

Linklaters



Guide to employment law in [Asia](#)

Guide to employment law in Asia

Index

Introduction	3
Employment law in Australia.....	4
Employment law in China	8
Employment law in Hong Kong.....	12
Employment law in India	16
Employment law in Indonesia	20
Employment law in Japan.....	24
Employment law in Singapore.....	28
Employment law in Thailand.....	32
Employment law in Vietnam	36

Introduction



Global workforces are critical for the success of multinational businesses operating in a global economy. Successful businesses need to be aware of and comply with the relevant employment, regulatory and remuneration requirements which apply to their workforce. Failure to do so can have negative consequences across the business.

This Linklaters guide provides a practical overview of employment and remuneration legislation across nine Asian jurisdictions. It is designed to be your at-a-glance first point of call on employment and remuneration matters. If you require more detailed advice, please speak to your Linklaters Employment and Incentives team contact.

I hope that you find this guide helpful and welcome your feedback.

Nicola Rabson

Global Head of the Employment and Incentives practice
Linklaters LLP



Employment Law in **Australia**

This guide sets out an outline of employment law rights and duties in Australia during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.



ON HIRING

Employment status

Individuals providing services will benefit from different rights depending on whether they are classified as employees or independent contractors/consultants. The employment status will be fact-specific and depend on the actual arrangement between the individual and the entity receiving the services. It is unlawful for an employer to misrepresent an employment relationship as an independent contracting arrangement. It is also an offence to dismiss an employee in order to engage them as an independent contractor, or to make a false statement to persuade or influence an individual to become an independent contractor (rather than an employee).

Employment contracts

Employment contracts can be written or unwritten, but it is good practice to have the terms of employment recorded in a written agreement. While employers and employees are free to agree on the terms of an employment contract, the National Employment Standards underpin the terms of employment and cannot be excluded by agreement. In addition, if a modern award (an industrial instrument that

contains minimum employment terms and conditions applicable to specified classifications of employees in a particular industry or occupation) applies to the employee, the employment contract cannot provide for terms and conditions that are less favourable than the minimum terms and conditions under the modern award. Employees have a statutory right to be provided with a Fair Work Information Statement setting out specified information about their employment.

Collective/Enterprise agreements

An employer may choose to enter into an enterprise agreement with a group of its employees, which allows the employer and employees to agree to depart from the standard provisions contained in the modern awards that would otherwise apply to them. An enterprise agreement must be approved by the Fair Work Commission, which must be satisfied that the employees will be better off overall under the enterprise agreement than they would be under the modern award that would otherwise apply to the employees. An enterprise agreement operates to the exclusion of the relevant modern award until the agreement is terminated.

Practicalities

Subject to satisfying certain criteria (such as the employee must be employed under market terms and conditions of employment) and labour market testing, employers may apply to sponsor persons in one of the positions where the Australian Government has identified a shortage of skills in Australia, to work in Australia for a two-year or four-year period under a temporary work visa.



DURING EMPLOYMENT

Remuneration

Employees must be paid at least the national minimum wage or, if the employee is covered by a modern award or enterprise agreement, the minimum wage specified in the applicable modern award or enterprise agreement. Remuneration in certain sectors may be governed by additional regulation; for example, the financial sector regulations prohibit the use of certain remuneration structures (e.g. certain types of commission payments) for financial advisors.

Pensions (known as 'Superannuation')

Employers must make regular payments, on at least a quarterly basis, into a pension plan (known as a 'superannuation fund') chosen by the employee. The employer must have a default fund to which contributions can be made for employees who do not choose their own fund. Superannuation contributions must be 9.5% of 'ordinary time earnings', which is the remuneration that the employee regularly receives and includes performance bonuses that are linked to the results achieved in the employee's ordinary hours of work. There is a limit on contributions, currently set at \$51,620 per quarter.

Working time and holiday

The maximum number of working hours per week for employees is set at 38 (plus additional hours that are reasonable for the individual and business). Employees are entitled to 20 days' annual leave (pro-rated for part-time employees) in addition to public holidays.

Sickness absence and sick pay

Employees are entitled to 10 days' paid personal leave (comprising sick leave and carer's leave) per year (pro-rated for part-time employees).

Family and carer entitlements

Employees who have been employed by the employer for 12 months or more are entitled to 52 weeks' unpaid parental leave and are guaranteed the right to return to their position at the end of their parental leave. Certain categories of employees (such as those returning from parental leave, employees aged 55 years or older, employees experiencing domestic violence) have the right to request flexible working arrangements.

Data protection

Employee records are exempt from the obligations in the Privacy Act governing the collection, processing and storing of information. In order for the employee records exemption to apply: (1) the organisation must be acting in its capacity as a current or former employer of an individual; (2) the disclosure is directly related to a current or former employment relationship between the employer organisation and the individual; and (3) the disclosure is directly related to an employee record held by the organisation. Employers are required to make copies of an employee's records available at the request of the employee or former employee.



TROUBLESHOOTING

Discrimination

Discrimination by employers on the basis of a particular characteristic (including race, age, sex, disability or religion) is unlawful. An employer who treats an employee or any job applicant differently for reasons that include any one of these protected attributes will be liable to pay compensation under State or Federal anti-discrimination laws and an adverse action claim under the Fair Work Act. Workplace bullying (where an individual or a group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member and the behaviour creates a risk to health and safety) is also unlawful.

Whistleblowing

There are certain protections available to whistleblowers who meet relevant criteria. For example, information provided by whistleblowers must be kept confidential and whistleblowers must be protected from victimisation and litigation.

Employment disputes

Enterprise agreements generally contain specific dispute resolution procedures that are available to employees in the event of a grievance (which include grievances arising out of disciplinary matters). Such procedures often allow for the

employee to refer disputes for conciliation/mediation to the Fair Work Commission, and if this is not successful, arbitration by the Fair Work Commission. In relation to disciplinary matters, where an employee has statutory protection against unfair dismissal the employer must follow a prescribed procedure, which includes giving the employee an opportunity to improve (if the issue is performance-related) or to respond to allegations about their conduct before determining a disciplinary outcome.

Consultation requirements

The Fair Work Act requires employers to consult with employees when: (1) the employer makes a decision to dismiss 15 or more employees by reason of redundancy; (2) when an employee requests flexible working arrangements; and (3) during the enterprise bargaining process. Modern awards and enterprise agreements typically include consultation provisions which are usually triggered when an employer makes a definite decision to introduce (but before introducing) major changes that are likely to significantly affect its employees or when an employer proposes to make changes to the ordinary hours of work. An employer is also subject to certain consultation obligations under health and safety legislation.

Business transfers

On the sale of a business, the employment of employees who are employed in the business will not automatically transfer to the buyer. An employee must accept an offer of employment from the buyer before the employment can be transferred. Unless the buyer's offer is: (1) for the same or substantially the same work; (2) on terms that are overall no less favourable than the current employment terms; and (3) on terms that recognise the employee's period of service with the current employer as being continuous service with the buyer, then the current employer will be liable to make redundancy payments to any employees who do not wish to transfer.



TERMINATION

Notice periods

Employees are entitled to receive at least a statutory minimum notice period, starting at one week and increasing with length of service to a maximum of five weeks from an employer, although the employment contract can specify a longer notice period. The employer can elect to pay the employee in lieu of notice, and/or, if the employment contract permits, to put the employee on a period of "gardening leave" for all, or part, of the notice period.

Unfair dismissal

Employees who earn less than the high income threshold (\$138,900 from 1 July 2016) or who are covered by a modern award or an enterprise agreement have statutory protection against unfair dismissal. For a dismissal to be fair, the dismissal must be for a valid reason, pursuant to a fair procedure, and must not be harsh, unjust or unreasonable in light of all relevant circumstances. If it is not, the employer could be required to pay compensation to or reinstate the employee. There are no statutory procedural fairness requirements that must be followed in terminating the employment of an employee who is not protected by the unfair dismissal provisions under the Fair Work Act.

Redundancy

Unfair dismissal protection does not apply where employment is terminated on the grounds of a genuine redundancy. This occurs when the employee's role is no longer required, provided that the employer has: (1) complied with the notification and consultation obligations in the relevant modern award or enterprise agreement (if applicable); and (2) to the extent reasonable, attempted to redeploy the employee. Once the employer has decided to make one or more roles redundant, it is likely that any consultation obligations in a relevant award or enterprise agreement will be triggered, requiring the employer to undertake a consultation process before making any final decision.

Unlawful dismissal

It is unlawful for employers to dismiss employees because of: (1) a period of temporary absence due to illness or injury; (2) a workplace right that the employee has exercised (such as a right to make a complaint or inquiry about their employment conditions); (3) a discriminatory reason that is prohibited under anti-discrimination laws; or (4) their association with a union.



POST-TERMINATION

Confidentiality and restraint of trade

Post-employment restraints are at first sight void for public policy reasons. An employer seeking to enforce a restraint against a former employee will need to demonstrate that: (1) it has legitimate business interests; (2) those interests need the protection of the restraints; and (3) the restraints go no further than reasonably necessary to protect those interests.

