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Chapter 10

China


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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main source of employment law in China is legislation promulgated by the National People's Congress and its Standing Committee. The PRC Labour Law is the foundation and highest level of legislation with regard to labour and employment. There are many other laws, rules and regulations providing for specific areas within employment law, such as the Labour Contract Law ("LCL"), the Social Insurance Law, the Employment Promotion Law, the Trade Union Law, etc., and many other regulations and rules issued by national authorities or local governments. Judicial interpretations on the application of certain laws issued by the Supreme People's Court and adopted by the Standing Committee have the same effect as laws.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

All workers who enter into an employment relationship with an employer in China will be protected by employment law, except university students who have not yet graduated or retirees. Workers generally fall into two categories: full-time and part-time workers. Full-time workers are categorised into workers of fixed-term employment, permanent employment and employment for the completion of a certain task.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

Employment contracts in China must be in writing.

In general, the establishment of an employment relationship is subject to the satisfaction of the following conditions:

- the entity and the individual are in compliance with relevant laws and regulations;
- the employment rules and systems provided by the entity in accordance with relevant laws are applicable to the individual, the individual is subject to the management of the entity, and the individual works on assignments given by the employer in exchange for remuneration; and
- work provided by the employee to the employer constitutes a part of the employer's business.

Once the above conditions are fulfilled, an employment relationship is established, whether or not this has been recorded in writing.

The failure to conclude an employment contract can have the following consequences:

- If an employer fails to conclude a written employment contract with an employee for more than one month but less than one year from the commencement of employment, it must pay double the employee's monthly wage to the employee each month.
- If, after a year from the day of employment, the employer has still failed to conclude a written contract, a permanent employment contract is deemed to have been concluded between the employer and the employee.

1.4 Are any terms implied into contracts of employment?

Yes, there are terms implied in the employment contract, e.g. provisions under collective agreement.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Aside from the requirement to enter into a written employment contract, there are statutory minimum labour standards and employee entitlements, such as annual leave (five to 15 days based on accumulative service years), working hours (eight hours per day, 40 hours per week), maximum probation period (six months), medical insurance, paid sick leave, work-related injury insurance, maternity leave, etc.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

All employees have the right to participate in and organise labour unions, and labour unions can conclude a collective agreement with the employer on behalf of employees. The collective agreement can only be concluded upon mutual agreement between the employer and employees (or the labour union on their behalf). Collective bargaining more often takes place at company level rather than industry level.

Trade unions at corporate bodies are common. According to the All-China Federation of Trade Unions ("ACFTU"), approximately 90% of relevant Chinese enterprises set up their own trade unions from 2011 to 2013. Until end of 2013, over 6 million trade unions were established. Collective agreements are common in state-owned companies. The Chinese government is engaged in an effort to roll out collective bargaining and collective agreements. In light of the Notice on a Plan to Drive Implementation of Collective Agreement

Policy (issued by ACFTU, the Ministry of Human Resource and the Social Security and China Enterprise Confederation in 2014), the goal of the plan was to uplift the coverage rate of collective bargaining and collective agreements to assure that at the end of 2015 the execution rate of collective agreements would reach 80%. However, we failed the implementation status of this plan.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Trade unions observe a unitary system. All trade unions are led by a higher level of trade union and the establishment of any trade union must be approved by a higher level of trade union. The All-China Federation of Trade Unions ("ACFTU"), the unified trade union at the national level, is the highest level of trade union, leading all the trade union organisations in China. ACFTU is under the leadership of the Chinese Communist Party.

2.2 What rights do trade unions have?

The trade union has the following main rights:

- An employer must pay monthly trade union fees in the amount of 2% of the total payroll of all its employees to its trade union, and provide the necessary facilities, places, and other support to its trade union for handling office matters and organising activities.
- An employer must seek the opinion of its trade union if it decides to unilaterally terminate the employment contracts of certain employees.
- The employer must seek the opinion of its trade union when it looks into significant issues concerning its operation and development, or issues any internal rules which affect the direct interests of its employees.
- An employer must invite the representative of its trade union to attend meetings in respect of wages, welfare, labour safety and hygiene, social insurance, and other matters in connection with the interests of the employees.
- The trade union has the right to negotiate and execute a collective agreement with the employer on behalf of the employees.

2.3 Are there any rules governing a trade union's right to take industrial action?

There are no rules that set out a trade union's right to take industrial action. The law rather provides that in the event of a strike or sabotage, the concerned trade union shall negotiate with the employer on behalf of the employees, and in the case of labour disputes, the concerned trade union shall participate in the mediation work.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

The counterpart concept to a works council in China is the Employees' Representative Congress ("ERC"), the body through which employees exercise their democratic management right. The law requires enterprises to establish democratic management based on the form prescribed by the ERC.

The ERC has consultation rights with respect to:

- the employers' business operations;
- the employers' formulation and revision of their internal rules;
- material matters which have a direct bearing on an employee's material benefits;
- decision rights regarding drafts of collective contracts, utilisation plans of an employee benefit fund, adjustment plans of payment rate and time for social insurance and housing fund; and
- election and removal of employee directors and employee supervisors, etc.

A plenary session should be held to elect employee representatives. The session must be attended by at least two-thirds of the employee population. The decision of electing an employee representative shall be validated by the consent of at least half of the employee population.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

The ERC has co-determination or decision rights on limited matters only. These include:

- drafts of collective contracts and utilisation plans of an employee benefits fund;
- adjustment plans of payment rate and time for social insurance and housing fund;
- election and removal of employee directors and employee supervisors; and
- electing employee representatives for creditor meetings and creditor committees when the enterprise undergoes bankruptcy proceedings.

2.6 How do the rights of trade unions and works councils interact?

Trade unions are the functional body of the ERC and are responsible for carrying out the daily work of the ERC. The trade union is obliged to organise the election of employee representatives and head of the representative group, propose ERC topics and agenda, etc.

2.7 Are employees entitled to representation at board level?

For a limited liability company that is set up by two or more state-owned enterprises or two or more state-owned investment entities, the board of directors must include employee representatives. The board of directors of any other limited liability company may include employee representatives, but there is no requirement to do so. Employee representatives as board directors shall be democratically elected by the employees of the company through the ERC, the employees' assembly or otherwise.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

A number of Chinese laws stipulate that the general principles of lawfulness, openness, fairness, equality, competition, selection

of the best, free will and good faith must be observed during the recruitment process. Furthermore, any discrimination against applicants on the basis of gender, nationality, race, religion, disability, being a pathogen carrier of an infectious disease or status as a rural worker is prohibited.

3.2 What types of discrimination are unlawful and in what circumstances?

The following criteria may not be used to differentiate between employees without justification:

- ethnicity;
- race;
- sex (gender);
- religious belief;
- disability status;
- status as retired army personnel;
- certain health conditions; and
- status as rural workers.

3.3 Are there any defences to a discrimination claim?

Certain laws and regulations allow different treatment. For example, Article 59 of the Labour Law provides that it is forbidden to arrange a female employee to work down a pit of mines, or engage in work with Grade IV physical labour intensity as prescribed by the national laws. In the absence of specific defences there is no general approach to defending a discrimination claim.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

While an employee who has been discriminated against may be able to claim for civil damages, there are generally no specific provisions on monetary damages or penalties for discriminating against employees set out in the law. In cases of discrimination against hepatitis B pathogen carriers, however, a fine of up to RMB 1,000 is prescribed. Both parties can settle claims at any time during the dispute resolution proceedings.

