People and Reward

Asia employment law bulletin 2021

Freshfields Bruckhaus Deringer

Welcome to the 2021 edition of our Asia employment law bulletin!

Introduction

Last year, our bulletin focused on the era of disruption and its impact on businesses in the APAC region, but none of us could have predicted the *nature* of the disruption (or the scale and impact of the disruption) that 2020 would present to the world!

For employers, 2020 will be a year remembered as a year of many "firsts" – it was the first time many employers have had to make quick and sweeping changes to the way employees worked; it was the first time they have had to deal with such an imminent threat to the health and safety of their workforce; and for many, it was the first time that the importance of having a robust business continuity plan has come into such sharp focus.

Against this backdrop, this 2021 edition of our annual bulletin will be focused on the future of work as a result of the COVID-19 pandemic. We have again collaborated with our Stronger*Together* colleagues to reflect upon our experiences in 2020 across 14 countries in the APAC region and how they may shape the future of work.

The areas of focus for employers have evolved with the life cycle of the pandemic. At the outset of the pandemic, employers faced the need to ensure business continuity while retaining their workforce, for example, by turning to government support schemes. They also had to consider what their obligations to ensure the health and safety of their employees meant in light of the remote working arrangements. Now with the roll out of vaccine programs in many countries, employers are considering issues around testing and vaccinations as well as new local government measures, for example, regarding restrictions on the hiring of foreign workers.

One prediction made across the board is that remote working, which employers in the APAC region were perhaps slower to embrace pre-pandemic, will be here to stay.

In this 2021 bulletin, we will also discuss some of the key legal issues and legislative developments that we have seen in 2020 in APAC, as well as key changes that we expect to see this year.

The Freshfields Global People and Reward team has penned other articles in our WorkLife 2.0 series bringing together ideas and opinions from across the firm on a range of topics that we consider to be at the forefront of businesses' minds as we begin to emerge from the pandemic.

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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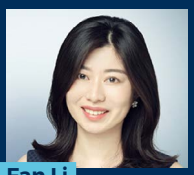

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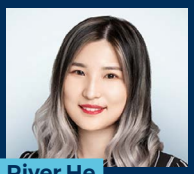

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Australia

Developments in the light of COVID-19

Similar to many other jurisdictions, the global pandemic acted as the catalyst in transforming the Australian workplace environment. Many Australian employers were forced to adapt their set workplaces, such as office environments, to working remotely.

Towards a hybrid workplace – what should employers know

In 2021, employers who were previously reluctant to implement flexible working arrangements will need to carefully consider their ability to deny staff the option to work from home, now that it has been implemented as a viable option.

With the transition to remote working, research from The Centre for Future Work revealed that people working from home increased their weekly hours and were engaging in unpaid overtime. The research found that employees worked an average of 5.25 hours of unpaid labour each week during the COVID-19 pandemic, with the worse affected group being full-time employees (who averaged 6.21 hours of unpaid overtime a week) closely followed by self-employed and part-time employees. This means that employers who have been paying their workers an 'all-inclusive' wage or salary intended to cover all overtime and entitlements, may be at risk of underpaying their employees. It also raises concerns about health and safety measures in the remote working environment.

The duty of employers under Australian work health and safety legislation to ensure the health and safety of employees at work, extends to the home workplace. The research regarding unpaid overtime shows that employers must ensure they have measures in place to prevent employees suffering health and safety risks caused by excessive work hours, including risks to mental wellbeing such as fatigue and stress, even while employees are working remotely. This has also demonstrated that in many cases, workplace health and safety measures were previously inadequate to protect against the spread of infectious diseases in the workplace.

New legislation – Fair work amendment bill

The various lessons learnt in 2020 led to the introduction of the *Fair Work Amendment* (*Supporting Australia's Jobs and Economic Recovery*) Bill 2020 into Federal Parliament. The industrial relations omnibus bill introduces reform in multiple areas as a result of widespread consultation with employers, industry groups and trade unions.

A significant reform proposed in the bill is the criminalisation of wage theft. The bill will introduce jail terms and significant fines for employers who dishonestly engage in a deliberate and systematic pattern of underpaying one or more of their employees. The offence will carry a maximum penalty of a four years' jail sentence and/or AUS$1.11 million (approximately US$0.88 million) in fines for individuals, and up to AUS$5.55 million (approximately US$4.38 million) for a body corporate. The Fair Work Ombudsman, the workplace relations regulator, will also receive increased funding to investigate underpayment and non-compliance by large businesses, and to set up a free advisory service for small businesses to advise them about paying their staff correctly under the applicable industrial instruments.

In line with the culture of flexible working that was introduced during the pandemic, the bill also proposes to extend flexible working provisions introduced during COVID-19 until March 2023, which will enable employers to vary employees' duties and location of work for a further two years.

Vaccinations – no jab, no job?

The new hybrid working environment i.e. both on-site and home workplaces, may also be impacted by the rollout of a COVID-19 vaccine in Australia, and mandatory vaccination may form part of health and safety practices in future for employers. Australian employers have a duty under the work health and safety legislation to provide a safe workplace for employees and, as far as reasonably practical, protect the health and safety of their employees and other people who may be put at risk from their business.

However, an employer's direction to employees to be vaccinated prior to returning to the traditional workplace should not be made without ensuring that such a direction to employees is lawful and reasonable. Employers will need to consider the applicable circumstances of their workplace and their employees' risk of exposure to determine whether compulsory vaccination is reasonable, noting that some employees may object to vaccination. Otherwise, if an employer requires mandatory vaccination in circumstances that may not be reasonable, it may be at risk of discriminating against workers who object to vaccination.

