TOP EMPLOYMENT LAW ISSUES FOR EMPLOYERS IN ASIA-PACIFIC

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INTRODUCTION

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CONTENTS

CAMBODIA

The Ministry of Labour and Vocational Training ("**MLVT**") in Cambodia issued new Official Guidelines on fixed duration contracts and probationary contracts (I) and seniority payments before 2019 for enterprises in the garment, textile and footwear sectors (II). In a notification dated 8 July 2019, it also confirmed several provisions applicable to the same sectors (III).

1. Guidelines dated 17 May 2019 on probationary contracts and fixed duration contracts

On 17 May 2019, the MLVT issued Official Guidelines 050/19 on Fixed Duration Contract ("**FDC**"). These Guidelines provide that a labour contract signed for a specific duration cannot exceed two years and may be renewed one or more times provided that the renewal does not exceed the two-year maximum duration. If such a contract exceeds such a two-year maximum duration, it will automatically convert into an Unfixed Duration Contract ("**UDC**"). The Guidelines illustrate that if the first FDC is for one year, the maximum duration of the FDCs will be three years in total. Accordingly, the maximum duration for FDCs (including renewals) is contingent upon the length of the initial FDC and may never exceed four years.

The Guidelines also provide that, except in limited circumstances (employees recruited, seasonal work, etc.), in the event that the FDC maximum duration is reached, employers may enter into a new FDC with the same employee for the same or similar work provided that a gap of at least one month is observed between the previous and new FDC. Otherwise, the new FDC will be converted into a UDC.

2. Guidelines dated 10 June 2019 on seniority payments before 2019 for enterprises in the garment, textile and footwear sectors

The MLVT issued official Guidelines 057/19 on 10 June 2019. Such Guidelines clarify the calculation of seniority payment back pay for employees before 2019 ("**Back Pay**") in the Garment, Textile, and Footwear ("**GTF**") Sectors. In accordance with the Guidelines 057/19, the following calculation of Back Pay apply:

- average base wages per month is equal to total base wages during the Back Pay entitlement period divided by the total number of months during the period of Back Pay entitlement period;
- average base wage per day is equal to average base wage per month above divided by 26 days;

- Back Pay per year is equal to average daily base wages above multiplied by 15;
- the calculation does not factor in probationary contracts; and
- the period of maternity leave, sick leave and leave due to work related accidents, shall be factored into the calculation of Back Pay.

Guidelines 057 also provide that Back Pay installments must be stated separately from monthly wages for tax purposes and provided to the employees in the second cycle of salary payment.

3. Notification dated 8 July 2019 on seniority payments before 2019 and new seniority pay from 2019 onward for enterprises in the garment, textile and footwear sectors

On 8 July 2019, the MLVT issued Notification No. 023/19 on the Back Pay and New Seniority Payments Each Year from 2019 ("**New Seniority Pay**"). Such a Notification reconfirms that Seniority Payment is only applicable to employees under a UDC. Employees under an FDC are entitled to Severance Pay of 5% if there is no separate collective bargaining agreement that provides differently. In the case that an FDC exceeds the maximum period allowed by law, employees who have received severance pay of 5% are not entitled to Back Pay under a UDC. The Notification also confirms that both Back Pay and New Seniority Pay are exempt from tax, except for foreign employees and, in the event of resignation by an employee or termination due to serious misconduct, such an employee will not be entitled to seniority payment.

№ 30, Norodom Boulevard
4th Floor BRED Bank Building
Sangkat Phsar Thmey 3
Khan Daun Penh (PO Box 7)
120203 Phnom Penh
Cambodia

Contact: Marion Carles-Salmon
MarionCarlesSalmon@dfdl.com

CHINA

1. Increasing Number of Mass Layoffs

The ongoing trade war between China and the United States has increasingly caused economic difficulties for many employers. Those employers hit the hardest, or merely choosing to move out of China, have responded in a wave of mass layoffs. While employers in theory could unilaterally terminate employees under labor law procedures, the practice remains for employers to offer severance packages and sign termination agreements with each terminated employee. The amount of packages has been on the increase, with some firms offering six months compensation in addition to statutory requirements.

2. Reduced Social Insurance Rates

In order to reduce the financial burden of employers during challenging economic times, the national government has reduced employer social insurance contribution obligations. In May 2019, the statutory pension rate was capped at 16% (of employee pay, such as to caps) and occupational injury rates were reduced 20% or 50%. In addition, local governments are required to lower the maximum cap and minimum floor of social insurance bases.

3. Individual Income Tax is Reduced

Individual income tax rules have been amended resulting in most employees seeing less deductions from their monthly paychecks. The monthly tax threshold was increased from RMB 3,500 to 5,000. Taxpayers may also deduct from their taxable income certain expenses, such as child tuition, costs of supporting parents, adult education, housing loan interest, and housing rent.

4. Protection of Women's Employment Rights

Regulations issued in February 2019 reiterated the probation against discriminating against women in employment. Employers are not allowed to advertise that job opportunities are not available to women, refuse to employ a woman based on her gender, inquire during recruitment about a woman's marriage and childbearing status or plans, or include a pregnancy test in a health check. Employers who violate these rules may be fined RMB 10,000 to 50,000, as well as having their discrimination practices released to the public.

CHINA

5. Renewed Pressure on Employers to Have Unions

The off-and-on unionization campaigns have resumed with union officials contacting companies to form branch unions within the companies. The pressure to form unions is China particularly strong for companies that have more than 100 employees. Although there is no penalty that could be imposed on employers who do not take steps to establish labor unions, employees who resist unionization may face increased scrutiny of their operations.

JunHe
26/F HKRI Centre One
HKRI Taikoo Hui
288 Shimen Road (No. 1)
Shanghai, China

Contact: Jeffrey Wilson
jeffrey_wilson@junhe.com

HONG KONG

1. Recognition of spousal benefits and joint-tax rights for same-sex married couples

In the recent decision of Leung Chun Kwong v Secretary for the Civil Service, the Hong Kong Court of Final Appeal ("CFA") ruled that same-sex couples who were legally married overseas should enjoy the same spousal benefits and right for joint assessment. The case was brought by way of judicial review against unlawful discrimination on the grounds of sexual orientation in the following decisions: (1) the Civil Service Bureau's denial of Leung's entitlement to spousal medical and dental benefits ("Benefits Decision"), and (2) the rejection of Leung's application for joint assessment with his same-sex spouse by the Inland Revenue Department ("Tax Decision"). The CFA acknowledged in its judgment that there are different forms of differential treatment that may be regarded as discriminatory and that unlawful discrimination is "fundamentally unacceptable" unless it can be justified. The CFA held that in denying a same-sex married couple the same employment benefits that were available to a heterosexual married couple, the Secretary for Civil Service's decision in the Benefits Decision was unjustifiable and discriminatory. Regarding the Tax Decision, the CFA rejected the proposition that heterosexual marriage would be undermined by the extension of the employment and tax benefits to same-sex married couples. The CFA held that the efficient administration of government and collection of revenue were unrelated to the protection of the institution of marriage.