3.5 What remedies are available to employees in successful discrimination claims?

In successful discrimination claims, the employees may ask for compensation of economic losses. The quantum of claim will depend on the specific circumstances and facts of the case and there is no cap set by the law on this amount.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Dispatched employees are entitled to equal pay for equal work in line with employees employed at the place of dispatch. Generally, no other legislation provides for additional protection.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Female employees are entitled to not less than 98 days of maternity leave. During this period, they are protected from dismissal or discrimination on the basis of their pregnancy. Furthermore, female employees in or after the seventh month of the pregnancy may not be subjected to certain hazardous working conditions (e.g. overtime and night work) and must be granted certain rest time during their working hours.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

During maternity leave, the employee should be fully paid according to usual contractual entitlement, and is entitled to a maternity subsidy payable by the insurance fund. If the employee's contractual salary is higher, the employer must make up the difference. However, in order to be eligible for maternity leave and related benefits, employees must comply with the government's birth control regulations.

4.3 What rights does a woman have upon her return to work from maternity leave?

As an employee on maternity leave may not be dismissed, her employment relationship continues for the 98-day duration of her maternity leave and she has the right to return to her job at the end of this period.

4.4 Do fathers have the right to take paternity leave?

While there is no national-level paternity leave policy, some local governments have implemented paternity leave policies.

4.5 Are there any other parental leave rights that employers have to observe?

After giving birth and returning from maternity leave, mothers are entitled to a break of at least one hour per day to feed and tend to the child until the child reaches the age of one (1).

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

The law does not provide for such entitlement except that female employees are entitled to one hour's nursing break each day until the child reaches the age of one (1).

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

The transfer of employees following a transfer of business is not an automatic process. Instead, the parties to an asset purchase agreement can structure the deal in one of two ways:

1. accepting that all (or a large majority of) the employees transfer to the buyer and that these employees will retain their pre-transfer lengths of service; or
2. stipulating that all of the employees will be dismissed (and will receive severance payments, who pays these is a matter for agreement between the parties) and that the new employer will rehire only the employees it requires.

Employee transfer under an asset deal is subject to the affected employee's consent.

If the transfer involves state-owned enterprises, an additional consultation process with employee representatives is necessary.

There is no transfer of employees in a share sale as normally the employing entity will not change.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

Following the transfer of a business, the change in an employer's name, legal representative, key personnel or investors has no impact on the employees' contracts. In cases of a merger or demerger, the employment contracts originally in place between the employer and its employees remain valid. The rights and obligations pursuant to the employment contracts simply transfer to the new employer.

In a share sale, the buyer simply assumes the employees and their employment contracts as part of the transaction. However, (despite ambiguous wording in the relevant law), the sale of a business by way of transferring its assets amounts to the dismissal of the entire workforce by the seller and the immediate rehiring of the same workforce by the new owner. Such employee transfer is subject to the affected employee's consent. As employees who are dismissed by their employer are generally entitled to severance payments, in practice the parties to asset deals usually decide (on the basis of their business objectives) either that such severance payments will be made (and by whom) or that the entire workforce is acquired by the purchaser (and the employees' pre-transfer lengths of service are recognised by the new employer). In recent times the local labour authorities and trade unions have tended to put pressure on the companies involved (especially foreign investors) to reemploy the whole workforce.

In China, a collective contract or special collective contract may be modified or rescinded where the employer undergoes merger, dissolution or becomes insolvent, thus rendering their continued performance impossible.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Under PRC law, the transferor has a duty to inform and consult the trade unions within the company or appropriate representatives in connection with the transfer of a business and any termination of employment on a statutory ground. If there is no trade union or employee representative body, all employees should be informed and consulted about the transfer and any group layoff of staff. The law has not, however, provided any penalty in relation to any non-compliance in this respect. There is no duty on the transferee to inform or consult.

The transferor and/or transferee may also be obliged to inform and consult an ERC where one exists (this is unlikely unless the transferor is a state-owned company).

5.4 Can employees be dismissed in connection with a business sale?

There is no specific protection against termination of employment related to a business transfer. The transferor will be liable to continue to employ, or terminate, affected employees who are not re-hired by the transferee in accordance with the law. There may be statutory grounds for unilateral termination but in practice employers almost always effect terminations through mutual separation agreements to avoid any labour disputes.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

This depends on the form of the business sale. If it is an asset sale, it may be deemed a material change of objective circumstance on which the original employment contract was concluded, which renders the contract unenforceable. Under this circumstance, the employer may reach an agreement with the concerned employee on amendments to the employment contract. Any such amendment is subject to the employee's consent.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

During their probationary period, an employee must provide the employer with at least three days' notice of termination. Thereafter, the employee must provide the employer with at least 30 days' notice.

The employer must provide the employee with 30 days' notice of termination (unless termination for gross misconduct, with immediate effect, is justified in the circumstances).

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes, but the employee should be fully paid during such garden leave.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

The protections are mainly as below.

- An employer may only terminate an employee on a few limited grounds provided by law, such as gross misconduct, underperformance, inability to work due to non-work-related illness or injury, and material changes of objective circumstances.
- If the termination is not due to an employee's fault, the company shall assume obligations of notification and statutory severance payment.

If an employer intends to terminate an employment contract unilaterally, it shall first inform the labour union of the reason. The labour union has a right to require the employer to make an adjustment if the employer violates laws, administrative regulations or the labour contract. The employer shall consider the opinions of

the labour union and notify the labour union in writing of the result of its handling of the matter. This means an employer is required to undergo a statutory information process rather than seek the labour union's consent. While an employer intends to carry out economic entrenchment, it shall explain the situation to the labour union or all the staff 30 days in advance. After soliciting their opinions, the employer shall file a redundancy report to the labour authority. Then the employer may proceed with the layoff.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

The following categories of employees may not be terminated or dismissed for non-fault reasons:

- employees who suffer from an occupational disease or injury, and are confirmed to have lost or partially lost the ability to work;
- employees who are under a statutory medical treatment period for non-work-related illnesses or injuries;
- employees who are pregnant, and for one year after the delivery date (constituting confinement and nursing periods);
- employees who are engaged in operations exposing them to occupational disease hazards and who have not undergone a pre-departure occupational health check-up, or are suspected of having contracted an occupational disease and are being diagnosed or are under medical observation;
- employees who have worked for the employer continuously for at least 15 years and are less than five years away from their legal retirement age;
- employees who are still within their term as a union chairman, vice-chairman, or union committee member; or
- employees who are still within their term as a collective bargaining representative during collective bargaining negotiations. (A collective bargaining representative is different from an employee representative. The former is appointed by the labour union, or if there is no labour union, the representative shall be subject to the consent of half of the total employees above. Its basic function is participating in collective bargaining. The latter shall be elected by a plenary session and subject to the consent of half of the total employees above.)

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

The termination grounds for reasons related to the individual employee are:

- the employee fails to meet the recruitment requirements during the probationary period;
- the employee is unqualified for the job and remains unqualified after the employer offers training and adjustment to the work ("Disqualification Reason"); and
- the employee engages in gross misconduct, i.e. serious breach of the employer's internal rules; serious dereliction or abuse of position, causing a material loss to the employer.

