project employees are coterminous with the project. They can be terminated upon the end or completion of that project, or a phase of the project, for which they were hired. The employer has no obligation to pay them separation pay.

The predetermination of the duration of the period of a project employment is important in resolving if an employee is a project employee or not. For example, in a previous case, the Court ruled that while the employee was clearly hired for a specific project, the absence of a definite period of the project led the Court to the conclusion the employee was regular.

2.1.3 **Seasonal employment.** Seasonal workers perform work that is seasonal in nature and are employed only for the duration of one season (*Labour Code, Article 294*).

Seasonal workers who are rehired every working season are considered to be regular employees. The nature of their relationship with the employer is such that during off-season they are temporarily laid off, but when their services are needed, they are re-employed. Strictly speaking, they are not separated from the service, but are merely considered as on a leave of absence without pay until they are re-employed. Their employment relationship is never severed, but only suspended. As a result, these employees are considered to be in the regular employment of the employer.

However, it is not sufficient that the work performed is seasonal in nature. There must also be evidence that the employee worked only for the duration of the season. For example, in a previous case, the fact that the employees repeatedly worked as sugarcane workers for the employer for several years established the regular employment.

2.1.4 **Casual employment.** There is casual employment where an employee is engaged to perform a job, work or service which is merely incidental to the business of the employer, and that job, work or service is for a definite period made known to the employee at the time of engagement (*Implementing* Rules *of the Labour Code, Book VI, Rule I, section 5(b)*). A casual employee is one whose work is neither regular, project, nor seasonal.

However, if a casual employee has worked for at least one year (whether continuously or not) he becomes a regular employee but only with respect to the activity in which he is employed, and his employment will continue while that activity exists. Even though a casual employee, he is entitled to all the rights and privileges, and is subject to the same duties and obligations, as is granted by law to regular employees during the period of his actual employment.

2.1.5 **Fixed-period employment.** While not specifically mentioned in Article 294, fixed-period employment is recognised under the Civil Code, pursuant to the freedom of parties to fix the duration of the contract, whatever its object. These fixed-term employment contracts are not limited to seasonal work or specific projects with predetermined completion dates; also contemplated are employment arrangements whereby the parties have assigned a specific date of termination.

For this employment arrangement to be considered compliant with the employees' right to security of tenure, it must:

- Be voluntarily and knowingly agreed upon by the parties, without any force, duress, or improper pressure being brought to bear upon the employee, absent any vices of consent.
- Appear that the employer and employee dealt with each other on more or less equal terms, with no moral dominance whatever being exercised by the former over the latter.

Article 295 makes express reference to Probationary Employment, which provides a trial period, during which the employer observes the fitness, propriety and efficiency of a probationer to decide whether he is qualified for permanent employment, while the probationer seeks to prove to the employer that he has the qualifications to meet the reasonable standards for permanent employment. If the employee was allegedly hired on a probationary basis, but was not informed of the standards that would qualify him as a regular employee, he is deemed a regular employee from the very start.

Additionally, an employee who is allowed to work beyond the probationary period shall be deemed regular. This probationary period is usually fixed at six months or less. However, the parties to an employment contract can agree to a longer period of probation (for example, when the same is established by company policy or when the same is required by the nature of work to be performed by the employee).

Employees can also be further classified in terms of position as:

- Managerial.
- Supervisory.
- Rank-and-file.

2.1.6 **Managerial employees**. This refers to:

- Those whose primary duty consists of the management of the establishment in which they are employed or of a department or subdivision of that establishment.
- Other members of the managerial staff.

An employee is considered a member of the managerial staff where:

- His primary duty consists of work directly related to the management policies of the employer.
- He customarily and regularly exercises discretion and independent judgement.
- He does not devote more than 20% of his hours worked in a working week to activities which are not directly and closely related to the performance of the work described in the following three bullets:
    - Regularly and directly assists a proprietor or a managerial employee whose primary duty consists of the management of the establishment in which he is employed, or a subdivision of that establishment; or
    - Executes under general supervision work along specialised or technical lines requiring special training, experience or knowledge; or
    - Executes under general supervision special assignments and tasks.

2.1.7 **Supervisory employees.** These are employees who, in the interest of the employer, effectively recommend managerial actions, where the exercise of that authority is not merely routine or clerical in nature but requires the use of independent judgement.

2.1.8 **Rank-and-file employees.** Employees not falling within any of the above two categories (managerial or supervisory) are considered rank-and-file employees for the purposes of this chapter.

2.2 Entitlement to statutory employment rights

Philippine Supreme Court rulings recognise job security even in cases involving non-regular employees. A project employee is entitled to security of tenure for either of the following:

- The duration of the project for which he was hired.
- The phases of the project for which he was hired, or to which he was assigned, or in connection with which he rendered services.

Similarly, an employee hired for a fixed term enjoys security of tenure during the agreed period. Security of tenure also applies to a probationary employee. However, a probationary employee can be dismissed for failure to qualify as a regular employee in accordance with the reasonable standards made known to him at the time of his engagement.

Title I of Book 3 of the Labour Code provides for minimum conditions of employment in respect of:

- Hours of work.
- Meal periods.
- Night shift provisions.
- Overtime work.
- Weekly rest periods.
- Holidays.
- Service incentive leaves.
- Service charges.

However, these minimum conditions of employment do not apply to the following employees (excluded employees):

- Government employees.

- Managerial employees.
- Officers and members of the managerial staff.
- Field personnel.
- Members of the family of the employer who are dependent on him for support.
- Domestic helpers.
- Persons in the personal service of another.
- Workers who are paid by result as determined by the Secretary of the Department of Labour and Employment (DOLE).

In addition, employers must pay their rank-and-file employees who have worked for at least one month during the calendar year a thirteenth month pay not later than 24 December of every year. This requirement covers all employers except, among others:

- Employers of those who are paid on a purely commission, boundary or task basis.
- Employers of those who are paid a fixed amount for performing a specific task, irrespective of the time spent performing that specific task (with the exception of workers paid on a piece-rate basis).

2.3 Time periods

A casual employee who has worked for at least one year (whether continuously or not) becomes a regular employee, but only with respect to the activity in which he is employed. His employment will continue while that activity exists.

A probationary employee who is allowed to continue working beyond the probationary period (which generally cannot exceed six months) ceases to be a probationary employee and becomes a regular employee.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

3.1 Recruitment for local employment

A Private Recruitment and Placement Agency (PRPA) must secure a licence from the Department of Labour and Employment (DOLE). The licence is valid all over the Philippines for two years from the date of issuance, unless it is suspended, cancelled or revoked by the Regional Director before the end of this two-year period.

In addition to the licence, a PRPA or its authorised representative must secure an authority to recruit from the Regional Office of the DOLE, which has jurisdiction over the place where recruitment activities will be undertaken. The authority to recruit operates on the same terms as the licence, unless it is revoked or cancelled by the issuing Regional Office or terminated by the PRPA. Only representatives duly authorised to recruit and whose names are registered with the Regional Office can engage in recruitment activities.

3.2 Recruitment for overseas employment

The Philippine Overseas Employment Administration (POEA), which is under the DOLE, regulates private sector participation in the recruitment and overseas placement of workers through a licensing and registration system (*Migrant Workers' Act, section 23(b.1)*).

A Private Employment Agency (PEA) engaged in the recruitment and placement of workers for overseas employment must secure a licence to operate from the DOLE through the POEA.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

4.1 Visa

4.1.1 **Procedure for obtaining approval.** Foreign nationals seeking admission into the Philippines for the purposes of employment must apply for the appropriate work visa. There are several work visa categories available, depending on the corporate employer's registration as a legal entity and other special registrations. The most common work visa is the section 9(g) pre-arranged employment visa. The corporate employer must file the prescribed application with the Bureau of Immigration together with the documentary requirements, which include application forms and the employment agreement. A pre-arranged employee must also first secure an Alien Employment Permit from the Department of Labour and Employment (DOLE) *(see below 4.2, Permits).*

Subject to certain exceptions, if a foreign national is already in the Philippines as a tourist or a business visitor, he can file the appropriate petition to convert his visa status to that of a pre-arranged employee without having to leave the Philippines. After the visa approval has been stamped on the employee's passport, the processing of the Alien Certificate of Registration Identification Card (ACR I-Card) will start. The section 9(g) work visa can be renewed/extended prior to its expiry. After expiry, a new application for a section 9(g) work visa must be submitted (*Commonwealth Act No 613, An Act to Control and Regulate the Immigration of Aliens into the Philippines (The Philippine Immigration Act of 1940) sections 19 and 20*).

4.1.2 **Cost.** Government fees for the issuance of a section 9(g) visa that is valid for one year, related certifications and tourist visa renewals generally cost about PhP13,000.00.

4.1.3 **Time frame.** Processing of the work visa usually takes about four to six weeks from the time of submission of complete requirements.

4.1.4 **Sanctions.** Where a foreign national renders work for a Philippine company without securing a section 9(g) visa, Special Work Permit or Alien Employment Permit, or if he exceeds his authorised stay, he may be the subject of deportation proceedings for violating section 37(a)(7) of the Philippine Immigration Act.

4.2 Permits

4.2.1 **Procedure for obtaining approval.** All foreign nationals who intend to engage in gainful employment in the Philippines must apply for an Alien Employment Permit (AEP) (though certain categories of foreign nationals are excluded from this requirement) (*Labour Code, Article 40; Department Order No 97-09, Revised Rules* for *the* Issuance *of Employment Permits to Foreign Nationals, as amended by Department Order No 120-12, section 1*). In this regard, only the following categories of foreign nationals are exempt from securing an AEP in order to work in the Philippines:

- All members of the diplomatic services and foreign government officials accredited by the Philippine Government.
- Officers and staff of international organisations of which the Philippine Government is a co-operating member, and their legitimate spouse desiring to work in the Philippines.
- Foreign nationals elected as members of the governing board who do not occupy any other position, but have only voting rights in the corporation.
- All foreign nationals granted exemption by special laws and all other laws that may be promulgated by the Congress.
- Owners and representatives of foreign principals, whose companies are accredited by the Philippine Overseas Employment Administration (POEA), who come to the Philippines for a limited period solely for the purpose of interviewing Filipino applicants for employment abroad.
- Foreign nationals who come to the Philippines to teach, present and or conduct research studies in universities and colleges as visiting, exchange or adjunct professors under formal agreements between the universities or colleges in the Philippines and foreign universities and foreign governments (provided that exemption is on a reciprocal basis).
- Permanent resident foreign nationals, probationary or temporary resident visa holders.

An approved AEP is required before a foreign national can file an application for a section 9(g) work visa.

All applications for an AEP must be filed and processed at the DOLE Regional Office or Field Office, which has jurisdiction over the intended place of work. In the case of foreign nationals to be assigned in related companies, they can file their application with the Regional Office, which has jurisdiction over any of the applicant's intended places of work.

Where an employee takes an additional position in the company, or is assigned to a related company, whilst the AEP is valid, or whilst it is being renewed, an additional publication fee will be payable to ensure that the AEP remains valid. Where an employee has a change of position, or a change of employer, an application for a new AEP will need to be made.

The AEP is valid for the position and the company for which it was issued for a period of one year, unless the employment contract, consultancy services, or other modes of engagement provide otherwise, though an AEP can only be valid for a maximum period of five years.

4.2.2 **Cost.** Government fees for the issuance of an AEP are generally PHP8,000.

4.2.3 **Time frame.** Processing of the AEP usually takes about one month from submission of complete requirements.

4.2.4 **Sanctions.** Foreign nationals found to be working in the Philippines without a valid AEP will be fined PHP10,000 for every year of illegal work completed (or fraction of a year of illegal work completed). The organisation that was illegally employing them will also be subject to a fine of PHP10,000 for every year of illegal employment completed (or fraction of a year of illegal employment completed).

4.3 Other

4.3.1 **Procedure for obtaining approval.** Foreign nationals who have commenced employment while their applications for an AEP or a section 9(g) visa are still pending must secure a Provisional Work Permit (PWP). The PWP will be valid for a period of three months or until a section 9(g) visa has been issued in favour of the applicant, whichever comes first.

4.3.2 **Cost.** Government fees for the issuance of a PWP are generally PHP4,000.

4.3.3 **Time frame.** Issuance of the PWP takes about two to three weeks.

4.3.4 **Sanctions.** A foreign national who applies for a section 9(g) visa can only commence work upon approval of his PWP application. Otherwise, he will be violating the terms of his admission as a temporary visitor and as a consequence, he may be the subject of deportation proceedings.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

It is not necessary to have a written employment contract to prove that a person is an employee. There is also no law specifically enumerating the terms that must be included in an employment contract.

Article 1306 of the Civil Code of the Philippines recognises the freedom of the parties to stipulate or establish the terms and conditions of a contract, provided these are not contrary to law, morals, good customs and public policy. However, Article 1700 of the Civil Code classifies labour contracts as contracts imbued with public interest. Labour contracts, therefore, must yield to the common good. Labour contracts are also subject to special laws on labour unions, collective bargaining, working conditions, and similar matters.

The usual provisions in an employment contract will include details covering:

- Names of the parties.
- Job position and status.
- Job description.
- Pay.
- Benefits.
- Intellectual property provisions.
- Confidentiality clauses.

5.2 Implied terms

Labour laws and statutory labour standards are deemed to be written into all employment contracts, and stipulated terms and conditions cannot fall below the applicable labour standards provided by the Labour Code. Any terms or conditions that violate the applicable labour standards

are null and void. Employers cannot use employment contracts to evade their responsibility for complying with labour laws.

Philippine labour arbiters, tribunals, and courts can uphold implied amendments to employment contracts when certain benefits granted to employees are found to have modified the terms and conditions of employment, provided there is no diminution or elimination by the employer of the employee's existing benefits.

5.3 Collective agreements

The Philippine Constitution and the Labour Code guarantee the right of employees to self-organisation, which includes the right to form, join or assist labour organisations for the purpose of collective bargaining through representatives chosen by the employees, and to engage in lawful concerted activities, including the right to strike in accordance with law.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

An employer, in the exercise of its management prerogative, has the right to transfer and reassign employees based on its assessment and perception of its employees' qualifications, aptitudes and competence, provided however that there is no demotion in rank or a diminution of his salary, benefits, and other privileges. The prerogative to transfer and reassign employees must be exercised without grave abuse of discretion. If it is proven that the transfer was used as a subterfuge of the employer to rid himself of an undesirable worker, the employer may be held liable for illegal dismissal.

In case of a constructive dismissal, the employer has the burden of proving that the transfer and demotion of an employee are for valid and legitimate grounds (for example, genuine business necessity). Particularly, for a transfer not to be considered a constructive dismissal, the employer must be able to show that the transfer is not unreasonable, inconvenient, or prejudicial to the employee; nor does it involve a demotion in rank or diminution of his salaries, privileges and other benefits.

With respect to changing the terms and conditions of employment relating to compensation and benefits, the same is limited by the rule on non-diminution of benefits. The rule mandates that benefits given to employees under an agreement, policy or established practice cannot be taken back, removed or reduced unilaterally by the employer. For the grant of benefits to be considered an established practice, the Supreme Court has ruled that those benefits should have been enjoyed over a long period of time and must be shown to be consistent and deliberate, given not by reason of a strict legal or contractual obligation, but by reason of an act of liberality on the part of the employer.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

In the Philippines, holidays are classified as regular or special. There are currently 12 regular holidays and three special non-working holidays. Additional holidays can be promulgated from time to time. Some public holidays are promulgated only for certain regions or provinces.

Employees are paid their normal rate for regular holidays even if they do not work on those days. Employees can be required to work on regular holidays, but they must be paid double their regular wage. Where the holiday falls on the scheduled rest day of the employee, work performed on that day merits at least an additional 30% of the employee's regular holiday rate.

For special holidays, the rule is no work, no pay. However, if employees are required to work on a special holiday, they must be paid a premium of 30% of their regular wage. If the work is performed on a special holiday falling on the employee's rest day, the premium rises to 50% of their regular wage.

Employees are entitled to five days of paid vacation leave after 12 months of service, referred to as "service incentive leave" by the Labour Code.

7.2 Public holidays

The following are the regular holidays in the Philippines:

- New Year's Day: 1 January.

- Maundy Thursday: movable date.
- Good Friday: movable date.
- Eidul Fitr: movable date.
- Eidul Adha: movable date.
- Araw ng Kagitingan: 9 April.
- Labour Day: 1 May.
- Independence Day: 12 June.
- National Heroes Day: last Monday of August.
- Bonifacio Day: 30 November.
- Christmas Day: 25 December.
- Rizal Day: 30 December.

The following are the special holidays in the Philippines:

- Ninoy Aquino Day: 21 August.
- All Saints Day: 1 November.
- Last Day of the Year: 31 December.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Philippine laws do not automatically grant employees sick leave, although employees who have rendered at least one year of service are entitled to be given service incentive leaves of five days with pay. However, there is nothing that prohibits the employer and employee from agreeing on the grant of sick leave through voluntary employer policy or collective bargaining agreements.

Under Republic Act No 8282, an employee who has paid at least three monthly Social Security System (SSS) contributions in the 12 month period immediately preceding the period of sickness or injury, and is confined for more than three days in a hospital or elsewhere with the approval of the SSS, will be paid by his employer a daily sickness benefit equivalent to 90% of his average daily salary credit for each day of confinement. However, this allowance will only begin to be paid after all sick leave with full pay due from the employer has been exhausted.

Under Republic Act No 9710, a woman employee who has rendered a continuous aggregate service of at least six months for the last 12 months is entitled to a special leave benefit of two months with full pay based on her gross monthly compensation, following surgery caused by gynaecological disorders.

8.2 Entitlement to paid time off

The SSS will reimburse the employer 100% of the daily sickness benefits, provided the SSS receives satisfactory proof of that payment, and the legality of that payment, and the employer has notified the SSS of the confinement within five calendar days after receipt of the notification of sickness or injury from the employee.

8.3 Recovery of sick pay from the state

Employees who become ill or experience work-related injuries can make a claim to the Employees' Compensation Programme (ECP). The ECP is designed to provide assistance (in the form of medical services, rehabilitation services, and/or income cash benefit) to employees for work-related injury, sickness, disability or death. Only the employer is required to pay monthly contributions, no contribution is due from the employee. The employer's contributions for the ECP make up the State Insurance Fund, from which compensation for approved claims is sourced.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

A female member of the Social Security System (SSS) who has paid at least three monthly contributions in the 12 month period immediately preceding her childbirth or miscarriage will be paid a daily maternity leave benefit equivalent to 100% of the average daily salary credit (based not on actual salary but on the SSS graduated scale, with a maximum monthly salary credit of PHP15,000) for:

- 60 days in the case of a normal delivery.
- 78 days in the case of a caesarean delivery.

This is subject to the conditions prescribed by the SSS, which include notification requirements (*Republic Act No 8282 (SSS Law of 1997), section 14-A*).

The employer will advance full payment of the maternity leave benefit within 30 days from the filing of the maternity leave application. The SSS will immediately reimburse the employer 100% of the amount of maternity leave benefits advanced to the employee upon receipt of satisfactory proof of that payment.

In addition to the maternity leave benefit, the Republic Act No 9710 (also known as the "Magna Carta for Women") also guarantees access for women to services such as:

- Maternal care including pre- and post-natal services to address pregnancy and infant health and nutrition.
- Promotion of breastfeeding.
- Responsible, ethical, legal, safe and effective methods of family planning.

9.2 Paternity rights

Every married male employee is entitled to a paternity leave of seven days with full pay for the first four deliveries of his legitimate spouse with whom he is cohabiting. "Delivery" includes childbirth or any miscarriage. Unused paternity leave benefits are not convertible to cash (*Republic Act No 8187, section 2*).

9.3 Surrogacy rights

There are no provisions governing surrogacy in the Philippines.

9.4 Adoption rights

Adoption leave is available to an employee who adopts a child from a child-placement or child-caring agency that is duly licensed and accredited by the Department of Social Welfare and Development (DSWD). The adoptive parents will, with respect to the adopted child, enjoy all the benefits to which biological parents are entitled. Maternity and paternity and other benefits given to biological parents upon the birth of a child will be enjoyed if the adoptee is below seven years of age as of the date the child is placed with the adopted parents through the Pre-Adoptive Placement Authority issued by the DSWD (*Rules and Regulations to Implement Republic Act No 8552 (The Domestic Adoption Act of 1998), Article VI, section 34*).

9.5 Parental rights

A single or solo parent as defined by law who has served at least one year of service is entitled to a parental leave of not more than seven days with full pay per year. Unused parental leave benefits are not convertible to cash and cannot be accumulated (*Republic Act No 8972, section 3*). As defined, a single or solo parent is:

- A married person whose spouse is absent or incapacitated.
- A woman who gives birth as a result of rape and/or other crimes.
- A person left alone:

- Due to the death of the spouse;
- While the spouse is detained or is serving sentence for a criminal conviction for at least a year;
- Due to legal or *de facto* separation from the spouse for at least a year, or a declaration of nullity of marriage decreed by a court or church as long as he/she is entrusted with custody of the children;
- Due to abandonment of the spouse for at least a year;
- As an unmarried mother/father who has preferred to keep and rear her/his child/children instead of having others care for them;
- Who is any person who solely provides parental care and support to a child; and
- Who is any family member who assumes the responsibility of head of the family.

In addition to providing parental leave, the law also requires employers:

- To give solo parent employees a flexible working schedule, provided that this does not affect individual and company productivity.
- Not to discriminate against solo parent employees with respect to terms and conditions of employment on account of their status.

The Department of Labour and Employment (DOLE) can exempt an employer from the requirement to provide a flexible working schedule on meritorious grounds.

The employee must obtain a Solo Parent Identification Card, which is issued by the Municipal/City Social Welfare and Development Office after assessment and evaluation, in order to be eligible to take advantage of these benefits.

9.6 Carers' rights

There are no provisions governing carers' rights in the Philippines.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

A casual employee who has worked for at least one year (whether continuously or not) becomes a regular employee, but only with respect to the activity in which he is employed and his employment will continue while that activity exists.

With regard to probationary employees, a probationary employee who is allowed to continue working beyond the probationary period ceases to be a probationary employee and becomes a regular employee. The employer and employee can also validly agree to extend the probationary period. It was stated that no public policy protecting the employee and the security of his tenure is served by prescribing voluntary agreements that actually improve a probationer's chances of demonstrating his fitness for regularisation by way of extending the probationary period.

Whilst regular employees do not gain any other specific benefits from a continuous period of employment under law, company policies, practice or the employment contract can provide for additional benefits in this respect.

