Linklaters

Asia Pacific Employment & Incentives Legal Update
14 February 2017

Introduction

Welcome to the first of our bi-annual update newsletters for 2017. This publication is designed to help you keep your finger on the pulse of the key legal developments across APAC that could affect your organisation.

If you, like me, were hoping that the second half of 2016 would be smoother than the first half, our hopes did not materialise! The year ended with a bang, rather than a whimper. As organisations reflect on the way forward, and how to react to developments in Europe and North America, we would encourage you to reach out to our APAC network of lawyers to help navigate you through choppy waters and provide you with support for your 'business as usual' needs.

In the APAC region, a key trend has been legal change driven by the changing demographics of ageing populations, with many governments across the region passing or proposing laws that address retirement ages and the administration of pension funds. There has also been a trend across the region to propose or pass increases to minimum wage legislation and enhance employees' family-friendly rights.

If you have any questions or if there is anything you require assistance with, please reach out to me or anyone across our APAC network. My details are below, the names of your local contacts across the region have been hyperlinked to their email addresses and full contact details for our team are at the back of this newsletter.

Wishing you a happy, healthy and extremely prosperous year of the Rooster!

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Australia

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

Industrial Relations Bill increases whistleblower protections

The Federal Parliament has passed an Industrial Relations Bill that includes significant increases to the whistleblower protections applicable to unions and employer organisations. Among other things, the new laws extend the scope of qualifying disclosures and provide for access to a greater number of remedies if a person takes, or threatens to take, a reprisal against a whistleblower. The Federal Government has confirmed it will support a Parliamentary inquiry to examine the whistleblower amendments in the Bill with the objective of achieving 'equal or better' whistleblower protections (including a compensation regime) in the corporate and public sectors. The present intention is for legislation to be introduced to Parliament by the end of 2017.

To read our separate update on these new protections, click here.

Ombudsman orders mining company to repay AUD 2m+ to employees whose allowances were under-paid

The Fair Work Ombudsman ("**FWO**") has entered into an enforceable undertaking with a mining services company, which requires the company to repay more than AUD two million to over 200 current and former employees (plus interest). This case illustrates that the FWO is unlikely to accept as a mitigating factor the fact that a company relied on erroneous legal or accounting advice, or a simple miscalculation as to entitlements such as allowances or night shift penalties.

Enforcement action against employers who improperly offer unpaid internships

The FWO has also been proactive in taking enforcement action against employers who improperly offer unpaid 'internships'. The courts have emphasised that employers profiting from 'volunteers' is unacceptable. This has resulted in the imposition of penalties in excess of AUD 250,000 for serious breaches by employers and individual directors of companies engaged in contraventions have also been fined.

Inquiry into the banking sector

Following July's federal election, Prime Minister Malcolm Turnbull asked the Standing Committee on Economics to inquire into and report on a review of Australia's four major banks. Public hearings were held in October and the first report was tabled on 24 November 2016 (the "**First Report**").

The First Report made 10 recommendations focusing on three main areas: ensuring healthy competition in the banking and financial sector, strengthening consumer outcomes and improving regulatory requirements.

A substantive change aimed at increasing competition was the recommendation to implement open sharing of customers' data between financial institutions and ASIC-approved third parties, such as comparison websites. This recommendation mirrors a similar proposal put forward by the UK Competition and Markets Authority in August 2016.

The First Report also suggested that the Government strengthen consumer outcomes by establishing a Banking and Financial Sector Tribunal and by requiring that Australian Financial Service Licence ("**AFSL**") holders inform their clients if they become aware that the clients' financial advisor has breached their legal obligations.

Finally, the First Report recommended that the Government introduce regulations which require more expansive and publicly accessible reporting by both AFSL holders and the wealth management industry.

