Legal Insight

K&L GATES

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May 3, 2012

Practice Group:

Labour and Employment

2012 Global Labour and Employment Horizon

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Overview

Multinational employers are subject to a host of differing employment laws, regulations and court decisions in various countries. In the past year, we noted a number of changes in global employment law in various countries that multinational employers should be sure to review. As a resource to our clients, the Labour and Employment team at K&L Gates has summarised key law changes of the past year affecting employers in 2012 in certain key countries in which we are located. This publication provides the global perspective to complement our earlier work outlining key changes in employment law in the United States. View the United States summary here.

Europe and Middle East

The effects of the global economic contraction and the Eurozone debt issues have proven a strong point of leverage for a series of employer-friendly changes to employment law in key countries across the European Union. However, from a U.S. perspective, employment laws in Europe remain significantly weighted in favor of employees and unions. We have summarised key changes in the United Kingdom, France, Germany and Poland below.

United Kingdom

The Bribery Act 2010

The antiquated bribery provisions, which dated back to the Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Acts of 1906 and 1916, were swept away on 1 July 2011 with the introduction of the Bribery Act 2010, which has been described as *"the toughest bribery legislation in the world."*

As well as it now being an offence to bribe another or to accept a bribe, the Act also creates a new corporate offence: failing to prevent bribery. The Act states that a commercial organisation is guilty of an offence if a person associated with the organisation bribes another to obtain or retain business or in order to gain a business advantage. Given that the only defence available to commercial organisations is that it took adequate steps to put in place procedures to prevent bribery, employers are well advised to take such steps. These include adopting tough Anti-Corruption and Bribery Policies and limiting corporate hospitality offered to clients and customers to avoid potentially falling foul of the Act's provisions.

Abolition of the Default Retirement Age

Following a review of the default retirement age (the "*DRA*") by the government in 2010, the DRA was abolished in October 2011 to reflect the change in the economic circumstances of the UK, which is seeing rising numbers of individuals working past 65 years of age in order to pay for their retirement.

Employers are able to choose whether they wish to keep a fixed retirement age. Any fixed retirement age, however, will need to be objectively justifiable in order to avoid being ruled discriminatory under the Equality Act 2010. The response of many businesses has been to eliminate compulsory age-based retirement entirely and instead to seek to rely on another of the potentially fair reasons for dismissal under UK legislation when dismissing employees, such as capability, misconduct or redundancy.

The Agency Workers Regulations 2010

2011 also saw the introduction of the Agency Workers Regulations 2010.

The Agency Worker Regulations provide agency workers with the same basic working and employment conditions to which they would have been entitled had they been recruited directly by the hirer, provided that the agency worker satisfies a 12-week qualifying period. Agency workers also have the right to use business' facilities such as the canteen, car park or, potentially, free child care offered to staff from the first day they start working for the hirer.

The Regulations contain specific anti-avoidance provisions, which are likely to catch any attempt by businesses to deprive agency workers of equal rights.

Looking Forward to 2012 and Beyond

As part of its continuing efforts to kick-start the economy, the British Government has turned its attention to employment law reform. Some of the proposed changes, announced in November 2011, have been promised for some time, but others are new. The aim is to provide employers with more protection and more flexibility in their dealings with employees, to redress the perceived imbalance between the rights of employers and employees, and to instill businesses with a new level of confidence. The proposals have met with predictable levels of support from employer bodies and criticism from unions.

In a three-pronged approach to the reform of employment law, the Government announced its written response to the *Resolving Workplace Disputes* consultation on the reform of the employment tribunal system and also made two "calls for evidence," in which the Government invites comments on how legislation is operating in practice, relating to the possible reform of collective redundancy consultation and the UK's legislation that protects employment rights on the transfer of a business (TUPE).

These proposals have been hailed by many as the most radical reforms to employment law in Britain for decades, yet a number of business representative bodies are calling for the Government to speed up the process and implement the proposals. This, of course, is being met by strong opposition from unions.

The Government has proposed:

- A requirement for all employment litigation claims to be submitted to ACAS, an independent conciliation service, before the claim can begin. This is to allow the parties to undertake a pre-claim conciliation process, if both agree to do so. The parties will have a one-month period in which to attempt to settle the claim, after which the employee will then be free to commence legal proceedings.
- The introduction of the concept of "protected conversations," to allow employers to raise workplace issues "in an open way, free from the worry it will be used as evidence."
- A thorough review of the employment tribunals' rules of procedure to be carried out by the current President of the Employment Appeal Tribunal. In addition, the Government has already announced an increase on the limit applicable to orders imposing court costs (which can be made against either party) from £10,000 to £20,000. The Government has also

announced that employers who are unsuccessful in their defence of claims may, at the discretion of the employment tribunal, be required to pay a financial penalty to the Government, of 50% of the amount of damages awarded to the employee, subject to a maximum ceiling of £5,000. The penalty will be reduced by 50% if paid within 21 days.

