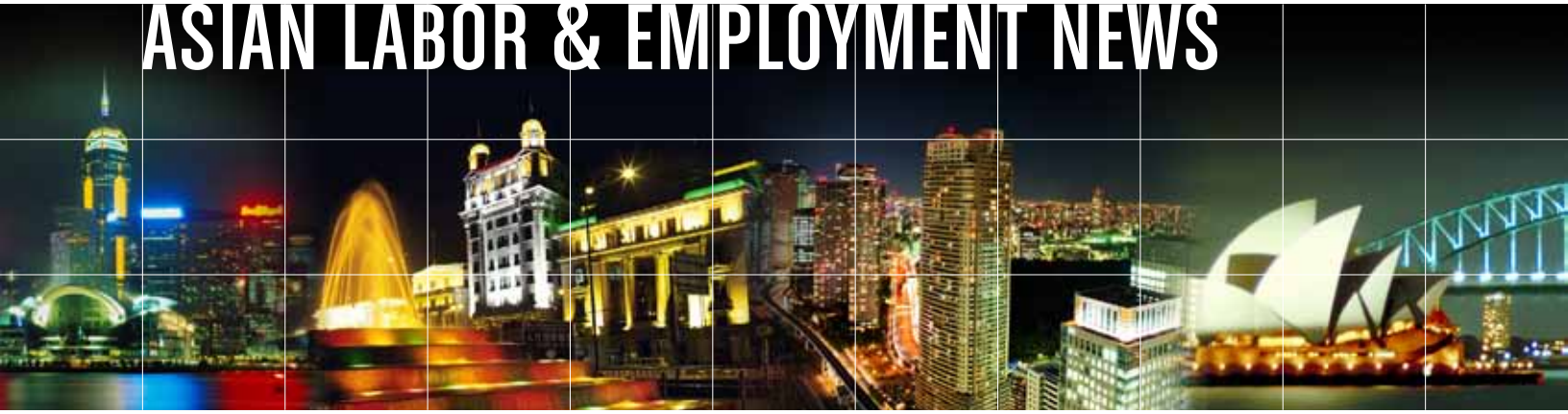
JONES DAY

VOLUME 2 ▪ ISSUE 1 ▪ JANUARY 2010

ASIAN LABOR & EMPLOYMENT NEWS



LABOR DISPUTES AND LABOR RIGHTS IN HONG KONG

In the current harsh economic climate, employees in every sector are having to grit their teeth and accept the prospect of job losses or agree to less favorable terms and conditions. Generally, these issues are resolved by collective agreement and without undue disruption, but recent months have seen a growing number of workers expressing discontent through strikes and other forms of trade union activities.

Some disputes, such as those involving airport ground crews and contract workers at PCCW Limited—the holding company of HKT Group Holdings Limited, Hong Kong's premier telecommunications provider and a world-class player in information and communication technologies—have been settled quickly and quite amicably. Others, like the January strike by approximately 200 Nepali security guards employed by G4S plc ("G4S")—a large security services provider with operations in more than 110 countries[1]—have had further repercussions and raised questions about the legal protections strikers have in Hong Kong and the actions employers may take. In the G4S case, security staff left their guard posts in support of a demand for pay raises and other improvements in benefits. Subsequently, the company dismissed approximately 100 of the security guards, stating that the strike had caused a loss of business, but the Confederation of Trade Unions argued that this conduct amounted to wrongful dismissal. As a result, G4S reached an agreement with the striking guards and agreed to reinstate all the guards whose employment contracts

[1] http://www.g4s.com/home/about.htm.

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had been terminated. The company allowed them either to resume their former positions where possible or to receive an alternative placement with the company within one month. G4S also agreed to an increase in monthly wages of HK$300; the agreement provided that the company would not be liable for any further recovery to those involved. Such agreements do not have to be approved by Hong Kong authorities.

Under Article 27 of the Basic Law, all Hong Kong residents enjoy the right and freedom to partake in trade union activities and to strike. Also, Section 9(2) of the Employment Ordinance ("EO") specifically stipulates that the fact that an employee takes part in a strike does not entitle his employer to summarily terminate the employee's employment contract. This applies whether the strike takes place within or outside working hours. Moreover, Section 70 of the EO expressly provides that any term of an employment contract that purports to extinguish or reduce any right, benefit, or protection afforded to an employee by the EO shall be void. Thus, an employer is prohibited from inserting in the employment contract any term that purports to render participation in a strike by the employee a breach of the employment contract.