The termination grounds for business-related reasons are:

- a material change in the objective circumstances relied upon at the time of conclusion of the employment contract renders it impossible for the parties to perform and, after consultation, the employer and the employee are unable to reach an agreement on amending the employment contract; and
- economic entrenchment.

Statutory severance pay should be paid for the "Disqualification Reason" and business-related reasons which is calculated based on the employees' service years at the company and average monthly salary (with a statutory cap).

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

The LCL requires the employer to give the employees 30 days' notice for non-fault dismissals, give its labour union advance notice of any unilateral terminations, and advise the labour union of the reason for the terminations.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

The legal consequence for unlawful termination in China is severe. The employee can claim illegal termination and immediate reinstatement of employment or double severance pay.

6.8 Can employers settle claims before or after they are initiated?

Yes, both parties can reach a settlement agreement on the claims at any time during the dispute resolution proceedings.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

An employer may terminate employees by reason of economic redundancy if any of the following circumstances make it necessary to reduce the workforce by 20 employees or more, or by at least 10% of the total number of employees ("Economic Redundancy"):

- the employer restructures in accordance with the Enterprise Bankruptcy Law;
- the employer encounters serious difficulties in business operations;
- the employer changes the nature of its business, introduces a major technological innovation or revises its business methods and therefore needs to reduce the workforce; or
- a major change occurs affecting the objective circumstances relied upon at the time of conclusion of the relevant employment contracts, rendering them unenforceable.

Under Economic Redundancy, the employer is required to:

- explain the circumstances to its labour union or to all of its employees 30 days in advance of making the redundancies;
- consider the opinions of the labour union or the employees; and
- report the redundancy plan to the local labour authority.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

For mass dismissal, a concerned employee may challenge the employer as to whether it has met certain grounds provided by law to carry out a mass layoff (as provided in question 6.9 above).

If an employer fails to comply with the said obligations, the termination will be deemed illegal and the legal consequence is

reinstatement of the employment relationship and back payment of salary and benefits or a double severance fee.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

In the PRC, post-employment restrictive covenants include non-compete and confidentiality obligations. The LCL does not address the enforceability of non-solicitation clauses. However, non-solicitation clauses are likely to be viewed by the courts as forming part of the non-compete clause (if any).

Non-competes can be imposed on certain classes of employees. Where restrictive covenants are permissible, the employer is required to enter into a written agreement with that employee addressing the terms of the non-compete restrictions, including paying reasonable compensation during the restraint period.

7.2 When are restrictive covenants enforceable and for what period?

Pursuant to the LCL, a post-employment non-compete restriction is enforceable in the PRC provided:

- the employee is in senior management, a senior technician, or is subject to a confidentiality obligation towards the employer;
- the employer pays monthly compensation to the individual throughout the restraint period; and
- the term of the non-compete restriction does not exceed two years.

Normally the scope of a non-compete clause should be reasonable in order for it to be enforceable.

7.3 Do employees have to be provided with financial compensation in return for covenants?

The employer is required to pay monthly compensation to the employee during the post-employment restraint period. The minimum amount of compensation required depends on local regulations.

For example:

- Jiangsu: 1/3 of the employee's average monthly salary during the 12-month period immediately prior to the termination must be paid during the restraint period.
- Zhejiang: 2/3 of the employee's average monthly salary during the 12-month period immediately prior to the termination must be paid during the restraint period.
- Shenzhen: 50% of the employee's average monthly salary during the 12-month period immediately prior to the termination must be paid during the restraint period.

7.4 How are restrictive covenants enforced?

If the employee breaches the non-compete restriction and it is held by the court that the restraint is enforceable, the employee may be held liable for damages or liquidated damages, which are often expressly stipulated in the non-compete agreement. There are no statutory standards or guidelines in relation to liquidated damages under the LCL.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

The law provides that an employer shall keep its employees' personal information confidential and obtain their written consent for publicising their personal information.

Generally, it is a disputable issue whether an employer can transfer employee data freely to other countries. To avoid any legal risks, it is advised to obtain the employee's consent before transferring his/her personal data abroad. Transferring any information abroad concerning state security is prohibited.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Normally an employee may obtain copies of his/her personal information that is held by their employer with a justifiable reason.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Generally, it is fine to carry out pre-employment checks which are closely related to the employment relationship to be established. In practice, before entering into an employment relationship with a prospective employee, an employer may include in the offer letter that the person consents to the employer's pre-employment checks on him/her.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Though the PRC laws and regulations generally provide protection in connection with freedom of privacy and correspondence, in practice, with respect to protection of the employees' personal data stored on the work computer system, email inbox or on the company's server, the regulations are silent. It is generally regarded and accepted that since the work computer system, work email accounts and servers and the work telephone system are owned by the employer, the employer has a right to monitor and utilise anything stored in such systems or devices for the purpose of employment. However, it is highly advisable for an employer to implement company email, internet or phone use policies and obtain all staff members' written acknowledgment of such policy and undertaking to adhere to such policy.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

The law does not specify such control. As such, an employer may include the relevant provisions in its internal rules and validate such rules in accordance with law.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

PRC courts or labour tribunals have jurisdiction to hear labour disputes between PRC employers and their employees. A labour dispute must first be filed at a labour arbitration tribunal before it is tried by a court. Subject to limited exceptions (e.g. disputes with a low monetary amount), if either party is dissatisfied with the arbitration decision it may appeal to the court within 15 days. For disputes with a low monetary value, only the employee has the right to appeal the decision to the court. Labour tribunals and courts consist of one or three arbitrators/judges.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

There are basically four different ways in which labour disputes may be resolved:

1. an (informal) meeting between the employee and the employer to discuss the dispute and attempt to reach a settlement;
2. a voluntary process in which a company-based mediation commission tries to facilitate settlement of the matter;
3. an arbitration proceeding (by far the most common method) initiated by either party, the result of which is binding upon both parties; and
4. a procedure before the civil courts (including district court stage and intermediate court stage, although the jurisdiction of civil courts is limited. They typically only operate as appeal bodies, and the employer's right to appeal is also limited).

Conciliation is not mandatory before a complaint can proceed. No arbitration/litigation fee is needed to submit a claim.

9.3 How long do employment-related complaints typically take to be decided?

It normally takes a labour tribunal 45–60 days to make a decision. The first instance trial normally takes six (6) months for any normal proceedings and three (3) months for simple proceedings. The second instance trial normally takes three (3) months.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes, employees always have the right to appeal, but the employer's right to appeal is limited for certain cases. The appeal to a district court normally takes three (3) to six (6) months, and any proceedings at the intermediate court take three (3) months.

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Ying Wang is a partner in Bird & Bird's International HR Services Group, based in Shanghai, where she heads Employment practice for China.

She has more than 13 years' experience across the full range of employment issues, including various PRC labour and social insurance regulatory matters, mass layoffs, labour disputes, M&A-related matters, cross-border employment, and daily corporate labour issues. In addition, Ying was appointed as a Part-time Arbitrator of the Shanghai Labour Dispute Arbitration Committee in September 2004 and advises on labour arbitration and litigation.

Ying's clients include multinational companies and Fortune 500 companies in various industries such as commercial banking, investment banking, FMCG, retail, luxury, IT and automobile. Ying also advises start-up companies and newly-established Foreign Invested Enterprises ("FIEs"), including M&A and restructures.