10.2 Consequences of a transfer of employee

A transfer of an employee to an entirely new entity is akin to a change in the terms of the employee's contract, in which case his consent must be secured. Because the concerned employee is transferred to a new entity, the employee does not retain their period of continuous employment. However, the former employer must pay the employee separation pay equivalent to at least one month's pay or one month's pay for every year of service, whichever is higher, as if the employee was terminated for authorized cause under redundancy or retrenchment. Unless there is an express provision that an employee's tenure with the previous employer will be continued when he is transferred to a new entity, the employee's period of employment will begin anew.

In cases of asset transfers executed in good faith, the transferee is under no legal duty to absorb the employees of the transferor even if it continues the same business. The most that the

transferee can do is to give preference to those qualified employees who, in its judgement, are necessary or desirable for the continued operation of the business enterprise.

The transferor however is liable to pay the employees separation pay as if the employees had been retrenched, at the rate of at least one month's pay or one half month's pay for every year of service, whichever is higher. However, even in this case the preference in hiring would still be at the transferee's discretion. Should the transferee rehire the employees of the transferor, it will not be bound by the terms and conditions of their former employment with the transferor, nor will it be obliged to grant the same compensation and benefits. Similarly, the employees of the transferor cannot be compelled to accept employment with the transferee.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Philippine Supreme Court rulings recognise job security even in cases where employees are not regular employees. A project employee is entitled to security of tenure for the duration of the project he was hired for, or the phases of that project to which he was assigned, or in connection with which he rendered services. The length of his employment is determined by the completion of the task for which he was hired. Similarly, an employee hired for a fixed term enjoys security of tenure during the agreed period. Security of tenure also applies to a probationary employee. However, a probationary employee can also be dismissed for failure to qualify as a regular employee in accordance with the reasonable standards made known to him at the time of his engagement.

11.2 Agency workers

The law allows independent contractors to undertake job contracting provided that:

- It carries on an independent business and undertakes the contract work on his own account, under his own responsibility, according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the results thereof.
- It has substantial capital or investment in the form of tools, equipment, machinery, work premises and other materials that are necessary in the conduct of its business.
- A finding that there exists "labour-only" contracting results in the existence of an employee-employer relationship between the principal (employer) and the employees, with the contractor considered as an agent of the employer. The employer is made by statute as the entity responsible to the employees, as if it had directly engaged their services.

11.3 Part-time workers

Insofar as they are considered regular employees, part-time workers are also entitled to the same rights as permanent employees.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

The Labour Code prohibits discrimination against any female employee with respect to the terms and conditions of employment solely on the basis of her sex (*Labour Code, Article 133*), by, for example:

- Paying a lesser compensation than that applicable to a male counterpart.
- Favouring a male employee over a female employee with respect to promotion, training opportunities and study and scholarship grants.

It further prohibits discriminating, or otherwise prejudicing, a female employee merely by reason of her marriage (Labour *Code, Article 134*). The Republic Act No 9710 (also known as the "Magna

Carta for Women") also penalises public and private entities and individuals found to have committed discrimination against women. The law is an expression of the state's policy to eliminate all forms of discrimination against women and ensure equality between men and women.

The Labour Code also prohibits the following forms of discrimination:

- Discriminating against a person with respect to their terms and conditions of employment based on age (Labour Code, Article 138).
- Discriminating against workers who exercise their right to self-organisation (Labour Code, Article 255).
- Discriminating with respect to wages, hours of work, and other terms and conditions of employment in order to encourage or discourage membership in any labour organisation; or discriminating against an employee for giving, or being about to give, testimony under the Labour Code (*Labour Code, Articles 257 (e) and (f)*).

Finally, Republic Act No 7277, as amended (also known as the "Magna Carta for Persons with Disability"), provides that:

- No disabled person can be denied access to opportunities for suitable employment.
- A qualified disabled employee must be subject to the same terms and conditions of employment and the same compensation and benefits as a qualified able-bodied person.

The Philippines has laws relating to sexual harassment requiring employers to take certain measures to prevent and address it.

Sexual harassment is committed when a person demands, requests or otherwise requires any sexual favour from another. The harasser can be an employer, employee, manager, supervisor, agent of the employer or any other person who has authority, influence or moral ascendancy over the person who is being harassed.

In a work-related or employment environment, sexual harassment is committed when:

- The sexual favour is made as a condition in the hiring, the employment, the re-employment or the continued employment of the person being harassed, or in granting the person being harassed favourable compensation, terms, conditions, promotions, or privileges, or the refusal to grant the sexual favour results in limiting, segregating or classifying the person being harassed in such a way that it would discriminate, deprive or diminish their employment opportunities or otherwise adversely affect that employee.
- The above acts would impair the employee's rights or privileges under existing labour laws.
- The above acts would result in an intimidating, hostile, or offensive environment for the employee.

It is the duty of the employer, or the head of the work-related institution, to prevent or deter the commission of acts of sexual harassment and to provide procedures for the resolution, settlement or prosecution of acts of sexual harassment. The employer must promulgate appropriate rules and regulations prescribing the procedure for investigating cases of sexual harassment, and put in place administrative sanctions so that incidents of harassment can be dealt with appropriately.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

Under Philippine labour law, an employee can only be lawfully dismissed if both the substantive and the procedural requirements for dismissal are met. Not only must the dismissal be for a just or authorised cause, or be related to the employee's ill health or failure to pass the probationary period, as provided for by law *(see Question 14, Protection against dismissal)*, but the rudimentary requirements of due process must also be observed before an employee can be lawfully dismissed *(see below 13.3, Procedural requirements for dismissal)* (*Implementing Rules of the Labour Code, Book VI, Rule I, section 2*).

The notice periods vary according to the substantive reason for the dismissal. (For further details, see below 13.3, Procedural requirements for dismissal).

13.2 Severance payments

An employee who is dismissed for a "just cause" under Article 297 of the Labour Code *(see Question 14, Protection against dismissal)* is not entitled to termination or separation pay, without prejudice to whatever rights, benefits, and privileges they may have under the applicable individual or collective bargaining agreement with the employer, or voluntary employer policy or practice.

In the case of dismissal for an "authorised cause" under Article 298 of the Labour Code *(see Question 14, Protection against dismissal)*, the employer must pay separation pay equivalent to least one-half month's or one month's pay (depending on the specific cause of termination) for every year of service (a fraction of at least six months is considered as one year), and in no case less than the equivalent of one month's pay In cases of retrenchment to prevent losses, illness, and closure or cessation of operations not due to serious business losses, the minimum separation pay is one-half a month's pay for every year of service. Separation due to redundancy or the installation of labour-saving devices entitles the employee to a minimum separation pay of one month's pay for every year of service.

13.3 Procedural requirements for dismissal

Standards of due process vary according to whether the reason for the dismissal is a just cause or an authorised cause. Dismissal due to a just cause under Article 297 of the Labour Code requires that the following procedure be followed:

- The **first written notice** to be served on the employees should contain the specific causes or grounds for termination against them, and a directive that the employees are given the opportunity to submit their written explanation within a reasonable period. Reasonable opportunity means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense. This should be construed as a period of at least five calendar days from receipt of the notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint.

  Moreover, in order to enable the employees to intelligently prepare their explanation and defenses, the notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge against the employees. A general description of the charge will not suffice. Lastly, the notice should specifically mention which company rules, if any, are violated and/or which among the grounds under Art. 297 are being charged against the employees.

- After serving the first notice, the employers should schedule and conduct a **hearing or conference** wherein the employees will be given the opportunity to:

  - Explain and clarify their defenses to the charge against them;
  - Present evidence in support of their defenses; and
  - Rebut the evidence presented against them by the management. During the hearing or conference, the employees are given the chance to defend themselves personally, with the assistance of a representative or counsel of their choice. Moreover, the parties could use this conference or hearing as an opportunity to come to an amicable settlement.

- A written notice of dismissal must be served on the employee, indicating that upon due consideration of all the circumstances, grounds have been established to justify their dismissal.

In the case of a dismissal due to an authorised cause under Article 298 of the Labour Code, the employer must serve on the employee and the appropriate Regional Office of the Department of Labour and Employment (DOLE) a written notice specifying the ground(s) for dismissal at least 30 days before the effective date of the dismissal.

Dismissal on the ground of ill health under Article 299 of the Labour Code requires the issuance of a certificate by a competent public health authority that the illness or ailment is of such a nature, or at such a stage, that it cannot be cured within a period of six months, even with proper medical treatment. If the illness or ailment can be cured within a six month period, the employee can only be asked to take a leave of absence and must be reinstated to their former position upon their recovery.

If an employment relationship is terminated by the completion of a project (or a phase of that project), no prior notice is required. However, Section 2.2 of D.O. No 19 states that the completion of a particular project or undertaking must be reported to the DOLE Regional Office having jurisdiction over the workplace within 30 days following the date of his separation from work, using

the prescribed form on employee's terminations/dismissals/suspensions, as one of the indicia of project employment.

If a dismissal is brought about by the failure of an employee to meet the standards of the employer in the case of probationary employment, it is sufficient that a written notice is served on the employee within a reasonable time frame from the effective date of dismissal. The notice of dismissal is usually given to the probationary employee before the stipulated end-date of the probationary period.

If an employee is dismissed for a just cause (under Article 296) or for an authorised cause (under Article 297) but the employer failed to comply with the required procedure, the procedural irregularity does not invalidate the dismissal. Provided that there in fact exists a just or authorised cause for dismissal, and the employer is able to prove the existence of that cause, the dismissal will be upheld even if the employer failed to comply with the procedural requirements of due process.

However, the employer will be held liable to pay nominal damages as an indemnity to the employee. If the dismissal is based on a just cause (under Article 297), the nominal damages to be imposed will generally be tempered because the dismissal process was initiated by an act imputable to the employee. If the dismissal is based on an authorised cause (under Article 298), the nominal damages to be imposed will be harsher, because the dismissal was initiated by the employer's exercise of their management prerogative.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

An employee can only be dismissed on the following grounds:

- "Just cause" (Labour Code, Article 296).
- "Authorised cause" (Labour Code, Article 297).
- Ill health (Labour Code, Article 298).
- Failure to pass the probationary period.
- Completion of a project (or phase of a project) for which the employee was employed.
- End of the season for which the employee was hired.
- Expiration of the term or period fixed in the employment contract.
- Completion or end of the casual activity for which the services of the employee was engaged.

Article 296 of the Labour Code lists the just causes for dismissing an employee, as follows:

- Serious misconduct or wilful disobedience by the employee of the lawful orders of their employer or the employer's duly authorised representative in connection with their work.
- Gross and habitual neglect by the employee of their duties.
- Fraud or wilful breach by the employee of the trust bestowed on them by their employer, or the employer's duly authorised representative.
- Commission of a crime or an offence by the employee against the person of their employer, or any immediate member of the employer's family or their duly authorised representative.
- Other causes similar to the above behaviours, for example, being quarrelsome, which have been construed as being equivalent to serious misconduct or insubordination.

Article 297 of the Labour Code lists the authorised causes for dismissal, as follows:

- **Installation of labour-saving devices.** This contemplates the installation of machinery or new processes to encourage economy and efficiency in the operations of the business, such as in the methods of production. It includes the institution of new methods, the installation of more efficient machinery or the automation of certain tasks.
- **Redundancy.** Redundancy exists where the services of an employee are in excess of what would reasonably be demanded by the actual requirements of the enterprise. A position is redundant when it is superfluous, and this can be caused by a number of factors, for example:
    - The over-hiring of workers

- A decrease in the volume of business.
- The dropping of a particular line or service previously manufactured or undertaken by the enterprise.

The law also recognises management's prerogative to cut labour costs or improve efficiency and productivity through the reorganisation of work processes or operations to eliminate duplication.

- **Retrenchment to prevent losses.** Retrenchment is an economic ground to reduce the number of employees employed by the employer because of business losses, lack of work, or a considerable reduction in the volume of the employer's business. In order to be justified, the termination of employment by reason of retrenchment must be due to business losses or lack of work that is serious, actual and real.
- **Closure or cessation of operation of the establishment or undertaking.** The closure or cessation of operations contemplated by law is one that is permanent, whether it is total or partial. An employer can close or cease business operations or undertakings even if that closure or cessation is not due to business losses or lack of work as no law compels anybody to stay in business. However, such closure or cessation of operations must be bona fide, in good faith, and not for the purpose of defeating or circumventing the rights of the employees.

Article 298 of the Labour Code lists another authorised cause for dismissal, which is the employee's illness or ailment, where that illness or ailment is of such a nature, or at such a stage, that it cannot be cured within a period of six months, even with proper medical treatment. However, if the illness or ailment can be cured within a six month period, the employee can only be asked to take a leave of absence and must be reinstated to their former position upon their recovery.

An employment relationship can also be terminated by:

- The completion of a project (or a phase of that project) for which the employee was employed.
- Expiration of the indicated term (for fixed term employment).
- The failure of an employee to meet the standards of the employer in the case of probationary employment.

14.2 Protected employees

Whilst Article 292 of the Labour Code specifically affords regular employees the right to security of tenure in their employment, in practice, the Philippine Constitution grants all employees this right to security of tenure, in the absence of a just or authorised cause for dismissal.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

Redundancy occurs where the services of an employee are in excess of what would reasonably be demanded by the actual requirements of the enterprise (*Labour Code, Article 297*). A position is redundant when it is superfluous, which can be caused by a number of factors, including:

- The over-hiring of workers.
- A decrease in the volume of business.
- The dropping of a particular line or service previously manufactured or undertaken by the enterprise.

The law also recognises management's prerogative to cut labour costs or improve efficiency and productivity through a reorganisation of work processes or operations to eliminate duplication, which can result in redundancies. For the implementation of a redundancy program to be valid, the employer must comply with the following requisites:

- Written notice served on both the employees and the Department of Labour and Employment at least one month prior to the intended date of retrenchment;
- Payment of separation pay equivalent to at least one month pay for every year of service, whichever is higher;

- Good faith in abolishing the redundant positions; and
- Fair and reasonable criteria in ascertaining what positions are to be declared redundant and accordingly abolished.

Please also note that Philippine labour laws distinguish redundancy from retrenchment, which is defined as the termination of employment initiated by the employer resorted by management during periods of recession, industrial depression or seasonal fluctuations or during lulls over shortage of materials. It is a reduction in manpower, a measure utilized by an employer to minimize business losses incurred in the operation of its business. The requirements for a valid retrenchment are:

- That the retrenchment is reasonably necessary and likely to prevent business losses which, if already incurred, are not merely *de minimis*, but substantial, serious, actual and real, or if only expected, are reasonably imminent as perceived objectively and in good faith by the employer;
- That the employer served written notice bot h to the employees and to the Department of Labour and Employment at least one month prior to the intended date of retrenchment;
- That the employer pays the retrenched employees separation pay equivalent to one month pay or at least one half month's pay for every year of service, whichever is higher;
- That the employer exercises its prerogative to retrench employees in good faith for the advancement of its interest and not to defeat or circumvent the employees' right to security of tenure; and
- That the employer used fair and reasonable criteria in ascertaining who would be dismissed and who would be retained among the employees, such as status (ie, whether they are temporary, casual, regular or managerial employees), efficiency, seniority, physical fitness, age, and financial hardship for certain workers.

Employers may also close shop even if not due to serious business losses or financial reverses, provided that the same is done *bona fide* and that the employer pays the employees an amount equivalent to one half month's pay for every year of service or one month, whichever is higher.

15.2 Procedural requirements

In the case of a dismissal due to redundancy, the employer must serve on the employee and the appropriate Regional Office of the Department of Labour and Employment (DOLE) a written notice specifying the ground(s) for dismissal at least 30 days before the effective date of the dismissal.

15.3 Redundancy/layoff pay

In the case of the dismissal of an employee as a result of redundancy, the employee is entitled to severance pay equivalent to one month's pay for every year of service. Retrenched employees are entitled to severance pay equivalent to one half -month's pay for every year of service. A minimum level of severance pay equal to one month's pay must be paid in all cases.

15.4 Collective redundancies

There are no special rules relating to collective redundancies.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

Generally, employees are not entitled to management representation.

16.2 Consultation

Article 218 of the Labour Code provides that it is state policy "to ensure the participation of workers in decision and policy-making processes affecting their rights, duties and welfare." Article 266 of the Labour Code further provides that "any provision of the law to the contrary notwithstanding, workers shall have the right, subject to such rules and regulations as the Secretary of Labour and Employment may promulgate, to participate in policy and decision-making process of the establishments where they are employed insofar as said process will directly affect their rights,

benefits and welfare." Employee participation is implemented through labour-management councils, which the law encourages both employers and workers to organise. Representatives to these councils are elected by at least a majority of all employees in the establishment.

16.3 Major transactions

The management is not any under any obligation to consult its employees regarding major transactions such as acquisitions or joint ventures, unless it is bound to do so under a valid contract with the employees or a third party.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

In the formulation of disciplinary rules and penalties, court rulings generally require that the affected employee be consulted before these rules and penalties can be enforced. However, the final decision on what rules and penalties to prescribe belongs to the employer.

However, in unionised establishments, the collective bargaining agreement can impose an obligation on the employer to consult the union on certain management actions (for example, the sale of the business to a third party, entering into a merger with another entity, among others).

17.2 Employee action

If the employer fails to comply with its duty to consult, employees can file a grievance or a notice of strike against management if the establishment is unionised. They can also apply for an injunctive relief with the DOLE to stop the implementation of the action.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

In the absence of any express stipulation, when a business is transferred (for example, when a business is sold), the employees are not automatically transferred to the new owner of the business. Unless there is an express provision when the business is transferred that the new management will retain the old employees, there is no automatic transfer of employees to the new business.

However, in a change in ownership resulting from the sale of shares of a corporation, the status of the employees will not be affected, considering that the employer-corporation will retain its personality which is separate and distinct from that of its shareholders. Thus, the corporation will continue to be the employer of the employees.

If the closure or cessation of operations involves a transfer of assets, the general rule is that an innocent transferee has no liability to the employees of the transferor to continue employing them, or for past obligations of the previous owner, except when either:

- That liability is assumed by the transferee.
- That liability arises out of the transferee's participation in thwarting or defeating the rights of the employees.

If the asset transfer is in good faith, the transferee is under no legal duty to absorb the employees of the transferor even if it continues the same business. The most that the transferee can do is to give preference to those qualified employees of the transferor who, in its judgement, are necessary or desirable for the continued operation of the business enterprise.

Even in this case, the preference in hiring is still entirely at the transferee's discretion. Where the transferee rehires the employees of the transferor, it is not bound by the terms and conditions of their former employment with the transferor, nor is it obliged to grant the same compensation and benefits. Similarly, the employees of the transferor cannot be compelled to accept employment with the transferee.

18.2 Protection against dismissal

The closure or cessation of operations must be bona fide, that is, its purpose must not be to defeat or circumvent the rights of the employees under the law or a valid agreement. If the closure or cessation of operation is not bona fide, the employer can be held liable for the illegal dismissal of employees under a transfer made to a new entity in bad faith.

18.3 Harmonisation of employment terms

In the absence of any contrary express stipulation, the new employer is not under any obligation to maintain the terms of employment the employees had with their previous employer. Since the employees are not automatically transferred to the new employer when a business is sold or transferred, the contracts of all employees will be considered new employment contracts and the new employer is not obliged to incorporate any employment terms from their previous employment contracts.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

Foreign nationals working in the Philippines can be classified either as resident aliens or non-resident aliens for tax purposes. Both resident aliens and non-resident aliens are liable to pay income tax only on income derived from sources within the Philippines. Under the National Internal Revenue Code, a non-resident alien who comes to the Philippines and stays for an aggregate period of more than 180 days during any calendar year shall be deemed a non-resident alien doing business in the Philippines.

19.2 Nationals working abroad

Citizens of the Philippines can also be classified as either resident or non-resident citizens. Resident Filipino citizens are taxed on their income from sources both within and outside the Philippines. Non-resident Filipinos are taxed on their income from sources within the Philippines only. As a result, resident Filipino citizens who work abroad can be taxed in the Philippines on their income from working abroad as well as their other income from sources within the Philippines.

However, a resident Filipino citizen who leaves the Philippines for employment on a permanent basis, or who works and derives income from abroad and whose employment abroad requires him to be physically present abroad most of the time during the taxable year, is considered a non-resident citizen for income tax purposes. Further, a Filipino citizen who is working and deriving income from abroad as an overseas contract worker (OCW) is taxable only on income from sources within the Philippines (which means that his income from overseas employment is exempt from Philippine income tax).

A seaman who is a Filipino citizen and who receives compensation for services rendered abroad as a member of the complement of a vessel engaged exclusively in international trade is treated as an OCW. To be considered as an OCW, one must be duly registered as such with the Philippine Overseas Employment Administration (POEA) with a valid Overseas Employment Certificate (OEC), and with a valid Seafarers Identification Record Book (SIRB) or Seaman's Book issued by the Maritime Industry Authority (MARINA) in the case of seafarers.

The Philippines also has tax treaties with certain countries, which provide for relief from double taxation, subject to certain conditions or requirements.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

The tax rate varies according to the rate of the employment income, and is charged as follows:

- Income of PHP10,000 or less: 5%.
- Income over PHP10,000 but not more than PHP30,000: PHP500 plus 10% on the excess above PHP10,000.
- Income over PHP30,000 but not more than PHP70,000: PHP2,500 plus 15% on the excess above PHP30,000.
- Income over PHP70,000 but not more than PHP140,000: PHP8,500 plus 20% on the excess above PHP70,000.

- Income over PHP140,000 but not more than PHP250,000: PHP22,500 plus 25% on the excess above PHP140,000.
- Income over PHP250,000 but not more than PHP500,000: PHP50,000 plus 30% on the excess above PHP250,000.
- Income over PHP500,000: PHP125,000 plus 32% on the excess above PHP500,000.

20.2 Social security contributions

20.2.1 **Social Security System (SSS).** Employers and employees must both pay contributions into the Social Security System (SSS). Employees must make contributions to the Social Security Programme (SSP), and employers must make contributions to both the Social Security Programme (SSP) and the Employees' Compensation Programme (ECP).

On the first day of an employer's operations and on the first day an employee's employment they are deemed to be included in the compulsory coverage of the Social Security System (SSS) and must register with the SSS. Employers are required to report all its employees so that they can be covered in the SSS, which is compulsory upon all employers and all employees aged 60 years old or less.

It is the employer's responsibility to remit both:

- The employee's contribution (for the SSP), which the employer must deduct from the employee's salary.
- The employer's own contributions (for both SSP and ECP).