- For the first time, a requirement for employees to pay a fee in order to commence an employment tribunal claim, possibly with higher fees for higher value claims. This is not expected to be introduced until 2013.
- A limitation on the scope of the UK's whistleblowing legislation by overturning case law that has established that employees are entitled to whistleblower protection for complaining about a breach of their own contracts of employment.
- Doubling the service period required before employees can claim unfair dismissal, from one year to two years.
- Simplifying recruitment by reviewing the extensive legislation that governs employment agencies, including a commitment to review in early 2013 the Agency Workers Regulations 2010 which give agency workers the right to be paid at the same level as comparable employees after 12 weeks of employment and which only came into force on 1 October 2011.
- Extending to all workers the right to request flexible working schedules (thereby removing the current six-month service requirement) and implementing a more modern system of parental leave that reflects the greater involvement of modern fathers in child care.

In terms of timing, the Government has confirmed that the increase to the unfair dismissal qualifying period and the increased maximum costs order will be effective as of April 2012. The longer qualifying period for unfair dismissal will, however, only apply to employees commencing employment after 6 April 2012. The Government has also invited the President of the Employment Appeal Tribunal to recommend a revised procedural code by that date. Implementation of the Government's remaining proposals will be subject to further consultation, although a number are expected to be introduced towards the end of 2012.

Critics of the proposals point to the fact that the most concrete, the increase in the unfair dismissal qualifying period, will not elevate business confidence as suggested—especially in times of deep uncertainty created by the Eurozone crisis. The Government's own estimates tend to support that view. These estimates state that increasing the qualifying service period will only reduce the number of unfair dismissal claims by between 1,600 and 2,400 each year. Since 47,900 such claims were heard by employment tribunals last year, it is indeed questionable whether a 4% reduction will have any practical impact. What is clear is that British businesses will have to come to grips with yet another raft of employment-related legislation, just as they have in previous years under previous governments.

France

The French legislature has worked on simplification of French labour law, especially in relation to work time flexibility. On the other hand, it has increased companies' responsibilities in certain areas such as professional equality within the workforce and termination indemnities.

Revisions to the Labour Code

The Warsmann law has been adopted and, although not yet published, shall come into effect swiftly. This law modifies important parts of French labour law, including:

- *Working time:* The Warsmann law enables the implementation of flexible working time on a monthly or annual basis, instead of the weekly legal basis, through a collective agreement. This does not require individual written agreements from each employee. This should allow companies to negotiate more flexible working arrangements.
- *Paid leaves:* Employees start accruing paid leaves from the date they are hired, and no longer have to wait until 10 working days after their hire date to start such accruing.
- *Payslips:* The Warsmann law will generally simplify payslips and the related statutory administrative declarations. It will also reduce the mandatory mentions on monthly payslips.
- *Remote working:* The Warsmann law has created 3 new articles in the French labour code, from L. 1222-9 to L. 1229-11, that define and regulate remote working. As set forth in Article L. 1229-9 of the French labour code, remote working shall mean an organisation of work that could have been executed within the employer's premises but is executed out of such premises by a salaried employee on a regular basis, using new information and communication technologies. This Article requires that remote working must be voluntarily implemented through a mutual agreement between an employer and employee, and that an employee's refusal to work remotely cannot justify the termination of his/her employment contract. The employment contract shall define the rules applicable to change of working conditions as well as the monitoring of the employee's working time. The employer has the duty to pay for the costs linked to the employee's professional activity, to inform the employee of any restrictions on the use of the IT equipment, and to allow the employee to work within the premises if he/she so wishes. The employer must also organise an annual meeting to address working conditions as well as scheduling the hours during which the employee shall be reachable.

Professional Gender Equality

A law implemented in 2011 established a new obligation for companies with a workforce of at least 50 employees to negotiate with employee representatives an agreement or action plan regarding professional gender equality. The deadline for adopting an agreement or action plan was the end of 2011.

The collective agreement or action plan must cover hiring, training, professional advancement, qualifications, classification, working conditions, actual compensation, and the liaison between professional activity and familial responsibilities.

As of January 1, 2012, non-compliant companies incur a penalty of 1% of the aggregate total gross salaries per month until an agreement is reached or action plan implemented.

The legislature is currently working on increasing the financial consequences of non-compliance with these obligations. Non-compliant companies may lose the benefit of exoneration from certain social charges, especially those applicable to low salaries. Moreover, companies with a workforce above 300 employees would have increased obligations and would be compelled to remit the collective agreement or action plan to the labour authorities within 15 days following the meeting with the Works Council, during which it delivers its opinion. Breach of such obligation would trigger a penalty of 1% of the aggregate gross salaries. Finally, companies employing more than 20 employees and abusing their right to hire part-time employees for women—if the rate of part-time employees is higher than 25% compared to the total workforce—would face a 10% increase in social charges rates.

