People and Reward

Asia employment law bulletin 2020

Freshfields Bruckhaus Deringer

Welcome to the 2020 edition of our Asia employment law bulletin.

Introduction

Many commentators are saying that we are living in an era of disruption. These disruptive forces take many forms, including rapid geopolitical changes, technological advancements and cultural shifts. Employers are having to navigate these new challenges and find ways to adapt in order to build resilience and continue to grow.

In this year's Freshfields Asia employment law bulletin, we have, with our StrongerTogether colleagues, looked back at 2019 to identify the significant areas of change in some of the key Asia Pacific jurisdictions and the way in which these disruptive forces have permeated employment law, employer policies and workplace culture in the region. We have also looked to the horizon, to spot the material changes companies in the region should anticipate, as well as the emerging trends we expect to play out in the coming year.

Please do pick up the phone to your usual contacts or get in touch if you would like to discuss any of the issues covered in more detail.

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Contents

01 Australia

In response to a range of business scandals and the aftermath of the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry, Australia has seen an increased focus on regulation designed to hold businesses accountable and introduce transparency, a trend that can be expected to continue in 2020.

Director duties and climate change

Of particular poignance given the ongoing bush fires in Australia, has been the recent focus on impact on climate change should shape the duties of directors, who are under a duty to act with care and diligence and act in the best interests of the company. A coordinated engagement by regulators and an opinion expressed by former High Court judge Kenneth Hayne AC QC, has suggested that climate change-related risk is a real and measurable financial risk that needs to take a more prominent place in directors' decision-making.

Hayne has indicated that, given the expert consensus on climate change is clear, climate risk is a matter of fact which boards can no longer disregard. It is argued that to avoid breaching their duties, more directors will need to consider the potential impact of climate change on their respective companies' operations, respond appropriately and report material findings to shareholders.

Introduction of enhanced whistleblower protection regime

Off the back of a parliamentary inquiry which recognised the importance of whistleblowing for deterring and exposing misconduct, fraud and corruption, a significantly expanded private sector whistleblower protection regime has recently come into effect. The regime operates so that where disclosures meet certain requirements, whistleblowers are afforded a range of protections, with corresponding significant penalties where a company or individuals fail to protect whistleblowers from suffering a consequential detriment. The complexity and novelty of the regime means employers are expected to implement new and comprehensive procedures for dealing with disclosures to ensure they do not risk breaching the new laws. From 1 January 2020, public companies, large proprietary companies and trustees of superannuation entities must have a whistleblower policy in place outlining, among other things, the legal protections available to whistleblowers and how a company will investigate disclosures and protect whistleblowers from detriment.

Potential reform for the gig economy

Earlier in 2019, the Fair Work Ombudsman determined that Uber drivers were independent contractors, rather than employees, having noted that "*there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer*". While the decision relates solely to Uber, it builds on a growing legal framework for how courts and tribunals are to determine other gig economy relationships.

This and other recent decisions have raised the question of whether the legal principles currently used to determine distinctions between employees and independent contractors are sufficiently adaptable to new forms of work. Unions are lobbying for reforms to address the unique issues generated by the gig economy and further claims are being brought by gig economy workers claiming that they are employees, rather than contractors. As a result, this area remains one to keep a close eye on in 2020.

Underpayment sanction reform

In 2019 there was an increasing number of employers being named and shamed for underpayments of employee entitlements, with even some of Australia's most well-resourced companies failing to comply with minimum legal entitlements. Recently, the restaurant business fronted by celebrity chef, George Calombaris, entered into a deal with the Fair Work Ombudsman in which an AUD 7.8 million (c.USD 5.4 million) underpayment attracted a "contrition" payment of AUD 200,000 (c. USD 140,000). Australia's largest supermarket chain, Woolworths, has also been caught up in an underpayment scandal, having recently admitted to underpaying workers up to AUD 300 million (c. USD 209 million) over the last decade. While penalties for corporate and financial misconduct have increased significantly over recent years, there is general concern that the sanctions for breaches of employment laws remain too low to effectively encourage compliance.

In light of this, the Commonwealth Government of Australia has commenced work on drafting legislation to criminalise serious instances of underpayment and has given in-principle support to increasing the general level of penalties in line with those applicable to other business laws. While several unions are pushing for a strict liability test to apply to criminal penalties for underpayment, there is a clear balance to be struck between the use of penalties to encourage compliance and ensuring that penalties are not excessive so as to lead to genuine mistakes being crushingly punitive for businesses. New laws are unlikely to be seen until later in 2020 but companies will need to ensure that they are aware of not only the potentially increased legal risks, but also reputational risks associated with failing to provide employees with their legal entitlements.

Enterprise bargaining reform

Under Australia's current enterprise bargaining system, employers must establish that employees are better off overall than under the award (i.e. the government drafted document which sets out minimum terms and conditions of employment (including pay) for employees covered by the Australian national workplace relations system) applicable to that employee. This current approach has seen the proportion of private sector workers covered by enterprise agreements (i.e. an agreement between one or more national system employers and their employees) halved from 2013 levels to roughly 11%. Unsurprisingly, there have been calls from the business community to reform the system and prevent the "rigid" and "absolutist" approach from constraining productivity. Various proposals have been put forward, including to alter the enterprise bargaining approval test so that employers are only required to establish that a class of employees are better off than under an applicable award.

With the Commonwealth Government's review into the industrial relations system expected to be released in the middle of 2020, legislative reform in this area is expected.