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Hong Kong

Samantha Cornelius, Emma Pugh, Andrew Chapman and Joshua Li, Linklaters

High Court dismisses claim for bonus given breach of fiduciary duties

The Court of First Instance, in its judgment issued on 2 November 2016, has provided guidance on when a bonus claim under an 'Engagement Agreement' (similar to a consultancy agreement) will fail. This case is a useful reminder: (i) of the importance of understanding an individual's fiduciary responsibilities as a director when the company and director agree to the director providing services to the company as an independent contractor; (ii) to ensure that any necessary approvals for transactions have been obtained (e.g. members' approval at a general meeting where required); and (iii) to ensure that a person is adequately qualified and licensed if that person will carry on regulated activities.

In *Wong Lung v. The Chinese University of Hong Kong Employees' Credit Union* (HCA 1122/2010), the Claimant had been president of the Respondent's board for eight years and had also acted as its Chief Financial Supervisor since October 2008. While a director, the Claimant and Respondent agreed that the Claimant would provide his services as an independent contractor to the Respondent. The Claimant and Respondent signed an engagement agreement (the "**Engagement Agreement**") under which the Claimant provided services as a financial advisor/ supervisor in respect of the Respondent's investments. The Respondent's board approved bonuses of HK$18,906.92 and HK$9,745,803.22 for the Claimant. The Claimant received the first bonus payment of HK$18,906.92 and by a second cheque for HK$4,872,902, the Respondent purported to part pay the Claimant for the second bonus. The Respondent then requested that the Claimant return the second cheque on the basis that the sum would need to be audited. The Claimant returned the cheque and the Respondent refused to pay any further bonus to the Claimant.

The Claimant was unsuccessful in his claim for a bonus under the Engagement Agreement. The Court held, amongst other things, that:

i. the Claimant breached his fiduciary duties by participating in discussions about the Engagement Agreement as a director of the Respondent and failed to disclose and obtain members' consent for the payments;
ii. the Claimant lacked the relevant SFC licence to perform financial advisory services under the Engagement Agreement, and the agreement should therefore be avoided/ not enforced on grounds of illegality;
iii. the Engagement Agreement was entered into outside the scope of the powers of the Respondent (a Credit Union), whose powers were set out in the Credit Union Ordinance;
iv. the Claimant's representation in the Engagement Agreement that he would comply with all applicable laws/ regulations in respect of the services he would provide was a fraudulent or negligent representation on which the Respondent had relied, allowing the Respondent to rescind the agreement and/ or recover sums paid under it; and
v. the Engagement Agreement was unconscionable and therefore unenforceable under the Unconscionable Contracts Ordinance.

Privacy Commissioner intervenes where bank disclosed excessive personal data in a telegraphic transfer

The Privacy Commissioner for Personal Data (the "**Commissioner**") issued a case note in September 2016 reporting a complaint by a customer against a bank. The case is a reminder that: i) the use (disclosure) of personal data in Hong Kong must be consistent with the purpose for which that data was intended to be used at the time of collection with no unnecessary disclosures; and ii) there is a risk of complaints from data subjects leading to intervention by the Commissioner when this fails to happen, even where the use may have been routine for the data user concerned.

The complainant instructed Bank A to remit a sum of money by telegraphic transfer to an account at Bank B, and found that the electronic advice issued to the payee by Bank B contained the complainant's name and address. Bank B explained that the purpose of showing the remitter's name and address was to provide sufficient information to the payee to identify the remitter. The Commissioner's view was that only showing the remitter's name and account data was adequate for identification purposes. Bank B agreed to amend its electronic advice pro forma to prevent unnecessary disclosure of the remitter's address to any payee in the future.

District Court assesses damages for sex discrimination claim in relation to gender-based disparity in night club entrance fees

The District Court has provided guidance on the calculation of damages in *Yiu Shui Kwong v. Legend World Asia Group Limited* (DCEO 8/2015). This case illustrates the importance of a claimant in a discrimination claim proving the loss resulting from the alleged discriminatory conduct. Failing to do may render the claim fruitless, even when the conduct alleged is clearly discriminatory.

The Claimant, upon entry to the Respondent's night-club, was charged a higher entrance fee, and submitted a Notice of Claim alleging direct discrimination. Following the Respondent's default in filing a response, interlocutory judgment (i.e. default judgment) was entered in favour of the Claimant. At a subsequent hearing to assess damages, the Claimant claimed: i) the difference in value of entrance fees; ii) damages for injury to feelings; and iii) exemplary damages. The Claimant was assisted by the Equal Opportunities Commission ("**EOC**").