The employer is liable to pay a penalty charge for failure to remit the contributions in a timely manner. Failure to register employees or to deduct contributions from the employees' salary and remit them to the SSS is punishable by a fine and by imprisonment.

20.2.2 **National Health Insurance Programme.** The National Health Insurance Programme (NHIP) is a compulsory health programme for employees who are included in the SSS. The NHIP basically provides health insurance coverage for employees.

The employer must remit to PhilHealth:

- The employee's contribution to the NHIP, which the employer must deduct from the employee's salary.
- The employer's own contribution to the NHIP.

Failure or refusal to deduct contributions from the employee's salary, or to remit the complete employer's and employee's contribution to PhilHealth, is punishable by a fine and by imprisonment.

20.2.3 **Home Development Mutual Fund.** The Home Development Mutual Fund (HDMF) (formerly the Pag-IBIG fund) is a system of both employee and employer contributions that enable member employees to procure housing loans.

The employer must remit to the HDMF:

- The employee's contribution to the HDMF, which the employer must deduct from the employee's salary.
- The employer's own contribution to the HDMF.

Refusal or failure (either without lawful cause, or with fraudulent intent) to comply with the provisions of the HDMF law and its pertinent rules and regulations (particularly with respect to the registration of employees, collection and remittance of employee and employer contributions, or remitting the correct amount due) can leave the employer liable to a fine and/or imprisonment. Employers in breach of the provisions concerning HDMF can also be liable for civil claims.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Under Philippine jurisprudence, a bonus is an amount granted and paid to an employee for his industry and loyalty that contributed to the success of the employer's business and the realisation of profits. Employers give bonuses to reward employees for work done and to encourage future good performance. Bonuses are granted at the management's prerogative, and are not a

demandable or enforceable obligation, unless the bonus has been made part of the employee's usual wage, salary or compensation package. In the Philippines, bonuses are more commonly given to managerial and other key officers, and are typically based on company performance.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

The Philippine Supreme Court has ruled that the validity of restraints upon trade or employment is determined by the intrinsic reasonableness of the restriction in each case, rather than by any fixed rule. Such restrictions can be upheld provided that they are:

- Not contrary to the public welfare.
- Not greater than is necessary to afford fair and reasonable protection to the party in whose favour it is imposed.

In general, for a non-compete clause to be valid, it must be limited as to time, place and trade. The determination of reasonableness is made on the particular facts and circumstances of each case, and the Supreme Court has not set a fixed time limit on the duration of a valid non-compete restriction.

22.2 Post-employment restrictive covenants

The Supreme Court has held that in determining whether a post-employment restrictive covenant (prohibiting an employee from accepting post-termination competitive employment) is reasonable, the trial court should consider whether:

- The covenant protects the employer's legitimate business interest.
- The covenant creates an undue burden on the employee.
- The covenant is injurious to the public welfare.
- The time and territorial limitations contained in the covenant are reasonable.
- The restraint is reasonable from a public policy viewpoint.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

A number of bills have been submitted to the House of Representatives and the Senate seeking to amend provisions of the Labour Code, some of which are enumerated below as follows:

- House Bill ("**HB**") No 5470 – An Act to Enhance the Regulation on Employment of Foreign Nationals and Transfer of Technology, amending for the purpose Articles 40, 41, and 42, Title II, Book 1 of Presidential Decree No 442, as amended, or the Labour Code of the Philippines
- HB No 5471 – An Act Rationalizing Government Interventions in Labour Disputes by Adopting the Essential Services Criteria in the Exercise of the Assumption or Certification Power of the Secretary of Labour and Employment, and Decriminalizing Violations Thereof, Amending for this Purpose Articles 263, 264, and 272 of Presidential Decree 442, otherwise known as the Labour Code of the Philippines, as amended and for other purposes
- HB No 5698 – An Act Prohibiting the Discrimination on the Employment of any Individual on the basis merely of Age
- HB No 5777 – An Act Creating the Occupational Safety and Health Administration (OSHA) under the Department of Labour and Employment Thereby Imposing Criminal Penalties against Violations of the 1978 Occupational Safety and Health Standards and for other purposes

- Senate Bill ("**SB**") No 1382 – An Act Strengthening Adult Education Programs for Workers and Employees, Amending for the Purpose Article 210 of Presidential Decree No 442, as amended, Otherwise Known as the "Labour Code of the Philippines"
- SB No 1427 – An Act Expanding the Prohibited Acts of Discrimination Against Women on Account of Sex, Amending for the purpose Articles 135 and 137 of Presidential Decree No 442, as amended, otherwise known as the Labour Code of the Philippines
- SB No 2526 – An Act Clarifying the Meaning of Full Backwages, by Amending Article 271 of the Labour Code of the Philippines, and for Other Purposes
- SB No 2651 – An Act Amending Article 287 of Presidential Decree No 442, as amended, otherwise known as the Labour Code of the Philippines, by Providing Financial Assistance to Employees who Reached the Age of Sixty-Five but are not Entitled to any Retirement Pay
- SB No 2656 – An Act Increasing Maternity Leave Benefits from 60 days to 120 days or Four Months, amending for the purpose, P.D. 442, as amended by R.A. 7322
- SB No 2760 – An Act Enhancing the Regulation on Employment of Foreign Nationals and Transfer of Technology, Amending for the Purpose Articles 40, 41, and 42, Title II, Book 1 of Presidential Decree No 442, as amended, otherwise known as "The Labour Code of the Philippines"
- SB No 2837 – An Act Strengthening the Operations of the National Labour Relations Commission, amending for this purpose Articles 219 and 221 of the Presidential Decree No 442, as amended, otherwise known as the Labour Code of the Philippines

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September 2015

Singapore

SINGAPORE

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Employment relationships are governed by both legislation and common law.

The main legislation governing employment relationships is the Employment Act (Chapter 91) of Singapore ("**Employment Act**"). This applies to all employees, except (among others):

- Persons employed in a managerial or executive position earning more than S$4,500 basic monthly salary. Basic monthly salary does not include overtime payments, bonus payments, annual wage supplements, reimbursement for special expenses, productivity incentive payments and any allowance.
- Seafarers.
- Domestic workers.
- Statutory board employees or civil servants.

The Employment Act also applies to foreign employees who fall within the scope of the Employment Act.

The terms and conditions of employment of persons who do not qualify as employees under the Employment Act are governed by their employment contract.

Under Singapore law, the relationship between the employer and employee is regulated almost exclusively by contract. The governing law of the contract will depend on the choice of law clause in the contract. Parties are generally free to contract as they choose under an employment contract, subject to certain statutory requirements and limits as provided for in legislation and public policy.

The following laws can apply to employees working in Singapore, regardless of any choice of law provisions in the employment contract:

- The Employment Act (see above).
- Maternity, paternity, childcare, shared parental, adoption and infant care leave laws under various legislations including the Employment Act and the Child Development Co-Savings Act.
- Central Provident Fund Act (for Singapore citizens and permanent residents).
- Income Tax Act.
- Work Injury Compensation Act.
- Workplace Safety and Health Act.
- Retirement and Re-employment Act.

These laws do not apply to Singaporeans working abroad full-time unless the employment contract expressly provides that Singapore law is to apply.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

The law does not distinguish between different categories of workers; so long as one is an employee working under a contract of service with an employer, he is covered by the Employment Act. These employees include local and foreign workers, as well as employees who are employed full-time, part-time, temporary or by contract.

2.1 Categories of worker

N/A.

2.2 Entitlement to statutory employment rights

N/A.

2.3 Time periods

N/A.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

Employers must file Central Provident Fund (CPF) contribution details for each new employee they hire with the CPF Board. This pertains to employees who are Singapore citizens or Singapore permanent residents. Further information can be obtained from the CPF Board's website (*www.cpf.gov.sg*).

For foreign workers, employers paying the foreign worker levy do not have to pay CPF contributions for them. However, they are required to pay the Skills Development Levy. No levy is payable for foreign employees on an employment pass.

3.1 Filings

See above.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

Foreign nationals (that is, persons who are not Singapore citizens or permanent residents) must obtain work passes before they can work in Singapore, approval of which is at the discretion of the Ministry of Manpower.

Foreign nationals performing certain kinds of activities in Singapore need not apply for a Work Pass where their stay in Singapore is for less than 60 days. Further information on Work Pass-exempt activities can be found on the MOM's website (*www.mom.gov.sg*).

Types of Work Permits

There are several types of work passes for different salary ranges and qualifications. For example, the employment pass is a work pass for foreign professionals working in managerial, executive or specialised jobs. A foreign national can work in Singapore if they obtain one of the following types of Work Pass (all references to salary in the following paragraphs refer to basic salary, and allowances, overtime pay, bonuses and commissions are excluded):

- **Work Permit.** This is for unskilled or semi-skilled workers, and the following apply to the Work Permit:
    - Under current administrative practice, a foreign national whose salary per month does not exceed SGD$2,000 must obtain a Work Permit to work in Singapore;
    - A levy is imposed on an employer employing a foreign national on a Work Permit;
    - There are quota restrictions as a matter of practice;
    - The employer must furnish a security bond for non-Malaysian employees as a matter of practice;
    - The Work Permit is usually valid for two years, after which it can be renewed; and

- There are special categories of Work Permits for foreign domestic workers, confinement nannies and foreign performing artists (further information on these special categories can be obtained from the MOM's website (*www.mom.gov.sg*)).

- **Employment Pass.** This is for professionals, managers and executives, and the following apply to the Employment Pass:
  - Under current administrative practice, a foreign national whose fixed monthly salary exceeds SGD$3,300 and who holds an acceptable university degree, professional qualification or specialist skill can apply for an Employment Pass; and
  - The Employment Pass is usually valid for two to three years, after which it can be renewed.
- **S Pass.** This is for mid-level skilled foreign professionals, and the following apply to the S Pass:
  - In practice, the applicant's monthly salary must be at least SGD$2,200;
  - A levy is imposed on employers of S Pass holders;
  - There are also quota restrictions for employers of S Pass holders; and
  - It is usually valid for two to three years, after which it can be renewed.
- **Personalised Employment Pass.** The following persons can apply for a PEP:
  - A foreign professional whose last drawn salary overseas was at least SGD$18,000 per month.
  - An Employment Pass holder earning a fixed monthly salary of at least $12,000.
- **Training Employment Pass/Work Permit.** These are for applicants undergoing training (they are usually valid for three to six months), and the following apply:
  - The Training Employment Pass is for foreign nationals undergoing practical training attachments for professional, managerial, executive or specialist jobs whose minimum monthly salary is at least SGD$3,000, or who has acceptable tertiary or professional qualifications; and
  - The Training Work Permit is for applicants who are unskilled or semi-skilled foreign nationals undergoing training in Singapore and who are not eligible for a Training Employment Pass (levies are payable in respect of employees on Training Work Permits).
- **Miscellaneous Work Pass.** This is for foreign nationals working on the following short-term assignments (assignments for a period of not more than 60 days):
  - A foreign national who is involved in activities directly related to the organisation or conduct of any seminar, conference, workshop, gathering or talk concerning any religion, race or community, cause, or political end;
  - A foreign religious worker giving talks relating directly or indirectly to any religion; and
  - A foreign journalist, reporter or an accompanying crew member not supported or sponsored by any Singapore Government agency to cover an event or write a story in Singapore.

Requirements for employment pass applications

As part of the Fair Consideration Framework issued by the Ministry of Manpower, firms that wish to hire employment pass holders must first advertise the position in the Singapore Workforce Development Agency's Jobs Bank. The advertisement must be:

- Open to Singaporeans.
- Comply with the Tripartite Guidelines on Fair Employment Practices.
- Run for at least 14 calendar days.

Employment pass applications that do not meet the advertising requirements are not accepted. For employment pass applications filed from 1 October 2015, the accompanying advertisements must include published salary ranges.

Companies are exempt from the Jobs Bank advertising requirement in the following cases:

- Company has 25 or fewer employees.
- The job position is paying a fixed monthly salary of $12,000 and above.
- The job is to be filled by an intra-corporate transferee (ICTs). Under the World Trade Organisation's General Agreement on Trade in Services (WTO GATS), ICTs refer to those holding senior positions in the organisation or have an advanced level of expertise.
- The job is necessary for short-term contingencies (ie period of employment in Singapore for not more than one month).

Multiple Journey Visa

There is also a Multiple Journey Visa which is available for foreign nationals from countries whose citizens ordinarily need to apply for a visa to enter Singapore. The Multiple Journey Visa is tagged to the Employment Pass so that a pass holder can make multiple trips out of Singapore while their Employment Pass is valid without having to apply for a visa to enter Singapore each time they return. The same administrative fees apply as for the Employment Pass (though the issuing fee is SGD$30). If the applicant is from a country whose citizens ordinarily do not require a visa to enter Singapore, then they need not apply for a Multiple Journey Visa.

Costs of Work Passes

Further details on the computation of quotas and levies for Work Permits, S Passes and Training Work Permits, as well as the application process for each of the above Work Passes, can be found on the MOM's website (*www.mom.gov.sg*).

Cost. The following fees are payable in relation to each of the above Work Passes:

- **Work Permit.** An administrative fee of SGD$30, together with an issuing fee of SGD$30 per Work Permit.
- **Employment Pass.** An administrative fee of SGD$70, together with an issuing fee of SGD$150 per Employment Pass.
- **S Pass.** An administrative fee of SGD$60, together with an issuing fee of SGD$80 per S Pass.
- **Personalised Employment Pass.** An administrative fee of SGD$70, together with an issuing fee of SGD$150 per Personalised Employment Pass.
- **Training Employment Pass.** An administrative fee of SGD$70, together with an issuing fee of SGD$150 per Training Employment Pass.
- **Training Work Permit.** An administrative fee of SGD$30, together with an issuing fee of SGD$30 per Training Work Permit.
- **Miscellaneous Work Pass.** An administrative fee of SGD$70.

  For further information on fees for the special categories of foreign domestic workers, confinement nannies and foreign performing artistes listed under the Work Permit, see the MOM's website (*www.mom.gov.sg*).

Time Frame of Work Passes

Time frame. The time frames for obtaining approval in relation to each Work Pass are as follows:

- **Work Permit.** It takes one day to process a Work Permit application submitted online. However, on approval, there are certain conditions that the Work Permit applicant must fulfil before he is allowed to collect his Work Permit. Further information on the conditions and time frames for the special categories of Work Permits for foreign domestic workers, confinement nannies and foreign performing artists can be obtained at the MOM's website (*www.mom.gov.sg*).
- **Employment Pass.** 80% of online applications are processed within seven days. Manual submissions and applications made through a sponsor are usually processed in five weeks.
- **S Pass.** 80% of online applications are processed within seven days.
- **Personalised Employment Pass.** Applications are usually processed in five weeks.
- **Training Employment Pass/Work Permit.** The following time frames apply to these:
  - Training Employment Pass: 80% of online applications are processed within seven days.

- Training Work Permit: interim approval is given by the next working day and an in-principle approval letter will be issued to the applicant. This letter must be mailed to the MOM by the applicant, together with some other documents for final approval.

- **Miscellaneous Work Pass.** This can only be done submitted manually. Applicants will be notified of the outcome of their application, usually five weeks after submission (excluding two working days for postage).

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

Written employment contract

It is not mandatory to have a written employment contract. Employees covered by the Employment Act must enter into a "contract of service" with their employer. This contract of service can be in writing or oral, express or implied.

Implied terms

Terms can be implied into an employment contract by:

- **Statute.** For example, employees covered by the Employment Act have the implied right to terminate the contract by giving notice, or salary in lieu of notice.

- **The court.** For example, an employer has a duty to indemnify any expenses, losses or liabilities incurred by an employee while carrying out his duties.

- **Custom.** Terms can be implied on the basis of custom or practice provided the custom or practice is general, uniform, certain and reasonable.

Collective agreements

Collective agreements between labour and management must be renewed every two to three years. To be binding, tripartite Industrial Arbitration Court (IAC) must certify the collective agreements.

The IAC can refuse certification on the grounds of public interest, although in practice it has never refused to certify a collective agreement for this reason. Transfers and retrenchments are excluded from the scope of collective agreements, although unions have the right to ask for the reasons behind the retrenchment and are not precluded from negotiating compensation for workers in these cases.

Disputes can be settled by means of consultation, negotiation and conciliation through the Ministry of Manpower, where the procedures are clearly laid down by the Industrial Relations Act. If conciliation fails, the parties can submit their case to the IAC for determination.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Generally, an employer cannot unilaterally change the terms and conditions of employment. However, in some circumstances, the terms of employment can be modified or varied unilaterally if the contract of employment provides for it.

The terms and conditions of employment can be varied with the employee's consent. That variation must be supported by consideration, for example, the employer may promise additional benefits and the employee may in return agree to take on a heavier workload than that actually required by the contract.

Employers can also lawfully terminate the contract of employment and then re-hire the employee on new terms.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

Only employees covered by the Employment Act have a minimum holiday entitlement. These employees are entitled to be paid on public holidays. In addition, employees and workmen covered by Part IV of the Employment Act (ie a workman (doing manual labour) earning a basic monthly salary of not more than $4,500, or an employee who is not a workman, but who is covered by the Employment Act and earns a monthly basic salary of not more than $2,500) are entitled to seven days' paid leave per year if they have already worked with their employer for a minimum period of three months. This entitlement is increased by one day per year for every additional year that the employee remains in his employer's service. If the employee has worked for his employer for at least three months but less than a year, his annual leave entitlement is pro-rated based on the number of full months he has worked. This entitlement applies even if the employee is still on probation.

It should be noted that this entitlement is subject to certain provisos, which can be found in section 43 of the Employment Act.

7.2 Public holidays

The 11 gazetted public holidays are:

1. New Year's Day.
2. Chinese New Year - first day.
3. Chinese New Year - second day.
4. Hari Raya Puasa.
5. Hari Raya Haji.
6. Good Friday.
7. Labour Day.
8. Vesak Day.
9. National Day.
10. Deepavali.
11. Christmas Day.

Note: If the holiday falls on a rest day, the next working day will be a paid holiday.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Employees are only entitled to paid sick leave if:

- They are covered under the Employment Act;
- They have served their employer for at least three months;
- They have informed or tried to inform their employer within 48 hours of their absence; and
- Their sick leave is certified by the company's doctor or a government doctor (including doctors and dentists from approved medical institutions).

Note: As long as the employee is certified by the doctor to be in need of hospitalisation, he does not necessarily have to be warded in a hospital to be eligible for paid hospital leave.

If they have worked for their employer for at least six months they are entitled to:

- 14 days' sick leave a year.
- Hospitalisation leave of either (whichever is of a shorter duration):
    - 60 days a year; or

- The aggregate of 14 days plus the number of days the employee is actually hospitalised.

The number of days of sick leave and hospitalisation leave is lower for employees who have worked for their employers for less than six months, as follows:

No of months of service completed	Paid outpatient non-hospitalisation leave (days)	Paid hospitalisation leave (days)
3	5	15
4	8	30
5	11	45
6 and thereafter	14	60

There is no sick leave entitlement for employees who have worked for their employer for less than three months. For full details, see section 89 of the Employment Act.

8.2 Entitlement to paid time off

Employees covered by the Employment Act who take medically certified sick leave or hospitalisation leave are entitled to be paid, except for rest days, public holidays, non-working days, annual leave and unpaid leave.

Employees on paid hospitalisation leave are entitled to their gross rate of pay. Employees on paid outpatient sick leave are also entitled to their gross rate of pay, excluding any shift allowance. For monthly shift allowances, employees should consult their employer and union on whether they can continue to receive the shift allowance during their sick leave period.

8.3 Recovery of sick pay from the state

Employers are not entitled to recover sick pay from the government.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Working mothers are eligible for 16 weeks of Government-Paid Maternity Leave (GPML) under the Child Development Co-Savings Act only if they meet the following criteria:

- Their child is a Singapore citizen.
- They are lawfully married to the child's father.
- For employees: they have served their employer for a continuous period of at least three months immediately before the birth of the child.
- For self-employed: they have been engaged in their work for at least three continuous months and have lost income during the maternity leave period.

However, if their child is not a Singapore citizen, or they are not lawfully married to the child's father, then they are only eligible for 12 weeks of maternity leave under the Employment Act.

Under the GMPL scheme, working mothers are to be paid their usual monthly salary during leave period. Their employers can then claim reimbursement from the government as follows:

- First and second births: Last eight weeks.
- Third and subsequent births: All 16 weeks.

Note: Working mothers can choose to share one week of maternity leave with their husband. Their maternity leave will then be adjusted to 15 weeks accordingly.

9.2 Paternity rights

Working fathers are entitled to one week of Government-Paid Paternity Leave (GPPL) (capped at six working days) up to $2,500 (including CPF contributions), for all births if they meet the following requirements:

- Their child is a Singapore citizen, born on or after 1 May 2013.
- They are lawfully married to the child's mother.
- For employees: they have served their employer for a continuous period of at least three months.
- For self-employed: they have been engaged in their work for a continuous period of at least three months, and have lost income during the paternity leave period.

This does not include the one week of shared parental leave.

9.3 Shared Parental Leave

Working fathers, including those who are self-employed, are also entitled to one week of shared parental leave (capped at six working days) up to $2,500 (including CPF contributions), if they meet the following requirements:

- Their child is a Singapore citizen.
- The child's mother qualifies for Government-Paid Maternity Leave (GPML).
- They are lawfully married to the child's mother.

This does not include the one week of paternity leave.

9.4 Surrogacy

Singapore law makes no provision for surrogacy rights.

9.5 Adoption rights

Adoptive mothers are entitled to four weeks of Government-Paid Adoption Leave (GPAL), capped at $10,000, if they meet the following criteria:

- Their adopted child is below the age of 12 months at the point of their formal intent to adopt. The 'formal intent to adopt' happens:
    - For a local child: when they file the court application to adopt.
    - For a foreign child: when in-principle approval is granted for a Dependant's Pass.
- The adopted child is a Singapore citizen. If the child is a foreigner, one of the adoptive parents must be a Singapore citizen, and the child must become a Singapore citizen within six months of the adoption.
- They must be lawfully married at the point of formal intent to adopt.
- They must have served their employer or been self-employed for a continuous period of at least three months immediately before their formal intent to adopt.
- The adoption order must be passed within one year from the formal intent to adopt.

Notably, this adoption leave must be consumed before the child's first birthday.

9.6 Parental rights

Employees who meet the relevant criteria under the Child Development Co-Savings Act are entitled to a maximum of six days of childcare leave a year if they have children under seven years of age and if they have worked for their employer for a continuous period of at least three months. The first three days are employer-paid, and the last three days are paid for by the government (currently capped at SGD$500 a day, including CPF contributions).