Admitted as a solicitor in China in 2007, Ying holds an LL.B. from Fudan University Law School, Shanghai and a Bachelor of Economics with Distinction from Nanjing University of Economics. She is also a member of the Shanghai Labour Law Association.

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She is experienced in advising multinational clients that operate in a variety of sectors, including luxury, manufacturing, retail, technology, and automotive, on a broad range of employment issues that include economic retrenchment, hire and exit, secondment, senior executive termination, union matters and M&A-related issues.

Before starting her legal career, Lorraine had been employed by a Fortune 500 consumer lifestyle company for five years – an experience that makes her ideally placed to provide highly informed employment advice thanks to her commercial awareness.

Admitted as a solicitor in China in 2013, Lorraine has obtained a Graduate Certificate in Laws from East China University of Political Science and Law and a Master's degree in British and American Literature from the Guangzhou Institute of Foreign Languages.

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Chapter 19

Hong Kong


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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main source of employment law is legislation. All legislation must comply with the Basic Law of the Hong Kong Special Administrative Region. The Basic Law was adopted on 4 April 1990 by the Seventh National Congress of the People's Republic of China and came into force on 1 July 1997; the date sovereignty passed to China. The Basic Law expressly provides that the laws in force prior to 1 July 1997 continue to be maintained as long as they do not contravene the Basic Law. There is also express provision that precedents of other common law jurisdictions may be referred to by the Hong Kong Courts. Given Hong Kong's history, the case law of England and Wales is especially relevant and is often relied upon in disputes.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Employment legislation applies to employees only. Contractors or those operating on a self-employed basis are primarily subject to the terms of the contractual arrangement and do not enjoy statutory protection.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

There is no obligation for the contract of employment to be in writing. Some information must be provided to an employee prior to the commencement of employment but, again, this does not need to be in written form. However, not having a written contract may result in a one-month notice period applying by default.

1.4 Are any terms implied into contracts of employment?

There are a number of terms implied into the employment contract both in respect of the employer and the employee. Employees have implied obligations to: carry out their work with reasonable skill and competence; obey lawful and reasonable instructions; serve the employer with fidelity and in good faith; avoid disclosing certain categories of confidential information; and to account for property and payments gained during the employment. Employers have the implied duty to: behave in a manner which does not destroy the relationship of trust and confidence; provide work; provide a safe working environment; indemnify the employer for expenses incurred when fulfilling duties under the contract; and to provide reasonable notice. Contractual terms can also be implied through custom and practice if certain criteria are established.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Employees have a variety of minimum legal rights, predominantly prescribed under the Employment Ordinance (Cap. 57). A number of benefits and protections under the EO are only available to "continuous" employees. These are employees who have been continuously employed for four consecutive weeks for at least 18 hours a week. These benefits include: 12 paid statutory holidays; paid annual leave of between seven and 14 days; a rest day (not necessarily paid) every seven days; paid sickness allowance up to a maximum of 120 days; and paid maternity and paternity leave. Employers must further register and contribute to a Mandatory Provident Fund if the employee is employed in or from Hong Kong for at least 60 days on a continuous contract. Both employer and employee are each required to contribute at a rate of 5% of relevant income, capped at a contribution rate of HKD 1,500 each month. Exemptions apply for expatriate employees. Employers required to take out a policy of insurance in respect of injuries arising out of and in the course of employment, otherwise the employer could be liable to a criminal offence. All employees must earn at least the minimum wage which is currently set at HKD 32.50 per hour.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining can theoretically be a source of contractual terms and conditions. In practice, it is rare for there to be any relevant collectively agreed terms.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

All trade unions (which must have at least seven people) must comply with statutory requirements for legislation. The application

must be made to the Registrar of Trade Unions within 30 days of the establishment of the trade union.

2.2 What rights do trade unions have?

Once registered, the trade union and its member-officers are provided with certain immunities in respect of qualifying trade disputes. In addition, trade unions have the right to be independent and not subject to interference from employers. Employees are entitled to join a registered trade union, to participate in its activities and to associate with others for the purpose of joining a trade union.

2.3 Are there any rules governing a trade union's right to take industrial action?

Legislation provides avenues for resolving trade disputes through conciliation, mediation, and arbitration. In the first instance, a labour dispute may be referred to the Labour Relations Division of the Labour Department for conciliation. The Commissioner for Labour may appoint a special conciliation officer to undertake the conciliation. If conciliation fails, the Chief Executive of Hong Kong may become involved with a broad remit to take whatever action is warranted.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There is no obligation on employers to set up works councils. They do not really factor in employment relations in Hong Kong, although employers do occasionally adopt informal consultation bodies.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Formal works councils do not exist in Hong Kong.

2.6 How do the rights of trade unions and works councils interact?

Formal works councils do not exist in Hong Kong.

2.7 Are employees entitled to representation at board level?

The law does not provide for any form of representation at board level.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Employees are protected against discrimination because of sex, marital status, pregnancy, disability, family status, race, colour, descent and national or ethnic origin ("**protected characteristics**"). As yet, there is no express protection against discrimination for age or sexual orientation in Hong Kong. The protection extends to contract workers which include agency workers, temporary staff and staff provided on a short-term contract basis.

3.2 What types of discrimination are unlawful and in what circumstances?

The law prevents direct discrimination when an individual is treated less favourably on the grounds of a protected characteristic. This can occur at any point during the employment cycle, including decisions about whether to employ, conditions of employment, training opportunities, promotion decisions and separation agreements.

Indirect discrimination occurs when a requirement or condition is applied equally to individuals with and without the protected characteristic but it has a disproportionate effect on an individual because of the existence of the protected characteristic. It is only lawful if the employer can justify the requirement or condition and its application operates to the individual's detriment.

There is a prohibition on harassment which amounts to sexual, racial or disability harassment. The principle is that the behaviour is unwelcome in circumstances where a reasonable person would have anticipated that the person being harassed would be offended, humiliated or intimidated. There is also the concept of "hostile environment" harassment where the conduct on the grounds of the individual's sex or race, creates a hostile or intimidating environment for that individual.

The discrimination legislation protects individuals from discrimination by way of victimisation. This includes treatment because an individual has sought to enforce any rights under the law or assist any individual in enforcing his or her rights.

3.3 Are there any defences to a discrimination claim?

The legislation provides that employers are vicariously liable for the acts of its employees carried out during the course of employment. It is a defence for employers to establish that they took steps that were reasonably practicable to prevent the discriminatory act taking place.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Employees may seek the assistance of the Equal Opportunities Commission ("**EOC**") through a conciliation system. The EOC has a duty to investigate any claim which is not frivolous, vexatious, misconceived or lacking in substance. The EOC's role is to conciliate. If a conciliation settlement is not reached, the EOC may provide legal assistance to support the applicant where the case raises a question of principle or where it is unreasonable to expect the applicant to deal with the case unaided. The legal avenue open to employees is the instigation of a civil claim in the District Court.

Claims can be settled prior to or after formal instigation of proceedings.

3.5 What remedies are available to employees in successful discrimination claims?

Compensation is the most usual remedy in successful discrimination claims. An award will normally be based on the financial loss incurred as a result of the discriminatory act. Successful claimants may also be awarded a sum for injury to feelings. This can range from HKD 7,000 to HKD 380,000 depending on the circumstances and severity of the case. There is no limit on awards for

compensation. In addition to financial compensation, individuals may seek a declaration that the respondent has engaged in unlawful conduct and an order that the respondent perform any reasonable act or course of conduct to redress the loss or damage suffered by the applicant (including an order for re-engagement or re-instatement).

