HERBERT SMITH FREEHILLS

WELCOME TO OUR REVIEW OF RECENT LABOUR LAW DEVELOPMENTS ACROSS THE GLOBE

30 April 2015
Legal Briefings

1. AUSTRALIA: TIME TO REVIEW AND UPDATE EMPLOYMENT CONTRACTS

With remuneration reviews and salary negotiations approaching, employers should consider their existing contracts of employment to determine whether they offer maximum protection for the business and are in line with best practice.

Carefully drafted terms and conditions of employment can give employers greater protection against legal claims and better chances of enforcing key terms of employment, including restraints of trade and termination provisions. Key issues to help identify whether updates are required include:

- whether there have been significant changes to an employee's employment – if so, consider issuing a new contract or ensuring that the changes in terms are documented and clearly preserve the existing written contract
- whether contracts provide flexibility to make changes to benefits, roles, duties or reporting lines without affecting the employee's ongoing employment or triggering a potential breach of contract or redundancy claim
- whether policies and procedures are incorporated into the contract and binding on the company – where these are contractual, this can create unexpected liabilities. A recent case saw an employer required to pay more than AUD$3,000,000 in redundancy pay pursuant to its own 'closed' policy
- whether termination provisions, notice periods and post-employment restraints are tailored to the particular individual and their role, seniority, access to confidential

information and importance to the business

- whether executive contracts are compliant with the Corporations Act 2001 (Cth) and may require the company to seek shareholder approval for certain termination payments – this can be avoided by careful drafting.

ACTIONS FOR EMPLOYERS

Employers are encouraged to review their existing employment arrangements, including template employment contracts, for issues such as those above. As some changes may require employee consent, the remuneration review process often provides an opportunity for the 'updating' to occur.

For more details, see our website here.

Authors: Natalie Perrin, Executive Counsel and Melanie Smith, Solicitor

2. CHINA: STRICTER REDUNDANCY RULES PROPOSED

Employee redundancies have become more common in recent times. In response, the Chinese Ministry of Human Resources and Social Security issued the draft Rules regarding Employee Redundancy by Enterprises on 31 December 2014.

Under existing PRC law, an employer that wants to make redundant 20 or more employees, or 10% or more of the company's total workforce, must comply with certain statutory redundancy procedures.

The draft Rules introduce an additional step of pre-redundancy consultations and provide detailed guidelines with regard to employee redundancies. They also require notification for consensual redundancies.

(i) Pre-redundancy consultations

In addition to the existing procedural requirements, the draft Rules require an employer to take the initial step of consulting with the labour union or employee representatives to avoid or reduce the need for redundancies.

(ii) Detailed guidelines

The draft Rules set out detailed requirements as to the information and materials to be provided by employers during the statutory redundancy procedures. The detailed requirements, if adopted, are likely to increase the burden on employers wishing to make employees redundant. However, they will also help establish consistent practice for the statutory redundancy procedures.

(iii) Procedures for large-scale consensual terminations

The draft Rules introduce, for the first time, notification and reporting requirements for the consensual termination of 20 or more employees. This differs from redundancies because the employees are agreeing to their termination.

Under the draft Rules, employers are required to notify the labour union or all employees about any large-scale consensual termination, and report the same to the local labour authority 30 days before the terminations are effective.

ACTIONS FOR EMPLOYERS

The draft Rules are expected to be officially promulgated later this year. Employers should monitor their legislative progress and prepare accordingly if they have any redundancy plans.

For further information see our blog here.

Author: Jasmine Chen, Associate

3. FRANCE: NEW PROPOSALS TO SIMPLIFY EMPLOYEE REPRESENTATION

The French Government has proposed a new law intended to simplify employee representation. The key proposals are as follows:

- for companies with fewer than 11 employees (who don't currently have an obligation to put in place any employee representatives): the creation of regional commissions (with 10 employee representatives and 10 employer representatives) giving employees representation outside of the company
- for companies with fewer than 300 employees: a unified employee representative body (DUP) which will meet every 2 months and will include all employee representative bodies (works council, personnel delegates, trade union representatives and health and safety committee) in one body
- companies with more than 300 employees will also have the opportunity to group together in one body all employee representatives excluding the trade unions
- a reduction in the number of obligatory subjects for information and consultation (from 17 to 3): strategic direction, economic situation of the business and social policy; by agreement, also the possibility to reduce the number of annual meetings required (currently 6)
- simplification of the consultation on pay (NAO) and the possibility to avoid doing this annually.

