Employment

CLYDE&CO

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Employment practice highly ranked by *Legal 500 Asia Pacific 2015*

Clyde & Co's APAC Employment Newsletter publishes recent employment related updates and information from across the region on a quarterly basis. In this issue, we have updates written by Clyde & Co's offices, associated offices and correspondent firms in China, Hong Kong, India, Japan, Mongolia and Thailand to provide you with an overview on various topical issues.

Overview on production safety in China

Written by Dr. Iris Duchetsmann, Lisa Li and Cynthia Zheng

Several production accidents have recently returned public attention to the issue of production safety. During China's prolonged period of rapid economic growth over the past decades, legislation has constantly developed to regulate and protect the workforce. Most recently, on 31 August 2014, China issued the amended Production Safety Law ("2014 Production Safety Law"). This would become the fundamental legislation for production safety, and has come into force on 1 December 2014.

Legal framework

The 2014 Safety Production Law is the central national level legislation outlining general aspects of safety production and which regulates companies' obligations. In addition, there are further laws addressing specific issues, including the Fire Protection Law and the Occupational Disease Prevention Law. All such national legislation is implemented by the different bodies within central government and local governments, which also formulate implementation regulations.

Beyond the above, companies must also comply with various national and industry standards which regulate working conditions, so as to ensure production safety, and protective clothing, amongst others. In addition, for certain industries (e.g., the chemical industry), companies must obtain special licenses permitting them to operate; meeting production safety requirements is one of the conditions authorities require to be demonstrated before granting such licenses.

Obligations of companies

Under the 2014 Production Safety Law, companies' obligations concern the following general aspects the facilities and equipment provided, their workforce and funds.

Employers must also assign responsibility for production safety to delegated members of staff.

Facilities and equipment

For companies to build new factories, their designs and construction plans must take into account production safety so as to ensure that the necessary facilities and equipment are in good condition, and ready for use when the project is completed. The same requirement applies in case of any modification of the initial construction project.

Once construction is completed and the plant is operational, companies must provide working conditions in compliance with the applicable national and industry-wide standards. They must conduct periodic internal inspections to ensure the facilities and equipment are functioning and take all necessary measures to minimise the risks of potential accidents occurring in a timely manner.

For companies in certain industries (e.g., offshore oil drilling), certain type of their working equipment may threaten the health of the workforce and, as such, there are additional national and industrial-wide standards which apply to this equipment and must be complied with.

Some companies provide dormitories for their employees. In such instances, the dormitory must be isolated and be in a safe distance away from the place where the workshop, warehouse or store is located and where any hazardous products are manufactured, stored or sold.

Employee protection

Companies are certainly under a direct obligation towards their employees. These obligations include, in general terms:

- formulating and reviewing internal production safety regulations and operational rules to ensure they effectively implement the applicable laws and regulations as well as national and industry-wide standards;
- formulating an accident response plan and undertaking regular drills;
- providing necessary protective articles to the employees;
- informing the employees of any dangerous aspects in their workplace or any relating to their positions and ensuring that they are aware of measures to prevent accidents and the accident response plan;
- educating and training their workforce (including dispatched employees and interns) in respect of the statutory rules, internal production safety regulations and operational rules.

In addition to the above general obligations, companies are under further obligations towards those employees who are exposed to hazardous operations which may cause occupational diseases. In defining occupational diseases, there is a national catalogue which provides a comprehensive list.

These further obligations include:

- informing new employees of the possible occupational hazards and consequences and the prevention measures, etc. before they sign the employment contract. The same applies to employees who change roles to positions which may cause occupational diseases;
- arranging health checks at a medical institution approved by the government for employees who will perform operations which may cause occupational diseases. Again this would include both new employees and employees transferred from other positions;
- arranging regular health checks at an approved medical institution for employees who perform operations which may cause occupational diseases;
- arranging health checks at an approved medical institution before termination of the employment relationship to confirm whether the employee suffers from any occupational diseases.

Companies are specifically prohibited from hiring or arranging for employees under age of 18 to perform operations which may cause occupational diseases, or arranging for employees to conduct hazardous operations if they are more vulnerable to suffer occupational diseases generally or suffer from diseases caused by the specific hazardous operations.

If an employee is diagnosed with an occupational disease, then their employer must release them from the work and make proper arrangements on their behalf. These would include arranging medical treatment and transferring them to other positions upon recovery. Suffering from occupational diseases constitutes a work-related injury and the respective employee is further entitled to benefits and treatment (for example statutory subsidies and protection from termination) as provided by the relevant work-related injury laws and regulations.