References

Although there are no specific laws that deal with references, the restrictions contained in the Privacy Act will apply so that a former employer will only be able to disclose information relating to a former employee's employment in the event that the employee has provided his/her consent to such a disclosure.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Veronica Siow

Partner, Allens, Sydney
Tel: (+61) 2 9230 4135
veronica.siow@allens.com.au



Simon Dewberry

Partner, Allens, Melbourne
Tel: (+61) 3 9613 8110
simon.dewberry@allens.com.au



Employment Law

China

This guide sets out an outline of employment law rights and duties in the People's Republic of China (the “**PRC**”, which for the purposes of this guide, excludes the Hong Kong Special Administrative Region, the Macau Special Administrative Region and Taiwan) during the employment life cycle.



ON HIRING

Employment contracts

An employer and an employee must enter into a written employment contract within one month from the date of actual employment, except in the case of part-time employment. Generally, there are three types of employment contracts in the PRC: (1) fixed-term contracts; (2) open-term contracts; and (3) contracts for specific projects.

Labour dispatch arrangements

This type of arrangement offers an alternative to a direct employment relationship between a company and its workers. Individuals are employed by a licenced agency and then dispatched to provide services to another company. Dispatched workers are technically employed by their agencies rather than the companies they do work for. In order to protect the interests of dispatched workers, the relevant law in the PRC therefore specifies, among other things, that: (1) dispatched workers are only permitted for temporary, auxiliary or substitute positions; (2) the total number of dispatch workers cannot be more than 10% of the total workforce of the employer; and (3) there must be equal pay for equal work.

Representative offices of foreign companies are legally required to engage PRC nationals through labour dispatch arrangements (i.e. they cannot employ PRC nationals directly). Therefore, the restrictions on positions (i.e. dispatched workers are only permitted for temporary, auxiliary or substitute positions) and total numbers of dispatched workers (i.e. limiting dispatched workers to no more than 10% of the total workforce) do not apply to the offices of these foreign companies.



DURING EMPLOYMENT

Remuneration

There is a minimum wage requirement, which is determined at a municipal or provincial level.

Social insurance and housing fund

Employers are required to contribute to a statutory social insurance fund and housing provident fund for employees. The statutory insurance fund covers the following: (1) basic pension insurance; (2) basic medical insurance; (3) unemployment insurance; (4) work-related injury insurance; and (5) maternity insurance.

Working time and holiday

There are three working hour systems under PRC labour laws: (1) the standard working hour system; (2) the flexible working hour system; and (3) the comprehensive working hour system. The standard working hour system is the default working hour system applicable to employees. For an employee under the standard working hour system, the employee is to work no more than eight hours a day and 40 hours a week (in effect, a five-day work week), and working hours may be extended (i.e. overtime) after negotiations with the labour union and the employee.

Overtime may not generally exceed one hour per day although, under special circumstances, this may be longer (but in any event no more than three hours per day and 36 hours per month). An employee is entitled to statutory paid annual leave (which is between 5 and 15 days) and proportionate to his/her total working life (and not just the length of service with the current employer).

Overtime compensation

The compensation requirements for overtime under the standard working hour system are: (1) no less than 150% of the employee's salary for overtime on a working day; (2) no less than 200% of the employee's salary for overtime on the employee's rest day where no alternative rest day is arranged; and (3) no less than 300% of the employee's salary for overtime on a statutory holiday.

Family and carer entitlements

Employees are entitled to paid leave in special circumstances, such as marriage and maternity or paternity leave. The duration of such leave will depend on local laws, which will depend upon the locality.

Data protection

Employers have the right to obtain from an employee the basic information which is directly relevant to the employment contract and must keep the employees' personal information confidential.



TROUBLESHOOTING

Discrimination

As a general principle, employers are required to provide equal employment opportunity to all employees and applicants for employment without regard to nationality, race, religion, sex, or any other basis prohibited by legislation. The employment contract cannot contain any restriction on marriage and pregnancy for a female employee. There are also specific prohibitions against discrimination against individuals who are carriers of infectious diseases (save that infected individuals cannot engage in specific occupations where there is a higher risk for the spread of infectious diseases).

Whistleblowing

There are no specific rules protecting workplace whistleblowers; however, the general protection against unilateral termination by an employer provides a degree of protection.

Employment disputes

If there is any labour dispute, either the employer or the employee may apply to the competent labour arbitral tribunal for arbitration. Unless otherwise specified under the law, generally either party disagreeing with the arbitration award may file a lawsuit with the court.

Consultation

There is a general requirement on employers to notify and consult with all employees or the employees' congress in relation to any decisions relating to internal regulations of the employer or a material event if the decision will have a direct impact on the interests of the employees.

Business transfers

There is no automatic transfer of employees on a business sale or transfer. Instead, each individual employee must be notified in order to obtain their consent to: (1) the termination of the employment with the seller; and (2) the acceptance of an offer of employment made by the purchaser.



TERMINATION

Notice periods

Generally, employers do not have the right to early termination of an employment contract with notice. However, under certain limited statutory termination grounds an employer may terminate employment by either giving 30 days' written notice or making a payment of one month's salary in lieu of notice. There are no express rules in relation to "garden leave".

Reasons for termination

There is no right of "at-will" termination for the employer and unilateral termination of an employment contract by an employer is only permitted on certain statutory grounds. This may be with notice or without notice depending on the relevant statutory ground. Employees will be entitled to statutory severance pay in certain circumstances.

Unlawful termination

In the case of any unlawful termination (i.e. a termination not based on a statutory termination ground), the employer may be ordered to double the amount of statutory severance pay, or to reinstate the employee at the employee's request.

Redundancy

Redundancy, i.e. a reduction of 20 or more employees or 10% or more of the total workforce due to certain circumstances, is a valid reason for termination. The employer must comply with procedural requirements before making redundancies. Employees who are made redundant are entitled to statutory severance pay.



POST-TERMINATION

Post-termination

Non-compete restriction – a post-termination non-compete restriction may be imposed only on the following three classes of employees: (1) senior management personnel; (2) senior technical personnel; and (3) other personnel who are subject to confidentiality obligations. The maximum length of a non-competition period post-termination or expiry of the employment is two years. Compensation must be paid on a monthly basis to the employee during the non-compete period post-termination to enforce the non-compete restriction.

References

On termination, the employer must provide the employee with a separation certificate evidencing the termination, but there are no specific rules relating to references.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Richard Gu

Senior Consultant, Shanghai
Tel: (+86) 21 2891 1839
richard.gu@linklaters.com



Lois Zhang

Associate, Shanghai
Tel: (+86) 21 2891 1930
lois.zhang@linklaters.com



Employment Law

Hong Kong

This guide sets out an outline of employment law rights and duties in Hong Kong during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice. The Employment Ordinance (Cap. 57) (“**EO**”) applies to all employees in Hong Kong, and sets out the minimum entitlements of employees. These provisions apply to expatriates as well as local staff.



ON HIRING

Employment status

Individuals providing services will benefit from different rights depending on whether they are classified as employees or consultants. The employment status will be fact-specific and depend on the actual arrangement between the individual and the entity receiving the services. Many of the entitlements prescribed by the EO are only applicable to employees on a continuous contract. A “continuous contract” is a contract whereby an employee is continuously employed for a minimum of four consecutive weeks for at least 18 hours per week.

Employment contracts

It is recommended that all employees sign a written contract of employment with the employer. The parties are generally free to agree the terms of the contract, but any clause which purports to extinguish or reduce any right, benefit or protection conferred on the employee by the EO will be void. Where there is no formal document expressed as a contract or agreement, an offer letter from a prospective employer will (once accepted) constitute the basis of a legal contract. Where there is no written documentation or if there are any aspects not covered by such written documentation, the applicable statutory provisions of the EO will apply.

Practicalities

There are few restrictions on the types of persons who can be employed, but employers should ensure that, if necessary, a prospective employee obtains a work visa. Employers are required to maintain, on a confidential basis, a record of employees’ full names as shown on the employees’ identity cards or other documents by which the employees are lawfully employable, along with the numbers and types of those documents. Expatriate employees generally require an employment visa to work in Hong Kong. The application process normally takes 4-6 weeks, and the employer will act as the “sponsor” of the visa.



DURING EMPLOYMENT

Remuneration

Employees must be paid at least the statutory minimum wage, which as of 1 May 2017, is HK\$34.50 per hour.

Pensions

Subject to some limited exceptions, employees must be covered by a retirement scheme after completing 60 days’ service. Most employers enrol their employees in a scheme offered by a large financial institution. The statutory contributions are capped at HK\$1,500 per month, but employers can make a greater contribution.

Working time

There is currently no statutory maximum number of weekly working hours in Hong Kong. Employees will work the hours agreed in the employment contract. Market practice is to have between 35-50 contractual working hours per week, usually over the course of 5 days, but it is not uncommon for employees to be required to work for 6 days in a week. Employees on a continuous contract are entitled to one rest day in every period of seven days. Rest days must be fixed to regular days (usually Sunday) or notified to employees at the beginning of each month.

Annual leave

After completing 12 months’ continuous service, an employee is entitled to statutory annual leave. The amount of statutory annual leave starts at seven days per year and increases with length of service up to a maximum of 14 days per year. Many multinational employers provide annual leave

above the statutory minimum (usually 18 to 25 days for managerial level employees), subject to their own terms and conditions (e.g. forfeiture of untaken leave).