ACTIONS FOR EMPLOYERS

The proposals will be voted on in July 2015. Employers should watch this space...

Author: Emma Röhsler, Partner

4. GERMANY: NEED FOR REVIEW OF TERMS WITH SUBCONTRACTORS AND SERVICE PROVIDERS IN LIGHT OF POTENTIAL MINIMUM WAGE LIABILITY

As of January 2015, a statutory minimum wage has been implemented in Germany. According to the new German legislation, companies can also be liable for violations of the minimum wage by subcontractors and service providers.

If the subcontractors or service providers do not pay the minimum wage to their employees, the company receiving the services can be made liable for the payment of the minimum wages. Such liability exists even if the company receiving the services has no knowledge/indication of any violation on the part of the subcontractor/service provider. The affected employees of the subcontractors or service providers can claim for the minimum wages directly against the company receiving the services.

Additionally, financial sanctions (a maximum fine of EUR 500,000.00) can be imposed on the company receiving the services by public authorities. Furthermore, the company can be excluded from public projects and orders.

ACTIONS FOR EMPLOYERS

Companies should review and amend their general terms and conditions with subcontractors and service providers to ensure there is a contractual obligation to comply with minimum wage law and an indemnity covering the consequences of any failure to do so.

Author: Moritz Kunz, Of Counsel

5. HONG KONG: CROSS-BORDER DATA TRANSFERS

The Office of the Privacy Commissioner for Personal Data in Hong Kong recently published a "Guidance on Personal Data Protection in Cross-border Data Transfer", suggesting that section 33 of the Personal Data (Privacy) Ordinance (Cap. 486) which prohibits cross-border transfer of personal data, unless certain conditions are satisfied, might come into effect in the near future.

Although the Ordinance was enacted in 1995, section 33 is not yet operative. Once implemented, section 33 of the Ordinance will prohibit the transfer of personal data:

- from Hong Kong to another jurisdiction
- between two other jurisdictions where the transfer is controlled by a Hong Kong data

user, unless certain conditions are met.

Intra-group transmission of employees' personal data or storage of such data in a cloud server located or accessible outside of Hong Kong, for example, would come within section 33.

Examples of where cross-border transfer of data will not be prohibited include:

- the data transferee is located in a jurisdiction that has been "whitelisted" by the Privacy Commissioner (as a jurisdiction with a data protection regime similar to the Ordinance)
- the data user has "reasonable grounds" to believe that the transferee is located in a jurisdiction that has a data protection regime similar to the Ordinance
- the data subject has consented to the transfer in writing
- the data user has taken all reasonable precautions and exercised all due diligence to ensure that the personal data will not be handled in a way that would contravene the Ordinance.

ACTIONS FOR EMPLOYERS

Employers who transfer employees' personal data to related entities or third party service providers located outside of Hong Kong, or who use cloud storage solutions, should seek to ensure that one or more of the following apply:

- such transferred or stored data will be subject to the same standard of legal protection as is afforded under the Ordinance
- the transferee is obliged to protect, retain, store and destroy personal data in compliance with the Ordinance and the data will be used only pursuant to the data user's written instructions
- the data user retains a right to control access to the data and conduct audits.

Employers should also consider revisiting and updating employment documentation (eg, contracts of employments, personal information collection statements and internal policies) to comply with section 33.

More information is available here.