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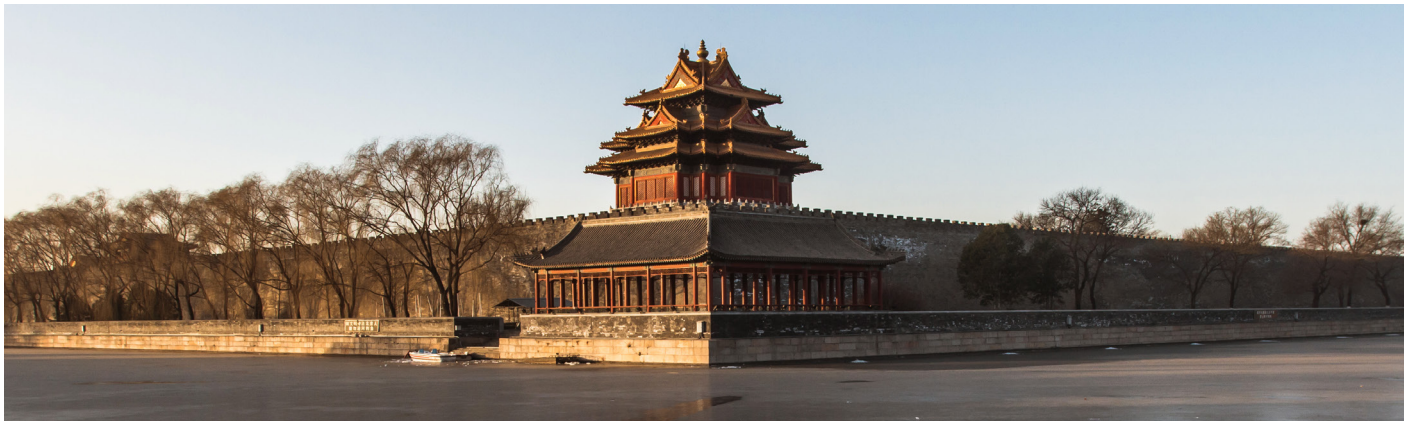

Funds

Companies are further required to allocate and maintain necessary funds to provide the necessary working conditions in compliance with law. According to the specific industry such as machinery manufacturing, mines, etc., administrative regulations set minimum amount of the funds. The amount of allocated funds is generally linked to business income or the production volume of the relevant companies, and could amount to millions of Renminbi.

Delegated staff and top management

Depend on their industrial sector and scale, companies are required to either assign staff or set up a department to implement the statutory rules and requirements and manage the production safety matters. These delegated production safety personnel are responsible for:

- formulating internal rules concerning production safety. For example this would include: production safety management rules, operation rules, emergency plans, etc.;
- organising production safety training;
- organising drills; and
- supervising and ensuring compliance with the statutory and internal rules.

In addition to the delegated personnel, companies' top management is also laid general managerial and supervisory responsibilities in relation to production safety.

Liabilities

Companies may face civil, administrative or even criminal liabilities for non-compliance. Civil liabilities will include compensation to the employees for losses suffered. Administrative liabilities could include, for example, administrative fines, confiscation of income and an order to cease production. Finally, where a failure in production safety causes an accident, criminal liabilities may also be imposed on a company's top management and its delegated production safety personnel. This liability could extend to imprisonment for up to 7 years.

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China's Supreme People's Court issue judicial opinion on work-related injuries

Written by Dr. Iris Duchetsmann and Cynthia Zheng

As of 1 September 2014, the new judicial opinion of the China's Supreme People's Court concerning work-related injuries (the "Opinion") came into force. This Opinion mainly clarifies the scope of work-related injuries, to support the implementation of the Regulations on Work-Related Injury Insurance (the "Regulations").

General framework of work-related injuries

The Regulations define the general framework of work-related injury matters, including the scope of work-related injuries, verification of the injury, and obligations and liabilities of employers, amongst other aspects.

Under the Regulations, work-related injuries include the following cases, where:

- an employee is injured as a result of an accident occurred due to his/her work within working hours and at his/her place of work;
- an employee is injured as a result of an accident within their place of work, before or after normal working hours, whilst preparing for or finishing work related to his job;
- an employee suffers from violence or another unexpected injury during working hours, at their place of work, whilst performing his/her duties;
- an employee suffers from an occupational disease;
- an employee's whereabouts are unknown due to an injury or accident that occurred whilst he/she was travelling beyond the workplace in performance of his/her duties (the "Business Trip Period"); or
- an employee is injured in a traffic accident for which he is not principally responsible, or during urban rail transit, in passenger ferry or rail accident on his/her way to or from work ("Commuting Accidents").