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Minimum Wage

On January 1, 2012, the statutory minimum wage increased by 0.3%, following an increase of 2.1% on December 1, 2011. Thus, for the current year, the monthly minimum gross salary must be equal to at least 1,398.37 Euros (1,860.70 US$) for any salaried employee. The legal minimum wage applies to any salaried employee of any kind. However, most of the sectorial statutory collective bargaining agreements provide for sectorial minimum wages, linked to the employees' positions, which must be higher than the aforementioned legal minimum wage.

Social Security Applicable to Termination Indemnities

For all termination of employment contracts notified or agreed to after January 1, 2012, the ceiling of exoneration from social charges shall be decreased from 3 to 2 times the annual ceiling of social security. This means that, in 2012, termination indemnities will be exonerated up to 72,744 Euros instead of 109,116 Euros, except if the mandatory dismissal indemnity exceeds 72,744 Euros the ceiling shall remain 109,116 Euros.

Any amount paid above these ceilings and linked to termination of an employment agreement (such as termination indemnity or settlement indemnity) shall be subject to social charges like salary. The only exception will be the additional dismissal indemnities negotiated with employees' representatives in case of redundancies—collective dismissals for economic grounds—which will be subject to the ceiling of 3 times the annual ceiling of social security—109,116 Euros in 2012.

Germany

Statutory Developments on Employee Leasing

In late 2011, Germany incorporated into legislation amendments to the Lease of Employees Act (*Arbeitnehmerüberlassungsgesetz*). The regulation of the temporary leasing of employees has been extended by increasing the Act's scope to include intra-group leasing of employees, such as secondments. Secondments between affiliated companies were previously privileged, but are now subject to a license issued by the Federal Employment Agency.

Federal Labour Court Developments

The Federal Labour Court recently issued decisions on temporary employment contracts as well as collective bargaining law, each of great importance to the German employment landscape.

Temporary Employment Contracts

An employer's ability to limit the duration of employment contracts has been increased by recent case law. Until recently, previous employment with the same employer would invalidate a contractual time limitation unless the limitation was justified with good cause. As a consequence, employers had to take the precaution of reviewing old personnel files and databases for previous employment of a candidate, including short-term employment decades earlier. The Federal Labour Court has now limited this excessive interpretation of the law. Only employment relationships that fall within the three years preceding the commencement of a short-term employment contract may hinder the time limitation on that contract. This decision provides employers with greater flexibility in contracting and significantly reduces the employer's risk.

Collective Bargaining

In July 2010, the Federal Labour Court overthrew the fundamental principle of a single collective bargaining system per business. Previously, every employer was only obliged to negotiate collective

bargaining agreements with one union representing its employees. The employer was in the position to reject all other unions' requests to negotiate collective bargaining agreements. The employer will now have to evaluate negotiation requests from all representative unions and assess whether to enter into negotiations or take the risk of strike measures.

Poland

2012 brought some changes to existing Polish employment laws that will have an impact on both sides of the employment relationship. There also are significant changes being considered by the government that employers should monitor.

Revisions to the Labour Code

The most important development in Polish employment law concerns the amendments to the Labour Code which took effect on January 1, 2012.

These changes, among other things, prolong the period when overdue vacation (unused vacation from the previous year) may be used by employees. Following these changes, employers must allow employees to use their vacation from the previous year by the end of September the subsequent year, instead of by the end of the first quarter of the year. Extending the period by six months should make it easier for employers and employees to agree on vacation times that suit both parties.

Beginning in January 2012, female employees are entitled to an additional two weeks maternity leave. Female employees are entitled to between 20 and 37 weeks of fully paid maternity leave depending on the number of children born (i.e., twins, triplets, etc.) at the same time. Additionally, a female employee may ask for an additional 4 weeks in the case of one child and 6 weeks in the case of more children born at the same time. Similar rules apply to parents adopting children. Male employees received an additional one week of paternity leave. Fathers may now take two weeks of paternity leave to care for their child, and may use this right at any time until the child is 12 months old.

Minimum Wage

On January 1, 2012, the statutory minimum monthly wage was increased by about 8% and for the current year it amounts to 1,500 PLN (approximately US$484 and 361 Euros). The increased minimum wage impacts a number of employment and social benefits for employees, as certain provisions refer to the minimum wage as a basis for calculation of those benefits. For example, employers will have to pay higher wages for night work. The maximum statutory severance will increase for employees being made redundant due to reasons attributable to the employer within a collective redundancy procedure. The maximum severance for collective redundancies is 15 times the minimum wage; therefore, in 2012, it will amount to 22,500 PLN (approximately US$7258 and 5422 Euros).

Social Security

As of February 1, 2012, employers pay an additional 2% in disability insurance contributions on behalf of employees (for a total contribution equaling 8% of the employees' net wages). Employees finance 1.5% of this contribution and employers finance 6.5%.