All three claims failed. The Court held the Claimant was not entitled to the price differential as he had not claimed this in his initial Notice of Claim. No damages for injury to feelings were awarded, with the Court noting these were not automatic upon a finding of unlawful discrimination and that the Claimant's evidence did not suggest any such injury. The Claimant's conduct on the relevant night (by patronising the club) and during proceedings (calling off a conciliation meeting) weighed against him. In relation to exemplary damages, the Court noted the case law test was whether the Respondent's conduct was "outrageous" and if available remedies were inadequate to punish/ deter the Respondent from such conduct. The Court noted: i) this was the first case to hold that

gender-based entry price differentials were discriminatory; ii) that the EOC's statutory obligation was to eliminate discrimination in Hong Kong; and iii) the EOC had the statutory power to make recommendations or issue enforcement notices. The Respondent had not been provided with any such statutory recommendation or enforcement notice. The Claimant was therefore unable to demonstrate that the Respondent's conduct was "outrageous" and that available remedies were inadequate to punish or deter the Respondent. On this basis, the Court refused to award any exemplary damages.

Pregnancy discrimination case provides warning to employers on 'no-go' questions to employees

The District Court has provided guidance to employers about: a) who will be considered the employer's agent (the significance being that employers can become jointly liable for agents' discriminatory acts); and b) what actions may constitute 'less favourable treatment' for the purpose of the Sex Discrimination Ordinance. The case serves as a warning for employers of the risks of discrimination claims by evidencing the courts' willingness to draw adverse inferences and take a purposive approach to achieve the objectives under the Sex Discrimination Ordinance.

In *Waliyah v. (1) Terence Yip (2) Man Hong Chan* (DCEO 1/2015), the Claimant claimed for: a) damages arising from alleged sex and pregnancy discrimination; b) breach of contract; c) breach of statutory maternity protection under the Employment Ordinance; and d) unlawful dismissal. A central issue in the case was whether Ms Hong Chan was acting as Mr Yip's agent when Ms Hong Chan requested that the Claimant take a pregnancy test. Mr Yip was the Claimant's legal employer, and Ms Hong Chan was Mr Yip's wife at the relevant times. The court held that Ms Hong Chan was Mr Yip's agent, inferring that in a domestic setting it was 'obvious' that Mr Yip intended for Ms Hong Chan to be in a position to give orders to the Claimant, and noted that Ms Hong Chan was often alone in the house with the Claimant.

The Court held that two discriminatory acts had taken place. The first was Ms Hong Chan's request that the claimant take a pregnancy test. The Court noted this was a 'private mater about which the employer had no right to know'. The request – on its own – was considered 'less favourable treatment' on grounds of gender, as the Court held that a male employee would not be asked to take such a test and disclose this information to their employer.

The second discriminatory act was Mr Yip making the Claimant sign a termination notice and demanding that she move out a week before expiry of her notice period. The Court inferred that Mr Yip had become aware of the Claimant's pregnancy, and would not have subjected the Claimant to this treatment but for her pregnancy. Mr Yip's acts were also held to amount to: a) a breach of contract (namely a breach of the implied term of trust and confidence); b) a breach of the Employment Ordinance regarding pregnancy protection; and c) unlawful dismissal.

The court only addressed liability in its judgment and reserved issues of remedies and damages for a separate hearing.

Pensions shake-up introduces default investment strategy for mandatory provident fund schemes

The Mandatory Provident Fund Schemes (Amendment) Ordinance will come into effect on 1 April 2017. This introduces the concept of a "Default Investment Strategy" ("**DIS**"), which is a standardised and fee-controlled MPF investment strategy. The amendments have been introduced to address public concerns that it can be difficult for members to select investment strategies and the fact that there are often high fees associated with MPF management.