02
Cambodia

While it may be premature to forecast the disruptive impact of the new social security schemes on employment relations in Cambodia and the overall attractiveness of the Cambodian labour market, the recent introduction of the long-awaited pension and unemployment schemes have created new concerns for the private sector in relation to increasing labour costs in Cambodia.

A new Law on Social Security Schemes (*LSSS*) was promulgated on 2 November 2019.

While the LSSS came into effect the day following its promulgation, certain key provisions relating to the conditions, formalities and procedures to determine contribution rates for the social security schemes will be issued in subsequent implementing regulations.

Notably, the LSSS will be applicable not only to persons covered by the Labour Law (as in the case of the previous legislation), but also to civil servants in the public sector including, among others, officials working in judiciary organizations, former civil servants and veterans, persons working in air and maritime transportation, household servants and self-employed persons.

There are four pillars of social security schemes under the LSSS: (1) pensions; (2) health care; (3) occupational risk; and (4) unemployment. All the schemes are predicated on compulsory contributions being made by employers and employees.

The existing contribution rates for the occupational risk scheme and health care scheme (as regulated by the previous law) will continue to be applicable to employees in private sectors, until they are superseded by new implementing regulations. At present, for employees working in the private sector, the monthly contribution rate for the occupational risk scheme payable by employers is equivalent to 0.8% of an employee's monthly average salary. The monthly contribution rate for the health care scheme payable by employers is equivalent to 2.6% of an employee's average monthly salary.

The contribution rates for pension and unemployment schemes will be determined in new implementing regulations.

Employers, companies or enterprises that fail to comply with their contributory obligations are liable to a fine from ten to thirty times the daily base wage of all affected employees.

This article has been prepared in collaboration with Sarin & Associates, an association of Cambodian admitted Attorneys-at-Law, working in a commercial relationship with DFDL.

03
China

State council issues opinion on employment policies

Although China managed to surpass its annual national target for the number of jobs created within the first 11 months of 2019 by 16.3%, the outlook for 2020 is less optimistic. In its annual "economy blue book" commentary published on 9 December 2019, the Chinese Academy of Social Sciences named the slowdown in economic growth and the ongoing trade conflict with the United States as two of the main factors disrupting China's economic development in 2020.

In December 2019, the State Council of China issued its Opinion on Further Stabilizing Employment (the ***Opinion***), which outlined its assessment of the labour environment in China and policy direction going into the next year. The issuance of the Opinion indicates that the government is taking a proactive approach and emphasising the importance of a stable employment situation, in order to pre-emptively manage anticipated economic disruptions in the coming year.

Amongst other things, the Opinion stated the aim of implementing policies to broaden aid to stabilise employment and reduce the cost of obtaining social insurance coverage for unemployment and occupational injury by April 2021.

The Opinion further expressed support for enterprises to collectively bargain alternative measures to redundancies, involving salaries, working hours, shift rotation and provision of onsite training.

To encourage businesses to recruit currently unemployed people, the Opinion mentioned the implementation of a one-off subsidy for enterprises that enter into an employment contract (for a term of at least one year) with persons who have been unemployed in the past six months. The subsidy is expected to be implemented only in target geographical regions for the 2020 calendar year.

Additionally, the Opinion encouraged the development of new working models, including temporal, part-time, seasonal and other forms of flexible arrangements. In order to achieve this, the elimination of unreasonable restrictions on working flexibility is stated to be a priority.

Update to draft data security assessment measures impacts on the cross-border transfer of employee data

While entering into the age of "big data", China is looking to refine its legal system to facilitate better protections for personal information. In June 2019, the Cyberspace Administration of China (***CAC***) issued its latest draft of the Measures for Security Assessment of Cross-border Transfer of Personal Data (the ***Security Assessment Measures***). This latest revision shows the impact of the internationalisation of data protection: for example, the latest draft requires network operators (which generally includes employers in relation to personal data of employees) to give data subjects (e.g. employees) enforceable contractual rights against the unlawful transfer of their personal data, demonstrating the influence of the European General Data Protection Regulation in China.

The latest draft Security Assessment Measures also demonstrates China's increasing awareness of the need to regulate the digital aspects of foreign investment, whether inbound or outbound. While not specific to an employment context, the latest revisions impose a significantly more cumbersome approval requirement in relation to data transfers and will cause wide-ranging disruption not only for international companies operating in China, but also domestic companies with operations overseas.

Unlike the previous versions, which had only required operators of "critical information infrastructure" to obtain regulatory approval for transfers of personal data outside of China (except for certain high volume transfers), the latest draft Security Assessment Measures require all network operators to obtain prior approval from local CAC branches for each cross-border transfer (with an exception for repeat or continuous transfers to the same recipient). The transferring party will also need to re-apply for approval every two years.

04
Hong Kong

2019 has been a year of political upheaval for Hong Kong.

The pro-democracy protests which began in June, show no signs of abating, despite escalating violence and November 2019 landslide victory for the pro-democracy party at the district council elections. Uncertainty remains as to the possible political developments that Hong Kong might see in the immediate and more distant future. However, the political unrest, against a backdrop of the US-China trade war and an easing in China's economic growth, has contributed to the economic decline of Hong Kong. Plunging into an official recession for the first time in 10 years, Hong Kong's economy shrank by roughly 3% during the three months leading up to September 2019 and it is expected that the recession will continue into 2020.

The political disruption in Hong Kong has meant employers in the region have needed to navigate several sensitive people issues including how to handle citywide walk-outs (please see our article: "Political unrest and strikes in Hong Kong: What employers need to know") and the growing pressure to reduce workforce costs.