A company that violates this part of the law must pay the employee a sum equal to the wages otherwise payable for the contractual notice period. The required notice period for terminating an employee is that provided in the employment contract, but not less than seven days, unless it is during probation. Absent a contractual provision governing notice of termination, the law presumes a monthly renewable contract, and the notice period is set at one month, under Section 6 of the EO. There may also be liability for additional damages, such as for the termination of a fixed-term contract (unlikely to be used in the case of security guards), as the contract would indicate what the employee would have earned during the remainder of the contract period.

On the other hand, there is no bar to the hiring by the employer of temporary or permanent personnel to take up the work of the striking employees during the period the employees are on strike, provided the employment contracts of the striking employees have not been terminated in contravention of the EO. Moreover, reinstatement is not required by Hong Kong law, even if the employee has been wrongfully dismissed for participation in a lawful economic strike.

The EO also affords every employee the right to participate in trade union activities either outside working hours or at a time agreed by the employer. Any company that prevents or deters staff from exercising this right, or penalizes them for doing so, will be guilty of an offense and is liable to be fined up to HK$100,000.

If an employer is found to have dismissed someone for taking part in union activities, the court may find that an order for the reinstatement of the employee is appropriate, and subject to the agreement of both the employer and the employee to such an order being made, the court shall make an order for the same. The employer can refuse reinstatement, in which case the court may award compensation in addition to the terminal payments to which the employee is entitled. The compensation will be an amount the court considers just and appropriate, but not exceeding HK$150,000, which is the statutory maximum. The calculation will take account of general and special damages normally measured by the loss of expected earnings and wages payable in lieu of proper notice of termination.

Critics of Hong Kong law suggest that it provides insufficient protection for strikers and trade unionists. For example, the EO does not prevent an employer from terminating a contract by stating other reasons. Thus, a company might be able to allege underperformance in an appraisal in order to justify dismissal, rather than referring to strike- or union-related activities that may have been the true underlying motivation.

Hong Kong still relies on the Labour Relations Ordinance ("LRO") of the laws of Hong Kong, which came into operation in 1975, to promote settlement of labor disputes through conciliation and mediation. The LRO empowers the Commissioner for Labour to intervene and lay down a set of procedures to facilitate resolution of a dispute. In 2008, the Labour Department handled about 120 separate disputes involving 20 or more employees, the majority of which were resolved through settlement. The Department also settled more than 70 percent of the over 20,000 smaller wage claims it handled during the year.

Participation in the process is entirely voluntary, but it can help parties in dispute reach an agreement that is legally binding. In the absence of such participation, the Commissioner

can refer the matter to a mediator who has the power to make recommendations and push for settlement by making these public.

One part of the LRO, yet to come into operation, grants the Chief Executive in Council the power to impose a cooling-off period in very special circumstances, where possible interruption of the supply of goods or services may harm the economy, the public order, or livelihoods.

A cooling-off order might require the withdrawal of instructions for industrial action or their deferment for a specific period. It would also prohibit workers from calling a strike or threatening to do so and would prevent employers from penalizing staff previously involved in strike activities. So far, the Department has apparently not seen the need to resort to this measure.

JAPAN AMENDS LABOR STANDARDS ACT TO RAISE OVERTIME PREMIUM AND REQUIRE OTHER MEASURES TO DISCOURAGE OVERLONG WORK HOURS

In Japan, the Labor Standards Act (Act No. 49 of 1947, as amended, hereinafter "LSA") was amended on December 12, 2008. Accordingly, some changes were made to the Ordinance for Enforcement of the Labor Standards Act and other related regulations. The amendment to the LSA will come into effect on April 1, 2010 ("Effective Date").

The main purpose of the amendment is to cut down prolonged work hours by increasing the premium that must be paid for such overtime work. The prolonging of work hours has become an issue of public concern. A recent study shows that the number of employees who work more than 60 hours a week is increasing, reaching 20 percent for those in their 30s.