The DIS will be designed to automatically reduce a member's investment risk (from high-risk asset funds to low-risk asset funds) as the member approaches 65. The changes also cap overall fees (i.e. trustees', managers' and sponsors' fees) for such funds and cap disbursements/ out-of-pocket expenses (e.g. audit costs) to 0.75% and 0.2%, respectively. Trustees will also be required to identify members whose accounts are wholly invested in existing, default arrangements. Where

such arrangements exist and a member has never provided investment instructions, trustees will be required to send a transfer notice to such member by October 2017. If the member provides no response, the member's existing benefits and new contributions will be invested through the DIS.

Minimum wage to increase

With effect from 1 May 2017, the minimum wage will increase to HK$34.50 per hour (an increase of HK$2 per hour from the current minimum wage of HK$32.50 per hour).

Additionally, with effect from 1 May 2017, employers are under an obligation to keep a record of the number of hours worked in each wage period for employees who earn less than HK$14,100 per month (the current monetary cap is HK$13,300 per month).

Proposed abolition of offsetting of Mandatory Provident Fund contributions and change in calculation of statutory severance and long service payments

The Chief Executive of the HKSAR announced in his Policy Address 2017 the Government's proposal to abolish the offsetting of statutory severance payments or long service payments with Mandatory Provident Fund contributions. The proposal has three elements: (1) no retrospective effect so that the proposed amendments will not affect Mandatory Provident Fund contributions made before the implementation date; (2) a downward adjustment in the calculation of statutory severance and long service payments from two-thirds of one month's wages to half a month's wages as compensation for each year of service; and (3) a Government subsidy for the cost of statutory severance and long service payments in the 10 years after the implementation date. These proposals seek to balance the concern of employees to obtain sufficient compensation on termination and the concern of employers in relation to additional employment-related costs. The Government will launch a public consultation on these proposals and will propose amendments to the legislation if there is sufficient public support.

Consultation on standard working hours closes with report submitted to the Government

The Standard Working Hours Committee has completed its consultation process on working hours policy directions and has submitted its report to the Government of the HKSAR. The Committee recommended legislation requiring employers to pay overtime pay at a rate no less than the rate of the agreed wages and to specify working hours terms in the employment contracts of "lower-income grassroots employees". However, there are no recommended limits on the maximum working hours and these policies would not cover persons to whom the Employment Ordinance and the Minimum Wage Ordinance do not apply (e.g. domestic helpers). The Committee was also unable to suggest a definition of "lower-income grassroots employees".

For other categories of employees, the Committee considered there are widely divided opinions and therefore it is not appropriate to introduce "across-the-board" legislation. The Committee therefore recommended continued consultation with different sectors and industries to identify and formulate sector-specific guidelines with suggested working hours standards, overtime compensation methods and good working hours management measures. A review after two years of the implementation of the policies in relation to "lower-income grassroots employees" was also recommended.

Labour unions and employee representatives heavily criticised this report while the Government stated it will consider the report carefully to devise, within the term of the current Government, a working hours policy direction suitable for the HKSAR.

An Executive Summary of the Committee's report can be found here while the full report can be found here.

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Indonesia

Yolanda Hutapea and Ani Simanjuntak, Widyawan & Partners

Jakarta regional minimum wage changes

In October 2016, the Jakarta Governor issued a regulation which stipulates the regional minimum wage for 2017 to be Rp3,355,750 per month. Although this is an increase of 8.25% from the preceding year's minimum wage, the number is lower than labourers had called for. Labourers were requesting a minimum wage of Rp3,831,690, taking into account the inflation rate and their market survey on the current need for decent living. The Government refused to adopt such an approach on the basis that the calculation should be based on the formula provided under the prevailing regulation. The regional minimum monthly wage for Jakarta of Rp3,355,750 became effective from 1 January 2017. Please note that there will be a sectoral minimum wage that applies to certain sectoral businesses – that regulation has not yet been issued.

