



## Top 10 Questions to Ask When Hiring and Firing Employees in Asia and the Pacific

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### AUSTRALIA

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#### HIRING IN AUSTRALIA:

1. Is the prospective employee an Australian citizen or otherwise legally entitled to work in Australia? Non-citizens must have a valid work visa. What conditions of employment should be agreed up front in respect of any visa arrangements?
2. Who is the employing entity? This can be unclear in circumstances where an employee will perform work for a number of companies in a group of related companies.
3. Is the worker to be employed as an employee or engaged as an independent contractor? Or alternatively engaged via a labour hire agency?
4. What (if any) pre-employment checks are to be required (e.g., criminal record checks, medical examinations)? Are these requirements consistent with anti-discrimination legislation?
5. Will the terms and conditions of employment be regulated by a modern award or enterprise agreement?
6. Do the terms and conditions of employment meet the National Employment Standards under the *Fair Work Act 2009* (Cth) (**FW Act**)?
7. Will the employee be required to comply with company policies? If so, are these policies intended to be incorporated into the contract of employment?
8. Will the employment be casual or ongoing, for a fixed period or a fixed task? Is the employment subject to a probationary period?

9. Should the terms of employment include post-employment constraints, obligations relating to confidentiality that survive the termination of the contract, and intellectual property rights?

10. In what circumstances may the contract lawfully be terminated and how?

#### **FIRING IN AUSTRALIA:**

1. What are the lawful requirements for terminating employment under the terms of the contract of employment, the National Employment Standards, and any applicable modern award or enterprise agreement?
2. Will the employee work throughout his/her notice period or will the employer pay the employee in lieu of notice, bringing the employment to an immediate end? Alternatively, can the employer require the employee to take 'garden leave' (i.e., remain employed but required not to attend or perform work until expiration of the notice period), ensuring ongoing confidentiality and fidelity obligations during that time?
3. Ensure that the reasons for termination do not include grounds protected by the FW Act or anti-discrimination legislation, for example, discriminatory grounds (i.e., race, sex, age, disability) or temporary absence from work due to illness, union or non-union membership, filing complaints against the employer, absences due to parental leave, or voluntary emergency management activities.
4. Does the employee have access to unfair dismissal remedies? If so, ensure that the termination of employment is not harsh, unjust, or unreasonable.
5. Has the employee engaged in serious misconduct (for example refusing to comply with any lawful direction, engaging in fraud, theft, or bullying behaviour)? If so, the employment may be terminated summarily (without notice).
6. Is the termination for reason of redundancy (i.e., the employer no longer wishes the job the employee is performing to be done by anyone)?
7. If the termination is for reason of redundancy, have the requirements under the contract, any applicable enterprise agreement or modern award, or the National Employment Standards been complied with? For example, have consultation requirements been met? What are the employee's notice and severance pay entitlements? Where redundancy arises due to a transfer of business from one entity to another, the employer may be exempt from the obligation to make severance payments, as acceptable alternative employment has been arranged for the employee.
8. Will the employer be seeking to enforce applicable post-employment restraints? Will these be enforceable in the circumstances?

9. Will all accrued leave entitlements (i.e., annual leave and long service leave) and any outstanding wages be paid to the employee upon termination of employment?
10. Should the employers consider seeking to enter a deed of release/settlement agreement with the employee to avoid or resolve potential claims arising from the termination of an employee's employment?

## **CHINA**

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### **HIRING IN CHINA:**

1. Is the employee a PRC national, foreign national, from Hong Kong, Taiwan or an overseas Chinese?
2. What type of entity is the employer? Representative office, branch, company?
3. In addition to national laws, what local laws and practice are important?
4. Is the employer required to recognize any of the employee's previous service?
5. Where will social insurance be paid? And will the employer pick up the employee contributions?
6. Is the employee being hired through a labor agent? Is it legal? Or desirable?
7. What type of contract should be provided? Fixed-term, open-term, project-based?
8. How can the contract be terminated? What is a permitted probation period?
9. Are benefits contractual? Or follow company policy?
10. How is confidential information and IPR protected? And should the employee be subject to a non-compete?

### **FIRING IN CHINA:**

1. The statutory grounds for termination are quite limited.
2. Some of the statutory termination grounds are extremely difficult to meet in practice.
3. Unions and labor bureaus may need to be consulted when terminating employees.

