



Lee, Tsai & Partners

A GREATER CHINA LOCAL FIRM

# Asia Employment Law: Quarterly Review

2018-2019

ISSUE 23: FIRST QUARTER 2019

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# 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 twenty-third edition, we flag and provide comment on anticipated employment law developments during the first quarter of 2019 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2019.

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 [contacts page](#).

We hope you find this edition useful.

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**Proposed law to provide all casual employees with the right to request conversion to full-time or part-time employment**

The Australian Government has introduced legislation to amend the Fair Work Act 2009 (Cth) (FW Act) extending the right for casual employees to request conversion to full-time or part-time employment, to apply to all regular casual employees. The amending legislation, the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (Casual Conversion Bill) incorporates a right to request conversion to full-time or part-time employment into the National Employment Standards.

Under the Casual Conversion Bill, an employee will have the right to request conversion from casual to full-time or part-time employment if the employee has:

- been designated as a casual employee by their employer for the purposes of the employee's contract of employment or any fair work instrument that applies to the employee; and
- in the previous 12 months worked a regular pattern of hours on an ongoing basis which without significant adjustment the employee could continue to work as a full- or part-time employee.

Employees who meet these two requirements may submit a written request to their employer for their employment to be converted to full-time or part-time employment, as consistent with the regular pattern of hours worked by the employee during the previous 12 month period. The employer may only refuse the employee's request if:

- it has consulted with the employee; and
- there are reasonable grounds for refusing the request based on facts known or reasonably foreseeable at the time of refusing the request.

The reasonable grounds for refusing an employee's request include:

- that converting to full-time or part-time employment would require a significant adjustment to the employee's hours of work;
- within the period of 12 months after giving the request:
- the employee's position will cease to exist;
- the hours of work which the employee is required to perform will be significantly reduced; or
- there will be a significant change in the days and/or times that the employee is required to work that cannot be accommodated within the days or times the employee is available to work; and
- granting the employee's request would not comply with a recruitment or selection process required under Commonwealth or State law.

The Casual Conversion Bill still requires the approval of the Senate before it is passed into law.

*Fair Work Amendment (Right to Request Casual Conversion) Bill 2019*  
*Explanatory Memorandum*  
*Second Reading Speech*

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**Potential changes to casual loading offset regulations**

The Australian Federal Opposition has proposed a motion in the Senate to disallow the Federal Government's *Fair Work Amendment (Casual Loading Offset) Regulations 2018 (Casual Loading Offset Regulations)*, which came into effect in December 2018. The Casual Loading Offset Regulations were introduced in response to the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, in which the Court decided that employees who were paid a casual loading in lieu of leave entitlements but who were actually employed as permanent employees could claim against their employer for unpaid leave entitlements.

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The Casual Loading Offset Regulations provide that employers who have paid identifiable casual loading to employees engaged as casuals but later found to be permanent employees can apply to have the loading offset against claims by such employees for National Employment Standards entitlements (including leave entitlements).

On 14 February 2018, federal Labor Senator Doug Cameron proposed a motion in the Senate to disallow the Casual Loading Offset Regulations, which was postponed until 2 April 2019. From 2 April 2019, if the motion is agreed to or has not been resolved or withdrawn within 15 sitting days after having been given, the Casual Loading Offset Regulations will cease to have effect.

*Fair Work Amendment (Casual Loading Offset) Regulations 2018*

*Fair Work Amendment (Casual Loading Offset) Regulations 2018 Explanatory Statement*

## Changes to Australian whistleblower protection laws

The Australian Federal Parliament has passed the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 (Whistleblower Bill)*. The Whistleblower Bill harmonises current whistleblower regimes under Federal law, expands existing protections and remedies for whistleblowers, and creates a whistleblower regime for tax-related misconduct and contraventions. The Whistleblower Bill has currently not received Royal Assent; it will likely commence on 1 July 2019.

The Whistleblower Bill will apply to disclosures made on or after commencement, and that relate to matters that occurred before, on or after commencement. The Whistleblower Bill also:

- requires public companies and 'large proprietary companies' (see definition below) to have mandatory whistleblower policies;
- facilitates the making of protected disclosures about a wide range of misconduct, including the existence of an 'improper state of affairs';
- broadens the range of people who may make protected disclosures than under the previous regime;
- allows anonymous disclosures;
- provides protections to whistleblowers on the basis that the disclosure was made to an 'eligible recipient' of the disclosure, which includes officers or senior managers (but not other employees generally) of the company, auditors, actuaries, or another person authorised by the company;
- no longer requires a whistleblower to act in good faith to gain the benefit of protections;
- expands the protections and redress available to whistleblowers who suffer reprisals, including access to compensation;
- allows for 'emergency' or 'public interest' disclosures to be made to the media or members of Parliament in extreme cases; and
- excludes most disclosures of personal work-related grievances from protection.

Public companies and 'large proprietary companies' must, within six months of the commencement of the Whistleblower Bill, implement a whistleblower policy. A 'large proprietary company' is currently defined as a company that meets at least two of the following three requirements: (a) consolidated revenue of \$25 million or more; (b) gross assets of \$12.5 million or more; and (c) the company and any entities it controls have 50 or more employees. Failure to comply with the requirement to implement a whistleblower policy is a strict liability offence, with a penalty of 60 penalty units (currently \$12,600).

A company's whistleblower policy must set out information about:

- protections available to whistleblowers;

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- the person / organisation to whom protected disclosures may be made, and how they can be made;
- how the company will support whistleblowers and protect them from detriment;
- how the company will investigate protected disclosures;
- how the company will ensure fair treatment of employees who are mentioned in protected disclosures, or to whom the disclosure relates; and
- how the whistleblower policy is to be made available to officers and employees of the company.

There will be significant penalties for corporations and individuals that contravene the provisions of the Whistleblower Bill. In relation to breaching confidentiality of the identity of the whistleblower:

- for an individual:
  - » a civil penalty of up to \$1.05 million or three times the benefit derived or detriment avoided; and
  - » six months' imprisonment or a fine of up to \$12,600 or both; and
- for a body corporate:
  - » a civil penalty of up to \$10.5 million or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to \$525 million); and
  - » a fine of up to \$12,600.

The penalties in relation to victimisation or threatened victimisation of the whistleblower are:

- for an individual:
- a civil penalty of up to \$1.05 million or three times the benefit derived or detriment avoided; and
- two years' imprisonment or a fine of up to \$50,400 or both; and
- for a body corporate:
- a civil penalty of up to \$10.5 million or three times the benefit derived or detriment avoided, or 10% of the body corporate's annual turnover (up to \$525 million); and
- a fine of up to \$50,400.

*Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018*  
*Revised Explanatory Memorandum*  
*Second Reading Speech*

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## Circular on Further Regulating Recruitment Practices to Promote Female Employment

Nine departments, including the Ministry of Human Resources and Social Security ("MOHRSS"), jointly issued the Circular on Further Regulating Recruitment Practices to Promote Female Employment on 18 February 2019. The Circular gives a further detailed description of particular forms of gender discrimination in recruitment activities, clearly requiring that in preparing the recruitment plans or in other recruitment activities, all types of employers and human resource service agencies shall neither impose limits on gender or have gender preference, nor refer to the gender as an excuse to restrict opportunities available to women to seek employment or refuse to employ women. Also, the Circular calls for establishing the joint interview mechanism, under which authorities will hold a joint interview to talk with those employers on suspicion of gender discrimination during the recruitment process, according to whistleblower reports and complaints they have received; employers will be investigated and punished if they refuse to attend such talk or to make corrections after the talk, and their illegal practices will be exposed among the general public through the media. Moreover, the Circular stresses that, efforts shall be made to improve training services concerning women's employment, promote the development of care services for infants under the age of three, step up after-school services for primary and middle schools, optimize and put in place the maternity insurance system, and thus create a good environment and favorable conditions for women's employment.

