

### A GREATER CHINA LOCAL FIRM

# Asia Employment Law: Quarterly Review

2015-2016

ISSUE 11: FIRST QUARTER 2016





### **INTRODUCTION**

Asia's legal and human resources advisors are often required to function across multiple jurisdictions. Staying on top of employment-related legal developments is important but can be challenging.

To help keep you up to date, our firm produces the **Asia Employment Law: Quarterly Review**, an e-publication covering 15 jurisdictions in Asia.

In this eleventh edition, we flag and provide comment on anticipated employment law developments during the first quarter of 2016 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2016.

This publication is a result of ongoing cross-border collaboration between 15 law firms across Asia with whose lawyers our firm has had the pleasure of working with closely for many years. For a list of contributing lawyers and law firms, please see the <u>contacts page</u>.

We hope you find this edition useful.





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### High Court Rules Courts can Consider Agreements on Penalty in Civil **Penalty Proceedings**

In Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate and Others [2015] HCA 46, the High Court of Australia unanimously held that courts are not precluded - in civil penalty proceedings - from considering and (if appropriate) imposing penalties that have been agreed between the parties.

As a result, prosecuting authorities such as work health and safety regulators, the Fair Work Ombudsman, and the Australian Competition and Consumer Commission may enter into penalty agreements with parties who have breached civil penalty provisions of applicable legislation. Those agreements can then be produced for consideration by a court when it comes to determining the appropriate penalty.

The decision resolves an area of recent uncertainty, and is likely to encourage parties who have engaged in civil penalty breaches to resolve (rather than contest) any resulting enforcement proceedings.

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### Sexual Harassment Damages Exceed \$330,000 in Recent VCAT Ruling

In Collins v Smith (Human Rights) [2015] VCAT 1992, the Victorian Civil and Administrative Tribunal (VCAT) awarded the complainant in a sexual harassment case over A\$330,000 in damages. The decision continues the shift in approach to assessment of damages for sexual harassment contraventions which was affirmed in Richardson v Oracle Corporation Australia Pty Ltd and Tucker [2014] FCAFC 82.

This new approach reflects a recognition: 'that community attitudes regarding the impact of sexual harassment [have] changed, in particular that the adverse consequences ... can extend to loss of employment and career; severe psychological illness; and relationship breakdown.'

Applying these principles in this case, VCAT awarded general damages in the amount of A\$180,000; aggravated damages of A\$20,000; another A\$120,000 for past and future loss of earnings and superannuation; and A\$12,280 for out of pocket expenses - making a total damages amount of A\$332,280. The conduct complained of involved the manager (in a small workplace with few employees) engaging in repeated attempts to kiss and embrace the complainant employee; touching her inappropriately; and sending her incessant text and phone messages containing further sexual advances.

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### Government Releases Reports of the Productivity Commission Workplace Relations Review and the Trade Unions Royal Commission

The Final Report of the Productivity Commission's Inquiry into the Workplace Relations Framework was released on 21 December, followed by the Royal Commission into Trade Union Governance and Corruption Final Report on 30 December.

After two years of hearings, the Final Report of the Trade Unions Royal Commission (TURC) concluded that there has been 'widespread' and 'deep-seated' misconduct on the part of Australian union officials over the last 23 years – including corruption, financial arrangements favouring the interests of unions over their members, fraudulent payments, and misappropriation of union funds.

As the federal Government has already committed to implementing the recommendations of the Trade Unions Royal Commission (TURC), while it is still weighing up its response to the Productivity Commission (PC) report. 2016 is likely to be dominated by discussion of proposals for increased regulation of trade unions. This will include lifting standards of financial probity, disclosure and accountability within unions; substantially increasing the penalties for serious breaches of these legal requirements; and establishing a specialist agency to oversee and enforce the new regulatory regime, the Registered Organisations Commission.

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Looking Forward In the Final Report on its wide-ranging review of Australia's federal workplace relations system, the Productivity Commission (PC) took the overall the view that the system is not fundamentally flawed – but requires 'repairs' in several key areas. These include:

- Establishing a new body, separate from the Fair Work Commission (FWC), called the Workplace Standards Commission with the functions of reviewing and varying the minimum wage and modern awards;
- Reducing Sunday penalty rates for permanent employees in the hospitality, entertainment, retail, restaurant and cafe industries to Saturday rates;
- Introducing a new statutory instrument 'enterprise contracts' which would enable small-medium enterprises to implement award variations without having to engage in individual or collective negotiations with employees;
- Providing employers with several new options to finalise agreements for 'greenfields' business projects, and allowing these agreements to be struck for the duration of the relevant project.

The Government is still weighing up its response to the report, as several of the recommendations may be politically risky in the lead-up to this year's federal election. Consultation will now take place with major stakeholders before the Government announces the changes that will for part of its pre-election workplace relations policy.

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### FWC Full Bench Sets High Bar for Industrial Action 'Cooling Off' Periods

In MUA v Patrick Stevedores Holdings Pty Ltd [2016] FWCFB 711, a Full Bench of the Fair Work Commission indicated that clear evidence will need to be provided in support of an employer's application for a "cooling off" period under section 425 of the Fair Work Act 2009 (Cth).

The parties have been negotiating since March 2015 over a new agreement for Patrick's port operations at Brisbane, Port Botany, Melbourne and Fremantle. Towards the end of 2015, the union instigated the process for taking protected industrial action in support of its bargaining claims. Action in the form of work bans and stoppages commenced in January 2016. The employer then sought a suspension of the union's action under section 425, to enable negotiations to re-commence through a 'cooling off' period.

The Full Bench overturned the decision at first instance granting the employer's application for a cooling off order. According to the Full Bench, the tribunal member below had reached an incorrect factual conclusion that the elevation of hostilities between the parties (including the union's resort to industrial action) had precluded discussion and negotiation.

The decision sets a high bar for the evidence that will be required to substantiate the employer's argument that a suspension of protected action will assist the parties to reach an agreement.

