Linklaters

Asia Pacific Employment & Incentives Legal Update

Introduction

Welcome to the second issue of our bi-annual Asia Pacific employment and incentives legal update for 2017. As businesses continue to be increasingly globalised, this newsletter aims to help you stay ahead of the latest legal developments across various APAC jurisdictions.

Employment law responds swiftly to changing societal values and rapid economic development. During the first half of 2017, there were significant developments both in case law and in legislation covering matters such as occupational safety, employment status, equality, retirement ages and benefits and personal data privacy. Governments across the region have also been very active in devising legislative proposals and we expect to see further developments in the near future.

In order to protect workers' rights and to promote compliance by employers with laws and regulations, we have also observed increased enforcement actions against defaulting employers and a tendency by the Courts to interpret contractual arrangements and legislation in favour of workers.

We trust you will find this newsletter useful. We have an extensive network of employment law specialists across APAC and we are always ready to work with you as you navigate the ever-changing rules and legal environment in the region. If you encounter any issues or if there is anything you require assistance with, please feel free to reach out to any one of us using the email hyperlink in each jurisdiction's section or the full contact information at the end of this newsletter.

Laure de Panafieu
Partner
Head of Employment & Incentives – Asia
Linklaters

Tel: +65 6692 5791
laure.de_panafieu@linklaters.com

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Australia

Veronica Siow, Simon Dewberry and *Peter Arthur, Allens*

Fair Work Commission cuts penalty rates

By way of background, penalty rates are mandatory minimum rates of pay that are required to be paid to employees who work on weekends or public holidays or who work overtime, late night shifts or early morning shifts. Penalty rates are higher than the usual minimum wage.

As part of its four-yearly review of modern awards, the Fair Work Commission (the "**FWC**") on 23 February 2017 announced that Sunday penalty rates would be cut with respect to the following four awards:

- the General Retail Industry Award;
- the Pharmacy Industry Award;
- the Fast Food Industry Award; and
- the Hospitality Industry (General) Award.

The reductions reflect the FWC's finding that working on Sundays represents lesser disutility to employees than it has in the past. However, Sunday rates still remain slightly higher than Saturday rates.

The Commission has declared that the cuts will begin to be implemented from 1 July 2017, with a three-year transitional period to the full decrease applying to fast food and hospitality workers, and a four-year transitional period for retail and pharmacy workers.

Public holiday penalty rates are also set to be reduced with respect to the four aforementioned awards, as well as the Restaurant Industry Award, with immediate effect (no transitional period) from 1 July 2017.

On 23 June 2017, a workers' union for the hospitality industry, United Voice, launched a challenge in the Federal Court of Australia against the penalty rate decision, arguing that the FWC:

- failed in its obligation to 'uphold the living standards of low-paid workers' set out in section 134(1)(a) of the Fair Work Act 2009 (the "**Act**") which sets out the objectives of the modern award scheme; and
- did not have the jurisdiction to vary the award under section 156 of the Act without first being satisfied that the 'operation or effect' of the award had changed.

The case is scheduled to be heard in September.

The Labor Party in Opposition has pledged to reverse the cuts if it wins government in the next election.

457 skilled migrant visas abolished in favour of 'Temporary Skill Shortage' visa program

On 18 April 2017, the Government announced that it would abolish the 457 visa program, which enabled employers to sponsor skilled foreign migrants to work temporarily in Australia. In replacement, a new 'Temporary Skill Shortage' visa program has been implemented. The new program comprises two visa streams: a short term visa of two years and a medium term visa of

four years. The former is no longer a pathway to eligibility for permanent residency. The programme initially reduced the number of eligible occupations by a third.

Other key changes include:

- requiring migrant workers to satisfy certain criteria regarding:
  - relevant work experience;
  - age;
  - criminal history; and
  - English language proficiency; and
- requiring employers to:
  - undertake labour market testing for all relevant occupations:
  - undertake an as-yet-undefined 'non-discriminatory workforce test' to ensure that Australian workers are not being 'actively discriminated' against;
  - pay the minimum Australian market salary rate; and
  - contribute towards training Australian workers.

The changes, particularly the reductions in the list of eligible occupations, faced significant backlash from businesses across a range of sectors and from industry groups such as Universities Australia and the Business Council of Australia, on the basis that they created serious barriers to bringing specialised skills and expertise and global experience to Australia. Notably, senior executives and specialised technology workers had initially been eligible only for a two year visa. In response, the Government has made a number of concessions with regard to the eligible occupations list, which came into effect on 1 July 2017.