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**Recommendations to increase Maternity leave from 10 weeks to 14 weeks**

In her 2018 Policy Address, the Chief Executive proposed that the statutory maternity leave ("SML") under the Employment Ordinance ("EO") be extended to 14 weeks (from the current 10 weeks). Following this, the Labour and Welfare Bureau submitted recommendations on this in the document "Review of Statutory Maternity leave". Their recommendations include:

- 1) extending SML to 14 weeks, with details including:
  - a. the newly added 4 weeks will continue from the current 10 weeks granted to expectant mothers;
  - b. the pay for the additional 4 weeks will remain at four-fifths of the employee's average daily wages;
  - c. the government will fund the additional 4 weeks of SML wages – this will be paid by the employer to the employee following the current procedure for paying the 10 weeks of SML pay, and upon proof of payment the government will reimburse the employee
  - d. the additional 4 weeks SML pay will be capped at \$36,822 per employee.
- 2) amending the EO as follows:
  - a. amend the definition of "miscarriage" to "the expulsion of the products of conception which are incapable of survival after being born before 24 weeks of pregnancy" (currently it is 28 weeks)' – this will entitle an employee whose child is incapable of survival after being born in the 24th week of pregnancy or after to SML (currently a termination of pregnancy in the 24-27th week will only entitle an employee to sick leave)
  - b. require an employer to pay sickness allowance to a pregnant employee who attends a pre-natal medical examination provided that she provides a medical certificate and relevant documentary proof of her having done such medical examination.

The Government intends to introduce a bill amending the EO to the Legislative Council in late 2019.

[More...](#)

**Hong Kong District Court Strikes Out Discrimination Claim Against Judges**

Hong Kong's District Court (the "Court") in 庄裕安 v 关淑馨及另二人 [2018] HKDC 1589 struck out the Applicant's discrimination claim against the Respondents, who were the judges who dismissed the Applicant's appeal in a Court of Appeal case CACV 185/2017. The Court also gave a Restricted Proceedings Order against the Applicant.

**Facts**

The hearing of CACV 185/2017 was scheduled on 1 June 2018, but the Applicant was unable to attend the hearing due to his sickness. The Respondents dismissed the Applicant's appeal in the absence of the Applicant. The Applicant claimed that the Respondents discriminated him on the ground of his disability by refusing to adjourn the hearing.

For the present case, the Respondents applied for a striking-out order while the Applicant submitted an application to appoint an *amicus curiae* and an application to list the Judiciary as a respondent.

**Decision**

The Court struck out the Applicant's claim.

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The Court held that there was no reasonable cause of action in the Applicant's claim as it was inconsistent with the immunity from legal action provided by Article 85 of the Basic Law to the members of the judiciary in the performance of their judicial functions.

It is also impossible for the Applicant to pass the "but for" test used in the determination of whether there is "discrimination". The reason why the Respondents refused to adjourn the hearing was that they did not accept the Applicant's reason for his failure to attend the hearing. The Applicant claimed that he was suffering from a stomach ache, however, according to the medical certificate he was diagnosed as suffering from upper respiratory tract infection. Therefore, the Court held that the Respondents' refusal to adjourn the hearing was totally unrelated to the Applicant's alleged disability. The Applicant's claim was vexatious and was an abuse of the court's process.

The Court also refused the Applicant's applications to appoint an amicus curiae and to list the Judiciary as a respondent.

The Court awarded costs to the Respondents on an indemnity basis.

Finally, the Court also imposed a Restricted Proceedings Order on the Applicant. Given that the Applicant has also issued unmeritorious legal proceedings against judges before, the Court was of the view that he has abused and is likely to continue abusing the court's process. The Applicant was prohibited from initiating new legal action against judges or members of the judiciary without the leave of the Court.

[More...](#)

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### Hong Kong Statutory Paternity Leave Increased from Three Days to Five Days from 18 January 2019

The Employment (Amendment) (No.3) Ordinance 2018 (the "**Amendment Ordinance**"), which increased the statutory paternity leave in Hong Kong from three days to five days, commenced on 18 January 2019.

Male employees must provide his employer with proper notice if he wishes to take paternity leave. If the employee already provided notice to his employer at least 3 months before the expected date of his child's delivery, he may take paternity leave once he informs his employer of the dates he will be on leave. Failing this, the employee must notify his employer of the dates he intends to take paternity leave at least 5 days in advance of taking such leave.

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### Increased Minimum Wage Rate to take effect from 1 May 2019

On 18 January 2019, the Minimum Wage Ordinance (Amendment of Schedule 3) Notice 2019 was gazetted to increase the Statutory Minimum Wage ("SMW") rate to HK\$37.50 per hour. This is a HK\$3.00 increase from the current rate of HK\$34.50 per hour. The new rate will, subject to the approval of the Legislative Council, come into effect on 1 May 2019.

To reflect the change to the SMW rate the current HK\$14,100 monthly cap on keeping records of hours worked will be increased to HK\$15,300 per month. This will take effect on the same day the new SMW comes into force.

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## Guidance Note on How to handle Data Breaches published by the Privacy Commissioner

The Privacy Commissioner has published a note to guide data users on the remedial procedures to take after a data breach. The guidance note includes the following steps:

1. Immediately gather information about the breach and assess the damage done to the data subjects
  - The data users should create a designated team to investigate the breach and issue a report on its findings. The details that the team should collect include:
    - o The time, date and location of the breach
    - o The cause of the breach
    - o Who detected the breach
    - o The types of data and number of data subjects involved
2. Seek assistance from relevant authorities and attempt to contain the situation
  - The data user should contact the relevant authorities and experts for assistance in stopping the breach. Some methods of containment include:
    - o Engaging technical experts to spot and cure the system loopholes to halt current and future hacking
    - o Removing the access rights of individuals who are suspected to be involved
    - o Changing the passwords of all those having access to the personal information
    - o Contacting the police if there is a risk of identity theft
3. Evaluate the extent of harm done
 

The damage done to data subjects include identity theft, financial loss, danger to personal safety, humiliation or damage to reputation and loss of employment and business opportunities. The degree of harm done depends on many factors, including the type and volume of data being hacked, whether such data was encrypted, whether the hackers are traceable and whether the harm is capable of being mitigated. Thus, it is imperative that the data users contain the breach as soon as possible to prevent the losses from exacerbating.
4. Notify the data subjects of such breach
 

It is recommended best practice to formally notify those involved in a data breach as soon as possible by phone, writing email or face to face, although this is not required under the PDPO. Parties involved could include the data subjects, the Privacy Commissioner and any relevant law enforcement authorities. The contents of such notification could include:

  - a description on what happened – the time, date, and location
  - the cause of the breach
  - the level of harm done
  - actions done to mitigate and control the situation
  - contact details of a designated individual who could provide assistance to the data users affected
5. Measures to take to avoid recurrence
 

During the data breach investigation, it is essential for the data user to identify the insufficiencies in the user's system and make improvements to prevent another breach. The data user should review:

  - whether the security measures in place is sufficient to safeguard the personal data
  - whether the access rights is adequately controlled
  - whether the current privacy policy is updated

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INDEX	HONG KONG	<ul style="list-style-type: none"> <li>the need to provide training to the data user's employees to raise awareness of data privacy risks and how to manage data safely</li> <li>the mechanism used to supervise employees and data processors to ensure they are following the data user's privacy policy</li> </ul>
2019	JAN 2019	<a href="#">More...</a>
AUSTRALIA		<b>Investigation report published by the Privacy Commissioner regarding the HKBN Database intrusion</b>
CHINA		
HONG KONG		<p>After the Hong Kong Broadband Network Limited ("HKBN")'s database intrusion in mid-April 2018 which lead to a personal data leakage affecting 380,000 individuals, the Privacy Commissioner published an investigation report and made the following findings:</p>
INDIA		
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MALAYSIA	▲	<b>Facts</b>
NEW ZEALAND	▲	<p>The hacked database ("database A") was an inactive database which should have been deleted after a system migration many years ago. The failure to delete database A was due to human oversight and the failure to perform a comprehensive follow up review after the system migration to check that the database was deleted. It was also found that HKBN failed to consider an appropriate retention period for the personal data of its former customers and failed to give internal guidance to its employees on the retention period and procedure to deleting such personal data. Thus, HKBN contravened s26 PDPO and Data Protection Principle (DPP) 2(2) of Sch 1 PDPO by failing to erase all personal data in database A when it was no longer needed and retaining such data for longer than necessary.</p>
PHILIPPINES	▲	
SINGAPORE	▲	
SOUTH KOREA	▲	
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**Maximum tax deduction of HK\$60,000 per taxpayer in place starting in the next financial year**