Hong Kong has two systems of public holidays: employees are entitled to 12 days of statutory holidays under the Employment Ordinance and general holidays under the General Holidays Ordinance (17 days, which includes the 12 statutory holidays plus Easter holidays (3 days), Buddha’s birthday and boxing day). All employees in Hong Kong must be granted statutory holidays in accordance with the Employment Ordinance. The additional five general holidays need only be observed by banks, educational establishments and most Government offices in Hong Kong. Employers may choose to award general holidays even though they do not fall within the categories of entities that must observe general holidays, and in fact market practice is for office workers to be granted general holidays, even though it is not a legal requirement.

Sickness absence and sick pay

Employees with at least one month’s continuous service are entitled to paid sick leave. Statutory sick leave accrues at a rate of two sick days per completed month worked, during the first 12 months of employment. Thereafter, it accrues at a rate of four sick days per completed month worked, up to a maximum accrual of 120 days. Sick pay is paid at a rate of 4/5 of the employee’s daily wages (calculated based on the average wages over the past 12 months). Multinational employers often provide sick leave benefits above the minimum statutory requirement.

Family and carer entitlements

Statutory maternity leave is 10 weeks’ paid maternity leave (subject to meeting certain conditions). Maternity leave is unpaid if the employee has not completed 40 weeks of continuous service immediately before commencing maternity leave. The statutory rate of pay during maternity leave is 4/5 of the average daily wages in the 12-month period preceding the first day of the maternity leave (or the period of employment if less than 12 months). Some multinational employers elect to provide a longer period of paid maternity leave, or pay the employee’s usual base salary during the maternity leave. Male employees are entitled to three days’ paternity leave for the birth of their child, with statutory paternity pay for the same period. The paternity leave can be taken any time from four weeks before the expected date of birth to 10 weeks after the actual birth date.

Data protection

Employers can obtain, process and store personal data about employees and have an obligation to comply with the Personal Data (Privacy) Ordinance (“PDPO”), which governs the collection, use and disclosure of “personal data” in Hong Kong. Employers must comply with the requirements of the PDPO (including in respect of notification and consent) where they collect the personal data of employees in Hong Kong.



TROUBLESHOOTING

Discrimination

There are four anti-discrimination laws in Hong Kong, which prohibit direct and indirect discrimination on the grounds of sex, race (which means race, colour, descent or natural or ethnic origin), pregnancy, marital status, responsibility to care for an immediate family member and disability. They expressly refer to discrimination in the employment field, and in particular prohibit discrimination on the specified grounds relating to recruitment, terms of employment and provision of benefits, promotion and dismissal.

Whistleblowing

There is currently no legislation offering comprehensive protection to whistle-blowers in the private sector. For listed companies, it is recommended best practice under the Corporate Governance Code issued by the Stock Exchange of Hong Kong to establish a whistleblowing policy and system for employees to raise concerns about the company in confidence.

Employment disputes

There are no statutory pre-litigation dispute resolution mechanisms.

Consultation requirements

There are no statutory consultation requirements. However, if a consultation requirement arises by contract (e.g. specified in the employment contract or in a company policy with contractual effect), employers will be required to comply with such contractual requirements.

Business transfers

On the sale of a business or a service provider change, the employment of employees assigned to the business/services will not automatically transfer to the purchaser or new provider of services. An offer and acceptance process needs to be followed to transfer the employees to the purchaser. If an employee accepts the offer of employment with the purchaser, his or her entire period of service (with the seller and the purchaser) will be treated as continuous.

The sale of the business in which an employee works will result in that employee becoming redundant (and entitled to severance pay). To avoid statutory severance pay obligations with the seller, the purchaser should make new offers of employment on terms and conditions that are the same or no less favourable and take effect on (or prior to) the termination with the seller. Employees who do not accept the new offers will not be eligible for severance benefits from the seller unless they have been employed by the seller for five years or more, in which case, they are eligible for statutory long service payments.



TERMINATION

Notice periods

Unless a statutory restriction applies (e.g. if the employee is pregnant or on statutory sick leave), either party may terminate the employment contract in accordance with the terms of the contract by giving notice or agreeing to make a payment in lieu of part or all of the notice period. The period of notice is whatever is agreed between the parties but must not fall below the statutory minimum, which is: (1) not less than seven days for a continuous contract; (2) not less than one month for a contract renewable from month to month which does not specify a notice period; and (3) not less than seven days for a contract renewable from month to month which does specify a notice period. Where an employment contract is stated to be probationary, during the first month of the probation period, the employment contract can be terminated without notice or payment in lieu (notwithstanding any contractual provision providing otherwise), and on not less than seven days' notice for the remainder of the probationary period (unless the employment contract specifies a longer period, in which case that longer period will apply). If provided in the contract, the employee can be put on a period of "garden leave" for all or part of the notice period.

Termination without notice

The EO provides that an employer may terminate a contract of employment without notice (or payment in lieu) in certain circumstances (e.g. the employee commits serious misconduct), and an employee may terminate his or her employment without notice (or payment in lieu) in certain circumstances (e.g. if the employee

reasonably fears physical danger, or has been subjected to ill treatment by the employer). It is common (and preferable) to list in the employment contract the circumstances in which an employer will have the right to terminate the employment contract without notice or payment in lieu of notice (the enforceability would depend on the particular circumstances). If an employer (or employee) terminates the contract without notice in circumstances other than those permitted under the EO, he or she will be in breach of contract and liable for damages (in addition to any other remedies available under a wrongful termination claim and/or anti-discrimination legislation, if applicable).

Unfair dismissal

There is no unfair dismissal regime, but an employee who has been employed under a continuous contract for two years or more can claim unreasonable dismissal if he or she is dismissed without a valid reason (such as redundancy or related to the employee's conduct or performance). However, damages for unreasonable dismissal are generally quite limited. If an employee is paid all his or her statutory and contractual entitlements, which include severance pay or long service pay, he or she is unlikely to be entitled to any further monetary compensation.

Redundancy

An employee who has been employed on a continuous contract for not less than 24 months is eligible for a statutory severance payment if his or her employment is terminated by reason of redundancy, if a fixed term employment contract expires without being renewed by the

employer due to redundancy, or if he or she is laid off. Statutory severance pay is calculated based on length of service (pro-rated for incomplete years) and the employer is entitled to reduce the amount of the severance pay by the amount of any gratuities based on length of service or occupational retirement / MPF scheme benefits (to the extent that they relate to the employee's years of service for which the severance pay is paid). Some multinational employers elect to pay employees a higher rate of severance pay than the statutory minimum (typically one month's wages per year of service) and the additional severance pay may be consideration for a release of liability.

Long service pay

An employee who has been employed under a continuous contract for not less than five years will be entitled to a statutory long service payment if: (1) the employment is terminated by the employer (except by reasons of redundancy or summary dismissal due to the employee's serious misconduct); (2) the fixed term employment contract expires without being renewed by the employer; (3) the employee dies during employment; (4) the employee is permanently unfit for his or her present job and he or she resigns (verified by a certificate issued by a registered medical practitioner or a registered Chinese medicine practitioner); or (5) the employee is aged 65 or over and resigns on grounds of old age. Statutory long service pay is calculated using the same formula as for severance pay and an employee is entitled to either severance pay or long service pay, but not both.



POST-TERMINATION

Confidentiality and restraint of trade

It is common to include express confidentiality and intellectual property provisions in employment contracts for the benefit of the employer and its affiliates. In addition, employees owe a common law duty of confidentiality to their employer. As a matter of public policy, restrictive covenants are generally unenforceable and will only be enforced by the courts if the employer can show that the covenants were required to protect its legitimate business interests (such as confidential information, goodwill, client relationships and/or a stable workforce) and that they were imposed for no longer than was strictly necessary to protect those interests in the circumstances.

References

There are no specific duties concerning references. However, once an employer agrees to give a reference, it owes certain duties to both the employee and the recipient of the reference.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Samantha Cornelius
Co-Head of Employment & Incentives, Hong Kong
Tel: (+852) 2901 5542
samantha.cornelius@linklaters.com



Emma Pugh
Co-Head of Employment & Incentives, Hong Kong
Tel: (+852) 2901 5541
emma.pugh@linklaters.com



Employment Law

India

This guide sets out an outline of employment law rights and duties in India during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.

India has several laws, rules and regulations which govern different types of employees and employers and apply to different aspects of labour welfare. Both the central and state governments can enact labour welfare laws.



ON HIRING

Employment status

Individuals will benefit from different rights depending on several factors, including whether they are classified as “workmen”, managerial employees, consultants, or contract-labourers. This classification will depend on the actual arrangement between the business and the individual. Consultants appointed on a contractual basis do not typically qualify for benefits under Indian labour laws and are instead regulated by their consultancy agreements. Contract labour is regulated by a specific statute.

Employment contracts

There is no obligation for employers to provide employees with written terms of employment (except in Delhi, where letters of appointment are required), but most employers recognise the value of providing written terms. Factories must clearly define the conditions of employment of their employees and make those conditions known to their employees through a standing order dealing with, amongst other things, classification of the workers (whether permanent, temporary, apprentices, or probationary), attendance, holidays, pay-days, hours of work, termination, dismissal, suspension of work, and dispute resolution. If a model standing order has been prescribed by the state, the employer’s standing order must conform to the same, as far as practicable. Where standing orders apply, they constitute the employees’ terms of employment.