The statutory limit of working hours under the LSA is eight hours a day or 40 hours a week. However, by entering into a labor-management agreement, an employer may extend the working hours over the statutory limit according to such agreement.

In the event that an employer extends the working hours over the statutory limit, the employer must pay an overtime premium for such overtime work hours, which is calculated according to the rate stated by the cabinet order (presently 25 percent or more of a normal wage). Currently the rate does not change, no matter how many hours the employee works beyond the statutory limit.

The newly amended LSA ("Amended LSA") modifies the 45-hour standard on the extension of working hours set by the Minister of Health, Labor and Welfare ("Standard"). The modified Standard provides that an employer has a legal duty to make efforts to minimize overtime work hours that exceed the 45-hour limit and to increase the overtime premium paid (up to 25 percent of a normal wage) for work hours that exceed the 45-hour limit.

To reduce the incentive to require extremely long working hours, the Amended LSA stipulates that the rate of increase for the overtime premium for overtime work hours that exceed 60 hours a month shall be 50 percent or more of a normal wage. In addition, by agreement, an employee who actually works overtime in excess of 60 hours a month would be entitled to take an "alternative paid leave" in substitution for a portion of the overtime premium otherwise required.

Note that the amendment to overtime allowances for the overtime work hours exceeding 60 hours a month will not be applicable to certain small and medium-sized enterprises for a certain period of time after the Effective Date, in consideration of the possible economic impact the amendment might have on such enterprises.

Also, the LSA has been amended to allow annual leave of up to five days a year if a prior agreement between the employer and employee so provides. Whether the leave is taken on a daily or hourly basis is determined by the employee.

Companies are required to have new work rules reflecting these changes in effect by April 2010. In some areas, employers must enter into proper agreements with their employees to effect these changes.

MANAGING LABOR LAW COMPLIANCE ACROSS MULTIPLE LOCATIONS IN CHINA

It is now common for international companies with operations in China to expand those operations beyond a single location, with multiple legal entities and/or branch offices spread across the country. Yet while this geographic expansion may bring increased business opportunities, it makes labor compliance a more complicated matter. China HR teams, often based in regional headquarters in Shanghai, Beijing, or Hong Kong, have the challenging task of ensuring that their companies comply with fast-changing national and local labor laws in each location where they have employees. We set forth below a few practice tips to keep in mind when managing the HR function across multiple locations.

- **LABOR LAWS, AND THEIR IMPLEMENTATION AND ENFORCEMENT, CAN VARY CONSIDERABLY ACROSS LOCALES.**

While it is true that local and regional labor laws should fall within the framework of national labor laws, the latter typically contain broad language that not only allows for significant regional variation in implementation and enforcement, but also opens the door for local and regional labor laws to fill in the gaps. Consequently, it is not uncommon for provisions of an HR policy to be legal in one location and run counter to local practice in another. For instance, the base salary rules for calculating overtime pay vary considerably across locations. In Shanghai advance notice prior to the expiration of an employment contract is not required, while in Tianjin it is required and an employer must pay one month's salary if it fails to give at least 30 days' notice. Yet another provision that varies by location is the length of maternity leave. There are numerous other examples of this, all of which underscore the need to keep up with the laws and practice rules in any location where the company has employees.

- **WHEN POSSIBLE, CONSIDER MATCHING UP THE EMPLOYER'S REGISTERED ADDRESS WITH THE PLACE WHERE THE EMPLOYEE WILL PERFORM THE CONTRACT.**

PRC national law provides that if the place where the employment contract is performed (the "Place of Performance") differs from the place where the employer is registered, the relevant rules of the Place of Performance regarding the employee's minimum salary requirements, employment conditions, prevention of occupational hazards, and other employment matters will prevail. This further illustrates why it is difficult for companies to adopt unified HR policies throughout China. However, if the local labor standards of the employer's registered address are higher than those of the Place of Performance and both parties have agreed in the employment contract to comply with the former, then the parties' agreement will prevail. Given the challenge companies face in learning and monitoring changes in the laws, rules, and enforcement trends in both the Place of Performance and the registered address, one approach companies can take to simplify this issue is to "localize" the employment relationship by designating a subsidiary or branch office where the employee works as the employer on the contract, thereby clarifying that the rules of the Place of Performance will apply.