In efforts to encourage the working population to make earlier retirement savings and be more prepared for retirement, The Inland Revenue and MPF Schemes Legislation (Tax Deductions for Annuity Premiums and MPF Voluntary Contributions) (Amendment) Bill 2018 was passed on 20 March 2019 and the Ordinance will take effect on 1 April 2019. This amendment will allow taxpayers to benefit from tax deductions under salaries tax and personal assessment for their contributions paid into tax deductible MPF voluntary contribution accounts and qualifying deferred annuities premiums. Each taxpayer can get a maximum of HK\$60,000 per year in tax deductions, which is an aggregate limit for tax deductible MPF voluntary contributions and qualifying deferred annuity premiums.

For deferred annuity premiums, taxpayers are also entitled to tax deduction covering their spouse as joint annuitant or either one of the two as sole annuitant. The new Ordinance also allows taxpaying couples to allocate the deferred annuity premium tax deduction between themselves so that they can claim a total of HK\$120,000 in tax deductions, as long as each taxpayer doesn't exceed the maximum limit per individual.

[More...](#)[More...](#)[More...](#)[More...](#)

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INDIA

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2018

**Amendment to the Kerala Shops & Commercial Establishments Act, 1960 ("Kerala S&E Act")**

On 4 October 2018, the Kerala State Government amended the Kerala S&E Act by promulgating an ordinance. While the ordinance was in force, the State Legislative Assembly passed a bill to amend the Kerala S&E Act, incorporating the changes introduced by the ordinance. The bill received the Governor's assent on 21 December 2018 and has been made effective retrospectively from 4 October 2018 (i.e., the date of the Ordinance). The key changes introduced to the Kerala S&E Act are:

- **Grant of weekly holiday:** the earlier requirement for every shop to remain closed on one whole day in a week and for the shop-keeper to display a notice of the close-day has now been done away with. Instead, the only requirement now is that employees in shops and commercial establishments should be provided with at least one weekly holiday.
- **Increase in the working hours for women and children:** persons younger than 17 years and women are now permitted to work up to 9 p.m. (previously, allowed to work only up to 7 p.m.). Further, women can be employed between 9 p.m. and 6 a.m., after obtaining their consent, and ensuring that (a) at least 5 employees are present at those hours, of which at least 2 shall be female employees, and (b) adequate protection is provided to protect their dignity and safety, by provision of facilities such as, transportation from the establishment to their residence.
- **Significant increase in the penalties:** the maximum penalties for violating provisions on working hours, rest intervals, annual leave, notice of dismissal, health, hostel and seating facilities have been increased from INR 5,000 (USD 70) to INR 100,000 (USD 1,400) for first-time offences, and up to INR 2,00,000 (USD 2,800) for subsequent offences. Fines for contravention of provisions on overtime, employment of women and children at night, and production of records for inspection have been increased to from INR 50 (USD 7) to INR 50,000 (USD 700), subject to a cap of INR 2,000 (USD 30) per worker. The First-Class Judicial Magistrate is also now empowered to impose fine for violations under the Kerala S&E Act, up to INR 2,00,000 (USD 2,800).
- **Ability to maintain registers and records in electronic form:** registers and records under the Kerala S&E Act may now be maintained in electronic format. However, during the time of an inspection, a duly signed hard copy of the records will need to be submitted to the inspector upon demand.

[More...](#)**Amendment to the Payment of Wages Act, 1936 ("PW Act")**

The Haryana Government has passed a notification dated 12 December 2018 (published on 25 December 2018), which amended the PW Act in its application to the State of Haryana. The PW Act is a central legislation which regulates the payment of wages to a certain class of employees working in specific kinds of establishments. In the first instance, the PW Act is applicable to persons employed in a factory, railways and to persons employed in an industrial or other establishment. "Industrial or other establishment" is defined under the PW Act to include, inter alia, establishments which the appropriate government (here, State Government) may specify by notification. By way of this amendment, the Haryana Government has notified shops and commercial establishments covered within the Punjab Shops and Commercial Establishments Act, 1958 ("Punjab S&E Act") (in its application to the State of Haryana), within the definition of "industrial or other establishment" under the PW Act. This would mean that shops and commercial establishments in Haryana will now be covered under the PW Act, and in turn, be covered under the Industrial Employment (Standing Orders) Act, 1946.

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**Exemption under the Punjab S&E Act**

The Punjab S&E Act is a State legislation applicable to persons employed in shops or commercial establishments in the State of Haryana and Punjab. The Haryana Government by way of a notification dated 18 December 2018, amended the Punjab S&E Act to create an exemption in its applicability to the State of Haryana. The employer of every establishment is required to get their establishment registered under the Punjab S&E Act and obtain a registration certificate. Prior to the exemption, the registration certificate had to be renewed every 3 years by 31st March. The notification now exempts shops and commercial establishments in Haryana from the requirement to get the registration certificates renewed.

[More...](#)

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**Digitized Filing of Annual Returns under Certain Central Rules**

By way of several notifications dated 29 January 2019, the Central Government has amended the following Rules to require filing of annual returns in electronic form:

- Payment of Bonus Rules, 1975
- Payment of Wages (Mines) Rules, 1956
- Payment of Wages (Railways) Rules, 1938
- Payment of Wages (Air Transport Services) Rules, 1968
- Minimum Wages (Central) Rules, 1950
- Maternity Benefit (Mines and Circus) Rules, 1963
- Industrial Disputes (Central) Rules, 1957

Accordingly, employers are now required to upload electronic unified annual return on the Ministry of Labour and Employment's website on or before 1 February every year, with details relating to the previous year. This amendment is in line with the government's initiatives of digitizing compliances.

[More...](#)[More...](#)[More...](#)[More...](#)[More...](#)[More...](#)[More...](#)**Draft Amendment to the Employees State Insurance (Central) Rules, 1950 ("ESI Rules")**

15 February 2019, the Central Government published the draft amendment to the ESI Rules. The proposed amendment seeks to decrease the rates of the employees' state insurance (**ESI**) contributions required to be made by both, the employer and the employees. Currently, employers are required to make contributions in respect of all employees earning monthly wages of INR 21,000 (approximately USD 300) or less, at the rate of 4.75% of such wages, whereas, covered employees are required to make contributions at the rate of 1.75% of their wages. However, if the proposed amendment is brought into effect, then the existing contribution rates will be decreased to 4% (employer-contribution) and 1% (employee-contribution) of an employee's wages. Thus, this will reduce the financial burden on both, the employers and employees. The draft amendment to the ESI Rules is now open for public comments up till 17 March 2019 (i.e., 30 days from the date of its publication). The comments would be considered by the Government before finalizing the amendment.

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**The Punjab Labour Welfare Fund (Haryana Amendment) Bill, 2019 ("Bill")**

On 22 February 2019, the Haryana Government published the Bill seeking to amend the Punjab Labour Welfare Fund Act, 1965 (in its application to the State of Haryana). The Bill proposes that the contribution of the employee to the labour welfare fund every month, be revised to 0.2% of his/her salary or wages (subject to a limit of INR 25 i.e. approximately USD 0.36) instead of a flat contribution of INR 10 (approximately USD 0.15). The employer would be required to contribute twice the amount contributed by the employee. Further, the revised limit is proposed to be indexed annually to the consumer price index beginning from first of January each year.