An increasing number of companies in Hong Kong are considering their contingency plans and so employers are having to consider redundancies but also the alternatives to downsizing, which we explored in our recent article "To downsize or not to downsize: What are the alternatives?"

Another trend we are seeing in the Hong Kong market is employers embracing flexible and agile working policies. In the past year, we have received a marked increase in the number of requests from employers to assist them with putting in place agile and/or flexible working policies. And these policies have been tested over the last six months, with the disruption to transport caused by the protests, necessitating remote working. We explored some of the issues around agile and flexible working in Asia in our article "Agile and Flexible Working in Asia – How to get it right".

Looking forward to 2020, it seems that political uncertainty will continue for Hong Kong as well as the economic recession, which will both continue to give rise to new legal and commercial challenges for employers in the region.

05
India

Training young India for "new-collar" jobs

With the global domination of the avant-garde disruptive digital solutions and integration of artificial intelligence and internet of things across a wide spectrum of businesses, there is an increased demand for employees with adequate technological capabilities. A study by the National Association of Software and Service Companies (NASSCOM), the industry association for the IT sector in India, suggests that about 40% of India's total workforce will need to be re-skilled over the next five years to cope with this emerging trend and match the industry requirements. According to NASSCOM, the demand for the number of so-called "new collar" roles in artificial intelligence, big data and other allied deep technologies in India (which stood at around 0.5 million in 2018), is expected to grow at an annual rate of around 16% to about 0.8 million in 2021.

Recognising the need for an up-skilled and reskilled workforce, the Indian finance minister in her maiden budget speech in July 2019 stated that the government will focus on imparting these new technological skills. A skill building platform was launched by the government in collaboration with the global IT giant, IBM in order to train students with the technical skills needed for these "new collar" jobs. The third version of the government's flagship skilling scheme known as the "Pradhan Mantri Kaushal Vikas Yojana" (which roughly translates to Prime Minister's Skill Development Scheme - initially launched in 2015 and re-vamped in 2016) is likely to include within its ambit artificial intelligence, internet of things, big data, 3D printing, virtual reality and robotics. It appears that a dedicated policy for re-skilling and upskilling of the existing workforce with focus on newer areas of technology is in the works by the skills development ministry.

The government (through the ministry of electronics and information technology) has also launched a program for Reskilling/ Upskilling of IT Manpower, touted to be one of the largest government led digital skilling initiatives globally, this program has been designed with an objective to train professionals across different segments in ten emerging technologies (including artificial intelligence, cyber security and blockchain).

The growing unemployment rates are now increasingly being used as a stick to beat the current government with. It seems that the government is now aiming to shift the attention from its failure to generate adequate job opportunities in the traditional manufacturing sector by emphasising and providing training opportunities for these "new-collar" roles which appears to have the potential to absorb the unemployed workforce.


HSBC

06
Indonesia

"Disrupting" existing employment laws and regulations with the Omnibus Law on Job Creation

As President Joko Widodo enters into his second term, the Indonesian government continues to propose new measures in an effort to improve the investment climate in Indonesia and in particular, encourage foreign investment. Such new measures include reforming various provisions of the Employment Law and its related regulations, which notoriously favour employees' interests over employers'. One significant initiative is a raft of legislative changes in the form of a much heralded "*omnibus law*" bill that is intended to integrate, streamline and amend the Employment Law and its related regulations.

The government has stated that it will introduce an omnibus law bill specifically to encourage job creation (***Omnibus Law***), with the expectation that it will boost Indonesia's employment market, raise its ranking on the 2020 Global Competitiveness Index (***GCI***) and make it easier to do business in Indonesia.

Details of the Omnibus Law bill were discussed in depth throughout 2019, with the government expressing its intention to pass it into law in 2020. Although a draft of the bill has not yet been released for public discussion and so the final impact of the bill is uncertain, employers in Indonesia should be aware of the potential wide-reaching changes the Omnibus Law may introduce. The government's stated goals for the new law are to simplify the regulations and improve bureaucratic efficiency in the employment process. Media reports indicate that, through the Omnibus Law, the government seeks to cut red tape and eliminate overlapping laws and regulations that have placed a burden on foreign investors, thereby hindering job creation.

To implement its stated goals, the government has announced that the Omnibus Law will simplify a great number of laws and provisions on employment-related issues, with the underlying principle of introducing "*easy hiring and easy firing*" to Indonesia. The main reforms mentioned by the government include simplifying expatriate work permits as well as the statutory procedures relating to many employment matters and setting wages. Other possible amendments introduced by the new law include changes in relation to outsourcing, issues concerning foreign workers, severance pay, working hours, minimum pay and penalties. Unfortunately, no details are yet available on the substance of such amendments, so at this stage we are unable to say whether they will have substantial impact on job creation or are mainly cosmetic.

The Omnibus Law bill is currently being discussed by the stakeholders, including the government, labour unions, the Employers' Association of Indonesia (***APINDO***) and Indonesian employment legal consultants (***HKHKI***). In addition, the government has recently formed a task force for public consultation on omnibus laws (***Task Force***). Following public consultation, the Task Force must report to the Ministry of Economic Coordinator on its findings. It is not clear if any public consultations or reports have been carried out or been drafted in relation to the Omnibus Law or, if reports have been drafted, whether they will ever be made publicly available.

Although the government has expressed its intention for the proposed Omnibus Law to be completed and submitted to the legislature in January 2020, we will need to wait and see if the government's intention becomes a reality. Unfortunately, based on past experience, the timeframe for the passage of a bill into law in Indonesia is unpredictable, the Omnibus Law being no exception. With this estimated timeframe for completion of the bill in mind, it is important for the government to give details of the proposed changes to the public so that employers in Indonesia will be able to anticipate and adjust to the key changes and enable a smooth transition once the Omnibus Law is eventually passed.