Another amendment provides that employers may report regular information to the Social Security Office and National Health Fund collectively once a year instead of every month. However, employees may request monthly reports. And, due to the fact that the employees need to obtain these reports to prove their medical insurance when they visit doctors, this amendment is not likely to

change current monthly reporting practices unless somebody does not need to go the doctor within the entire calendar year.

Time limits for claiming overdue social security contributions and for storage of employee contribution reports have been reduced. Both periods are now 5 years instead of the previous 10 years.

Veterans

Beginning on March 30, 2012, Poland will have a new privileged group of employees: veterans of current military operations of the Polish armed forces. These veterans will have a priority right in employment in units subordinated to the Ministry of Defence and Ministry of Domestic Affairs. Additionally, these employees will also be entitled to 5 more vacation days than regular employees, who have 20 or 26 days of vacation depending on the length of employment.

Anti-Crisis Act

December 31, 2011, marked the end of more than two years of the Anti-Crisis Act in Poland. This Act was geared towards entrepreneur-employers. It suspended two Labour Code rules that limited the number of temporary (definite) employment contracts employers could enter with the same employee and defined the term "working day" as 24 consecutive hours from the beginning of work. The Act also extended reference periods (for settlement of any overtime) from the normal one to four months up to twelve months in order to give employers more flexibility in planning and settling working hours.

With the repeal of the Anti-Crisis Act, all rules and restrictions of the Labour Code are restored. However, according to Mr. Radosław Mleczko, Undersecretary of State at the Ministry of Labour and Social Policy, the social partners (employers and country-wide trade unions) agreed in February to amend certain aspects of the Labour Code. The proposed changes include providing for longer reference periods, removing the definition of the working day, and providing a maximum length of definite term contracts and flexible forms of employment.

United Arab Emirates

The United Arab Emirates (the "UAE") is a civil law jurisdiction. Employment and labour relations are governed by UAE Federal Law 8 of 1980 (the "Labour Law").

Employment Contracts

Employment contracts can be for a fixed or unlimited term. The Labour Law treats employees under a specified or fixed term contract differently from an employee under an unlimited term. As such, drafting an offer and subsequent contract should be done with care. Most employers in the UAE offer specified term contracts; however, these contracts are more difficult and costly to terminate. Also, with respect to termination entitlements, an employee who terminates the employment under an unlimited term will only be entitled to a portion of his/her severance entitlement (which will be discussed further below).

The Labour Law provides minimum employment standards that every employer should be cognisant of, as any breach of the Labour Law may result in the Ministry of Labour revoking the employer's right to hire new employees or imposing other monetary and non-monetary sanctions.

Minimum Employment Standards

Although the Labour Law provides that a minimum rate of remuneration is to be fixed by federal decree, no such minimum has been adopted. Earlier in 2011, the Ministry of Labour proposed a monthly minimum of US$1,400 for employees with a high-school diploma and US$3,260 for those

with a bachelor's degree. Whether these proposals will be adopted is unknown. Wages are currently set by market demand and competition.

The maximum hours of work is eight hours a day or forty-eight hours a week, but is reduced by two hours a day during the holy month of Ramadan. The minimum hours may be increased to nine hours a day in trading companies; hotels; cafes and other operations with permission from the Ministry of Labour. An employee is entitled to regular pay plus an overtime pay rate of at least 25% for hours worked over the maximum.

With respect to annual/holiday leave, the Labour Law provides two calendar days a month for a period of service between six months to one year and 30 calendar days a year where the service has been more than one year.

Termination of Employment

A contract for a specified term may be terminated by mutual agreement between the employer and the employee or at the expiry of the specified term. A contract for an unlimited term may be terminated by mutual agreement or with at least 30 days' notice in writing. In cases where the employee performs day-to-day work, the notice period is determined by length of service. If the employment service was less than six months, the notice period is one week; up to five years, two weeks; and if more than five years, one month notice is required.

It should be noted that an employer may terminate an unlimited term contract without providing any further compensation other than the notice period, or payment in lieu, and termination entitlements such as severance pay (described in detail below) and pay in lieu of unused vacation entitlement. However, where the employer terminates a specified term contract prior to the expiry of such term, the employer must pay the employee compensation of three months' wages. Conversely, if an employee terminates a specified term contract prior to the expiry of such term, the employee will have to pay the employer compensation of up to one and a half months' wages.

A contract may also be terminated without notice if certain conditions are met. They include, but are not limited to:

(1) termination during the employee's probation period;

(2) the employee has caused material damage and/or loss to the employer and such damage and/or loss was reported to the Ministry of Labour within 48 hours of discovery; or

(3) the employee has failed to perform their duties under the contract despite being placed on notice that if they fail to perform their duties they will be dismissed.

Conversely, the employee may terminate a contract without notice if the employer has not fulfilled its obligations under the employment contract or the Labour Law. Termination without notice is also possible if the employee has been assaulted by the employer or the employer's representative.