Transitional arrangements to the new scheme are already in place (although the changes do not affect current 457 visa holders), and will be completed in March 2018.

To read our separate update on these changes to visa arrangements, click here.

Federal Parliament considers legislation to protect 'vulnerable workers' from underpayment and exploitation

In response to continuing investigative and enforcement action taken by the Fair Work Ombudsman ("**FWO**") against a number of high-profile companies (including 7-Eleven, Pizza Hut, United Petroleum and celebrity chef George Calombaris) underpaying employees, the Government has introduced the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (the "**Fair Work Bill**") which aims to 'help deter, catch and punish unscrupulous bosses and protect responsible employers'. The Fair Work Bill proposes to:

- prevent employers from directly or indirectly requesting unreasonably payments from staff (an amendment designed to capture directions to employees to make wage back-payments);
- significantly increase penalties for serious contraventions involving deliberate and systematic underpayment of workers and falsification of pay records (to AU$108,000 for individual employers and AU$540,000 for corporate employers);

- broaden the accessorial liability principles in the legislation in order to hold franchisors liable where the franchisor, who has control over the franchisee, knew or could reasonably have been expected to know about the underpayment or breach, and failed to take reasonable steps to prevent the underpayment or breach; and
- strengthen the investigative and enforcement powers of the FWO (in addition to additional funding for the body).

The Fair Work Bill has passed the House of Representatives and was expected to be enacted during the 2017 Winter sittings of Parliament, but has been delayed from consideration by the Senate until Parliament returns in August 2017.

To read our separate update regarding the impact of the Fair Work Bill on franchisors and holding companies, click here.

Hong Kong

Samantha Cornelius, Emma Pugh and Joshua Li, Linklaters

High Court considers case of contract-end gratuity

In *Chok Kin Ming v Equal Opportunities Commission* (HCLA 42/2015), the High Court in Hong Kong agreed with the employer's interpretation of an end of contract gratuity clause in the employment contract. This case is a good example of how an employee's personal conduct outside the office may still give rise to a conflict of interest with his/her employer's interests and demonstrates that, when assessing employee performance, an employer may, in certain circumstances, take the employee's conduct outside the workplace into consideration.

In this case, the employee, Mr Chok, had been employed by the Equal Opportunities Commission (the "**EOC**") since 1996. The last renewal of his employment contract was for a period of three years from 1 November 2011 to 31 October 2014, under which he was entitled to receive a gratuity in respect of his actual period of service "*on satisfactory completion of the agreement in the opinion of the [EOC]*".

In July 2014, Mr Chok volunteered to join the EOC's taskforce in relation to a three-month public consultation on a discrimination law review (the "**DLR**"). During the period of the public consultation, Mr Chok attended and gave a talk in his personal capacity at a private forum organised by a church to introduce and explain the DLR consultation. A transcript of the forum detailed how Mr. Chok had made negative comments about the EOC, had urged the audience to respond to questions in the DLR consultation in a particular way and had guided the audience on how to ensure their response would be considered by the EOC seriously. His actions were subsequently reported by local newspapers leading to a great deal of criticism against the EOC, Mr Chok and the DLR.

In response, the EOC conducted an internal investigation which resulted in a formal warning notice being issued to Mr Chok for breach of the EOC's Code of Conduct (in failing to avoid a conflict of interest and for breach of his duty of fidelity and good faith). While the EOC considered that Mr Chok's conduct justified summary dismissal, its case was that it did not do so given the imminent end of his employment contract and his long service with the EOC. However, on expiry of his employment contract, the EOC did not provide Mr Chok with any end of contract gratuity. Mr Chok then brought a claim at the Labour Tribunal for this gratuity in the sum of HK$867,021.25.

The Labour Tribunal decided in favour of Mr. Chok. It considered that the "satisfactory completion" condition specified in his employment contract was temporal in nature (i.e. in this case, the completion of the three-year term). Even if the condition related to Mr Chok's work performance, the Tribunal's view was that the forum was a private function which had nothing to do with Mr Chok's work and Mr Chok had the freedom to express opinions in his personal capacity. Therefore, it did not raise any conflict of interests with the EOC either.