07
Japan

Japan has adopted the so called "life-time" or "long-term" employment system for many years. This system has provided job security to employees in Japan but with the declining economy and aging population, many companies can no longer afford to provide this type of employment. Furthermore, this system has caused various social issues, such as excessive working hours (because companies expect full dedication from their employees in exchange for providing life-time/long term employment), a predominantly male work force (because of the long working hours) and an increase in non-regular staff (because it is very difficult to terminate regular employees in Japan).

The Work Style Reform Act was introduced in June 2018 to tackle these problems and some of the related regulations came into effect in April 2019, such as the regulations setting the upper limits on the hours of overtime which can been worked at large corporations and the regulations requiring employers to ensure that their employees actually take at least 5 days of paid annual leave each year.

There are two main updates regarding employment regulation in 2020 as part of the Work Style Reform Act: (1) Equal Pay for Equal Work; and (2) the introduction of upper limits to the hours of overtime for small and medium-sized enterprises.

Equal Pay for Equal Work

As above, the traditional "life-time" or "long-term" employment system has resulted in a significant increase in the number of non-regular staff. The working conditions of non-regular staff are significantly worse than those of regular employees and it is very difficult for a non-regular staff to become a regular employee. This has created a significant division in society and the Equal Pay for Equal Work regulations, which will come into effect in April of this year, were enacted as part of the new law to tackle this issue. The regulations require employers to treat non-regular staff (such as fixed-term employees, part-time employees and dispatched workers) "equally" with regular employees in relation to all terms and conditions of employment including salary, bonus, allowances, leaves and pension.

The regulations do not require completely equal treatment if the job and/or career path of the non-regular staff are different from those of regular employees. They prohibit "unreasonable" differences compared with regular employees. As for dispatched workers, this requirement will not apply if the employment (dispatch) agency enters into a labour management agreement under which it is agreed that the dispatched workers will be paid at market rate.

New regulations of overtime work for small/mid-sized enterprises

The new regulations setting upper limits to the hours of overtime have been introduced into large enterprises from April 2019. From April 2020, the new regulations will be also introduced into small and medium-sized enterprises.

08
South Korea

The most significant development in the labour and employment law realm in 2019 was the introduction of a workplace harassment law. The passage of this law stems from various media reports that brought social awareness to several high-profile cases of employee abuse. It also builds on the general trend, which is fully supported by the current presidential administration, started by the "#MeToo" movement of giving those in the weaker position a voice. With the passage of this law, there has been a spike in the number of harassment claims.

Also, South Korea's fertility rate fell from in 2018, making it one of the lowest birth rates among OECD countries. In connection with this phenomenon, we have seen a number of amendments to the laws of South Korea in 2019 that are meant to assist employees that become parents, including:

- Increasing paternity leave from 3 days to 10 days and making all 10 days paid leave.
- Increasing childcare leave and the period that employees may request to work reduced working hours from a combined total of 1 year to 2 years—employees may now request 1 full year of childcare leave and 1 full year of reduced working hours.

Finally, the work-hour reduction law that will make 52 hours per week the statutory maximum amount of work hours for rank-and-file employees is already effective for companies with 300 or more employees. The law became effective for companies with 50 to 299 employees on 1 January 2020. However, given the strong voices of employers who have cited the difficulty in complying with this law, the government announced at the end of 2019 that it will impose a one-year grace period regarding the enforcement of this law. The grace period does not defer the effective date of the law but will encourage compliance with the amendment by suspending labour audits and providing opportunities for corrective measures, and thus the Ministry of Employment and Labour (MOEL) will refrain from enforcing the law proactively. The MOEL will handle violations of the working hour limit during the grace period by way of corrective measures or administrative supervision, rather than criminal sanctions.

09 Malaysia

The labour laws in Malaysia have been fairly stable, without any major changes over the past decade. Whilst laws such as the Personal Data Protection Act, Minimum Retirement Age Act and the Minimum Wages Order have been introduced over the past 10 years, the main laws relating to employment, namely the Industrial Relations Act 1967 (*IRA*) and the Employment Act 1955 (*EA*) have not been materially amended.

This changed in 2019. With a new government installed in 2018, the Ministry of Human Resources promptly embarked on a review of the IRA and EA.

Since then, amendments to the IRA have been tabled and as of December 2019, approval from both the upper and lower houses of Parliament had been obtained.

Along with the amendments to the IRA, the amendment to the Malaysian Anti-Corruption Commission Act (*MACC Act*) will also have an impact on employers in 2020.

Amendments to the Industrial Relations Act 1967

The amendments to the IRA include the following:

1. The existing discretion of the Minister of Human Resources as to whether or not to refer cases to the Industrial Court for adjudication has been removed, with that discretion not sitting with the Director General of Industrial Relations.
2. Cases that are not resolved through conciliation at the Industrial Relations Department shall be referred to the Industrial Court without further filtering i.e. they will be automatically referred.
3. Currently, an unjust dismissal claim ends on the death of the claimant worker. However, under the amendments, the Industrial Court is vested with new powers to continue with proceedings in an unjust dismissal claim notwithstanding the death of the claimant and, where appropriate, award back wages or compensation to the next of kin of the deceased employee.
4. Whilst no interest was applicable previously to any Industrial Court awards, interest of up to 8% per annum may now be imposed on any award sum from the date the award is made till the date the payment is fully satisfied.
5. The penalty for non-compliance of an Industrial Court award or a collective agreement has been increased from RM 2,000 (c. USD 490) to RM 50,000 (c.USD 12,260).
6. If a dismissal is demonstrated to be one that is related to union busting, the Industrial Court will have wider powers to determine what remedies appropriate. In all likelihood, this will include awarding some form of punitive compensation against the employer.