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# Federal Circuit Court Imposes Penalties on Employer for Underpayment of Interns

In Fair Work Ombudsman v Aldred [2016] FCCA 220, the Federal Circuit Court fined a former marketing chief executive A\$17,500 for engaging three interns at below award rates of pay. The conduct of the executive which was found to be unlawful included:

- Representing to the young graphic design, multi-media and marketing interns that their terms of engagement accorded with minimum statutory employment conditions a claim which was intended to dissuade them from checking on their legal entitlements;
- Falsifying the payslip of one of the interns, by changing her employment status.

The court imposed the penalty after an investigation by the Fair Work Ombudsman which also resulted in the executive repaying the interns around A\$10,000 in unpaid wages. They had been engaged for three-month internships with the prospect of ongoing positions to follow.

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The decision follows increased attention on the use of unpaid work experience and internships in Australia in recent years, and greater enforcement activity in this area by the Fair Work Ombudsman.

A widespread underpayment scandal has also been exposed in 7-Eleven franchises across Australia. In September 2015, the company responded to public concern about this issue by appointing an independent panel to review the wage claims of all underpaid workers, which 7-Eleven head office will repay (even though it was not the direct employer of the employees concerned).

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# The New Labour Dispute Judgment Guidelines Issued by Shenzhen People's Intermediate Court

On 1 December 2015, the Shenzhen People's Intermediate Court issued "Judgment Guidelines for the Trial of Labour Dispute Cases" (hereinafter called "the Judgment Guidelines"), with "Explanations on the Judgment Guidelines (hereinafter called "Explanations"). The Explanations are attached to the Judgment Guidelines as elaboration. In Labour disputes occurred among the contractor, subcontractor, the affiliated party, the lessor of business license involving illegal contracting or subcontracting to employers without entity qualifications, the Explanations set out how to identify legal relations and determine the attribution of liability in such labour disputes.

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### Population and Family Planning Law Revised

Recently, the Decision on Revising the Population and Family Planning Law (the "Decision") was adopted at the 18th Session of the Standing Committee of the National People's Congress for implementation as of 1 January 2016.

The Decision expressly states that the State advocates two children for every couple. If provisions on giving birth to more than one child are different in provinces, autonomous regions, and/or municipalities directly under the Central Government where a couple's registered permanent residence is located, the provisions in favour of the couple shall apply. The Decision provides that a couple having children in compliance with provisions set forth in the laws and regulations may receive extended maternity leave or other benefits. In addition, the Decision also proposes that, during the period of the State's one-child policy, couples voluntarily opted to have only one child shall be issued a Glorious One-child Parents Certificate by the State. Couples holding this Glorious One-child Parents Certificate may enjoy benefits related to one-child parents in accordance with the relevant provisions of the State, provinces, autonomous regions, and/or municipalities directly under the Central Government.

More.

# Opinion on Comprehensive Regulation of Migrant Workers' Arrears of Wages Issued

Recently, the General Office of the State Council has issued the Opinion on the Comprehensive Regulation of Migrant Workers' Arrears of Wages (the "Opinion").

The Opinion highlights that it is imperative to clarify the responsibilities of all parties involved in wage payment. In the field of project construction, the contractors shall take overall responsibility for the payment of the migrant workers' wages in respect of their contracted engineering work. All enterprises shall be urged to, conclude employment contracts with the migrant workers in accordance with the law and strictly perform those contracts, create registers of employees and go through the record-filing procedures for employment. In the field of project construction, the administrative system for migrant workers by real names shall be implemented in all respects. Meanwhile, the Opinion proposes that in order to improve the system for the monitoring and guaranteeing wage payment, a mechanism for wage payment and a wage deposit system in enterprises be established to perfect the administration of special accounts system for migrant workers' wages (labour service fees), and put in place the responsibilities for settlement of arrears of wages. It is imperative to promote the set up of a credit system for wage payment by enterprises, set up a "blacklist" system listing enterprises with wage payment problems, by including the enterprises' illegal acts such as arrears of wages in the credit systems. For disputes involving arrears of wages, they shall be handled in a timely fashion, investigated and punished in accordance with the law.

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Circular on Seeking Public Comments for the Opinion on Issues Concerning the Implementation of Regulations on Work-related Injury Insurance (II) (Draft for Comments) ("the Circular")

For implementing the Regulations on Work-related Injury Insurance and resolving the Con't

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policy difficulties in practical work, the Circular issued recently by the Ministry of Human Resources and Social Security was released to the public to solicit their opinions. The Comments specified the corresponding content in the Regulations on Work-related Injury Insurance against some unclear points regarding certification of work-related injury, e.g. the concept of "on the way between home and office" when determining work-related injuries, the case of an employee injured in a non-work related activity required by the employer, etc.

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### State Council Cancelled 61 Ooccupational Qualification Certification and Rrecognition

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On 20 January 2016, the State Council issued the Decision Guo Fa [2016] No. 5, cancelling 61 occupational qualifications certification and recognition. Meanwhile, the Decision suggested cancelling one occupational qualification certification set according to the law, which the State Council will submit to the Standing Committee of the National People's Congress (NPC) to amend the relevant regulations. According to the Decision, a total of 43 occupational qualifications and certifications for professionals are to be removed, including relating to entry requirements and 38 relating to competence evaluation; another 18 for skilled personnel qualifications and certifications are to be removed, all of these are relating to competence evaluation.

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### Circular on Adjusting Premium Rate for Insurance for Work Related Injuries was Issued by Shanghai Municipality

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Industrial benchmark premium rate for work related injury insurance shall be implemented in Shanghai Municipal with premium rates floated upwards or downward according to factors such as the employer's rate of contribution to work related injury insurance and the incidence of work-related accidents, from 1 October 2015. The premium rate of the work-related injury insurance will be maintained at the benchmark rate of the national work injury insurance industry corresponding to Types 1 to 8 work injury risks of the industries at approximately 0.2%, 0.4%, 0.7%, 0.9%, 1.1%, 1.3%, 1.6% and 1.9% respectively, and the rate will be adjusted according to the principal of "tax-and-spend and balance of payments".