Practicalities

An employer must obtain a separate registration under each labour welfare statute that applies to it. Employers should take precautions to protect the health and safety of their employees and insure against liability for personal injury sustained by employees (this is compulsory for factories). Background checks may be required in some states for specific job descriptions. Each labour law contains compliance requirements, such as making periodic contributions, periodic filings with labour authorities, maintenance of registers, records, etc.



DURING EMPLOYMENT

Remuneration

Employees must be paid a minimum remuneration, which is state-specific and applies only to specific kinds of employers (for example, mills, mines, ports, and docks) listed in a central statute. Both the central and state governments can add to this list by way of notifications from time to time. Employees that have worked for a specific duration may also be entitled to a minimum bonus.

Pensions and Provident Fund

Employers that satisfy certain requirements (for example, having at least 20 employees and being a factory engaged in a specific activity) must register with the provident fund authority, and the employer and its employees are each required to make mandatory minimum contributions of 10% or 12% of the employee’s salary towards employee retirement benefits, such as a provident fund and a pension scheme.

Working time and holiday

Working time and holidays for factories are governed by a central statute, whereas other commercial establishments are governed by state laws. In Maharashtra and Delhi, employees can work up to 9 hours in a day and 48 hours in a week, with additional working hours permitted subject to certain conditions. Employees are entitled to rest breaks ranging from 30 to 60 minutes after having worked for periods ranging from five to six hours, as applicable. Employees are entitled to paid leave, which can range from 15 to 21 days per year, in addition to national or state holidays. Unused leave can be cashed in periodically or on termination of employment.

Sickness absence and sick pay

State laws generally set out the minimum leave that employees are entitled to, without providing separately for sick leave (with exceptions, such as in Delhi, where sick leave is calculated separately). Employers in certain states can adopt their own policies on paid sick leave. Central laws also provide for payments to compensate employees or their dependants (as applicable) for sickness, injury, disability or death during employment, subject to applicable limits and conditions.

Family and carer entitlements

The statutory paid maternity leave entitlement has recently been increased from 12 weeks to 26 weeks for women who have worked in an establishment for at least 80 days in the 12 months preceding the expected date of childbirth. Additional statutory maternity benefits are available by way of nursing breaks or in certain circumstances, such as in the event of miscarriage, sickness during pregnancy or premature delivery. Pregnant women cannot be made to work if their work could affect their pregnancy or health. Paid maternity leave of 12 weeks is also available to women who adopt children below the age of 3 months. There is no statutory paternity leave.

Data protection

Employers can obtain, process and store personal data about their employees and have an obligation to comply with applicable data protection legislation, including using such personal data for legitimate reasons and to maintain its confidentiality.



TROUBLESHOOTING

Discrimination

While there is no specific legislation governing discrimination in the workplace, various statutes legislate for such matters: for example, women cannot be discriminated against during recruitment; are entitled to equal remuneration for the same work done by men; and cannot be dismissed or paid lower wages because they receive maternity benefits. Factories located in certain states (e.g. Assam and Gujarat) must employ a specific number of “physically handicapped” persons, but other states do not have the same requirements. While there is no specific labour legislation against discriminating against the disabled or on the basis of religion or belief, such discrimination could be construed to be an unfair labour practice if it arises out of the employer showing favouritism or partiality to one set of workers regardless of merit. Sexual harassment is prohibited and can result in criminal proceedings. Employers are prohibited from engaging in “unfair labour practices”; for example: (1) employing people as temporary workers for many years to deprive them of the status and privileges of permanent workers; (2) restraining or coercing workers from joining trade unions; (3) discharging or dismissing workers without regard to the principles of natural justice; (4) transferring workers (to a different location) with a negative intention; or (5) showing favouritism or partiality to one set of workers regardless of merit.

Whistleblowing

Listed companies and other companies that satisfy certain conditions need to establish a “vigil mechanism” for directors and employees to report genuine concerns. The vigil mechanism must safeguard directors or employees against victimisation because of any such reports. Separately, listed companies must also have an effective whistleblowing mechanism to allow employees to freely voice their concerns on illegal or unethical practices.

Employment Disputes

Employers with 20 or more workers must set up one or more grievance redressal committees to hear aggrieved employees within a stipulated time; other employers can do so voluntarily. Employers may also conduct inquiries on receiving a complaint or of their own accord. Where an inquiry is conducted for any other reason, the principles of natural justice should be followed; for example: the employee should be informed of the charges; witnesses should be examined in his presence and he should be allowed to cross examine them; and the inquiry officer or committee should record the findings with reasons. Employment disputes may also be referred to arbitration by either the employer or employee if an arbitration agreement exists between them.

Business transfers

Employees do not automatically transfer to a purchaser on a business sale. The purchaser and seller of a business will enter into discussions with the seller’s employees prior to closing to negotiate the terms of their transfer. A transfer of employees would qualify as a retrenchment (redundancy) by the seller unless certain conditions are satisfied: (1) the service of the employees should not be interrupted by the transfer; (2) the terms and conditions of employment after the transfer should not in any way be less favourable than those immediately before the transfer; and (3) under the terms of the transfer, the purchaser is legally liable to pay each employee compensation in the event of retrenchment on the basis that his service has been continuous and uninterrupted by the transfer. The purchaser must also obtain the consent of each employee for the transfer of that employee to be effective, failing which the seller can either retain the employee or dismiss the employee by paying all amounts due to him, such as retrenchment compensation, gratuity and payment in lieu of any untaken holiday leave. After the sale, the buyer can be held jointly or severally liable for certain liabilities in relation to any period prior to the sale.



TERMINATION

Notice periods

Employees are entitled to receive notice of one to three months or wages in lieu (depending on state laws). Failure to provide notice or make payment in lieu of notice will give rise to a claim for wrongful dismissal.

Reasons for termination

Certain conditions must be satisfied and procedures completed before an employee can be dismissed.

Unfair dismissal

Failure by an employer to comply with certain conditions and procedures can result in a dismissal being held to be unfair. An employee is entitled to challenge his dismissal in the appropriate labour court/tribunal. If the employee is successful, the employee may be reinstated and/or monetary penalties may also be imposed on the employer.

Redundancy

Labour laws provide various scenarios in which a redundancy can arise, such as: (1) lay-off (i.e. a failure, refusal or inability to provide employment due to natural disasters, shortage of raw materials, etc.); (2) permanent or temporary closure of a place of employment; and (3) retrenchment (termination of an employee’s services except by way of voluntary retirement, punishment resulting from disciplinary action, etc.).

The process to implement a redundancy in each of these scenarios may differ slightly but generally the process includes: (1) providing notice; (2) depending on the number of employees, either prior notification to, or obtaining the prior approval of, the relevant central or state government (as applicable); and (3) making relevant statutory payments, including retrenchment compensation, gratuity and payment in lieu of any untaken holiday leave. In practice, employers may offer voluntary retirement schemes to their employees which may be simpler and more cost-effective to implement.



POST-TERMINATION

Confidentiality and restraint of trade

At the end of the employment relationship most duties end. There are no statutory requirements as regards confidentiality, although the employment agreement can contain post-employment confidentiality obligations. However, any post-termination restrictions such as non-compete clauses are void.

References

There are no specific duties concerning references.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Feroz Dubash
Partner, TT&A, India
Tel: (+91) 22 6613 6900
feroz.dubash@tta.in



Deepa Christopher
Managing Associate, TT&A,
India
Tel: (+91) 22 6613 6943
deepa.christopher@tta.in



Employment Law

Indonesia

This guide sets out an outline of employment law rights and duties in Indonesia during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.



ON HIRING

Employment status

There are two types of employment status in Indonesia: (1) definite period employment (i.e. temporary employment), which can be entered into only for certain jobs (those that will be completed in a specified period of up to three years, work that is temporary by nature, seasonal jobs or jobs related to new products or activities which are still in a trial period or exploration stage); and (2) indefinite period employment (i.e. permanent employment).

Employment contracts

A definite period employment contract must be in writing in the Bahasa Indonesian language. The contract can be bilingual (Indonesian and the language of the foreign party) but in the event of any inconsistency, the Indonesian version will prevail. The term of the contract may initially be a maximum period of two years, extended once with a maximum period of one year, and can be renewed once for a period of two years after a grace period of 30 days following the expiry of the first term of the contract. An indefinite period employment contract can be made orally or in writing, although it is good practice for contracts to be in writing. The contract can also be made in a bilingual form (Indonesian and the language of the foreign party) and in practice, it would be expected that the Indonesian version will prevail in the event of inconsistency.

Outsourcing

Outsourcing is important in the labour market. There are two types of outsourcing: (1) Work Process Outsourcing, which involves only a certain work process eg. part of a production process. Only certain work processes can be outsourced, such as those which support and facilitate a company's principal activities; and (2) Labour Outsourcing, where only certain supporting activities can be outsourced (which are not the core business processes), such as cleaning services; catering for workers; security services; support service activities in the mining and oil sectors; and transportation services for workers. These activities can be contracted out to a labour provider.