Redundancies

As stated above, an employment contract may be terminated for any reason so long as the employer provides adequate notice, or payment in lieu, and termination entitlements such as severance pay as described below. However, in the event that the employer terminates the contract for reasons that are unrelated to the employee's work performance, such as redundancies, the employer will have to provide additional compensation to the employee—in addition to the severance pay—of three months' wages. Therefore, it is very important for employers to adequately document the reasons for termination relating to the employee's work performance.

End-of-Service Gratuity

When employment is terminated and the employee has completed at least one year of continuous service, the employee is generally entitled to severance pay called end-of-service gratuity ("Gratuity"). This Gratuity is payable even if the employee terminates the employment.

The Gratuity is calculated as follows:

- 21 days of basic salary for each year of the first five years of continuous service; and
- 30 days of basic salary for each additional year of continuous service provided that the total gratuity payment does not exceed the basic salary of two years of service.

An employee is entitled to a Gratuity payment regardless of whether the employee or employer terminated the agreement (except when the employment is terminated by the employer for reasons not requiring notice and/or compensation listed above). However, where an unlimited term contract is terminated by the employee prior to three years of continuous employment, the employee is entitled to one-third of the Gratuity payment. Where the employment is terminated by the employee between three to five years of continuous employment, the employee will be entitled to two-thirds of the Gratuity payment. Where the employment is terminated after five years of continuous employment, the employee is entitled to the full 21 days' salary Gratuity payment.

While Gratuity entitlement does not include overtime salary or allowances, the UAE courts have recently held that commissions will be included in the Gratuity entitlement.

Asia

In general, the trend across Asia has been to continue to enhance and refine legal provisions in relation to employment law. Much of the change involves refinement of legal process rather than substantive changes in practice, though a notable exception is the adoption of specific measures protecting older workers in Japan.

People's Republic of China

Significant developments in 2011 in the employment laws of the People's Republic of China ("China" or the "PRC") include the introduction of a social insurance scheme for foreign workers and the promotion of mediation to resolve labour disputes. In addition, this summary covers two issues under PRC law which are noteworthy for multinational employers—the secondment arrangement and severance payment.

Social Insurance Scheme for Foreign Workers

As of October 15, 2011, all foreigners who legally work in China are required to participate in the nation's social insurance scheme pursuant to the *Tentative Measures for the Participation in Social Insurance by Foreign Nationals Employed in China* (the "New Rules") issued by the PRC Ministry of Human Resources and Social Security.

The New Rules impose a filing obligation on the employers to register their foreign employees for social security purposes within 30 days of the submission of a work permit application for the employees. The employers, together with their foreign employers, are obligated to make social insurance contributions in 5 areas: pension, medical care, work-related injury, unemployment, and maternity insurance. In particular, the mandatory work-related injury insurance has undergone significant changes subsequent to the revision of the *Regulations for Work-related Injury Insurance* effective on January 1, 2011. The changes, in essence, expand the scope of work-related injury

insurance, simplify the procedures for insurance claims, and mandate the insurance benefits for employees who die or are disabled as a result of work.

The New Rules are applicable to all employers, whether they are organisations lawfully registered in China, or representative offices or branches in China, who hire foreign nationals in China directly or indirectly through a secondment arrangement. In addition, the New Rules are subject to bilateral or multilateral treaties regarding social insurance between China and some foreign countries. Currently only Germany and South Korea have such arrangements with China. Employers who fail to comply with the filing requirement, or to make full and timely social insurance contributions, will be subject to late payment interest surcharges and a fine of 1-3 times the overdue amount.

In practice, the New Rules have not yet been implemented by the PRC authorities. Moreover, there are a number of uncertainties in the New Rules. First, they are silent on whether residents of Hong Kong, Macau and Taiwan are regarded as foreign nationals. Second, they do not explain how foreign employees can claim benefits under the social insurance schemes other than the pension scheme.

Mediation to Resolve Labour Disputes

In light of the increase in labour disputes in China in recent years, the PRC Ministry of Human Resources and Social Security issued the *Regulations on Consultation and Mediation of Labour Disputes in Enterprises* (the "Regulations"), which are intended to encourage companies to settle labour disputes internally through mediation before resorting to arbitration or court.

Effective January 1, 2012, the Regulations require all enterprises of large or medium size[1] to establish an employee dispute mediation committee (the "Mediation Committee"), a new internal organisation which is mandatory under the law in addition to the labour union. The Mediation Committee shall consist of equal numbers of representatives from the company management and the employees. The total number of members in the Mediation Committee shall be determined by both parties through consultations.

In addition, the Regulations establish the legal procedures for mediation and set out procedural time limits to ensure the efficiency of mediation. The Regulations also strengthen the enforceability of mediation in order to promote the use of mediation to resolve labour disputes. Under the Regulations, an agreement reached after mediation would be deemed as strong evidence in any subsequent arbitration. Such a mediation agreement shall also be enforceable by law if the agreement is subsequently recognised in arbitration.