The CFA's decision primarily concerns civil servants and its effects on the private sector remains to be seen. There may be arguments based on the implied duty of trust and confidence if the provisions of an employment contract should also comply with government practices. To avoid any allegation of unlawful discrimination on the grounds of sexual orientation, employers should review their internal policies and check whether their current benefit policies apply to both heterosexual and homosexual married couples.

2. The eligibility of the same-sex partner of a person holding an employment visa to apply for a dependent visa

As of 19 September 2018, the same-sex partner of a person holding a valid employment visa (who has entered into a same-sex marriage or civil partnership with that person) became eligible to apply for a dependent visa for entry into Hong Kong. This change followed the CFA's landmark decision of QT v Director of Immigration, a case which concerned the Director of Immigration's refusal to grant QT a dependent visa on the basis that the immigration policy interpreted

"spouse" for the purposes of dependency as "the concept of a married couple consisting of one male and one female".

3. Developments on the extension of maternity and paternity leave

On 18 January 2019, the Hong Kong Employment (Amendment) (No.3) Ordinance 2018 came into operation, providing for the increase in statutory paternity leave from 3 days to 5 days. The Labour and Welfare Bureau also submitted a review of statutory maternity leave ("ML") to the Legislative Council Panel on Manpower, setting out recommendations on amendments to be made to the Employment Ordinance including: (i) ML be increased from a continuous period of 10 weeks to 14 weeks; (ii) the rate of the ML pay for the extra 4 weeks of ML should be maintained at four-fifths of the employees' average daily wages; (iii) the cost for the extra 4 weeks ML pay would be borne by the government; and (iv) the cap for the extra 4 weeks ML pay should be $36,833 per employee. Employers should take note of the latest legislative changes and ensure that their ML policies are in full compliance with the statutory requirements.

Deacons
5th Floor, Alexandra House
18 Chater Road, Central
Hong Kong

Contact: Cynthia Chung
cynthia.chung@deacons.com

INDIA

1. Enactment of the Code on Wages 2019 ("Wage Code")

The Wage Code recently received Presidential assent after being passed by both houses of parliament. It remains to be notified in the official gazette before becoming applicable, but that is expected to happen in the near future. The Wage Code will replace the Minimum Wages Act, the Payment of Wages Act, the Equal Remuneration Act and the Payment of Bonus Act. The Wage Code brings about some significant changes, such as the following -

- The provisions on equal remuneration have become gender neutral, protecting all genders and not only women. It further expands the definition of "same or similar work" to account for "experience" of the individual as well, in addition to skill, effort and responsibility.
- The Wage Code has decriminalized all offenses except where it is a repeat similar offense within 5 years. It also allows compounding of the first offense. On the other hand, it also prescribes larger fines for non-compliance and the compensation payable for any default in payment of wages, minimum wages, bonus, etc. could be up to 10 times the claim determined by the relevant authority.
- The Wage Code states that the appropriate government must lay down an "inspection scheme", which may also provide for web-based inspection and calling of information, thereby avoiding the potential harassment organizations face in physical inspections. Further, labour inspectors have been given the dual role of a "Facilitator" as well.
- Another key feature is the provision allowing the Central Government to stipulate a "floor wage" (which may vary based on geographical areas), based on advice from the Central Advisory Board. While State governments retain the authority to determine their own minimum wages, these cannot be lower than the floor wage set by the Central Government. This would hopefully set the stage for greater uniformity in minimum wages across the country.

A key change that would work against employers, is the proposed removal of wage thresholds viz. obligations relating to deductions from wages. The existing Payment of Wages Act currently only extends to individuals whose wages don't exceed Rs 24,000 / month. Since no such wage limit has been contemplated by the Wage Code, all provisions prohibiting deductions from wages are likely to apply even to employees in senior supervisory and managerial roles, including the

C-suite of an organization. This would make matters cumbersome and onerous for employers, especially when it comes to structuring pay and benefits agreements with senior employees. Such arrangements increasingly involve claw back and other deduction provisions, which may fall afoul of this law.

2. Creche Rules in Bangalore and Gurugram

The Maternity Benefit Act was amended in 2017 to include a new provision mandating that establishments with 50 or more employees provide a creche facility, within such distance from the office as the government may stipulate. It's been 2 years since and finally the state government in Karnataka has rolled out formal rules regarding creches. The state government in Haryana too has come up with draft rules on this subject. Key highlights of the Karnataka rules are as follows -

- The creche must be within 500 m from the establishment's entrance;
- There must be one creche for every 30 children below the age of 6;
- The creche must always be open, based on the shift timings of employees and must have trained female staff;
- Every child must be medically examined at the time of admission and thereafter every 2 months.

These rules therefore go beyond just stipulating the distance of the creche, and lay out various other requirements, many of which are being argued as too onerous or prescriptive. Further, although the Maternity Benefit Act only applies to women and only makes provision for women to visit the creche (up to 4 daily visits are permitted), the Rules seem to go above and beyond in stating that the creche will be accessible to "parents". This raises questions as to whether organizations with an all-male workforce are also required to operate a creche or whether those who only hire male employees in night shifts are required to keep the creche open for use by male employees in the night. The rules also do not lend any clarity on whether the creche must be provided free of cost to employees or can be done on a cost-sharing basis, which is a crucial area that the industry had hoped will be clarified.

3. Supreme Court's ruling on PF contributions

The Supreme Court of India came out with a landmark ruling earlier this year in the case of *Regional PF Commissioner, West Bengal v. Vivekananda Vidyamandir* wherein it has reiterated and further expanded on principles based on which organizations are expected to make mandatory social security contributions. Under the Employees' Provident Fund Act (**EPF Act**) all organizations with 20 or more employees are required to contribute PF at the rate of 12% of the employees 'basic wages'. In India, it's common to split salaries into 'basic salary' and other tax saving and other allowances. The interpretation of the term 'basic wages' has been the subject of controversy for several decades, with organizations taking the stand that PF must only be paid on the 'basic salary' component and not on other allowances. The Supreme Court has now held to the contrary and established that PF contributions must be made on all allowances, if they are guaranteed and universal in nature. Further, the concept of universality seems to have been diluted further through this ruling, such that allowances being paid even to a select 'category' of employees would meet the universality test. This ruling has far reaching repercussions for Indian employers, since the EPF Act does not have any limitation period and the PF authorities could conduct assessments for previous years based on this judgement. Past liability can result in large financial exposure, since organizations will need to pay for the employee's contribution as well (i.e. 24%), along with interest (another 12%) and penalty (up to 25%).