For example, if a workplace involves minimal interaction with clients or the public and other measures may adequately protect employees without vaccination, it may not be considered reasonable to require that all employees must be vaccinated. However, as seen in the recent *Maria Corazon Glover v Ozcare* [2021] FWC 231 decision, in some circumstances, vaccination may be an "inherent requirement of the role", and an employee's refusal to be vaccinated may lead to termination of employment.

02
Cambodia

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.

Developments in the light of COVID-19

Working from home

Working from home is not specifically regulated in Cambodia and is typically an arrangement mutually agreed upon between the employer and its employees. Cambodian Labour Law stipulates that the employer is entitled to exercise "direction and supervision" over its employees as long as the direction and supervision is reasonable and in accordance with the law. Based on this provision, the employer may make necessary arrangements including, amongst others, working from home arrangements. However, if the working from home arrangements affect any terms and conditions of the employment contract, for instance, if it results in a reduction of an employee's benefits, prior consent from the employee is required.

In light of these health and safety concerns, Cambodian Labour Law requires employers to provide a safe working environment to their employees. If an employer is deemed to have intentionally or negligently infringed its duty of care, the employer may be held liable under tort provisions for damages, sustained by the employee.

Testing of employees and other measure that employers should take to prevent the spread of COVID-19

Employers must use all reasonable efforts to ensure that they strictly comply with the guidelines issued by all relevant authorities to prevent the spread of COVID-19, which include:

a. to immediately report to the competent authorities if any of their employees have COVID-19 symptoms or are suspected to be COVID-19 positive; and

b. to establish an Occupational Health and Safety (***OSH***) Committee or COVID-19 Committee in the workplace to regularly disseminate information, instruct employees on personal hygiene measures and advise on preventative measures to avoid the spread of COVID-19.

Employers may formally adopt employee COVID-19 testing measures as part of their health and safety rules to protect the health and safety of all employees at the workplace. Such rules should also include applicable disciplinary actions for non-compliance. The rules should be acknowledged and accepted by all employees in writing. However, any disciplinary action taken against an employee for failure to comply with the internal work rules must be proportionate to the magnitude of the employee's misconduct.

New measures to mitigate the impact of COVID-19

The Royal Government of Cambodia (***RGC***) issued in 2020 a number of measures aimed at mitigating the impact of COVID-19, including:

a. a government subsidy of up to USD 40 per month during a contract suspension approved by the Ministry of Labour and Vocational Training (***MLVT***) from January to March 2021 for employers of several industries, such as: the garment, textile, footwear, travel products and bags, and for the tourism sector;

b. that enterprises may suspend monthly contribution payments to the National Social Security Fund during the suspension of its operations;

c. the MLVT has continued to delay implementation of the pension scheme for another six months, until July 2021; and

d. the MLVT continues to defer Back Pay of seniority payments (prior to 2019), and New Pay of seniority payments (from 2019 onward) applicable in 2020 and 2021 but payable in 2022 for any sectors inside

or outside of the garment manufacturing sector (as listed above). However, the MLVT issued Notice No. 003 dated 21 January 2021 which provided that for factories and manufacturing sectors, Back Pay of seniority payments (prior to 2019) and New Pay of seniority payments applicable in 2020 and 2021 are implemented in 2021.

Finally, earlier in 2020, the MLVT organised a tripartite consultation-seminar on amendments to the Labour Law. This seminar discussed and proposed certain amendments including:

a. amendments to provisions concerning shift work in factories, enterprises and establishments where more than one shift regularly occurs, including revised rates of payment for night work;

b. expansion of the Arbitration Council's jurisdictional scope to cover individual disputes to enhance the effectiveness of labour dispute resolution mechanisms; and

c. cancellation of substitute days for public holidays falling on a Sunday to enhance labour productivity.

In light of these anticipated changes, employers are advised to be vigilant. This is because, if the proposed amendments are accepted, they will likely require affected employers to modify the terms and conditions of their employment contracts and policies, including those in relation to night shift work, paid public holidays, etc.

03 China

Developments in the light of COVID-19

Protection for both employees and employers during the pandemic

Between January and March of 2020, the Chinese government announced various employment-related policies in response to the COVID-19 pandemic. These policies benefitted both employers and employees. Employers were prohibited from dismissing employees who were confirmed COVID-19 patients, suspected patients or in quarantine. Employers were also not permitted to carry out massive layoffs using the pandemic as a ground. On the other hand, employers benefitted from the Chinese government's waiver of a part of the employers' contribution to social insurance and allowed employers to delay such contributions until after the pandemic.

These policies remain in force and continue to be applicable to both the employers and employees a year after they were introduced.

Guidance on workforce sharing

The initial response to address labour surplus or shortages in view of the COVID-19 outbreak was through workforce sharing. This model was first introduced in a district in Shanghai to help employees who were out of work due to their employers' suspended or reduced operations. In such instances, such employees could be temporarily engaged by another company that needed manpower. The pilot project in Shanghai proved to be a success and was welcomed by both employers and employees alike. Certain employers were as a result able to reduce their employment costs without undertaking any layoffs, while employers that faced a shortage of manpower, particularly those in the e-commerce sector, benefitted from the temporary engagement of additional workers to meet a surge in business demand.

This solution was later advocated nationwide by the Chinese central government. In September 2020, the Ministry of Human Resources and Social Security issued a circular, stipulating that all human resources departments were to support workforce sharing in order to achieve job stability and served as a guide to the employers on such co-operation agreements. Rights and obligations (including the size of the shared workforce, time and place of work, work content, etc.) is required to be specified between the employer with a labour surplus (the ***Legal Employer***) and the employer with a labour shortage (the ***Host Entity***).