Although setting up a Mediation Committee is mandatory for large or medium-sized companies, the Regulations do not specify any substantial liability or penalties for companies that fail to meet the requirement. Under the Regulations, the PRC authorities may only publicly criticise companies that, with no Mediation Committee established, face frequent labour disputes or collective actions. Moreover, the Regulations encourage—but do not require—companies and employees to attempt to resolve labour disputes in mediation before arbitration. This contrasts with the existing PRC laws in which arbitration is mandatory before companies or employees bring a labour dispute to court.

Potential Tax Liabilities in Secondment Arrangement

It is common for multinational companies to second their employees to work in their offices in China via international secondment arrangements. Under a typical secondment arrangement, the foreign companies pay for the salaries and allowances of the employees and such costs are reimbursed by

[1] The Regulations provide no definition of "enterprise of large or medium size". For reference purposes only, the previous draft of the Regulations (Draft for Comment) released on June 3, 2011 required enterprises of more than 300 employees to establish an employee dispute mediation committee.

their Chinese affiliates. A key legal issue is whether or not the foreign companies constitute a permanent establishment in China under such secondment arrangement and thereby incur tax liabilities. If the employees are regarded by the tax authorities as representatives of the foreign companies to provide services in China for the Chinese affiliates, then the foreign companies may be deemed as constituting a permanent establishment in China, such as in a service agreement. In consequence, the reimbursement made by the Chinese affiliates to the foreign companies on the employees' cost would be seen as service fees and thus subject to China corporate income tax and business tax.

In recent years, there are signs that the PRC tax authorities are increasingly concerned about this issue and, in some cases, refuse to issue tax-free certificates when the Chinese affiliates remit the reimbursements of employees' costs to the foreign companies. Hence, multinational companies are advised to carefully review their secondment arrangements, which must be clearly distinguishable from a tax-liable service arrangement. Companies should also keep proper documentation of the secondment arrangement in order to minimise the chance of incurring tax consequences and engage professional assistance when necessary.

Calculation of Severance Payment

Pursuant to the *PRC Labour Contract Law* and other provisions concerning the severance payment enacted in recent years, termination of an employment contract is under stringent control in China in comparison to other jurisdictions. In particular, an employee who is terminated upon certain statutory grounds is entitled to receive statutory severance payments. The calculation of the severance payment is quite complex under PRC law. In general, the amount of the severance payment depends on the length of employee service, subject to a cap on the amount and the length of service in certain circumstances. Given the complexity of the legislation, companies are advised to pay particular attention and consider seeking professional advice when determining the amount of severance required by law.

Compliance with these changed employment laws will help companies to avoid potential disputes with employees, which is of particular importance in light of the PRC authorities' current emphasis on workers' rights in an attempt to secure a harmonic and stable society.

Hong Kong SAR

Court Decisions

A recent employment law decision in Hong Kong will have lasting impact on multinational employers with Hong Kong employees. In February 2012, the Court of First Instance held that if an employee is working in Hong Kong—even if the governing law of the employment contract is foreign law—the mandatory provisions of the Employment Ordinance in Hong Kong override the foreign law of the contract and any contractual provisions which extinguish or reduce any right or benefit that would be conferred upon the employee by the Ordinance.

In the case at issue, the employment contract was set for an initial period of 2 years, then was automatically renewable for successive periods of 1 year. The employer sought to uphold a contractual provision stating that an employee can only terminate the contract by issuing 3 months' notice within the last 2 weeks of the renewal period. The court held that an employee can issue the 3 months' notice at any time. The contract also provided that an employee has to pay liquidated damages if the employee leaves employment prior to the expiration of the employment contract. The court held that this restrains an employee's freedom to terminate an employment contract at any time and therefore cannot be upheld.

Statutory Changes

The Hong Kong Government is implementing a Work Incentive Transport Subsidy to relieve the burden of expense of travelling to and from work on the part of low-income households and to promote sustained employment. The subsidy will be paid by the Hong Kong Government. This will promote the mobility of the workforce in Hong Kong.

Effective on February 24, 2012, when either Lunar New Year's Day, the second day of the Lunar New Year or the third day of the Lunar New Year falls on a Sunday, the fourth day of the Lunar New Year is designated as a statutory holiday and general holiday. If the day following the Chinese Mid-Autumn Festival falls on a Sunday, the day thereafter is designated as a statutory holiday and general holiday.

Taiwan

The most significant developments in Taiwan employment law concern amendments to the Labour Union Act, the Settlement of Labour Disputes Act, and the Collective Agreement Act that became effective on May 1, 2011. The main features of these amendments as well as a few other legislative changes are discussed below.

The Labour Union Act

Labour unions are classified as one of three types: enterprise, industry, or occupation. Joining an enterprise union remains compulsory for labourers, but they will not be penalised if they fail to do so. Labour unions may form confederate unions according to their need without being subject to the restrictions that existed under the old laws. For example, in order to maintain the autonomy of labour unions, the incorporation of a labour union does not require prior approval. Instead, a labour union only has to report to the authority after it is formed. Moreover, the supervision right of the authority no longer exists.