[More...](#)**The Regional Provident Fund Commissioner (II) West Bengal v. Vivekananda Vidyamandir and Ors. (Civil Appeal Nos: 6221 OF 2011]**

Under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, employers are required to deposit 12% of an employee's 'basic wages', dearness allowance and retaining allowance towards provident fund ("PF"), and employees make an equal contribution through a payroll deduction. For very long, there has been an ambiguity on the wage-components to be included while determining 'basic wages', and several petitions and appeals were pending before the Supreme Court to provide clarity on this issue. The Apex Court jointly heard 5 appeals arising from various High Courts to decide this commonly-raised question of law. It has now laid to rest the long-standing controversy, by holding that the crucial test for inclusion of allowances as part of 'basic wages' is universality i.e. allowances which are uniformly, universally, necessarily and ordinarily paid to all employees in a concern would form part of 'basic wages', on which PF contributions should be calculated. In essence, the Supreme Court has upheld the principles laid out in the earlier case of *Bridge and Roof Co. (India) Ltd. v. Union of India* (1963) 3 SCR 978. *The Bridge and Roof* case had observed that all universal allowances should be treated as part of 'basic wages', and hence should be subject to PF contributions. Organisations should take immediate note of this ruling and carry out a scrutiny of their pay structure and PF contribution practices, especially for employees whose basic salary is below INR 15,000 (USD 220) at present and for employees classified as 'International Workers' (for whom PF contribution caps don't apply).

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## Occupational Diseases

Presidential Regulation No. 7 of 2019 regarding Occupational Diseases was issued on 25 January 2019 to implement provisions of Work Accident Social Security under the Social Security Administrator (*Badan Penyelenggara Jaminan Sosial* or "BPJS") for Employment.

This new presidential regulation clarifies the definition of occupational disease, the scope of coverage, and the types of diseases that will be covered under Work Accident Social Security.

Presidential Regulation No. 7 of 2019 regarding Occupational Diseases replaces Presidential Regulation No. 22 of 1993 on the same subject.

CONTRIBUTED BY:

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2019

## New regulations regarding long working hours and realization of varied and flexible work styles under Work Style Reform Act

Wording: Pursuant to so called Work Style Reform Act promulgated on July 6, 2018, some new regulations regarding long working hours and realization of varied and flexible work styles will take effect as of April 1, 2019.

Under these new regulations, unless an exception applies, overtime work may not exceed 45 hours a month and 360 hours a year. Even if an exception applies, total of overtime work and work on holidays must be less than 100 hours a month and must not exceed an average of 80 hours a month during any of 2 to 6 month period, and total of overtime work per year must not exceed 720 hours.

Further, an employer must ensure that an employee who is eligible to use 10 days or more of annual paid leave pursuant to the Labor Standards Act actually uses at least five days each year.

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**Minimum Wages Order (Amendment) 2018**

The **Minimum Wages Order (Amendment) 2018** came into effect on Jan 1, 2019. With effect from 1 January 2019, the minimum wage for employees was set at RM1,100 per month or at RM5.29 per hour for workers paid at the hourly rate.

[More...](#)[More...](#)

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**Employees Provident Fund (Amendment of Third Schedule) Order 2018**

With effect from 1st January 2019, EPF contributions for senior citizens (60 years old and above) , the rate of monthly contribution by the employer shall be calculated at the rate of 4%. The employees do not need to pay contributions.

[More...](#)

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**Foreign Workers covered under SOCSO**

With the gazetting of **Employees' Social Security (Exemption Of Foreign Workers) (Revocation) Notification 2018**, with effect from 1 January 2019, foreign workers in Malaysia shall be entitled to the protection under the Employee's Social Security (SOCSO). All employers are required to make statutory contributions under Social Security. However, there is a one year cooling off period. Previously, foreign workers are typically covered under the under the Foreign Worker Compensation Scheme (FWCS).

Foreign workers who are still covered under the FWCS shall be covered until the expiry of the scheme. Pursuant thereafter, the employer shall have to register and contribute for the said foreign worker's SOCSO contributions.

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**Possibility of Sectoral-based minimum wage**

The Malaysian Minister of Human Resource has proposed that a sectoral based minimum wage may be implemented in the future. As it stands, the minimum wage for employees in Malaysia is RM1,100 based on the Minimum Wage Order 2018. However, the jump in minimum wages is deemed steep by certain employers which led to increased business operations. The Human Resource would thus the National Wages Consultative Council Resources, may make recommendations to the government on the coverage of the recommended minimum wage by business sector, type of employment and regional areas.

[More...](#)

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2018

## Employment Relations Amendment Bill

This Bill was passed on 5 December 2018 and returns many provisions of the Employment Relations Act to the pre-2011 position. The general impact of the Bill is the bolstering of union protections and powers.

A number of changes came into effect on 12 December 2018. These changes include:

- Union representatives are now able to enter workplaces without consent, provided employees are covered under, or bargaining towards, a collective agreement. Union representatives are still obligated to follow health and safety /security measures, as well as exercising access rights reasonably. Consent is still required where no collective bargaining exists;
- An employer can no longer make partial deductions in response to partial strikes;
- An employer can no longer opt out of multi-employer collective bargaining. Employers must have a genuine reason based on reasonable grounds for not concluding a collective agreement;
- Reinstatement has been restored as the primary remedy for unjustifiable dismissals;
- Unions can initiate collective bargaining 20 days ahead of an employer;
- The extension of protections against discrimination on the grounds of union membership status.

A number of changes will come into effect on 6 May 2019. These changes include:

- Limiting the use of 90-day trial periods to employers with fewer than 20 employees;
- The reintroduction of greater prescription for rest and meal breaks. For example, an eight hour working day must include two 10-minute rest breaks and one 30-minute meal break.
- The restoration of the duty to conclude bargaining and the 30-day rule.
- Employers must provide new employees with an approved active choice form within the first ten days of employment;
- Where requested, employers must pass on information about the role and function of union to prospective employees;
- Pay rates must be included in the collective agreement.
- Union delegates are entitled to reasonable paid time to represent employees.

[Simpson Grierson's coverage](#)

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2018

## Employment Relations (Triangular Employment) Amendment Bill

A triangular employment arrangement involves a person being employed by one employer, but working under the control and direction of another business or organization. The purpose of this Bill is to ensure that employees in triangular employment arrangements have the right to coverage of a collective agreement, and are provided with a framework to raise a personal grievance.

The Select Committee report was released 17 December 2018. The Select Committee suggested removing the collective agreement provisions due to the potential difficulties faced by firms who may be required to manage multiple collective agreements. The report also suggested a framework that would facilitate joining the controlling third party to the personal grievance proceedings. The Government is currently considering the Select Committee Report.

[Simpson Grierson's coverage](#)

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**Domestic Violence – Victims’ Protection Bill**

The Bill entitles employees affected by domestic violence to up to 10 days of leave per year. Employees will also be able to request a short term variation to their working arrangements, to which the employer must respond urgently and within 10 days.

This bill received the Royal Assent on 30 July 2018 and will come into force on 1 April 2019.

[Recent coverage](#)

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**Privacy Bill**

The Bill intends to replace the Privacy Act 1993 and bring New Zealand’s privacy law in line with recent international developments and reforms. Key changes include:

- Mandatory reporting of privacy breaches;
- New ways to enforce information privacy principles;
- Stronger powers for the Privacy Commissioner;
- New offences and increased fines.