Amendments to the MACC Act

With effect from 1 June 2020, the new Section 17A of the MACC Act will become effective. This new provision creates corporate liability for corruption. A commercial organisation may be guilty of an offence if any person associated with the organisation commits a corrupt act in order to obtain or retain business for the organisation. However, liability does not stop with the organisation. A person who is a director, controller, officer, partner or a person concerned with the management of the organisation's affairs can be deemed to have personally committed the offence as well.

Potential consequences under this provision are a maximum fine of 10 times the sum of gratification involved or RM1 million (c. USD 245,000) whichever is higher or a maximum jail term of 20 years or both. This amendment accordingly seeks to strengthen accountability and place potential liability not only on the corporation but also on senior management. The new provision essentially requires organisations to commit 'top down', to promote a culture of integrity and maintain a comprehensive anti-corruption compliance program. The time has now come for organisations to wake up and realise that it must not only have policies and procedures in place, but it must be seen to be effectively implementing these policies with effective risk management and due diligence.

The gig-economy

It is apparent that the new government is serious about seeking reforms in labour laws. However, whilst the above amendments address existing mechanisms and attempt to improve processes within those existing laws, there is a whole other area of law that still requires attention.

In 2019, the Prime Minister identified that the gig economy would be a new source of economic growth and will be made part of the 12th Malaysia Plan (i.e. an economic development plan for the years 2021-2025). However, whilst acknowledging the gig economy has benefited many, the government has voiced concerns over the protection of "workers" rights in such an economy and has said that new laws will be developed to regulate the economy and protect workers.

It remains to be seen when these laws will be read in Parliament but certainly, these are laws that need to be carefully considered balancing the rights of organisations and individuals in a gig economy. The debate continues globally as to whether providers in a gig economy are employees or independent contractors and so any new laws enacted by the government in this area will need to provide clarity as to the right classification.

Certainly exciting times for employment law in Malaysia!

10 Myanmar

Myanmar witnessed a number of government instigated developments in 2019 which aim to a safer and healthier workplace and easier dispute resolution mechanism.

Law amending the Labour Dispute Settlement Law (LDS Law)

On 3 June 2019, Pyidaungsu Hluttaw, the Parliament of Union of Myanmar, enacted the Law amending the Labour Dispute Settlement Law (***Amendment Law***). Some of the key amendments are set out below:

Definition of Worker and Employer

The definition of "worker" is widened to include trainees, workers on probation as well as workers who are dismissed or terminated in furtherance of a dispute. In the event the employer is a company incorporated under Myanmar Companies Law, the head of management and members of the board will also be construed to be employers as per the revised definition of "employer".

Dispute for Employment Rights and Privileges

The terms "individual dispute" and "collective dispute" have been replaced by "dispute for employment rights and privileges" and "dispute for benefits" respectively. Under the LDS Law, both individual and collective disputes by the employee need to be settled through the dispute conciliation body before appeals can be lodged with a competent court (in the case of an individual dispute) or step-by-step appeals to an arbitration council (in the case of collective disputes). Under the Amendment Law, if a dispute is related to employment rights and privileges, either the employer or employee can submit the complaint directly to the relevant Department of Labour Relations or to a competent court. For disputes related to employment benefits, the grievance shall be submitted on a step-by-step basis from the dispute conciliation body to the arbitration council in the same manner as a collective dispute under the old law.

Workplace Coordination Committee

Employers with 30 or more employees are responsible for forming a "Workplace Coordinating Committee" which includes three representatives each for the employer and the employees (the number of representatives required to form a committee under the LDS Law was two). The term of the committee is two years (it was one year under the LDS Law). In the case of any dispute between the employer and the employee, the Workplace Coordinating Committee shall attempt to resolve the dispute and if successful, the parties shall form a collective agreement. Within one year from the signing date of such an agreement, any terms and conditions agreed to thereunder shall not be raised in complaint again. The collective agreement is to be filed with a relevant dispute conciliation body.

Fines and Penalties

The Amendment Law prescribes revised fines and penalties for non-compliance with the provisions of the LDS Law. Among others, the fine levied on an employer for non-compliance with formation of a Workplace Coordinating Committee has been revised to a range from MMK 300,000 to 1 million (c. USD 205 to 684).

The Occupational Safety and Health Law (OSHL)

The OSHL which was enacted on 15 March 2019 aims to augment occupational safety and effectively manage health matters in industries and businesses and to prevent occupational hazards and diseases. The OSHL extends to eighteen types of industries and businesses including private sector companies and joint venture businesses involved in (or doing business in the field of) manufacturing, industrial and construction activities, mining and oil and gas, port businesses, educational services, health care, transportation and communication activities. While it remains unclear when the OSHL will come into effect, we expect that it will in the course of 2020. We have set out some of the OSHL's key provisions below:

New obligations for employers

Companies carrying on the activities covered under the OSHL must register with the competent department (***Department***) for occupational health and safety purposes. The OSHL also provides for the appointment by the employer of an "in-charge employee" to supervise the health and safety of workers at the workplace (***Occupational Safety and Health Officer***). Additionally, the OSHL imposes an obligation on the employer to notify the Department in the event of serious workplace injuries, dangerous incidents and severe occupational accidents (as defined under the OSHL).