Author: Gareth Thomas, Partner, and Gillian McKenzie, Associate

6. JAPAN: FOCUS ON HELPING EMPLOYEES RAISE THEIR CHILDREN

The regime under the Act on Advancement of Measures to Support Raising Next-Generation Children has recently been extended. The Act sets out employers' obligations to formulate an action plan, including specific objectives to be achieved within a limited period, to help their employees raise their children, and to file that action plan with the regional Labour Bureau. These obligations apply to employers having at least 101 employees. It was enacted in July 2003 and implemented for a limited ten-year period, from 1 April 2005 to 31 March 2015.

Since 2007, a system has been introduced to recognise employers who have satisfied certain criteria. To obtain recognition, employers would generally need to demonstrate, in particular, that at least 70% of their eligible female employees, as well as at least one male employee, have taken childcare leave. Relaxed criteria are applicable to those employers having no more than 300 employees. Recognised employers are permitted to use a mark of recognition (called "Kurumin") on their products and advertisements, and are entitled to a certain tax benefit.

The Act has recently been amended to extend the period of application to 31 March 2025, so employers' obligations to formulate and file their action plan have now been extended for a further ten-year period. The revised Act also sets out a new system of recognition to encourage recognised employers to make public the details of how they are implementing their action plan.

ACTIONS FOR EMPLOYERS

Employers filing their action plan on or after 1 April 2015 will be required to use a new format of the prescribed application form, which is available here.

Author: Florence Cheung, Senior Associate, Gaikokuho Jimu Bengoshi

7. KOREA: LANDMARK RULINGS ON IN-HOUSE SUBCONTRACTING

Pursuant to the Act on the Protection, etc. of Dispatched Workers, in-house subcontracting is only allowed in respect of 32 clearly-defined job classifications. If an employee has been subcontracted outside the scope of these job classifications, the arrangement is an illegal one; the employee would thus be entitled to become a regular or full-time employee at law.

In September 2014, the Seoul Central District Court rendered back-to-back decisions recognising 1,058 subcontractors as full-time employees of Hyundai, declaring that all in-house subcontracting arrangements with Hyundai were illegal. Another 121 subcontractors were given mandatory employment status, which legally entitles them to demand regular employment from Hyundai. In its decision, the District Court found that in-house subcontracting was illegal in all phases of automobile manufacturing, from processes involving the car body, painting and pressing, to production management, sub-assembly of engines and loading of cars for export – this was so even where subcontractors and full-time employees work together on the same process or phase.

More recently, in February 2015, the South Korean Supreme Court affirmed a decision of the Seoul High Court ordering Hyundai to recognise four former subcontractors as full-time employees of the company. In so finding the Supreme Court held that, if a company had used in-house subcontractors for more than two years, the subcontractors should be recognised as full-time employees of the company. The Supreme Court noted in this regard that the four subcontractors had worked for Hyundai for more than two years, whereas the remaining three had not. It was also possible to distinguish between subcontractors and full-time employees based on who supervised them, whether the subcontractors' tasks were different from that of full-time employees and whether the subcontractors used their own equipment. Here, the four subcontractors were under the control of Hyundai's staff, and were therefore de facto employees of the company.

ACTIONS FOR EMPLOYERS

The recent decisions certainly send a strong signal that the surreptitious use of illegal in-house subcontracting arrangements will not be tolerated. We would therefore strongly recommend that employers reassess their employment structures and strategies to ensure that any in-house subcontracting arrangements do not fall foul of the law and give rise to unintended consequences.

Author: Sarah Yazid, Associate

8. QATAR: WAGE PROTECTION LAW APPROVED

In February 2015, Qatar approved a law making it mandatory for private companies to remunerate employees directly through authorised banks.

The law is aimed at guaranteeing that foreign nationals are paid in full in a timely manner, in accordance with applicable contractual terms. While the implementation details are yet to be released, the law is said to require employees to be remunerated on a monthly or bi-monthly basis. Penalties ranging from fines to imprisonment are expected to be applied for non-compliance after the lapse of a six month grace period.

A similar system is already in place in the United Arab Emirates where employers are required to transfer wages to certain authorised banks, which then transfers the wages to the employees.