Therefore, most organizations would either need to start contributing PF on 'allowances' right away or restructure their pay appropriately. Further, organizations would also need to take stock of their past PF contribution practices and make adequate *provision* or *book contingent liability* in their accounts for exposure associated with past years.

TriLegal
7th Floor
The Residency
#133/1, Residency Road
Bangalore - 560 025

Contact: Atul Gupta
atul.gupta@trilegal.com

INDONESIA

1. Positions Open for Expatriate Workers

Minister of Manpower Regulation No. 228 of 2019 regarding Certain Positions Open for Expatriates ("MoM Reg 228") details those positions that expatriate workers can hold. Highlights of MoM Reg 228 include the possibility of having an expatriate commissioner or director (non-HR) in all 18 business sectors listed in the decree, and the possibility that the MoM will approve positions that are not listed in the decree. Another important point is that the MoM will evaluate the list of positions open to expatriates at least every two years, or whenever necessary. Work Permits (Izin Mempekerjakan Tenaga Kerja Asing) issued before the issuance of this new decree will remain valid until their expiration.

MoM Reg 228 revokes 19 MoM regulations on positions open to expatriates in 19 different business sectors and any MoM regulation that provides any positive list for expatriate manpower positions.

2. Amendment to Outsourcing Regulation

A new Minister of Manpower regulation introduces several changes and provisions related to delegating work to other companies. MoM Regulation No. 11 of 2019 regarding the Second Amendment of Minister of Manpower and Transmigration Regulation No. 19 of 2012 regarding Requirements for the Partial Delegation of Work to Other Companies ("MoM Reg 11") is dated August 1, 2019.

In accordance with the purpose to streamline and ease business licensing services, as provided for in the preamble to Government Regulation No. 24 of 2018 regarding Electronically Integrated Business Licensing Services ("GR 24/2018"), Article 1 point 7(a) and (b) of MoM Reg 11 appoints the agency managing the Online Single Submission (OSS) system to issue business licenses for and on behalf of the MoM, and also to organize government matters in the field of investment. Consequently, the OSS system is responsible for issuing Labor Supplier Business Permits.

3. Online Mandatory Reporting of Employment by Companies

A new Ministry of Manpower regulation provides guidelines for companies submitting mandatory employment reports online. MoM Regulation No. 4 of 2019 regarding the Amendment of MoM Regulation No.18 of 2017 regarding Procedures for the Online Mandatory Reporting of Employment by Companies was issued on April 26, 2019. The new regulation covers

a number of topics including (a) online reporting, (b) reporting procedures, (c) utilization and management of submitted data, and (d) supervision.

4. Minimum Wage Calculation

The Minister of Manpower issued MoM Regulation No. 15 of 2018 regarding Minimum Wage at the end of 2018. This regulation clarifies the formula to calculate regional minimum wage. This new minimum wage formula is based on the sum of Indonesia's inflation and GDP growth over the past 12 months. Minimum wage is calculated using the formula as follows:

New minimum wage = current minimum wage + [current minimum wage x (Inflation + % GDP annual increase during the year)]

This new regulation replaces MoM Regulation No. 7 of 2017 regarding Minimum Wage.

SSEK
Mayapada Tower I,
14th Floor
Jl. Jend. Sudirman Kav.
28 Jakarta, 12920
Indonesia

Contact: Fahrul S. Yusuf
fahrulyusuf@ssek.com

JAPAN

1. Equal pay for equal work

The "Action Plan for the Realization of Work Style Reform" was established as of March 2017 by the Council for the Realization of Work Style Reform, a private advisory body to Prime Minister Shinzo Abe. That plan stated the policy of “equal pay for equal work” (i.e., the concept of paying the same wage to workers who have the same content of work). This policy was raised in order to realize a society in which everyone is motivated and can demonstrate his/her ability to the fullest extent. Some lawsuits were filed alleging that the wage differences between regular employees and non-regular employees were illegal. Now, a new law establishing provisions to eliminate unreasonable discriminatory treatment among regular workers, fixed-term workers and part-time workers is planned to be enforced in April 2020.

2. Regulations to limit overtime work

In the past it was not illegal to have employees work as long as required, so long as their working hours did not exceed the upper limit of the overtime working hours stipulated by agreement between a labor union, etc. and the employer. However, based on the above-mentioned "Action Plan for the Realization of Work Style Reform," which was adopted in March 2017, an upper limit for overtime hours at 720 hours per year had been considered. Then, in April 2019, as part of the so-called “work style reform laws,” the amended Labor Standards Act was enforced, setting forth the upper limit for overtime hours at 45 hours per month and 360 hours per year in general, and 720 hours per year under extraordinary circumstances.

3. Power harassment (workplace bullying)

So far, as for sexual harassment and maternity harassment, employers have been obligated to take necessary measures in terms of employment management under both the Act for Equal Employment Opportunity of Men and Women, and the Child Care and Family Care Leave Act, while there has been no such obligation applicable to power harassment. However, recent power harassment cases that have been receiving attention and other factors have led to the development of a revised act obligating employers to take measures to, among others, prevent workplace power harassment (this revised act is scheduled to become effective by June 2020).

4. High-Level Professional System

In April 2019, the amended Labor Standards Act was enforced as part of the so-called “work style reform laws,” under which employees who are assigned a definite scope of work, meet a certain annual income requirement (not less than 10,750,000 yen), and engage in work that

requires highly professional skills are exempt from regulations on work hours, holidays, extra payment for late night work, etc., subject to implementation of measures for securing health and welfare, acquisition of consent of the relevant employee, resolution of the relevant committee, and so forth. This is a system to respond to the needs of workers who desire to work in a manner that is evaluated not by the number of hours worked but by their performance, and to enable such workers to demonstrate their willingness and abilities to the fullest extent.

5. Requirement to ensure partial use of annual paid leave

Under the amended Labor Standards Act, enforced in April 2019 as part of the so-called "work style reform laws," employers are required to have each worker who receives ten (10) or more days of annual leave to use at least five (5) days of such annual leave by designating the date of use. The low rate of use for annual paid leave among employees in Japan compared to global standards has been considered problematic (the average number of days of annual paid leave granted by companies in 2017 was 18.2 days per worker, but the use thereof was 9.3 days on average), and the amendment was enacted to address such situation.

Ushijima & Partners
Sanno Park Tower 14F 11-1,
Nagatacho 2-chome
Chiyoda-ku, Tokyo, 100-6114
Japan

Contact: Rikisuke Yamanaka
rikisuke.yamanaka@ushijima-law.gr.jp

KOREA

1. Restructuring

With the current slowdown of the global economy, coupled with the trade war between the United States and China, the Korean economy is suffering from significant negative effects as it heavily depends on exports of goods and services.

The working hour reduction and minimum wage hikes discussed below also have had negative impacts, especially on small and medium-sized businesses and the self-employed. Finally, the fourth industrial revolution demands fundamental changes to existing business structures in many industries, such as the automobile industry. This has led many Korean companies (and foreign companies doing business in Korea) to take part in, or contemplate, restructurings of various types.