Further, the employment relationship between a shared employee and the Legal Employer must not be terminated because of the temporary sharing of workforce. The Legal Employer remains obliged to pay salaries to its employees, making its social insurance contributions and assume any work-related injury insurance liabilities even though a shared employee suffers a work-related injury whilst working for the Host Entity (though it may seek reimbursement from the Host Entity). If the employment between a shared employee and the Legal Employer terminates while the Host Entity continues to engage the employee for his/her work, then a ***de facto*** employment relationship will be established between the employee and the Host Entity.

Opinions to support flexible employment

The Chinese government is committed to support the development of new forms of employment models which has been credited for containing the COVID-19 pandemic. In July 2020, the State Council issued the Opinions on Supporting Flexible Employment through Multiple Channels (the ***Opinions***), pursuant to which a whole host of measures are to be rolled out that aim to boost job creation and to raise income levels. Amongst other things, the Opinions require provincial governments and the ministries and commissions under the State Council to:

a. expand certain industries where part-time workers are commonly used (e.g., cleaning, retail and construction);

b. support the development of new employment models (e.g., e-retailing, smart mobility, online education and training, internet healthcare and online entertainment);

c. support the development of technologies which will facilitate remote working, home working and part-time working;

d. strengthen public services for employment (e.g.,

matching employers with labour surplus with employers that require more manpower to participate in workforce sharing); and

e. encourage online platforms to create more flexible job opportunities, while imposing responsibilities on these platforms to ensure that the rights and interests of employees outside of the traditional employer-employee relationships are protected.

Going forward, it is envisaged that the government departments and local legislative institutions may introduce related regulations to implement the Opinions in the course of 2021, and we expect to see new employment models emerge (in addition to workforce sharing) that allow greater flexibility and we expect this will be much welcomed by both employer and employees.

04
Hong Kong

Developments in the light of COVID-19

After a year of political upheaval in 2019, Hong Kong faced yet another challenging year with the outbreak of the pandemic. Employers in Hong Kong have had to grapple with a variety of challenges, including having to quickly implement remote working arrangements to ensure the health and safety of their employees.

Although the challenges were not unique to Hong Kong, certain issues were compounded here. Most Hong Kong homes tend to be very compact, which means that working from home may not be a feasible option for some employees, particularly where they live with other family members.

Further, the health and safety legislations in Hong Kong have not caught up with the modern ways of working, which means that it's not always easy for employers to understand and access their liabilities towards the health and safety of their employees where they are working remotely.

Mitigating the risks of remote working

In Hong Kong, there are three sources of liabilities when it comes to providing a safe working environment for employees, namely:

a. a common law duty of care;
b. a statutory duty under the Occupational Safety and Health Ordinance (the ***OSHO***); and
c. under the Employees' Compensation Ordinance (the ***ECO***).

Under common law, employers have a duty to care to employees and to provide a safe place of work and this duty likely continues to apply even when employees are working from home. An employer could be liable for negligence or breach of an implied duty in an employment contract to provide a safe working environment if it fails to take reasonable care to ensure that the employees are safe.

The OSHO also requires employers to (amongst other things) ensure as far as reasonably practicable the health and safety all employees at work, but the legislation has not caught up with the modern ways of working. As a result, it is not entirely clear how an employer can satisfy the overarching requirement to provide a safe working environment for employees when the workplace has evolved to include an employee's home or even a coffee shop down the street, all of which are venues which the employer has no control over. As an example, the OSHO requires an employer to carry out a health and safety assessment of the working environment; otherwise it may be liable for a fine.

As with the OSHO, the ECO does not consider the implications of employees working from home. The general position is that if a personal injury by accident "arises out of and in the course of employment", the employer will be liable to pay compensation in accordance with the ECO, even if the employee may have committed acts of negligence leading to the accident. Under case law, an accident "arises in the course of employment" if it is in discharge of the employee's duties or is reasonably incidental to the employee's employment. In other words, if the employee slips and falls when running to pick to a work call at home because the floor was wet, this could be deemed a work injury. To put things into perspective, however, an employee travelling to the airport for a work trip who suffers an injury on the way will also have a claim under the ECO because it arises out of or in the course of employment. These risks have always existed and will continue to exist regardless of whether we move towards more flexible working.

Until the law is updated to reflect the realities of modern day working, allowing employees to work flexibly or agilely will come with inherent risks which Hong Kong employers will need to take into consideration.

Practically speaking, there are things that employers can do to mitigate (but not completely eliminate) those risks. This includes having a flexible working policy in place so that it is clear that those who wish to take advantage of the policy need to be satisfied that their home is an appropriate venue for work. Other steps which an employer can take to demonstrate that it has taken reasonably practicable steps, include:

a. providing training to employees by occupational therapists (for example) on tips for setting up a home office;
b. a pack of information which includes best practices on maintaining health and safety at home (covering things like having a good light source, taking breaks regularly, etc.);
c. regular check-ins with employees to ensure that any issues with working from home are fed back to management.

Vaccination of employees

Currently, the Hong Kong government's vaccination programs are expected to be rolled out from February 2021 but limited information is available. Employers that are looking to implement vaccination policies in workplaces will likely have to carefully strike a balance between their obligations under the OSHO and common law to ensure the health and safety of their employees at work and potentially other competing legal issues that such participation by employees may potentially bring.