Within the above scope, whether an injury constitutes a work-related injury or not is subject to assessment and verification by local labour authorities. Once confirmed that it is so, and depending on the severity of the injury, an injured employee will be entitled to statutory benefits, including coverage of medical expenses and provisions of statutory subsidies by the statutory work-related injury fund.

His/her employer also has obligations. The employer must continue to pay the employee's full monthly salary during the medical treatment period (which is generally up to 12 months, and may last for 24 months in severe cases subject to approval by the local labour authorities).

Following medical treatment, the employer's liability depends on the disability and injury grade (from 1 (the most severe one) to 10), as evaluated by the local labour authorities. Liabilities generally include arranging appropriate work, providing compensation or paying subsidies according to local standards. Employment must be maintained if the grade of disability and injury is verified as 1 to 4.

Clarifications provided by the Opinion

The Regulations provide the general definition of work-related injuries, but challenges remain for implementation. To guide practice in implementation, the Opinion provides helpful clarifications.

The Opinion clarifies that the following cases also constitute work-related injuries, where:

- the injury occurs during working hours and at the place of work, and where the employer or the labour authority can provide no evidence that the injury is due to a non-work-related reason;
- the employee is injured during an activity organized by the employer, or by another entity but at which the employee's attendance is required by the employer;
- within working hours and whilst travelling between several working locations in the course of carrying out his/her work duties, there occurs an injury to the employee whilst within a reasonable proximity of these locations; and

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– whatever the injury suffered by the employee, it occurred during working hours and within a reasonable proximity to the work place, which is relevant to his/her work.

The Opinion considers the following period as the "Business Trip Period":

– when, as assigned by his/her employer or required by his/her work, the employee travels beyond their place of work to undertake activities which are related to his/her job duties;
– when the employee is receiving training or attending a meeting as assigned by the employer;
– when the employee travels beyond their place of work to conduct activities as required by his/her work.

As to Commuting Accidents, the Opinion upholds an accident as a Commuting Accident if it occurs within a reasonable time period on a reasonable route the employee takes for the purpose of commuting between his/her work place and:

– his/her domicile, habitual residence or dormitory;
– the residence of his/her spouse, parents or children;
– the place where he/she performs those activities necessary for earning a living.

If it occurs within a reasonable time period whilst on any other reasonable route that the employee takes whilst commuting, the accident will also be upheld as a Commuting Accident.

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Shanghai High People's Court issues new internal guidelines for popular labour disputes

Written by Dr. Iris Duchetsmann and Cynthia Zheng

Following a seminar held between local judges in October 2014, the highest level local court, the Shanghai High People's Court (the "Court") issued internal guidelines summarising its discussions and detailing the current prevailing opinions in relation to popular labour disputes. The following update highlights the key issues from those guidelines.

Employment relationship

It is not uncommon for domestic private companies to handle social insurance contributions for some non-employee individuals; this can be for a variety of reasons. The Court has held that handling social insurance formalities, or making contributions, do not necessarily lead to the constitution of an employment relationship. Instead it is one of the factors which a court will take into consideration. Other factors which the Court will assess include:

1) whether both parties have reached a consensus on establishing an employment relationship;

2) whether the individual is subject to the company's management, including whether s/he takes and follows instructions; and

3) whether labour provided by the individual is part of the business of the company.

Termination

The Court confirmed that a de facto employment relationship receives the full scope of protection provided by Chinese labour laws. Therefore, termination must comply with the 2008 Labour Contract Law ("LCL"). The same liabilities for an employer – double severance or reinstatement (it being the employee's right to claim either remedy) – apply to a wrongful dismissal.

The Court further clarified that if an employer has performed its obligation of honest consultation but no written agreement could be reached in relation to the requisite clauses, the employer may terminate the employment relationship and pay severance.

Additionally, the Court has provided guidance on how to handle difficult situations. In practice, an employer will need to adjust an employee's position according to its production and operational needs. Generally, such adjustments constitute a contractual amendment which requires both parties' consent. However, it is quite common that an employee might request time to consider the amendment. Rather than expressly providing a rejection, the employee might not report for the new job or the original position. Following this, the employer would dismiss him/her due to absence.

The Court generally upholds an employer's right to make a reasonable and lawful adjustment to an employee's position where it modifies its production structure or scope of business due to a change in the external market environment. An employee should cooperate in such a situation. If the employee disagrees, s/he should settle the dispute via consultation and should not resist or fight the adjustment through inappropriate means. Therefore, where an employee's absence resulting from a refusal to work in the new position or the original position constitutes a material breach of the internal rules and regulations of the employer, the employer may lawfully dismiss the employee.