4. Most employees are terminated by paying agreement, with severance above statutory requirements.
5. Paying severance and giving notice may not be sufficient to terminate an employee.
6. Dispatched employees may not necessarily be terminated by returning them to the agent.
7. PRC law may not even apply when terminating foreign national employees.
8. Employees in certain categories (e.g., pregnancy or illness) may be protected from termination.
9. Non-compete usually may be waived by the employer.
10. In an unlawful termination case, evidence may be difficult to introduce.

## HONG KONG

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### HIRING IN HONG KONG:

1. Does the employee have a right to work in Hong Kong or does the employee need a **work visa**?
2. Is the employment offer subject to any **condition precedent** (e.g., satisfactory reference check, obtaining the necessary qualification)?
3. Is the **recruitment screening and decision-making process** fair and free from challenge of discrimination?
4. Is the employee **free from restrictive covenants** to take up the job?
5. Is the **personal data** of the candidate/employee collected or dealt with in accordance with Hong Kong law?
6. Does the employee need to be a member of the **mandatory provident fund (MPF)** in Hong Kong or is the employee exempt?
7. Does the remuneration of the employee meet the **statutory minimum wage** requirement? Are rest days/lunch breaks paid or not?

8. Is the employee entitled to all the **statutory required benefits** granted under Hong Kong law (e.g., employees' compensation insurance, statutory annual leave, statutory holiday, rest day etc)?
9. Is **mandatory safety training or medical checkup** required for the employee's position?
10. Have all the legal requirements with respect to **occupational safety and health** been complied with?

#### **FIRING IN HONG KONG:**

1. Does the employer have a **valid reason** for the termination?
2. Does the employer have **sufficient evidence** to terminate the employment of an employee on the alleged ground?
3. Is the employee pregnant, on maternity or paid sick leave, or receiving employee's compensation (in which case it is **unlawful to terminate** the employee)?
4. Is the termination free from challenge that one of the grounds of termination was sex, disability, family status, or race **discrimination**?
5. What **termination payments** (e.g., outstanding wages, payment in lieu of notice, annual leave pay, severance or long service payments) will the employee be entitled to?
6. Will/can the **restrictive covenants** be enforced?
7. Any special treatment required with respect to any **unvested share options** or other benefits after termination of employment (e.g., MPF)?
8. Will the employer pay an ex-gratia payment in return for the employee entering into a **settlement agreement** in full and final settlement of all claims that the employee has or may have?
9. Has the requisite notification been made to the **Inland Revenue Department** informing the authority regarding the relevant termination payments and the final payment withheld where required?
10. Has the **Immigration Department** been informed regarding the termination of employment in the circumstances that the employee is under a work visa?

## **INDIA**

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### **HIRING IN INDIA:**

1. Has a background check been carried out on the employee to ensure that the employee does not have any criminal record and is adequately qualified? The background check should also determine the reasons for the employee leaving his/her earlier company and whether such employee has ever been charged with misconduct.
2. Is the employee restricted from taking on employment with the employer by virtue of his/her previous agreement with the previous employer? (Please note that in India a non-compete covenant is not enforceable. However, non-solicit clauses and confidentiality obligations are enforceable for a certain period after the employment ceases.)
3. Has the employee been offered a salary that is consonance with the Minimum Wages Act?
4. Has the employee been granted leave entitlements in accordance with the Shops & Establishments Act?
5. Is the employee eligible to make and receive contributions in accordance with Indian provident fund laws? If yes, then has the employee been added on to the registered provident fund of the employer?
6. Has the employee been granted a valid employment visa as per the Indian visa regulations?
7. Has the employee been granted a valid and effective release letter from his/her earlier employer?
8. Has the employee been informed of the ways in which his/her personal data collected by the employer is going to be stored and how it can be accessed in accordance with the Data Protection Rules, 2011?
9. Has an employment contract been provided to the employee in accordance with the Shops & Establishments Act?
10. Has the employee signed a confidentiality agreement at the time of being hired?