Employees covered by the Employment Act are entitled to paid childcare leave for a maximum of two days a year if they have children under the age of seven years and have worked for their employer for a continuous period of at least three months.

If the employee satisfies the eligibility criteria under the Child Development Co-Savings Act, and if they have worked for the employer for a continuous period of three months, the employee is entitled to unpaid infant care leave for their children under two years of age.

9.7 Carers' rights

Singapore law makes no provision for carers' rights.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Employees covered by the Employment Act enjoy some benefits from continuous employment. For example, under Part IV of the Employment Act, no employee will be eligible for retirement benefits unless he has been in the employer's service for a continuous period of five years. See the Employment Act for more instances of continuous employment creating benefits for employees.

10.2 Consequences of a transfer of employee

For employees covered by the Employment Act, Section 18A deals with the transfer of employment where an undertaking (or part of an undertaking) is transferred from one person to another.

Section 18A provides that the transfer of an undertaking (or part of it) will not operate to terminate the contract of service of any employee employed by the transferor in the undertaking (or part of it) which is transferred. The contract of service will have effect after the transfer as if originally made between the employee and the transferee.

As a result, any terms in the contract which are made dependent on the length of service (for example, the amount of redundancy payments to be made in the event of redundancy) are not lost or reduced.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

The terms of employment for workers not covered by the Employment Act are generally governed by the employment contract between the employer and the employee. Therefore, it is possible for an employer to employ a temporary or agency worker and offer them the same terms as a permanent employee. Singapore law does not prevent an employer from offering terms to its temporary or agency workers that are less favourable than those offered to its permanent employees.

Where a temporary or agency worker enters into an employment contract with an employer and additionally meets all the requirements for the provisions of the Employment Act to apply to them, they will enjoy the same rights accorded to employees by the Employment Act. Certain rights under the Employment Act require employees to have worked for their employer for a minimum period, and those who do not meet those minimum periods of employment will not enjoy those rights.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Protection from discrimination

The only type of employment discrimination prohibited by legislation in Singapore is age discrimination. The Retirement and Re-Employment Act (Cap. 274A) applies to all employees,

including executives and managers, and prohibits the dismissal of any employee who is below the retirement age of 62 years (or other retirement age prescribed by the Minister of Manpower) on the grounds of age, notwithstanding any agreement to the contrary.

Singapore does not have any legislation that prohibits discrimination on the grounds of race, ethnicity, religion, gender, disability or sexual orientation.

While Article 12 of the Constitution does provide that all persons are entitled to the equal protection of the law and that there shall be no discrimination based on religion, race, descent or place of birth, challenges on constitutional grounds are rare.

The Tripartite Alliance for Fair Employment Practices has non-binding guidelines on fair employment practices.

Protection from harassment

Singapore law recognises a statutory tort of harassment under the Protection from Harassment Act, which applies to conduct in the workplace and outside the workplace. The tort of harassment creates liability for conduct, which includes threatening, abusive or insulting words, behaviour or communication that would cause harassment, alarm or distress to a reasonable person.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

The Employment Act provides that either employees covered by the Employment Act or their employers can terminate the employment contract by giving notice. The minimum notice periods are based on the employee's period of service, and are as follows:

- Less than 26 weeks' service: one day's notice.
- 26 weeks or more, but less than two years' service: one week's notice.
- Two years or more, but less than five years' service: two weeks' notice.
- Five years' service or more: four weeks' notice.

(Note: The notice period includes the day on which the notice is given.)

It is possible for an employee's contract to provide for a different period of notice, which can be shorter. However, the period of notice must still be the same for both the employer and the employee covered by the Employment Act.

Under common law, employees not covered by the Employment Act have an implied right to terminate a contract of employment by giving reasonable notice unless:

- The employment contract is for a fixed term.
- As a matter of construction of the contract, it is clear that the parties did not intend the contract to be terminated by one or both of the parties by notice.

What constitutes reasonable notice depends on the circumstances surrounding the particular termination.

If the contract provides for termination with notice, or salary in lieu of notice, Singapore law recognises the right of the employer to contractually terminate the employment contract without having to give any reasons.

Additionally, employees can terminate employment without notice if their employer fails to pay their salary within seven days of it being due. Likewise, their employer can terminate employment without notice if their employee is absent from work continuously for more than two working days, (a) without approval or a good excuse, or (b) without informing or attempting to inform their employer of the reason.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

Under common law, an employee can be dismissed on the grounds of misconduct without any notice or salary in lieu of notice. The employment contract can stipulate what constitutes misconduct or the employer can rely on the specified acts which are classified as misconduct under the common law, for example:

- Incompetence.
- Wilful disobedience of lawful orders.
- Fraud or dishonesty.
- Physical violence in the office.
- Abusive behaviour.
- Intoxication or drug use during office hours.
- Negligence.
- Breach of confidentiality.

The position under the Employment Act is generally similar to the common law position. Section 11 provides that either party to a contract of service can terminate a contract of service, without notice or without waiting for expiry of the notice by making a payment in lieu of notice. An employer can terminate an employee's employment contract (where that employee is covered by the Employment Act) where:

- There is wilful breach by the employee of a condition in the contract of service under section 11.
- The employee has committed any misconduct inconsistent with the fulfilment of the express or implied conditions of their service under section 14(1).
- The employee has been continuously absent from work for more than two days without prior leave from their employer, without reasonable excuse, or without informing or attempting to inform their employer of the excuse for that absence under section 13.

14.2 Protected employees

Protection against dismissal is provided to female employees on maternity leave. In addition, employees covered by the Employment Act who have been dismissed may make representations to the Minister for Manpower to be reinstated to their former employment.

The protection given to female employees on maternity leave under the Employment Act is also available to female employees covered by the Child Development Co-Savings Act.

It is unlawful for an employer to terminate the employment of a female employee without sufficient cause provided that she has:

- Worked for her employer for at least three months before receiving the notice of dismissal or retrenchment.
- Been certified pregnant by a medical practitioner before receiving the notice of dismissal or retrenchment.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Definition of redundancy/layoff

Redundancies and layoffs are more commonly known as retrenchments in the Singapore context and are defined to refer to a portion of the staff or the labour force being discharged due to a surplus of employees.

Procedural requirements

Singapore law does not have any mandatory procedural requirements that the employer must follow when making employees redundant. However, the Ministry of Manpower recommends that, as far as is possible, affected employees should be informed of the impending retrenchment before notice of the retrenchment is given.

Redundancy/layoff pay

The Employment Act states that employees covered by Part IV who have been in the continuous service of their employer for less than three years are not entitled to retrenchment benefits.

Employees covered by Part IV with the requisite length of service are entitled to retrenchment benefits.

However, employees not covered by Part IV of the Employment Act will have a right to retrenchment benefits where these are provided for in the employment contract or collective agreement.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Singapore's employment laws do not give employees a right to management representation or employee consultation, save for the requirement placed on the employer to consult with its employees under a transfer of business (Section 18A of the Employment Act).

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

In the event that the employer delays in conducting consultations as prescribed in Section 18A of the Employment Act, the Commissioner for Labour may direct the employer to comply.

A dispute between the employer and the employees relating arising from a transfer of business related to Section 18A of the Employment Act may be referred to the Commissioner for Labour and dealt with pursuant to Section 115 of the Employment Act.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

Employees covered by the Employment Act are statutorily protected on a business transfer under Section 18A. Other employees not covered by the Employment Act will have their employment contracts terminated on a business transfer under the common law.

18.1 Automatic transfer of employees

Section 18A of the Employment Act provides for the automatic transfer of employees. The employee's contract of service is also automatically transferred so that there is no break in the continuity of service as regards the contract of employment.

18.2 Protection against dismissal

Considering the legislative intention behind Section 18A, it is likely that the transferor of a business is entitled to dismiss employees before the transfer takes place.

18.3 Harmonisation of employment terms

Section 18A(12) allows the transferee and the employee, or the trade union representing the employee, to negotiate different terms if they need to.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Foreign nationals

A foreign national working in Singapore is liable to pay income tax where they have tax residency status. A person is considered to be tax resident in Singapore for the calendar year concerned if they stay or work in Singapore either:

- For at least 183 days in a calendar year.

- Continuously for three consecutive years.
- For at least 183 days for a continuous period over two years.

A tax resident will be taxed on all income earned in Singapore. The income, after the deduction of tax reliefs, will be taxed at progressive resident rates. Any foreign-sourced income brought into Singapore on or after 1 January 2004 is tax exempt.

Nationals working abroad

Generally, overseas income received in Singapore on or after 1 January 2004 is not taxable and does not need to be declared. This includes overseas income paid into a Singapore bank account. Overseas income is taxable in Singapore if it is received in Singapore through partnerships in Singapore, or if the overseas employment is incidental to the employee's Singapore employment (that is, as part of the employee's work in Singapore, the employee needs to travel overseas).

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

Rate of taxation on employment income

Income tax is charged at a progressive rate, and the tax rates applicable for YA 2012 to YA 2016 are as follows:

- For every dollar of the first SGD$20,000: 0%.
- For every dollar of the next SGD$10,000: 2%.
- For every dollar of the next SGD$10,000: 3.5%.
- For every dollar of the next SGD$40,000: 7%.
- For every dollar of the next SGD$40,000: 11.5%.
- For every dollar of the next SGD$40,000: 15%.
- For every dollar of the next SGD$40,000: 17%.
- For every dollar of the next SGD$120,000: 18%.
- For every dollar exceeding SGD$320,000: 20%.

Social security contributions

Employers in Singapore must make contributions to the Central Provident Fund (CPF) accounts of their employees who are Singapore citizens or permanent residents. Employees' contributions to the account are deducted by the employer from the employees' salary and paid into the account. CPF contributions represent a compulsory form of pension system in Singapore which is administered by the CPF Board.

Further information on the contribution rates payable by employers and employees can be found on the CPF Board's website (*www.cpf.gov.sg*).

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

In Singapore, it is common to reward employees through contractual or discretionary bonuses. There are generally no restrictions or guidelines on what bonuses can be awarded.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

Restrictive covenants in employment are based on the common law. It is possible to restrict an employee's activities during employment and after termination. However, the restriction must be reasonable with reference to the interests of both the employer and the employee, that is, it must relate to a legitimate interest of the employer (for example, trade secrets or customer connections) and must not be unreasonably wide.

In addition, the restriction must be reasonable in reference to the interests of the public.

Post-employment restrictive covenants

Under Singapore law, employers generally do not have a duty to pay a former employee while they are subject to post-employment restrictive covenants.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

The Employment Act has gone through some phased changes in the past couple of years. More changes to the Employment Act - for example making it mandatory for employers to give their workers' payslips, electronic or otherwise - are expected in the first half of 2016.

CPF Board policies and regulations are very often adjusted. It is prudent for employers to keep abreast of the latest developments by regularly visiting the CPF Board's website (*www.cpf.gov.sg*).

Parts of this overview were written by Abdul Jabbar Bin Karam Din, Kala Anandarajah, Rajesh Sreenivasan and Jimmy Oei of Rajah & Tann LLP. Stephanie Wee of Shook Lin & Bok has updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.

September 2015

South Korea

South Korea

SOUTH KOREA

SCOPE OF EMPLOYMENT REGULATION

1 Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Laws applicable to foreign nationals

Korean labour and employment laws apply, in principle, to foreign nationals working in Korea. Further, labour and employment law is a matter of public policy. Unlike many other nations, provisions guaranteeing employment rights are enshrined in the Republic of Korea's Constitution:

- Article 32 guarantees the right to work and a minimum wage.
- Article 33 guarantees employees' rights of association, collective bargaining and collective action.

Certain generic civil law principles are applied to working conditions even in the absence of specific regulation under the labour laws. These include the principles of:

- Good faith.
- Fair dealing.
- Preventing an abuse of legal right.

Some labour laws also provide for criminal penalties for certain violations. For example, the Labour Standards Act (LSA) (which regulates minimum standards for working terms and conditions) and the Trade Union and Labour Relations Adjustment Act (TULRAA) (which regulates matters concerning employees' rights of association, collective bargaining and collective action) have penal provisions which carry criminal punishments, including fines and imprisonment.

The LSA is Korea's principal law regulating the minimum working conditions for employees and prescribing the basic legal framework governing labour relations between employers and employees. It applies to all workplaces, with some variations in the application of certain provisions depending on the number of employees in the workplace, and has as its basic principles:

- A prohibition on the lowering of working conditions.
- Compliance in good faith with collective bargaining agreements, rules of employment and the terms of employment contracts.
- The equal treatment of employees.
- Mutual agreement between employers and employees.
- A prohibition on forced labour.
- A prohibition on violence.
- A guaranteed right to exercise civil rights.

Various criminal penalties may be imposed on an employer who violates the LSA, including up to five years' imprisonment or a fine of up to KRW30 million.

The TULRAA is the principal collective labour relations law in Korea. It governs the legal requirements for the establishment and operation of trade unions, the basic framework for raising and dealing with labour disputes, and the legal formalities for the mediation and arbitration of labour disputes. The TULRAA establishes the following:

- The freedom of employees to establish a trade union.
- The authority of the trade union.
- The prerequisites for, and limits on, industrial action.
- The prohibition on industrial action during a period of mediation/arbitration.

- The prohibition on unfair labour practices.

Various criminal penalties can be imposed on a trade union, an employee or an employer who infringes the TULRAA, including up to five years' imprisonment or a fine of up to KRW50 million.

1.2 Laws applicable to nationals working abroad

Whether or not Korean employment law applies to nationals working abroad is dictated by the provisions contained in their contract of employment. That said, if employer and national working abroad do not specify the governing law in the employment contract and the employment contract is closely tied to Korea, there is a possibility that Korean law shall apply and govern.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

Under Korean law, workers are categorised as follows:

- Employee: a worker who offers work or services to a workplace in exchange for payment of wages (here the LSA will apply).
    - Full-time employee: a worker who has executed an employment contract with the employer without defining the duration of the contract (here the LSA will apply).
    - Fixed-term employee: a worker who has executed a fixed-term employment contract (here the Act on Protection of Fixed-Term and Part-Time Workers will apply).
    - Part-time employee: a worker who works part-time, meaning less hours per week than the weekly working hours of full-time employees performing same or similar work at the workplace (here the Act on Protection of Fixed-Term and Part-Time Workers will apply).
    - Dispatched employees (that is, agency workers): workers employed by a temporary work agency, who provide services for a user company (under their direction and instruction) in accordance with the terms and conditions of a contract on temporary placement of workers, executed between the temporary work agency and the user company. The employment relationship is with the temporary work agency. (The Act on the Protection of Temporary Agency Workers will apply).
- Independent contractors.
- Other types of workers, such as subcontract workers. Workers employed by a subcontractor usually work at the user company's premises, but are under the direction and supervision of the subcontractor, not the user company.

2.2 Entitlement to statutory employment rights

All employees are entitled to statutory employment rights, such as statutory severance pay and paid annual paid leave, while other types of worker (such as independent contractors) are not.

2.3 Time periods

For fixed-term employees, the employer can utilize the employees for a maximum of two years. After this time, the employers are legally required to hire the employees as permanent employees.

For dispatched employees, the user company can utilize employees for a maximum of two years. After this time, the user company is obliged to employ the employees as permanent or fixed-term employees.

RECRUITMENT

3 Do any filings need to be made when employing people?

There is no general filing requirement for employing people other than the completion of social insurance reports. However, an employer with 300 or more employees is required annually to publish the status of its employees (ie, the breakdown of the various types of employees employed).

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country?

4.1 Visa

Long-term and short-term general work visas are available to visit Korea for business-related purposes. Two short-term visas are available (C-3-4 and C-4 visas), and three long-term visas are available (D-7, D-8 and E-7 visas). The appropriate visa type depends, among other things, on the nature of the assignment/employment and the type of employing entity located in Korea.

Special work visas (E-4, D-5 and D-9 visas) are available for foreign nationals working in highly specialised areas of expertise.

Special resident visas (F-4 and F-5 visas) are available which allow a foreign national to live and work in Korea without requiring a separate work visa.

4.1.1 **Procedure for obtaining approval.** The procedure to obtain each type of visa is as follows:

- **C-3-4 visa.** Even for a short-term stay in Korea, if the nature of the visit is for business purposes, this short-term business visa is required. This visa can be obtained by applying to a Korean consulate outside Korea with proper documentation.
- **C-4 visa.** An applicant must obtain this visa in order to be employed by a Korean company for a period of 90 days or less. This visa can be obtained by applying to a Korean consulate outside Korea with the proper documentation.
- **D-7 visa**. This long-term visa is available to an expatriate employee of a branch or liaison office of a foreign enterprise who has been assigned from, and worked with, the head office, branch or other affiliates for at least one year before the Korea assignment. D-7 visa processing requires a pre-approval certified number from the Immigration Office. On receipt of the pre-approval certified number, the expatriate can visit a Korean consulate to have the visa stamped in their passport.
- **D-8 visa.** This long-term visa is available to an expatriate employee of a Korean subsidiary or joint venture of a foreign enterprise who is being assigned from the foreign affiliate to the foreign-invested Korean entity. For most nationalities (exceptions apply), on entering Korea with either no visa, a tourist visa or a short-term business visa, a request can be made for a visa status change from the entry visa to a long-term D-8 work visa.
- **E-7 visa.** This type of visa applies to a foreign national directly hired by a Korean company, including a branch of a foreign-invested company. Therefore, generally, a foreign national applying for an E-7 visa is not an assignee seconded from a foreign affiliate as with expatriates under D-7 and D-8 visas. As part of the process, a recommendation letter from the appropriate Korean ministry is maybe required in some cases. A pre-approval certified number and visa stamping outside Korea at a Korean consulate is also required.
- **E-4 visa.** This technological supervision visa can be granted to a foreign national who enters Korea on the invitation of a Korean company to provide expertise in industrial technologies. The inviting company should file an application and supporting documents (including the high technology inducement contract) with the Immigration Office. If accepted, the applicant will receive a pre-approval certified number. The remaining procedure is the same as that under D-7 and E-7 visas.
- **D-5 visa.** This visa applies to a special correspondent from a foreign media or broadcasting company on assignment to Korea. On approval, a pre-approved certificate is issued. The remaining procedure is the same as that under D-7 and E-7 visas.
- **D-9 visa.** This visa generally applies to foreign technicians dispatched to Korea to supervise shipbuilding and the manufacture of industrial equipment. The technicians are generally dispatched from the foreign entity importing the ships or industrial equipment. A pre-approval certified number and visa stamping outside Korea at a Korean consulate is also required.
- **F-4 visa.** This visa is given exclusively to a foreign national with Korean heritage. With this resident visa, no employer sponsorship is required and it is possible to work in Korea without obtaining any other work visas.
- **F-5 visa.** This is a long-term resident visa given to foreign nationals meeting certain specified qualifications, which include making a substantial investment into Korea or holding a long-term work visa for at least five years, among other things.

4.1.2 **Cost.** The cost for each type of visa, may vary depending on the country of applicant, but on average is as follows.

- **C-3-4 visa.** Visa issuance is US$50 (single entry) and US$100 (multiple entry).
- **D-7 visa.** Visa issuance is US$80 (single entry) and US$100 (multiple entry), and KRW30,000 for alien registration.
- **D-8 visa.** Visa issuance is US$80 (single entry) and US$100 (multiple entry), and alien registration is exempt from any fees. Changes of sojourn status and alien registration are exempt from any fees.
- **E-7 visa.** Visa issuance is US$80 (single entry) and US$100 (multiple entry), and KRW30,000 for alien registration.
- **E-4 visa.** Visa issuance is US$80 (single entry) and US$100 (multiple entry), and KRW30,000 for alien registration.
- **D-5 visa.** Visa issuance is US$80 (single entry) and US$100 (multiple entry), and KRW30,000 for alien registration.
- **D-9 visa.** Visa issuance is US$80 (single entry) and US$100 (multiple entry). Change of sojourn status and alien registration are KRW130,000.
- **F-4 visa.** Change of sojourn status and alien registration are KRW130,000.
- **F-5 visa.** Change of sojourn status and alien registration are KRW230,000.

4.1.3 **Time frame.** The time frame for obtaining each type of visa is:

- **C-3-4 visa.** Usually from three to seven working days.
- **D-7 visa**. Obtaining a pre-approval certified number takes two to three weeks. Visa issuance takes three to five days, and alien registration takes three weeks.
- **D-8 visa**. Obtaining a pre-approval certified number takes two to three weeks. Visa issuance takes three to five days, and alien registration takes three weeks. Change of sojourn status and alien registration takes three weeks.
- **E-7 visa.** Obtaining a pre-approval certified number takes three to four weeks. Visa issuance takes three to five days, and alien registration takes three weeks.
- **E-4 visa.** Obtaining a pre-approval certified number takes two to three weeks. Visa issuance takes three to five days, and alien registration takes three weeks.
- **D-5 visa.** Obtaining a pre-approval certified number takes two to three weeks. Visa issuance takes three to five days, and alien registration takes three weeks.
- **D-9 visa.** Obtaining a pre-approval certified number takes two to three weeks. Visa issuance takes three to five days, and alien registration takes three weeks.
- **F-4 visa.** Change of sojourn status and alien registration takes three weeks.
- **F-5 visa.** Change of sojourn status and alien registration takes approximately six months.

Generally speaking, a visa should be renewed before the expiration date and the applicant must reside in Korea during the renewal process.

4.2 Permits

While no permits are required for a foreign national to work in Korea, he/she is required to obtain a sojourn status eligible for employment activities. For additional details please refer to "4.1 Visa."

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

5.1 Written employment contract

Under the LSA, all employers in Korea must enter into a written agreement with their employees which details, among other working conditions:

- Wages.

- Working hours and recess periods.
- Weekly paid days off.
- Paid annual leave.

Any agreement that does not satisfy the standards prescribed by the LSA and other binding laws relating to working conditions will be void to the extent that it fails to meet those legal requirements.

5.2 Implied terms

Certain terms are implied into the employment relationship by the LSA, collective bargaining agreements (CBAs) and the employing company's rules of employment (ROE). The general practice in Korea is to have open-ended contracts. Contracts for a specified term are also permitted, although there is an implied term that, after two years of service with an employer, a worker will be deemed to be employed on an unlimited term contract. Typically, the provisions of an individual employment contract secure special working conditions for the individual employee that are not covered by the relevant laws, CBA or ROE.