DURING EMPLOYMENT

Remuneration

Employees must be paid at least the provincial minimum wage and if applicable, the sectoral minimum wage which applies in the relevant province or city.

Pension/Social Security System

Employees must be enrolled in the Social Security System programme that is managed by the Social Security Agency (*Badan Penyelenggara Jaminan Sosial – BPJS*), and both the employer and the employee are required to make mandatory contributions.

Working time and holiday

An employee's standard weekly working hours are up to 40 hours (seven hours per day for a six-day work week and eight hours per day for a five-day work week). Employees are entitled to rest breaks of: (1) 30 minutes after four hours of continuous work (when working more than six hours); and (2) one day for a six-day work week or two days for a five-day work week. Employees are also entitled to at least 12 days' paid annual leave after 12 months of service and paid leave for their own wedding (three days), child's circumcision (two days), child's baptism (two days), child's marriage (two days), death of husband/wife, parents/parents-in-law, child or son-in-law/daughter-in-law (two days) and death of a relative who lives in the same house (one day).

Sickness absence and sick pay

Employees are entitled to be absent from work due to sickness that is confirmed by a doctor's certificate. Employees are entitled to sick pay of 100% monthly salary for the first four months, 75% for the next four months, 50% for the next four months and 25% thereafter. The employer can terminate employment after 12 months of sick pay and the employee is then entitled to receive a severance payment prescribed by law.

Maternity and paternity leave

Female employees are entitled to paid maternity leave for one and a half months before the birth and a further one and a half months after the birth. Fathers are entitled to two days' paternity leave.

Data protection

Employers will collect, process and keep or cause storage of employees' personal data. Employers must comply with the requirements of the applicable data protection legislation, including obtaining the prior consent of the employees (typically in the employment contract) to process their personal data in an electronic system.



TROUBLESHOOTING

Discrimination

Discrimination by employers against employees in the course of their employment on the grounds of sex, ethnic group, race, religion, skin colour or political orientation is prohibited. Men and women must receive equal pay for work that is equivalent or of equal value.

Whistleblowing

There are no specific rules relating to whistleblowing. There is some protection for employees who have knowledge of criminal acts of the employer. An employer cannot dismiss an employee by reason that the employee reports to the relevant authority an alleged criminal offence by the employer.

The employee may terminate the employment relationship and be entitled to severance, service and compensation pay if the employer incites or orders the employee to commit an act contrary to laws and regulations, however, this type of termination must be approved by the Industrial Court.

Employment disputes

Indonesia has legislation pertaining to the settlement of industrial relations disputes which regulates how employers and employees should deal with rights disputes, interests disputes, layoff disputes and disputes among labour unions in a company. The legislation provides that if the employer and the employee cannot reach a mutually agreed settlement agreement, then the dispute is to be referred to mediation or conciliation (which involves the relevant Regional Manpower officer) and if no resolution can be reached, to the Industrial Tribunal.

Business transfers

On the sale of an asset/business, employees do not automatically transfer by operation of law. Generally, the transfer of employment requires the consent of the employee and if the employee refuses to be transferred and the seller does not wish to retain the employee a severance payment may be payable by the seller.



TERMINATION

Notice periods

Except for voluntary resignation (see below), there are no statutory notice periods. Termination by notice is not available to employers in Indonesia wishing to terminate the employment of a permanent employee and the employer must pay the minimum mandatory severance package payment even if the contract provides for payment in lieu of notice. In practice, an employer may put an employee on “garden leave” during a termination process.

If an employee resigns voluntarily, he is entitled to prescribed compensation pay under the Indonesian Manpower Law. He must submit a notice to the employer no later than 30 days prior to the date of resignation. He is not entitled to the minimum mandatory severance package.

Reasons for termination

Termination at will is not available in Indonesia. Termination of an indefinite period employment contract must be “with cause”. The Indonesian Manpower Law sets out causes/grounds for termination and such causes/grounds correspond to the level of the minimum mandatory severance package payment.

Unfair dismissal

Termination without cause may result in the employee applying to the court for reinstatement. While the court process is ongoing, the employee is entitled to continue receiving normal remuneration.

Redundancy

Redundancies are only allowed if the employer permanently ceases to operate.



POST-TERMINATION

Confidentiality and restraint of trade

At the end of the employment relationship, most duties end. Many employers therefore choose to include express contractual terms protecting confidential information and restricting what an employee can do post-termination (e.g. non-compete or non-solicitation clauses). The enforceability of restrictive covenants is unclear. In practice, enforcement of non-competition and non-solicitation covenants would likely depend upon the terms of the covenants (e.g. scope, duration of restrictions, and payment during the non-compete period (if any, as they are not commonly provided)). It is preferable to limit the restrictive covenants geographically and temporally, and to provide compensation (although this is not required by law).

References

There are no specific rules in relation to giving references to former employees, although it is common practice to do so.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Yolanda Hutapea
Widyawan & Partners
Partner, Indonesia
Tel: (+62) 21 2995 1596
yolanda.hutapea@linklaters.com



Ani Simanjuntak
Widyawan & Partners
Managing Associate, Jakarta
Tel: (+62) 21 2995 1505
ani.simanjuntak@linklaters.com



Employment Law

Japan

This guide sets out an outline of employment law rights and duties in Japan during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.



ON HIRING

Employment status

Individuals providing services will benefit from different rights depending on the relationship between the individuals and the entities receiving the services, such as employment (*koyou*), contract for work (*ukeoi*) or entrustment (*inin*). The employment status will be fact-specific and depend on the actual arrangement between the individuals and the entities receiving the services.

Employment contracts

Employers must provide employees with written particulars of employment (setting out the basic terms and conditions of employment, including, but not limited to, wages, hours of work, term of employment, place of work, work description, holiday entitlement and termination matters) when entering into an employment contract. There is no obligation for the employment contract to be in a written document, but the law recommends that the terms and conditions of employment should be confirmed in writing. In practice, most employers enter into a written contract with their employees. Employment conditions prescribed in the work rules or collective agreements are incorporated into employment contracts and serve as the minimum standards. If an employer and employee agree on employment conditions that do not meet these minimum standards, such agreed conditions will be invalid.

Practicalities

Employers must: (1) check that non-Japanese employees have the right to work in Japan; and (2) make necessary arrangements (such as filings) in order for their employees to participate in the statutory labour and social insurance scheme.



DURING EMPLOYMENT

Remuneration

Employees must receive at least the national minimum wage paid in cash at least once a month.

Pensions

An employee of a corporate employer satisfying certain conditions must be enrolled into the statutory employee pension insurance scheme (*kousei nenkin hoken*) and both the employer and the employee must make mandatory minimum contributions into the scheme.

Working time and holiday

An employee's maximum weekly working hours must not exceed 40 hours and maximum daily working hours must not exceed eight hours (unless the employer enters into a written agreement with a labour union or a representative of the employees). Employees are entitled to rest breaks of: (1) at least 45 minutes when working more than six hours and at least one hour when working more than eight hours; and (2) one day in each seven-day period (unless the employer enters into a written agreement with a labour union or a representative of the employees). Employees who have been employed for six months or more and worked 80% or more of the working days are also entitled to at least ten days' paid leave per year, which increases with length of service (pro-rated for part-time employees).

Sickness absence and sick pay

Many employers have policies dealing with sickness absence in their work rules. There is no specific statutory right to time off for any non-work related illness or injury. Employees who are unable to work due to work-related illness or injury are entitled to statutory compensation for absence from work.

Family and carer entitlements

Statutory maternity leave is six weeks prior to the expected birth date and eight weeks after giving birth. Employers are not required to pay maternity pay during maternity leave, but payment is made through the statutory health insurance scheme (subject to meeting certain conditions). There is no statutory paternity leave or similar statutory leave entitlements on adoption. Child-care leave may be taken by both male and female employees who have a child (either their own or adopted) aged less than one year (or up to one year and a half if meeting certain conditions). Employees who need to nurse a family member may take nursing-care leave of up to 93 days per person. Employers are not required to pay for child-care and nursing-care leave, but employees are entitled to receive payments through a statutory employment insurance scheme (subject to meeting certain conditions).

Data protection

Employers can obtain, process and store personal data about employees and have an obligation to comply with the applicable data protection legislation, which includes processing data in a proportionate manner and for legitimate reasons. Employees have the right to request details of their personal data held by the employer.



TROUBLESHOOTING

Discrimination

Discrimination by employers against employees in the course of their employment on the grounds of nationality, belief, social position, sex or disability is prohibited. This encompasses direct and indirect discrimination, harassment and victimisation. Salary discrimination between men and women is prohibited.

Whistleblowing

Employees are protected from being dismissed or subjected to a detriment because they have made a protected disclosure about particular “wrongdoings” by their employer.

Employment disputes

Employees may bring a claim against their employer in, amongst others, courts and labour tribunals. Labour tribunals consist of one judge and two persons with knowledge and experience of labour matters.

Consultation requirements

Statutory obligations to consult with labour unions or a representative of employees arise in certain circumstances, such as in the case of setting up or amending work rules. Consultation requirements in addition to those stipulated by law may be further agreed in collective agreements.