In accordance with the OSHL, the employer must undertake a threat assessment of the machinery and equipment used in the workplace, arrange medical check-ups of its employees to ensure that they do not suffer from occupational diseases, provide personal protective equipment and ensure that the company provides appropriate medical assistance and services to its employees (a registered doctor and nurses must be appointed when the number of employees exceeds a specific threshold).

The OSHL provides for protective measures in favour of employees, such as protection against dismissal during the period of leave and prohibition from work that, due to its nature, does not fit with the recommendations of a certified doctor. The employer must also take all necessary measures to prevent any negative effects on the health of pregnant and breastfeeding employees in the workplace. Finally, the OSHL provides the right for employers to limit or restrict the work of employees who are incapacitated due to their health condition.

Offences and Penalties

The OSHL lays down severe penalties in the form of a fine or imprisonment for any contravention of the provisions of the law by an employer. The fine ranges from MMK 1 million to MMK 10 million (c. USD 684 to 6,830), depending on the contravention. Certain violations on the part of the employer like failure to appoint an Occupational Safety and Health Officer, failure to report an occupational accident and/or hazardous event or failure to pay for occupational safety and health expenses may lead to imprisonment.

11 Philippines

2019 saw positive developments in labor legislation in the Philippines aimed principally at improving employee welfare and placing labor standards at par with international benchmarks.

Safe Spaces Act

The Safe Spaces Act, signed into law on 17 April 2019, criminalizes gender-based sexual harassment in streets, public spaces, online, workplaces, and educational or training institutions. This new legislation supplements the Anti-Sexual Harassment Act of 1995, expanding the definition of harassment subject to criminal prosecution. This law provides, for example, that "the crime of gender-based sexual harassment may also be committed between peers and those committed to a superior officer by a subordinate," unlike the Anti-Sexual Harassment Act which requires moral ascendancy as an element in the crime of sexual harassment. The Safe Spaces act also prescribes certain duties and obligations on both the employer and employees. Notably, this law provides that employers may be held responsible for: (a) non-implementation of their duties under the law; or (b) not taking action on reported acts of gender-based sexual harassment committed in the workplace. A violation by the employer is penalized by a fine upon conviction.

Along with the rise of the #MeToo movement, the enactment of the Safe Spaces Act has led to increased awareness in women's rights and the urgent need for employers to create and sustain workplaces free from any form of harassment. This, in turn, has led to an increased number of workplace harassment complaints and disciplinary investigations involving sexual harassment. We see this trend continuing in 2020, especially given the expected release of the implementing rules and regulations of the Safe Spaces Act this year.

Veto of the Security of Tenure Bill

Finally, in July 2019, President Rodrigo Duterte vetoed the Security of Tenure Bill, which provides stricter regulations on contracting arrangements. Not surprisingly, the veto was welcomed by the business sector but was heavily criticized by labor groups. In his veto message dated 26 July 2019, the President explained his veto, stating that "businesses should be allowed to determine whether they should outsource certain activities or not, especially when job-contracting will result in economy and efficiency in their operations, with no detriment to the workers, regardless of whether this is directly related to their business."

To a certain extent, the past year has seen the fruition of the campaign promise made by then candidate Duterte for labor law reform. And, although one of the most significant pieces of legislation (i.e., the Security of Tenure law) was not approved in 2019, we believe that some version of this law will definitely be approved in the coming months. The critical question is, will it be a boon or a bane to business?

Extended maternity leave provision

One major piece of labour legislation in 2019 was the "105-Day Expanded Maternity Leave Law", which grants female workers a 105-day maternity leave with full pay. Signed into law on 20 February 2019, the new law is more consistent with the 14-week maternity benefit prescribed by the International Labor Organization Convention, substantially increasing the number of maternity leave days and requiring the payment of full salary during the 105 days of maternity leave. This means that employers are now mandated to shoulder the difference between the worker's full pay and the average salary credit paid by the Social Security System (SSS).

Philippine HIV and AIDS Policy Act

The Philippine HIV and AIDS Policy Act, which took effect on 25 January 2019, aims to ensure access to HIV and AIDS related services by eliminating the stigma and discrimination that surrounds the HIV and AIDS situation in the Philippines, and the people directly and indirectly affected by it. This law prohibits, amongst other things, the rejection of a job application, the termination of employment and any other discriminatory policies in hiring solely or partially on the basis of actual, perceived or suspected HIV status. The new law also requires employers to prevent or deter acts of discrimination against persons with HIV and to provide procedures for the resolution, settlement or prosecution of acts of discrimination.

Social Security Act of 2018

The Social Security Act of 2018, which took effect on 5 March 2019, aims to ensure the long-term viability of the SSS by expanding the powers of the Social Security Commission, extending the system's coverage, and increasing the benefits granted to SSS members.

Universal Health Care Act

The Universal Health Care Act, which took effect on 10 March 2019, aims to progressively and systematically realize universal health care in the country and ensure that all Filipinos are guaranteed equitable access to quality and affordable health care and are protected against financial risk by reducing out-of-pocket spending on medical goods and services. This law provides that all Filipino citizens are automatically covered by the National Health Insurance Program.

12
Singapore

As with many other countries in the Asia Pacific, Singapore has not been immune to the disruptive effects of the US-China trade war and even the protracted protests in Hong Kong.