2. New Workplace Harassment Law

On July 16, 2019, an amendment to the Labor Standards Act ("LSA") made acts of workplace harassment unlawful. Workplace harassment is defined by the new law as any act that causes physical or mental suffering, or worsens the working environment of another worker, by taking advantage of one's position or relationship within the workplace beyond the appropriate work scope. Employers are required by this new law to modify their work rules to include provisions concerning workplace harassment and take affirmative measures to prevent workplace harassment, protect victims and reporters of such harassment, conduct prompt and thorough investigations, and educate employees on workplace harassment. It is also prohibited under the law to retaliate against or treat unfavorably victims and reporters of workplace harassment, and to do so risks criminal penalties.

3. Labor Unions and Unfair Labor Practices

The labor unionization rate in Korea in 2017 was 10.7%, which was a 0.4% point increase from 2016 and the highest since 2008. Based on current trends, we expect that the 2018 rate will be even higher, once official data is released. Coupled with this, the Ministry of Employment and Labor ("MOEL") has hired about 1,200 more labor inspectors since May 2017 (representing a 70% increase). As one of the first acts of the current presidential administration's policy agenda, the MOEL established a task force to investigate and remedy potential Unfair Labor Practices ("ULPs") on the part of employers against labor unions or employees attempting to establish

labor unions. Some of these new labor inspectors have been assigned to this task force. Further, labor unions also appear to have become more

aggressive in filing ULP claims, which carry potential criminal liability under Korean labor law, against employers.

The government has also taken a much tougher stance on enforcement and compliance issues generally, and this includes labor and employment issues. So the approximately 1,200 new labor inspectors have been very active conducting labor inspections on many of the other issues discussed herein, such as working hours and harassment issues (in fact, the MOEL has created a dedicated unit of labor officers to only conduct labor inspections).

4. Working Hour Reduction

Another policy goal of the government is to reduce employee working hours, which on average are some of the highest in the OECD. The government also believes that reducing working hours will increase the hiring of new workers. So in early 2018, the National Assembly passed legislation that reduced maximum weekly working hours from 68 to 52 hours. As of this date, the law applies to public institutions and workplaces with 300 or more employees, and it will apply to workplaces with 50 to 299 employees as of January 1, 2020 and workplaces with five to 49 employees as of July 1, 2021.

Because of the significant burden the work hour reduction has placed on employers, the government and various stakeholders have discussed expanding the application of two alternative working hour systems, specifically: (1) expanding the period over which hours may be averaged under the flexible working hour system from three months to six months; and (2) expanding the job categories that qualify under the deemed working hour system for discretionary type work. Of these two proposals, the expansion of the job categories that qualify for the discretionary working hour system has actually occurred (by way of recent MOEL guidance), while the legislation that would expand the measurement period for the flexible working hour system is still pending at the National Assembly.

5. Minimum Wage

Another aspect of the government's approach to improving employees' working conditions has been to increase the minimum wage. In this regard, the minimum wage increases since 2017 have been as follows:

KOREA

2018: KRW 7,530 (+16.4%)
2019: KRW 8,350 (+10.9%)
2020: KRW 8,590 (+2.9%)

Increased labor costs, such as this approximately 30% increase in the minimum wage over the past two years, has hit small and medium-sized businesses and the self-employed particularly hard, especially employers in the manufacturing, retail, accommodation, restaurant, and wholesale sectors.

President Moon had promised during his 2017 presidential campaign, and again after entering office, that he would increase the minimum wage to KRW 10,000 per hour by the end of his five-year term (in 2022). While the first two minimum wage increases for 2018 and 2019 were consistent with this goal, the minimum wage increase for 2020 will make it very difficult for the government to reach this goal without significant increases in 2021 and 2022.

Kim & Chang
Seyang Building
39, Sajik-ro 8-gil
Seoul, 03170, Korea

Contact: C.W Hyun
cwhyun@kimchang.com

MALAYSIA

1. Proposed Changes to the Employment Act

The Human Resources Ministry has proposed amendments to the Employment Act 1955 which include areas on enhancing overall protection to employees, increasing productivity, reducing working hours, handling forced labour issues, complying with international labour standards, improving the effectiveness of foreign workers' management and strengthening enforcement activities. The proposals include making the Act apply to all employees, irrespective of the wages they earn or their job scope. Currently, only certain employees are covered under the Act, mainly those whose monthly wages do not exceed RM2,000 or those engaged in manual labour. However, under the new proposals, certain provisions of the Act will not apply to employees earning more than RM5,000, such as hours of work, retrenchment benefits, and payment for working on a public holiday.

2. Mental Health in the Workplace

Mental health in the workplace should no longer be ignored as it can seriously affect workers and may be very costly to manage. When an employee is suffering from such condition at the workplace, it can potentially cause mental illness and absence due to medical reasons and long-term incapacity for work. Under the Occupational Safety and Health Act 1994, the focus is very much on safety and physical health although section 4(C) of the Act states that it aims to promote an occupational environment which meets the physiological and psychological needs of workers. A pertinent consideration for employers would be the implementation of policies / schemes if an employee is up against termination due to their mental health disorder.

3. Sexual harassment

The government is planning to table a Sexual Harassment Bill this year, following a feasibility study and consultation with NGOs and survivors of sexual harassment. The proposed legislation aims to complement existing criminal laws related to sexual harassment by plugging loopholes that will criminalize parties that fail to act on such complaints. It is pertinent to note that one of the proposed amendments to the Employment Act 1955 is that employers can no longer refuse to inquire into any complaint of sexual harassment. Proposed amendments to the Employment

MALAYSIA

Act 1955 require employers to have a written code or prevention of sexual harassment and have it placed in a conspicuous area. Employers are advised to review their policies on sexual harassment and provide trainings on the same.

4. Use of social media

The proliferation of social media has resulted in the extensive use of such tools and platforms globally. The right to privacy at the workplace comes with certain limitations. Whilst the law recognizes the right to privacy at the workplace, employers still have a legitimate right to either use reasonable means to monitor its employees to prevent the abuse of office facilities or to enforce discipline. An employer would be justified to take action against an employee where it can be shown that the employee had posted a statement on social media which affects the reputation of the employer. Where employees are found to have excessively used the company's equipment to gain access to social media, the employer would be justified to monitor the use of the same. It is pertinent to note that the repercussion of the misconduct depends on the severity of the infringement and the most serious repercussion will lead to dismissal. Employers should review their policies and procedures in relation to social media.