Business transfers

On the sale of a business, the employment of employees assigned to the business will not automatically transfer to the buyer. The employer will need to obtain consent from each employee in order to transfer them to the buyer. If the sale of a business is made by way of a statutory demerger (*kaisha bunkatsu*), the employment of employees assigned to the business will automatically transfer to the receiving entity. However, the employer must inform and consult with employees and the labour union. Any employee who has been primarily engaged in the transferred business but will not be transferred to the receiving entity, or any employee who has not been engaged in the transferred business but will be transferred to the receiving entity, can demand or refuse to be transferred.



TERMINATION

Notice periods

Employees are entitled to receive at least 30 days' notice from their employer, although the employment contract can specify a longer notice period. Employers can elect to pay their employees in lieu of all or part of the notice period. A failure to pay the employee in lieu of the notice period may give rise to a claim for wrongful dismissal.

Unfair dismissal

Compulsory dismissal is allowed only if there are “objectively reasonable grounds” which justify the dismissal. In determining “objectively reasonable grounds”, Japanese courts apply different standards, rules and criteria depending on the grounds on which the dismissal is made and any challenge to the dismissal. The “objectively reasonable grounds” to justify compulsory dismissal are generally difficult to successfully argue in a court and in most cases the employer will try to persuade the employee to resign voluntarily. If the employee's claim is successful, the employer can be ordered to reinstate or re-engage the employee or to pay compensation.

Redundancy

A court will consider the following four factors when determining whether there are “objectively reasonable grounds” to dismiss employees by way of redundancy: (1) whether there is a high degree of business necessity for the dismissal; (2) whether the employer has made utmost efforts to avoid dismissals (for example, undertaking other cost-cutting measures, placing the redundant employees in different positions/divisions and seeking voluntary resignations); (3) whether objectively reasonable selection criteria were used in determining who should be dismissed (such as criteria based on performance, length of service and difficulty of finding alternative employment); and (4) whether the employer has undertaken good faith consultations with the employees or the labour union (if any) (for example, informing the relevant employees of the reasons for their redundancy and engaging in good faith negotiations with each relevant employee or the labour union).



POST-TERMINATION

Confidentiality and restraint of trade

At the end of the employment relationship most duties end. Many employers therefore choose to include express contractual terms protecting confidential information and restricting what an employee can do post-termination (e.g. non-compete or non-solicitation clauses). Such clauses are only enforceable insofar as they go no further than is reasonably necessary to protect the employer's legitimate business interests.

References

There are no specific duties concerning references.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Hiroya Yamazaki
Partner, Tokyo
Tel: (+81) 3 6212 1435
hiroya.yamazaki@linklaters.com



Takashi Shibusawa
Associate, Tokyo
Tel: (+81) 3 6212 1441
takashi.shibusawa@linklaters.com



Employment Law

Singapore

This guide sets out an outline of employment law rights and duties in Singapore during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.



ON HIRING

Employment status

Individuals providing services benefit from different rights depending on whether they are classified as employees or independent contractors and, in respect of employees, whether they are covered by the Singapore Employment Act (“the EA”). The employment status will be fact-specific and depend on the actual arrangements between the individual and the entity receiving the services. Whether employees are subject to the provisions of the EA (“an EA Employee”) will depend on their roles and salaries. The EA only applies to employees who are: (1) employed in non-managerial or non-executive roles; and (2) employed in managerial or executive roles whose salaries do not exceed S\$4,500 per month.

The EA does not define what it means by managerial or executive roles but Singapore’s Ministry of Manpower (“MOM”) has provided guidance that these would be employees with executive or supervisory functions, with the authority to influence or make decisions on issues such as recruitment, discipline, termination of employment and be involved in the management and running of the business.

MOM has also clarified that professionals with higher education and specialised knowledge/skills and whose employment terms are comparable to those of managers and executives will also be deemed to be “managers and executives” for the purposes of the EA.

Employment contracts

Employers must provide EA Employees with written particulars of employment (setting out the key employment terms, including, but not limited to, the employing entity, job title and main duties and responsibilities, wages, hours of work, leave entitlement and notice period) within 14 days of the start of employment.

Practicalities

Employers must: (1) be registered with the Central Provident Fund (“CPF”) board; (2) check maximum quotas applicable to them in respect of hiring of foreigners; (3) check that employees have the right to work and live in Singapore, and if not, make the necessary application to the Ministry of Manpower (“MOM”) for the relevant work pass; (4) subscribe for insurance coverage as required by law; and (5) keep up to date with labour laws in Singapore.

Directorships

As from 7 November 2016, the MOM clarified on its website that a company must obtain prior approval from the Ministry if it intends to appoint a work pass holder employed by another company to its board of directors. The MOM will generally grant approval if the company is related by shareholding to the work pass holder’s employer and the work pass holder is taking up the secondary directorship for purposes related to his primary employment.



DURING EMPLOYMENT

Remuneration

There is no concept of minimum wage in Singapore (but the application for work passes is subject to minimum remuneration levels). Depending on the sector and/or the employee’s position there may be regulatory requirements and/or restrictions on remuneration. The statutory rules for deductions from wages only apply to EA Employees and deductions can only be made from an EA Employee’s salary if it is prescribed by the EA. Otherwise, the MOM’s approval will be required.

Pensions/CPF

Private pension contributions arrangements are permitted in Singapore but are not common. The CPF is a mandatory social security scheme that has been established to deal with retirement, healthcare and housing needs and is funded by contributions from employers and employees. It is mandatory for Singapore citizens or foreigners holding Permanent Resident status (“PRs”) working in Singapore, voluntary for Singapore citizens and PRs who work overseas and not open to foreigners who are not PRs. The contribution rates are set by law and depend on several factors (e.g. employee’s age group, employee’s ordinary wages and additional wages, and, if applicable, number of years for which the employee has had PR status).

Working time and overtime pay

Rules on working time and overtime pay only apply to EA Employees who are covered by Part IV of the EA (“Part IV EA Employees”). For all other employees, their working time and entitlement to overtime pay is subject to their employment terms. If Part IV EA Employees take on additional hours, they are entitled to claim overtime pay in accordance with the provisions of the EA, which prescribes rates of overtime pay by reference to daily and weekly working time.

Annual leave

Statutory minimum annual leave entitlement only applies to Part IV EA Employees. The number of days of statutory annual leave depends on the employee’s length of service with the employer and will be a maximum of 14 days of paid annual leave after the employee’s eighth year of service. Part IV EA Employees are also permitted by law to carry over any unused statutory annual leave in any leave year for the next 12 months. For all other employees, their annual leave entitlement will be subject to their employment terms.

Sick leave and sick pay

Statutory sick leave entitlement is only provided for EA Employees and is dependent on the length of service with the employer and whether hospitalisation is necessary. EA Employees qualify for statutory sick leave when they have

been continuously employed for at least three months and will receive their maximum entitlement under the EA when they have been in service with the employer for at least six months. For all other employees, the employer will be free to decide on the duration for which employees would continue to receive salary and benefits if they are absent due to sickness.

Family friendly entitlements

Employees starting a family in Singapore are entitled to several statutory benefits (maternity leave, paternity leave, childcare leave, infant care leave, shared parental leave and adoption leave). However, these statutory rights only apply where the employee’s child is a Singapore citizen, save that certain family-friendly rights are also granted to EA Employees (though not necessarily on as favourable terms). For foreign employees who are non-EA Employees, the employer will be free to set its own internal family-friendly benefits.

Data protection

Employers must comply with the Singapore Personal Data Protection Act 2012 which governs the collection, use and disclosure of personal data by an organisation. There are, however, several statutory carve-outs available to employers where the collection, use and disclosure of personal data is for “evaluative purposes” or for the purposes of managing or terminating employment relationships.



TROUBLESHOOTING

Discrimination

Although there are no express laws prohibiting discrimination in the employment context, there are tripartite guidelines issued by the Tripartite Alliance for Fair and Progressive Employment Practices on fair employment practices addressing this and which employers are encouraged to adopt.

Whistleblowing

Save for the disclosure of workplace safety issues under the Workplace Safety and Health Act, there is no overarching legislation to protect employees from being dismissed and/or subject to any detriment if they blow the whistle on company malpractices.

Employment disputes

Only EA Employees have recourse to the MOM if they consider that their employers have not complied with the EA. All other employees must bring disputes against their employers to the Singapore courts or, in relation to certain salary-related disputes, to the new Employment Claims Tribunal (see below). There are tripartite

guidelines on how employers should deal with an employee's complaint, which broadly require that the employer investigates any grievances or disciplinary issues, meets with the employee and allows the employee to appeal against any decision. The guidelines are not binding but compliance with them will be considered if the employee decides to bring a claim against the employer.

A new Employment Claims Tribunal was established in April 2017 to deal with salary-related disputes. The Tribunal will hear: (1) statutory salary-related disputes from employees covered by the EA, the Retirement and Re-employment Act and the Child Development Co-Savings Act; and (2) 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.

Consultation requirements

There are relatively few statutory consultation obligations. These mainly arise in the case of business transfers or in the case of a unionised workforce.