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Japan

Hiroya Yamazaki, Mamiko Nagai, Takashi Shibusawa and Kenji Shimada, Linklaters

Changes to the regulations in relation to the transfer of employment in company splits, mergers and business transfers

On 1 September 2016, the following amendments and guidelines came into force: (i) Amendment to the Ordinance for Enforcement of the Act on the Succession to Labour Contracts upon Company Split (the "**Labour Succession Ordinance Amendment**"); (ii) Amendment to the Guidelines Necessary to Promote the Appropriate Implementation of Measures that the Split Company and Successor Company, etc., Should Take Regarding Succession of Labour Contracts and Collective Agreements Entered into by the Split Company (the "**Labour Succession Guidelines Amendment**"); and (iii) Guidelines on Points of Attention for Company, etc. regarding Merger or Transfer of Business (the "**Business Transfer Guidelines**").

These new amendments and guidelines aim to raise employers' awareness in relation to the transfer of employment in a company split or business transfer situation. As a result, amongst other things, in the case of a company split, the Labour Succession Ordinance Amendment and the Labour Succession Guidelines Amendment expand the scope of the employees with whom the transferor company must consult, as well as the content of the notifications to be sent to certain employees and the consultations. In the case of a business transfer, the Business Transfer Guidelines require the transferor company to consult with the employees who will be transferred and with the labour union or a representative of a majority of the employees.

Family friendly changes introduced, including a requirement for employers to prevent workplace harassment relating to maternity and taking child/ family care leave

On 1 January 2017, changes to the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (*ikuji kyuugyou kaigo kyuugyou tou ikuji matawa kazoku kaigo wo okonau roudousha no fukushi ni kansuru houritsu*) (the "**Child Care and Family Care Leave Act**") and the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (*koyou no bunya ni okeru danjyo no kintou na kikai oyobi taiguu no kakuho tou ni kansuru houritsu*) came into force. These laws are intended to improve the workplace atmosphere and flexibility for employees who have caring responsibilities for a child or family member.

In addition to the obligation of employers not to treat employees disadvantageously for reason of maternity or taking child and family care leave, employers are now required to implement measures to prevent harassment in their workplace in relation to maternity and taking child and family care leave. Examples of the measures to be taken include stipulating the relevant rules in the work rules and holding internal seminars to prevent such harassment.

Changes under the Child Care and Family Care Leave Act that came into force on 1 January 2017 also include relaxing the statutory requirements for employees taking child and family care leave enabling employees to take family care leave more than once per family member. Employers will need to review their work rules to ensure these satisfy the statutory requirements set out under the Child Care and Family Care Leave Act.

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Korea

Robert Flemer and Jung-Taek Park, Kim & Chang

Maternity leave compensation increase

With effect from 1 January 2017, the maximum maternity leave compensation of KRW 1,350,000 per 30 day period increased to KRW 1,500,000 per 30 day period. This maternity leave compensation is paid by the Employment Insurance Fund in Korea.

Supreme Court recognises right to convert fixed-term employment contract to indefinite term employment contract

The Supreme Court has recently recognised, for the first time, that a fixed-term employee who was hired after the enactment of the Act on Protection of Fixed-Term and Part-Time Employees has a reasonable expectation and right to convert their fixed-term employment contract into a permanent employment contract where certain conditions are met (such as evidence of an intent to renew by the parties).

Minimum retirement age of 60 now applies to all companies

The minimum retirement age of 60, introduced in May 2013, now applies to all companies in Korea. It had previously only applied to companies with 300 or more employees.

Requirements to preserve hiring documentation/ job applications (and provide the same to job applicants) will apply to more companies

From 1 January 2017, companies with 30 or more employees are subject to the same requirements that companies with 100 or more employees have been subject to since 1 January 2015. These requirements are to:

1. preserve for three years the hiring documents, e.g. job applications, internal notes/ email correspondence and other on-boarding documentation, of successful job applicants; and
2. preserve for 180 days all documentation that relates to that applicant's job application and provide the same (except for those documents provided by e-mail or by the job applicant without any request from the potential employer) to unsuccessful job applicants (on request).

Companies who do not comply with these requirements risk a corrective order from the Ministry of Employment and Labour as well as a fine of up to KRW 3,000,000.

Minimum wage increase

The minimum wage for 2017 has increased by 7.3% to KRW 6,470 per hour, up from KRW 6,030 per hour.