Shearn Delamore & Co.
7th Floor, Wisma Hamzah-
Kwong Hing
No. 1 Leboh Ampang
50100 Kuala Lumpur
Malaysia

Contact: Sivabalah Nadarajah
sivabalah@shearndelamore.com

MYANMAR

The second amendment to the Settlement of Labour Disputes Law of 2013 was passed on 3 June 2019 by the Parliament of the Union of Myanmar. Some of the key changes are provided below:

1. **Directors of companies are explicitly defined under the term "Employer" in the law.**
2. **Employers with 30 or more employees are responsible for forming a so-called "Workplace Coordinating Committee".**

Whereas the number of representatives required to form a committee under the original law was two, the amendment law provides that this Workplace Coordinating Committee includes three representatives, each for the employer and the employees. The term of the committee is two years (one year under the original law). In the case of any dispute between the employer and the employee, the Workplace Coordinating Committee must attempt to resolve the dispute and if successful, the parties shall form a collective agreement. Within one year from the signing date of such an agreement, any terms and conditions agreed to thereunder shall not be raised in complaint again. The collective agreement must be filed with a relevant dispute conciliation body.

3. **The terms "individual dispute" and "collective dispute" have been replaced by "dispute for employment rights and privileges" and "dispute for benefits" respectively.**

Under the Settlement of Labour Disputes Law 2013, both individual and collective disputes by the employee need to be settled through the dispute conciliation body before an appeal can be lodged with a competent court (in the case of an individual dispute) or step-by-step appeals to an arbitration council (in the case of collective disputes). Under the amendment law, if a dispute is related to employment rights and privileges, either the employer or the employee can submit his/her complaint directly to the relevant Department of Labour Relations or to a competent court. For disputes related to employment benefits, the grievance shall be submitted on a step-by-step basis from the dispute conciliation body to the arbitration council in the same manner as a collective dispute under the old law.

MYANMAR

4. Fines and penalties for non-compliance with the law have been revised.

Among others, the fine levied on an employer for non-compliance with formation of a Workplace Coordinating Committee has been revised to a range from MMK 300,000 to 1 million (under the original law it was MMK 100,000 then revised to MMK 500,000 in 2014).

DFDL
No. 134/A, Than Lwin Road,
Golden Valley Ward (1)
Bahan Township (GPO Box 729)
Yangon
Myanmar

Contact: Marion Carles-Salmon
MarionCarlesSalmon@dfdl.com

NEW ZEALAND

1. Employment Relations Amendment Act 2018

The Employment Relations Amendment Act 2018 was passed on 11 December 2018. The Act returns many provisions of the Employment Relations Act 2000 to its pre-2011 position, bolstering union protections and powers.

Changes which have been introduced include limiting 90-day trial periods to employers with fewer than 20 employees; reintroducing set rest and meal breaks; restoring reinstatement as the primary remedy for unjustifiable dismissals; enabling union representatives to enter workplaces without consent; and preventing employers from making partial deductions in response to partial strikes.

2. Domestic Violence—Victims' Protection Act 2018

The Domestic Violence—Victims' Protection Act 2018 came into force on 1 April 2019. Employees who are affected by domestic violence are now entitled to take up to 10 days paid domestic violence leave per year. Employees have a right to request a short-term (two month or shorter) variation of their working arrangements for employees to deal with the effects of domestic violence.

3. Employment Relations (Triangular Employment) Amendment Act 2019

The Employment Relations (Triangular Employment) Amendment Act 2019 was passed on 27 June 2019 and will come into force 12 months following this date. The Act introduces a new personal grievance framework whereby an employee may apply to have a controlling third party joined to proceedings.

4. Equal Pay Amendment Bill

The Equal Pay Amendment Bill aims to improve the process in which employees can raise, progress and resolve pay equity claims within New Zealand's existing bargaining framework and prohibits an employer from differentiating on the basis of sex.

The Education and Workforce Committee reported back on 13 May 2019 with recommendations, which included clarifying the definition of "predominantly performed by female employees" to mean work performed by a workforce of approximately 60% or more female workers; and clarifying that an employer must offer all of the terms of a settlement (including back pay) to employees who qualify for them.

NEW ZEALAND

The Bill is currently awaiting its second reading and is expected to pass in late 2019.

5. Privacy Bill

The Privacy Bill seeks to repeal and replace the Privacy Act 1993. The Justice Committee reported back on 13 March 2019, recommending amendments, including clarifying the mandatory data breach reporting regime; strengthening cross-border data flow protection and clarifying responsibilities for cloud service provider actions.

The Bill passed its second reading on 7 August 2019 and is expected to pass in late 2019 with a start date of 1 March 2020.

Simpson Grierson
Level 27, Lumley Centre
88 Shortland Street
Auckland 1010
New Zealand

Contact: John Rooney
john.rooney@simpsongrierson.com

PHILIPPINES

1. 105-Day Expanded Maternity Leave Law

This law increases the maternity leaves of working mothers from 60 or 78 days (for caesarean deliveries) to 105 paid days for both normal and caesarean deliveries (with seven days transferable to the fathers or partners of the working mothers subject to certain conditions). An additional 15 days are given to single mothers who qualify for solo parent benefits. The law removes the cap of four availments in the previous law. Lastly, employers are now required to pay the difference between the maternity benefit granted by the Social Security System and the employee's "full pay" for the entire duration of the 105-day maternity leave.

2. Hiring of Foreign Employees - Latest Immigration Updates

Joint Guidelines No. 1 series of 2019 (Joint Guidelines; effective on July 16, 2019) issued by Department of Labor and Employment (DOLE), Department of Justice (DOJ), Bureau of Immigration (BI), and Bureau of Internal Revenue (BIR) enumerates the nature of work or activities for which a Special Working Permit (SWP) can be issued by the BI. The Joint Guidelines also generally require the foreign national to obtain a Tax Identification Number (TIN) from the BIR.

3. New Mental Health Act - Republic Act No. 11036, June 20, 2018

This Act requires employers to develop appropriate policies and programs on mental health in the workplace designed to, among others, raise awareness on mental health issues, correct the stigma and discrimination associated with mental health conditions, identify and provide support for individuals at risk, and facilitate access of individuals with mental health conditions to treatment and psychosocial support. The Implementing Rules and Regulations (IRR) of the Mental Health Act were signed on January 22, 2019 and require the DOLE to issue the appropriate guidelines within 6 months from its effective date.

4. The Vetoed Security of Tenure and End of Endo Act of 2018 - Senate Bill No. 1826

The Bill aims to regulate the prevailing outsourcing arrangements by changing the definition of prohibited labor-only contracting to make it broader in scope. It was vetoed by the President on July 26, 2019 because "businesses should be allowed to determine whether they should outsource certain activities, regardless of whether such activity is directly related to their

business, so that the Philippines will not be placed at a disadvantage when compared to its peers in the region". The rules on outsourcing remain unchanged at this time because of the veto.