### **FIRING IN INDIA:**

1. Has the employee been given sufficient notice and reasons for why his/her employment is being terminated?

2. Has the employee been paid all contractual (e.g., bonus, outstanding salary, ex-gratia payments, extra leave entitlements, etc.) and statutory (e.g., gratuity, payment in lieu of notice, annual leave pay, severance payment etc.) amounts due by the company in relation to his/her employment?
3. Is the employee who is being fired on maternity leave or on paid sick leave? (If yes, then such employee cannot be terminated during such period.)
4. Has the employee returned all confidential documents and other properties of the company?
5. If the employee is being retrenched, has the employee been paid retrenchment compensation?
6. Is the employee required to comply with any restrictive covenants post termination?
7. Is the employee entitled to the unvested ESOPs post termination and if yes on what criteria will they be granted?
8. If the employee is being dismissed for grounds of misconduct, has the employer conducted disciplinary proceedings and provided the employee with an adequate opportunity of representing himself/herself? This must be ensured in order to prevent any litigation that the employer might face in future.
9. If the employee who is fired is a senior employee, has the employer obtained sufficient indemnity from him/her for actions taken during the course of employment?
10. Has the employee signed a release agreement agreeing that a full and final settlement of dues payable to him/her has been paid by the employer?

## INDONESIA

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### HIRING IN INDONESIA:

1. Does the employee have a right to work in Indonesia or does the employee need a **work visa**?
2. Is the employment offer subject to any **condition precedent** (e.g., satisfactory reference check, obtaining the necessary qualification)?

3. Is the **recruitment screening and decision making process** fair and free from challenge of discrimination?
4. Is the employee **free from restrictive covenants** to take up the job?
5. Is the **personal data** of the candidate/employee collected or dealt with in accordance with Indonesian law?
6. Does the employee need to be a member of the **mandatory social security program (JAMSOSTEK)** in Indonesia or is the employee exempt?
7. Does the remuneration of the employee meet the **statutory minimum wage** requirement?
8. Is the employee fixed term, which requires an Indonesian language or bilingual written contract and is subject to maximum first term of two years? Is the employee intended to be hired on a permanent basis subject to the maximum permitted three-month probationary period with or without a written employment agreement? If a written contract is used for a permanent employee, is it in the Indonesian language or bilingual? All employees are entitled to **statutory required benefits** granted under Indonesian law (e.g., statutory annual leave, statutory holidays, rest days, and generous termination benefits etc.), but should the company be considering special secondment arrangements for expatriate employees to lawfully avoid the termination procedures and benefits under Indonesian law?
9. Is **mandatory safety training or medical checkups** required for the employee's position based on the employer's internal requirements?
10. Have all the legal requirements with respect to **occupational safety and health** been complied with?

#### **FIRING IN INDONESIA:**

1. Does the employer have a **valid reason** for the termination?
2. Does the employer have **sufficient evidence** to terminate the employment of an employee on the alleged ground?
3. Is the employee on paid sick leave for less than one year, or on maternity leave or other types of leave regulated by Indonesian law, which need to be taken into account when planning a termination?
4. Is the termination free from challenge that one of the grounds of termination was sex, disability, family status, or race **discrimination**?
5. What **termination payments** (e.g., outstanding wages, annual leave pay, severance payment, long service payment, and the so-called health and housing allowance) will the

employee be entitled to, given the specific reason for termination? Has the employer expressly provided for notice of termination or pay in lieu of notice, which does not apply in Indonesia (and should never be included in employment documentation in Indonesia), but if so provided, may give rise to a supplementary claim for pay in lieu of notice?

6. What **restrictive covenants** are relevant to the subject employee (confidentiality or less commonly non-solicitation and non-competition) and what are the requirements for such covenants to be enforceable?
7. Any special treatment required with respect to any **unvested share options** or other benefits after termination of employment?
8. Will the employer pay an ex-gratia payment in return for the employee entering into a **settlement agreement** in full and final settlement of all claims that the employee has or may have, recognizing that termination at-will is not recognized in Indonesia and that employees are entitled to full salary until their individual termination is approved by the Labour Court, and all applicable appeal periods have expired or appeal decisions rendered?
9. Has the requisite withholding tax filing been made to the **Indonesian Tax Office** informing the authority regarding the relevant termination payments and related withholdings?
10. Has the **Immigration Department** been informed regarding the termination of employment in the circumstances that the employee is under a work visa, and has the employer obtained the necessary Exit Permit (EPO)?