Foreign employment

In general, foreigners must obtain a work permit for them to work in China legally, and the employing company will be named on the work permit. The Court has clarified that, if a foreign individual's actual employer is different from that which is recorded on his or her work permit, there will be no employment relationship between the individual and the actual employer.

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A different rule applies to holders of a permanent residence permit. The Court has confirmed that an employment relationship may still be established, even where they do not obtain a work permit.

With regard to the termination of employment for foreign employees, it is widely accepted among the courts of other cities and provinces that the restricted dismissal situations provided by the LCL apply equally to foreign employees and that any contractual agreement deviating from the statutory rules is invalid.

However, Shanghai takes a different approach. In accordance with long-existing local legislation, companies and foreign employees may agree on termination situations which deviate from the LCL rules. Under such local regulations, an employment contract with a foreign employee may agree on the application of termination conditions as provided by the LCL. In some situations, the contract may keep silent on the consequences for the employer of any termination which is in violation of the terms of the agreement.

The Court confirms that a claim for reinstatement following a dismissal in violation of such a contractual agreement will not be upheld. The key consideration for the Court is whether or not reinstatement is practically possible. If an employer agrees on reinstatement, it can be ruled. However, if the employer disagrees, reinstatement should not be ruled on the basis of the practical difficulty in enforcing the judgment where the employer de-registers the work permit with the labour authority.

As a different case, a contract may agree that the employer shall bear liabilities for its termination in violation of contractual agreement but is silent on the detailed rules about compensation (i.e., no agreement on the calculation method or the amount). In such case, the Court will uphold a claim for compensation of actual losses.

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Beijing issues Notice to further tighten administration over foreign employment

Written by Dr. Iris Duchetsmann and Vivien Xu

In September, Beijing issued the local Notice to Further Strengthen Administration over Foreign Employment ("the Notice"). The highlights of the Notice are summarised as follows:

Conditions for foreigners

The Notice re-affirms the following conditions, required for a foreign individual to work in Beijing and obtain a work permit:

- Age limit: must be aged 18 years or older, but not older than 60 years old.
- Education:
  - In general, a bachelor's degree or above;
  - For senior, skilled talent who will hold a position that is to be urgently filled, or conduct the research and development of key technology, skill or qualification certificates where he/she does not hold a bachelor's degree or above.
- Working experience requirement: a minimum of 2 years experience of the related area.

For talents who are urgently needed for the economic and social development of Beijing, the above requirements in respect of age and working experience will be loosen. However, there is no statutory definition or catalogue of such type of talents. The Beijing labour authority will make assessment on a case-by-case basis.

Obligations for companies employing foreign individuals

The Notice requires the employer to:

- create and maintain a personnel file which contains the foreigner's employment contract, copies of their valid passport and work certificates and permits, temporary residence registration certificate, criminal record check, attendance record, social insurance contribution record, salary slips, and any other relevant documents;
- submit a plan of its expected demand for foreign employment for the coming year to the local labour authority by early December each year;
- establish internal mechanisms and policies, in particular for performance evaluation, remuneration and benefits, work safety, training;
- supervise their foreign employees to ensure they complete all necessary registration requirements with the public security authority in relation to their accomodation and living arrangements;
- designate a stable team responsible for all issues related to foreign employment, for example permit related matters; and
- establish an emergency plan for foreign employees. If, for example, the foreign employee suffers an injury, the company shall activate the relevant emergency plan and report to the necessary authority, including the labour authority, foreign affairs authority and public safety authority, as required.

Further to the above general management requirements, employers are required to handle the following work permit related formalities within the designated timeframe. They must:

- deregister work related permits within 10 days of the termination of the labour contract;
- apply for permit extensions at least 60 days prior to their expiration;
- make an announcement through public media to last 10 days when a foreigner leaves without notice and where the company is unable to contact him/her up to 15 days following his/her departure. If the foreigner still cannot

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be reached the company must apply for deregistration of his/her work permit with the local labour authority. Upon receiving the application, the labour authority will make a public announcement on its website for 10 days and the permit will be de-registered if the foreigner does not raise any objection during that period; and

– report the loss of, or apply for an alteration to, an existing registration within 10 days of the relevant event where a foreign employee's work permit is lost, damaged or stolen, or their registered information is changed.

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Expatriate personnel taxation targeted in China

Written by Martin Ng and Ened Du from WTS Consulting (Shanghai) Ltd.

Tax administration against expatriate personnel's individual income tax ("IIT") filings is being escalated in a number of cities in China.