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### The People's Bank of China (PBOC) Improves the Deposit Rate Formation Mechanism for Employee Housing Provident Fund Accounts

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With the approval of the State Council, the PBOC, the Ministry of Housing and the Urban-Rural Development (MHURD) and the Ministry of Finance recently printed and distributed the Notice on Improving the formulation of a mechanism on determination of Deposit Rate for Employee Housing Provident Fund Accounts (Yin Fa [2016] No. 43). According to the Notice, as from 21 February 2016, the Employee Housing Provident Fund Account deposit rates will be determined according to the 1-year benchmark deposit interest rate, thus replacing the previously adopted basis of on-demand and 3-month deposit benchmark interest rates as at the time of fund collection.

### New Policy on Population and Family Planning were Issued by Many **Provinces**

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At the end of 2015, Guangdong Province first published the revised Regulations on Population and Family Planning. Subsequently, many provinces also published their local regulations on population and family planning. On 23rd Feb 2016, Shanghai Municipality issued its revised Regulations on Population and Family Planning. All of the above provinces have abolished the late marriage leave and late maternity leave, these province also formulated their local standard marriage leave and maternity leave. So far more than ten cities and provinces like Tianjin, Zhejiang and Ningxia have published their local population and family planning regulations. The longest period of maternity leave is 180 days and the shortest period of maternity leave is 128 days, the difference is almost two months. The



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longest period of marriage leave is 30 days and the shortest period is only 3 days.

CONTRIBUTED BY: MAYER+BROWN JSM

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### The Standard Working Hours Committee held its 18th meeting

The Standard Working Hours Committee ("SWHC") held its 18th meeting on 29 December 2015.

The SWHC recommended exploring a legislative approach to mandatorily require employers and employees in general to enter into written employment contracts, specifying clearly such terms relating to working hours, e.g. the number of working hours, overtime work arrangements and methods of overtime compensation (i.e. the "big frame").

The SWHC also explored whether there is a need for other suitable measure(s) to provide further protection for grass-roots employees with lower income, lower skills and less bargaining power (i.e. the "small frame").

The SWHC agreed to consult major trade associations and labour organisations, employers' and employees' associations of the relatively long-working-hours sectors, and other relevant organisations on its preliminary discussion outcomes and working hours policy directions under exploration (the "second-stage consultation")

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### The Contracts (Rights of Third Parties) Ordinance Came into Force

The Contracts (Rights of Third Parties) Ordinance (Cap. 623) ("the Ordinance") came into force on 1 January 2016.

The Ordinance applies to most types of contracts, with very limited exceptions. It reforms the privity of contract rule that only a party to a contract may enforce it. The Ordinance enables someone who is not a party to a contract to have rights under it, if:

- The contract gives that person an express right to do so; or
- A contract term purports to confer a benefit on that person.

If this is not your intention, then action is required. Standard employment contract templates should be reviewed to check that appropriate safeguards, such as an exclusion (where third parties are not intended to have any enforceable rights) or a restriction (where third parties are intended to have some enforceable rights) of the Ordinance are in place. New variations of existing employment contracts should also be checked.

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# The Equal Opportunities Commission ("EOC") Announced its Findings on Age Discrimination in Employment

The EOC published its report: "Exploratory Study on Age Discrimination in Employment".

The exploratory study featured a quantitative telephone survey with 401 employed persons as well as qualitative in-depth interviews with key stakeholders, including 10 employers from small-and-medium enterprises (SME), three SME employees, and four Legislative Councillors.

The study found that there is substantial support among employees across all age groups for legislation against age discrimination. According to the quantitative survey, 35% of employed persons have experienced some form of age discrimination at work in the last five years, with mature workers being most vulnerable. The most commonly experienced forms of discrimination included receiving lower salaries, being denied job promotions and being targeted for redundancy in organisational re-structuring.

Based on the research findings, the EOC made policy recommendations to the Government and also urged the Government to publicise the "Practical Guidelines for Employers on Eliminating Age Discrimination in Employment" more widely.

Full Report
Press Release

The Equal Opportunities Commission ("EOC") Announced its Study on Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status

The EOC published its report: "Study on Legislation against Discrimination on the Grounds

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of Sexual Orientation, Gender Identity (SOGI) and Intersex Status". The extensive study was conducted by the Gender Research Centre of the Hong Kong Institute of Asia-Pacific Studies at The Chinese University of Hong Kong.

The study revealed that discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people is a common occurrence in Hong Kong. The study found that public opinion has visibly shifted in favour of legislation against discrimination on the grounds of sexual orientation, gender identity, and intersex status. Over half (55.7%) of the telephone survey respondents (over 1000 respondents were interviewed) agreed with legislation – nearly double the comparable figure from a decade ago. Notably, the vast majority (91.8%) of youth considered anti-discrimination legislation necessary, while nearly half (48.9%) of those with religious views also concurred.

There is currently no comprehensive legal protection against discrimination on the grounds of sexual orientation, gender identity and intersex status in Hong Kong. The EOC hopes this report will lay the groundwork for the Government to carry out a public consultation on potential anti-discrimination legislation and move on from the question of whether or not there should be legislation on the grounds of sexual orientation, gender identity and intersex status to how such legislation should be designed.

Full Report Press Release

### The Standard Working Hours Committee Held its 19th Meeting

The Standard Working Hours Committee ('SWHC') held its 19th meeting on 26 January 2016.

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The SWHC further discussed the revised draft second-stage consultation document in the meeting. With reference to the SWHC's discussion, the secretariat would formulate the relevant documents and arrangements relating to the second-stage consultation for consideration by members of the SWHC.

The SWHC stated it would need more time to complete the remaining work (including conducting the second-stage consultation, formulating appropriate and feasible working hours policy directions, as well as preparing the SWHC's report). Given that the current term of the SWHC will end in early April 2016, the SWHC submitted to the Government a proposal to extend its term.