On appeal, the High Court considered that the Labour Tribunal's construction of the relevant clause in the Conditions of Service was incorrect and was of the view that the EOC was entitled not to award any gratuity to Mr. Chok. The High Court's view was that the expression *"[o]n satisfactory completion of the agreement in the opinion of the employer*" plainly included the manner in which the agreement was to be performed and, therefore, the quality of the employee's performance could be taken into account by the employer, who was entitled to form an opinion as to whether there had been satisfactory completion of the employment agreement. The High Court further considered that nothing in the clause suggested that the conduct, which led to the conclusion of the lack of satisfactory completion, had to be misconduct justifying summary dismissal.

This case also serves as a useful reminder that an employer must not exercise a discretionary power under an employment agreement in a manner which is perverse or irrational, or where no reasonable employer would have exercised the discretion in the same way. This is the test that the court had to consider when determining whether the EOC had breached the employment contract in deciding not to pay the contract-end gratuity.

In considering this question, the High Court held that in this case, the satisfactory completion of the agreement was not confined to work within the office premises – it extended to all of the agreement's terms. The fact that Mr Chok attended the forum in his private time did not mean that it could have no impact upon his performance of the agreement. The Court also noted that the Code of Conduct specifically covered "*activities outside the [EOC] which may give rise to a perceived conflict of interest….*". Additionally, the fact that the forum was not open to all members of the public did not mean it could have no relation at all to Mr Chok's employment. The EOC was entitled to consider the nature of the occasion and the number of participants in exercising its discretion.

Proposed amendment to the Employment Ordinance

The Employment (Amendment) Bill 2017 (the "**2017 Bill**") was gazetted on 5 May 2017 and introduced to the Legislative Council for first reading on 19 May 2017. The 2017 Bill seeks to amend the Employment Ordinance (Cap. 57) to remove the employer's agreement as a pre-requisite for making a reinstatement or re-engagement order in the event of unreasonable and unlawful dismissal. There is currently no scheduled second reading or third reading date for the 2017 Bill. A similar Bill was introduced to the Legislative Council last year but it was not enacted before the end of the last Legislative Council term. The principal difference in the 2017 Bill relates to the maximum level of further compensation payable by the employer, where the employer fails to re-instate or re-engage the employee as required by the order. Under the 2017 Bill, the further compensation payable is subject to a cap of HK$72,500 (as opposed to a cap of HK$50,000 in last year's Bill). This further compensation is in addition to the monetary remedies payable to an employee, as ordered by the Labour Tribunal as currently provided by the Employment Ordinance.

Proposed legislative approach for working time regulations

The Chief Executive in Council has recently announced that it has endorsed a proposal submitted by the Standard Working Hours Committee in January 2017 to introduce a standard working hours

system in Hong Kong. The main aspects of the general framework for the future formulation of standardised working hours and supplementary measures include:

(i) a mandatory requirement for employers to enter into written employment contracts containing terms on working hours and overtime compensation with employees earning a monthly wage of less than HK$11,000;

(ii) entitlement to statutory overtime compensation (or equivalent time-off in lieu) for such employees; and

(iii) drawing up 11 sector-specific working hours guidelines.

Under the current timetable, the Government will continue discussions with employer and employee representatives to "iron out" the implementation arrangements with a view to submitting a bill to amend the Employment Ordinance in the second half of 2018 to commence the legislative process. The Government currently envisages that these policies and measures will be implemented by the end of 2020 / early 2021, after giving employers and employees a transitional period to prepare.

Proposed abolition of offsetting of Mandatory Provident Fund contributions

Under the current legislation, employers are entitled to offset an employee's statutory severance or long service payment with the accrued benefits derived from the employer's contributions made to the employee's retirement scheme. On 23 June 2017, the Executive Council affirmed the Government's proposal to progressively abolish such "offsetting". (We covered the main elements of the Government's proposal in the first issue of our legal update in February 2017.)

Despite this recent announcement, the new Chief Executive, Mrs Carrie Lam, who assumed office on 1 July 2017, expressed her intention to restart the consultation process with businesses and labour representatives on this controversial offset mechanism. As such, there may be substantial changes to the current announced proposal.