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

There are no specific provisions dealing with part-time, fixed-term or temporary workers.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

All employees employed under a continuous contract (i.e. where the employee has worked for a minimum period of four weeks for at least 18 hours a week or where there is an agreement that employment is continuous) are entitled to a continuous period of 10 weeks' maternity leave. The commencement of maternity leave should be no less than two weeks and not more than four weeks before the expected date of confinement. An employee is entitled to an extra period of four weeks sickness leave on the grounds of illness or disability arising out of the pregnancy or confinement.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

Employees who have been continuously employed by the same employer for not less than 40 weeks immediately before the expected date of commencement of maternity leave, are entitled to paid leave. The calculation is 80% of the average wages received by the employee in the 12 months prior to the commencement of the maternity leave. The calculation of wages for these purposes is quite complex and should be considered carefully.

Once a pregnant employee gives notice of pregnancy there is a general prohibition on the employer terminating her employment until she returns from maternity leave. There are exceptions for employees during the first 12 weeks of their probationary period, so long as the termination is not on account of the pregnancy and in cases of summary termination for gross misconduct. A breach of this prohibition may result in criminal sanctions as well as civil claims.

4.3 What rights does a woman have upon her return to work from maternity leave?

Given the short length of maternity leave, employees have a right to return to the role performed prior to the commencement of maternity leave.

4.4 Do fathers have the right to take paternity leave?

Eligible male employees employed under a continuous employment contract are entitled to three days' paternity leave since 27 February 2015. Male employees who have been employed under a continuous contract for not less than 40 weeks immediately before the day of paternity leave are entitled to payment calculated at 80% of average wages applying the same calculation as that applied to females on maternity leave.

4.5 Are there any other parental leave rights that employers have to observe?

There are no other parental leave rights that employers have to observe.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

There are no express provisions in Hong Kong providing any entitlement to work flexibly. However, an employee could seek to challenge the refusal to agree to flexible working on the basis this potentially amounts to indirect sexual discrimination. This line of argument will only really assist female employees and the argument has not really been run in Hong Kong yet.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

There is no automatic transfer of employment relationships from one entity to another on an asset sale. Employment relationships with the former employer must be lawfully concluded and a new relationship entered into with the new employer. There is, however, provision for certain termination payments to be avoided if the employee is provided with a new contract by the new employing entity and the new employing entity is an associated company of the original employer or the new employment is as a result of a business transfer (whether or not this is an associated entity). If the employee accepts this new employment, his or her previous continuous employment is automatically recognised. Unreasonably refusing a suitable offer of new employment or a business transfer may disentitle the employee to certain termination payments. A share sale has no impact on the employee's contract of employment as the employment does not change.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The employee has no automatic rights on a business sale. An employee relinquishes their rights to certain termination payments if they accept the new employment by an associated entity of the original employer or following a business transfer. Collective agreements are not affected by any business transfer unless there is some express provision within the collective agreement itself, and this is highly unlikely to be the case.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no information and consultation rights on a business sale unless there is an enforceable contractual obligation to engage in any such process but this is highly unlikely to be the case.

5.4 Can employees be dismissed in connection with a business sale?

There is no restriction on dismissing employees on a business sale. In such a case, the reason for the dismissal is likely to be redundancy and the usual rules and entitlements in a redundancy termination will apply.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employers are free to change the terms being offered to an employee following a business sale subject to the usual rules governing the variation of an employee's contract. As the employee will not automatically transfer, if the proposed terms are not acceptable to the individual, he or she can just refuse the contract and retain the entitlement to relevant termination entitlement. On a share sale there is no change to the contract.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Employees have to be provided with notice unless they are terminated following an act of gross misconduct. The period of notice is the period agreed between the employer and employee but it must be no less than seven days. If there is no specific provision dealing with notice and the contract is considered to be a contract renewable from month to month, then the notice period will be one month. Employees who do not enter into a formal contract with an agreed notice period (of at least seven days) should expect to be subject to one month's notice. The employee is subject to the same obligations. Both the employer and the employee have a statutory right to pay wages *in lieu* of notice. Different notice provisions apply during a probationary period when no notice is required by either side in the first month (regardless of whether the contract provides) and after the first month the minimum notice during the rest of the probationary period is no less than seven days.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Garden leave provisions are governed by the terms of the employment contract.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees with continuous employment of at least 24 months have the right to claim unreasonable termination at the Labour Tribunal. A dismissal occurs for these purposes if the employer terminates the contract, if a fixed-term contract is not renewed or if the employee resigns in circumstances where the employer's conduct has amounted to a fundamental breach of the contract. Consent is not required from a third party before an employer can dismiss.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

There are a number of categories of employees who cannot be terminated in certain circumstances. These include an employee who is: undertaking jury service; suffering from a work-related injury entitling the employee to compensation under the Employees' Compensation Ordinance (Cap. 282); absent from work and in receipt of sickness allowance; taking accrued statutory annual leave; or following the provisional notice of pregnancy from that date until the end of statutory maternity leave.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

An employer can avoid a finding of unreasonable termination if it can establish that the termination was for a valid reason. Potentially valid reasons are: conduct; capability or qualification for the work that the employee was employed to do; redundancy or other genuine operational requirements of the employer; the fact that the employer and/or the employee would breach the law if the employment continued (or continued without variation); or any other substantial reason which is sufficient to warrant the termination.

An employee who establishes an unreasonable termination is entitled to the sums that should have been paid if the termination had been lawfully handled. Employees with at least two years' service who are dismissed for redundancy are entitled to a severance payment. In circumstances other than redundancy any employee with at least five years' service is entitled to a long service payment (except where dismissal is justifiable as gross misconduct). Both payments are calculated on the basis of two-thirds of the employee's full month's wages or two-thirds of HKD 22,500 whichever is less per year of service. The current cap on the total payment is HKD 390,000. Employers can off-set the amount of any severance or long service payment made against any gratuity or retirement scheme payment in respect of the years for which the severance or long-service payment is made.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

There is no obligation on the employer to follow any form of procedure prior to terminating unless there is a contractual commitment to do so. In the absence of such a contractual obligation, the only real risks arising from an immediate termination without adopting any procedure is with regard to potential claims for discrimination. As long as the employer pays all sums due under the employment contract and legislation, there are currently limited risks arising from a same-day termination.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee can claim for sums due under the contract and potentially for an unfair termination. See question 6.5 above.

6.8 Can employers settle claims before or after they are initiated?

Claims for unfair termination can be settled at any time.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

There are no obligations to engage in any additional consultation or process as a result of an increased number of dismissals. The only such obligations are likely to arise in some form of collective agreement and this is exceedingly rare.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

In cases of mass termination, the rights are enforced individually at the Labour Tribunal.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants which seek to enforce non-competition and non-solicitation and protect confidential information are recognised.

7.2 When are restrictive covenants enforceable and for what period?

For restrictive covenants to be enforceable, they need to protect a legitimate business interest and be reasonable in ambit and duration. Restrictive periods of longer than 12 months are at risk of being considered too long in duration so the usual period is 10 months or less.

7.3 Do employees have to be provided with financial compensation in return for covenants?

There is no obligation to pay specifically for covenants. There is considered to be adequate payment or legal consideration by virtue of the contract itself.