Other developments

Freshfields 2020 whistleblowing survey

We continued our survey that started in 2014 to gather the views of respondents across 13 industries in the UK, US, France, Germany and Hong Kong to assess their attitudes towards whistleblowing and to examine how this has changed over time. This survey has taken place in 2014, 2017 and 2020.

The Hong Kong chapter of the survey reflects the answers from 500 middle and senior managers within large companies in Hong Kong. Amongst other encouraging statistics revealed by the 2020 report, one observation is that managers in Hong Kong are the most involved in whistleblowing - a stark comparison to the US. Please see our blog exploring why we think this is the case: "**Whistleblowing in the spotlight: why are managers in Hong Kong more likely to blow the whistle?**" It is hoped that this trend will continue into 2021 and the disruptions to the way we work due to the COVID-19 pandemic will not have a detrimental impact on the health of whistleblowing in Hong Kong.

05 India

Developments in the light of COVID-19

The changing definition of "workplace"

During the COVID-19 lockdowns, various advisories and directions were issued by both the central and state level governments, directing employers to allow their employees to shift work bases to their homes. Indian labour laws did not really contemplate or legislate the working conditions for work-from-home (***WFH***) models and hence businesses were seen scrambling to put in place appropriate WFH policies and business continuity plans. The sectors in India which saw a tectonic shift over the last year are the information technology (***IT***), information technology enabled services (***ITES***) and the business process outsourcing (***BPO***) industries in India which currently employs more than 3 million Indians.

Picking up the cue quite early on, the Department of Telecommunications (the ***DoT***- the sectoral regulator for the BPO industry), first rolled out temporary relaxations to enable the shift to the WFH model. Witnessing the positive impact of these exemptions, the DoT came out with a revised set of guidelines for service providers of voice-based BPO services in November 2020, expressly recognizing the concept of "*work from anywhere*" in India and incorporating the relaxations provided earlier in the year into these guidelines - lending permanence to them. A study by the National Association of Software and Service Companies (the industry association for the IT sector in India) suggests that over the next three to five years, up to 60 per cent of the IT industry's work and up to 40 per cent of the ITES work could shift to a WFH model. It appears that the "world's back office" (the moniker India had "earned" due to its prolific BPO sector) is now migrating to Indian homes!

Whilst the WFH model was put in place involuntarily, it is expected to continue even in the post-pandemic era for the above-mentioned sectors with companies finding it a viable and more cost-effective model. Recognising this, the Indian labour ministry has for the very first time incorporated the 'work from home' concept as part of its draft model standing orders for the service sector. Standing orders are essentially rules of conduct of an establishment (relating to *inter alia*, classification of workers, leaves, and termination) and employers (engaging more than a certain number of workers) are required to prepare and adopt these in line with the model standing orders issued by the government.

Other developments

Parliament approves the labour law codes

After almost five years of discussions, four new labour codes relating to industrial relations, wages, social security and safety were finally passed by the Indian parliament (the code on wages was approved in 2019 and the remaining three in September 2020). They are expected to be finalised and brought into force by April 2021 and once enacted, these codes are expected to make navigating the labyrinth of Indian regulatory frameworks simpler for employers and therefore, potentially also making it easier to do business in India.

Key changes include the introduction of the concept of "*fixed term*" employment with a view to provide employers the flexibility to directly employ workers for a fixed duration on the one hand and ensuring that wages, benefits and conditions of work as are available to permanent workers are made available to the fixed term employees on the other. In a first, gig and platform workers have also now been recognised under the Indian Social Security Code and have been defined to mean persons who are engaged in a work arrangement outside of a traditional employer-employee relationship.


HSBC

06 Indonesia

Developments in the light of COVID-19

In an effort to mitigate the spread of the COVID-19 pandemic, starting in Indonesia from April 2020, Indonesia's regional governments implemented, from time to time, "large scale social restrictions" (***PSBB***).

Working from home

The main purpose for implementing PSBB, amongst others, is to limit the number of employees working in the office. The PSBB policy requires 50 up to 75 per cent of a total number of employees in each company to work from home. This introduces new work habits such as remote-working and virtual meetings through video conferencing and therefore significantly changes the dynamics of work environments. Indonesian regulations are silent on the working from home arrangement. The criteria to determine which employees should work from home or in the office are not specified in any regulation, but rather in a Circular Letter of Ministry of Manpower of 2020, which gives employers the discretion to determine the kind of arrangement needed. In determining such criteria, employers are prohibited from discriminating against its employees based on, for example, gender, ethnicity, religion or political orientation, as provided in the Employment Law and its amendment (Law No. 13 of 2003 on Employment as amended by Law No. 11 of 2020 on Job Creation).

Under the Circular Letter, employers have several options in implementing work from home arrangements, such as to:

a. Classify the employees as:

   a. main employees that must work in the office for production operational activities;

   b. employees with administrative work who may work from home;

   c. vulnerable employees who have underlying health conditions and who need to take public transportation to and from their offices;

b. Arrange for half of the employees to work from home and to adopt a schedule of shift working; and

c. Arrange for employees to work from home on a full-time basis.

Additionally, employers are advised to refrain from having employees regularly work shifts from evening to early morning.

Exceptions to the above apply for certain sectors. For instance, a recent regulation issued by the Minister of Health sets out certain limited exceptions to work activities that are not subject to the social restriction policy (or can be carried out in office premises), which cover services related to defense and security, public order, food commodities, oil and gas fuel, health, the economy, finance, communications, industry, export and import, distribution, logistics and other basic needs.

In addition to the above, amendments to the Employment Law also allow employers in certain sectors to implement more flexible working hours and regulate them internally.