The Select Committee recently reported back the Privacy Bill, with some significant recommendations. These recommendations include:

- Clarification on the mandatory data breach reporting regime: The introduction of a mandatory data breach reporting regime is endorsed, but a number of amendments to it have been proposed. Most significantly, data breaches will now only be notifiable to the Commissioner and affected individuals if the breach has caused, or is likely to cause, “serious harm”.
- Privacy Act extended to apply to activities of a NZ agency offshore: The Privacy Act will apply to all actions taken by a New Zealand agency, whether inside or outside New Zealand. It will also apply to all personal information collected or held by a New Zealand agency, regardless of where the information is collected or held, and where the individual concerned is located.
- Privacy Act extended to apply to offshore agencies: A significant proposed change is to expressly extend the Privacy Act to apply to agencies located offshore, so long as that agency is “carrying on business in New Zealand”.
- Further strengthening to cross-border data flow protection: A new information privacy principle has been added for the off-shoring of personal information. If an agency wants to disclose personal information to an overseas person, it will need to rely on an applicable exemption.

[Follow the Bill’s coverage](#)

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**Equal Pay Amendment Bill**

The Bill allows workers to make a pay equity claim within New Zealand’s existing bargaining framework, and accelerate the process for progressing claims.

The Bill is currently at the Select Committee stage. The Select Committee report is due to be released on 16 April 2019.

[Recent coverage](#)

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**Holidays Act Review**

In May 2018, the Government established a Holidays Act Working Group to carry out a full review of the Holidays Act, focusing on the provision and payment of holiday and leave entitlement. Historic underpayments will not be considered. The Group is due to report back in May 2019.

[Recent coverage](#)

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## Pay Equity Joint Working Group

A Fair Pay Agreement Working Group was established in June 2018 to advise on the establishment of a sector-level bargaining system. This would allow employers and unions to develop “fair pay agreements” that set minimum terms and conditions for workers in an entire industry. The Working Group recommendations were released publicly on January 31 2019. These recommendations included a compulsory system by default (with no opt-outs), and a low threshold whereby 10% of workers in an industry (or 1000 total, whichever number is lower) need to request a fair pay agreement in order to trigger bargaining.

*Working Group's report*



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**REPUBLIC ACT No. 11165** also known as the **"Telecommuting Act"**

The Act institutionalizes 'Telecommuting' as an alternative work arrangement for employees in the private sector. Under the Act, *Telecommuting* refers to a **voluntary** arrangement between the employer and the employee in the private sector allowing the employees to work from an alternative workplace, eg., from home, with the use of telecommunication and/or computer technologies.

[More...](#)

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**REPUBLIC ACT No. 11199** also known as **"The Social Security Act of 2018"**

The Act rationalizes and expands the powers and duties of the Social Security Commission, repeals Republic Act No 1161 (Social Security Act of 1987) and expands the mandatory coverage of the Social Security System to include Overseas Filipino Workers.

[More...](#)

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**REPUBLIC ACT No. 11210** also known as the **"105-Day Maternity Leave Law"**

The Act increase the maternity leave period with pay from 60 days (for normal birth) and 78 days (for cesarian section) to 105 days regardless of mode of delivery for pregnant employees in the public and private sectors, including those in the informal economy, regardless of civil status, or the legitimacy of the child, with the option of extending the leave for an addition thirty (30) days without pay , and granting an additional fifteen (15) days for solo mothers. As defined in the Solo Parents Act, otherwise known as Republic Act No. 8972.

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**Company fined \$400,000 for fire at Petroleum Refinery in Pulau Bukom**

On 8 January 2019, Shell Eastern Petroleum Pte Ltd ("**Shell**") was fined \$400,000 for a fire at a petroleum refinery in Pulau Bukom which resulted in six workers suffering varying degrees of burns.

On 21 August 2015, two groups of workers were simultaneously conducting maintenance and project works on a Crude Distillation Unit at the refinery. The first group of workers was carrying out hot works at various points on a scaffold, while the other group was carrying out cold works at the ground level. Flammable vapours from the cold works came into contact with sparks from the hot works. Although the worker was alerted and immediately closed the valve, a fire broke out.

In the process of escaping from the fire, six workers sustained varying degrees of burns, including two workers who were closer to the fire suffering about 50% and 70% burns. The fire was contained and extinguished by the Bukom Emergency Response Team within 30 minutes.

Investigations revealed that there was a systemic failure in Shell's oversight to check for compatibility of different work activities carried out within the same vicinity at the same time. The hot works and cold works carried out by the two groups of workers in the same vicinity were not coordinated, thus creating a situation where flammable vapours generated by the cold works was ignited by sparks from the hot works.

Shell was fined \$400,000 after pleading guilty in October 2018 to an offence under the Workplace Safety and Health Act for failing to implement adequate control measures to ensure compatibility of works carried out at the refinery.

[More...](#)

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**F&B firm fined for making false salary declarations**

On 27 December 2018, food and beverage company, GD Group Pte Ltd ("**GD Group**"), was convicted of seven charges under the EMFA, and fined \$94,500 for making false salary declaration in order to fraudulently apply for Employment Passes ("**EPs**"). Another 13 charges were taken into consideration for the purpose of sentencing. MOM has barred the company from hiring foreign employees.

Investigations found that the company had circumvented foreign worker quota rules by hiring foreigners on EPs, but paying them less than the salaries declared in the work pass applications. Between February 2013 and July 2015, the company falsely declared salary amounts of between \$4,000 and \$4,800 for 20 foreign employees to meet the salary requirement for EPs. However, the foreign employees were paid salaries of between \$1,500 and \$2,200.

In a statement, MOM's foreign manpower management division director of employment inspectorate Kandhavel Periyasamy said GD Group had gained an unfair advantage in hiring foreigners at the expense of other firms, and that MOM will continue to take stern actions to uphold the integrity of its work pass controls.

All employers in Singapore must make accurate, complete, and truthful declarations to the Controller of Work Passes in their work pass applications. If convicted of making false declarations to the Controller, offenders can be fined up to \$20,000 per charge and/or jailed for up to two years under the EFMA. They will also be barred from employing new foreign workers and renewing their permits of their existing foreign workers.

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**Woman employee who stole nearly \$340,000 jailed for criminal breach of trust**

On 21 January 2019, a 37-year-old administrative executive at a property management firm, Soh Huay Ching, was sentenced to three years and four months' jail for misappropriating almost \$340,000 from her employer. Soh pleaded guilty to one count of criminal breach of trust linked to more than \$320,000. Two other similar charges involving the remaining amount were considered during sentencing.

The offences took place between January 2012 and November 2014. Soh was tasked to collect rent and utility fees from tenants as well as maintain the season parking at Goldbell Tower in Scotts Road. The maintenance of season parking included allocating spaces and collecting the annual fees of \$2,880 from tenants who own vehicles. Although the company's policy is not to offer season parking to non-tenants of Goldbell Tower, Soh went against this policy and sold season parking to 45 vehicle owners who were non-tenants without authorisation. She collected fees from these persons and misappropriated them for her personal use instead of handing them over to the company. She also misappropriated monies for items such as rentals and utilities.

Her illegal activities came to light when she went on maternity leave in October 2014 and her colleagues discovered discrepancies in areas such as the collection of rental payments. A police report was made in November 2014. In early 2015, Soh's employer received complaints that non-tenants were parking at Goldbell Tower. The non-tenants told the company that they had paid Soh for the season parking spaces. Some of them lodged claims against the firm at the Small Claims Tribunals. All 45 affected vehicle owners were given their refunds.

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**Proposed Amendments to the Work Injury Compensation Act**

On 31 January 2019, MOM announced that it had reviewed the Work Injury Compensation Act ("WICA") to provide injured employees with greater assurance of compensation and much sooner after the accident. The Ministry sought public feedback on the proposed amendments to the WICA.

Broaden WICA Coverage and Increase Payout

The MOM proposed expanding mandatory insurance coverage to prioritise lower-income employees most at risk of financial hardship, if their employers fail to compensate. More than 24,000 currently uninsured employees will benefit from the expanded mandatory insurance coverage by April 2021.