- **USE A LABOR DISPATCH AGENCY TO RESOLVE DISCREPANCIES BETWEEN THE EMPLOYER'S REGISTERED ADDRESS AND THE PLACE OF PERFORMANCE.**

Use of labor dispatch agencies can provide additional flexibility. Such agencies play a useful role in resolving rule discrepancies across locations in favor of a company's headquarters. For example, a company's head office in Shanghai could hire people in Hangzhou to work at its Hangzhou facility by using a Hangzhou labor dispatch agency, and by doing so, the company would be able to apply the local rules of Shanghai instead of the rules of the Place of Performance. This can be advantageous if the local rules in Hangzhou are less favorable for the company than those of the company's registered address.

- **EXPRESSLY AGREE IN THE EMPLOYMENT CONTRACT ON THE COURT OF JURISDICTION FOR LABOR DISPUTES.**

As mentioned above, it is often the case that the employees will be hired in one location (*e.g.*, the company's head office in Shanghai) but will need to work in a different location and therefore will have a Place of Performance that differs from the employer's registered address. PRC law provides that both the employer's registered office and that of the Place of Performance have jurisdiction in labor dispute arbitrations. This creates the possibility of the parties submitting the case to different arbitration commissions, with each commission having jurisdiction to oversee its respective case. To avoid this

scenario, it may prove helpful to specify in the employment contract the specific arbitration commission the parties agree to use in the event of a dispute. From the company's perspective, this should be the jurisdiction whose local rules it is using to govern the employment relationship. Such specification increases the possibility that if the case proceeds to trial, the company may be assigned a judge who is familiar with the local rules the employer has been using in administering the employment relationship.

NEW RESTRICTIONS ON TERMINATION PAYMENTS MADE TO EXECUTIVES OF AUSTRALIAN COMPANIES

Executive remuneration practices have been identified internationally as a key contributor to the current economic and financial crisis. The Australian federal government, like other governments, is attempting to strengthen the regulatory framework in relation to the remuneration of directors and executives. To this end, the Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 (Cth) (the "Act") was enacted on November 23, 2009. The Act sets out the restrictions that will be imposed on executive termination payments in Australia and, more generally, in the wider context of executive remuneration.

In addition to the ordinary fiduciary duties of directors of Australian companies, the new Division 2 of Part 2D.2 of the Corporations Act 2001 (Cth) now regulates the payment of benefits in connection with a director's retirement from a board or managerial office (or loss of that office). Essentially, it is an offense to receive a "benefit" on retirement from a board or managerial office (or loss of that office) without the approval of the members of the company (or to give such benefit to someone connected to that person). The new legislation incorporates exhaustive definitions and examples of what constitutes a "benefit" (which includes any payments made in lieu of notice of termination, any options that vest on termination, and any superannuation contributions made in excess of the minimum statutory requirements). Expressly excluded from this definition are deferred bonuses (*i.e.*, bonuses that have been earned and not yet paid) and any payments from a defined-benefit superannuation scheme that was in existence before the new laws came into effect.

Under the Act, termination payments for a "person holding a managerial or executive office" (which includes senior executives and key management personnel) are capped at 12 months' "base salary" (excluding any statutory entitlements such as accrued annual leave or long service leave) unless shareholder approval is obtained. Previously, shareholder approval was required only where the value of the benefit was more than seven years of the executive's total annual remuneration. The lower threshold, when combined with the expansion of the definition of "benefit," means that a far broader range of payments is subject to shareholder approval. Any payments made without the necessary approval have to be repaid, and the penalties for all such payments are increased under the Act (with maximum penalties of AU$19,800 for an individual and AU$99,000 for a body corporate), together with the option of six months' imprisonment.

As is the case in the U.S., where there are similar prohibitions regarding the making of "golden parachute" payments to certain senior executives, the proposed changes will have a direct impact on the way companies design compensation packages (encouraging increased base salaries and sign-on bonuses). While the Act holds that the changes will not apply retrospectively, the new provisions will apply to any contracts that are made, renewed, or varied after November 23, 2009. Therefore, moving forward, companies will need to keep these restrictions in mind when making and reviewing executive contracts.

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JONES DAY LOCATIONS

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