to the merger must "fully employ or to make reasonable arrangements for the existing staff and workers of the companies to be employed".

CHN ¶80-061 Requirements for a lawful dismissal

The term "lawful dismissal" is not a term officially used in the laws and administrative regulations. The term is used here to refer to a dismissal by the employer in accordance with the relevant statutory and contractual provisions.

In order to dismiss an employee legally, an employer must comply with certain substantial and procedural requirements in the *Labour Contract Law* and relevant implementation regulations and rules. Those requirements include:

Conditions under which an employee may be dismissed

Under the *Labour Contract Law*, except for those conditions under which an employer is allowed to carry out redundancy (see "Redundancy" at CHN ¶80-571), there are nine basic conditions under any of which an employee can be dismissed:

(1) where he/she has been proved to have failed to satisfy the recruitment conditions during the probation period (Art 39(1) of the *Labour Contract Law*);

(2) where he/she has seriously violated labour discipline or the rules promulgated by the employer (Art 39(2) of the *Labour Contract Law*);

(3) where he/she has committed a serious dereliction of duty or graft, causing substantial harm to the employer's interests (Art 39(3) of the *Labour Contract Law*); (Here, the harmfulness of the employee's act shall be determined in accordance with the internal rules published by the employer. In case of dispute, the issue should be submitted to the Labour Dispute Arbitration Committee to decide (Art 25 of the *Labour Law* Explanation).)

(4) where the employee has additionally established a labour relationship with another employer which materially affects the completion of his/her tasks with the first employer, or he/she refuses to rectify the matter after the same is brought to his/her attention by the first employer (Art 39(4) of the *Labour Contract Law*);

(5) where the employee uses such means as deception or coercion, or take advantage of the employer's difficulties, to cause the employer to conclude a labour contract that is contrary to the employer's true intent (Art 39(5) of the *Labour Contract Law*);

(6) where he/she is subject to criminal prosecution in accordance with the law (Art 39(6) of the *Labour Contract Law*);

(7) where he/she has fallen ill or sustained a non-work related injury, and can neither engage in the original work nor in other work arranged by the employer after the expiration of the medical treatment period (Art 40(1) of the *Labour Contract Law*);

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(8) where he/she is incompetent to perform the job and remains incompetent after training or being transferred to another post (Art 40(2) of the *Labour Contract Law*);

(9) where major changes in the circumstances under which the labour contract was entered into have rendered such contract incapable of being performed, and the parties have failed to reach an agreement on the amendment of such contract after consultations and negotiations (Art 40(3) of the *Labour Contract Law*).

Conditions under which an employee may not be dismissed

Article 42 of the *Labour Contract Law* lays down certain situations under any of which an employee may not be dismissed even if the abovementioned conditions (7), (8) or (9) are satisfied:

(a) where the employee has lost the capacity to work due to occupational disease or work-related injury;

(b) during the required period of medical treatment for an illness or non-work-related injury;

(c) female employees during the period of pregnancy, confinement and nursing;

(d) where the employee is engaged in operations exposing him to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observation;

(e) where the employee has been working for the employer continuously for not less than 15 years and is less than five years away from his legal retirement stage; and

(f) other circumstances provided for by laws or administrative regulations.

In the case of (b), (c), (d) and (e) above, if the labour contract expires when such circumstance exists, it should be prolonged until the same no longer exists. In case of (a) above, it shall be handled in accordance with the state regulations on work-related injury insurance.

Where an employer dismisses an employee who falls within any of the abovementioned categories, the dismissal could be regarded as a "wrongful termination". If the employee in the arbitration/litigation procedures can successfully prove losses suffered due to such wrongful termination, then the employer will be ordered to pay damages as provided for by the law (see "Wrongful termination" at CHN ¶80-231).

CHN ¶80-071 Notification requirements

In cases of dismissal under CHN ¶80-061, in particular, conditions (7), (8) and/or (9), the employer must give the employee 30 days written notice or pay the employee one month wage in lieu of such notice. For dismissal under conditions (1), (2), (3), (4), (5) or (6), prior written notice is not mandatory. A

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contract in violation of the *Labour Contract Law* and the employee demands continued performance of such contract, the employer shall continue performing the same. If the employee does not demand continued performance of the labour contract or if continued performance of the labour contract has become impossible, the employer shall pay damages to the employee pursuant to Art 87 (see "Remedies available to the employee" above).