## **MALAYSIA**

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### **HIRING IN MALAYSIA:**

1. Does the employee have a right to work in Malaysia or does he/she need a work permit?
2. Is the employment offer subject to any condition precedent (e.g., satisfactory reference and medical checks)?
3. Is the recruitment process free of discrimination?
4. Is the contract in writing?
5. What should be included in the employment contract?

6. Are the employees subject to any minimum terms and conditions of employment and/or minimum wage?
7. Does the employer have any statutory obligations to make contributions or deductions for staff provident funds, social security funds, and income tax?
8. Can the employer include non-compete clauses in the contract?
9. Are the employment particulars subject to personal data protection?
10. Are the employees subject to representations by trade unions?

#### **FIRING IN MALAYSIA:**

1. Is there employment at-will in Malaysia or must the termination be for cause?
2. What are the justifiable grounds for termination (e.g., misconduct, unsatisfactory performance, and redundancy)?
3. Is it necessary to hold a domestic inquiry before dismissal?
4. Is the employee required to comply with any restrictive covenants post termination?
5. Must misconduct be sufficiently serious before an employee is dismissed summarily?
6. What are the requirements for dismissing an employee for poor performance?
7. In what circumstances can an employee be retrenched?
8. Is the employer obliged to pay an employee any retrenchment benefits?
9. What is the employee's legal recourse for challenging his/her termination?
10. What is the employer's potential liability in unfair dismissal?

#### **NEW ZEALAND**

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#### **HIRING IN NEW ZEALAND:**

1. Does the employee have a right to work in New Zealand or does the employee need a **work visa**?

2. Is the employment offer subject to any **condition precedent** (e.g., satisfactory reference check, criminal record check, credit check, obtaining the necessary qualification/s)?
3. Is the **recruitment screening and decision-making process** compliant with the NZ Human Rights Act and free from challenge of discrimination?
4. Is the employee **free from restrictive covenants** to accept the offer of employment?
5. Is the **personal information** of the candidate/employee collected and used in accordance with New Zealand Privacy Act?
6. Does the remuneration of the employee meet the **statutory minimum wage** requirement?
7. All employees are entitled to **statutory required benefits** granted under the New Zealand Holidays Act (e.g., statutory annual leave, public holidays, sick and bereavement leave, etc.), but does the employer wish to provide enhanced entitlements and/or redundancy compensation?
8. Is the employee intended to be hired subject to the statutory **90-day trial period**, or alternatively a probationary period?
9. Has the employee been provided with a reasonable opportunity to seek independent legal advice regarding the offer of employment?
10. Has the employer received a signed copy of the employee's employment agreement before the employee starts work?

#### **FIRING IN NEW ZEALAND:**

1. Does the employer have a **valid reason** for the termination (as all terminations must be for 'cause' and there is no concept of 'at-will' employment in New Zealand)?
2. Has the employer followed a fair and reasonable process before making the decision to terminate (e.g., did the employer sufficiently investigate the allegations, raise concerns with the employee, give the employee a reasonable opportunity to respond, genuinely consider the employee's explanation (if any), follow a performance management plan, etc.)?
3. Has the employer provided the employee with an opportunity for feedback on the employer's preliminary view on sanction/s (e.g., dismissal on notice, summary dismissal) before making a decision to terminate?
4. Has the employer complied with any company disciplinary policy and/or the employee's employment agreement to ensure compliance?

5. Has the employee been offered the opportunity to have a support person/representative present during all disciplinary investigation meetings?
6. Has the employer checked the employee's personnel file for past instances of similar conduct, work history, years of service, and previous warnings?
7. Is the termination free from challenge that it was based on one of the prohibited grounds of discrimination – i.e., sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, or sexual orientation?
8. What **payments** upon termination of employment (e.g., outstanding salary/wages, payment in lieu of notice, annual holiday pay, long service payments, etc.) will the employee be entitled to?
9. Will the employer seek to enforce any **restrictive covenants** in the employee's employment agreement?
10. If the employee raises a personal grievance for unjustified dismissal and/or unjustified disadvantage, will the employer without prejudice enter into negotiations/offer to pay an ex-gratia payment and/or compensation for hurt and humiliation under s123(1)(c)(i) of the Act in return for the employee entering into a **settlement agreement** in full and final settlement of all claims which the employee has or may have?