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# Privacy Commissioner Issued Statement Highlighting Record Number of Privacy Complaints in 2015

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The Office of the Privacy Commissioner for Personal Data received a record number of complaints in 2015. There was a rising trend in the number of enquiries and complaints in relation to the use of information and communications technology ("ICT"). A number of data leakage incidents occurred during the year amounted to a contravention of data security principle. Such statistics indicated an increase in public awareness on personal data privacy protection. The rapid development of ICT and the use of big data and cloud computing will further change the ways that individuals' personal data is collected, retained and used.

Please see the full press release for the statistical breakdown of the complaints and inquiries received by the Privacy Commissioner in 2015.

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### Hong Kong's Employment (Amendment) Bill 2016

Hong Kong's Employment (Amendment) Bill 2016 (the "Bill") was gazetted on 12 February

The Bill, if passed in its current form, will amend the Employment Ordinance (Cap. 57) to provide that where an employee is unreasonably and unlawfully dismissed, the Labour Tribunal may make a reinstatement or re-engagement order without the consent of the employer. Currently, the Tribunal can only make such an order if the employer consents, which would be extraordinary!

If an employer refuses to re-engage a dismissed employee, then it will need to pay the employee a maximum sum of three times the employee's average monthly wages, subject to a cap of HK\$50,000. This sum is on top of the monetary remedies payable to the employee currently provided in the Employment Ordinance. An order for re-engagement can be satisfied by an associated company if the dismissed employee agrees.

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### The Standard Working Hours Committee Held its 20th Meeting

The Standard Working Hours Committee ('SWHC') held its 20th meeting on 24 February 2016.

The SWHC continued to discuss the relevant draft documents and arrangements relating to the second-stage consultation. The second-stage consultation aims to start in April 2016 and is expected to take three months. During the consultation period, the SWHC will meet with major employers' associations and labour organisations, and organise consultation forums for, among others, the relatively long-working-hours sectors and the general public to listen to the views of the community on working hours policy directions being considered by the SWHC.

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### District Court Dismissed a Claim of Unfair Treatment and Dismissal on Grounds of Disability, Sex and Family Status Discrimination

On 4 March 2016, the District Court in Law Miu Kuen Sally v Sunbase International (Holdings) Limited (DCEO 7/2012) dismissed a claim of disability, sex and family status discrimination in relation to the unfair treatment and dismissal of an employee.

### **Facts**

The Plaintiff (" $\mathbf{P}'$ ) was a long-serving employee of the Defendant (" $\mathbf{D}''$ ) and frequently took sick leave to undergo medical treatment. In 2009, D issued a set of guidelines ("Leave **Guideline**") which required all employees to submit sick leave certificates and stipulated that paid sick leave would only be granted for sick leave periods of not less than 4 days. Prior to this, D had paid all sick leaves in full and did not require sick leave certificates. In 2010, in a meeting between P and P's supervisors, P was asked to resign and, upon return from maternity leave, P's employment was terminated.

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### Claim

P claims the issuance of the Leave Guideline and her dismissal were targeted against her disabilities, sex and family status, in contravention of the Disability Discrimination Ordinance, Sex Discrimination Ordinance and Family Status Discrimination Ordinance.

### **Test**

The burden was on P to prove discrimination on the balance of probabilities and the court applied the two-part test stated in Mv Secretary for Justice [2009] 2 HKLRD 298, namely (i) whether less favourable treatment to the plaintiff had occurred and (ii) whether it had been caused by one of the prohibited discriminatory grounds.

### **Findings**

The court dismissed P's claim for the following reasons:

1. The Leave Guideline was not discriminatory because (i) it complied with the Employment Ordinance so it could not be argued that D committed discrimination by

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complying with the law, (ii) the procedural requirements under the Leave Guideline (i.e. how to report sick leave and the need to provide a sick leave certificate) were reasonable and fair, and (3) P's employment contract stated that "other matters" (including sick leave) would be governed by company guidelines and the Employment Ordinance; and

2. Evidence revealed that P had a prolonged record of poor work performance, had behavioural problems in the workplace and had breached D's company computer guidelines by possessing a large amount of personal data on her computer. The cumulative weight of evidence indicated it was more probable than not that P was dismissed for legitimate reasons rather than as a result of discrimination against P's physical condition, sex or family status.

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### EOC Makes Recommendations to the Government on Comprehensive Reforms to the Anti-Discrimination Legislation

On 29 March 2016, the Equal Opportunities Commission ("EOC") issued 73 recommendations to the Government to reform Hong Kong's existing four antidiscrimination ordinances, which consist of the sex, family status, race and disability discrimination ordinances.

The EOC specifically highlighted 27 issues as higher priority areas for reform, which can be summarised into the following categories:

- Providing stronger and more comprehensive protection for various vulnerable groups, including people with disabilities, women, and ethnic minorities.
  - o Recommendations included introducing express protection for people with disabilities who are accompanied by assistance animals and women who are breastfeeding, and expanding the protection against racial discrimination by association beyond close relatives to also cover friends, colleagues, and other associates.
- Encouraging institutional changes and addressing systemic inequality.
  - o Recommendations included introducing a duty to provide reasonable accommodation for people with disabilities across multiple domains and the right of women to return to a work position after maternity leave.
- Facilitating more effective application of the anti-discrimination ordinances.
  - o Recommendations included enhancing the clarity and consistency of the definition and protection against direct and indirect discrimination as well as harassment across various protected characteristics.
- Closing gaps in the existing protection against discrimination.
  - o Recommendations included providing protection from racial discrimination in relation to the exercise of Government functions and powers, and providing express protection from discrimination in voting and standing for elections for persons with disabilities.

The EOC's 73 recommendations were a product of their Discrimination Law Review, which included a four-month public consultation. The aim was to simplify and modernise Hong Kong's anti-discrimination regime.