To cite a couple of more recent examples, Hong Kong-based duty-free retail operator DFS Group announced in late August 2019 that after a 38-year tenure, it will be pulling out of Singapore's Changi Airport by June 2020. DFS then retrenched more workers from its branch in Singapore's main shopping district, reportedly due to "pressure from the trade war and turmoil in Hong Kong". The move drew widespread criticism from Singapore's Ministry of Manpower and employee unions, as the retrenchment was initially done with little advance warning and poor retrenchment benefits. Then in early December 2019, Hong Kong based cosmetics retailer Sasa - an early pioneer in makeup retail in Singapore, followed suit by announcing that it will be pulling out of Singapore entirely and closing down its 22 stores. Reported reasons included its core market in Hong Kong facing a "drastic decline in Mainland tourist arrivals", as well as a decision to concentrate on e-commerce.

As global economic headwinds and uncertainty continue into 2020, one can expect even more such redundancy exercises to take place. Technological disruption is also expected to contribute to this trend. In this regard, a joint-study released by Cisco Systems and Oxford Economics in September 2018 predicted that by 2028, 20.6% of Singapore's workforce will be displaced by new technology.

All that said, Singapore's unemployment and retrenchment rates held relatively steady in 2019. We expect at least a few more retrenchment exercises in 2020 though, in light of the ongoing geopolitical ructions and the relentless march of technology.

Employers considering retrenchment exercises should take note of a number of issues. They are strongly encouraged to refer to the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment, which sets out formulae for calculating retrenchment benefits and encourages the provision of other forms of assistance. Though not presently statutorily binding, this advisory has often been referred to by the Ministry of Manpower, which is able to bring considerable pressure to bear through various extra-legal means including withholding work pass privileges to recalcitrants. Employers should also bear in mind that dissatisfied trade unions could bring retrenchment disputes before Singapore's Industrial Arbitration Court, which, unlike the regular Courts in Singapore, is statutorily empowered to act in accordance with common equity and fairness. The disaffected employees could also commence claims before the Employment Claims Tribunals (ECT) if they feel that they have been wrongfully dismissed, if they take the view that the retrenchment selection process was unfair or if there is no "genuine" retrenchment and it was just an excuse for termination.

13
Taiwan

New protections for dispatch workers added to the Labour Standards Act

Dispatch labour and alternative employment structures have become increasingly common in Taiwan in recent years but Taiwan previously lacked any law or binding regulation addressing such employment structures. This changed in the summer of 2019, when the Labour Standards Act was amended to include new protections specifically for dispatch workers. The key points of the new provisions are as follows:

- requiring that the labour contract between a dispatch agency and a dispatch worker shall be a non-fixed term contract, thus prohibiting a dispatch agency from terminating a dispatch worker without a statutory basis;
- restricting dispatch clients from interviewing dispatch workers or otherwise appointing a specific dispatch worker before the worker signs a labour contract with the dispatch agency, otherwise, the dispatch client may be deemed to be the actual employer of the dispatch worker;
- dispatch clients are now liable for owed wages to dispatch workers, if the dispatch agency is fined by the competent authority for owing wages or fails to comply with an order to pay; and
- dispatch clients and dispatch agencies are now jointly and severally liable for employer compensation when a dispatch worker suffers from occupational accidents.

Food delivery platforms may be liable as employers of their couriers

The explosive popularity of food delivery platforms in Taiwan in the past year has also led to an increase in serious vehicle accidents involving food delivery couriers. Therefore, the Ministry of Labour has issued the legally non-binding "Guidelines for Safety of Food Delivery" for food delivery platforms' reference. Furthermore, several of Taiwan's labour authorities have preliminarily determined that couriers should be deemed to be employees of the food delivery platforms, rather than independent contractors as customarily assumed. If these determinations hold, food delivery platforms will be required to provide couriers with all of the benefits and protections of employees under Taiwan labour laws. These developments are likely to have implications for the wider "gig economy" in Taiwan as well.

Labour Incident Act with effect from 1 January 2020

The Labour Incident Act (which has also been referred to as the Labour Procedure Act) was approved by the Legislative Yuan in November 2018. Finally, the law took effect on 1 January 2020 according to the formal announcement by the Judicial Yuan. Several key provisions for employers to take notice of are as follows:

- Most labour disputes will be required to be submitted to court-supervised mediation, prior to proceeding to litigation.
- All payments that the worker received from the employer under the employment relationship shall be presumed to have been wages for the purposes of wage calculations.
- All work hours recorded on the worker's timesheet shall be presumed to have been performed with the employer's permission.
- In a dispute regarding whether a worker was properly terminated, the court may order a temporary injunction to require the employer to continue employment and payment of wages to the worker while the dispute is pending.

As many of the new provisions could have significant implications in future labour disputes, Taiwan employers are encouraged to consult with their legal counsel to discuss potential options to mitigate these effects.

Employment Promotion Law for Middle-aged and Elderly People

Taiwan has is an aging society. Therefore, to improve the labour participation of middle-aged and elderly people and promote economic security, the "Employment Promotion Law for Middle-aged and Elderly People" was approved on 15 November 2019 and officially announced on 4 December 2019. The law provides that employers are prohibited from discriminating against any applicant or employee aged 45 or older on the basis of age. There are also regulations that request the competent authorities to promote the re-employment of unemployed and retired workers. The law is expected to take effect in the second half of 2020, subject to a formal announcement by the Executive Yuan.

14
Thailand

In the disruptive era where technology and society are evolving faster than business, the Thai government has been striving to keep up with the changes through its many legislative reforms. Various changes have been and continue to be made in many areas to support entrepreneurs as well as to reap the benefits of the fast-changing business landscape. For example, changes are underway to further facilitate e-commerce and to allow businesses to interact with and obtain official documents from government agencies via electronic means. At the same time, there are now discussions on how the government could better collect taxes from e-entrepreneurs.