Business transfers

On the transfer of an undertaking (which will include any trade or business), the employment of EA Employees assigned to the business will automatically transfer to the buyer with continuity of service. Before the transfer takes place, the transferor must inform and consult with EA Employees and their trade unions (if applicable). EA Employees will benefit from additional protection against dismissal because of a transfer, and changes to the employees' terms and conditions can only be made where it has been agreed. For all other employees, an offer and acceptance route needs to be followed.



TERMINATION

Notice periods

EA Employees are entitled to receive at least a statutory minimum notice period, starting at one day and increasing with length of service to a maximum of four weeks. EA Employees have the option of terminating their employment with immediate effect by making a payment in lieu of notice.

For all other employees, their termination provisions are subject to the terms of their employment contract. If provided for under the employment contract, the employer can put the employee on a period of "garden leave" for all or part of the notice period.

Summary termination for cause

EA Employees can only be summarily dismissed, after due inquiry, on the grounds of conduct which does not meet the express or implied conditions of their services. EA Employees who believe they have been dismissed without just cause or excuse can bring a claim within one month of the dismissal and make representations to the MOM to be reinstated in their former employment. If the claim is successful, the employer can be ordered to reinstate the employee and pay an amount that is equivalent to the wages that the employee would have earned had he not been dismissed or pay such amount of wages as compensation as may be determined by the MOM.

Redundancy

Part IV EA Employees who have been in continuous service for at least two years are entitled to retrenchment benefits. The EA does not provide for minimum redundancy/retrenchment payments. In practice, any amount payable is usually subject to several factors, including the employer's performance and industry standards.

Retirement and Re-employment

The minimum retirement age in Singapore is 62 years but this only applies to Singapore citizens and PRs (foreigners holding Permanent Resident status). Employers must offer re-employment to eligible employees who turn 62, up to the age of 65 (or 67 with effect from 1 July 2017) to continue their employment, if certain statutory requirements are met. 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".



POST-TERMINATION

Confidentiality and restraint of trade

At the end of the employment relationship most duties will end. Many employers therefore choose to include express contractual terms protecting confidential information and restricting what an employee can do post-termination (e.g. non-compete or non-solicitation clauses). Such restraint of trade clauses are void as a matter of public policy, unless the employer can show that it has a legitimate proprietary interest to protect, and that the covenants in question are reasonable in the interests of the parties concerned and reasonable in the interests of the public.

References

There are no specific duties concerning references, except in regulated environments such as financial services where there may be requirements to conduct background checks prior to the appointment of the employee to certain functions. However, once an employer agrees to give a reference, it owes certain duties to both the employee and the recipient of the reference.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Laure de Panafieu
Partner, Singapore
Tel: (+65) 6692 5791
laure.de_panafieu@linklaters.com



Shang Ren Koh
Associate, Singapore
Tel: (+65) 6692 5797
shang_ren.koh@linklaters.com



Employment Law

Thailand

This guide sets out an outline of employment law rights and duties in Thailand during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.



ON HIRING

Employment status

Individuals providing services will benefit from different rights depending on whether they are classified as employees, contractors or consultants. The employment status will be fact-specific and depend on the actual arrangement between the individual and the entity receiving the services.

Employment contracts

There is no obligation for an employment contract to be made in writing, but most employers recognise the value in providing terms in a written contract. Written employment contracts will usually set out basic terms and conditions of employment, including initial job title, place of work, wages, hours of work, holiday entitlement, benefits and notice periods as agreed between the employer and the employee. Such terms and conditions cannot be contrary to the minimum requirements provided by Thai law.

Practicalities

Employers must register with, and contribute to the Social Security Fund on a monthly basis. Contributions to the Social Security Fund are made by the Government, employers and employees.



DURING EMPLOYMENT

Remuneration

The minimum wage is set by law and is applicable to all employees apart from those employed in certain types of businesses, occupations or areas as specified in the Government Gazette. Skilled-labour wages must not be less than the minimum wage.

Provident Fund

Employers and employees can voluntarily agree to establish, or participate in, a provident fund to provide security for employees (and their families) in case an employee dies, resigns from work or resigns from the fund. Each of the participating employees and the employer are required to make a monthly contribution to the provident fund at the rate agreed between them.

Working time and holiday

An employee's maximum working hours must not exceed eight hours per day and 48 hours per week. In the case of work that can be hazardous to health and safety (as prescribed in the ministerial regulations), working hours must not exceed seven hours per day and 42 hours per week. Employees are entitled to a one-hour rest break after five consecutive working hours. Individual rest periods can, by agreement between the employer and the employees, be shorter than one hour, but aggregate rest periods must not be less than one hour per day. Employees are also entitled to a minimum

of one day paid leave per week at an interval not shorter than six days plus a minimum of 13 traditional holidays per year. Employees who have worked for a consecutive period of not less than one year are entitled to paid annual leave of not less than six regular working days per year.

Sickness absence and sick pay

Employees are entitled to sick leave and the employer may require the employee to provide a medical certificate if sick leave is taken for three consecutive days or more. The employer must pay wages to the employee during sick leave, equal to wages on a working day, throughout the period of the leave, but not exceeding 30 days per year.

Family and carer entitlements

Statutory maternity leave is 90 days with statutory maternity pay paid for up to 45 days. If the employee has a medical certificate confirming that she is unable to perform her work assignment, she is entitled to request the employer to change her duties temporarily before and/or after giving birth. The employer is required, upon receipt of such a request, to consider a change of duties as deemed appropriate. Currently, only civil servants are entitled to statutory paternity leave.

Data protection

Thailand does not have any general statutory law governing data protection or privacy. However, there are statutory laws in some specific areas (such as telecommunications, banking and financial businesses (Specific Businesses)) as well as other non-business related laws, such as certain provisions under the Thai Penal Code and the Child Protection Act B.E. 2543 (2003), which do provide a certain level of protection against any unauthorised collection, processing, disclosure and transfer of personal data. A draft Personal Data Protection Act has been proposed and considered by the legislative body but has not yet been approved.



TROUBLESHOOTING

Discrimination

Male and female employees must be treated equally and termination of employment on the ground of pregnancy is prohibited. Men and women must receive equal pay for work that is equivalent or of equal value.

Employment disputes

There are obligatory procedures for: (1) presenting demands; (2) employer-employee negotiations; (3) mediations by Labour Department officials; and (4) arbitration by a Labour Relations Committee. Either the employer or employee (or their labour union) may serve a written demand on the other party.

The first stage of the proceedings is a direct employer-employee negotiation through their duly authorised representatives. If no settlement is reached, the dispute is referred to the Labour Dispute Mediation Office for mediation. If mediation fails, the parties may either jointly refer the matter to arbitration by one or more labour dispute arbitrators, the employees may choose to strike; or the employer may effect a lock-out. Where mutual negotiations and mediation fail to remedy disputes occurring in certain essential services where a shutdown would affect the general public or the national economy, e.g. railways, telecommunications or waterworks, the dispute will be handled by the Labour Relations Committee.

Consultation requirements

There are relatively few statutory consultation obligations. These mainly arise in the case of collective bargaining with the labour union.

Business transfers

On the sale of a business, the employment of employees assigned to the business will not automatically transfer to the buyer. Explicit consent of the employees must be obtained for the transfer. There is no legal requirement for a consultation with the labour union in relation to a business sale.



TERMINATION

Notice periods

Employees are entitled to receive at least a statutory minimum notice period, before or on the date wages are due to be paid, for the termination to take effect at the following payment date, although the employment contract can specify a longer notice period. The employer can elect to pay the employee in lieu of the notice period.

Reason for termination

The employer is entitled to terminate an employee's employment for one of the following "causes": (1) performing duties dishonestly or intentionally committing a criminal offence against the employer; (2) intentionally causing damage to the employer; (3) causing serious damage to the employer as a result of negligence; (4) violating work rules or lawful orders of the employer following a written warning issued within the past year (in a serious case a warning is unnecessary); (5) abandoning duty for three consecutive working days without justifiable reason; or (6) being sentenced to imprisonment by a final judgment (except offences committed through negligence or a

minor offence which did not cause damage to the employer). If termination is for one of these causes, the employer is not obliged to pay statutory severance pay. If employment is terminated without "cause", the employer must pay statutory severance pay calculated based on the length of service and ranging from one month's to 10 months' wages.

Protection from unfair practices

The employer is prohibited from dismissing an employee, a representative of employees, or a committee member of a labour union or labour federation, by reason of the employee having taken, or proposing to take, work-related lawful actions, e.g. calling a rally, submitting a demand, negotiating or instituting a lawsuit, being a witness or producing evidence to competent officials, or in the case where the employee is involved in a demand, or while an agreement relating to conditions of employment, decisions or awards resulting from such demand is in force. These employees' employment can however be terminated with the court's approval.

Unfair dismissal

The Labour Court is entitled to award compensation or to order the employer to re-engage an employee who is unfairly dismissed. In determining whether the dismissal was unfair, the Labour Court will consider a broad range of factors, including age, length of service, the hardship of the employee at the time of dismissal, the reasons for the dismissal and the compensation the employee is entitled to receive. The amount of compensation is subject to the court's discretion.

Redundancy

Redundancy is not considered a ground for fair termination. Termination of employment because of business restructuring (e.g. downsizing or business restructuring in accordance with instructions from the parent company) is generally regarded as unfair, especially when the employer has not suffered persistent losses, or is actually recruiting or continuing the expansion of its business.