7.4 How are restrictive covenants enforced?

Restrictions are enforced in the courts and there is an option to seek either an interim or full injunction and/or damages for any breach of enforceable terms.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employers must meet the provision of the Personal Data (Privacy) Ordinance (Cap. 486) when dealing with the collection, use/return and transfer of an employee's data. An individual may lodge a complaint with the Privacy Commissioner if there is any contravention of the privacy laws. There are a wide variety of sanctions available to the Privacy Commissioner which include fines and imprisonment for up to two years. At the current time the statutory provisions limiting the transfer of data to other countries is not yet in force.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees can request access to their personal data and the corrections of any personal data which is inaccurate or incorrect. An employer is entitled to charge a "reasonable fee", although there are no rules or guidance about what would constitute such a reasonable fee.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Employers can conduct pre-employment checks and enquiries. In addition to the primary privacy legislation, there are various codes and guidelines issued by the Privacy Commissioner which, while not legally binding, will be taken into account if there are any allegations of non-compliance with privacy obligations. The code of practice on Human Resource Management has a section dealing with the recruitment of employees. The critical obligation upon employers is to ensure that the data collected is directly related to a function or activity of the employer and the employee's suitability for a position, and only personal data which is necessary and not excessive for that purpose it is collected.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

There is no general prohibition against an employer undertaking the monitoring or surveillance of employees. The Privacy Commissioner has issued guidelines that set out best practice when conducting such monitoring. Employers are recommended to go through a process known as the 3As. This requires an Assessment of the risk of that employee monitoring seeks to manage and the benefits which will be achieved, considering Alternatives to employee monitoring which may be less intrusive and just as effective, and the employer assumes Accountability in relation to the handling of the personal data obtained.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer may require certain standards of employees when they use social media both in and outside the workplace. Any potential damage to an employer as a result of an employee's action on social media could be taken into account in taking a decision to terminate the employee's employment.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The Labour Tribunal has exclusive jurisdiction to hear any claims for a sum of money exceeding HKD 8,000 arising from breach of a

term in a contract of employment or for failure to comply with the Employment Ordinance (Cap. 47). While there is no upper limit to the monetary claims which can be heard by the Tribunal, there is a very wide discretion available to the Tribunal to refer the case to the civil courts if the circumstances justify a transfer. The Labour Tribunal only has jurisdiction to hear monetary claims; claims for non-monetary remedies must be brought before the District or High Court. Practising lawyers do not generally have any rights of audience in the Labour Tribunal unless they are representing their employer. Decisions are taken by the Presiding Officer who sits alone.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The conciliation process is a necessary procedural step prior to the instigation of formal proceedings. A certificate of conciliation is needed before a claim can be heard by the Tribunal. Once a claim is filed, a tribunal officer is allocated to the case in order to investigate the claim and direct the gathering of evidence and conduct of the litigation. Small fees need to be paid upon the filing of a claim; HKD 50 is the maximum with an additional fee of HKD 10 per defendant for the serving of documents. Fees and expenses will generally be awarded to the successful party. Given the absence of any rights for practising lawyers to attend the Tribunal, legal costs are not generally awarded.

9.3 How long do employment-related complaints typically take to be decided?

Cases in the Labour Tribunal are handled relatively quickly and are generally concluded within a three-month period.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

There is a right of appeal to the Court of First Instance of the High Court on the basis that an error of law has occurred or, alternatively, that the decision taken falls outside the jurisdiction of the Tribunal.

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Chapter 39

Singapore


Seow Hui Goh


Shu Yi Chye

Bird & Bird

1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The Employment Act (Cap. 91) ("**EA**") is the main employment legislation in Singapore. The following legislation and their subsidiary regulations also form part of the legal framework for employment and labour:

- the Central Provident Fund Act (Cap. 36);
- the Child Development Co-Savings Act (Cap. 38A);
- the Employment of Foreign Manpower Act (Cap. 91A);
- the Industrial Relations Act (Cap. 136);
- the Personal Data Protection Act (Act 26 of 2012);
- the Retirement and Re-employment Act (Cap. 274A);
- the Trade Unions Act (Cap. 333);
- the Work Injury Compensation Act (Cap. 354); and
- the Workplace Safety and Health Act (Cap. 354A).

In addition to formal law, the Tripartite Partners (comprising the Ministry of Manpower ("**MOM**"), the National Trades Union Congress ("**NTUC**"), and the Singapore National Employers Federation ("**SNEF**")) issue non-binding guidelines and advisories from time to time, which set out official standards expected of employers and employees. The employer-employee relationship is also governed by common law, in particular by contract law.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The EA covers all employees regardless of nationality who work under a contract of service in Singapore, except seafarers, domestic workers, government employees, and managers and executives earning a basic monthly salary of more than S$4,500 per month ("**EA Employees**").

While there is no statutory definition of "managers and executives", this has generally been taken by the MOM to refer to employees with executive and supervisory functions. These functions include decision-making authority on recruitment, termination and reward, formulating strategies and policies of the business, and managing the business. The class of "managers and executives" also includes professionals with tertiary education and specialised knowledge or skills.

The EA also covers 'workmen' as a separate class of worker, and this includes persons engaged in manual labour, machine operators and construction workers, regardless of salary.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

A contract of employment need not be in writing. However, with effect from 1 April 2016, the following "Key Employment Terms" must be provided in writing to EA Employees:

- full name of employer and employee;
- job title, and main duties and responsibilities;
- date of start of employment;
- duration of employment (if employee is on a fixed-term contract);
- working arrangements such as the daily working hours, number of working days per week, and the designated rest day;
- salary period and basic salary per salary period;
- all fixed allowances and deductions per salary period;
- overtime payment period (if different from the salary period) and overtime rate of pay;
- other salary-related components such as bonuses and incentives;
- leave entitlements such as annual leave, sick leave, maternity and childcare leave;
- medical benefits such as insurance and dental benefits; and
- notice period (and probation period, if applicable).

1.4 Are any terms implied into contracts of employment?

The minimum standards set out in the EA are implied into contracts with EA Employees, where the contract is silent or provides terms which are less favourable than the EA. Terms may also be implied on the basis of well-established and reasonable general custom or practice.

The courts have also recognised the following implied terms in contracts of employment, subject to any express terms or the context stating or implying otherwise:

- the employer's and employee's duty of mutual trust and confidence;
- the employee's duty to serve employer with good faith and fidelity;
- the employee's duty to not misuse or disclose confidential information; and
- the employee's duty to exercise reasonable skill and knowledge, care and diligence in the course of work.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

There are statutory minimum terms and conditions for EA Employees in respect of certain matters:

- notice periods;
- termination;
- when salary is paid;
- salary deductions;
- maternity leave; and
- sick leave.

Employers also have to observe the following additional statutory minimum terms and conditions for workmen earning up to S$4,500 per month and EA employees (other than workmen) earning up to S$2,500 per month, including:

- rest days;
- overtime rates; and
- annual leave.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining can only take place where a trade union of employees has been recognised by the employer. Collective agreements generally include compensation, notice periods, grievance and disciplinary procedures, and retrenchment benefits. Bargaining takes place at company level.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

A trade union of employees cannot represent its members in collective bargaining unless it has first been accorded recognition by the employer.