Beijing Local Tax Bureau has formalised regular data system interface with various government departments, including Industrial and Commercial Bureau, Human Resources Bureau, Social Security Bureau, Public Security Bureau and other departments. By frequent information exchange, expatriates IIT administration is enforced in an all-round way. For example, the tax authorities may notify the Exit & Entrance Administration Bureau to restrict a tax-owing expatriate from leaving China according to "China's Tax Collection & Administration Law". With better inter-department information exchange, the implementation of this provision has been enhanced.

Xiamen Local Tax Bureau has put all foreign personnel in a categorization program to facilitate benchmarking on their declaration of bonuses, incentives, stock options and any other offshore-paid income. An alert system has been built in to detect any late, failed or no-tax IIT filings, and to capture those income earning from multiple locations without a consolidated tax declaration. Expatriates' IIT declarations will be centralised and scrutinised against the data they declared and those provided by third parties.

Anhui Local Tax Bureau has required expatriates to conduct IIT self-examination for themselves covering the period from year 2011 to 2013.

All in all, expatriate personnel in China is advised to ensure their IIT obligation is fulfilled timely and properly according to the Chinese laws and regulations.

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Amendments in the Employees' Provident Fund Act in India

Written by Vineet Aneja and Vikram Bhargava from Clasis Law

The Ministry of Labour and Employment, Government of India has, with effect from 1 September 2014, brought into force several important amendments to the schemes framed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act") i.e. (i) The Employees' Provident Funds Scheme, 1952 ("PF Scheme"); (ii) The Employees' Pension Scheme, 1995 ("Pension Scheme"); and (iii) The Employees' Deposit-linked Insurance Scheme, 1976 ("Insurance Scheme").

Key Amendments

PF Scheme

- The definition of 'excluded employee' has been amended whereby the members drawing wages exceeding INR 15,000 per month are excluded from the provisions of the PF Scheme. Accordingly, the wage ceiling for an employee to be eligible for the PF Scheme has been increased from INR 6,500 per month to INR 15,000 per month.

Pension Scheme

- New members (joining on or after 1 September 2014) drawing wages exceeding INR 15,000 per month shall not be eligible to voluntarily contribute to the Pension Scheme.
- The maximum pensionable salary for the purpose of determining the monthly pension has been revised from INR 6,500 to INR 15,000 per month.
- The pensionable salary shall be calculated on the average monthly pay for the contribution period of the last 60 months (earlier 12 months) preceding the date of exit from the membership.
- The monthly pension for any existing or future member shall not be less than INR 1,000 for the financial year 2014-15.

Insurance Scheme

- The contribution payable under the Insurance Scheme shall now be calculated on a monthly pay of INR 15,000, instead of INR 6,500.
- In the event of death of a member (on or after 1 September 2014), the assurance benefits available under the Insurance Scheme has been increased by twenty per cent (20%) in addition to the already admissible benefits.

Implications of the Amendments

The amendments to the three schemes by the Government of India, post the proposal made by the Union Minister of Finance in his Union Budget speech (for the financial year 2014-2015), have enhanced the applicability, scope and benefits provided to employees under the EPF Act. However, at the same time, it has also increased the liability of the employers who would now be responsible to enroll additional eligible employees and to contribute on the increased statutory wage ceiling.

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Government of India unveils new labour reforms

Written by Vineet Aneja and Vikram Bhargava from Clasis Law

The Prime Minister of India Mr. Narendra Modi, on 16 October 2014, announced various labour reforms and schemes to ease the rules for establishments doing business in India and to provide several benefits to the employees. The said reforms and schemes aim to create a favorable environment for industrial development by ensuring transparency in the labour sector. A brief synopsis of the proposed reforms/ schemes has been provided below.

- **Shram Suvidha Portal**, which would allot unique Labour Identification Number (LIN) to nearly six lakhs units and allow them to file a single online consolidated return for 16 (out of the total 44) labour laws. Multiplicity of labour laws and the difficulty in their compliance has always been cited as an impediment to the industrial development in India. This portal should bring in the necessary ease in compliance of provisions related to labour and act as a step forward in promoting the ease of doing business in India.
- **Random Inspection Scheme**, which envisages utilizing technology to eliminate human discretion in selection of units for inspection and mandatory uploading of inspection reports within 72 hours of inspection by the labour inspectors. To bring in transparency in labour inspection, a labour inspection scheme is being developed with the following main features: (i) coverage of serious matters under the mandatory inspection list; (ii) random generation of a computerized list of inspections based on pre-determined objective criteria; (iii) complaints based inspections will also be determined centrally after examination based on data and evidence; and (iv) provision of emergency list for inspection of serious cases in specific circumstances.
- **Universal Account Number Scheme**, which would enable employees to have their Provident Fund account portable and universally accessible. This will provide portability of the social security benefits to the labour of organized sector across the jobs and geographic areas and enable provident fund account holders to have direct access to their provident fund accounts and consolidate all their previous accounts.
- **Apprentice Protsahan Yojana**, which aims to support the manufacturing units and other establishments by reimbursing fifty percent (50%) of the stipend paid to apprentices during the first two years of their training.
- **Revamped Rashtriya Swasthya Bima Yojana**, which proposes to introduce a smart card for the workers in the unorganized sector seeded with details of two more social security schemes.