5. Social Security System Condonation Program under Republic Act (RA) No. 11199 or the "Social Security Act of 2018

Circular No. 2019-004, effective March 15, 2019, provides guidelines on the condonation and non-imposition of penalties on delinquent SSS contributions of employers ("Condonation Program") under the Transitory Clause of the Social Security Act of 2018. The employers who may avail of the Condonation program include, among others, those not yet registered with the SSS, those with pending cases involving collection of contributions and/or penalties or non-reporting of employees; those against whom judgment had been rendered either by the Social Security Commission or the regular Courts but have not complied with the judgment, and those against whom a warrant of distraint/ levy/garnishment or encumbrance had been issued.

SyCip Salazar Hernandez & Gatmaitan
SyCipLaw Center
105 Paseo de Roxas
Makati City
Philippines 1226

Contact: Dante T. Pamintuan
dtpamintuan@syciplaw.com

SINGAPORE

1. Recent changes in the Employment Act ("EA")

Singapore recently (on 1 April 2019) amended its EA, spurring many employers to review their employment contracts and policies to ensure compliance with Singapore law and practice. Notably, save for seafarers, domestic workers and government employees, all employees are now covered by the EA. Previously, the EA only protected a certain class of employees, i.e. the more junior / lower paid staff.

As a consequence of the amendments, among other matters, deductions from salary and the handling of cases involving the dismissal of employees need to be handled with particular care. With respect to the former, employers should note that the EA explicitly provides for the type of deductions which can be made (previously, for non EA protected employees, this was subject to contract, and we have found that many contracts are now not compliant with the EA provisions). As for the latter, the EA allows any employee who considers that he has been dismissed without just cause or excuse (regardless of whether the termination is with or without notice), to lodge a claim under the Employment Claims Act (before the Employment Claims Tribunal) for one of the following remedies: (a) reinstatement or (b) compensation. This clause applies to employees who have served the employer for at least 6 months in any position. We have seen a rise in wrongful termination complaints in recent months.

2. Role of the Tripartite Alliance for Fair and Progressive Employment Practices ("Tripartite Alliance")

The Tripartite Alliance (comprising stakeholders from the Ministry of Manpower ("MOM"), the National Trade Union Congress and the Singapore National Employer's Federation) publish topical guidelines, advisories and standards to deal with current employment issues, and in recent months, more such publications have been issued. Guidelines need to be complied with (and they can attract sanctions). Advisories should be complied with as a general rule. Standards outline best practices for companies to adopt.

SINGAPORE

3. Increase in retirement age and CPF contribution rates

On 18 August 2019, Prime Minister Lee Hsien Loong announced the raise in retirement age and re-employment age to 65 and 70 respectively by 2030. The Central Provident Fund (CPF) contribution rates for older workers will also increase gradually from 2021 onwards. Companies can expect a "support package" by the government to help them adjust to these changes, such as re-designing company training and jobs around the abilities of older workers.

4. Work Injury Compensation ("WIC") Bill 2019

The WIC Bill was passed on 3 September 2019 and will replace the current WIC Act, coming into effect on 1 September 2020. Changes employers should take note of include higher maximum pay-outs for mandatory insurance covering work-related injuries, compensating employees on light duties due to work injury and compulsory reporting for all work-related leave or light duties to MOM. To safeguard employers, a core set of standard terms for WIC-compliant policies will also be prescribed to ensure adequate insurance coverage.

Wong Partnership
12 Marina Boulevard Level 28
Marina Bay Financial Centre
Tower 3
Singapore 018982

Contact: Jenny Tsin
jenny.tsin@wongpartnership.com

SRI LANKA

1. Proposed Employment Act

Presently, there is a draft formulated on the initiative of the Labour Department, which envisages, *inter alia*, providing for uniformity in respect of matters such as hours of work, remuneration, non-discrimination etc. The Act is intended to apply to all employment contracts or agreements in Sri Lanka other than employment under the government, any local authority or registered society within the meaning of the Cooperative Societies Law or any religious or charitable institution within the meaning of the Inland Revenue Act. With regards to employees, it is to apply to citizens of Sri Lanka and others who have the legal right to work in Sri Lanka and the proposed Act sets out minimum requirements.

Some of the more important provisions of the proposed law are the following: A legal duty is cast upon employers to recruit persons to be employees in a non-discriminatory manner and a duty to treat all employees in a fair and equal manner. It specifically makes it an offence for an employer, manpower agency or employment agency to discriminate against any person in any of the terms and conditions of hiring, employment, remuneration, promotion or termination of employment on the basis of gender, race, origin, religion, ethnicity, political views, language, creed, cast, age, family or marital status or disability - other than instances which may be specified in the draft Act, (e.g. where knowledge of a particular language is required for the performance of the task). Making a difference in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value, directly or indirectly based on any of the aforesaid grounds constitutes discrimination. The criteria or methodology for assessing work of equal value is to be prescribed by the Commissioner of Labour. Employers and manpower supply or employment agencies are also prohibited from inquiring into matters such as the family status, marital status or parenting responsibilities of any prospective or current employee and it would also be an offence for employers, manpower supply and/or employment agencies to inquire into the pregnancy status of any prospective or current female employee or to inquire into her child-bearing plans or childcare arrangements. Any such inquiry would constitute discrimination except where such inquiry is for the purpose of determining entitlements to benefits. The draft Act specifically makes it an offence for employers, manpower supply and/or employment agencies to permit an employer, employee or any other person to engage in sexual harassment, (defined in the Act), against any person. Advertising vacancies with a stated preference for male or female employees or a preference on the basis of race origin, religion, ethnicity, caste, age, family or marital status or disability.

Further, while employers would be permitted to request to examine and to make photocopies of original identification documents and/or educational or other similar documents of prospective employees it would be an offence for employers to retain the originals of such documents.

With regards to fixed-term contracts of employment, the draft Act, while providing for such contracts also provides that consecutive fixed-term contracts may be entered into where such contracts are specifically linked to the performance of a particular task project or customer contract of the employer. Provision is made for employment contracts to be extended by mutual consent and if an employer retains the services of an employee after the expiration of a fixed-term contract for more than six calendar months, the contract is to be deemed to have been extended for the same period as the "existing", (i.e. now expired), contract. Unwritten oral contracts may be inferred from practices and where evidenced by the length of service such contracts for more than 5 years would be presumed to be for an indefinite term. Whereas currently there is no statutory provision regarding casual employment, the draft Act expressly provides that an employee shall be deemed to be engaged in casual work, (implied only), if employed for not more than 36 days in any one calendar year. Among the other important changes proposed are provisions for compressed work week and the disentitlement to overtime pay for employees who are managers or other categories of staff as may be exempted by regulations made by the Minister under the Act and/or employees who are in receipt of a certain amount of basic wage, (the amount which is yet to be determined). The draft Act also contemplates provision with respect to employment by manpower agencies and employment agencies for a minimum retirement age of 60 years subject to the proviso of the Minister being empowered to vary that age by occupation.