Employers' new obligations

The Circular Letter also obliges employers to carry out certain preventive actions to limit the spread of the COVID-19 virus. For example, such as through temperature checking of employees and to provide employees with necessary protective equipment such as masks.

Employers must also introduce measures to maintain the general hygiene of work premises such as through frequent cleaning with disinfectants, ensuring air circulation and sunlight, providing access to handwashing facilities or hand sanitisers. Employers are also required to circulate health notices and information in the workplace (this may be published through banners, pamphlets, or other media or through audio and video media broadcasted regularly to the employees) to raise awareness amongst employees about the COVID-19 virus and to encourage good hygiene practices and the reporting of suspected COVID-19 cases in the workplace.

The Ministry of Manpower has also issued a Circular Letter which permits, amongst other measures to protect jobs, adjustments on wages and the method of payment subject to mutual consent between employers and employees.

Sanctions for breaching COVID-19 regulations

Except for the Law of 2018 on Health Quarantine where it is provided that a person who does not comply with the implementation of a health quarantine and/or who obstructs with the implementation of a health quarantine which causes a public health emergency may be punished with imprisonment of a maximum of a year and/or a maximum fine of Rp100,000,000 (approximately US$7,100), the other relevant COVID-19 regulations do not detail the sanctions for breach.

07
Japan

Developments in the light of COVID-19

Working from home

The adoption of remote working by employers in Japan in view of the COVID-19 pandemic is low compared to other jurisdictions. There are several reasons that can explain this phenomenon. For example, many employees in Japan commonly live in small housing and do not have private spaces in their homes for them to work in. Moreover, there is a tendency for Japanese workers to rely heavily on paper documents as opposed to electronic means to perform their work, making remote working a far less acceptable option for many.

That being said, there are a number of employers who have defied traditional working practices to welcome remote working or some other hybrid working arrangements. In such instances, as there are strict regulations around Japanese labour laws that govern working hours, employers should ensure that employees keep a proper record that track their actual hours of work performed and that there is no underreporting by employees of working hours for each workday when they work from home. Employers that have introduced work from home arrangements should also constantly monitor the adequacy of their working hours management systems to avoid any unintended breach of the law.

Other Developments

Another question that may arise if an employer places its employees on leave as a result of temporary office closure due to a public health emergency (for e.g. a Japanese government-issued lock down) or business hardship, is whether the employer is under any obligation to pay its employees salaries. The answer to this is likely yes. Article 26 of the Labour Standards Act (***LSA***) provides that an employer is liable to pay an employee 60 per cent or more of his/her salary as "involuntary leave allowance" if an employee is placed under involuntary leave as a result of a reason attributable to the employer. The meaning of an employer's "reason" under the LSA is broad to say the least, and can conceivably apply to any aspect of a business with few exceptions, such as a force majeure event. It is therefore generally difficult to be exempt from the payment of involuntary leave allowance even in those situations contemplated above.

08
South Korea

Developments in the light of COVID-19

The impact of the COVID-19 pandemic on the way in which people traditionally work in Korea will be a lasting one. The biggest change seen has been the adaptation by employers to the "new normal" of employees working from home and the surge in the use of video teleconferencing to replace face-to-face meetings. In response to these trends, the Ministry of Employment and Labour has issued detailed guidelines to give guidance to employers on how they should manage employees who work from home.

With more employees working outside of the office, more companies have been adopting the flexible working hour systems available under Korean law, including the "deemed working hour system" which is applicable to employees whose working hours are difficult to track.

However, for the companies that have not adopted such flexible working hour systems while implementing working from home, questions have arisen about how best employers should track and to check the exact working hours worked by employees. Recently, the Ministry of Employment and Labour found that working from home made it difficult for employers to check their employees' working hours and this has caused employees to work more hours. In light of this development, the Ministry is considering stepping up on its labour inspection efforts.

In addition, Korea has seen a large rise in the use of "platform-based workers," which refers to workers that use an on-line platform to provide their services, including delivery, transportation and household services.

In connection with this rise in the number of platform-based workers, on December 21, 2020, the Ministry of Employment and Labour announced plans to provide various measures that aim to protect these platform-based workers to grant them with greater protection. A bill on the protection of platform-based workers will be introduced in the first quarter of 2021.


6:44

09
Malaysia

Developments in the light of COVID-19

Increased number of court cases is expected due to dismissals during the COVID-19 pandemic

2020 has been quite a year globally and Malaysia is no different. In order to curb the spread of the COVID-19 pandemic, Malaysia went into a lockdown for a number of months and it appeared to have successfully curbed the transmission of the COVID-19 virus. However, since December 2020 and ushering the new year, there was a spike in the number of cases, which resulted in another lockdown with slightly less stringent measures.

Most employers responded to the lockdown by placing their employees under some form of work from home arrangements. Others, who were heavily impacted by the lockdown e.g. the tourism, non-essential manufacturing and retail sectors, tried various ways to ensure business continuity, including encouraging employees to take annual leave, reduced working hours, pay-cuts and ultimately, when there no other options, dismissal of employees. We are beginning to see employers put in place contractual rights to terminate employment and/or impose cost cutting exercises upon the occurrence of certain events. These have yet to be tested in the courts, but employers are understandably exploring ways that allows them flexibility to respond quickly according to their needs.

According to the Industrial Court (the body that hears cases of unjust dismissal), a rise in cases is expected throughout 2021 due to job losses during the pandemic. Employers should therefore prepare themselves by keeping abreast of the changes to the Industrial Relations Act.