With the Ministry of Labour and Employment introducing the above schemes, they shall, at the outset, be implemented with respect to the employees and workers under central agencies and autonomous bodies. Labour, being a concurrent subject under the Constitution of India (i.e. the subject matter over which both Central and State Government can legislate), the above schemes will apply in the States only after they make similar changes to their respective labour rules and laws.

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Japan's Supreme Court makes its first decision on the issue of "maternity harassment"

Written by Akiko Monden from Nijubashi Partners

On 23 October 2014, the First Petty Bench of the Supreme Court of Japan made its first decision on "maternity harassment" (discrimination against employees based on pregnancy, child birth, child care). The Supreme Court reversed and remanded a decision made by the Hiroshima High Court, which had ruled that there was no maternity harassment, to have the case re-tried by that High Court.

Protection of pregnant employees under Japanese law

There are various forms of protection under Japanese law for employees who become pregnant, go through childbirth, and raise children. The rules most relevant to this case are as follows:

- providing lighter duties during pregnancy when the employee requests (Article 65.3, *Labour Standards Act*)
- prohibiting discrimination of female employees who request for/ take lighter duties during pregnancy (*Article 9.3, Act on Securing, etc. Equal Opportunity and Treatment between Men and Women in the Workplace ("Equal Opportunity Act") and Article 2-2(6) of the Implementation Regulation of the Equal Opportunity Act*).

Background of the Case

The Employee is a physical therapist who worked in the Rehabilitation Division of the Employer, a health care provider. The Employee was a "sub-chief", a managerial position with a monthly additional allowance of JPY9,500, before she asked for lighter duties.

The Rehabilitation Division had two teams – one worked at a hospital operated by the Employer, and another provided visiting care by travelling to patients' homes. The Employee was in the visiting care team after her second pregnancy, and requested a transfer to the hospital team (the "Measure"), which was accepted by the Employer effective as of 1 March 2008. The Employer informed the Employee after the transfer (in mid-March) that she would be removed from her position as sub-chief (demoted) due to the transfer, to which the Employee reluctantly consented.

The Employee went on maternity leave from 1 September 2008 followed by child care leave, and upon her return on 12 October 2009, was transferred back to the visiting care team; however the post of sub-chief had already been filled by another employee soon after the Measure, and was not reassigned to her. She claimed that the failure to reassign her as sub-chief constituted unlawful discrimination.

Lower Court decisions reversed by the Supreme Court

The District Court and High Court decisions supported the Employer based on the Employee's consent to the Measure, and the Employer's discretion in assigning titles.

Criteria for allowing demotion as part of a transfer to a lighter duty due to pregnancy, set forth by the Supreme Court

The Supreme Court reversed the lower courts' decisions and applied a stricter standard by stating that, in order for a demotion to not fall under discrimination when done in response to a request for lighter duty due to pregnancy, one of the following circumstances is necessary:

a. an objectively reasonable circumstance to affirm that the employee consented through her free will, which should take into account factors such as the advantageous effect of the transfer, the content and extent of any disadvantage, the explanation provided by the employer, and the employee's inclinations; or

b. a special circumstance where the employer has a need to demote an employee who requests lighter duty in order to meet legitimate business needs such as smooth administration and effective posting of personnel, also

taking into account the advantages/ disadvantages set out above to determine whether the measure does not negate the purpose of the law to allow lighter duty due to pregnancy.

In this particular case, the Supreme Court explained that exception (a) above did not apply, and there was insufficient findings of fact by the lower court to make a conclusive finding on exception (b), as follows:

Exception a:

- the advantages of the Measure were not that clear other than the Employee not having to travel to patients' homes, because the difference in her burden from being in the team at the hospital was not apparent; however, the disadvantage was prominent in that the Employee would lose the managerial position she acquired after 10 years of service. However, there is no record showing that the Employer had explained that once she took the lighter duty, her demotion would remain in effect even if she returned to the visiting care team, so the Employee's consent to the demotion was not based on an accurate understanding of the consequences, and not a consent fully based on the exercise of her free will.