ACTIONS FOR EMPLOYERS

Once implementation details are released, employers must ensure that wages are transferred to authorised banks.

Author: Stuart Paterson, Partner

9. SPAIN: EXPIRED COLLECTIVE BARGAINING AGREEMENT MAY REMAIN APPLICABLE

The Spanish Supreme Court's judgment of 22 December 2014 has recently been published, establishing binding legal precedent with regard to the extended application of collective bargaining agreements (known as ultractividad) and the impact on employment relationships of the expiry of a collective bargaining agreement and failure to negotiate a new one.

Act 3/2012, of 6 July, established a mechanism to limit excessively lengthy processes to negotiate collective bargaining agreements. According to that law, if a collective bargaining agreement has reached its agreed expiry date and a new collective bargaining agreement has not been signed and no broader-scoped collective bargaining agreement is applicable, the expired agreement would continue to apply for a maximum of one year beyond the expiry date. If a collective bargaining agreement had expired when the new law entered into force (on 7 July 2012), the one year period would run from that date.

A company decided to rely on this provision following the expiry of its collective bargaining agreement: as a new agreement had not been reached within the relevant one year period from expiry and there was no broader-scoped agreement applicable to its business, it chose to apply the employment conditions established in the Spanish Workers' Statute.

A collective claim was lodged, which ultimately reached the Spanish Supreme Court. In its judgment, the Supreme Court established that the rights and obligations of the workers that had previously been governed by the no-longer-applicable collective bargaining agreement must be maintained as they are an integral part of the employees' contracts, on the basis of two principal arguments:

- employment conditions in employment contracts tend to be regulated by reference to the collective bargaining agreement applicable at that time; it can therefore be understood that they become a part of those contracts;
- employment contracts are adjusted and perfected throughout their life, according to the terms of the Workers' Statute (basically, according to the rules applicable to them at any given time).

ACTIONS FOR EMPLOYERS

Employers should be aware that, as a result of this ruling, the apparent legal certainty afforded by limiting negotiation processes as a result of Act 3/2012 is misleading. Although one year may elapse since a collective bargaining agreement has expired, with no agreement on renewal and no broader collective bargaining agreement in place, the employment relations of the employees affected will remain unchanged.

Author: Carmen Martínez, Senior Associate

10. THAILAND: NEW RIGHT OF CLASS ACTION FOR EMPLOYMENT CLAIMS

An amendment to the Thai Civil Procedure Code was announced in the Thai Royal Gazette on 8 April 2015. This is a significant development for employers in Thailand; when the amendment takes effect on 4 December 2015, employees will have the right to bring an action as a class against employers for breach of labour rights.

Broadly, the amendment allows for a class action suit to be brought for wrongful act, breach of contract, and cases relating to a claim for any right protected under the law. This includes rights under environmental law, consumer protection law, securities and exchange law, competition law as well as labour law. The amendment defines a 'class' to include one or more persons having similar characteristics to each other as against the defendant, including employees of a particular employer, where each member of the class possesses the same rights in relation to the same facts. A person may fall within a class even if that person suffers a different kind of damage to another member of the class.

ACTIONS FOR EMPLOYERS

In the context of labour law disputes, Thailand already is an employee friendly jurisdiction and the amendment will likely be received well by labour unions and employee groups. Employers should be cautious as the new amendment takes effect. To reduce the risk of a class action being brought by aggrieved employees, employers should ensure that their labour law practices and procedures comply with the minimum Thai statutory requirements.

Authors: Janaki Tampi, International Associate, and Chotika Voravongsakul, Associate

11. UK: OBLIGATION TO REGISTER SHARE PLANS ONLINE

All companies operating employee share plans in which UK employees participate must register the share plans with HM Revenue and Customs by 6 July 2015.

Where UK employees participate in arrangements (such as share plans) under which they may acquire shares or other securities, the company operating those arrangements is required to make an annual filing to HM Revenue & Customs in respect of certain events, such as the grant or vesting of awards, under such arrangements. The filing is required to be made in respect of each tax year (6 April – 5 April), by 6 July following the end of the tax year in respect of which the filing is made.