Amendments to the Industrial Relations Act, in force as of 1 January 2021

The Industrial Relations Act 1967 (***IRA***), which regulates disputes between employers and their workforce and/or trade unions, was amended several times by the Malaysian Parliament in 2020. These amendments have been effective since 1 January 2021 and they include the following changes.

New cases to be automatically referred to the Industrial Court

The previous requirement of a ministerial discretion before a case could be referred to the Industrial Court has been removed. Following this change in the law, it is the Director General of Industrial Relations (***DGIR***) who must automatically refer to the Industrial Court any cases that are not settled in reconciliation proceedings.

Wider powers for the Industrial Court

The expansion of the powers of the Industrial Court that now include the power to award compensation and back pay to the next-of-kin of deceased claimants (when previously, a claim would abate in the event of the demise of the claimant) and the granting of interest of up to 8 per cent per annum on monetary awards that remain unsatisfied after 30 days.

Enhancement of penalties

Previously, non-compliance with Industrial Court awards or orders could result in a fine of up to RM2,000 (approximately USD 495). The maximum fine payable has been increased to RM 50,000 (approximately USD12,370). This fine may be imposed in addition to the offender being compelled to pay any monetary award that may have been ordered. The general penalty for any contravention of the IRA has similarly been revised from RM 2,000 to RM 50,000 (approximately USD 1236).

These long awaited amendments are a welcome for employees. The implication however for employers is that this may prompt a rise in the number of claims taken out by employees, especially, unjust dismissal claims that would be referred to the Industrial Court on an expedited basis and employers would need to be better prepared to deal with such claims that may be progressed by the Industrial Courts much faster than before.

10 Philippines

In the beginning of 2020, following the eruption of the Taal Volcano, the Department of Labour and Employment (***DOLE***) issued a Labour Advisory in January 2020, setting out rules for work suspension and payment of wages (i.e. no work, no pay) during natural or man-made calamities. It also provides that employees cannot be administratively sanctioned for their failure or refusal to work by reason of imminent danger resulting from natural or man-made calamities.

This first Labour Advisory set the tone for the rest of the year as two months later, a nationwide lockdown was implemented due to the COVID-19 pandemic, resulting in more work suspensions in non-essential industries.

Developments in the light of COVID-19

A series of new legislation

As a response to the COVID-19 pandemic, the Philippine Congress enacted two Republic Acts, one known as *Bayanihan to Heal As One Act, and the other as Bayanihan to Recover as One Act*. Signed into law in March 2020 and September 2020 respectively, these laws provide for, amongst other things, government funding for the implementation of the DOLE's cash-for-work programs. The Bayan*ihan to Recover as One Act* also provided for tax exemption of retirement benefits received by officials and employees who opted to retire between 5 June 2020 and 31 December 2020 subject to certain conditions.

Further, the DOLE issued rules and regulations implementing these laws, including the guidelines on the implementation of the COVID-19 Adjustment Measures Program (***CAMP***), which is a safety net program that provides a one-time financial support to affected workers due to the COVID-19 pandemic. Other issuances of the DOLE in 2020 aimed at mitigating the effects of the pandemic on businesses and employees that include the following:

a. Guidelines on the implementation of flexible work arrangements (***FWA***) as a remedial measure due to the ongoing outbreak of COVID-19. Initially issued pre-lockdown, it aims to assist employers and employees in the implementation of temporary FWAs or alternative work schemes other than the traditional or standard workhours/days/week. The DOLE highly encourages the adoption of any of the flexible working arrangement schemes, such as reduction of workhours or workdays, rotation of workers or forced leave.

b. Interim guidelines on workplace prevention and control of COVID-19, issued in April 2020 by the DOLE and the Department of Trade and Industry, that provides directions to the private institutions that are allowed to operate during the quarantine.

c. The guidelines on employment preservation upon the resumption of business operations, issued in August 2020, which aims to assist employers to resume their business operations while preserving the employment of their workers. This applies to all employers and employees, in the private sector, regardless of the employment status, as long as they are allowed to resume business operations under the quarantine arrangements.

d. The department Order, issued by the DOLE in October, which sanctioned the fact that businesses may suspend their businesses for more than six months due to the pandemic. Prior to this order, an employment relationship could be suspended in given circumstances for a maximum of six months only.

Labour administration switches to the use of online proceedings

The DOLE shifted from manual to online filings and online hearings by establishing the Online Systems, a web-based programme developed to monitor compliance of employers on labour laws and other relevant issuances. The preferred mode of hearing for both the DOLE and the National Labour Relations Commissions is now videoconferencing.

Other developments

Expected legal developments on the gig economy

With work from home becoming more prevalent, the rise of the gig economy is expected this year. A Senate Bill, known as the National Digital Careers Act, which aims "*to create, design and develop programs to ensure access to training, market and other forms of support or innovation strategies for digital careers*," is now pending before the Philippines Senate. A version of this bill is expected to be approved in the coming months to prepare Filipinos and the government for the skills needed for the gig economy under the "new normal." The expected challenge would be the determination of the status of freelance workers and the rights and benefits that will come with it.

11 Singapore

Developments in the light of COVID-19

Often cited as being the 'new normal', it is becoming apparent that employers in Singapore (as with their counterparts worldwide) will not be completely discontinuing telecommuting and work-from-home arrangements, even as COVID-19 vaccines become publicly available. As of the time of writing, the Ministry of Manpower (***MOM***) in Singapore has continued to require at least partial remote working, and are likely to continue doing so at least for the foreseeable future.