5.3 Collective agreements

The CBA includes provisions relating to employees' working terms and conditions (for example, wages, bonus, working hours and so on), as well as the rights and obligations of the union and management. The LSA provides that a company's ROE must not conflict with the company's applicable CBA. In addition, the TULRAA provides that if the ROE or an employment contract contains provisions that violate the standards specified in the CBA concerning working conditions and other treatment of employees, those conflicting provisions will be deemed null and void and the corresponding provisions of the CBA will override those conflicting provisions.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Under the LSA, the company must obtain the majority consent of the employees as a group or union (if a majority union exists) if it wishes to make changes that are disadvantageous to the employees. The employer should consult with employees to make unilateral changes where these are not disadvantageous to the employees.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

An employer must allow employees a minimum of one paid day off per week under the LSA. Sunday is generally designated as the paid weekly day off. A company that has implemented a 40-hour working week must provide 15 days of paid annual leave after one year of service with the company, and an additional day for each two years of service thereafter (capped at 25 days).

7.2 Public holidays

In addition, employers must treat 1 May (Labour Day) as a mandatory paid holiday for employees under the Establishment of Labour Day Act of 1994. An employer has no legal obligation to treat other public holidays as paid holidays, though in market practice it is firmly embedded that they are treated as paid holidays. The following is a list of Korean public holidays, which are at times subject to change:

- 1 January.
- 31 December, 1 and 2 January of the Lunar Calendar: Lunar New Year's Holiday (Seollal).
- 1 March: Independence Movement Day.
- 5 May: Children's Day.
- 8 April of the Lunar Calendar: Buddha's Birthday.
- 6 June: Memorial Day.
- 14, 15 and 16 August of the Lunar Calendar: Harvest Festival (Chuseok).
- 15 August: Liberation Day.
- 3 October: National Foundation Day.

- 9 October: Hangeul Day
- 25 December: Christmas Day.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

8.1 Entitlement to time off

There is no legal requirement for employers to provide leave to employees for non-work related illnesses or injuries. It is not uncommon, however, for companies to provide paid sick leave whether or not an injury or illness is work related. Employees will generally use their annual paid leave as personal sick days if paid sick leave is not available.

8.2 Entitlement to paid time off

Employers are required under the LSA to provide paid leave for work-related illnesses or injuries.

The LSA requires employers to compensate employees for any work-related injury, disease or death. However, the Industrial Accident Compensation Insurance Act (IACIA) provides that an employer who subscribes to the industrial accident compensation insurance offered under the IACIA is exempt from that liability. Under the LSA, if gross negligence on the part of the employee is to blame for a work-related injury or disease, and the Labour Relations Commission (LRC) certifies that negligence, the employer need not provide compensation for any suspension of work or disability. Even in these cases however, the employer is required to provide for medical expenses, survivor's compensation and funeral expenses.

8.3 Recovery of sick pay from the state

Sick pay paid to an employee cannot be recovered from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Employers must grant pregnant female employees a total of 90 days' (120 days in case of multiple births) paid maternity leave, which can be used before or after childbirth. Compensation for 60 days (75 days in case of multiple births) is paid by the employer, while the remaining 30 days (45 days in case of multiple births) is paid from the Employment Insurance Fund, a state-run fund established by the Ministry of Employment and Labour under the Employment Insurance Act 1993.

Employers must also provide 30 minutes of paid nursing periods twice per day for female employees with children under the age of one. The statutory maternity leave includes holidays and Sundays. In addition, at least 45 days (60 days in case of multiple births) must be used after childbirth (but where more than 45 days (60 days in case of multiple births) were spent before childbirth, an employer must allow 45 days (60 days in case of multiple births) of maternity leave after childbirth.

Any period in excess of the statutorily prescribed days need not be considered paid leave. Although certain limitations exist, maternity leave must be allowed for premature births, miscarriages and stillbirths.

With effect from 25 September 2014 for employers with 300 or more employees (25 March 2016 for employers with less than 300 employees), a female employee may request for reduction of two working hours a day during the (a) first 12 weeks of pregnancy or (b) after 36 weeks into her pregnancy until commencement of maternity leave. The employer shall not reduce wages of the relevant employee when granting the request for such working hour reduction.

9.2 Paternity rights

With effect from 2 August 2012 under the GEEA, male employees are entitled to three days' paid leave, with two additional days of unpaid leave, which can be taken at the employer's discretion within 30 days of the child's birth.

9.3 Surrogacy

There are no regulations specifically addressing the issue of surrogacy.

9.4 Adoption rights

There are no regulations specifically addressing adoption rights.

9.5 Parental rights

The GEEA requires employers to provide a one-year leave of absence for childcare (not including the days of paid maternity leave used after childbirth in the case of a female employee) for any male or female employee with a child (including adopted child) under the age of eight or in the second year of elementary education or lower. That leave must be included when taking into account the employee's period of continuous service. In determining how to utilise childcare leave (or the work hour reduction), an employee can choose any one of the following methods:

- A one-time use of childcare leave.
- A one-time use of work hour reduction.
- A multiple-time use of childcare leave.
- A multiple-time use of work hour reduction.
- A one-time use of childcare leave and a one-time use of work hour reduction.

Whichever method is used, the overall period cannot exceed one year.

9.6 Carers' rights

With effect from 2 August 2012, the GEEA requires employers to provide up to 90 days' (and at least 30 days') family care leave per year for employees whose family members are sick, injured or old and need the employee's care, with certain exceptions (for example, it is impossible to find a replacement for that employee).

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

The Employee Retirement Benefit Security Act (ERBSA) provides that employees who have worked at least one year with their employer are entitled to statutory separation pay, which must be at least 30 days' average wages for each year of service. Because the amount is calculated based on the employee's most recent wages, the amount of the statutory separation pay typically increases with years of tenure, especially at large companies where wages rise with seniority.

10.2 Consequences of a transfer of employee

In a business transfer, the transferee assumes the employment of the transferring employees on their same terms and conditions of work, together with all relevant liabilities, unless the employees agree otherwise.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Under the relevant laws, the salaries and benefits of non-permanent workers should be equivalent to those of permanent employees for the same or similar jobs. If the employer violates these

obligations in a manner that constitutes unreasonable discrimination, the affected non-permanent workers can request remedial action by filing a detailed statement with the relevant Regional Labour Relations Commission (RLRC) within six months after the alleged violation. In addition, fixed-term contract employees on the company's payroll whose term exceeds two years are automatically presumed to be permanent employees in law once that two-year period has been worked.

11.2 Agency workers

See above (Temporary Workers 11.1).

11.3 Part-time workers

Under the LSA, part-time worker's working terms and conditions should be pro-rata, based on the number of hours compared to that of a full-time worker who performs the same work.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Article 6 of the LSA expressly prohibits discrimination based on:

- Gender.
- Nationality.
- Religion.
- Social status.

The Gender Equality Employment and Work-Family Balance Support Act (GEEA) likewise prohibits employment discrimination based on gender, focusing in particular on discrimination against women.

The Employment Promotion and Vocational Rehabilitation for Disabled Persons Act provides rehabilitation opportunities and job stability for disabled employees. This Act prohibits discrimination against any employee based solely on an employee's disability for all work-related employer actions including hiring, promotion and job transfer. In addition, under the Anti-discrimination Against Disabled Persons Act, employers employing 30 or more regular employees must provide to their disabled employees reasonable accommodation to allow them to work under equitable working conditions with other non-disabled employees.

This Act also requires the provision of reasonable accommodation to disabled female employees with respect to the use of day care facilities at the workplace, and the necessary means, such as sign language or raised letters, for hearing-impaired or vision-impaired employees to understand information produced or distributed by the employers and trade unions.

Under the Age Discrimination Prohibition in Employment and Aged Employment Promotion Act, all forms of age discrimination in the workplace, whether direct or indirect, are prohibited. This Act prohibits age discrimination in recruiting and hiring, as well as discrimination in other aspects of employment, including hiring, benefits, training, assignment and termination. The Employment of Foreign Workers Act (otherwise known as the Employment Permit System Act) prohibits discrimination against foreign employees by employers and is designed to provide workers who are foreign nationals with legal employment status.

The GEEA strictly prohibits sexual harassment in the workplace. As defined by the GEEA, sexual harassment in the workplace refers to a situation where an employer, a manager or an employee, by using their position at work or in relation to work, makes another employee feel sexually humiliated or offended by using sexual language or behaviour, or disadvantages an employee at work as a result of his/her refusal to accept sexual advances. Employers, managers and employees are prohibited from engaging in sexual harassment in the workplace. Whether sexual harassment exists in any particular case will be determined based on the viewpoint of the complaining party, regardless of the intent or perception of the alleged harasser.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

13.1 Notice periods

If an employee is dismissed, the LSA requires that the company provide the employee with 30 days' prior notice or 30 days' ordinary wages in lieu of notice. The company can be exempted from this requirement if either:

- It can establish that it is impossible to maintain its business due to a natural disaster or other unavoidable reason.
- The employee intentionally causes substantial problems for the company or intentionally damages company property.

The notice of dismissal must be given in writing, specifying the reason for dismissal and the effective date.

13.2 Severance payments

A company must pay statutory separation pay to any departing employee who has worked at a given company for at least one year, regardless of the circumstances under which the departure occurs (that is, whether it was a voluntary or involuntary departure). The legal minimum separation payment obligation for the employer is 30 days' average wage for each consecutive year of service. For the purposes of calculating separation payments, "average wage" includes all wages paid by the employer to the employee for the three month period before the date of departure divided by the total number of days during the same period. The statutory separation pay must be paid within 14 days from the effective date of the employee's departure from the company, unless the time is extended by agreement.

13.3 Procedural requirements for dismissal

Korea is not an "employment at will" jurisdiction. As a general rule, under Article 23 of the LSA, an employer with five or more employees cannot dismiss, suspend, transfer or take any other adverse employment action without establishing "just cause" for its action. What constitutes just cause is not expressly defined in the LSA. Therefore, if a dismissal is challenged by the affected employee, the labour authorities and courts will consider all of the circumstances to determine whether an employer has satisfied its burden of establishing just cause. As a matter of practice and interpretation, it is a highly stringent and difficult standard to meet.

In general, "just cause" to dismiss an employee can be based on the employee's own acts of serious or repeated misconduct or wrongdoing, or other poor performance issues, or on the employer's substantial business or economic reasons, generally termed "urgent business necessity".

13.4 Misconduct/poor performance

If an employee challenges a dismissal for misconduct or poor performance, the courts will determine whether the dismissal was warranted by that particular misconduct or poor performance, considering the legislative intent behind the LSA and relevant case law. The key factors taken into consideration include:

- The frequency and degree of the employee's misconduct or poor performance.
- The impact on the company.
- Whether the company gave the employee an opportunity to redeem themselves.

In general, it is more difficult for the employer to establish just cause in relation to a poorly performing employee than in the case of an employee who has committed serious misconduct.

13.5 Layoffs for economic reasons (urgent business necessity)

The LSA provides that an employer can dismiss workers if it can show that there is an "urgent business necessity" to do so. In practice, this reason for dismissal constitutes a redundancy/layoff situation *(see Question 15).*

In addition, when dismissing employees the company must observe the procedures outlined in the Rules of Employment (ROE) or in other company regulations. In the absence of specific provisions concerning the procedures to be followed, a company is not legally obliged to provide any particular form of due process. However, from a practical standpoint, fair and appropriate due process procedures are strongly recommended by labour authorities when dismissal is involved. Typically, a disciplinary action committee (comprised of management members) will hold a

meeting at which the employee can present a defence before the committee renders its decision to dismiss or carry out any disciplinary measures.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

An employee dismissed for just cause who believes that there is no just cause for the dismissal can challenge the dismissal by bringing a claim before the relevant Regional Labour Relations Commission (RLRC). The RLRC will conduct a single hearing, and generally provides a decision within two to three months. If the RLRC decides that the employee was dismissed unfairly, it can order the employer to reinstate the employee with back pay. Either the employee or the employer can appeal the RLRC's decision to the National Labour Relations Commission (NLRC). Subsequent appeals must be filed within the court system, starting with the administrative court, followed by the appellate court, and finally the Supreme Court.

If the employer does not comply with the RLRC's order to reinstate the affected employee with back pay, the RLRC can impose an administrative penalty (which is not a criminal fine) of up to KRW20 million. If the employer still does not comply, the penalty can be imposed up to four times within a two-year period. An employee dismissed without just cause can also initiate civil proceedings at the District Court. If the employer does not comply with a decision to reinstate the employee with back pay once the decision has become final (that is, after the appeals process has been completed), the Ministry of Employment and Labour (MOEL) can file a criminal complaint against the employer, with possible penalties of up to one year's imprisonment or a fine of up to KRW10 million. This fine is often applied both to the company and the individual representative in charge of operations (usually the representative director).

14.2 Protected employees

Employees who are on sick leave or maternity leave are protected from dismissal.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

15.1 Definition of redundancy/layoff

The LSA provides that an employer can dismiss workers if it can show that there is an "urgent business necessity" to do so subject to certain procedural requirements. Where there is an "urgent business necessity" reason, the employer can make redundant or layoff employees.

15.2 Procedural requirements

The "urgent business necessity" standard has been interpreted to mean that a company must demonstrate losses over a considerable period of time (at least one or two years). The Supreme Court has held that this standard can be satisfied in the event of continuous losses which may trigger bankruptcy, but cannot be satisfied by temporary business losses. The performance of the company as a whole, not a particular division, will be examined unless a division is truly independent from the other divisions and acts as an autonomous business unit. While the winding-up of a business is per se a justifiable reason for dismissal of employees, the closure of a division would not constitute a justifiable reason, unless the division is independent from the rest of the company or another separate business justification exists.

In addition, the Supreme Court has indicated that the restructuring or reorganisation of a company to improve productivity, strengthen competitiveness, change the business of the company, or change the organisational structure of the business or industry, may qualify as legal grounds for dismissal of employees. Therefore, a business line or division closure may also constitute an "urgent business necessity" if the purpose of the closure satisfies the Supreme Court's criteria.

A company is required to make every effort to avoid layoffs. Court precedents indicate that these efforts should include the following:

- Salary freezing.
- A freeze on new hiring.
- Reducing work hours and eliminating overtime.
- Rationalising the work system.

- Implementing cost-cutting measures.
- Transferring employees to other departments, or transferring them for education and training.
- Temporary suspension.
- Seeking voluntary resignations.

Reasonable and fair criteria must be used to select the employees who will be subject to layoffs, and 50 days' prior notice must be given to the union or the representative of the majority of employees. The employer must engage in good faith consultation to examine possible measures to avoid dismissals and to identify the selection criteria for dismissals. If a certain threshold number of employees is to be laid off (generally 10%), a layoff report must be filed with the MOEL at least 30 days before the effective date of the layoffs. If, within three years after a layoff, the employer decides to reinstate jobs from which employees were dismissed, the employer must first offer those jobs to the previously dismissed employees before hiring new employees.

15.3 Redundancy/layoff pay

A company must pay statutory separation pay to any departing employee who has worked at a given company for at least one year, regardless of the circumstances under which the departure occurs (that is, whether it was a voluntary or involuntary departure). The legal minimum separation payment obligation for the employer is 30 days' average wage for each consecutive year of service. For the purposes of calculating separation payments, "average wage" includes all wages paid by the employer to the employee for the three month period before the date of departure divided by the total number of days during the same period. The statutory separation pay must be paid within 14 days from the effective date of the employee's departure from the company, unless the time is extended by agreement.

Employers are not required to provide benefits for employers who are laid off, other than the employee's statutory separation pay entitlement. However, as a matter of practice, additional payments are often made in exchange for the employee's resignation, release and waiver.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

16.1 Management representation

Employees are not entitled to management representation.

16.2 Consultation

The Promotion of Worker Participation and Cooperation Act enacted in 1997 provides that a business or a workplace employing 30 or more employees must establish a Labour Management Council (LMC). The LMC promotes welfare and co-operation between employers and employees, and quite often serves as a useful discussion platform for issues. The LMC should be comprised of an equal number of employee and management representatives (from three to 10 representatives from each side; the representative director is required to be one of the management representatives) and held each quarter. Although the LMC discusses a range of employment-related matters, certain issues can only be resolved by a resolution by the LMC, including:

- Establishment of basic employee training plans.
- Establishment and management of welfare facilities.
- Establishment of an in-house employee welfare fund.
- Employee grievances that are not resolved by the grievance handling committee.
- Establishment of various labour management joint committees.

The LMC does not have the right to initiate, order or take industrial actions such as strikes, in contrast to a labour union, which is a voluntarily formed group comprised of employees, which operates with no interference from management and retains the right to bargain with and take industrial actions against the employer.

16.3 Major transactions

Employee consultation is not required for major transactions unless ROE, CBA or other contractual arrangements between the employer and the employees contain such a requirement.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

In certain circumstances the employer's action can be deemed null and void in the absence of required consultation. Action for breach of contract may be possible but damages should be substantiated.

17.2 Employee action

In principle, employees cannot take any action to prevent proposals going ahead.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

Under Korean case law precedent, in the event of a business transfer from an employment perspective, the transferee automatically assumes the transferor's responsibilities as regards the employees (including their working terms and conditions, and liabilities), unless the employees otherwise agree.

18.2 Protection against dismissal

Unless there is just cause, employees are they protected against dismissal (before or after the transfer).

18.3 Harmonisation of employment terms

Harmonisation of employment terms is allowed, but if changes that are disadvantageous to the employees are involved, the majority consent of the employees as a group or the union (if a majority union exists) will be required.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

19.1 Foreign nationals

Under the Korean Individual Income Tax Law, an individual who has domicile or residence in Korea for 183 days or longer is regarded as a resident and subject to income tax on all worldwide income derived from sources both within and outside Korea. For practical purposes, a foreign national assigned to Korea for 183 days or longer is regarded as resident from the first day of the assignment. However, foreign nationals that have resided in Korea for five years or less during the past 10 years are taxed on Korea source income and only the foreign source income that is paid in Korea or being remitted to Korea.

A non-resident is an individual who is not deemed to be a resident, and non-residents are only taxed on Korea source income, depending on the tax treaty between Korea and the country where the non-resident has residence.

Employment income paid by a local employer (including recharge to a Korean entity after an initial payment by a foreign entity) should be reported and withheld by the local employer on a monthly basis.

Employment income paid by a foreign employer must be voluntarily reported and paid by an individual employee either through the annual tax return, or through the taxpayers' associations that collect and remit taxes on a monthly basis on behalf of the individual.

19.2 Nationals working abroad

A Korean national working abroad on a foreign assignment will be still regarded as a resident of Korea if they are expected to return to Korea on completion of the foreign assignment, because their property remained in Korea, or family members remained in Korea, or their employment relationship is in Korea, regardless of their nationality or any right of permanent residence. They are subject to Korean income tax on their worldwide income. However, Korean income tax is not levied on KRW1 million or less per month from the remunerations that the individual receives in consideration of providing their employment services abroad.

The reporting requirements for employment income are the same as for foreign nationals (*see above **Error! Reference source not found.**, Foreign nationals).*

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Rate of taxation on employment income

The following tax is payable under Korean income tax rates (including 10% local income surtax):

- Income up to KRW12 million: 6.6%.
- Income of between KRW12 million and KRW46 million: 16.5%.
- Income of between KRW46 million and KRW88 million: 26.4%.
- Income of between KRW88 million and KRW150 million: 38.5%.
- Income over KRW150 million: 41.8%.

An exclusive tax benefit is provided to foreign nationals working in Korea who do not have Korean nationality only up to the calendar year when the five year period has elapsed since his/her first working day in Korea. Foreign nationals are given an option to either:

- Pay a flat 18.7% tax (including local income surtax) on gross employment income.
- Pay taxes calculated applying the regular progressive tax rates and deductions, exemptions, credits and so on available.
- A flat 18.7% tax rate option is available to foreign nationals who may make the choice after the end of each year. If a foreign national submits an application for the 18.7% flat rate on "monthly" salaries to the tax office on or before the 10th of the month following that of services, the local employer or the taxpayer's association should withhold taxes on monthly payroll at the 18.7% flat rate. The flat rate option offers no deductions, exemptions, credits and so on available under the graduated tax rate option, but the flat rate option is generally preferable for high income earners (individuals whose monthly employment income is about KRW12 million or more).

20.2 Social security contributions

In addition to income tax, there are four types of social security taxes in Korea:

- **National Pension**, to which the employer and employee both contribute 4.5% each.
- **National Health Insurance**, the employer and employee both contribute 3.035%, plus an additional 6.55% of the national medical insurance premium, for Elderly Long-Term Care Insurance.
- **Employment Insurance**, to which the employer contributes between 0.9% and 1.5% (depending on the industry and number of employees), and the employee contributes 0.65%.
- **Workers' Compensation Insurance**, to which the employer contributes between 0.6% and 34% (depending on the industry). The employee does not make any contributions to this.

Any employer with one or more employees must subscribe to national health insurance under the National Health Insurance Act (NHIA). Since 1 January 2006 foreign nationals working in Korea are also required to subscribe to the national health insurance programme, which had previously been optional for foreign nationals. However, they can be exempted if they show that they are provided with health insurance coverage commensurate with Korea's either:

- Under the laws or the health programme of their respective jurisdictions.
- Under a contract with the company employing them.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

The provision of bonuses is a common practice in Korea. Some take the form of fixed bonuses, particularly in larger Korean companies, ranging from 400% to 800% of the monthly basic pay, typically paid in instalments on the two major Korean holidays (Korean Thanksgiving and the Lunar New Year). Other bonuses take the form of a discretionary bonus based on the individual performance of the employee and/or the performance of the company. There are no restrictions or guidelines governing how bonuses must be paid, unless these are contained in an ROE, CBA or the employment contract.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

22.1 Restriction of activities

Under Korean law, trade secrets and confidential information can generally be protected either within the contract of employment between the employer and the employee, or under the Unfair Competition Prevention and Trade Secret Protection Act (UCPA) provided that both:

- The information falls within the meaning of trade secrets as defined by the UCPA.
- The unauthorised disclosure or use of the information is prohibited by other relevant law (for example, the Patent Act and the Design Protection Act).

The UCPA defines trade secrets as confidential information on technology and/or business operation that has been maintained as a secret and that also meets certain other requirements under the UCPA. There is an implied duty of loyalty and confidentiality between the employer and employer, but it is prudent to include provisions covering this issue (particularly concerning confidentiality) into the employment contract and/or work rules.

22.2 Post-employment restrictive covenants

While non-compete covenants are binding and enforceable in Korea, the period and scope within which those covenants will be applied must be reasonable for the type of employment concerned. When the courts determine the reasonableness of this kind of restriction, all of the circumstances of the case are taken into account, including:

- The duration and scope of the covenant.
- The degree of access the employee had to confidential information and the nature of that information.
- Industry practice.
- The employer's reasons for enforcing the restriction.