First company director to be sentenced to imprisonment after defaulting on Mandatory Provident Fund ("MPF") contributions

A company director was sentenced to 21 days' imprisonment for failing to comply with court orders to pay MPF contributions in arrears and surcharges for the company's employees to the Mandatory Provident Fund Schemes Authority. This is the first case in which a company director has been sentenced to imprisonment for defaulting on MPF contributions.

Employers are reminded that a failure by an employer to make MPF contributions in accordance with the Mandatory Provident Fund Schemes Ordinance is an offence that exposes the employer to a maximum penalty of four years' imprisonment and a fine of HK$450,000. In addition, any employer who fails, without a reasonable excuse, to comply with a court order made in civil proceedings for the payment of MPF contributions in arrears and contribution surcharges by a specified date also commits an offence. Any employer doing so is liable to a fine of HK$350,000 fine and three years' imprisonment. In the case of a continuing offence, the employer is liable for a daily penalty of HK$500.

Indonesia

Yolanda Hutapea and Ani Simanjuntak, Widyawan & Partners

Changes in the personnel structure and tenure of the Tripartite Cooperation Body

By way of background, the Tripartite Cooperation Body is a forum for communication, consultation and discussion of employment issues. The membership of this forum consists of representatives of labour unions, employer associations and the regulator.

On February 2017, the President of the Republic of Indonesia issued Government Regulation No. 4 of 2017 on the second amendment to the Government Regulation No. 8 of 2005 on the work system and organisational structure of the Tripartite Cooperation Body. The amendment focuses on the status of regulator representatives who will serve as the vice chairman and secretaries of the Tripartite Cooperation Body, either at national, provincial or regency/municipal level. Under this regulation, these positions should be assumed by government officials on an ex-officio basis.

Employers to formulate wage structure and scale

In March 2017, the Minister of Manpower ("**MOM**") issued MOM Regulation No. 1 of 2017 on Wage Structure and Scale ("**MOM Regulation 1/2017**"), an implementing regulation envisaged under the Government Regulation No. 78 of 2015 on Wages.

In summary, MOM Regulation 1/2017 imposes an obligation on employers to formulate a wage structure and scale by considering the seniority level, position, length of service, educational level, and competency of employees. The wage structure and scale must show the range of employee's basic salary (*upah pokok*) (i.e., from the minimum basic salary to the maximum basic salary for each job position). The company must make the structure and scale of wages available to all employees.

The wage structure and scale must also be provided to the relevant MOM agency when the employer applies for:

(i) approval and renewal of the company regulation (a company regulation is required for employers who employ at least 10 employees unless a collective work agreement is in place. The company regulation sets out the basic rights and obligations of the employer and employee, work requirements and details of the company's disciplinary policy and rules of conduct); and

(ii) registration, extension, and renewal of the collective labour agreement.

Employers have until 23 October 2017 to comply with MOM Regulation 1/2017.

Safety requirements for lifts and elevators at work

As part of work health and safety requirements, in March 2017, MOM issued MOM Regulation No. 6 of 2017 on lifts and elevators. This regulation stipulates that planning, construction, installation, assembling, utilisation, maintenance, handling and repair of lifts and elevators must be subject to an evaluation and/or test by a manpower supervisor specialist and/or a competent work safety and health expert. Further, employers of employees who are employed in a workplace with lifts/elevators are obliged to arrange for the evaluation and examination of such machinery at least once a year and deliver the examination report to the relevant Indonesia MOM office. Non-compliance with this requirement will subject the employer to (i) an administrative sanction (ranging from a warning letter up to revocation of license); and/or (ii) criminal sanctions in the form of imprisonment for a maximum period of three months or a fine of up to Rp100,000[1].

[1] The criminal and fine sanctions are regulated under the Law No. 1 of 1970 on Workplace Safety

Judicial Review of Article 153(1)(f) of Manpower Law in respect of marriage between co-workers

A group of Indonesian employees applied for judicial review of Article 153(1)(f) of the Manpower Law to the Constitutional Court. The effect of this Article is that an employer is prohibited from terminating the employment of one of its workers in the event that such worker marries another worker in the same company, unless this situation is covered in the employment contract or company regulation or collective labour agreement. While the intention of this Article 153(1)(f) appears to prohibit employers from terminating the employment of one of its employees because of their marital relationship with another employee, the exception language in Article 153(1)(f) provides employers with an easy loophole to circumvent the termination prohibition by simply including relevant provisions in their employment contracts, company regulation or collective labour agreement.