Procedural issues in dismissal

CHN ¶80-271 Consultation with or notification to the trade union

In addition to the notification requirements, there are other procedural issues to which the parties should pay attention to in cases of dismissal and termination.

Article 43 of the *Labour Contract Law* provides that when an employer is to terminate a labour contract unilaterally, it shall give the labour union advance notice of the reason therefore. If the employer violates laws, administrative regulations or the employment contract, the labour union has the right to demand that the employer rectify the matter. The employer shall consider the labour union's opinions and notify the labour union in writing the outcome of its handling of the matter.

CHN ¶80-281 Issuance of release certificate

According to Art 4 of the *Circular on Issues Regarding Enterprise Employees Movement* issued by the Ministry of Labour in 1996 ("Movement Circular"), after the termination of labour contract, the employer shall provide the employee with an appropriate document to evidence the termination. Article 50 of the *Labour Contract Law* provides that when a labour contract is terminated or has expired, the employer has the obligation to issue a certificate of termination of the labour contract to the employee at the same time.

In practice, such a document is often referred to as the "release certificate", which normally contains the following information:

- name of the employee;
- duration of employment;
- date of termination or expiry;
- job description; and
- reason for termination (upon the employee's request).

The release certificate is important because a new employer must examine the release certificate or other evidence to ensure that the candidate does not have existing employment relations with any unit before it enters into a new labour contract with the candidate. The employer may be held liable for the

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candidate's breach of labour contract with the former employer if that labour contract has not yet expired or terminated (see Case 1 at CHN ¶80-701 and Case 2 at CHN ¶80-711).

Under previous practices, the release certificate was normally issued after the employee had completed all internal "handing over" (*Yi Jiao*) procedures, such as returning all assets and documents belonging to the employer and repaying all amounts owed. However, it is necessary to note that under Art 50 of the *Labour Contract Law*, such certificate shall be issued at the same time when the labour contract is terminated. Completion of the handing over is not a condition precedent for issuing such certificate but is a condition precedent for payment of the relevant economic compensation.

According to Art 89 of the *Labour Contract Law*, if the employer fails to issue the release certificate according to the law, the labour administration authority shall order rectification. If the employee suffers harm as a result of such failure, the employer shall be liable for damages.

CHN ¶80-291 Transfer of personnel file and social insurance account

After the issuance of the release certificate, the former employer is obliged to transfer the personnel file of the employee to the new employer, or to the relevant authorities qualified to keep the personnel file for the employee, for example, the personnel exchange centre (Clause 1 of the *Movement Circular*, Art 50 of the *Labour Contract Law*). It is also obligated to transfer the social insurance account of the employee (Art 50 of the *Labour Contract Law*).

In practice, there is always a delay on the part of the former employer in transferring the file. It is therefore important for the employee or the new employer to urge the former employer to perform that obligation in a timely manner. In order to prevent such delay, Art 50 of the *Labour Contract Law* has provided a 15-day time limit for employers to transfer personnel files and social insurance accounts of employees.

CHN ¶80-301 Filing registration of termination

According to Art 62 of the *Employment Services and Employment Administration Provisions*, an employer shall file the registration of termination of employment at a relevant public employment service institution within 15 days after the termination of the labour relationship with an employee.

CHN ¶80-311 Alternatives to dismissal

According to Art 25(2) of the *Labour Law*, where an employee violates labour discipline or the rules and regulations of the enterprise, the employer is allowed to dismiss him/her if such violation is serious. Article 39(2) of the *Labour Contract Law* has deleted the wording "labour discipline", so only serious violation of employer's rules and regulations is a cause for dismissal.

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employee's right to resign, but if the labour contract is violated, then liability shall be borne (by the employee) (Art 31 of the *Labour Law Explanation*).

The Ministry of Labour, on 19 December 1995, clarified this matter to the Zhejiang Province Labour Department in its *Reply on the Issue of Termination of the Labour Contract by the Employee* (the "*Reply on Termination*"). The Ministry said that the 30-day written notice by the employee for the termination of a labour contract was not only a procedure, but also a condition for the termination of the labour contract.