Weighing the interests of the employer and employee, the Korean courts generally tend to limit the period of a non-compete covenant to between six to 12 months. Recent court precedent also requires reasonable consideration for complying with non-compete obligations. Since a non-compete covenant can unduly encroach on an individual's right to work and freedom to choose an occupation, the standards for upholding a non-compete agreement are generally higher than they are for non-solicitation and confidentiality agreements. If the court finds the scope or duration of any non-compete agreement excessive under the circumstances, the court will deem null and void only the specific elements of the agreement that it finds excessive and will enforce the remaining reasonable period.

As with non-compete covenants, non-solicitation agreements are binding and enforceable in Korea to the extent that they are reasonable. Non-solicitation provisions are subject to a lower level of judicial scrutiny than non-compete agreements. If the court finds the scope or duration of a non-solicitation agreement excessive under the circumstances of the case, it will deem the portion that it finds excessive null and void and reduce its scope concerning either its location or duration to a level that the court considers reasonable.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law or pensions law in your jurisdiction?

There are currently no proposals for reform of employment or pension law.

This overview was written by Jeong Han Lee and Anthony Chang of Bae, Kim & Lee, LLC. It has been updated for the Taylor Vinters' Asia Pacific Employment Law Handbook by Robert Flemer and Deok Il Seo of Kim & Chang.

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Taiwan

Taiwan

TAIWAN

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

1.1 Main laws regulating the employment relationship

Taiwan is a civil law jurisdiction. The Labor Standards Act (LSA) is the most important labor-related statute. The LSA establishes the minimum terms and conditions of employment in Taiwan, prescribing standards that must be met or exceeded by employers on such issues as labor contracts, wages, work hours, time off and leaves of absence, child workers, female workers, retirement, benefits, compensation for occupational accidents, apprenticeships, work rules, supervision and inspection. The LSA applies to all industries and occupations (with a few exceptions) and covers approximately 95% of all employees in Taiwan.

Other key statutes relevant to employment relationships in Taiwan include:

- Employment Services Act.
- National Health Insurance Act.
- Gender Equality in Employment Act.
- Employment Insurance Act.
- Massive Layoff Protection Act.
- Labor Pension Act.
- Labor Insurance Act.
- Labor Safety and Health Act.
- Mass Redundancy of Employers Protection Act.
- Personal Data Protection Act.
- Settlement of Labor Disputes Act.
- Labor Union Act.
- Collective Bargaining Agreement Act.

1.2 Laws applicable to foreign nationals

Foreign nationals, with few exceptions, are not permitted to work in Taiwan without a work permit. The main laws and regulations regulating the employment relationship generally apply to foreign nationals working in Taiwan.

The government has implemented a number of measures in recent years to attract and facilitate the employment of foreign professionals.

1.3 Laws applicable to Taiwan Nationals working abroad

In the case where a Taiwanese national working under an employment relationship governed by Taiwan labor law is assigned to work abroad, the employment relationship will continue to be subject to Taiwan labor laws, unless the employee agrees to suspend the original agreement.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the

requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of workers

The LSA broadly defines a worker as "a person who is hired by an employer to do a job for which wages are paid." The LSA divides employment contracts into fixed-term and indefinite-term contracts. Contracts relating to temporary, short-term, seasonal and specified work are considered fixed-term contracts.

It should be noted that individuals vested with substantial managerial authority may be deemed appointed managers rather than workers, and the relationship between the company and the manager a mandate relationship rather than an employment relationship. Mandate relationships are generally not subject to all of the requirements or protections of the LSA, particularly regarding termination.

2.2 Entitlement to statutory employment rights

Statutory employment rights are enjoyed upon employment. Fixed-term workers receive statutory rights and benefits that are essentially the same as for indefinite-term workers. Fixed-term workers are not entitled to notice or severance payment upon expiration of the term of employment.

2.3 Time periods

Employment contracts are indefinite-term contracts unless otherwise specified as fixed-term. Fixed-term contracts can become indefinite-term contracts. For example, if the employee continues to work beyond the termination date of the contract or enters into consecutive (within 30 days) fixed-term contracts lasting 90 days.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

In most cases, there are no filing requirements when employing people. Once employment begins, the employer must enrol the employee in the mandatory labor insurance and national health programs. In certain sectors, such as a law firm partnership between local and foreign lawyers, the hiring of a local lawyer requires an application to the Ministry of Justice. Other sensitive industries require additional documentation to be supplied to the relevant authority. Foreigner employees must have work authorization (work permits) to work in Taiwan.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

Employment of foreign nationals is governed by the:

- Employment Service Act (ESA).
- Regulations Governing the Permission and Administration of the Employment of Foreign Workers.
- Qualification and Criteria Requirements for Foreigners Undertaking Jobs Specified in the Employment Service Act.

Foreign employees require work permits to work in Taiwan. Based on the work permits issued, foreign employees can apply for alien resident certificates and receive resident status.

The duration of a work permit will not exceed three years subject to renewal on application.

An application for a work permit can take about two weeks to be approved if all the required documents are submitted and both the employer and the foreign employee have met the qualification requirements.

Foreign employees who have received permission to work in Taiwan must apply for resident visas before entering in Taiwan. Employees who have already entered Taiwan on ordinary extendible visas, can apply to have their visitor visa converted to a resident visa with National Immigration

Agency (NIA).

Foreign employees who have received the resident visa must apply to the National Immigration Agency within 15 days after entering Taiwan for an alien resident certificate.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

The employment relationship is primarily governed by employment contract. An employment contract need not to be in writing, but a company with more than 30 employees must set up work rules, which form part of the employment contract.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Generally, employers may not unilaterally change the terms and conditions of the employment relationship without the employee's consent; particularly if changes are adverse to the employee. The employer may unilaterally make changes to discretionary payments. Any changes to work rules made by the employer must be necessary and reasonable.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

The LSA stipulates that employees are entitled to paid annual leave as follows:

- Seven days for service of more than one year but less than three years;
- 10 days for service of more than three years but less than five years;
- 14 days for service of more than five years but less than 10 years; and
- One additional day for each year of service over 10 years up to a maximum of 30 days.

Employees must receive at least one rest day each week.

7.2 Public holidays

Employees are allowed time off for public holidays. Generally there are 10-15 public holidays a year – some are observed on fixed dates, some on the Lunar Calendar.

7.2.1 The commemorative holidays are as follows:

- Founding Day of the Republic of China (January 1).
- Peace Memorial Day (February 28)
- Revolutionary Martyrs Day (March 29).
- Confucius's Birthday (September 28).
- National Day (October 10).
- Chiang Kai-Shek's Birthday (October 31).
- Dr. Sun Yat Sen's Birthday (November 12).
- Constitution Day (December 25).

7.2.2 Labor Day as referred to herein is May 1.

7.2.3 Days that the central competent authority deems as holidays are as follows:

- The Day after the Founding Day of the Republic of China (January 2).
- Chinese New Year (January 1, 2 and 3 of the Lunar Calendar).
- Women and Children's Day (the day before the Tomb Sweeping Day).

- Tomb Sweeping Day (based on the Lunar Calendar).
- Dragon Boat Festival (May 5 of the Lunar Calendar).
- Mid-Autumn Festival (August 15 of the Lunar Calendar).
- Chinese New Year's Eve (the last day of December of the Lunar Calendar).
- Taiwan's Retrocession Day (October 25).
- Other public holidays as designated by the competent central government agency.

Upon negotiation and agreement by and between the employer and the employees, the aforementioned holidays may be adjusted accordingly.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Where an employee must be treated medically or take rest for injury, sickness or biological reasons, the employee may take sick leave as follows:

- Where the employee is not hospitalised, ordinary sick leave of up to 30 days in a year.
- Where the employee is hospitalised, the total amount of sick leave may not exceed one year within the period of two years.
- The total number of permitted sick leave days for non-hospitalisation and hospitalisation cannot exceed one year within the period of two years.

The employee may take additional unpaid leave, with approval of the employer, if:

- The total number of days of sick leave exceed the permitted duration; and
- The employee is still not recovered after deducting permitted personal leave and annual paid leave.

Where the employee is still not recovered after the permitted period of unpaid leave, the employer may dismiss the employee. Where the employee has met the criteria for retirement, the employer must pay the retirement pension.

8.2 Entitlement to paid time off

An employee on ordinary sick leave of up to 30 days in a year receives half-pay. Where the injury or sickness is partially covered by labor insurance but the amount of compensation is less than half of the employee's wage, the employer shall cover the balance.

8.3 Recovery of sick pay from the state

Employees can apply for a sick pay stipend paid out of an employment insurance fund from the state. However, employees may only receive a maximum of 50% of their monthly salary.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Employees with at least six months of service are entitled to eight weeks' paid maternity leave. Employees with less than six months of service are entitled to eight weeks' paid leave at 50% of normal pay.

During pregnancy, workers may apply to be transferred to lighter work (if available) without a reduction in wages. Female employees with children under one year of age are entitled to two 30 minute breaks per day to nurse. Nursing breaks are considered working hours.

Employees suffering medical complications due to pregnancy are entitled to up to one year of unpaid leave if hospitalised, and up to 30 days' unpaid leave if hospitalisation is not required.

In the case of a miscarriage after being pregnant for over two months and less than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for one week. In the case of a miscarriage after being pregnant for less than two months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for five days.

During an employee's term of pregnancy, the employer shall grant five days of leave for pregnancy check-ups. Regular wages shall be paid for pregnancy check-ups.

If a doctor has determined that the employee has a high-risk pregnancy, the employee is entitled to hospitalised sick leave.

Employees who are pregnant or breastfeeding may not be compelled to work at night (10pm to 6am). Employers are prohibited from terminating an employment contract during maternity leave.

9.2 Paternity rights

When an employee's spouse is in labor, the employer shall grant five days off as paternity leave. Regular wages shall be paid for paternity leave.

9.3 Surrogacy

There are no specific laws for surrogacy in Taiwan.

9.4 Adoption rights

Employees are entitled to parental leave without pay during the cohabitation period before the adoption is finalized under the Act Governing Family Affairs and those regulations governing the protection of the rights of children and minors.

9.5 Parental rights

Employees are entitled to non-paid parental leave provided that:

- The employee has worked for the employer for at least six months;
- The employee has a child under the age of three; and
- The employee's spouse is employed.

9.6 Carers' rights

Where a family member of an employee requires vaccination or is seriously ill, or other major accidents occur, as a result of which the employee must personally take care of the family, the employee may take a leave for family care. The number of family care leaves taken shall counted as personal leaves and shall not exceed seven days per year. The wage during the family care leave shall be calculated in accordance with the provisions on personal leaves.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Generally employees are entitled to statutory rights upon commencement of the employment relationship. However, some rights, such as annual leave, are gained after a specific period of employment.

10.2 Consequences of a transfer of employee

When a business entity is restructured or changes ownership, except for those workers to be retained through negotiations between the old and the new employers, the employer shall terminate labor contracts with the remaining workers by giving the minimum advance notice and shall pay severance payment. The new employer shall recognize the prior period of service of

those workers to be retained.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Under Taiwan's labor laws, temporary work means work of anon-continuous nature, which does not exceed six months. This category of employee receives statutory rights and benefits that are essentially the same as for permanent employees.

11.2 Agency workers

Agency workers' rights and benefits are the same as permanent employees of the agency under the assumption that they are employed by the agency. As they have no employment contracts with the placement company, they do not enjoy rights and benefits as that company's employees.

11.3 Part-time workers

Statutory rights and benefits for part-time workers and permanent workers are basically the same.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

The Employment Services Act guarantees equal job opportunities and access to employment services. It prohibits employers from discriminating against any job applicants or employees on the basis of race, class, language, thought, religion, political affiliation, place of origin or birth, gender, sexual orientation, age, marital status, appearance, facial features, disability, or past membership in any labor union. The Gender Equality in Employment Act (GEEA) prohibits discrimination based on gender or sexual orientation and sexual harassment. The LSA prohibits salary discrimination based on gender.

Sexual harassment under the GEEA is defined to include the creation of a hostile, intimidating and offensive working environment for the employee, and explicit or implicit requests of a sexual nature in return for some improvement in employment terms and conditions, or conversely, the negation of punishments or other actions detrimental to the employee. Under the GEEA, employers are required to prevent sexual harassment in the workplace.

In businesses with more than 30 employees, guidelines for preventing, filing grievances against and punishment for sexual harassment must be drawn up and publicly displayed.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

An employer may terminate an employee with notice, or pay in lieu of notice, under the following circumstances. Employees dismissed under any of these grounds are entitled to severance pay:

- Stoppage of business or a transfer of ownership;
- Business loss or curtailment of business operations;
- Suspension of operations for more than one month for reasons of force majeure;
- Alteration of the business nature, forcing a reduction in the number of employees; and
- The employee is incapable of performing the tasks assigned.

An employer may dismiss an employee without notice or severance pay under the following circumstances:

- Employee misrepresentation of facts at the time of signing the labor contract;

- Acts of violence by the employee against the employer, the employer's family, the employer's representative, or his or her fellow employees;
- Serious breaches of the employment contract or violations of work rules;
- Where a worker has been sentenced to temporary imprisonment in a final and conclusive judgment, and is not granted a suspended sentence or permitted to commute the sentence to payment of a fine;
- Purposeful damage or abuse of machinery, equipment, tools, raw materials, products, or any articles belonging to the employer;
- Intentional disclosure of the employer's technological or business secrets; and
- Absence from work for three consecutive days, or for six days in a month, without justifiable reasons.

Dismissal on any of the above grounds, except where a worker has been sentenced to temporary imprisonment, must be carried out within 30 days from the date the employer becomes aware of the circumstance.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

Employees may apply for mediation. Each local government has an employment center offering mediation and free legal support to employees involved in disputes. In addition, employees can file civil action against the dismissal. Most of the courts in Taiwan have a specialized labor division to handle labor-related cases.

In cases where an employer terminates an employment relationship without a legitimate reason, the employee may request that the court determine whether an employment relationship exists (that is, whether the termination was unlawful), and whether the employee can resume his or her employment, in which case, the employer must pay the employee's salary for the period of unemployment. An employee may claim compensation for any loss or damage caused by unfair dismissal, including the loss or damage caused by the termination of labor insurance.

In practice, however, employees whose employment was terminated in violation of the law or employment agreement usually request mediation with the competent authorities to resolve their problems, and the disputes often result in the employees obtaining termination indemnities.

14.2 Protected employees

Employers may not terminate employees on maternity leave or parental leave, or who are receiving medical treatment due to an occupational accident or disease.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Mass layoffs are regulated under the Mass Termination Protection Act. A mass redundancy occurs when a business entity wishes to dismiss employees for a cause under Article 11 of the LSA *(*see *Question 13)* or due to merger, acquisition or restructuring, and the number of redundancies meets any of the following thresholds:

- In a company employing less than 30 employees: dismissal of more than 10 employees within 60 days.
- In a company employing less than 200 employees: dismissal of more than one-third of employees within 60 days, or more than 20 employees in a single day.
- In a company employing less than 500 employees, dismissal of more than one-quarter of employees within 60 days, or more than 50 employees in a single day.
- In a company employing more than 500 employees: dismissal of more than one-fifth of employees within 60 days.
- The business entity intends to lay off over 200 workers within 60 days or more than 100 workers within one day.

If a mass redundancy is proposed, an employer must:

- Submit a termination proposal to the bureau of Labour Affairs of the relevant local government 60 days before the intended dismissal date.
- Notify relevant parties, the order of which is as follows:
  - The trade union (if any);
  - The labour representatives of the labour-employer committee (if there is no union); and
  - The affected workers.
- Publish the termination proposal 60 days before the intended dismissal date.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Employees are not entitled to management representation. However, if a company has more than 30 employees and a union has been established, the union must be involved in any termination process. In the event of mass layoffs, as defined under the Mass Termination Protection Act, the union or the employee representatives, as applicable, must be consulted *(see Question 15).*

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

An employer will be fined TWD100,000 to TWD500,000 for failure to comply with its consultation duties.

17.2 Employee action

An employee may take action against an employer on the basis of wrongful termination.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

There is no automatic transfer of employees on a business transfer. The new employer may decide whether to continue to employ the employees.

18.2 Protection against dismissal

Employees who do not agree to serve in the new employer are entitled to severance pay, payment in lieu of unused annual leave, payment in lieu of notice period and pension (if applicable) paid by the old employer.

18.3 Harmonisation of employment terms

Employees may decide whether to accept the new employer's employment conditions. If not, the employees may receive severance pay, payment in lieu of unused annual leave, payment in lieu of notice period and pension (if applicable) paid by the old employer.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

A person residing within Taiwan for 183 days or more during a tax year is considered a tax resident and is required to remit income tax every year. The employers of non-tax residents with income generated in Taiwan are required to withhold income tax.

Taiwan nationals with household registration in Taiwan residing in Taiwan for more than 31 days, or residing between one and 31 days in Taiwan and have his/her centre of vital interests in Taiwan, will be deemed tax residents.

Overseas income of employees, both foreign and Taiwan national tax residents, is taxed in Taiwan if it meets all of the following criteria:

- Overseas income is at least TWD1 million;
- Overseas income and other Taiwan sourced income is over TWD6.7 million; and
- Basic income tax is higher than regular income tax.

If the employee has paid income tax overseas, the paid amount may be deducted from the basic income tax.

The legal bases are the Income Tax Act and Income Basic Tax Act.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Tax resident employees

- **Income tax.** Resident taxpayers *(see Question 169)* are liable to personal consolidated income tax at a progressive tax rate from 5% to 40% based on the net taxable Taiwan-source income. Over TWD10 million is applied 45%. This is not a withholding tax.
- **Alternative minimum tax (AMT).** A tax-resident whose basic income exceeds TWD6.7 million is liable to AMT at the rate of 20% and must pay the higher of either AMT or income tax.
- **Labour insurance.** This is calculated as a percentage of the insured salary up to a current monthly maximum of TWD43,900, and is split between the employer, employee and the government.
- **National health insurance (NHI).** The NHI provides comprehensive health coverage for all residents, therefore foreign nationals who are legally employed in Taiwan must join the programme on employment. The NHI premium is split between the employer (60%), the employee (30%) and the government (10%).

20.2 Non-tax resident employees

- **Income tax.** Foreign nationals staying in Taiwan for no more than 90 days in a tax year are subject to withholding tax of 18% on income received from a local employer for services provided in Taiwan. However, if the total monthly salary is less than NTD30,012, the withholding rate is 6%.

  Foreign nationals staying in Taiwan for more than 90 days but less than 183 days within a tax year are subject to an 18% withholding tax on Taiwan-source incomes, including compensation received from a foreign employer for services provided in Taiwan.
- **Alternative minimum tax (AMT).** Non-tax resident employees are not subject to AMT.

20.3 Employers

Employers are liable for labour insurance and national health insurance (*see above*).

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

Yes, it is common to reward employees through contractual or discretionary bonuses. Taiwan's Company Act and the LSA require employers to give employees bonuses when there are surpluses in any given year.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes. In Taiwan, employers can enter arrangements of non-competition and non-disclosure during employment and after termination. However, the restrictions should be reasonable and subject to the following principles:

- The employer must have an interest that is protected by the non-compete clause.
- The departed employee's job duties and position were sufficient to enable the employee to learn trade secrets of the former employer.
- The scope of the non-compete restrictions must be reasonable. This standard applies to the length of the non-compete restriction, the work to which it applies, the employers for whom the employee cannot work, and the applicable region.
- The employee must receive consideration for his loss caused by agreeing to the non-compete clause. This should be in the form of a higher salary, stock option, or other forms of compensation specifically tied to the non-compete clause.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

The Dispatch Labor Protection Act is currently being discussed. This Act will be the first law to specifically regulate the employment relationships among agencies, employees and placement companies.

Parts of this overview were written by Eugenia Chuang of Tsar & Tsai Law Firm. Christine Chen and Yi-ching Chen of Winkler Partners have updated those parts and written the remainder of this overview for the Taylor Vinters' Asia Pacific Employment Law Handbook.

September 2015

Thailand

Thailand

THAILAND

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

The main laws regulating employment relationships in Thailand include the following:

- Thai Civil and Commercial Code (the "CCC") (Hire of Services, sections 575 to 586);
- Labour Protection Act B.E. 2541 (1998) (the "LPA") (as amended in 2008, No 2, 2008, No 3, and 2010, No 4);
- Labour Relations Act B.E. 2518 (1975) (the "LRA") (as amended in 1991, No 2, and 2001, No 3);
- Persons with Disabilities Empowerment Act B.E. 2550 (2007) (the "PDEA");
- Social Security Act B.E. 2533 (1990) (as amended in 1994, No 2; 1999, No 3; and 2015, No 4);
- Workmen's Compensation Act B.E. 2537 (1994);
- Working of Foreigners Act B.E. 2551 (2008) (the "WFA");
- Royal Decree Naming Professions Prohibited to Aliens of 1979 (the "RD"), (as amended in 1993, No 2, 2000, No 3 and 2005 No 4);
- Act on Establishment of Labour Court and Labour Court Procedure of 1979 (as amended in 2007, No 2);
- Home Workers Protection Act B.E. 2553 (2010); and
- Occupational Safety, Health and Environment Act B.E. 2554 (2011).

In addition, most laws provide for the promulgation of ministerial regulations, which offer additional clarity and rules.

Thai labour law applies to all employees working in Thailand, regardless of their nationality or tenure. It is not possible to avoid the applicability of Thai labour law through the use of choice of law provisions.

The WFA and the RD regulate employment of non-Thai nationals working in Thailand.

Subject to certain arcane exceptions, none of the laws are relevant to employment of Thai employees outside Thailand or employees (of whatever nationality) of Thai companies working outside Thailand.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

The law does not distinguish between different categories of workers. There are, however, special provisions to protect female and child employees. Child employees are aged 15 to below 18. No child under the age of 15 is permitted to work as an employee. There are also special labour protections for certain other classes of employees, such as manufacturing workers who work from home.

2.2 Entitlement to statutory employment rights

Female Employees:

Under the LPA:

- A female employee is not allowed to perform certain categories of work that are deemed as dangerous; and
- If an employer requires a female employee to work between 12am and 6am, and the labour inspection official considers that such work may be harmful to the health and safety of such female employee, then the labour inspection official shall submit a report to the Director-General or his or her designee for consideration and issuance of an order to the employer to change the working time or reduce the working hours as deemed appropriate, and the employer shall be required to comply with that order.