If an employer rejects a trade union's claim for recognition, the MOM may direct a secret ballot to be held. Where the results of the secret ballot show that the majority of the employees entitled to vote are members of the trade union which has claimed recognition, the employer must recognise that trade union.

2.2 What rights do trade unions have?

A recognised trade union may represent employees in respect of which the union has been recognised either individually or as a class, in negotiating with the employer to resolve disputes such as for breach of contract.

A recognised trade union may also engage in negotiations with that employer with a view to reaching a collective agreement on terms and conditions of employment for the classes of employees in respect of which the union has been recognised.

A recognised trade union may also take part in industrial action, subject to certain restrictions (please see question 2.3 below).

2.3 Are there any rules governing a trade union's right to take industrial action?

Before taking industrial action, a registered trade union must first conduct a secret ballot and obtain the consent of the majority of its members that would be affected by the industrial action if it takes place.

Trade unions and their members are prohibited from taking industrial action in connection with any trade dispute between represented executive employees and their employer, if the majority of the trade union's membership comprises non-executive employees. Executive employees who are members of the trade union are also not allowed to take part in any industrial action taken by the trade union.

It is an offence for employees employed in the essential services of water, gas or electricity to go on strike. It is also an offence for employees in other essential services such as banking, civil defence, health services and public transport to go on strike without first giving the employer notice of intention to strike 14 days in advance, and delivering it to the MOM within three days. These employees may not go on strike while conciliation proceedings or proceedings before an Industrial Arbitration Court are pending.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not required to set up works councils.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Not applicable. Please see question 2.4 above.

2.6 How do the rights of trade unions and works councils interact?

Not applicable. Please see question 2.4 above.

2.7 Are employees entitled to representation at board level?

There is no statutory entitlement for employees to be represented at board level.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

There are no stand-alone employee anti-discrimination laws in Singapore. However, employers are prohibited from:

- dismissing employees on the ground of age, under the Retirement and Re-employment Act (Cap. 274A) ("**RRA**");
- dismissing employees on the ground that he is or may be called up for national service, under the Enlistment Act (Cap. 93); and

- discriminating against job candidates on the ground that they are or will be members of a trade union, are entitled to benefits under a collective agreement, or have given evidence in any proceedings under the Industrial Relations Act, under the Industrial Relations Act (Cap. 136).

The Tripartite Alliance for Fair & Progressive Employment Practices ("**TAFEP**") has also issued a set of guidelines which promote fair and responsible employment practices, and that employers should recruit employees on the basis of merit, regardless of age, race, gender, religion, marital status and family responsibilities, or disability. The guidelines recommend employers to consistently apply relevant and objective selection criteria for all aspects of employment. It would not be considered discrimination if a particular criterion is indeed a requirement for the job, and the reason for the requirement has been made clear (e.g. the requirement of proficiency in a certain language for translation in that language).

While these guidelines do not have the force of statute, the MOM will have regard to them when dealing with discrimination complaints against employers.

3.2 What types of discrimination are unlawful and in what circumstances?

Please see question 3.1 above.

3.3 Are there any defences to a discrimination claim?

There are unlikely to be any defences if discrimination is established as a matter of fact.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Aggrieved employees may contact TAFEP for advice and assistance. If the employee consents, TAFEP will contact the employer to understand more about the situation, and may work with the employer to review employment practices and/or recommend improvements for the employer. If the employer is recalcitrant, unresponsive, or does not improve its employment practices, TAFEP would refer the case to MOM for investigation and action.

Where a claim is filed with the MOM, the MOM may, as a matter of practice, try to assist parties to reach an agreement. Employers may therefore be able to settle claims before or after they are initiated.

It is also possible for aggrieved employees to bring a civil claim against the employer, if the alleged discrimination amounts to a breach of the implied term of trust and confidence. The civil courts may direct parties to attend mediation or conciliation before an action is heard. Employers may be able to settle claims before or after they are initiated, but not after a decision is rendered.

3.5 What remedies are available to employees in successful discrimination claims?

For claims brought under the RRA, employees may seek reinstatement and/or financial compensation.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

There is no additional protection for "atypical" workers.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Maternity leave lasts 16 weeks under the Child Development Co-Savings Act (Cap. 38A) ("**CDCA**"), for a female employee lawfully married to the child's natural father and whose child is a Singapore citizen at the time of birth.

Female EA employees who do not meet the CDCA conditions will receive 12 weeks of maternity leave under the EA.

A female employee must have served her employer for at least three months preceding the delivery date in order to be entitled to maternity leave benefits.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A female EA employee cannot be dismissed during her maternity leave. The maternity benefits are unaffected by a notice of dismissal given without sufficient cause or on grounds of redundancy or reorganisation.

A female employee who meets the conditions under the CDCA is entitled to receive salary from her employer for the full 16 weeks of maternity leave. A female EA employee who does not meet the conditions under the CDCA is entitled to receive salary from her employer for eight weeks of maternity leave.

Besides the right to receive her pay and benefits during maternity leave, a female EA employee who works during her maternity leave is entitled to additional pay or days off *in lieu*.

4.3 What rights does a woman have upon her return to work from maternity leave?

The relevant legislation does not provide any additional maternity rights upon return to work from maternity leave.

4.4 Do fathers have the right to take paternity leave?

Both natural and adoptive fathers who meet the conditions under the CDCA are entitled to one week of paternity leave.

4.5 Are there any other parental leave rights that employers have to observe?

Employers may have to accord:

(1) adoption leave;
(2) paid childcare leave;
(3) unpaid infant care leave; and
(4) shared parental leave,

in accordance with the provisions of the CDCA.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

There is no statutory entitlement to flexible working hours.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In a business sale by asset transfer resulting in a change of legal employer (*viz.* to the transferee), EA employees are automatically transferred to the transferee. Where the business sale occurs via a transfer of shares in the employer, there will not be any change of employer, so no transfer is required.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

When an automatic transfer of employment applies, the contract of employment shifts from the transferor to the transferee as if originally made between the employee and the transferee. This transfer includes all rights, powers, duties and liabilities under that contract. Such a transfer will not break the continuity of the period of employment.

Any collective agreement entered into and in force between the transferor and trade union of the affected employees will continue in force between the transferee and the trade union for a period of 18 months after the date of the transfer or until the expiry date of the collective agreement, whichever is later.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

The transferor is required to notify the affected EA employees and their trade union (if any) of the fact that the transfer is to take place, the approximate date of the transfer and the reasons for the transfer, the implications of the transfer and the measures that will be taken in relation to the employees by either or both of the transferor and transferee. Such information must be conveyed "as soon as reasonable" before the transfer, to enable consultations to take place between the transferor and affected employees and/or their trade union (if any). The transferee is also required to provide the transferor with sufficient information to enable the transferor to carry out these obligations.

Where the MOM considers that there has been an inordinate delay in such notification, it may, by notice in writing, direct that information should be provided within a specified time period.

5.4 Can employees be dismissed in connection with a business sale?

The automatic transfer provisions operate such that the business sale shall not have the effect of terminating the employment of the transferred EA employees. However, there is nothing to prevent the dismissal of employees on any other valid ground before or after the business sale.