Vaccination programs

As Singapore begins rolling out its vaccination program, a key question on employers' minds is whether they can compel employees to take the vaccine. The answer is likely to be no. The Singapore government encourages everyone to get vaccinated against COVID-19 (and has promised free vaccines to all Singaporeans and long term residents), but it will be voluntary. Whether that will remain the case should vaccination acceptance rates prove low is still up in the air, but so far, take-up rates have been relatively high. Corporate employers will, in most circumstances, find it challenging to make it mandatory for employees to be vaccinated.

Requirements for employing foreigners

An issue that has been brought to the forefront by the pandemic is that of the employment of foreign talents amidst the economic contraction and uncertainty that we are facing. Alongside those in parliament stressing the need to protect the jobs of Singaporeans, the processes and eligibility criteria for work passes (required for foreign employees to work in Singapore) have also been tightened significantly.

Employers looking to employ foreign professionals, managers and executives (***PMEs***) and mid-skilled workers now have to advertise job openings on the national jobs portal for 28 days – double the previously required duration, to ensure that fair consideration is given to Singaporeans. Only then will employers be able to apply for Employment Passes (for PMEs) or S-Passes (for mid-skilled workers). Employers who pre-select a foreigner and go through a mere box ticking exercise may still find themselves facing administrative penalties, and even criminal prosecutions. Further, foreign PMEs the salary requirements to qualify for an Employment Pass have now been raised to a fixed monthly salary of at least S$4,500 (c. USD 3,399) (or higher, if an employee works in the financial services sector, or are older and more experienced).

Dismissal and trade union actions

Trade unions have also stepped up their efforts during this period to protect unionised employees from unfair dismissals. In July 2020, three unions took steps to take industrial action against an employer who went ahead with a planned dismissal exercise before talks were concluded with the unions. This sounds unremarkable until one considers that the last union-sanctioned strike in Singapore was in 1986.

Expected trend in 2021

There has been a discernible trend towards the protection of employees. This trend began some years ago but was greatly accelerated in 2019 when Singapore's Employment Act was amended to extend its coverage to all PMEs, and the Employment Claims Tribunals were empowered to hear wrongful dismissal claims.

This trend is expected to continue into 2021 and beyond. The authorities have made it clear that while Singapore will very much remain a global hub open for business, its foreign worker policies are not going to be relaxed any time soon and employee protections are here to stay regardless of the COVID-19 pandemic.

12
Taiwan

Developments in the light of COVID-19

Employer's right to extend working hours or suspend leave due to the COVID-19 pandemic

The Ministry of Labour issued an official interpretation that COVID-19 can qualify as an "unexpected event" under the Labour Standards Act. The latter allows the employer to extend working hours or suspend the leave of employees upon the occurrence of unexpected events. However, employers should bear in mind that if they use this exception, they must offer the employees appropriate time off or grant additional compensatory leave, as well as to make notifications to the appropriate trade union (if any) or the local competent authority.

Employers affected by the COVID-19 pandemic may obtain employees' consent to reduce their working hours

The Ministry of Labour has issued an official interpretation that an employer that is affected by the COVID-19 pandemic and suffers business contractions can follow the relevant regulations to negotiate with employees and to obtain their individual consent to reduce their working hours and wages. However, any reduced wages must still comply with the statutory minimum wage. In addition, the employer may adjust the labour insurance contribution for the employee after such reduction, but pension contributions must still be made based on the original monthly wage.

Employees' right to take "disease prevention isolation leave" and "disease prevention care leave"

"Disease prevention isolation leave" refers to a leave of absence granted to individuals who have been assigned to isolation or quarantine by health officials, or family caregivers of isolated or quarantined individuals who are unable to care for themselves. According to the Ministry of Labour, an employer is not obligated to pay for such leave, unless it was responsible for the employee's isolation or quarantine.

"Disease prevention care leave" refers to a leave of absence granted to parents of children under 12 years of age that are affected by school closures. According to the Ministry of Labour, this type of leave is intended to supplement and not replace family care leave provided to parents under the Act of Gender Equality in Employment. An employer is not obliged to pay for disease prevention care leave.

If an employee qualifies for either of the above-mentioned types of leave, the employer shall not treat the employee as absent without a reason, force the employee to take personal leave or other leave, deduct attendance bonuses, dismiss the employee or impose other unfavourable penalties.

13
Thailand

Developments in the light of COVID-19

It is undeniable that the pandemic and the government's response to it have had a significant impact on Thailand's population and the economy. The business sector has had to adapt and adjust their business strategy, including the management of its workforce, to survive the crisis. During this time, the Ministry of Labour has also answered many labour law-related questions from employers.

Managing force majeure

The term '*force majeure*' is broadly defined in the Thai Civil and Commercial Code (***CCC***) as an unforeseeable event beyond one's control. Whether COVID-19 constitutes a force majeure event for each business has to be determined on a case-by-case basis. However, based on the CCC, if a business is ordered by the government and/or local administrative agencies to close temporarily in order to curb the spread of COVID-19, an employer that is required to suspend its business operations does not have to pay wages to its employees during this period. On the other hand, there is no event of force majeure if an employer is not ordered to close by the government or where an employee can work from home based on the employer's policy.

While certain businesses may rely on COVID-19 as a force majeure event to suspend their operations and dismiss certain employees (including downsizing to meet reduced demand), they have to decide on such matters carefully given the other costs to be paid (including statutory severance) under the Labour Protection Act.