2. Termination of employment

Two statutes that bear on the matter of termination of employment are the Termination of Employment of Workmen (Special Provisions) Act [TEWA] and the Industrial Disputes Act. In terms of the former Act, that no employer can terminate the "scheduled employment" of any workman, (i.e. employee) – except as a punishment by way of disciplinary action - without either the prior consent in writing of the workman or the prior written approval of the Commissioner of Labour. Most employers and employees would be covered by this Act. The Industrial Disputes Act provides for any employee whose services have been terminated to make an application for relief to a Labour tribunal and the tribunal is empowered after such inquiry as it thinks fit to make any order that it considers just and equitable. Where relief is granted to an employee, such relief

could be in the form of reinstatement with full back wages from the time of termination to the time of reinstatement. Further, while the Tribunal could order compensation instead of reinstatement, there is no limit on the quantity of such compensation.

Although TEWA provides for a time limit of two months within which the Commissioner should make his order on an application by an employer to terminate the scheduled employment of a workman, it has been held that this is not mandatory but merely directory and it has been found impractical; the reality is that any such application may be pending even for a year - if not more - and the employer would be obliged to make payment of wages etc. to the workman during that period.

Where approval to terminate is granted by the Commissioner, he is empowered to award compensation to the workman. However, such compensation must be according to a prescribed formula tied to the number of years of employment but cannot exceed a sum of one million two hundred and fifty thousand Sri Lanka Rupees. In the case of the Industrial Disputes Act, the "letter of the law" requires the Labour Tribunal to make its order after inquiry within four months of the date the application is made. Further, it is provided that appeals to the High Court and/or Supreme Court, (if leave is granted), are concluded, in each case, within four months of the appeal filing. The reality is that the appeals process often takes many years and this is a problem for both parties.

3. Employment of Foreign Employees

Foreign employees who are to be employed in Sri Lanka have to be granted a work permit in order to do so. Generally, such permit would be granted only where the nature of the employment would not be possible to fill the vacancy with a local employee and/or the employer can show first that attempts to recruit locally have been unsuccessful and secondly that the prospective foreign employee has all necessary qualifications for the job.

SRI LANKA

4. Restrictive covenants

The general principle applicable to such covenants – noncompete agreements confidential information etc. would be prima facie be void and would not be enforced except where the Court considers that in the particular circumstances of the case, it is reasonable – such as where a proprietary right/interest, (e.g. trade secrets) of the employer is involved.

John Wilson Partners
365 Dam Street
Colombo 12
Sri Lanka

Contact: John Wilson
advice@srilankalaw.com

TAIWAN

1. Specific Stipulations Regarding "Labor Dispatch" in the Labor Standards Act

In the amendments to the Labor Standards Act that the Ministry of Labor announced on May 15, 2019, provisions regarding labor dispatch are officially incorporated into the statute effective immediately. The key points of the amendments are as follows: (a) Definitions for "dispatch business entity", "dispatch target entity", "dispatched worker", "dispatch agreement", (Article 2); (b) the employment agreement between the dispatch business entity and the dispatched worker shall be contracts of indefinite term to prevent the dispatch business entity from evading its contract termination and severance obligations, as well as, the stability of the worker's employment (Article 9, Paragraph 1); (c) if the dispatch business entity fails to pay owed wages to the dispatched worker despite notifications to do so, the dispatch target entity is responsible for the makeup payment of such wages so as to prevent hardship to the worker as a result of accumulated wages owed by the dispatch business entity (Article 22-1).

On June 19, 2019, a further amendment to the above labor dispatch rules was implemented, which prohibits the dispatch target entity from evading its employer responsibilities by assigning an employee who has passed its interview to a dispatch business entity and then dispatch back to work at the dispatch target entity (Article 17-1). Meanwhile, the dispatch target entity shall be jointly responsible with the dispatch business entity for compensation to workers injured in an occupational hazard incident, thereby providing greater protection to the workers' rights (Article 63-1).

2. Exempting High-Level Supervisory Personnel Making NT$150,000/month or more from Certain Restrictions in the Labor Standards Act

Article 84-1 of the Labor Standards Act exempts personnel in certain occupations (as announced by the Ministry of Labor) from certain restrictions regarding working hours, regular days off, national holidays and female workers' night work in the same law. On May 23, 2019, the Ministry of Labor issued a circular defining personnel who are in a supervisory or management role and earn at least NT$150,000/month as those that are exempt under Article 84-1 due to the need for greater flexibility in their hours in carrying out their management roles.

TAIWAN

3. The Rules on Employee Spouses Shall Apply Mutatis Mutandis to the Spouses of Same-Sex Marriages

The Judicial Yuan No.748 Interpretations was released on May 24, 2019 which officially legalized same-sex marriage in Taiwan. Article 24, Paragraph 2 of the Interpretations expressly state that all current laws in force regarding couples, spouses, marriage, and all rules borne out of a spousal relationship, shall apply mutatis mutandis to same-sex couples. The Ministry of Labor has thus further confirmed in a press release that all current labor laws in force regarding employee spouses shall apply in the case of same-sex marriages as well, including at least (a) receiving compensation for occupational hazard injuries, (b) requesting special stipends (such as births, funerals, survivor's benefits); and (c) reasons for taking leave (such as marriages, funerals).

Lee, Tsai & Partners
9F, 218 Tun Hwa S.
Road, Sec. 2
Taipei, 106
Taiwan, R.O.C.

Contact: Chung -Teh Lee
ctlee@leetsai.com

THAILAND

1. Employee termination may be an expensive proposition

An employee terminated other than for "cause" (which is narrowly defined in Thai legislation) will be entitled to severance pay, advance notice of termination (or payment in lieu thereof) and other benefits depending on the employment terms. Severance pay is a fixed tariff based on length of service; and currently the maximum severance entitlement is 400 days of basic wage for employment of 20 years or more. An employee terminated with severance is often also able to succeed with an additional "unfair termination" claim for additional damages fixed at the court's discretion. There are few reliable criteria as to when a termination is unfair, or as to what measure of damage is appropriate - but a common award is one month per year of employment.

2. Calculation of severance can be tricky depending on the type of benefits involved

Severance pay is a multiple of daily basic wage, which is money paid for work performed during regular work hours. Issues often arise as to whether allowances, commissions and other such amounts fall within the meaning of the term "wage", and each case turns on its own facts. Broadly speaking, recurring fixed amounts paid without the employee being required to produce evidence of having incurred expense are apt to be treated as "wage", but there can be exceptions and in recent years there has been a slight trend in the courts towards stricter interpretation, i.e. exclusion of certain types of payment from the "wage" definition.