## **SOUTH KOREA**

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### **HIRING IN SOUTH KOREA:**

1. What are the differences between hiring an employee on a fixed-term and indefinite-term basis?
2. Does the employment agreement have to be in the Korean language?
3. Does the company need to include a consent provision regarding email monitoring in the employment agreement or via a separate agreement?
4. Is it legally permissible to include a probationary period provision in the employment agreement?
5. Is overtime pay mandatory?

6. Is a non-compete provision legally enforceable in Korea?
7. Are background checks legally permissible in Korea?
8. Are all employees entitled to statutory severance pay?
9. Are pregnant female employees legally allowed to work overtime?
10. Is there a legal retirement age in Korea?

#### **FIRING IN SOUTH KOREA:**

1. What constitutes "just cause" for termination under Korean law?
2. Does the termination notice have to be in writing?
3. Is the company legally obligated to pay severance to an employee fired for cause or who resigns of his/her own volition?
4. Is due process required when firing an employee for cause?
5. Remedies for a fired employee?
6. What if the company refuses to comply with the reinstatement and back pay order by the labor authorities?
7. What are the legal requirements for a layoff?
8. What happens if a union exists?
9. Can a union go on strike over a layoff?
10. What is the standard practice in Korea regarding layoffs? Formula for redundancies?

#### **TAIWAN**

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#### **HIRING IN TAIWAN:**

1. Are the employees considered "workers/labors" as defined under the Labor Standards Act ("LSA")?
2. Is the employer responsible for applying for work permits for the employees?

3. Are there restrictions on the terms of employment for the employees under Taiwanese law?
4. Are the employment agreements required to be in writing under Taiwanese law?
5. Is the employee subject to a non-competition agreement with his/her former employer?
6. Are the employees required to have any special qualifications and/or licenses for the occupations?
7. Are there restrictions on gender regarding certain occupations under Taiwanese law?
8. Is the employee subject to the pension scheme under the LSA or the pension scheme under the Labor Pension Act?
9. Do the wages of the employee meet the standard for the minimum wages as announced by the competent authority?
10. Would the employer like to be the author of the works that the employee created within the scope and during the course of his/her employment?

**FIRING IN TAIWAN:**

1. Does the termination meet the statutory conditions where the employer may unilaterally terminate an employee as listed in the LSA?
2. Is the employee on statutory occupational sick leave or on injury leave due to an occupational illness or injury?
3. Is the employee on her statutory maternity leave?
4. Is the employer required to give prior notice to the employee before termination?
5. Is there a timeframe in which the employer is allowed to terminate the employee according to the LSA and/or the employment agreement?
6. Is the employer required to provide severance payment or termination payment to the employee?
7. Is the employer required to provide compensation to the employee for unused personal leave?
8. Has the employee reached the age of voluntary retirement?

9. Is it necessary for the employer to enter into a non-competition agreement with the employee? If yes, what is the reasonable scope of the non-competition agreement and what is the reasonable amount of the compensation to the employee?
10. Would the termination be classified as "mass redundancy" as defined under the Protective Act for Mass Redundancy of Employees?

## **THAILAND**

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### **HIRING IN THAILAND:**

1. Will it be regarded as the commencement of a new employment and, if so, is the employer obliged to recognise accrued rights of the employee from earlier employment elsewhere?
2. What are the pros and cons of fixed-term employment vs. indefinite employment for the position to be filled?
3. What (if any) particular or non-standard provisions may be desirable for inclusion in the employment contract?
4. Is the employee free from restrictive covenants to take up the job?
5. If the employee is not a Thai national, is a work permit obtainable? If the employee will additionally require a long stay visa, will it be obtainable?

### **FIRING IN THAILAND:**

1. What is the contractual position?
2. As concerns the statutory position, are there grounds for termination for cause?
3. If not, what termination payments, e.g., payment in lieu of notice, annual leave pay, or severance pay, will have to be given, and what will be the employment commencement date for calculation of severance?
4. Will/can restrictive covenants be enforced?
5. Is the termination likely to be construed as unfair, giving the employee a potential claim for additional damages? If so, can the risk be excluded by securing the resignation of the employee against an ex-gratia additional payment?