Full Reports:

EOC's Submissions to the Government

EOC's Report on Responses to the Public Consultation

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Introduction of simplified forms for claims related to withdrawals and advances under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (the **EPF Act**)

For claiming withdrawal and advances of the amounts accumulated in their provident fund accounts, members earlier had to get the relevant forms attested by the employer before submitting them to the EPF authorities. The EPFO has now introduced new forms 19 UAN, 10C UAN and 31 UAN. These new forms can be utilized by members who have (i) activated their Universal Account Number (**UAN**), (ii) seeded their bank account and identification details as part of the Know your Customer (**KYC**) process, and (iii) got these details verified through the employer's digital signature. Such members can submit these new forms to the EPF authorities directly without obtaining any attestation by the employer.

More...

### Amendment to Labour Laws in Gujarat

The Labour Laws (Gujarat Amendment) Act, 2015 came into effect from 30 December 2015, incorporating changes to various labour laws applicable in the State of Gujarat.

The salient features of the amendment include:

- The limitation period for raising an industrial dispute in relation to a dismissal, discharge etc., by an individual workman under the Industrial Disputes Act, 1947 (the **ID Act**) has been decreased from 3 years to 1 year;
- The ID Act as applicable in Gujarat had special provisions applicable to establishments set up in Special Economic Zones (**SEZ**). These establishments were exempt from providing a notification to the Government at the time of termination of workmen level employees on grounds of redundancy (which is required for all other commercial establishments). However, the SEZ units were required to pay 'retrenchment compensation' of 45 days wages for every year of service to such workmen, though other establishments are only required to pay retrenchment compensation of 30 days' wages for every year of service. After the Amendment in 2015, these special provisions now apply to workmen employed in industrial establishments located in Special Investment Regions, National Manufacturing and Investment Zones and 100% exportoriented units as well. The amount of retrenchment compensation payable by such entities has been further increased to 60 days wages for every year of service;
- Monetary penalties under various labour laws have been increased under the amendment; and
- Provisions related to compounding of offences have been included with respect to offences under various labour laws.

More...

### Amendment to the Payment of Bonus Act, 1965 (the PB Act)

The PB Act provides for the payment of bonus to persons employed in establishments having 20 or more employees. Prior to the Payment of Bonus (Amendment) Act, 2015 (the **Amendment Act**), employees earning INR 10,000 or less per month were eligible to receive a bonus. Under the Amendment Act, the wage threshold for determining eligibility of employees has been revised from INR 10,000 to INR 21,000 per month, covering a larger pool of employees. Further, the maximum bonus payable under the PB Act was 20% of the wages of the employee, subject to a wage of ceiling of INR 3,500 per month. The minimum bonus payment was also capped at 8.33% of INR 3,500 per month (assuming the employee earns more than INR 3,500 per month) or INR 100, whichever is higher. The calculation ceiling of INR 3,500 has now been doubled to INR 7,000 per month "or the minimum wage for the scheduled employment, as fixed by the appropriate Government" (whichever is higher). Therefore, the cost associated with bonus payments could double (or be greater still, depending on applicable minimum wages).

The Amendment Act was brought into retrospective effect from 1 April 2014. This retrospective nature of the Amendment Act has met with opposition from employer groups. Writ petitions have been filed challenging the retrospective application, and the

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High Courts in two Indian States, Karnataka and Kerala, have stayed the operation and implementation of the amendment to the extent of its retrospective applicability pending disposal of the petitions. Taking note of these developments, the labour authorities in some States (like Madhya Pradesh) have clarified that no enforcement of the Amendment Act will take place for the financial year 2014-2015 until the writ petitions mentioned above are disposed of.

More..

# Removal of grace period for payment of monthly contributions under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ("EPF Act")

8 JAN Under the EPF Act, employers are expected to make monthly remittances in the form of provident fund contributions and administrative charges. These remittances take into account the contributions of both the employer and the employee to the schemes under the EPF Act. The remittances are to be made within 15 days of the close of each month. Earlier, the employer was allowed a grace period of a further 5 days to make the necessary remittances, and hence, could remit the amounts by the 20th of each subsequent month. The EPFO has now discontinued this 5 day grace period which was available to employers for making remittances under the EPF Act. For remittances for the month of January 2016 onwards (which are payable in the subsequent month), employers will have to adhere to the 15 day limit as prescribed under the law.

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### Measures for Promoting Start-ups in India

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The EPFO issued a circular on 21 January 2016, outlining measures to ease compliance requirements in order to facilitate the growth of start-ups. These include the exempting of start-ups from being inspected during the first year of their existence under the EPF Act. The start-ups would be required to submit an online self-declaration instead. Further, start-ups can submit self-certified returns under the EPF Act until the end of the third year of their existence with inspections to be conducted only in instances of credible and verifiable complaints of violation. For your reference, a start-up is defined by the Department of Industrial Policy and Promotion (**DIPP**) as an entity, incorporated or registered in India, within the preceding five years, with annual turnover not exceeding INR 25 crores in any preceding financial year, working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property.

More...

# Draft of the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2015

27 JAN At present, the conditions of work in shops and commercial establishments are governed by the State-specific Shops and Establishments Acts (the **S&E Acts**). These legislations govern aspects such as opening and closing times, working hours, leaves and holidays, notice periods etc. The Ministry of Labour and Employment, citing a lack of uniformity in such provisions across States, has drafted a Model Shops and Establishments (Regulation of Employment and Conditions of Service) Act. The objective of this model law is that it can be adopted by States or can be used as a template by States to amend their existing laws. The draft model law is yet to be introduced in the Parliament. It would need to be passed by both Houses of Parliament and receive presidential assent before becoming law.

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# Amendment of the Employees' Provident Fund Scheme, 1952 (the EPF Scheme)

10 FEB The contributions made to the provident fund under the EPF Act and the circumstances in which they can be withdrawn by members are governed by the provisions of the EPF Scheme. The Ministry of Labour and Employment has amended the EPF Scheme to alter some of the positions with regard to withdrawals by members.

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10 FEB The key changes in the amendment include:

- Members under the EPF Scheme were permitted to withdraw up to 90% of the amount standing to their credit under the provident fund at any time after attaining 54 years of age or within one year before actual retirement on superannuation whichever is later.