The applicants in the judicial review therefore argue that Article 153(1)(f) violates the basic human right to marriage as guaranteed by the Indonesian constitution. On the other hand, the Indonesian Employers Association, one of the related parties in the judicial review, argues that prevention of a potential conflict of interest arising from co-workers' romantic relationship/marriage outweighs the right to freedom of marriage. After hearing from the interested parties, the Constitutional Court is now in the process of preparing a decision on the case.

Japan

Hiroya Yamazaki, Takashi Shibusawa and *Kenji Shimada, Linklaters*

Amendment to the Act on the Protection of Personal Information

On 30 May 2017, (apart from a few provisions that had already come into force such as provisions to establish an independent data protection authority), an act to amend the Act on the Protection of Personal Information (*kojin jouhou no hogo ni kansuru houritsu*) fully came into force.

The amendment, among other things:

(i) clarifies the definition of personal information (*kojin jouhou*) and sets out the rules for processing sensitive personal information (*youhairyo kojin jouhou*);

(ii) clarifies the rules applicable to the creation, transfer and processing of anonymously processed information (*tokumei kakou jouhou*) (so-called "big data");

(iii) sets out certain restrictions on the transfer of personal data to countries with insufficient levels of protection of personal data;

(iv) imposes new obligations to confirm certain information related to personal data and to keep records of transfer of personal data;

(v) will be applicable to small/medium size companies dealing with personal information of a small number of individuals (before this amendment, the Act did not apply to any person or entity who possessed and used for its business in Japan a database which contained personal information of 5,000 or fewer individuals on any day in the most recent six-month period); and

(vi) introduces new criminal offences such as where an information handler transfers a personal information database which he/she obtained in the course of his/her business to a third party for illicit gain.

Korea

Robert Flemer and *Jung-Taek Park, Kim & Chang*

Criminal sanctions for intentionally concealing industrial accidents

Under the Occupational Safety and Health Act ("**OSHA**"), Korean employers are required to report any serious industrial accident to the regional Ministry of Employment and Labor office immediately (or within one month in the case of an industrial accident that results in a leave of absence of three days or longer for the injured employee).

The OSHA will be amended with effect from 19 October 2017 such that employers will now face criminal liability (and increased fines) if they fail to properly report instances of industrial accidents:

- Any person who conceals, or aids and abets concealment of an industrial accident that occurred at a workplace, will be subject to imprisonment of up to one year or a criminal fine of up to KRW 10 million.
- Failure to report an industrial accident may result in an administrative fine of up to KRW 15 million, which is higher than the current fine of up to KRW 10 million.
- For failure to report a "serious industrial accident," an administrative fine of up to KRW 30 million may be imposed. A "serious industrial accident" for OSHA purposes means an accident that results in one or more deaths; two or more personal injuries that require at least three months' treatment; or a total of ten or more personal injuries or work-related illnesses that occur concurrently.

Supreme Court rules that sales agents of a retailer were employees, not contractors

In a recent decision, the Supreme Court held that sales agents engaged by a distributor to work at the distributor's retail space at a department store were the distributor's "employees" as defined under the Labor Standards Act and were therefore entitled to statutory severance payments from the distributor. The Court made this finding notwithstanding the fact that under the contractual arrangement, the sales agents were subcontracted to the distributor and were primarily remunerated in the form of a sales commission for selling products on the distributor's behalf to customers.

The Supreme Court was of the view that the sales agents were in fact in a subordinate relationship with the distributor in order to receive wages. In particular, the following factors were considered by the Supreme Court in reaching its decision: (i) the distributor gave work orders to the sales agents through the distributor's internal computer network; (ii) there was a cap on the sales commissions that a sales agent could earn and the sales agents were entitled to receive a certain amount of base remuneration even in the case of poor sales performance; (iii) employees from the distributor's headquarters regularly examined how the sales agents performed their work; and (iv) the distributor documented and managed the sales agents' attendance, such as tracking sick days and maternity leave.

The Supreme Court's decision is expected to have a significant impact, since many department stores and supermarkets in Korea similarly delegate and outsource certain tasks. That said, a court's determination on whether or not an employment relationship exists is based on a number of factors, the most important of which is the scope and degree of supervision and control exercised by the company over the individual. The specific factual circumstances will be relevant in each case and this Supreme Court decision does not mean that agents subcontracted to sell a product on a company's behalf in exchange for compensation will necessarily be classified as "employees" in every case.