3. Period of employment outside of Thailand may be included in calculating severance pay

Expatriate personnel with a long history of continuous employment with an international group are sometimes assigned to the group's subsidiary in Thailand, which ends up being the final assignment for whatever reason and are terminated under circumstances that do not constitute "cause". Even if having worked in Thailand for only a short period, such employees can often claim severance from the local subsidiary in Thailand based on the length of their global employment within the group. In some cases, there will also be an unfair termination entitlement, and again the global employment period would form the basis for whatever damages awarded. In such cases it can sometimes make sense for the group to consider reassigning the executive from Thailand to a different jurisdiction before proceeding with other steps, though the rationale for any such reassignment must not be made explicit.

THAILAND

4. Outsourced workers may be entitled to same benefits as regular employees

Business operators which use the services of outsource suppliers or subcontractors are required to provide remuneration, benefits and welfare to the employees of such outsource

suppliers or subcontractors on terms no less favorable than those enjoyed by the business operator's direct employees having the same or an equivalent function. Additionally, should the business operator inform an outsource supplier or subcontractor that it no longer requires certain of their employees (whether or not those outsource or subcontract employees have an equivalent among the business operator's direct employees), and should those outsource or subcontract employees in consequence be terminated by the direct employer (the supplier or the subcontractor), the business operator will be jointly liable with the direct employer for all components of termination compensation payable to those employees.

5. Employee consent required for transfers to a new entity

Employees may not be transferred to a new employer without the employees' consent. An employee not consenting to the transfer is entitled to severance pay and may also be able to claim unfair termination damages. For employees who do consent to transfer then a harmonization of employment terms by the new employer across its entire workforce again requires individual employee consents.

6. Be careful with scope of non-compete and non-solicitation provisions

Non-compete and non-solicitation provisions in employment contracts are permissible, but under unfair contract terms, legislation will be upheld only to the extent they are found to be fair and in line with market practice. It sometimes happens, however, that such restrictions are imposed in consideration of significant ongoing payments, arising at the date of termination, and it is thought - though there have been few if any cases on point in the Thai courts – that Thai courts would then look more favorably on such provisions.

7. Retiring employees at least 60 years old entitled to severance

There is no mandatory retirement age under Thai law for the private sector. However, a retirement age may be prescribed in an employment contract, or in the work rules of the employer. An employer terminating based on the employee's age is considered terminating without "cause" and is thus required to give severance pay, even where the employee is at an

agreed or prescribed retirement age. Also, when employees reach 60 years of age they may at any time thereafter give one month's notice to the employer of retirement, and must then be released with severance pay calculated as if the employer had terminated the employee.

8. Additional notice and severance requirements for terminations based on machinery or technology

If an employee is being let go as a result of introduction of machinery (including office equipment) or improvement in technology, then 60 days advance notice is required, and should this requirement not be observed then certain additional severance pay can be claimed over and above the regular severance pay. Furthermore, employees who have worked for at least six years will be entitled to additional severance of 15 days basic pay for each year worked.

9. Employees unwilling to relocate may resign with severance.

An employer must give 30 days advance notice to its employees of any planned relocation of a workplace. If an employee chooses not to relocate but to resign, then the employee must give 30 days notice to the employer and the employee will be entitled to severance pay calculated as if the employer had terminated the employee.

10. Maintenance and protection of employee personal data.

All employers are subject to a requirement to keep records of employees' email, chat, internet usage and personal identification for a minimum of 90 days. Starting in May 2020, the employee's personal data will also be subject to Thailand's Personal Data Protection Act (PDPA), which includes restrictions on the collection, use and transfer of personal data. Employers that have their own data privacy policies will want to ensure that they comply with the new PDPA.

Price Sanond
16th Floor Q House
Sathorn
11 South Sathorn Road
Bangkok 10120
Thailand

Contact: Andrew Wynne
awynne@pricesanond.com

PARTICIPATING FIRMS

Cambodia
№ 30, Norodom Boulevard
4th Floor BRED Bank Building
Sangkat Phsar Thmey 3
Khan Daun Penh (PO Box 7)
120203 Phnom Penh
Cambodia
Contact: Marion Carles-Salmon
MarionCarlesSalmon@dfdl.com

China
JunHe
26/F HKRI Centre One
HKRI Taikoo Hui
288 Shimen Road (No. 1)
Shanghai, China
Contact: Jeffrey Wilson
jeffrey_wilson@junhe.com

Hong Kong
Deacons
5th Floor, Alexandra House
18 Chater Road, Central
Hong Kong
Contact: Cynthia Chung
cynthia.chung@deacons.com

India
TriLegal
The Residency
7th Floor
#133/1, Residency Road
Bangalore - 560 025
Contact: Atul Gupta
atul.gupta@trilegal.com

Indonesia
SSEK
Mayapada Tower I, 14th Floor
Jl. Jend. Sudirman Kav. 28
Jakarta, 12920
Indonesia
Contact: Fahrul S. Yusuf
fahrulyusuf@ssek.com

Japan
Ushijima & Partners
Sanno Park Tower 14F 11-1,
Nagatacho 2-chome
Chiyoda-ku, Tokyo, 100-6114
Japan
Contact: Rikisuke Yamanaka
rikisuke.yamanaka@ushijima-law.gr.jp

Korea
Kim & Chang
Seyang Building
39, Sajik-ro 8-gil
Seoul, 03170, Korea
Contact: C.W Hyun
cwhyun@kimchang.com

Malaysia
Shearn Delamore & Co.
7th Floor, Wisma Hamzah-Kwong Hing
No. 1 Leboh Ampang
50100 Kuala Lumpur
Malaysia
Contact: Sivabalah Nadarajah
sivabalah@shearndelamore.com

Myanmar
DFDL
No. 134/A, Than Lwin Road,
Golden Valley Ward (1)
Bahan Township (GPO Box 729)
Yangon
Myanmar
Contact: Marion Carles-Salmon
MarionCarlesSalmon@dfdl.com

New Zealand
Simpson Grierson
Level 27, Lumley Centre
88 Shortland Street
Auckland 1010
New Zealand
Contact: John Rooney
john.rooney@simpsongrierson.com

Philippines
SyCip Salazar Hernandez & Gatmaitan
SyCipLaw Center
105 Paseo de Roxas
Makati City
Philippines 1226
Contact: Dante T. Pamintuan
dtpamintuan@syciplaw.com

Singapore
Wong Partnership
12 Marina Boulevard Level 28
Marina Bay Financial Centre
Tower 3
Singapore 018982
Contact: Jenny Tsin
jenny.tsin@wongpartnership.com

Sri Lanka
John Wilson Partners
365 Dam Street
Colombo 12
Sri Lanka
Contact: John Wilson
advice@srilankalaw.com

Taiwan
Lee, Tsai & Partners
9F, 218 Tun Hwa S. Road, Sec. 2
Taipei, 106
Taiwan, R.O.C.
Contact: Chung -Teh Lee
ctlee@leetsai.com

Thailand
Price Sanond
16th Floor Q House Sathorn
11 South Sathorn Road
Bangkok 10120
Thailand
Contact: Andrew Wynne
awynne@pricesanond.com

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