  The amendment has now increased the age threshold to 57 years.
- Members under the EPF Scheme were permitted to withdraw the full amount standing to their credit under the provident fund upon retirement from service after attaining 55 years of age. This threshold has now been increased to 58 years.







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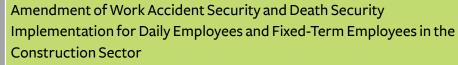
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Amendment of Work Accident Security and Death Security for Daily Employees and Fixed-Term Employees in the Construction Sector as the result of a new regulation on the mandatory social security program.

Ministry of Manpower Regulation No. 44 of 2015 dated 31 December 2015 regarding the Implementation of Work Accident Security and Death Security for Daily Employees and Fixed-Term Employees in the Construction Sector ("Reg. 44").

Reg. 44 revokes and replaces Ministry of Manpower Regulation No.KEP-197/MEN/1999 dated 29 September 1999 regarding the Implementation of Mandatory Social Security for Daily Employees and Fixed-Term Employees in the Construction Sector ("Reg. 197"). Reg. 44 was issued following the introduction of a new social security law.

This new regulation does not change the contribution employers must make to the employment social security agency, or BPJS Ketenagakerjaan. The employer contribution for daily employees, contract employees and fixed-term employees is as follows:

- a. Work Accident Security, amounting to 1.74% of the employee's monthly wage; and
- b. Death Security, amounting of 0.30% of the employee's monthly wage.



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### Introduction of the Stress Check System

Amendments to Japan's Industrial Safety and Health Act ("Act") regarding the stress check system came into force on 1 December 2015. The amendments require an employer having a place of business employing 50 or more regular employees (i.e., all permanent employees and certain fixed-term employees who have been, or are expected to be, employed by the employer for one year or more and whose weekly working hours are 75% or more of those of the permanent employees) to offer an annual stress check to the regular employees at the relevant place of business. The purpose of the stress check system is to give regular employees an opportunity to gain awareness of their stress levels and to prevent work-related mental illness.

Employers coming within the scope of the stress check requirements are required to implement the stress check system through the following steps:

- Announce to employees a basic policy explaining that the employer will offer stress checks in accordance with the Act and other relevant laws and regulations;
- Establish a health committee (if not already in existence at the relevant place of business) and have the committee prepared internal rules regarding the stress check system;
- Conduct a stress check by requesting the regular employees to fill out a brief survey designed to identify the stress level of employees and having the results submitted directly to a medical professional (e.g., a medical doctor, medical nurse or any other medical professional) who will review the sheets and inform each employee directly of his/her diagnosis;
- Arrange a face-to-face assessment with a medical doctor at the request of any employee who has been diagnosed to be under high stress;
- Take corrective measures based on the recommendations of the medical doctor (if any); and
- After conducting stress checks, to submit a report to the competent labour standards inspection office regarding details of the stress checks conducted by the employer.

The first round of stress checks must be completed no later than 30 November 2016.

An employer may not obtain the results of the stress check questionnaire or the medical professional's diagnosis without the employee's consent, although any specific corrective measures which are recommended by the medical doctor pursuant to follow up checks requested by the employee must be informed to the employer. Any information regarding the stress checks obtained by the employers should be kept strictly confidential and employers are advised to take measures to limit the scope of personnel or third party vendors who are authorised to have access to such information to the minimum extent necessary for the employer to comply with its stress check obligations. Additionally, employers may not treat employees adversely (e.g., terminate their employment or refuse to renew their contracts) on the basis of reasons related to an employee's stress check

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# Revision of the Contribution Rates to the Employees Provident Fund "EPF"

The monthly statutory contribution by the employee to the Employees Provident Fund has been reduced from 11 % to 8% for contributors below the age of 60. Contributors who are not keen to the reduction can opt to maintain the rate at 11%.

For contributors aged 60 and above the contribution rate has been reduced from 5.5% to 4%.

The new rate of contribution is for salaries between the period March 2016 to December 2017.

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CONTRIBUTED BY:

RAJAH TANN

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### Expansion of Permissible Grounds for Interim Severance Payment Interim severance payments are only allowed for specific reasons stated in the Employee Retirement Benefit Securities Act ("ERBSA"). Concerns have been raised in connection with the recent introduction of the wage peak system because employees who are subject to the wage peak system would not have been allowed to withdraw interim severance payment when their wages hit their respective peaks. This would result in reduced total severance payments for these employees compared to what the employees would have been entitled to but for the adoption of the wage peak system. The relevant provision of the Presidential Decree of the ERBSA was amended as of 15 December 2015, and took effect immediately. The amended Presidential Decree allows the interim withdrawal of a severance payment where: 1) an employer adopts a wage peak system under which an employee's wage may start to decrease at a certain age, service year or when wages hit a certain amount in exchange for extending the employee's retirement age; or 2) an employer and an employee agree to adjust the prescribed working hours by one hour per day or five hours or more per week, and the employee continues to work under the adjusted working hours for more than three months. Recent Constitutional Court Decision on the 30-day Termination Notice Requirement for Employees Who Have Been Employed for Less Than 6 Months On 23 December 2015, the Constitutional Court issued a unanimous decision on the constitutionality of Article 35, Paragraph 3 of the Labour Standards Act ("LSA"). This provision of the LSA stipulates that the 30-day advance notice (or payment in lieu thereof) requirement for employee termination does not apply to a monthly-paid employee who has been employed for less than 6 months. The Constitutional Court ruled that Article 35, Paragraph 3 of the LSA was unconstitutional because it would infringe the relevant employee's rights and is in violation of the principle of equality. A law declared unconstitutional loses its effect immediately, as of the date of the Constitutional Court's decision. Therefore, as of 23 December 2015, Article 26 of the LSA, which requires a 30-day termination notice, will apply to monthly-paid employees who have been employed for less than 6 months. Workplace Nursery Requirement Strengthened (Articles 44-2 and 44-3 of the Infant Care Act) Workplaces with 300 or more female workers or 500 or more total workers are required to provide nursery facilities for employees. The Infant Care Act requires such an employer to establish and operate nursery facilities or provide support for the care of workers' children by executing service agreements with local nursery facilities. Currently, no particular penalty is imposed under the Act for failure to establish a workplace nursery, except that a list of workplaces that have not done so is publically announced by the Ministry of Health and Welfare. Starting 1 January 2016, employers in violation of the above requirements may be ordered to comply and/or subject to administrative fines of up to 100 million Korean won, which may be imposed twice a year. National Health Insurance Premium Will Increase by 0.9% (Article 44 of the Presidential Decree of the National Health Insurance Act) According to the National Health Insurance Act, all employers with at least one (1) employee in Korea are, in principle, required to subscribe to the National Health Insurance program. The rates for the National Health Insurance are multiplied by monthly wages, adjusted every year. The rate for 2016 will be 6.12% (increased from 6.07% in 2015), divided equally between an employee and their employer at the rate of 3.06% of the employee's monthly wage each. Minimum Wage will Increase by 8.01% (Article 10(1) of the Minimum Wage Act) Under the Minimum Wage Act, all employers are required to pay to their employees (including regular employees, contract employees, part-time employees, etc.) at least the JAN minimum wage required by the Ministry of Employment & Labour, which it publishes each