The MOM also proposed expanding the scope of eligibility for compensation. Currently, only injured employees placed on medical leave are compensated. Those who are injured but have been certified by doctors to be well enough to perform light duties are not eligible for compensation. MOM proposed to expand compensation to those placed on light duties as a result of work injury, such that they are no worse off than those given medical leave.

The MOM will also lift maximum compensation levels under WICA by at least 10% to keep pace with wage growth and rising medical costs.

Speed Up Claims Processing

To offer a lower cost and speedier resolution to work injury compensation ("WIC") cases as compared to filing a suit in the courts, MOM proposed streamlining various aspects of claims processes to speed up claims processing. One of the measures is making compensation based on the assessment of incapacity at least six months after the date of accident, instead of waiting for the final extent of injury to be determined. For employees with injuries that take longer to stabilise, doctors can still defer assessments to a later date.

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MOM will also accredit WIC policies, based on a core set of standard terms and conditions, to ensure adequate WIC insurance coverage to protect both the employers and the employees. This is because currently, WIC insurance policies that exclude coverage of risky work situations increases the risk of employees not being compensated for their work injuries.

To ensure that claims are processed in a fair and timely manner, MOM will license insurers to sell and process all insured WICA claims. MOM will also be empowered to overrule the insurers' decisions if necessary.

Other amendments

The maximum fines for employers delaying or avoiding compensation will also be increased from \$10,000 to \$15,000. To deter repeat offenders, the maximum fines for second or subsequent WICA offences will be doubled.

*More...*

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## Singapore Budget 2019: Lower foreign worker quota in services sector; continued support for unemployed PMETs

On 18 February 2019, Finance Minister Heng Swee Keat delivered his Budget speech. Among several measures announced in his speech, it was announced that the Dependency Ratio Ceiling (DRC) for the services sector – a quota setting the maximum number of foreign workers a firm can hire for every full-time local worker it employs – will be lowered from 40% to 38% on 1 January 2019. The tighter ratio will also place a cap on the number of S Pass holders (i.e. mid-skilled foreigners earning at least \$2,300) companies can hire in the next two years - from 15% to 13% on 1 January 2020, and to 10% on 1 January 2021. For firms that exceed the new ceiling, the new quota will apply when they apply for renewals of permits. The DRC will remain unchanged for other sectors.

To help firms adjust to these foreign workforce policy changes, higher funding of up to 70% under two grants will be extended for three years up to 31 March 2023. These are the Enterprise Development Grant (EDG), which funds projects for firms to improve efficiency and internationalise, and the Productivity Solutions Grant (PSG), which subsidises the cost of off-the-shelf technology to help companies boost productivity. MOM still provides some flexibility for companies to employ more foreign workers while they transition to a more manpower-lean operating model under the Lean Enterprise Development Scheme, as well as on a case-by-case basis if companies need to bring in foreign workers with specialised skills lacking among Singaporeans.

Minister Heng also announced that, to help experienced workers, the Career Support Programme will be extended for two years until 2021. It subsidises the wages of Singaporeans who are mature and retrenched or are long-term unemployed, who are hired for professional, manager, executive and technician (PMET) jobs. New professional conversion programmes will also be launched to help workers move into careers in growth areas (e.g. blockchain, embedded software and prefabrication).

*More...*

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## Public Prosecutor v Anita Damu @ Shazana bt Abdullah [2019] SGDC 35

On 24 December 2018, 49-year-old Anita Damu ("**Accused**"), was sentenced to 31 months' imprisonment for abusing her 27-year-old domestic helper, Siti Khodijah ("**Victim**"). The Accused pleaded guilty to various charges under the Penal Code (Cap 224) and under section 22(1)(a) of the Employment of Foreign Manpower Act (Cap 91A) ("**EMFA**").

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During the course of the Victim's employment, the Accused restricted the Victim's sleeping hours to 11:00 pm to 4:00 am, when she would be required to wake up to get the Accused's daughter ready for school. As a result, the Victim felt constantly tired as she did not have enough rest. The Ministry of Manpower ("**MOM**") subsequently received information that the Victim had been abused by her employer.

Given the above facts, the Court held that the Accused had failed to provide the Victim with adequate rest and had thereby committed an offence under Section 22(1)(a) of the EFMA. After considering various factors, including the Accused's plea of guilt, the Court imposed a global sentence of 31 months' imprisonment and ordered a total compensation of \$12,000 to be paid to the Victim.

[More...](#)

### Asplenium Land Pte Ltd v Lam Chye Shing and others [2019] SGHC 41

Asplenium Land Pte Ltd ("**Asplenium**") applied to the Court for orders to restrain various parties from disclosing, receiving and/or using certain documents which Asplenium claimed to be legally privileged pursuant to section 128A(1) of the Evidence Act (Cap 97) ("**EA**").

One of the issues that arose was whether one Mark Hwang ("**Hwang**") could be deemed an employee and therefore the in-house legal counsel of Asplenium at the material time, although Hwang was formally employed by Nuri Holdings (S) Pte Ltd ("**Nuri**"). Nuri held approximately 46.46% of the shareholding of Tuan Sing Holdings Ltd ("**Tuan Sing**"). Tuan Sing was, in turn, the holding company of Asplenium. Although formally under the employment of Nuri, Hwang was also performing legal work for Tuan Sing for which Tuan Sing paid Nuri an equivalent to half of Hwang's salary under a cost-sharing arrangement between Nuri and Tuan Sing.

Since Asplenium was a subsidiary of Tuan Sing, the Court found that as long as Hwang could be regarded as a legal counsel employed by Tuan Sing at the material time, he would also be regarded as a "legal counsel" of Asplenium. Therefore, the dispute turned on how the term "employed" is to be interpreted and applied in the context of section 128A(4) of the EA. The Court considered the following non-exhaustive factors relevant to the identification of an employment relationship:

Extent of control: The evidence showed that Tuan Sing would assign work directly to Hwang without need for clearance from Nuri. There was also no evidence that Hwang had the discretion to turn down assignments given by Tuan Sing. Therefore, the test of control had been met.

Extent of integration: Hwang was seated in Tuan Sing's premises and was involved, on a daily basis, in providing legal advice to Tuan Sing and its subsidiaries through various means. Further, Hwang's work became so integral to Tuan Sing that Nuri proposed in 2014 that Tuan Sing should share the cost of Hwang's salary, and Tuan Sing readily accepted the proposal. Therefore, the test of integration had been met.

Remuneration of the putative employee: Tuan Sing shared in Hwang's remuneration by making a regular monthly payment to Nuri equivalent to half of Hwang's salary. Although Nuri had made the actual payments of Hwang's salary and CPF payments, the Court was of the view that the more important point was that all parties were aware that a cost-sharing arrangement between Nuri and Tuan Sing was in place, under which Hwang would provide his legal services to Tuan Sing, and Tuan Sing would pay Nuri the relevant part of Hwang's salary.

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Obligation to work for one employer: The Court was of the view that this did not go against the existence of an employment relationship between Hwang and Tuan Sing. Since Tuan Sing only paid half of Hwang's salary, Hwang could not be expected to work full-time for Tuan Sing to the exclusion of Nuri. Therefore, the fact that Hwang had continued working for Nuri while serving Tuan Sing was not inconsistent with the existence of an employment relationship between Hwang and Tuan Sing.

Provision of tools, equipment and training: The Court accepted that this was a relevant factor and that the evidence did show that Tuan Sing had provided Hwang with office space and equipment. However, it did not consider this factor conclusive and did not place too much weight on it.

Obligation to provide and accept work: The Court accepted that Hwang was obliged to accept work from Tuan Sing. Further, given that Hwang was Tuan Sing's only in-house legal advisor and that Tuan Sing paid half of Hwang's salary, Tuan Sing would have, as a matter of course, provided work to Hwang. However, the Court did not consider this a conclusive factor.