People's Republic of China[2]

Richard Gu and *Lois Zhang, Linklaters*

China's Labour Ministry Overhauls Labour Arbitration Rules

On 8 May 2017, the Ministry of Human Resources and Social Security published a revised set of arbitration rules which impact the resolution of labour and employment disputes. The following rules, (which revise the 2009 versions), took effect on 1 July 2017: the Rules for the Handling of Arbitration Cases Involving Labour and Employment Disputes (劳动人事争议仲裁办案规则, the "**Case Handling Rules**") and the Organizational Rules on the Arbitration Cases Involving Labour and Employment Disputes (劳动人事争议仲裁组织规则, the "**Organizational Rules**").

The main changes of the revised Case Handling Rules are that they (i) set out the types of cases that are subject to a "one-shot" arbitration with final and binding awards; (ii) set out specific criteria in order for a dispute to qualify for a more simplified set of arbitration procedures; (iii) introduce pre-arbitration mediation procedures as part of the arbitration process; and (iv) recognize the legal effect of mediation agreements by allowing them to be reviewed and endorsed by the arbitral tribunal.

Under the revised Organizational Rules the arbitration commission may set up tribunals in fixed locations or circuit or floating tribunals, as necessary. Additionally, a training and appraisal regime has been established for arbitrators and the revised rules further clarify the rights and obligations of arbitrators as well as grounds for their dismissal.

Singapore

Laure de Panafieu, Shang Ren Koh, Denise Bryan, Joel Cheang and Jolene Ang, Linklaters

Increase in Qualifying Salary for Employment Pass Applications

The qualifying salary for employment pass applications has increased from S$3,300 to S$3,600 from 1 January 2017.

[2] *The contents set out in this update do not constitute any opinion or determination on, or certification in respect of, the application of PRC law. Any comments concerning the PRC are based on our transactional experience and our understanding of the practice in the PRC. Like all international law firms with offices in the PRC, Linklaters LLP and its affiliated firms and entities (including Linklaters in Hong Kong) are not licensed to undertake PRC legal services. We have standing arrangements with a number of PRC lawyers. If you would like advice on the application of PRC law or other PRC legal services, please let us know and we would be pleased to make any necessary arrangements on your behalf.*

Mandatory Retrenchment Notifications

From 1 January 2017, employers who employ at least 10 employees are required to notify the Ministry of Manpower if five or more employees are retrenched within any six month period beginning 1 January 2017.

To read our separate update on the above notification regime, click here.

New Employment Claims Tribunal to Handle Salary-related Disputes

A new Employment Claims Tribunal was established in April 2017 to deal with (i) statutory salary-related disputes from employees covered under the Employment Act, the Retirement and Re-employment Act and the Child Development Co-Savings Act; and (ii) contractual salary-related claims from all employees except domestic workers, public servants and seafarers. All parties are required to go through mediation before their claims can be heard. There is a limit of S$30,000 on claims for cases with union involvement, and S$20,000 for all other claims.

Enhanced Statutory Family-friendly Leave Benefits

From 1 January 2017, unwed mothers receive the same maternity leave entitlement as lawfully wed mothers (i.e. 16 weeks paid maternity leave for mothers of Singapore citizen children and 12 weeks maternity leave for mothers covered by the Employment Act), and paid paternity leave for eligible fathers has increased from one week to two weeks.

From 1 July 2017, paid adoption leave for mothers with adopted children who are or become Singapore citizens within six months of adoption has increased from four weeks to 12 weeks, and mothers are permitted to share up to four weeks of maternity leave with their husbands (instead of the previous 1 week).

Increase of Re-employment Age

From 1 July 2017, the re-employment age of employees who are Singapore citizens or permanent residents has increased from 65 to 67. In addition, the statutory provision which allows employers to reduce wages of workers turning 60 by up to 10% has been removed. The recommended minimum "Employment Assistance Payment" ("**EAP**") amount has increased from S$4,500 to S$5,000 and the recommended maximum EAP amount has increased from S$10,000 to S$13,000.