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People's Republic of China[1]

Richard Gu, Xiaoying Zhang and *Lois Zhang, Linklaters*

New system for measuring employers' compliance with labour legislation

The Measures of Grading Evaluation of Compliance and Integrity of Enterprises' Labour Protection and the Measures of Public Disclosure of Significant Violations of Labour Protection Law came into force on 1 January 2017. The rules introduce an evaluation and classification system based on employers' compliance with the labour laws, rules and regulations. The classification results will be reflected as part of the employers' compliance files and kept for at least three years. Employers with an unsatisfactory evaluation result will become a target of labour protection supervision by the authority and significant violations of labour laws will be made public by the authority.

New single foreign work permit scheme

Following implementation of a pilot program in selected regions from October 2016 to March 2017, a unified foreign work permit scheme will be rolled out nationwide from 1 April 2017. Under the new scheme, the existing alien employment permit and foreign expert permit will be integrated into a single foreigner work permit, based on a three-tiered and points-graded classification system. The classification takes into account factors such as education background, salary, age, work experience and Chinese language competence. Tier-A candidates are offered a green-channel application process while Tier-B and C candidates are subject to a controlled and limited quota administration.

Revised Occupational Disease Prevention and Control Law

Effective from 2 July 2016, the Occupational Disease Prevention and Control Law has been revised to introduce a self-assessment regime to be implemented by companies engaging in most construction projects. This replaced the previous pre and post evaluation and approval procedures with qualified institutions and governmental authorities. The only exception is medical facility construction projects with potential radioactive hazards, in which case reports must still be submitted to, and prior consent and on-site examination must still be sought from, the health administrative authority.

[1] *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.*

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Singapore

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

Increase in qualifying salary for employment pass applications

Employers hiring foreigners will need to obtain work passes to enable them to work in Singapore. There are a number of work passes available depending on the foreigners' salary and their scope of work. The employment pass is for foreign professionals who work in managerial, executive or specialised jobs.

The qualifying salary for employment pass applications will be raised from S$3,300 to S$3,600 from 1 January 2017. The increase in the qualifying salary is part of the efforts of the Ministry of Manpower ("**MOM**") to keep pace with rising local wages, maintain the quality of the foreign workforce and enhance the integration of foreigners with the local workforce.

Appointment of employment pass holders to the board of directors of another company

The MOM confirmed in November 2016 that a company has to obtain the MOM's approval if it decides to appoint an employment pass holder from another company to its board of directors. The MOM will generally grant approval if the company is related by shareholding to the employment pass holder's employer and the employment pass holder is taking up the secondary directorship for purposes related to his primary employment.

Mandatory retrenchment notifications

With effect from 1 January 2017, employers who employ at least 10 employees are required to notify the MOM if five or more employees are retrenched within any six month period beginning 1 January 2017. The notification must be submitted within five working days after the fifth employee is notified of his or her retrenchment and must cover the first five employees. Thereafter, a separate notification must be submitted within five working days after each employee is given notice of retrenchment. This is done by completing a retrenchment notification form available on the MOM's website and emailing it to the MOM. Failure to notify within the required timeline is an offence and the employer may be liable on conviction to penalties, including a fine not exceeding S$5,000. 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 will be established from April 2017 to deal with salary-related disputes. The Tribunal will hear: (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 will be 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 will receive the same maternity leave entitlement as lawfully wed mothers (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 will increase 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 will increase from four weeks to 12 weeks, and mothers will be permitted to share up to four weeks of maternity leave with their husbands (instead of the current one week).

Increase of re-employment age

The re-employment age of employees who are Singapore citizens or Permanent Residents will be raised from 65 to 67 from 1 July 2017. Employers must offer re-employment to eligible employees who turn 62, up to the age of 67 to continue their employment, provided that certain statutory requirements are met. In addition, the statutory provision which allows employers to reduce wages of workers turning 60 by up to 10% will be removed. If the employee is eligible but the employer is unable to offer re-employment, the employer must offer the employee a one-off "Employment Assistance Payment" ("**EAP**"). From 1 July 2017, the recommended minimum EAP amount will be increased from S$4,500 to S$5,000 and the recommended maximum EAP amount will be increased from S$10,000 to S$13,000.