Right to dismiss, suspend, or evaluate the putative employee: The Court said that the fact that Hwang had superiors within Tuan Sing to report to suggested that Hwang would be evaluated by the management of Tuan Sing. Consequently, it is possible that Tuan Sing could terminate its relationship with Hwang. However, the Court did not consider this a conclusive factor.

Taking into account the above factors holistically, especially the control and integration tests, the Court found that an employment relationship existed between Hwang and Tuan Sing in respect of the work which Hwang did for Tuan Sing.

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## World Fuel Services (Singapore) Pte Ltd v Xie Sheng Guo [2019] SGHC 54

World Fuel Services (Singapore) Pte Ltd ("**Plaintiff**") applied to the Court to enforce a confidentiality clause ("**Clause 4**"), as well as a non-competition and non-solicitation clause ("**Clause 5**") in the Defendant's employment contract dated 15 August 2016 with the Plaintiff. Clause 4 imposed duties of confidentiality on the Defendant, and Clause 5 stated that for six months after the Defendant's termination for whatever reason, he would not compete or participate in businesses that compete against the business of the Plaintiff, and would not solicit the patronage of customers, or any brokers, traders, managers or directors employed by the Plaintiff.

The Defendant tendered his resignation on 19 November 2018 and informed the Plaintiff that he intended to join a company called China Aviation Oil (Singapore) Corporation Ltd ("**CAO SG**") on 19 February 2019 immediately after he ceased employment with the Plaintiff. CAO SG is a public listed company in Singapore, and its controlling shareholder is China National Aviation Fuel Group, a state-run entity in China which supplies aviation oil to the Plaintiff. After tendering his resignation, the Defendant was put on garden leave until 18 February 2019. The Plaintiff also applied to the Court to prevent the Defendant from commencing employment under CAO SG.

The Plaintiff was mainly concerned that the Defendant had contacts with its suppliers in China and knew the prices that the Plaintiff bought and sold its aviation oil. The Plaintiff argued that this constituted clear confidential information that was useful to a competitor, including CAO SG, as CAO SG and its subsidiaries would tender for aviation oil contracts alongside the Plaintiff. The information would enable the competitor to negotiate prices for the purchase and sale of aviation oil to the disadvantage of the Plaintiff.

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The Court allowed the Plaintiff's application to prevent the Defendant from commencing employment under CAO SG, finding that the Defendant's experience must have been an important consideration for CAO SG to employ him. The Court was also of the view that it was obvious the Defendant carried all his knowledge of the Plaintiff's connections and business with its suppliers and customers. It would be impossible to separate confidentiality from a detached discharge of his duties with CAO SG. In this regard, the Court noted that the Defendant's regular visits to China to meet the Plaintiff's suppliers seemed like a serious and important job. Additionally, the Court was of the view that, as a supply manager for the Plaintiff, the Defendant had access to important and confidential information such as the price that the suppliers sold to the Plaintiff, and the price the Plaintiff sold to its customers.

Even though the Defendant argued that Clause 4, which prevented him from disclosing confidential information, adequately protected the Plaintiff's interests and that he would honour his undertaking under Clause 4, the Court questioned why the Defendant was not similarly willing to honour Clause 5.

Finally, the Court noted that the Defendant will be paid \$10,400 a month with unspecified bonuses and a sign-on bonus of \$10,400, whereas the Plaintiff had a US\$40 million annual trading turnover derived from the aviation oil contracts. Even assuming that the Defendant may lose his job if prevented from working for CAO SG and taking into account the difficulty in finding another job, the loss of his new job was easily quantifiable. On the other hand, the loss of business by reason of price adjustments by the Plaintiff's competitors including CAO SG would be a more difficult exercise.

For the reasons above, the Plaintiff's application was allowed.

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## Government, unions and employers agree to raise retirement, re-employment age

On 5 March 2019, Minister of Manpower Josephine Teo announced that the Government, unions and employers have agreed on the need to raise the retirement and re-employment ages beyond 62 and 67. A workgroup comprising representatives from the Government, labour unions and the private sector has come to a consensus on the matter.

Minister Teo said that the workgroup, to which she is an adviser, believes that a higher retirement age will motivate both workers and employers to invest in skills upgrading and job redesign for older workers, as people enjoy more years of good health. The re-employment age, up to which firms must offer eligible workers re-employment, also remains useful. The workgroup said that the increases in the retirement and re-employment ages should be implemented in small steps over time as employers will need to make considerable adjustments. The workgroup also said that it is critical to ensure employment arrangements remain flexible.

Minister Teo said the WorkPro scheme, which covers various grants that fund efforts by employers to make their workplaces more age-friendly, will also be reviewed and may be extended beyond June this year. The workgroup will also be making recommendations on Central Provident Fund ("CPF") contributions for older workers later this year.

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## Amendment to the Labor Standards Act ("LSA") regarding Notice of Dismissal provision

The amendment to the LSA inserted an exception to the advance notice of dismissal requirement in Article 35 for employees whose consecutive service period is less than 3 months (i.e., regardless of whether they are probationary employees or not). The amendment deleted other existing exceptions to the notice of dismissal – which were based on the types of employment – to reduce controversy on the fairness of the existing system. This change was largely driven by the Supreme Court's holding that it was unconstitutional to exclude a salaried employee whose consecutive service was less than 6 months from the notice of dismissal requirement.

This amendment to the LSA has become effective from January 15, 2019, immediately upon its promulgation. However, as the amendment is applicable to employment contracts executed after 15 January 2019, the employment contracts executed before 15 January 2019 remain governed by Article 35 of the LSA before the amendment.

## Promulgation of an amendment to the Labor Standards Act ("LSA"), which defines and prohibits workplace harassment for the first time in Korea

An amendment to the LSA was promulgated on 15 January 2019, which established a new obligation to prohibit workplace harassment as follows.

The Amendment to the LSA prohibits workplace harassment, which is defined as an "act by an employer or employee[,] which causes physical or mental suffering, or worsens the working conditions/environment of another employee, by taking advantage of his/her (superior) status or (power) position in a relationship within the workplace beyond the appropriate scope of work" (Article 76-2 of the LSA Amendment).

An employer is required to include or amend the workplace harassment-related provisions on preventive and responsive measures upon occurrence of workplace harassment in the company's Rules of Employment ("ROE"), and report the new or amended ROE to the relevant labor authorities.

Any employee may report the occurrence of workplace harassment to the employer. An employer is required to promptly conduct an investigation if the employer receives a complaint, or is otherwise made of aware of workplace harassment. If workplace harassment is confirmed through the investigation, the employer is required take appropriate measures, such as disciplinary action, against the harasser.

During the investigation process, an employer is required to take appropriate measures (e.g., changing the victim's workplace, placing the victim on paid leave, etc.) to protect the victim-employee from (further) harassment after hearing the opinion from the victim.

If an employer takes any disadvantageous measures against the victim-employee or the employee who reports the occurrence of workplace harassment, the employer may be subject to a fine of up to KRW 30 million or imprisonment of up to 3 years.

Workplace harassment-related provisions in the LSA will become effective on 16 July 2019, which is 6 months from date of official promulgation.

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**The minimum wages for six trades have been amended with effect from 1st February 2019**

Amendments to the minimum wages for the to the following six trades :-

1. Motor Transport;
2. Hosiery Manufacturing;
3. Coconut Manufacturing;
4. Prawn Culture and Exports;
5. Match Manufacturing and
6. Brick and Tile Manufacturing.

have been notified by the Secretary, Ministry of Labour by notices dated 28 and 29 January 2019 was published in the Ceylon Daily News of 1st February 2019.

**Agrapathana Plantations Ltd. and (2) Lanka Tea and Rubber Plantations (Pvt.) Ltd. – Respondent-Appellants v. Seevali Arawwawala [Supreme Court].**

The Applicant-Respondent-Respondent [“the applicant”] had been employed as an Assistant Manager of an estate owned by the [1st] Appellant [“the employer”]. He was so appointed on 1 July 2009 and placed on probation for a period of six months from that date but, on 28 January 2010, the period of probation was extended for a further period of three months from 1 January 2010 to 31 March 2010.