Another major change is the introduction of Thailand's Personal Data Protection Act (*PDPA*). This is an important new law which aims to afford better consumer protection in the age of disruptive technology. At the same time, it will inevitably affect employer-employee relationships in Thailand. Enacted in May 2019, the PDPA contains significant new requirements for employers which collect employees' personal information. Although most sections of the PDPA will become effective in May 2020, employers should be aware of their duties and liabilities and prepare themselves for the change.

In the area of labour law, significant changes were also made under the labour protection law in 2019, which further improved the welfare and benefits of employees. However, it is clear that those changes are a product of several years of efforts by various groups and organisations to raise the bar of labour welfare in Thailand, rather than an attempt to modernise Thai labour law in keeping with disruptive technology. Below are some of the noteworthy changes.

Increased severance payment

Statutory severance pay was previously capped at 300 days' wages for employees who have worked for an uninterrupted period of 10 years or more. Effective from 5 May 2019, those who have been employed for 20 years or more at the time of termination will now be entitled to 400 days' wages at their most recent rate of pay - a substantial increase of 33% from the previous rate.

Increased maternity leave benefits

Employers must now grant pregnant employees 98 days' maternity leave (which was previously capped at 90 days). This is inclusive of scheduled weekly holidays, public holidays and annual holidays. In addition, maternity leave is now defined to include leave which is taken for pre-natal examinations before delivery.

Employee's consent is required for change of employer

Effective from 5 May 2019, where there is a change of employer, the employer must obtain consent from the employees who will be transferred to the new employer. This change also applies to situations where an employer changes as a result of a transfer of functions or staff from one company to another as well as where there is a registered merger between the employer and another company which results in a new entity. Following the transfer, the new employer will assume all the rights and responsibilities owed to the transferred employees by the previous employer.

Workplace relocation notification

Also effective from 5 May 2019, if an employer wishes to change an employee's current workplace to a new establishment or to another of its existing work locations, the employer has a duty to post an announcement which clearly states which employees will be relocated and the scheduled date of the relocation, at the current workplace, for a continuous period of at least 30 days, in advance of the relocation.

If an employee does not wish to relocate to the new place of business, such employee must inform the employer in writing within 30 days of the date of the announcement or the date of relocation. In such a case, the employee is entitled to severance pay calculated at the normal rate.

It can be seen that, with the increased benefits granted to employees under the new labour protection law, employers now face greater challenges. One would expect that, in the current economic conditions and in the era of disruption, the Thai government would look to how it can provide greater support and assistance to employers

in the jurisdiction. However, it seems that the current approach of the legislature is to provide businesses with that help through other measures rather than through amendments to Thai labour law. Accordingly, we are not aware of, or foresee any significant changes to Thai labour law in the next 12 months.

15 Vietnam

The year 2019 is viewed by many as a positively productive year for Vietnamese law-makers in the labour sector. Changes in 2019 included the introduction of a compulsory social insurance scheme applicable to foreign employees in Vietnam, the adoption of an increased regional minimum wage (increasing by roughly 5%) and the passing of a new Labour Code on 20 November 2019 (***2019 Labour Code***) which will come into effect on 1 January 2021.

In response to both employer and employee expectations for a more efficient legal framework to address issues with complying with the "old" law, certain salient changes were introduced by the 2019 Labour Code. We have set out some key changes below:

Strengthened statutory protection from discrimination and sexual harassment in the workplace

Consistent with the global focus on sexual harassment in the wake of the #MeToo movement, the 2019 Labour Code enshrines the definition of "discrimination", as "an act of differentiation, exclusion or prioritisation on the basis of race, skin colour, nationality, social origin, ethnic group, gender, age, maternity status, marital status, religion, political beliefs, disability, HIV status or participation in a trade union that impacts equity with regard to occupation opportunities", and the definition of "sexual harassment" "a sexual behaviour of any person towards another person at work that is not desirable or acceptable to the latter".

In addition to the introduction of the above definitions, the 2019 Labour Code is also the first Labour Code of Vietnam which expressly permits an employer to impose disciplinary actions for sexual harassment, including dismissal. However, as the definition of sexual harassment remains generically descriptive without particular acts being specified as amounting to sexual harassment, it is likely that an employer, when drafting internal policies, will need to specify what behaviour will amount to sexual harassment for the purposes of handling violations and potential disciplinary proceedings.

The 2019 Labour Code also allows the employee to unilaterally terminate his or her employment agreement without notice, if such employee suffers maltreatment or sexual harassment at work.

Fixed term contracts of foreign employees

In Vietnam, a fixed term contract may not have a term of more than 2 years and, upon the expiry of the second consecutive fixed term contract, the third contract between the parties must be an "indefinite" term, permanent contract. This rule applied to both local and foreign employees, despite a permanent contract often not being consistent with the employer's commercial objectives when employing a foreign worker and unilateral termination of a labour contract by the employer being difficult in Vietnam.

However, while its drafting on this point is not free from ambiguity, the 2019 Labour Code appears to recognise that an employer and a foreign employee may enter into any number of consecutive fixed term contracts without being required to move to a permanent contract.

Substance over form in employment contracts

As another "first" in Vietnam, any arrangement or contract regardless of its label can be re-characterised to be an employment contract if it substantially reflects the nature of an employment relationship. Despite its largely vague language, the 2019 Labour Code pinpoints two key indicators to scrutinise an employment relationship: (1) the payment of remuneration or salary; and (2) the management, control or supervision of one party over the other.

In terms of what form employment contracts can take: electronic means are permissible; and verbal agreements are also permissible for contracts whose term is less than one month.

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