To date, this filing has been made in hardcopy form. However, filings for the tax year ending 6 April 2015 and subsequently are required to be made through an online system.

In order to be able to submit filings using the online system, arrangements must first be registered. Therefore, in order for the annual filing to be able to be made by 6 July 2015, the relevant arrangements must be registered before that date.

In addition, any UK "tax-advantaged" share plans – Share Incentive Plans, Sharesave (SAYE) schemes and Company Share Option Plans (CSOPs) must also be self-certified as being in compliance with the relevant UK tax legislation. This self-certification is part of the online registration for these types of share plans, and must also be completed by 6 July 2015.

Failure to self-certify a UK tax-advantaged share plan (including tax-advantaged plans which operate over shares in a non-UK company) by 6 July 2015 can lead to a loss of the tax-advantaged status, which could prejudice the tax treatment of awards under the share plan and can lead to penalties being applied to the UK employing company.

ACTIONS FOR EMPLOYERS

All companies operating employee share plans or similar arrangements in the UK (including those which operate over shares in a non-UK parent company) must ensure that the arrangements are registered with HMRC before 6 July 2015 (and this should now be done as soon as possible).

It is also vital that any "tax-advantaged" employee share plan operated in the UK (including "tax advantaged" schedules to any share plan adopted by a non-UK company) is self-certified as being in compliance with the relevant legislation before 6 July 2015.

Author: Bradley Richardson, Senior Associate

12. US: EEOC PROPOSES REGULATION FOR EMPLOYEE WELLNESS PROGRAMS

Recently, the United States Equal Employment Opportunity Commission has brought several lawsuits under the Americans with Disabilities Act against companies that have allegedly penalised employees for failure to enrol in wellness programs. According to the Commission, the alleged penalties essentially required employees to undergo involuntary medical examinations with disability-related inquiries in violation of the Act. The Commission's position in this regard has been controversial, with at least one US federal court having rejected the Commission's view. The Commission has now proposed regulations setting parameters for permissible employer incentives for participation in such programs.

Employee wellness programs are now offered at virtually all major US companies. These programs, targeted at promoting healthy lifestyles and reducing disease, have been used by employers as a means of improving employee health and reducing medical insurance costs. In order to motivate employees to participate, approximately three quarters of employers offer some sort of incentive for partaking in the wellness program. The Commission's recent enforcement actions against employers have had a chilling effect on the use of such programs and have led employers to seek guidance from the Commission on how these programs should be implemented.

In response, the Commission issued a proposed rule on 16 April 2015 for how employers should design employee-wellness programs that include disability-related inquiries or medical examinations. Significantly, the rule provides that:

- employers may offer financial incentives or penalties for participation in a wellness program of up to 30% of the cost of individual healthcare coverage
- employers may not require employees to participate in wellness programs nor take any adverse employment action for failure to participate
- similarly, employees cannot be denied access to any healthcare benefit package for failure to participate in a wellness program
- health information collected pursuant to a wellness program would be subject to privacy protections and employers need to provide notice regarding what information will be collected and how it will be used.

The regulation is not yet final and the agency will accept public comments until 19 June 2015 before issuing a final rule.

Actions for employers

Employers should review their wellness programs to ensure that they will be compliant with the final rule. If any employers have comments with regard to this proposal, they should take the opportunity to submit them before the 19 June deadline.

Authors: Jonathan Cross, Of Counsel, and Julia Qi, Associate

13. UPDATED HSF MULTI-JURISDICTIONAL GUIDE TO EMPLOYEE ISSUES IN BUSINESS TRANSFERS

We have recently updated our multi-jurisdictional guide discussing potential employee issues in business transfers (first published in October 2013). The second edition reflects the law as at February 2015. The guide is a quick reference tool covering the key legal requirements in 32 jurisdictions in EMEA, South and Central America and Asia-Pacific, in a simple Q&A format. To request a soft copy of the fully updated guide, please click here.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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