Child Employees:

Under the LPA:

- No employer may hire a child less than 15 years of age as an employee;
- An employer must arrange for a child employee to have, each day, an uninterrupted rest period of not less than one hour for every four hours of work;
- It is prohibited for an employer to have an employee under 18 years of age work during the time from 10pm to 6am, unless written permission is granted by the Director-General or by a person authorized by the Director-General. There are exceptions to this rule for certain categories of work;
- It is prohibited for an employer to have an employee who is less than 18 years of age work overtime or on a holiday;
- An employer may not allow an employee under the age of 18 to perform certain categories of work that are deemed dangerous;
- An employer may not allow an employee under the age of 18 to perform work in environments that are deemed not age-appropriate;
- It is prohibited for an employer to demand or receive a security deposit from a child employee. It is also prohibited for an employer to pay wages of a child employee to another person; and
- Child employees have the right to take paid leave to attend certain educational events. The employer does not need to pay for more than 30 days per annum of this type of leave.

Additionally, to employ a child under the age of 18, an employer shall:

- Notify the labour inspection official of the employment of such child within 15 days from the date the child commences employment;
- Prepare a record of the conditions of employment if there is a change from the previous ones and keep it at the place of business or office of the employer for inspection by the labour official during working hours; and
- Notify the labour inspection official of the termination of employment of such child within seven days from the date such child ceases employment.

2.3 Time periods

Workers below the age of 18 are considered child workers. No child under the age of 15 is permitted to work as an employee.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

Yes. Employers having 10 or more employees must:

- Have work rules in the Thai language. The work rules must contain certain specified information. These work rules must be submitted to the Director-General or his or her designee within seven days of coming into effect. Also, a copy of these work rules must be kept at the place of business.
- Make a register of employees in the Thai language and keep that register at the place of business, ready for inspection by labour inspection officials during working hours. The register must contain certain specified information, and must be updated in accordance with certain rules.
- Prepare documents for each employee concerning the payment of wages, overtime pay, holiday pay and holiday overtime pay. These documents must include certain specified information. Employees who receive their compensation in person must sign them when they receive their compensation. If compensation is made via money transfer, bank records can replace an employee signature.
- Register the employee with the Social Security Fund and Workmen's Compensation Fund.
- File a form showing employment and working conditions with the Director-General, or the person authorized by the Director-General, within December of each year. If the facts concerning employment and working conditions change, then the employer must notify the Director-General of the person authorized by the Director-General within the month immediately following the month in which such change occurred.

Employee registers and documents concerning compensation need to be retained by an employer for two years or for longer in case of existing labour disputes until any existing labour disputes are resolved.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

The definition of 'working' under the Working of Foreigners Act B.E. 2551 (2008) is quite broad, ie, *'engaging in work by exerting energy or using knowledge whether or not in consideration of wages or other benefits'*. Any foreigner coming to Thailand (even for a short period) for any business or work activities would be deemed working, hence requiring a work permit even though he/she remains employed by a foreign entity.

Generally, a foreigner wishing to enter Thailand for business or work purposes shall apply for a Non-immigrant type "B" (Business) visa from a Royal Thai Embassy/Consulate abroad prior to their arrival in Thailand. Upon entering Thailand with such Non-B visa, the applicant will be granted a 90-day duration of stay as stamped in his or her passport by the immigration official.

The foreigner, however, cannot start working until they receive a work permit from the DOE. Presently, the DOE only grants a work permit to an expatriate who is employed by or sponsored by a company in Thailand. Said company will be the one that applies for a work permit for the expatriate.

The basic requirement for a work permit is that the DOE grants every company in Thailand a **general quota of one work permit each per Baht two million capital + four Thai employees hired**. The company applying for a work permit must also be a tax ID and VAT registered company. The DOE normally takes about 10 days to process and approve the work permit application. Government fees for a work permit are in the range of THB850 to THB6,100 depending on the validity period granted, which could be up to two years, plus minimal stamp duty.

A work permit is usually valid for a term of one year (renewable). Please note that obtaining a work permit will not automatically extend the 90-day duration of stay granted under the type B visa. If the foreigner wishes to stay longer, he or she has to apply for an extension of stay (up to one year) with the Immigration Bureau in Thailand.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

The employment relationship is governed and regulated by applicable employment agreements, work rules, and collective bargaining agreements, as well as the CCC's "Hire of Services" section, the LPA, the LRA and related laws, regulations and notifications.

Under the CCC, an employment relationship begins when an agreement between two people is formed when one will render services in exchange for being paid remuneration for the duration of the services. Employment contracts do not need to be in writing. Rather, the relationship can be proven by payroll reports or other documents. The terms of an employment relationship can be implied by the parties' conduct.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Under the LRA, changes to conditions of employment typically require the employee's consent. However, an employer may make unilateral changes that are more beneficial to the employee than to the employer without consent.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

An employee who has worked continuously for one full year shall be entitled to a paid annual holiday of not less than six working days.

An employee is also entitled to at least one paid weekly holiday.

7.2 Public holidays

An employee is entitled to at least 13 paid traditional holidays per year. One of these holidays must be the National Labour Day.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

An employee is entitled to take sick leave for as many days as the employee is actually sick. If sick leave is taken for three or more working days, an employer may require that the employee produce a medical certificate from a first-class physician or a government clinic. If the employee cannot produce such a certificate, then the employee must give an explanation to the employer.

8.2 Entitlement to paid time off

An employer shall pay normal wages to an employee for a day of sick leave. The employee can have up to 30 working days of paid sick leave per year. Any additional sick leave need not be paid.

8.3 Recovery of sick pay from the state

For the first 30 working days that an employee takes sick leave, the employer is responsible for providing the employee with his or her regular wages. The employer cannot recover this sick pay from the state.

If the employee takes additional days of sick leave then the employer is not liable to the employee for wages. However, if the employee has been paying contributions to the Social Security Fund for at least three of the previous 15 months, he or she is entitled to sickness benefits under the Social Security Act B.E. 2533 (1990) (the "SSA"). These benefits include income replacement as calculated pursuant to the SSA, as well as certain medical and other necessary expenses.

STATUTORY RIGHTS OF PARENTS AND CAREGIVERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Caregivers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

A female employee who is pregnant is entitled to 90 days of maternity leave, inclusive of holidays during the leave period, 45 days of maternity leave will be paid. Subject to certain conditions, the employee may also be entitled to maternity leave benefit from the Social Security Fund.

An employer shall not allow a female employee who is pregnant to perform certain categories of work that are deemed to be dangerous to the pregnant employee's health.

An employer shall not allow a female employee who is pregnant to perform work between 10pm to 6am, overtime work, or work on holidays. However, there are certain exceptions to this for employees who work in certain enumerated capacities, subject to the consent of the pregnant employee.

If a female employee who is pregnant produces a certificate issued by a first-class physician stating that she is not able to perform her original duties any longer, that employee shall be entitled to request that the employer change her work temporarily, either before or after childbirth, and the employer shall consider changing the duties to be suitable for such employee.

It is illegal for an employer to terminate a female employee due to her pregnancy.

9.2 Paternity rights

Thai labour law has no provisions specific to paternity rights.

9.3 Surrogacy

There is no specific provision on surrogacy under Thai labour law. However, a pregnant surrogate, as a pregnant woman, would have the same rights as other pregnant women under Thai labour law.

9.4 Adoption rights

Thai labour law has no provisions specific to adoptive parent rights.

9.5 Parental rights

Besides maternity rights, Thai labour law has no provisions specific to other parental rights.

9.6 Caregivers' rights

Thai labour law has no provisions specific to rights for caregivers.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

The statutory severance pay of an employee varies between 30 days to 300 days of wages at the last wage rate, based on the period of employment.

10.2 Consequences of a transfer of employee

If an employee has a change of employer due to assignment, inheritance, transfer, merger, or otherwise, the employee shall continue to have all the rights that he or she had under the existing employer. The new employer shall accept both the rights and duties in connection with the employee in all respects. This means that the years of service of the employee are transferred from the previous employer to the new employer unless otherwise agreed upon.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Under Thai law there is no distinction between temporary workers and permanent workers. Both categories of workers are considered employees, and both categories of workers have the same rights.

11.2 Agency workers

If a person that is not a job placement business (ie, "**Manpower Agency**") provides a worker ("**Worker**") for a company ("**Company**") to help in the production process or business of the Company, and then fails to provide said worker with wages or benefits that he or she is entitled to under the LPA, then the Company is obligated to provide them to the Worker in the Manpower Agency's stead.

Also, if the Company has employees ("**Employees**") who work in the same manner as the Worker, then the Worker is entitled to benefits and welfare equal to those received by the Company's Employees who work in the same manner. If the Manpower Agency does not provide them, then the Company must.

11.3 Part-time workers

Workers who work part-time are entitled to the same statutory rights and benefits as full-time employees.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Employees are protected by the law on discrimination and harassment. Male and female employees must be treated equally except under limited circumstances depending on the nature and conditions of certain types of work.

Employers, including managers and other supervisors, cannot sexually harass any employee.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

Termination is defined as any action taken by the employer that prevents the employee from working and being paid. Thai law distinguishes between termination with cause and without cause, and between fair and unfair termination. Fair and unfair terminations are undefined in Thai labour law and the courts will interpret their meaning on the facts of each case.

Termination is considered to be with cause only in certain specific situations. These situations occur if the employee (Section 119 of the LPA):

- Dishonestly performed his or her duties or intentionally committed a criminal offence against the employer;
- Deliberately caused the employer to suffer losses;
- Negligently caused the employer to suffer severe losses;
- Violated lawful and fair work rules, regulations, or working orders set by the employer despite having received a written warning for the same offence within the immediately preceding 12 months (for serious cases, the requirement of a written warning does not apply);
- Abandoned work for three consecutive working days without justifiable reason; or

- Was sentenced to imprisonment by final court judgment. If the offence is committed by negligence or is a petty offence, it must have caused the employer to incur loss or damage.

In circumstances justifying termination with cause, the employer can terminate employment immediately, without notice, and need not pay severance. However, if the employer terminates employment without cause, the employer must:

- Serve a timely notice of termination or provide the employee with a payment in lieu of notice. Notice will be timely if provided either at least one pay period in advance, or as stipulated in an applicable agreement governing the employment relationship, whichever is longer. Alternatively the employer can terminate the employment immediately, by making a payment in lieu of notice;
- Provide severance pay according to statutory calculations the amount of which depends on the length of service, ranging from 30 days of wages at the last wage rate to 300 days of wages at the last wage rate; and
- Provide the employee being terminated with any other outstanding pay or benefits (such as unused annual leave).

Even if an employer provides the required notice, severance pay, and all other benefits outstanding to the employee, the employee may still bring a suit against the employer for unfair termination. If a terminated employee considers his or her termination unfair, he or she may pursue the case in the labour courts, seeking compensation for unfair dismissal. The court, at its discretion, can award compensation beyond mere severance and payment of wages in lieu of notice, and so on. In making its determination, the court must consider various factors, such as:

- The age of the employee.
- The employee's tenure.
- The employee's position.
- The reason for termination.

If the court finds a termination unfair, it may order re-employment or damages. To avoid claims for unfair termination, employers should negotiate with outgoing employees to reach an amicable end to the employment relationship.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

Thai laws contain direct protection against dismissal for workers. Therefore, if any employer terminates an employee without cause, it will be considered as unfair termination. If a court finds that the termination was unfair, it may order the reinstatement of the employee or order the employer to pay statutory severance, remuneration in lieu of advance notice and compensation for the unfair termination. In addition, in some circumstances, the employer will face criminal liabilities.

14.2 Protected employees

Members of employee committees

Employers cannot terminate members of an employee committee without permission from the court. Generally, in workplaces with 50 or more workers, employees can appoint an employee committee consisting of five to 21 people, depending on the total number of employees.

Employees involved with labour demands

Employers cannot terminate workers who: (1) submit labour demands to management; or (2) submit labour claims against the employer; or (3) is a witness or gives evidence to a labour officer under the Labour Protection Act or other laws; or (4) is a member of a labour union.

Employers also cannot terminate workers involved in negotiations over labour demands that are taking place, except under limited circumstances. In other words, if an employee submits a labour demand to an employer, and that demand is being negotiated, the law prohibits the employer from terminating any employee, employee representative, or labour union member that is involved in the labour demand.

The following circumstances are exceptions to this rule:

- When an employee dishonestly performs his or her duties or intentionally commits a criminal offence against the employer.

- When an employee intentionally causes damage to the employer.
- When an employee violates the employer's work rules or lawful working orders, despite having received a written warning for the same offence. But in serious cases, the requirement of a written warning does not apply. However, the work rule cannot be an obstacle for resolving the employee's labour demand.
- Abandoning work for three consecutive working days without a justifiable reason.

If a collective bargaining agreement is in effect, the employer cannot terminate any employee who is involved in the labour demand, except if the employee commits an offence stated above.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

As a general matter, terminations due to redundancies and mass layoffs are simply considered terminations without cause. They are treated the same way as other terminations without cause. However, when related to new technology or machinery, employers have additional responsibilities.

When the utilisation of machinery or a change in machinery or technology cause improvements in the working unit, the production process, the distribution process, or the service process, any terminations that result require that the employer notify not only the relevant employees, but also labour inspection officials. The notification must include the names of employees being terminated, the reasons for termination, and the date of termination. Both the relevant employees and the labour inspection officials must receive the notification at least 60 days in advance of the employment termination date. If an employer fails to provide employees the requisite amount of notice, the employer must pay 60 days' pay on top of normal severance pay.

Additionally, for any employee that worked continuously for the employer for at least six years, the employer must pay 15 days of wages for each complete year of work (up to 360 days of wages) on top of normal severance pay.

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Employees are not entitled by law to management representation or to consultation in relation to corporate transactions. Nevertheless, employees are protected in situations of termination of employment without cause, whether in relation to redundancy or otherwise. In addition, employee consent is required in situations of transfer of employment from one legal entity to another.

If a workplace has 50 or more workers, employees can form an employee committee. The law requires an employer to organize a meeting with the employee committee at least one time per three months; or when more than half of the employee committee or labour union requests a meeting based on justifiable grounds for:

- Providing welfare for employees; or
- Consulting with the employer to state work rules for the employee's benefit.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

The employer does not need to comply with suggestions raised by the employee committee if there is no agreement, work rule or provision in the collective bargaining agreement requiring the employer to do so.

Employees can submit claims against the employer if the employer terminates the employees unfairly. If the court considers that the termination is unfair, the court will force the employer to pay severance, remuneration in lieu of advance notice, and compensation for unfair termination, and

other benefits stated in the employment contract and work rules, or order the employer to reinstate the employee.

17.2 Employee action

If there is a special agreement or collective bargaining agreement, etc, and the employer fails to comply with the employee committee's suggestion, the employee is entitled to submit a claim to the labour court.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

Yes. Under the Labour Protection Act, if a business changes due to assignment, inheritance, or otherwise, or if there is a change of registration, transfer, or merger with any other company, the employees shall continue to have all rights which they had under the previous employer, and the new employer must accept both the rights and duties in connection with the employees in all respects.

18.1 Automatic transfer of employees

If there is a merger, employees can be transferred automatically except if any employee expresses an intention that they do not want to be transferred to the merged business. In this case, the previous business effectively terminates the employee.

18.2 Protection against dismissal

The law requires an employer to pay statutory severance to the employee, as the law considers dismissal in this case to be "without serious cause." In addition, the employer may pay remuneration in lieu of advance notice to the employee, if the employer fails to inform the employee in advance pursuant to the law. The employee may further claim compensation for unfair termination as stated above.

18.3 Harmonisation of employment terms

The merged business must receive the rights and duties of the previous business for the transferred employees. In practice, this means that the employees must receive at least the same benefits as with the previous business. Therefore, the new employment terms and conditions must not be less than the previous benefits that the employees received from the previous business.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

A person (Thai or foreign) who resides in Thailand for a total period of 180 days or more (not necessarily consecutively) in any tax calendar year is considered a resident of Thailand for tax purposes. A resident of Thailand is liable for personal income tax on employment income from sources inside Thailand (eg, income derived from a post or office held in Thailand) and on employment income derived from sources outside Thailand (eg, income derived from a post or office held abroad).

However, the imposition of personal income tax on income derived outside Thailand will apply only to income derived and brought into Thailand in the same year in which such income is earned. A non-resident is subject to pay tax only on income from sources within Thailand, irrespective of the pace of payment.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Tax resident employees

Tax resident employees are subject to personal income tax at progressive rates of 5% to 35%. The tax year is from 1 January to 31 December.

Employers and employees must each contribute to the Social Security Fund. As of January 2014, contributions equal 5% of the employee's gross wages (up to a maximum of THB 750 per month).

20.2 Non-tax resident employees

Non-tax resident employees are subject to income tax in the form of a withholding tax on the gross amount of their Thai-source income at the flat rate of 15%. Tax payable is withheld at source at the time of the payment.

20.3 Employers

Employers must withhold income tax at the progressive rate or at the flat rate of 15% and remit the tax to the Thai tax authority no later than the seventh day of the month following the month of payment.

Employers must contribute annually to the Workmen's Compensation Fund. Depending on the classification of the employer, contributions range between 0.2% and 1% of an employee's annual earnings (up to a maximum of THB 240,000).

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is common to reward employees with contractual or discretionary bonuses. Unless bonuses are fixed as per an individual employment agreement or a collective bargaining agreement, employers often look at an employee's individual performance and the performance of the organisation in awarding bonuses.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Yes, it is possible to restrict an employee's activities during employment and for a period after employment. Restrictive covenants in employment contracts are enforceable under Thai law to the extent that they do not run contrary to public order and good morals, and to the extent that they are "fair" under the Unfair Contract Terms Act of 1997.

The law provides specific factors that a court should weigh in considering fairness, including the period and geographic area of the restriction, other possible opportunities for the employee to work, and other lawful interests of the parties. An employer is not required by statute to pay former employees while they are subject to post-employment restrictive covenants.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

The Social Security Act (No 4) will soon take effect. It extends benefits to insured persons, covering preventative care, damages caused by medical treatment, and cases of self-inflicted injuries or death. It also removes a barrier limiting coverage for childbirth to two births, and extends child allowance to a maximum of three children instead of two. The amendment also extends coverage to people who are less than 50% disabled, and extends unemployment benefits to employees whose employment is suspended due to force majeure. The Social Security Office is currently preparing 17 laws related to this amendment.

The Department of Labour Protection and Welfare is in the process of preparing 15 laws related to the Marine Labour Act, which is currently under consideration by the National Legislative Assembly. The purpose of the Marine Labour Act and related laws is to protect the rights, safety, and health of workers employed in marine work.

The Ministry of Labour is preparing a labour ministry decree requiring that licensed technicians must handle certain jobs endangering the public. People working as electricians or in the fields of electronics or computers, will soon require certificates from the Labour Department to work.

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September 2015

Vietnam

Vietnam

VIETNAM

SCOPE OF EMPLOYMENT REGULATION

1 What are the main laws that regulate the employment relationship? Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

The main law governing employment relationships in Vietnam is the Labour Code No 10/2012/QH13 passed by the National Assembly on 18 June 2012, which took effect from 1 May 2013 (the "**Labour Code**"). The Labour Code applies to:

- All individuals working in Vietnam, regardless of their nationality or position;
- All organisations or individuals utilizing labour on the basis of a labour contract, and
- All other organisations or individuals that may be directly related to an employment relationship (Labour Code, Article 2).

Vietnamese employees working abroad are regulated by the Law No 72/2006/QH11 passed by the National Assembly on 29 November 2011 on Vietnamese Employees Working Abroad under Contract.

In addition to the above laws, the employment relationship in Vietnam is also subject to other laws and regulations, governmental decrees, ministerial circulars and decisions, as well as provincial decisions and guidelines.

EMPLOYMENT STATUS

2 Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

2.1 Categories of worker

Not provided under Vietnamese laws.

2.2 Entitlement to statutory employment rights

Not provided under Vietnamese laws.

2.3 Time periods

Not provided under Vietnamese laws.

RECRUITMENT

3 Does any information/paperwork need to be filed with the authorities when employing people?

No information or paperwork needs to be filed with the authorities before employing Vietnamese employees. However, before employing foreign employees, an employer must:

- Prepare its annual plan to recruit foreigners for jobs for which Vietnamese employees do not qualify; and
- Submit such plan to the Chairman of the provincial People's Committee for approval; and
- Obtain work permits for such foreign employees.

PERMISSION TO WORK

4 What prior approvals do foreign nationals require to work in your country? What information/paperwork needs to be kept or filed with the authorities when they start work?

Foreign employees, with certain exceptions, must obtain work permits before working in Vietnam. Work permits are issued by the provincial Department of Labour, Invalids and Social Affairs (DOLISA) to a particular foreign employee with a term of two years. These can be renewed but cannot be transferred (Labour Code, Article 169 and Article 173; Decree 102, Article 13.5).

Before employing foreign employees, an employer must:

- Prepare its annual plan to recruit foreigners for jobs for which Vietnamese employees do not qualify and submit such plan to the Chairman of the provincial People's Committee for approval, and
- Obtain work permits for such foreign employees issued by the provincial DOLISA.

Approval of the plan to recruit foreigners will be issued within 15 days and a work permit will be issued within 10 working days from the submission date of complete and sufficient relevant applications to the provincial People's Committee or DOLISA, as applicable. However, the approval process can take longer in practice.

Upon issuance of a work permit, an employer and a foreign employee will enter into a labour contract. Within five working days after the execution of the labour contract, the employer shall send copies of:

- The executed labour contract; and
- The work permit of such foreign employee to the provincial DOLISA for reporting and filing.

A work permit is not required if the foreign employee:

- Is a contributing member or an owner of a limited liability company;
- Is a member of the board of management of a joint stock company;
- Is either the head of a representative office or a project of an international organisation, or a foreign non-governmental organisation in Vietnam;
- Enters and stays in Vietnam for less than three consecutive months to sell services;
- Enters Vietnam and stays for less than three consecutive months to handle an emergency, or one matter involving complicated technical or technological problems that affect production or business, which cannot be adequately addressed within Vietnam;
- Is a lawyer with a certificate of law practice in Vietnam granted by the Ministry of Justice of Vietnam;
- Is a foreign pupil or student who is studying in Vietnam and wants to work in Vietnam during his or her study period (the employer, however, must inform the provincial labour authority seven days prior to its recruitment of the foreign pupil or student);
- Is seconded to Vietnam as permitted under Vietnam's WTO Commitments;
- Provides expert and technical consultancy services or undertakes other tasks with respect to research, formulation, evaluation, monitoring and assessment, management and implementation of a program or project, using official development aid (ODA) in accordance with international treaty to which a Vietnamese government authority is a signatory;
- Has a media/press license issued by the Ministry of Foreign Affairs;
- Is appointed by a competent authority in a foreign country to teach at an international school managed by a foreign diplomatic office, or an international organisation in Vietnam (the appointment must be certified by such foreign diplomatic office or international organisation in Vietnam);
- Is a volunteer (such voluntary activity must be certified by a foreign diplomatic office or an international organisation in Vietnam);

- Is a consultant, teacher or researcher at a university or vocational college, and has a master's degree or higher or similar qualification and works in Vietnam for a period not exceeding 30 days; or
- Implements an international treaty to which Vietnamese government authority, a provincial body or a central social and political organisation is a signatory.