The amendments to the Labour Union Act reflect the trend of international labour conventions to expand the freedom to form labour unions by stipulating that "labourers have the right to organise and join labour unions." However, due to Taiwanese national conditions, there are still prohibitions on the forming of labour unions by labourers who work in the munitions industry.

In order to strengthen the protection of labourers' right to join and form labour unions, the amendments allow penalties to be imposed if an employer interferes with or restricts the organisation, operations, or activities of a labour union or treats members of a labour union unfairly.

Finally, the amendments removed the ROC nationality requirement for directors and supervisors of labour unions. Thus, a non-ROC citizen may act as a director/supervisor.

The Settlement of Labour Disputes Act

Where an employee initiates litigation or arbitration with respect to disputes over rights and obligations under laws, regulations, collective agreements, or employment contracts, authorities may provide appropriate support, including aid with legal assistance and living expenses.

The amendments introduce mediation as an additional method of dispute resolution, and adopt the mechanism of a single arbitrator for arbitration.

The procedures for labour strikes are detailed. A labour strike cannot be initiated by a labour union unless a majority of its members agree through a direct and secret ballot. In addition, unless a service

agreement has been entered into between employers and employees, labour unions in the utility industry (such as water, electricity or fuel suppliers) and in hospitals cannot initiate a labour strike.

To strengthen the protection of labourers' right of litigation, the amendment exempts a labourer or a labour union from half of the court fees when they file a lawsuit to ascertain the employment relationship or request payment of salaries. In addition, except in certain situations, when a labourer files a motion for a provisional attachment or injunction against an employer or employer organisation for payment of salaries, compensation or damages for occupational hazards, pension or severance pay, the amount that the court orders as security should not exceed one-tenth of the price or value of the claim.

The Collective Agreement Act

The amendment expressly stipulates that labourers and employers are obligated to proceed with negotiations for a collective agreement. Except for justifiable reasons, neither of them may refuse to join negotiations initiated by the other party. It also stipulates that only a labour union established under the Labour Union Act is competent to represent labourers in a collective agreement. Labour unions incorporated under other laws are not qualified to be a party to a collective agreement.

To respect the negotiation rights of labourers and employers and in order to ensure that collective agreements are concluded with the consensus of both parties, it is not considered appropriate for the government to excessively intervene with labour negotiations. Therefore, the amendments abolished the requirement of prior government approval. Instead, the parties need only submit their agreement for recordation after the fact unless one party is a government agency or government-owned entity. After a collective agreement is signed, the labour party should submit it to the authority for review and recordation.

On the basis of the "autonomy of will" principle, the amendments allow collective agreements to cover non-labour relationships and affairs related to management. For labourers that do not join the labour union which is bound by a collective agreement, employers are prohibited from changing the employment terms that apply to such labourers on the basis of the terms of the collective agreement unless the employers have justifiable reasons.

Before the amendment, only employers were obligated to make a signed collective agreement public. To ensure the rights and interests of the parties involved, the amendments impose public disclosure requirements on both parties. In the past, a party could not terminate the agreement on its own but could only request that the authorities did so and only if: (a) major changes in economic conditions occur after a collective agreement is concluded, (b) performance of the agreement leads to conflict with the operation of the employer's business or the living standards of the labourers, or (c) the goals of the agreement cannot be achieved. After the amendment, any party may request the amendment of the agreement terms or that the agreement be terminated if any of the above situations exists.

Amendment to the Labour Insurance Law

Effective on April 27, 2011, the amended Labour Insurance Law increased the fines payable by employers who fail to subscribe to insurance plans for employees or who subscribe to insurance plans based on salary figures that do not reflect the actual salary amount. The increased fines can be from two to four times the total payable premiums. In addition, an employer who transfers the obligation to pay the premiums to employees will be subject to a fine of two times the amount of the premiums that the employee has paid. The employer must also refund such premiums to the employee.

Amendment to the Labour Standards Law

Effective on June 29, 2011, the amended Labour Standards Law increased the fines for violation of various requirements under this law from between NT$6,000 and NT$60,000 to between NT$20,000 and NT$300,000. In certain non-compliance situations, the authority may publish the name of an employer who violates the law and the name of its legal representative. The authority may impose the fine repeatedly, if rectification is not made within the period specified by the authority.

Japan

During 2011 and early 2012, there were a few key amendments, new court cases and policy developments in Japan's employment law. The most significant of these are summarised below.

Partial Amendment of the Immigration Control and Refugee Recognition Act

A partial amendment of the Immigration Control and Refugee Recognition Act will become effective on July 9, 2012. Under the amended Act, the maximum period of a working visa will be expanded from three to five years. Therefore, a company will be able to obtain working visas for its foreign employees with a longer term of up to 5 years. Further details of the new rules can be found in the pamphlet prepared by the Immigration Bureau of Japan.