However, if a business has to shorten its operating hours or temporarily suspend business operations for reasons other than due to force majeure, in such case, the employer is required to pay its employees at least 75 per cent of their wages that they would have received for normal working days, for the entire period that the employer does not require them to work. A written notice of the reduction in operating hours or suspension of business must be given to employees and the local Labour Office at least three working days in advance. The local Labour Office will consider and approve the temporary suspension of business on a case-by-case basis based on the justifications provided by the employer such as having insufficient funds to fully operate the business.

Severance payments following the dismissals due to economic hardships of the employer

Currently, Thai labour law does not specify the COVID-19 pandemic as a reason for termination without statutory severance payment. Therefore, even if an employer terminates its employees in order to cope with the economic effects of COVID-19, or if an infected employee is no longer able to fulfil his/her duties to the company, the provisions of the Labour Protection Act relating to severance payments and other relevant compensations must still be complied with and remain unaffected by any consideration of the economic effects of COVID-19.

The rates of severance payment under the Labour Protection Act depend on the employees' duration of service

In April 2020, the Ministry of Labour published two regulations as short-term measures to help affected workers.

The first one, known as the Force Majeure Unemployment Benefits Regulation, provided that insured employees who ceased working temporarily between 1 March and 31 August 2020 are entitled to receive compensatory benefits, during the period of temporary business closure but for not more than 90 days.

An employee who has received (or will receive) 75 per cent of his or her wages from the employer, due to suspension of the employer's business, is not entitled to collect such amount from the Social Security Office (i.e. no double claim/ payment).

The other regulation, known as the Economic Crisis Unemployment Benefits Regulation, provides that insured employees are entitled to receive compensatory benefits from the Social Security Office during periods of unemployment caused by the economic crisis between 1 March 2020 and 28 February 2022 as follows:

a. in case of termination by the employer, the employee is entitled to receive compensation at the rate of 70 per cent of their daily wages, limited to 200 days for each termination; and

b. in case of resignation or expiration of fixed-term employment, the employee is entitled to receive compensation at the rate of 45 per cent of their daily wages, limited to 90 days for each period of unemployment.

A third regulation, known as the Ministerial Regulation on Receiving Unemployment Benefits Due to Force Majeure Caused by the Pandemic of Dangerous Communicable Diseases under the Law on Communicable Disease, announced in December 2020 entitles insured employees who are unable to work due to the fact that they are required to be quarantined, self-quarantine or their employer's business is ordered by the government to close temporarily to contain the spread of COVID-19, to receive unemployment benefits equal to 50 per cent of their daily wages (as opposed to 62 per cent of daily wages given to those affected by the first wave of COVID-19) during the period of temporary business closure but for not more than 90 days.

As highlighted above, the Thai government has implemented short-term labour policies to help affected employees. For the future, more long-term labour policies will be required to assist Thailand's recovery from the COVID-19 pandemic, for example, through job creation policies, skill development policies, and wage subsidies for businesses to support employment.

14
Vietnam

Developments in the light of COVID-19

Working from home

Many employers in Vietnam have established strict social distancing measures in their workplaces during the pandemic.

One of the lessons learnt by employers during the pandemic was that on top of the logistical challenges of having the necessary infrastructure in place to be ready to allow for flexible working, employers could benefit from pre-existing contractual rights written into employment contracts that provides them with the right and flexibility to update their internal policies as and when changes need to be made to the working arrangements. For example, work protocols had to be changed specifically to permit for flexibility on work allocation, working hours, time and place of work. This will be at the forefront of the minds of employers moving forward.

Other developments

Updated legal framework

Late 2020 and early 2021 witnessed the promulgation and coming into effect of the new Labour Code and some of its implementing regulations.

Next to the new Labour Code (effective as of 1 January 2021), three decrees have entered into force, namely: (1) labour conditions and labour relationships (effective as of 1 February 2021), (2) retirement age (effective as of 1 January 2021), (3) foreign employees working in Vietnam, recruitment and management of Vietnamese labour working for foreign organisations and individuals in Vietnam (effective as of 15 February 2021). The changes brought about by the new laws include:

a. *Terms of labour contracts*: "Seasonal labour contracts" (having a term under 12 months) have been abolished leavings only two types of labour contracts, i.e. definite-term contracts (not exceeding 36 months) and open-ended contracts that are recognised by the Vietnamese legislation. Another important change is that parties are no longer permitted to agree to an annex that extends the duration of a signed labour contract;

b. *Grounds for termination*: The grounds for employers in Vietnam to unilaterally terminate a labour contract continue to be restricted to limited specific circumstances as prescribed by law. However, new grounds allowing employers to terminate an employment without notice have been introduced, including (a) where an employee is absent from work without legitimate reasons for five consecutive days (instead of having to initiate complex dismissal procedures as required under the old law) and (b) in cases of the dishonest provision of false information by employees which affects recruitment decisions. Finally, the law now also permits employees to unilaterally terminate an employment without cause even for those employed under fixed-term labour contracts (in addition to open-ended contracts as permitted under the old law);

c. *Changes with respect to foreign employees*: It is now clear that an employer can have multiple continuous definite-term contracts with the same foreign workers. While the general restriction of not having more than two consecutive definite-term contracts with an employee (i.e. the third contract must be open-ended) is still retained for local employees, the new Labour Code expressly excludes foreign employees from this restriction; and

d. "*Independent*" *union representing employees*: the new labour regulations recognised, for the first time, the right of employees to set up their own representative organisations which, by law, is "equal" to the traditional Vietnam General Confederation of Labour. However, certain conditions apply, including having a sufficient number of members and being registered with the competent labour authority. It remains to be seen how this new representative organisation will be established and will function in practice.

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