POST-TERMINATION

Confidentiality and restraint of trade

At the end of the employment relationship most duties end. Many employers therefore choose to include express contractual terms protecting confidential information and restricting what an employee can do post-termination (e.g. non-compete or non-solicitation clauses). Such clauses are only enforceable insofar as they go no further than is reasonably necessary to protect the employer's legitimate business interests. Restrictions for non-competition within limited geography or a limited period are enforceable.

References

There are no specific duties concerning references.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Pichitpon Eammongkolchai
Partner, Bangkok
Tel: (+66) 2305 8017
pichitpon.eammongkolchai@linklaters.com



Sutthipong Koohasaneh
Counsel, Bangkok
Tel: (+66)2305 8060
sutthipong.koohasaneh@linklaters.com



Employment Law

Vietnam

This guide sets out an outline of employment law rights and duties in Vietnam during the employment life cycle. This guide provides an overview only and should not be regarded as legal advice.



ON HIRING

Employment status

Individuals are classified as employees if they provide services under employment contracts, work under the direction, supervision and management of the employer and receive salary as remuneration. Individuals providing services for service fees (i.e. consultants or contractors) are not considered as “employees” and not subject to the governance of employment regulations.

Employment contracts

Parties are generally free to negotiate and document employment contracts, provided that the terms are not less favourable than those prescribed by law, e.g. in relation to minimum annual leave, sick leave and maternity leave entitlements. The contract must be in writing, except contracts for temporary jobs for a period of less than three months.

The Labour Code prescribes three types of employment contracts; indefinite term contracts, definite term contracts of between 12 and 36 months in duration and definite term contracts of less than 12 months in duration. Definite term contracts may only be renewed once, after which the contract will be deemed indefinite. An employee may be employed on a trial or probationary basis for a limited period of up to 60 days.

Collective agreements

If requested by employees, the employer and the enterprise trade union will negotiate and sign a collective labour agreement (“CLA”) setting out the parties’ agreement on the working conditions and the parties’ rights and obligations. The CLA must be registered with the Department of Labour, War Invalids and Social Affairs.

Practicalities

Employers with more than 10 employees must have written internal labour rules (“ILRs”), which set out the working conditions. The ILRs is an important legal document, without which employers will not be able to apply disciplinary actions or terminate labour contracts with employees, even in circumstances specifically contemplated by law. The employer must consult with the applicable trade union or employees’ representatives and register the ILRs with the Department of Labour, War Invalids and Social Affairs before the ILRs can become effective and enforceable. Expatriate employees require a work permit to work in Vietnam, except in limited cases (e.g. foreigners working in Vietnam for less than three months). Each work permit will last for a maximum period of 24 months, after which it may be issued again if re-applied for by the employer.



DURING EMPLOYMENT

Remuneration

Basic salary must be at least equal to the regional minimum salary issued by the Government from time to time for each geographic area. Employees may also be entitled to salary-related allowances and other benefits under the employment contract.

Pensions and insurance

Both employees and employers are required to contribute a proportion of monthly salary (including salary-related allowances) to compulsory insurance schemes, which include social insurance, health insurance and unemployment insurance. The contributions are made to social insurance authorities and employees are entitled to various allowances from the social insurance fund, such as maternity allowance, sick leave allowance, pension, unemployment allowance.

Working time and holiday

In general, an employee’s normal working hours must not exceed 8 per day and 48 per week. Employees are entitled to at least one day off per week. If a weekly day off cannot be arranged, the employer must arrange for the employees to have at least four days off in a month. Employees are entitled to at least 12 days of annual leave per year (increasing by one day for each five years of service for the same employer) and ten public holidays.

Sickness absence and sick pay

Employees are entitled to payment from the social insurance fund when they take sick leave and employers are not obliged to pay employees their salary or pension allowance during these periods. The maximum number of paid sick days that an employee may claim from the social insurance fund depends on the social insurance contribution period and types of work of the employee, which normally ranges from 30 to 70 days (and can be up to 180 days for illnesses requiring long-term treatment). The employee will need to submit the application documents, including the medical report, to the social insurance authority to claim sick leave payments.

Family and carer entitlements

Statutory maternity leave is six months (plus one additional month for each additional child born at the same time). The employee is entitled to maternity allowance from the social insurance fund (not the employer). Similar entitlements will apply if the employee adopts children. Maternity entitlements can be transferred to the father if the mother dies after giving birth. Employees can take leave to take care of sick children. The number of carer leave days varies depending on the age of the sick children, but must not exceed 20 days in a year. Employees are also entitled to paid leave for certain personal matters, e.g. marriage of the employee, death of the employee’s parents or children.

Data protection

There is no specific regulation on data protection in the employment relationship. However, employers are required to comply with the general rule on personal data protection, which requires that any use, disclosure, processing or transfer of personal data must be subject to the consent of the data owner.



TROUBLESHOOTING

Discrimination

Any discrimination by employers against their employees on the grounds of gender, ethnic group, race, social background, marital status, disability, HIV, religion or belief, full-time or part-time employment job or being a member/founder of a trade union is prohibited.

Whistleblowing

There are no specific whistleblowing laws or protection for employees making allegations about “wrongdoings” of employers. In general, employees are protected under the constitutional principle under the Law on Denunciations, which provides that no revenge against whistleblowers is permitted.

Employment disputes

An individual employment dispute must be conciliated by a labour conciliator before being brought to court, except for limited circumstances, such as disputes related to dismissal, unilateral termination of employment, and compensation for termination of employment. The statutory time limit for the employer or the employee to request the court to settle the dispute is one year. Court proceedings are normally a time-consuming process and it may take from three to six months for the court to hear the case.

Consultation requirements

A trade union is considered as the representative of employees and has an obligation to protect the legitimate interests of employees. An employer is required to consult the trade union on various employment matters, such as issuance of ILRs, issuance of internal rules for assessment of employees' performance, temporary suspension of employment.

Business transfers

There is no automatic transfer of employment following a business or asset transfer. The transfer of employees can be effected by way of termination of the existing employment contracts and the employees entering into new employment contracts with the transferee. If there is any transfer of assets or business, the employer is required to prepare a labour usage plan and will need to consult with the trade union. Employees whose employment is terminated due to the transfer of the assets/business of the employer will be entitled to retrenchment (redundancy) allowance for any working period when no unemployment insurance has been contributed to.



TERMINATION

Notice periods

Notice is required for unilateral termination of an employment contract by either the employer or the employee. The notice period varies for different types of labour contracts: (1) 45 days for indefinite term contracts; (2) 30 days for contracts with a term of between 12 months and 36 months; and (3) three days for definite term contracts of less than 12 months.

Reason for termination

An employer can only unilaterally terminate employment on the basis of certain reasons (e.g. poor performance of the employee, long-term illness of the employee, internal restructuring of the employer, transfer of the business of the employer, misconduct by the employee, subject to dismissal measures as set out in the ILRs). The employer must also obtain the opinion of any labour union. The employer is not required to pay severance allowance or redundancy/retrenchment allowance to the employee upon termination of his/her employment contract in respect of any working period when the employee and the employer have contributed to unemployment insurance.

Unlawful dismissal

Apart from having to comply with the conditions for termination, the employer must also comply with a stringent termination process. Any failure to comply with the termination conditions or the required process may expose the employer to risk of the termination process being found to be unlawful by the Vietnamese courts. If the termination is unlawful, the employer must: (1) re-employ the employee; (2) pay the salary and compulsory insurances for the termination period; and (3) pay a compensation amount of at least two months' salary. If the employer does not want to re-employ the employee, the employer will need to negotiate with the employee for additional compensation, which must be at least an additional two months' salary.

Redundancy

An employer may 'retrench' its employees in limited circumstances provided by law (e.g. change of organisational structure, change of technology, economic crisis, merger, separation, or division of the employer). If two or more employees are retrenched, the employer will be required to prepare a labour usage plan, which must be subject to consultation with the trade union. The retrenchment must be notified to the Department of Labour, War Invalids and Social Affairs at least 30 days in advance. A redundant employee will be entitled to retrenchment allowance if he has 12 months or more continuous service. Retrenchment allowance is calculated as one month's salary for each year of service in respect of any working period when the employee and the employer have not contributed to unemployment insurance.



POST-TERMINATION

Confidentiality and restraint of trade

To protect confidential information or restrict competition post-termination, the employer will need to enter into a separate agreement with the employee. This agreement can be enforced as a contractual civil agreement rather than an employment agreement.

References

There is no specific requirement or rule on references. References will be given by employers on a voluntary basis, and employers have no legal obligation to provide a reference letter upon the termination of employment contracts.



CONTACTS

For further information, please get in touch with one of the below contacts or your usual Linklaters Employment and Incentives contact.



Linh Bui

Partner, Allens, Ho Chi Minh City
Tel: (+84) 8 3822 1717
linh.bui@allens.com.au



Mai Loan Nguyen

Senior Associate, Allens,
Ho Chi Minh City
Tel: (+84) 8 3822 1717
mailoan.nguyen@allens.com.au

linklaters.com

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications.

A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers.

Please refer to www.linklaters.com/regulation for important information on our regulatory position.