Amendment to the Worker Dispatch Law

An amendment to the Worker Dispatch Law passed the Diet and will become effective in late 2012 or 2013. The revisions will require worker dispatch companies (i.e., outsourcing companies) (1) to disclose their commission fee rate; and (2) to determine compensation for dispatched workers based on the compensation for permanent employees doing the same job at a client's workplace.

Disclosure of the commission fee rate will negatively impact worker dispatch companies as their clients will now have more ammunition to negotiate the dispatched workers' compensation. However, on the other hand, requiring worker dispatch companies to provide dispatch workers at the same compensation as their clients' permanent employees will likely create extra cost for their clients as permanent employees tend to receive more compensation than dispatched workers.

This amendment is likely to reduce the number of dispatch workers, resulting in an increase in the employment opportunity for permanent workers, but a loss of flexibility for employers.

Planned Amendments to the Elderly Employment Stabilisation Law

Discussions on amending the existing policy that requires a company to retain elderly workers (i.e., those who are 60 years old or over) are ongoing at the Diet. The aim is to amend the policy in April 2013.

Under the current Law, companies can adopt internal policies and standards establishing a mandatory retirement age of 60 years old or over. However, in order to secure employment opportunities for the elderly, employers that have internal policies establishing a mandatory retirement age of under 64 years old are required to have a plan to retain those employees who wish to continue to work until they become 64 years old even after they reach the mandatory retirement age set by the company. Effective March 2013, the required retention age will increase from 64 to 65 years of age.

Although companies have to retain the elderly up to 64 years old (65 years old after April 2013), companies can currently adopt internal policies and standards that limit the employment of elderly employees. The amendments will eliminate this "loophole" and require companies to abolish their internal policies and standards. Accordingly, a company will not be able to handpick its elderly

employees, and instead will have to retain all elderly employees who wish to continue to work. The timing of such mandatory abolishment is still under discussion.

On the other hand, the amendments will make it easier for companies to retain elderly workers by allowing employment or retention by the company's related entities or group companies.

When finalised, the amendments will require companies to amend their internal policies, work rules, and agreements with employee representatives in relation to the employment of the elderly.

In addition, a new sanction for any violations of the Act is under discussion—if an employer violates the Act, the name of the employer will be publicly disclosed.

Court Precedents and the MHLW Report Regarding the Definition of "Worker" under the Labour Union Act

Whether a service provider is defined as a "worker" under the Labour Union Act is significant for companies, because a worker is entitled to protections under the Labour Union Act. For example, a worker can create a labour union and conduct collective bargaining with the company (now defined as an "employer") and be protected from his employer's unfair labour practices. Clearly, a service provider who constitutes a "worker" would increase the scope of liability for the company as its "employer."

Two Supreme Court precedents dated April 12, 2011 (*Shin Kokuritsu Gekijyo Unei Zaidan Case* / *INAX Maintenance Case*) identified six factors to be considered when deciding whether a service provider is a "worker" under the Labour Union Act. A report issued by the Ministry of Health, Labour and Welfare ("MHLW") in July 2011 published an official interpretation based on these court cases.

The six factors are whether the: (1) service provider is retained in the company as an indispensable or important part of the workforce or organisation; (2) company is solely able to determine the terms and conditions and type of work of the service provider; (3) nature of compensation is for a fixed period, guaranteed, and not job-specific; (4) service provider generally has to provide all of the services that its client requests; (5) service provider has the discretion to follow the instructions of the company, determine the scope of work, and set the day, time, and place of providing the services; and (6) service provider has the education, skills, and/or experience to be able to run his or her own business.

This new rule should help employers distinguish between workers and non-workers under the Labour Union Act.

New Standards for Determining a Mental Illness Caused by Psychological Stress

On December 26, 2011, the MHLW issued an official notice regarding "new standards for determining a mental illness caused by psychological stress."

Claims regarding compensation for a mental illness caused during the course of employment are increasing. The standards provide specific interpretation and examples of the types of stress which will cause mental illnesses with an aim to speed up and promote the efficiency of the review process regarding these claims.

Report by the Working Group Roundtable regarding Workplace Bullying and Harassment

On January 30, 2012, the MHLW publicly released a report titled, "Report by the Working Group Roundtable regarding Workplace Bullying and Harassment."

2012 Global Labour and Employment Horizon

This report recommends that a company: (1) have a clear message about power harassment from top management; (2) establish a consultation area; (3) determine the company rules regarding power harassment; (4) prevent reoccurrence through training sessions; (5) recognise the current situation of the company; and (6) announce the company's policy to all employees. This report was prepared in an effort to bring further attention to power harassment issues and clarify which types of actions constitute power harassment or workplace bullying. We have prepared an Alert on this topic. Read the full alert text here.