Thereafter, by letter dated 17 March 2010., his employment was terminated with effect from 1 March 2010 as his performance had not improved.

The applicant sought relief from the Labour Tribunal which, in its order dated 30 September 2011., directed the employer to reinstate the applicant and transfer him to another estate controlled by the employer. The employer then appealed to the High Court, which affirmed the order of the Labour Tribunal.

Before the Labour Tribunal, the employer, while admitting that it terminated the services of the applicant further stated that the termination had been effected whilst the applicant was on probation.

The Labour Tribunal ordered that, as the employer had admitted the termination, the employer should begin the case. It was contended by the Appellant that this was erroneous since the termination had occurred while the applicant was on probation. Counsel for the Applicant, on the other hand, contended that the applicant was not on probation at the time of the termination of his services since, by the time the period of probation was extended on 28 January 2010, the period of probation had already come to an end on 31 December 2009.

In considering this issue, the Supreme Court noted that the letter of appointment provided, inter alia, that the employer had reserved to itself the right to extend the period of probation and also provided that confirmation would be in writing and the applicant would continue to be on probation until so confirmed. Noting further that the applicant had never been confirmed, the Supreme Court held that the services of the applicant had been terminated while he was on probation.

Proceeding to the next question as to which party should begin the case in such circumstances, the Court adverted to one of its previous judgments [Anderson v Husny – 2001 SLR 168] where it had held that

"upon proof that the termination had taken place while the employee was on probation the burden was on the employee to establish unjustifiable termination and the employee must establish at least a prima facie case of mala fides before the employer is called upon to adduce evidence as to his reasons for dismissal; and the employer does not have to show that the dismissal was, objectively, justified."

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Accordingly, the Supreme Court held that the order of the Labour Tribunal was wrong, could not stand and held further that the High Court had also erred in that while (rightly) holding that the probation had been lawfully extended, nonetheless affirmed the order of the Tribunal.

The order of the Labour Tribunal and the judgment of the High Court were set aside and a 'retrial' was ordered by the Supreme Court.

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## Amending the types of occupations defined under Article 36, Paragraph 4 of the Labor Standards Act

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Tiao-3-Zi-1080130098

Issue date: January 23, 2019

After negotiations between the Ministry of Labor and representatives from the relevant industries and sectors, while it is recognized that having passenger transport (i.e., tour bus) drivers work on national holidays, labor day and other holidays designated by the central competent authority according to the traffic mitigation plans made by the Ministry of Transportation and Communications represent a very important facet of public convenience, their personal health as well as road safety are both important concerns as well. As such, considering the public convenience as well as the health and welfare of the drivers, it is proposed to include those drivers under Article 36, Paragraph 4 of the Labor Standards Act for flexible adjustments of mandatory days off during any 7-day period on the "time specific" exceptional occasion. However, such day-off shifting and adjustments should comply with the following rules:

1. Driver may not be made to work for more than nine consecutive days.
2. Driver may not be made to remain on duty for more than 11 hours per day for more than three consecutive days.
3. Maximum driving time of 10 hours per day.
4. For every two continuous days on duty, there shall be a continuous 10-hour or more break period.

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The Ministry of Labor's interpretation regarding the determination of "Negotiation Eligibility" requirements under Article 6 of the Collective Agreement Act and relevant laws and regulations in case of a union of dispatched workers requesting to engage in collective bargaining with the dispatch company according to the Collective Agreement Act.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Guan-2-Zi-1080125196

Issue date: January 31, 2019

In the event a collective bargaining request is made by a dispatch workers' union to a dispatch company by which the dispatched union member workers are employed where the negotiation proposal clearly states that it is applicable only to those dispatched union member workers "serving at the same employer that they were dispatched to", then as long as the number of member-workers exceed at least 1/2 of the total number of workers dispatched by the dispatch company to that same employer, then the union shall be considered a labourer-side party that is "qualified to engage in collective bargaining" under Article 6, Paragraph 3 of the Collective Agreement Act. However, the above does not apply if the dispatch business has dispatched less than 20 workers to the same employer.

Since the "same employer" shall be defined according to the parties in the dispatch contract, when the regional labor authorities are engaged in assisting the two sides in determining the qualification for collective bargaining, it should have the dispatch company provide the relevant dispatch service contract for use as a basis to determine the said qualifications.

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The “justifiable reasons” proviso in Article 22 of the Act of Gender Equality in Employment shall be determined on a case-by-case basis. If a worker is personally raising two or more children of less than 3 years of age and is requesting unpaid child care leave from his/her employer, such circumstance shall be considered as a “justifiable reason” under the proviso in Article 22 of the Act of Gender Equality in Employment.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Tiao-4-Zi-1080130174

Issue date: February 21, 2019

Since it is provided as a proviso (i.e., an exceptional circumstance to the general rule) in Article 22 of the Act of Gender Equality in Employment that a worker may still request unpaid child care leave even if he or she has a spouse that is not in employment if there are justifiable reasons, the matter should be decided on a case-by-case basis.

In the current case, in consideration that it may be difficult for a single parent to take care of two or more children under the age of 3, as well as the general policy of encouraging parental involvement in child development, if the worker is requesting unpaid child care leave for taking care of two or more children under the age of 3 from his/her employer, it shall be deemed as a “justifiable reason” under the Article 22 proviso.

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The Ministry of Labor’s interpretation of how the Labor Standards Act and other relevant regulations apply for wage payments to workers under the Labor Standards Act Article 84-1 who work on the election/removal days for the president, vice-president, and all types of public officials as well as the referendum day.

Issued by: The Ministry of Labor

Ref. No. Lao-Dong-Tiao-2-Zi-1080130118

Issue date: March 4, 2019

In general, for workers under the Labor Standards Act Article 84-1, on the election/ removal days for the president, vice president and all types of public officials as well as the referendum day (“election days” in general), Article 37 of the Labor Standards Act stipulates them as a leave day, and every worker who has the right to vote and is obliged to work on that day shall have paid leave (for 24 consecutive hours from 12 am to 12 pm); those that did not have to work on that day do not get an extra day of leave. Once an employer has obtained consent for the worker to work on election day, the employer shall provide wages commensurate with the hours worked pursuant to Article 39 of the Labor Standards Act, while also taking care to avoid interfering with the worker going to the polls to vote. The employer shall pay the worker at a rate double the regular rate for work performed during “regular hours” (i.e., the hours the worker would have worked) on the election day, as well as overtime pursuant to Article 24, Paragraph 1 of the Labor Standards Act stipulates that if the worker performs work outside such “regular hours”. Lastly, since the right to vote may only be exercised on election day, election day is different in nature from all other national holidays or days off, and it is not possible to shift around that day off with other working days in the same way as other holidays of the year.



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When the employer has obtained consent from the worker to work on an election day, it shall provide wages per the aforementioned rules; if the worker would like to take make-up leave after work on that day instead of receiving wages, it would be up to the employer and the worker to negotiate the terms of the make-up leave (such as the standards and time-limit of taking the leaves as well as how to deal with the untaken hours of leaves) so as to protect the rights of both sides. As such, if an employer unilaterally restricts workers to only be able to choose make-up leave after working on election day, such work rule is not consistent with the Labor Standards Act.

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There are no significant policy, legal or case developments within the employment space during 2019 Q1.

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**Decree No. 157/2018/ND-CP**

The Decree provided for region-based minimum wage (ranging from VND 3.98 million (US\$172) to VND 4.18 million (US\$180)) applied for contracted employees as prescribed by the Labor Code 2012 in four different regions in Vietnam. Such rates are the lowest rates used as the basis for any salary arrangement between employers and employees who perform simplest tasks. Any trained employees must be paid at least 7% higher than the above regional minimum wage rates.

This Decree takes effect as from 1 January 2019 and its regulations take effect as from 1 January 2019.

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