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1 JAN year. For 2015, the current minimum wage is KRW 5,580 per hour. Effective 1 January 2016, the minimum wage will increase to KRW 6,030 per hour. The minimum wage under the Minimum Wage Act applies to any workplace with at least one (1) employee.

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Minimum Mandatory Retirement Age Set at 60 (Article 19 of the Act on Age Discrimination Prohibition in Employment and Promotion of Employment of the Aged)

Responding to social and economic changes in Korea's aging population, on 22 May 2013 the National Assembly put in place a limitation on employer's ability to set a mandatory retirement age by amending the Act on Prohibition of Age Discrimination in Employment and Promotion of Employment of the Aged. Under the amendment, the earliest retirement age that a company may set is age 60.

Beginning 1 January 2016, the new mandatory retirement age limitation will apply to businesses employing 300 or more permanent employees, public institutions as defined by Article 4 of the Act on Management of Public Institutions, and local public corporations and agencies established under the Local Public Corporation Act. For businesses employing fewer than 300 permanent employees, the new mandatory age limitation will apply beginning 1 January 2017.

# SOUTH

**SRILANKA** 

## The Fair Hiring Procedure Act

The Fair Hiring Procedure Act ("FHPA") was promulgated on 21 January 2014. Under the FHPA, where a job applicant who has submitted documents required for hiring to a business with 30 or more permanent employees demands that the documents be returned, the business must return the said documents to the job applicant (Article 11). In addition, a business with 30 or more permanent employees must keep the documents submitted by job applicants for a certain period of time (which has not yet been specified by statute) in preparation for possible requests for return of the documents (Article 11). A business that violates these requirements may be subject to a corrective order from the Minister of Employment and Labour and/or a monetary penalty not exceeding 3 million won (Article 17 (2)).

The FHPA took effect on 1 January 2015 for businesses with 300 or more permanent employees and public organizations. It shall take effect on 1 January 2016 for businesses with 100 to 299 permanent employees and on 1 January 2017 for businesses with 30 to 99 permanent employees.

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Reduced Working Hours for Pregnant Employees (Article 74 (7) of the Labour Standards Act)

A female employee who is within the first 12 weeks, or who has completed 36 weeks, of her pregnancy may request a reduction of her working hours by up 2 hours per day and her employer must accept this request. (Article 74(7) of the LSA). Furthermore, the employer cannot reduce the female employee's salary during this reduced work schedule period. (Article 74(8) of the LSA).

The above provisions have applied to businesses with 300 or more permanent employees since 25 September 2014 and will be applied to businesses with fewer than 300 permanent employees starting 25 March 2016.

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The Ministry of Labour Amending Articles 20-1, 21, 23, 25 and 51 of the Enforcement Rules of the Labour Standards Act, As Well As Adding Articles 23-1 and 24-1 and Deleting of Article 14, Effective 1 January 2016

The main points of the amendments are:

- 1. Article 14 is deleted to realize the "same job, same pay" principle and to raise the standards of child labour so that children may also be protected by minimum wage laws.
- 2. The definition of overtime under Article 20-1 is amended to reflect the changes to the statutory ordinary business hours under Article 30, Paragraph 1 of the Labour Standards Act.
- 3. The rules and standards regarding attendance records under Article 21 are amended to reflect the changes in Article 30, Paragraphs 5 and 6 of the Labour Standards Act.
- 4. The list of holidays under Article 23 is amended for consistency regarding Labour Day and other national holidays.
- 5. Article 23-1 is amended to insert the make-up holidays rules in the event that a national holidays falls on a day-off resulting from the reduced ordinary business hours (specified in Article 30, Paragraph 1 of the Labour Standards Act) or if a national holidays falls on a weekend.
- 6. Article 24-1 is amended to insert additional definitions regarding holidays and to clarify the uncertainties arising from the use of the term "days of rest" under Article 39 of the Labour Standards Act.
- 7. Article 25 is amended to reflect the name change of the Labour Safety and Health Act to the Occupational Safety and Health Act on 3 July 2013.

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The Ministry of Labour Explains that Any Leave that a Worker Takes for Care of Family Members and the Wages Earned During Such Leave are not Figured into the Average Wage Calculation under Article 2, Paragraph 4 of the Labour Standards Act

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The Lao-Dong-Tiao-2-Zi-1040132503 Circular published by the Ministry of Labour on 9 December 2015 clarifies that effective immediately, in order to avoid disputes over the calculation of average wages, it is hereby announced that the time off and the wages earned during personal leave for taking care of family members per Article 20 of the Act of Gender Equality in Employment shall not be figured into the average wage calculation.