Singapore Court of Appeal rules on Employer's Right to Withhold Salary Payment and Abridgement of Notice Period

The Singapore Court of Appeal in *Goh Chan Peng v Beyonics Technology Ltd* [2017] SGCA 40 ruled that an employer cannot rely on an employee's breach of fiduciary duties to justify withholding payment of salary that the employee is entitled to. However, the Court ultimately allowed the employer to claw back the paid salary as the agreement to shorten the contractual notice period was not supported by consideration.

Singapore High Court clarifies the concept of "due inquiry" in employment context

In *Long Kim Wing v LTX-Credence Singapore Pte Ltd* [2017] SGHC 151, the Singapore High Court held that the phrase "due inquiry" means something more than just the making of inquiries and the conduct of an investigation – there must be some sort of process in which the employee

concerned is informed about the allegation(s) and the evidence against him so that he has an opportunity to defend himself by presenting his position. While "due inquiry" does not mandate any formal procedure to be undertaken, the risk that "due inquiry" has not been undertaken will increase in accordance with the informality of the procedure. Accordingly, where no formal process has been undertaken, the court will be more careful to ensure that the employee's rights are protected.

Notwithstanding that the employee in this case was a director not covered under the Employment Act, the Court referred to the Ministry of Manpower's website, whose principles are consistent with the notions of justice and fairness and provide that an employee should have the opportunity to present his/her case.

Last but not least, the employee also alleged that the wrongful termination constituted a breach of the duty of trust and mutual confidence owed by the employer to him, and claimed for losses by reason of his failure to procure a similar job, picking up from the Court of Appeal's decision in *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] SGCA 43, where it was held that a breach of the implied term of mutual trust and confidence could give rise to losses such as impairment of future employment prospects beyond the usual measure of damages for notice monies. It is interesting to note that the Court had questioned whether the employee could establish his entitlement to such losses, both as a matter of legal principle and evidence, in the event of wrongful termination. As the High Court had already rejected the claim on the basis that there was no wrongful termination, it did not delve further into this issue and this remains an open point.

Thailand

Sutthipong Koohasaneh, Kimdara Chamlertwat and *Patchara Suebwattanakul, Linklaters*

New law regulating foreign workers has been deferred

In June 2017, the Royal Decree on management of aliens' work B.E. 2560 (the "**Foreign Workers Decree**") became effective. It replaced two pieces of legislation regulating foreign workers in Thailand namely, the Alien Working Act B.E. 2551 (2008) and the Royal Decree on foreign workers employed by domestic employers B.E. 2559 (2016). The major impact of the Foreign Workers Decree is that it imposes harsher penalties (i.e. a fine from THB400,000 to THB800,000 per foreign worker without a work permit) on an employer who employs a foreigner without a work permit. If the relevant employer is a company, the Foreign Workers Decree also extends liability to any person whose order or action causes the company to commit such an offence or any director, manager or person responsible for the employer company's operations (if it can be shown that the company's offence occurred because of his/her omission of duties). These individuals could potentially be subject to the same level of penalty as the employer company.

The Foreign Workers Decree caused mass migration of foreign workers who (together with employers) were concerned about the potential impact of the new legislation. As a result, its enforcement has been deferred (by the Order of the National Council for Peace and Order no. 33/2560) until 1 January 2018. This creates a transitional period for employers and employees and the Ministry of Labour in Thailand to take appropriate action in readiness for the Foreign Workers Decree.

Default retirement age and retirees' entitlement to severance pay approved

The National Legislative Assembly has approved the amendment to the Labour Protection Act (1998) that expressly states that retiring employees are entitled to severance pay, in line with the Thai Supreme Court's interpretation of the relevant provisions and precedents. Under this new amendment, the default statutory retirement age for employees is 60 years old. If the employer and the employee contractually agree that an employee's retirement age is to be above 60 years old, the retiring employee is entitled to provide the employer with 30 days' prior written notice of his/her decision to retire and the employer must pay the employee severance upon retirement. Failure to comply with these obligations on severance pay is a criminal offence. This amendment will become effective after it is published in the Government Gazette, which is expected to take place before the end of October 2017.

Vietnam

Linh Bui, Mai Loan Nguyen and *Hoa Phan, Allens*

Increase in amount of insurance contributions as a result of increase in basic salary

In Vietnam, Vietnamese employees and their employers are required to make contributions for social insurance and health insurance. The amount of the compulsory insurance contributions is calculated based on a percentage of the employee's monthly salary (including salary-related allowances). For the purpose of the insurance contributions, salary is capped at 20 times the basic salary as declared by the Government from time to time (before 1 July 2017, the basic salary was VND 1,210,000/month (c. USD54/month). (Note that this is not to be confused with the monthly regional minimum wage which is dependent on the region in which the employee is based).