Exception b:

- the extent of the advantage for the Employee in the transfer other than not having to travel to patients' homes (the difference of burden before/ after the Measure) was not made clear, whereas the disadvantage of losing her title as sub-chief and the allowance thereof was clear.
- the content of the managerial tasks of a sub-chief was not clear, so whether having that title taken away lightened the workload for the Employee and to what extent, or what kind of business need the Employer had to demote the Employee as part of the transfer was also not clear.
- thus there were no special circumstances that would indicate that the Measure did not negate the purpose of the law to protect pregnant employees who require lighter duty.

While the case is ongoing, the Supreme Court's decision shows that an employer faced with a need to demote an employee exercising maternity-related rights in order to maintain balance among the workforce, or as part of its personnel allocation, will need to provide clear explanation of the possible disadvantages and compare the pros/ cons/ impact of the measure that both the employee and employer may face in order to come up with what would be an objectively reasonable (and thus lawful) solution.

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Non-compete clauses in employment agreements in Thailand

Written by Dr. Andreas Respondek from Respondek & Fan Ltd

Many employers put substantial resources into training people and giving them valuable work experience which they don't want to see being exploited by their competitors. Therefore employers often have concerns about their employees competing with them after they leave the company. To make sure that confidential knowledge that is gained during the term of employment is protected, employers use non-competition clauses as a mechanism for employers to protect their proprietary interests and prevent former employees from disclosing proprietary information to their competitors.

As a general rule, non-compete clauses in employment contracts are acceptable in Thailand. Thai courts base their evaluations whether non-compete clauses are valid usually on Sec. 150 of the Thai Civil and Commercial Code (also Sec. 1168 for directors), the *Thai Unfair Contract Terms Act* and the *Thai Labour Protection Act*.

To determine whether non-compete clauses are permissible, Thai courts are considering the following three factors:

Does the employer have a proprietary interest that is entitled to protection?

The first question Thai courts will ask is whether it is legitimate for the employer to prevent the potential disclosure of trade secrets and confidential information by preventing a former employee from utilising the employer's proprietary interests. What the employer will have to prove is that the purpose of protection is to maintain the stability of the organisation and that failure to do so may cause damage to the employer's organisation, which may affect the remaining employees.

Is the use of the non-compete clause contrary to the public interest and good morals?

Under the Thai Civil and Commercial Code, to determine whether an act is contrary to public interest, Thai courts apply Section 150 Thai Civil and Commercial Code , which states that,

> *"An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals."*

The Thai Civil Court lacks a definition of "public order and good morals", so presumably this means a violation of the national interests. Whether or not this is the case will be determined by the Thai courts on a case-by-case basis.

Are the conditions spelt out under the non-compete clause "reasonable"?

Under reference to Section 5 of the Thai Unfair Contract Terms Act B.E. 2540, the Thai courts examine the "reasonableness" of the non-compete clause. Section 5 of the Unfair Contract Terms Act B.E.2540 reads as follows:

> *"The terms restricting the right or freedom in professing an occupation or an execution of a juristic act related to the business, trading or professional operation which are not void, but being the terms that cause the person whose right or freedom has been restricted to bear more burden than that could have been anticipated under normal circumstances, shall only be enforceable to the extent that they are fair and reasonable according to such circumstances.*
>
> *In determining whether the terms under paragraph one cause the person, whose right or freedom has been restricted, to bear more burden than that could have been anticipated, consideration shall be taken to the scope of the area and the period of restriction of right or freedom, including whose ability and opportunity to profess occupation or to execute juristic act in other form or with other person, as well as all legitimate advantages and disadvantages of the contracting parties."*

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The *Unfair Contract Terms Act* stipulates that contract terms which are not void, but which cause a person whose right or freedom has been restricted to shoulder more of a burden than a reasonable person could have anticipated under normal circumstances, shall only be enforceable insofar as they are fair and reasonable in the circumstances. To determine the reasonableness under Section 5, the Thai courts regularly examine all relevant circumstances of the employer's situation and the relationship with the restrictions, i.e. the geographic area of the applied restrictions and the period of limitation of occupational freedom. Thai courts take into consideration various factors to determine the reasonableness of a geographic area restriction clause. To protect trade secrets and trade connections, the employer may have to prove the actual extent of its operation to determine whether a former employee can have influence over the employer's trade connections. The size of the employer's business may sometimes be a factor when specifying the size of the non-compete area.

It is also important to note that the restrictions contained in the non-compete clause may not restrict the activities of the employee more than necessary, especially they may not undermine an employee's ability to earn a living, taking into consideration that the freedom of occupation is protected under the Thai Constitution. The more restrictive the non-competition clause is, the less likely it is to be upheld by the courts.