A work permit is also not required if:

- It is exempted under an international treaty to which Vietnam is a signatory; or
- It is approved by the Prime Minister of the Government following a proposal made by the Ministry of Labour, Invalids and Social Affairs (MOLISA).

In order to be exempt from a work permit for a foreign employee, the employer must file an application with the provincial DOLISA to confirm the exemption.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

5 How is the employment relationship governed and regulated?

The employment relationship in Vietnam is subject to:

- Labour laws;
- Governmental decrees, ministerial circulars and decisions, provincial decisions and guidelines; and
- Collective labour agreements, internal company rules and individual labour contracts.

6 What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Vietnamese laws do not allow any party to unilaterally change the terms and conditions of a labour contract. If a party wishes to amend or supplement the labour contract, such party needs to inform the other party of the proposed amendment or supplementation three days in advance. If both parties agree on the proposed amendment or supplementation, the parties shall enter into an amendment agreement or execute a new labour contract.

HOLIDAY ENTITLEMENT

7 Is there a minimum paid holiday entitlement?

7.1 Minimum holiday entitlement

An employee who has worked for an employer for a full 12 months is entitled to fully-paid annual leave days as follows:

- 12 working days, applicable to employees working in normal working conditions;
- 14 working days, applicable to employees working in heavy, toxic or dangerous jobs, and to employees in places with harsh living conditions, and to employees who are juniors or disabled persons; or
- 16 working days, applicable to employees working in extremely heavy, toxic or dangerous jobs, and to employees in places with especially harsh living conditions.

One additional annual leave day shall be added to the above after every five consecutive working years for one employer.

7.2 Public holidays

An employee is entitled to have fully-paid days-off for the following 10 public holidays:

- New Year: one day (the 1st day of January of each calendar year);
- Lunar New Year: five days;
- Victory Day: one day (the 30th day of April of each calendar year);

- International Labour Day: one day (the 1st day of May of each calendar year);
- National Day: one day (the 2nd day of September of each calendar year); and
- Hung Kings Commemoration Day: one day (the 10th day of March of each Lunar year).

Foreign employees working in Vietnam are entitled, in addition to the public holidays in Vietnam, to one traditional public holiday and one national day of their home country.

ILLNESS AND INJURY OF EMPLOYEES

8 What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

8.1 Entitlement to time off

Vietnamese employees are required to join the compulsory social insurance scheme that covers sickness, maternity, labour accidents and occupational disease, retirement and death. If a Vietnamese employee suffers sickness or injury as confirmed by a competent medical institution, he/she is entitled to fully paid days off for treatment. However, the laws only allow such employees a maximum period of time for sickness per year as follows:

- With respect to an employee working in normal conditions, he/she is entitled to up to 60 days of sickness absence per year, depending on the timing of subscription for compulsory social insurance.
- With respect to employees working in strenuous, hazardous or dangerous jobs, an employee is entitled to up to 70 days of sickness absence per year, depending on the timing of subscription for compulsory social insurance.

However, when an employee has been suffering from illness or injury and has not been able to recover after a lengthy period of treatment the employer may unilaterally terminate the employment of such employee. A lengthy period of treatment is defined as:

- 12 consecutive months with respect to an employee working under an undefined term labour contract; or
- Six consecutive months with respect to an employee working under a defined term labour contract; and
- Half of the term of the labour contract with respect to an employee working under a seasonal or 12 month labour contract.

Currently, foreign employees working in Vietnam are not required to join any compulsory social insurance policy. Entitlement to time off for sickness or injury must be agreed with the employer in the relevant labour contract. However, from 1 January 2016, foreign employees working in Vietnam will have the right to subscribe to compulsory social insurance, and will therefore have the same entitlement to time off as local Vietnamese employees.

8.2 Entitlement to paid time off

Whilst absent under the sickness regime above, an employee working in normal conditions will usually be paid 75% of the monthly salary used to calculate the compulsory social insurance premiums immediately prior to the absence. Employees working in strenuous, hazardous or dangerous jobs will be paid 100% of the monthly salary used to calculate the compulsory social insurance premiums immediately prior to the absence.

8.3 Recovery of sick pay from the state

Employers are required to settle the sickness claims of employees within three working days after the date of receipt of the proper sickness absence dossiers from employees. Quarterly, employers are then required to submit to the relevant social insurance organisation the dossiers of the employees for whom sickness claims have been settled. The social insurance organisation then makes payment within 15 days after the date of receipt of the valid dossiers from the employer.

STATUTORY RIGHTS OF PARENTS AND CARERS

9 What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

9.1 Maternity rights

Vietnamese laws provide many favourable rights and benefits to female employees who are pregnant or have young children, such as:

- Employers cannot request female employees who are on:
  - Their seventh month of pregnancy; or
  - Raising children under 12 months old to work overtime, work at night or take a business trip;
- Female employees who are pregnant or raising children under 12 months old cannot be fired or subject to labour discipline;
- Female employees working in heavy conditions are to be transferred to less onerous duties after their seventh month of pregnancy;
- Female employees who are pregnant are entitled to return to their employment after their maternity leave; and
- Female employees who are pregnant may unilaterally terminate or postpone their employment, if they have certification from a medical institution stating that continuing to work could harm their child.

Whilst covered by social insurance, female employees are entitled to maternity coverage that pays their salary when they are on maternity leave. Furthermore, female employees are also entitled to a one-off allowance of a minimum of two months' salary upon the birth of each child.

9.2 Paternity rights

Male employees are entitled to a maximum of 20 days off to care for sick children under three years of age, or 15 days to care for sick children above three years but under seven years of age.

Under the current laws and regulations, if a mother dies whilst giving birth and only the father is covered by social insurance, the father is entitled to a lump-sum allowance equivalent to two months' common minimum salary for each child. From 1 January 2016, if only the father is covered by social insurance, the father is entitled to receive a one-off payment of two months' minimum salary for each child when his wife gives birth.

In cases where only the father or the mother is covered by social insurance, or both the father and mother are covered by social insurance and the mother dies in childbirth, the father or the person directly nursing the new-born child is entitled to payments under the maternity regime until the child is four months old.

From 1 January 2016, a male employee covered by social insurance is entitled to paternity leave of five working days when his wife gives birth, and in case only the father is covered by social insurance and the mother dies in childbirth or faces a postnatal risk that makes her unable to care for the child, as certified by a competent medical institution, the father is entitled to take paternity leave until the child reaches six months of age.

9.3 Surrogacy

The Law on Social Insurance 2006 is silent on gestational surrogacy. However, since gestational surrogacy is allowed by the Law No 52/2014/QH13 passed by the National Assembly on 26 June 2014 on Marriage and Family (the "**Law on Marriage and Family**") which has been effective since 1 January 2015, the Law on Social Insurance 2014 regulates that a female employee as a surrogate mother is entitled to benefits under the maternity regime until she relinquishes the child to the intended mother, provided the leave period does not exceed six months for one child (plus one) additional month for each child in the case of twins or more).

In cases where the maternity leave period is under 60 days from the date of childbirth to the time of relinquishing the child, surrogate mothers are entitled to continue taking leave under the maternity regime for the remainder of the 60 day period, including holiday.

Upon receiving the child from the surrogate mother, the intended mother is entitled to benefits under the maternity regime until the child is six months old.

9.4 Adoption rights

Under current laws and regulations, an employee adopting a child under the age of four months is entitled to the benefits under the maternity regime until the child is four months old. From 1 January 2016, the duration of maternity leave in these circumstances is extended until the child is six months of age.

9.5 Parental rights

Besides maternity and paternity rights as set out above, Vietnamese labour law has no provisions specific to other parental rights.

9.6 Carers' rights

Besides maternity and paternity rights as set out above, Vietnamese labour law has no provisions specific to other carers' rights.

CONTINUOUS PERIODS OF EMPLOYMENT

10 Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

10.1 Statutory rights created

Under Vietnamese laws, many rights and benefits of employees are covered by the social insurance policy. It is compulsory for employers and employees to subscribe to this regime as set out above. The principle prescribed in the Law on Social Insurance 2006 is that the level of social insurance entitlement is calculated on the basis of the premium rate, the social insurance payment duration and sharing among social insurance participants. The duration of social insurance premium payment means the period from the time an employee starts paying social insurance premiums to the time he/she stops paying. When an employee's payment of social insurance premiums is interrupted, the duration of social insurance premium payments is the total cumulative period of social insurance premium payments. Therefore, it does not matter if an employee is transferred to a new entity.

10.2 Consequences of a transfer of employee

When an employee is transferred to a new entity, the employee's previous payments of social insurance premiums are recognised. For this purpose, a social insurance book is granted to each employee to monitor the payment and enjoyment of social insurance regimes and serve as a basis for settlement of social insurance payments and benefits. Employees are responsible for notifying new employers, and sending their social insurance books, medical insurance cards and other relevant papers to their new employer in order that they can continue to record social insurance premium payments.

FIXED TERM, PART-TIME AND AGENCY WORKERS

11 To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

11.1 Temporary workers

Under Vietnamese law, there is no definition of "temporary worker" or "permanent worker". However, three kinds of labour contract are described as follows:

- **Indefinite term labour contract** is a contract in which the parties do not fix the term or a date for termination of the contract;
- **Definite term labour contract** is a contract in which the parties fix the term of the contract as a period between 12 months and 36 months; and
- **A seasonal or specific job labour contract** is a contract in which the parties agree on a specific job and the duration of the contract is less than 12 months.

Generally, Vietnamese laws provide for equal rights and obligations in respect of employees under the various types of labour contracts. The only difference is a requirement of advance notice in the case of unilateral termination of the labour contract, ie:

- At least 45 days advance notice must be given in respect of employees working under indefinite term labour contracts;
- At least 30 days must be given in respect of employees working under definite term labour contracts; and
- At least three working days advance notice must be given in respect of employees working under seasonal (or contracts of less than 12 months' duration) labour contracts.

In addition, under the Law on Social Insurance 2006, employees working under indefinite term labour contracts, or contracts of more than three months' duration, are entitled to subscribe to compulsory social insurance. However, from 1 January 2016, employees working under all kinds of labour contracts with terms of more than one month are entitled to subscribe to compulsory social insurance.

11.2 Agency workers

Agency workers are entitled:

- To be paid a wage not lower than the wage of an employee of the sub-leasing employer with the same professional qualifications and doing the same job or a job of the same value;
- To make a complaint to the labour outsourcing enterprise if the sub-leasing employer breaches the contents of the labour sub-lease contract;
- To exercise the right to unilaterally terminate the labour contract with the outsourcing labour enterprise; and
- To enter into an employment relationship with the sub-leasing employer after termination of the labour contract with the outsourcing labour enterprise.

11.3 Part-time workers

Vietnamese laws treat part-time workers as having the same rights and obligations as full-time workers. For example, part-time workers must not be discriminated against and are entitled to the same labour safety and hygiene conditions.

DISCRIMINATION AND HARASSMENT

12 What protection do employees have from discrimination and harassment, and on what grounds?

Under Vietnamese laws, discrimination on the grounds of sex, colour, social class, religion, beliefs, marital status, HIV infection, disability or because of establishing, joining or participating in a trade union is prohibited. An employee complaining of harassment or discrimination must follow the grievance procedure set out in the employer's internal labour rules and can make a complaint of harassment or discrimination to a competent person (eg employer, head of a trade union or labour inspectorate). The laws also allow an employee to legally unilaterally terminate the employment if he/she is being discriminated or harassed, provided that such employee has informed his/her employer three days in advance.

TERMINATION OF EMPLOYMENT

13 What rights do employees have when their employment contract is terminated?

Unilateral termination of a labour contract is strictly regulated by Vietnamese law. An employer can only unilaterally terminate an individual labour contract in limited circumstances, such as where:

- The employee has regularly failed to complete assignments in accordance with his labour contract;
- The employee has been unable to recover from illness or injury after a certain period of time (eg 12 consecutive months for an employee working under an indefinite term labour contract);

- The employer has to reduce the scale of business and dismiss certain employees due to force majeure; or
- The employer ceases its operations.

Employers must notify an employee in advance of any unilateral termination of the labour contract (ie, 45 days' prior notice if the employee's labour contract has an indefinite term; 30 days prior notice if the employee's labour contract has a definite term of 12 to 36 months; three working days prior notice if the employee's labour contract is seasonal or has a term of less than 12 months) and pay a severance allowance with an amount equal to half of one month's salary for each year of employment for the working period not covered by unemployment insurance. For the purpose of calculating a severance allowance, "salary" means the average salary pursuant to the labour contract for the six months immediately preceding the termination.

If an employer unilaterally terminates a labour contract illegally, they must allow the employee to return to work and compensate all salary and bonus (if any) for the period the employee was not permitted to work, plus an additional payment of at least two months' wages. If the employee does not want to return to work, the employer must additionally pay the employee a severance allowance. If the employer does not want to take back the employee, the employer must additionally pay a compensation amount of at least two months' wages.

14 What protection do employees have against dismissal? Are there any specific categories of protected employees?

14.1 Protection against dismissal

Dismissal is the highest labour discipline and strictly regulated by Vietnamese law. An employer can only dismiss an employee in the following limited circumstances:

- Where an employee is guilty of theft, embezzlement, gambling, wilful violence causing injury to others, using drugs within the workplace, disclosure of technology or business secrets, infringement of intellectual property rights of the employer, or the employee causes or threatens to cause critical damage to the property or interests of the employer;
- The employee is subject to disciplinary action of deferral of a wage increase or removal of office but re-commits an offence during that period; or
- An employee, at his/her own volition, fails to attend work for five cumulative days in a month, or 20 cumulative days in a year, without reasonable excuse. Reasonable excuse may include force majeure and absence due to illness/injury (with certification from a medical institution).

Under Vietnamese law, in order to take disciplinary action against an employee in general or dismiss an employee in particular, an employer must have issued and registered its internal labour rules and specified acts in breach such rules and the forms of discipline applying to each act respectively. Additionally, Vietnamese law imposes obligations on an employer when seeking to impose disciplinary sanctions.

For example, an employer must:

- Prove the fault of the employee;
- The representative of the trade union or all employees must participate in any labour discipline or dismissal procedures;
- The employee (or a legal representative) must have an opportunity to respond to any allegation at the meeting to decide the labour discipline; and
- The employer cannot apply multiple disciplinary actions for a single breach.

14.2 Protected employees

Termination and other disciplinary action is prohibited in the following circumstances:

- The employee is absent due to illness or injury under the sickness regime or otherwise by consent of the employer;
- The employee is temporarily imprisoned;
- Pending the results of any investigation into allegations of wrongdoing;
- A female employee is pregnant or on maternity leave, or the employee is raising a child under the age of 12 months (including any adopted child); or

- An employee is suffering from a mental or other illness that results in loss of civil capacity.

REDUNDANCY/LAYOFF

15 How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Vietnamese law does not provide any specific definition of "redundancy" or "layoff". However, it is generally understood that redundancies or layoffs mean that an employer has to lay off one or more employees due to organisational restructuring, a change in technology or economic reasons such as economic crisis.

In case of collective redundancies, the employer has to:

- Set up an employment plan, providing a list of employees which identifies those employees to be retained, re-trained for re-employment, retired and laid off; and demonstrating how it will deal with the employment plan.
- Discuss the employment plan with the collective representative of all employees;
- Inform the DOLISA 30 days prior to the redundancies or layoffs.
- Pay each dismissed employee a redundancy allowance which is one month salary for each year of service (subject to a minimum payment of two months' salary).

EMPLOYEE REPRESENTATION AND CONSULTATION

16 Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Employees have the right to establish or join a trade union in the company in which they work. Such trade union will be the collective representative of all the employees, in order to protect their rights and benefits. The employer has to consult with the trade union in order to legally conduct certain specific acts that could impact on the rights and benefits of employees, including:

- Drafting internal labour rules and any collective labour agreement;
- Setting of salary scales and payroll;
- Imposing labour discipline on an employee; and
- Conducting redundancies/layoffs

In cases where the employer and the employees have not established a trade union, the trade union at the district level will be deemed the collective representative of the employees to protect their rights and benefits.

17 What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

17.1 Remedies

An employer is required to consult with the trade union of the company about any decisions/regulations impacting the rights and obligations of employees. For some acts that materially impact rights and obligations of the employees (as mentioned in question number 16 above), the employer has to consult and reach an agreement with the trade union or collective representative of the employees in order for that act to be implemented.

In practice, the DOLISA will reject any application or decision that materially impacts rights or obligations of employees until such time as the employer has undertaken appropriate consultation. Accordingly, there is no remedy for an employer should they fail to comply with the consultation duties other than performing those consultation duties.

17.2 Employee action

If an employer fails to comply with its consultation obligations, the employees can proactively raise a request for discussion, and ask the trade union of the company to arrange such discussion. Otherwise, a labour dispute may be raised against the employer, and the employer may be

required to compensate the employees. In practice, the courts and other competent authorities tend to give more favour to the employee than the employer in an employment relationship. The employer is therefore at a disadvantage in any labour dispute.

CONSEQUENCES OF A BUSINESS TRANSFER

18 Is there any statutory protection of employees on a business transfer?

18.1 Automatic transfer of employees

In the event of a business transfer, Vietnamese laws provide that the succeeding employer shall retain the current employees of the transferring employer, and will amend labour contracts accordingly.

18.2 Protection against dismissal

In the event of dismissal due to a business transfer, Vietnamese laws require the employer to have an employment plan listing those employees to be retained, re-trained for re-employment, retired and laid off. The employer is additionally required to demonstrate how it will deal with the employment plan, discuss this with the collective representative of all employees, and inform the DOLISA of its plan in advance. In the event an employer retrenches employees in spite of the requirement to retain existing employees, the employer must pay a job-loss allowance to the retrenched employees of one month's salary for each year of service (with a minimum payment of two months' salary).

18.3 Harmonisation of employment terms

The succeeding employer and the current employees of the transferred enterprise may negotiate and agree to keep or renew the employment terms of the transferred enterprise.

TAXATION OF EMPLOYMENT INCOME

19 What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Under Vietnamese laws, an individual paying tax on employment income is classed as either resident or non-resident. A resident taxpayer is one who either:

- Has been present in Vietnam for at least 183 days in the tax year;
- Has a registered permanent residence in Vietnam; or
- Holds a lease over a residential house in Vietnam with a term of more than 90 days in a tax year.

A non-resident is an individual who does not meet any of the above conditions.

A resident is required to pay income tax on his/her taxable employment income, including salary and any kind of allowance/income from employment within or outside the territory of Vietnam. A non-resident is only required to pay income tax on his/her income from work performed in Vietnam.

20 What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

20.1 Tax resident employees

Employment income progressive tax rates:

Annual Taxable Income (million VND)	Monthly Taxable Income (million VND)	Tax Rate
0 – 60	0 – 5	5%
60 – 120	5 – 10	10%
120 – 216	10 – 18	15%
216 – 384	18 – 32	20%

Annual Taxable Income (million VND)	Monthly Taxable Income (million VND)	Tax Rate
384 – 624	32 – 52	25%
624 – 960	52 – 80	30%
More than 960	More than 80	35%

Under current regulations, Vietnamese employees must pay the following security insurance contributions per month:

- Social insurance premium: 8% of salary and wages;
- Health insurance premium: 1.5% of salary and wages; and
- Unemployment insurance premium: 1% of salary and wages.

Foreign employees are not subject to compulsory social insurance under the Law on Social Insurance 2006 or unemployment insurance under the Law on Works. Accordingly, they do not have to make the social insurance and unemployment insurance contributions (though foreign employees are still required to make health insurance contributions). Under the Law on Social Insurance 2014, foreign employees have the right, but not an obligation, to contribute to social insurance.

20.2 Non-tax resident employees

A personal income tax of 20% must be paid on Vietnam-source income. In addition, if non-resident employees work in Vietnam, under labour contracts governed by Vietnamese law, they must contribute health insurance of 1.5%.

20.3 Employers

Employers must deduct and withhold employees' personal income tax and submit it to the tax authority. In addition, they must make social security contributions of:

- Social insurance: 18% of employees' salary and wages.
- Health insurance: 3% of employees' salary and wages.
- Unemployment insurance: 1% of employees' salary and wages.
- Trade union fee: 2% of the salary and wages of Vietnamese employees working for the employer.

BONUSES

21 Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded?

It is encouraged under Vietnamese laws to reward employees. The plain language of the laws reads as monetary reward, however, a reward could be of any kind in practice, such as a benefit in kind or a gift. The law only requires an employer to decide and publish the reward regime after consultation with the collective representative of all the employees. It could be understood that the laws allow the employers to freely decide which employees it will reward and how it will reward such employees.

RESTRAINT OF TRADE

22 Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

The Labour Code is silent on restriction of an employee's activities. Broadly speaking, during employment the relationship between the parties is governed by the labour contract. The parties to the labour contract could therefore agree to certain restrictions.

With respect to post-termination restrictions, the Labour Code does not have any provisions dealing with such restrictions. In practice, it is not unusual for employers in Vietnam to seek to restrain employees after termination of employment. However, in the event of a dispute in respect

of such covenants, Vietnamese courts have expressed the view that such covenants contravene public policy in limiting the right of employees to work. As a matter of practice, Vietnamese courts tend to favour employees in employment cases.

Notwithstanding the above, after termination of employment, if an employee does any act causing damage to their former employer, such as disclosing trade secrets of the employer, the employer could initiate legal proceedings against the employee and make a claim for damages.

PROPOSALS FOR REFORM

23 Are there any proposals to reform employment law in your jurisdiction?

There are currently no proposals to reform employment law in Vietnam.

This overview has been prepared by K. Minh Dang and Tran Ngoc Hoang Phuong of YKVN for the Taylor Vinters' Asia Pacific Employment Law Handbook.

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