With effect from 1 July 2017, the basic salary has increased by seven per cent to VND1,300,000 (c. US$57.2) per month. Accordingly, the increased basic salary means that the corresponding amount of the social and insurance contributions will also increase.

Draft regulation on contribution of compulsory social insurance by foreign employees

In February 2017, the Ministry of Labour, War Invalids and Social Affairs ("**MOLISA**") published a draft Decree detailing the social insurance contributions to the Vietnam Social Insurance Fund ("**VSIF**") by foreign employees working in Vietnam and their employers. If approved, commencing on 1 January 2018, a foreign employee who satisfies certain conditions and his/her employer will be required to pay a compulsory monthly social insurance contribution calculated at eight per cent of the employee's monthly salary* to the retirement and death fund of the VSIF. In return, the foreign employee will be entitled to benefits for sickness, maternity, occupational diseases and accidents, retirement and death (which are similar to those currently applicable to Vietnamese employees).

**As with Vietnamese employees, the salary used for calculating the monthly social insurance contribution is his/her monthly salary (including salary-related allowances), capped at 20 times the basic salary as detailed above*.

Reduced monthly contribution rate to the Labour Accident and Occupation Diseases Fund

In April 2017, the Government approved the new monthly contribution rate for employers to the Labour Accident and Occupation Diseases Fund. The rate has been reduced from 1% to 0.5% of the employee's salary ("salary" being the employee's salary for the purposes of calculating social insurance contributions (see above)). The new rate became effective on 1 June 2017, except for employees who work under labour contracts with a term of at least one month but less than three months. In respect of such employees, the new rate will be applicable from 1 January 2018.

Introduction of online registration system for work permits

In order to promote the development of the e-government platform as well as to improve the quality and efficiency of administrative procedures, MOLISA issued an official letter in February 2017 requesting local labour authorities to implement online application, issuance and registration of work permits via the national portal of MOLISA (which can be accessed here). In practice, this has been implemented in major cities such as Hanoi, Da Nang and Ho Chi Minh City. These online procedures are expected to save time and costs compared to previous paper-based procedures.

Your core Employment & Incentives team

Laure de Panafieu
Linklaters, Singapore
Head of Employment & Incentives – Asia
Partner

Tel: +65 6692 5791
Email: laure.de_panafieu@linklaters.com

Peter Arthur
Allens, Sydney
Senior Employment Counsel

Tel: +61 2 9230 4728
Email: peter.arthur@allens.com.au

Simon Dewberry
Allens, Sydney
Partner

Tel: +61 3 9613 8110
Email: simon.dewberry@allens.com.au

Veronica Siow
Allens, Melbourne
Partner

Tel: +61 2 9230 4135
Email: veronica.siow@allens.com.au

Yolanda Hutapea
Widyawan & Partners, Jakarta

Tel: +65 6692 5729
Email: yolanda.hutapea@linklaters.com

Samantha Cornelius
Linklaters, Hong Kong
Co-Head of Employment & Incentives – Hong Kong

Tel: +852 2901 5542
Email: samantha.cornelius@linklaters.com

Emma Pugh
Linklaters, Hong Kong
Co-Head of Employment & Incentives – Hong Kong

Tel: +852 2901 5541
Email: emma.pugh@linklaters.com

Hiroya Yamazaki
Linklaters, Tokyo
Partner

Tel: +81 3 6212 1435
Email: hiroya.yamazaki@linklaters.com

Richard Gu
Linklaters, Shanghai
Senior Consultant

Tel: +86 21 2891 1839
Email: richard.gu@linklaters.com

Robert Flemer
Kim & Chang, Korea

Tel: +82 2 3703 4661
Email: robert.flemer@kimchang.com

Jung-Taek Park
Kim & Chang, Korea

Tel: +82 2 3703 1282
Email: jtpark@kimchang.com

Sutthipong Koohasaneh
Linklaters, Bangkok
Counsel

Tel: +66 2305 8060
Email: sutthipong.koohasaneh@linklaters.com

Linh Bui
Allens, Vietnam
Partner

Tel: +84 8 3822 1717
Email: linh.bui@allens.com.au