**Respondek & Fan is an international law firm with offices in Bangkok and Singapore, assisting and securing the growth of successful companies in the Asia Pacific Rim.*

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A brief overview of the requirements for employment agreements and the termination in Mongolia

Written by Odmaa Tsevegjav from MDS & KhanLex LLP

According to the Mongolian Law on Labour (1999) an employer is obliged to conclude an employment agreement with an employee in writing and is prohibited to conclude agreements other than employment agreement for a permanent workplace.

An employer may not demand an employee to perform work which is not specified in the employment agreement, except as otherwise provided in the Labour Law. The relevant Labour Law exceptions are a) temporary transfer to another job due to an unavoidable work need, such as in circumstances of natural disaster, industrial accident, or any other unforeseen circumstances; b) temporary transfer to another job during idle time; and c) transfer to another job for health reasons based on the decision of a medical-labour commission.

Validity of an employment agreement

An employment agreement must be in writing and should, at least, include the following basic terms:

- job title or name of a position;
- job duties specified in the position description;
- amount of basic or position salary;
- labour conditions.

An employment agreement that does not include any of the above mentioned basic terms shall be invalid. The parties are free to agree upon any terms in addition to the basic terms. An employment agreement shall become effective from the date of signing by the parties.

Any term of an employment agreement which is less favorable than those provided in the legislation or collective agreements or covenants shall be null and void.

Termination of employment agreement by the employee

Unless otherwise provided in the law or an employment agreement, an employee shall have the right to leave his or her workplace upon the expiration of 30 days after submitting his or her request of resignation to the employer, in which case the employment agreement shall be considered as terminated. An employment agreement may be terminated prior to the above mentioned time limit due to a valid reason or by an agreement with respect to the time of resignation with the employer.

Termination of an employment agreement by the employer

Change of ownership or affiliation of a business entity or organisation shall not serve as a ground for termination of an employment agreement.

Notice of termination of an employment agreement pursuant to the following terms shall be given to the employee one month prior to such termination:

- liquidation of the employer's business entity or organisation, branch or unit thereof, abolition of the job or position within it, or reducing the number of employees;
- where it has been determined that the employee fails to meet the requirements of the job or position due to the lack of professional qualifications or skill, or health reasons;

An employer shall pay to an employee whose agreement is terminated on the grounds mentioned above, a severance pay in an amount equal to at least the employee's average salary for one month. This severance pay shall also be payable to an employee whose employment agreement is terminated because he or she has been called to active military service or has attained 60 years of age and has become eligible to receive a pension. In the case of a mass redundancy of employees an employer shall agree

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the amount of the severance pay to be paid through negotiations with the representatives of employees.

Other possible grounds to termination of an employment agreement by an employer are:

- repeated breach by the employee of the labour disciplinary rules or commission of a serious breach for which the employment agreement specifically provides termination of the labour relations (serious negligence);
- where it has been determined that an employee who is responsible for assets or money has lost the trust of the employer due to an act or omission (financial negligence);
- an employee is elected or appointed to another salaried work; or
- arising on the grounds set forth in the contract.

Conditions in which termination of the employment agreement is prohibited

It shall be prohibited to terminate an employment agreement with an employee whose job or position is retained, unless the business entity or organisation is liquidated.

An employee shall retain a job or position in the following circumstances, even though an employee is not performing his or her job duties:

- the employee performs duties by election in a state body for a period of up to 3 months;
- the employee is on an annual vacation;
- the employee is undergoing medical examinations, acts as a donor, or is on leave pursuant to a medical certificate or at employer's permission or;
- the employee is on pregnancy, maternity or child care leave;
- the employee is participating in negotiations to conclude a collective agreement or bargain, or is participating in a lawfully organised strike;
- with respect to an employee who has received a call-up under the decision of the military call-up commission for active military service;
- such other cases as provided in the legislation, collective or employment agreements.

Additionally, the labour Law prohibits employers to terminate an employment agreement with an employee who is pregnant or has a child less than three years old unless such employee has conducted financial or serious negligence or the employer is liquidated.

**MDS & KhanLex LLP is the largest law partnership in Mongolia. The core practice of MDS & KhanLex consists of complex financial and corporate transactions as well as infrastructure and mining law practice. The mission of the firm is to assist both local businesses and international investors entering the Mongolian market by blending international legal industry knowledge with local expertise.*

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* Recommended employment lawyer by *Legal 500 Asia Pacific 2015*

Further advice should be taken before relying on the contents of this Newsletter.

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