Singapore Court of Appeal rules on controversial summary dismissal case

In the 2015 case of *Iouri Piattchanine v Phosagro Asia Pte Ltd* [2015] 5 SLR 1257, the High Court found that breaches by an employee of his fiduciary duties and his express and implied contractual duties were insufficient to justify summary dismissal by his employer for serious misconduct or wilful breach.

The Court of Appeal decision on 28 October 2016 overturned the High Court's finding that the employee was not guilty of serious misconduct. The Court of Appeal held that where the breach in question is of a term which constitutes a condition of the contract, it would entitle the innocent party (i.e. the employer) to elect to treat the employment contract as discharged, regardless of the nature and consequences of the breach. To read our separate update on this decision, click here.

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Thailand

Sutthipong Koohasaneh and *Kimdara Chamlertwat, Linklaters*

Retirement age and severance pay

In January 2017, the Cabinet approved an amendment to the Labour Protection Act (1998) to expressly state that retiring employees are entitled to severance pay (the Supreme Court had already awarded severance payments to retiring employees, but the legislation has now been formally amended to reflect this). A further amendment was approved which sets the default statutory retirement age for employees at 60 years old, unless employers and employees agree otherwise. This amendment will take effect once approved by the legislature, although there is currently no clear timetable as to when this will occur.

Tax privileges for employers of retirees

As a measure to encourage retired employees to re-join the work force, the Ministry of Labour announced in mid 2016 that there will be tax privileges for employers who employ retired employees. Employers who hire a retired employee will be entitled to deduct an amount equivalent to double the retired employee's wages from its revenue for the purpose of calculating its corporate income tax. These tax privileges have yet to be formally implemented.

National Provident Fund

In November 2016, the Cabinet approved a package of measures to deal with Thailand's ageing population, which included making the provident fund, which was previously a voluntary arrangement between employers and employees, a mandatory requirement through the establishment of the National Provident Fund. The new National Provident Fund will cover employees between the ages of 15 to 60 in the private sector, temporary employees and Government employees who are not members of any other existing provident funds. Both employers and employees (except employees who earn less than THB 10,000 per month, in which case only employers will be required to contribute) will be required to contribute 3% of employees' wages to the National Provident Fund. The contribution percentage is contemplated to increase up to 10% over a period of 10 years after the establishment of the National Provident Fund. Similarly, these measures will require approval by the legislature and the timing for their implementation has not yet been announced.

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Vietnam

Linh Bui, Mai Loan Nguyen and *Hai Nguyen, Allens*

Proposed changes to the Labour Code of Vietnam

The Ministry of Labour, Invalids and Social Affairs recently published draft amendments to the Labour Code. The proposed changes are expected to be a key discussion topic at the meeting of the Vietnam National Assembly which will be held in April 2017. If passed, changes will become effective in early 2018. Some key proposed changes are as follows:

i. an employee will be able to unilaterally terminate his/ her fixed-term labour contract without being subject to the termination conditions listed in the current Labour Code, provided that the employee provides 30 days' prior notice;

ii. an employer will be able to dismiss or unilaterally terminate the labour contract of a female employee who is pregnant, on maternity leave, or raising a child under the age of 12 months, provided that the employer is able to prove that the dismissal or the unilateral termination is not due to the employee's pregnancy, maternity leave or child-care responsibilities;

iii. the retirement ages are proposed to be increased from 55 to 60 for female employees and 60 to 62 for male employees. The proposal also provides that employers can unilaterally terminate a labour contract if an employee reaches his/ her retirement age, regardless of whether the employee has satisfied conditions in respect of social insurance contributions for entitlements to a monthly pension; and

iv. the current limits on overtime working hours are proposed to be increased. The following two options have been suggested for further discussion:

option 1: the total working time, including overtime, in one day must not exceed 12 hours and employees must not work overtime for more than five consecutive days. The total overtime hours in one year must not exceed 600 hours; or

option 2: the total working time, including overtime, in one day must not exceed 12 hours and employees must not work overtime for more than five consecutive days.

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