In the event of a business sale, non-EA employees may be dismissed in accordance with the terms of their employment contract.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Yes, with the employees' consent to the changes.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Employees have to be given notice of termination in accordance with the terms of their employment contract. The notice period is generally determined by contract for both non-EA and EA Employees, but if the contract is silent, the following minimum notice periods in the EA apply for EA employees:

- one day's notice if length of employment is less than 26 weeks;
- one week's notice if length of employment is for 26 weeks or more but less than two years;
- two weeks' notice if length of employment is for two years or more but less than five years; and
- four weeks' notice if length of employment is for five years or more.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Employers can place employees on "garden leave" if the right to do so is provided for in the employment contract. Even if the right to do so is not provided in the contract, an employer may be able to rely on the argument that it is entitled to do so, as a reasonable and lawful direction which the employee ought to comply with.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

"Dismissal" is defined in the EA as the termination of the contract of service of an employee by his employer, with or without notice and whether on the grounds of misconduct or otherwise.

An EA Employee may complain to the MOM that he/she has been dismissed without just cause or excuse. Employees represented by a recognised trade union may also make a similar complaint through the trade union. In successful cases, the MOM may order the employer to reinstate the employee and/or pay such amount of compensation as the MOM determines.

Both non-EA and EA employees may also have a cause of action for wrongful dismissal or for constructive dismissal, i.e. where the dismissal takes place through the repudiatory breach on the part of the employer.

Third party consent is not required for a dismissal.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Female EA employees on maternity leave, employees who are approaching the statutory retirement age (currently 62 years), and employees who are or may be called up for national service.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

(1) Employers may summarily dismiss an employee who is in repudiatory breach of the employment contract (e.g. serious misconduct, unapproved absences from work), or for 'cause' on grounds set out in the employment contract. Employers may also dismiss an employee by giving the requisite contractual notice in all other circumstances (e.g. poor performance insufficient to warrant summary dismissal).

(2) Termination can also take place due to restructuring or redundancy. Employers are generally not required to establish a genuine business reason for termination on the grounds of redundancy, as long as the requisite contractual notice is given. There is no statutory entitlement to redundancy benefits, but redundancy benefits may be contractually agreed in a collective agreement between the employer and trade union, or between the employer and employee under the employment contract or the employer's policies. Employees who have continuously served their employer for at least two years may be eligible to receive retrenchment benefits; the Tripartite Guidelines on Managing Excess Manpower recommend a rate of two to four weeks' pay per year of service.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

If there is a contractually-agreed procedure to be followed before termination (e.g. performance improvement plans, disciplinary process) this must be followed. Employers ought to observe the principles of natural justice when conducting inquiries/disciplinary procedures.

In addition, before an EA employee can be dismissed for cause, the employer should conduct due inquiry.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Employees may claim damages by civil action for wrongful dismissal (specific performance is generally not awarded in the employment context). For dismissal without just cause or excuse, the MOM may order reinstatement and/or compensation in certain circumstances.

6.8 Can employers settle claims before or after they are initiated?

Employers may privately settle claims at any time in the proceedings before a judgment or order is made.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

The MOM advises employers to notify it before carrying out a retrenchment exercise.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

This is not applicable in Singapore.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

The restrictive covenants typically sought to be enforced in the Singapore courts are non-compete clauses, non-solicitation clauses and confidentiality clauses.

7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants are generally not enforceable, unless the ex-employer can show that it has a legitimate interest to protect, and that the restrictive covenant is reasonable in reference to the interests of the parties and the interests of the public.

There is no "standard" period of restraint; the reasonableness of the length of the restraint depends on the seniority of the outgoing employee and the nature of the interests for which protection is sought.

7.3 Do employees have to be provided with financial compensation in return for covenants?

No. The enforceability of a restrictive covenant does not depend on whether financial compensation had been provided by the employer; the fact that financial compensation had been provided does not of itself render the restrictive covenant valid.

7.4 How are restrictive covenants enforced?

Restrictive covenants are typically enforced by way of a prohibitory injunction from the High Court, on the basis that damages are not an adequate remedy.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employers are generally required to obtain consent from employees when processing employees' personal data. "Processing" under the Personal Data Protection Act (Act 26 of 2012) ("**PDPA**") is defined as carrying out any operation or set of operations in relation to the personal data, and this definition includes the collection, use, disclosure and transmission of personal data.

There are certain exceptions to the general consent requirement in the PDPA that may be relevant. For example, an employer may process data without employees' consent for the purpose of "managing or terminating the employment relationship" (the scope of this phrase

is not defined in the PDPA), and for evaluative purposes (including the determination of suitability or eligibility or qualifications of an individual for employment, promotion, continuance in or removal from employment).

For consent to be valid, or where an employer processes personal data for the purpose of managing or terminating the employment relationship, the employer must first notify the employee of the purpose(s) for which the data will be processed.

An employer cannot transfer employee data freely to other countries. Unless the employee has consented to the transfer, the employer must first ensure that the recipient is bound by legally enforceable obligations (such as the law in the receiving country, or a contractual agreement with the recipient) to provide a standard of protection that is at least comparable to the protection under the PDPA.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Employees have a right to request for access to their personal data, which may or may not extend to a right to obtain copies of that data, depending on whether the request is reasonable.

For example, an employer need not provide such information where the burden or expense of providing access or copies would be unreasonable or disproportionate to the individual's interests, or where the provision of that data could be reasonably expected to threaten the safety or health of a third party.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, subject to compliance with the consent requirements under the PDPA.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

There is no prohibition against employee monitoring, although under the PDPA, employers are required to inform employees of the purposes for which such monitoring is carried out.

Employers should ensure that employee monitoring does not fall afoul of the Computer Misuse and Cybersecurity Act (Cap. 50A). For example, unauthorised access to data (e.g. logging into an employee's personal email account without the employee's consent) is an offence under the Act.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

While an employer can prohibit the use of social media during office hours or in the workplace, they may not be able to effectively prohibit the use of social media after office hours or outside the workplace, although an employer's internal policies may provide that an employee is not allowed to use social media in a manner that would disparage the company's reputation or image.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Currently, all employment claims are within the civil jurisdiction of the State Courts and the High Court, depending on quantum. EA Employees have the option of lodging complaints with the MOM, which administers the Labour Court.

An Employment Claims Tribunal is likely to be set up in 2016, and it is likely to assume jurisdiction over certain employment-related claims currently within the jurisdiction of the MOM, State Courts and High Court. Details of the exact composition and jurisdiction have not been announced.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

Although conciliation is not mandatory, both the MOM and the civil courts may encourage (or direct, in certain circumstances) parties to attempt mediation or conciliation. The mediation/conciliation process may be presided over by an MOM officer, judge or a neutral third party trained to conduct mediation/conciliation.

Complaints to the MOM may be made within a year after the incident occurs (save for claims for matters arising out of or as the result of termination, which must be made within six months from the termination of employment). Such complaints are generally submitted online. Nominal registration fees apply.

Civil claims may be commenced by filing a writ action with the High Court or State Courts' registry (whichever the case may be). The limitation period for employment contractual claims in court is six years. Court filing fees apply.

9.3 How long do employment-related complaints typically take to be decided?

Complaints to the MOM may take between one to three months to be resolved; civil claims may take between nine and 15 months to be decided. The length of time required depends on the complexity of the matter and the stance taken by the respective parties.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

A decision of the MOM may be appealed to the High Court within 14 days after the date of decision.

Appeals to the High Court may take between nine to 15 months to be resolved, depending on the complexity of the matter and the stance taken by the respective parties.

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