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### Presidential Order to amend the Labour Standards Act

The Presidential Order with Ref. No. Hua-Zhong-Yi-Yi-Zi 10400146731 dated 16 December 2015 added Articles 9-1, 10-1 and 15-1 to the Labour Standards Act and amended Articles 44 and 46. The main points are as below:

- 1. Non-compete clauses are now limited to a maximum of two years. The employer must have a proper business interest to protect, the employee must have a chance to come into the employer's confidential information, and the restrictions on duration, region and scope of business activity must be reasonable. Furthermore, the employer must provide reasonable compensation to the employee in consideration of the non-compete obligation, or the obligation is deemed null and void; the reasonable compensation does not include the payments made by the employer to the employee while the employee was still working for the employer.
- 2. To prevent employer from forcing an employee to leave through transfers, in addition to not breaching any of the terms of the employment agreement, an employer may not have improper motive in making a job transfer for an employee. The employee's employment conditions, such as wages, may not be reduced as a result of the transfer. If the transfer is to an overly distant location, employer must provide necessary assistance to the employee; the employee and his/her family's daily livelihood interests should be taken into consideration in conducting the transfer.



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3. Unless any one of the following circumstances is present, an employer may not stipulate a minimum years of service requirement for an employee: (1) Employer is paying for professional training to the employee; and (2) employer will provide a reasonable compensation in consideration of a minimum service requirement. Failure to meet the above will cause such stipulation to be void. If the minimum service requirement is not met because the employment agreement is terminated for reasons not attributable to the employee, the employee is not liable for breach of such requirement or return the professional training fees.

- 4. Workers between 15-16 years of age are to be considered as a child worker. Workers between 15-18 years of age may not be engaged in dangerous or hazardous work.
- 5. Employers are required to also prepare age certification documents and legal guardian's consent letters for workers between 15 to 18 years of age.

The Ministry of Labour Published its Interpretation Defining Businesses that Operate Pursuant to the Official Government Calendar shall be the Businesses as Defined Under Article 30, Paragraph 3 Of the Labour Standards Act

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The Lao-Dong-Tiao-3-Zi-1050130120 Circular published by the Ministry of Labour on 21 January 2016 states that effective immediately, businesses that operate pursuant to the official government calendar shall be the businesses as defined under Article 30, Paragraph 3 of the Labour Standards Act. As the government works on make-up days to allow days off during weekdays which would extend holidays over to the weekend, such as working on 30 January 2016 in order to take 12 February off, many private businesses also choose to follow this scheme. To prevent labour disputes, businesses that do not otherwise fall under Article 30, Paragraph 3 of the Labour Standards Act may still apply the statute if, other than Labour Day on 1 May it operates pursuant to the official government calendar and uses make-up working days to bridge to weekends on other holidays.

Interpretation Regarding whether an Insured who is Unemployed or Currently on Unpaid Leave for Child Care but Currently Acting as a Responsible Person for Another Entity, may Apply for Unemployment Benefits or Unpaid Child Care Leave Compensation

21 JAN The Lao-Dong-Bao-1-Zi-1050140035 Circular published by the Ministry of Labour on 21 January 2016 clarifies the uncertainties arising from whether an individual who is unemployed or currently on unpaid leave for child care but currently registered as a responsible person for another entity, may apply for unemployment benefits or unpaid child care leave compensation, due to the fact that such registration could disqualify the individual from the above benefits. The Ministry of Labour says that the applicant is still entitled to the above benefits if this other entity has certification showing that it is engaging in a non-profitable business, the applicant is not operating this entity, or as long as any earnings during unemployment/while receiving unemployment benefits are declared pursuant to Article 31 of the Employment Insurance Act at the time of applying for unemployment certification.

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**Important:** action likely required

**Good to know:** follow developments

**Note changes:** no action required

> Looking Back

**Looking Forward** 

No significant policy, legal or case developments are anticipated within the employment space during 2016 Q1.



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**Important:** action likely required

**Good to know:**follow
developments

**Note changes:** no action required

> Looking Back

**Looking Forward** 

A New Decree Regulating Region-Based Minimum Wages for Employees Working for Companies, Cooperative Unions, Cooperatives, Cooperative Groups, Farms, Households, Individuals and Organizations Hiring Employees under Labour Contracts

On 14 November 2015, the Government issued Decree no. 122/2015/ND-CP regulating region-based minimum wages for employees working for companies, cooperative unions, cooperatives, cooperative groups, farms, households, individuals and organizations hiring employees under labour contracts ("**Decree 122**"). In particular, the new minimum wages will be 3.5 millions per month, 3.1 millions per month, 2.7 millions per month and 2.4 millions per month for region I, II, III and IV respectively. The list of cities in each region is provided in the Appendix of Decree 122. These are the minimum wages applied to workers doing the simplest jobs. For trained workers it is regulated that they must be paid 7% higher than the minimum wages (Article 5 of Decree 122).

Decree 122 takes effect on 1 January 2016 and replaces Decree 103/2014/ND-CP dated 11 November 2014.

### A New Decree Providing Detailed Guidance on Some Articles of the 2012 Labour Code Regarding Foreign Employees Working in Vietnam

On 3 February 2016, the Government issued Decree No. 11/2016/ND-CP ("**Decree 11**") providing detailed guidance on some articles of the 2012 Labour Code regarding foreign employees working in Vietnam. In particular, for employers who want to recruit foreign employees, they must establish their need for foreign employees and apply for the approval from the Head of Provincial People's Committee. It is also provided that the recruitment of foreign employees can only be approved if there is no qualified Vietnamese employee to fill such positions. In addition, Decree 11 gives detailed guidelines on the application, re-application as well as the revocation of work permit for foreign employees working in Vietnam. A foreign employee who does not have a work permit or document proving that he does not need a work permit to work in Vietnam shall be deported under Vietnamese I aw.

Decree 11 takes effect on 1 April 2016 and replaces Decree no. 102/2013/ND-CP dated 5 September 2013.

LOOKING BACK P P P P

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