Consent of the employer is not required for the termination if the employee has given the employer the 30-day written notice. The employer should carry out the procedures for the termination upon the request of the employee when the 30-day period elapsed.

If the employee has violated the provisions of the labour contract and thus has caused economic losses to the employer, then the employee should bear the liability for paying damages in accordance with relevant laws, regulations, rules, and the provisions of the labour contract. If the employee causes economic losses to the employer by wrongful termination, then the same holds true.

When the *Labour Law Explanation* and the *Reply on Termination* are read together, it seems clear that the employee has an absolute right to terminate the labour contract if he/she meets the 30-day written notice requirement.

If the employee fails to meet the 30-day written notice requirement — which is both a procedure and a condition for a lawful termination by a employee — then his/her termination will be deemed wrongful and he/she will be liable for paying damages in accordance with relevant laws, regulations, rules, and the provisions of the labour contract. If, on the other hand, he/she has met the 30-day written notice requirement but his/her termination will result in violating other provisions of the labour contract, then the same will still hold true.

Employers who have spent a substantial amount of resources to train their staff and who want to protect their interests in cases of early termination by the employee should make clear in the labour contract the employee's obligations upon the early termination. These may include repayment of training expenses or other benefits that have been provided to the employee, provided that such obligations on the part of employee are not grossly unfair.

CHN ¶80-721 Case 3

Miss Li entered into a labour contract with a bank to work as an accountant. The bank terminated the contract when it found out that Miss Li had only one kidney. The reason for the termination was that Miss Li lied about her health condition and that according to the bank's internal rules, newly recruited staff must be "healthy, having no severe illness or other deformity". The bank deemed that lacking one kidney was a "severe deformity" and thus terminated the contract on that basis.

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Miss Li applied for labour dispute arbitration. The arbitration tribunal's award upheld the bank's termination decision. Miss Li then appealed to the county court. After entrusting a hospital to make a medical examination on Miss Li's condition, the court decided that although Miss Li had lost one kidney, she was not "severely deformed" and was able to live and work normally. Miss Li's physical condition was fit for the job and hence the dismissal was wrongful. The court ordered the bank to reinstate Miss Li.

CHN ¶80-731 Case 4

A, B, C, and D were employees of a factory located in Hubei Province. In 1995, they all entered into two-year labour contracts (1 August 1995 – 1 August 1997) with the factory. When the term expired, the parties did not renew the contract, but A, B, C, D continued working for the factory. In July 1998, however, the factory notified A, B, C, and D of the termination of their employment. A, B, C, and D brought the matter to arbitration. Meanwhile, D got pregnant in October 1998. The arbitration tribunal made a decision in favour of the workers. The factory subsequently brought a legal action in the local court.

The court decided that according to the *Implementing Rules for Adopting Labour Contract System* (formulated by the factory and passed by the workers representative conference), the factory should sign five- to ten-year labour contracts with the workers. The two-year contract did not reflect the true intention of the workers and hence was invalid. The factory must sign two- to seven-year contracts with A, B, C, and D.

The factory appealed. The appeals court decided that although the *Implementing Rules for Adopting Labour Contract System* provided that the factory should sign five- to ten-year contracts with the workers, contracts of shorter terms were also allowed if the parties agreed. In addition, the *Implementing Rules for Adopting Labour Contract System* had been discussed by all the workers before adoption. Therefore, A, B, C, and D may not argue that the signing of the two-year contracts was not their intention. The trial court had applied the law wrongly and the decision should be reversed.

However, the factory did not end the employment relations with the four workers upon the expiry of their contracts and there did exist a *de facto* employment relationship between the factory and the workers. Many *de facto* employment relationships are the result of the employers' intention to get rid of the restrictions of a labour contract. Thus, Art 14 of the *Notice on the Adoption of Labour Contract System* (issued by the Ministry of Labour in 1996) provides: "If a term of a labour contract was not formally terminated or renewed upon expiry and a *de facto* employment relation has been formed, the labour contract should be deemed renewed. The parties should consult on the term of the contract and carry out the renewal procedures."

Article 20 of the *Opinion on Several Questions Concerning the Implementation of Labour Contract System* (issued by the Labour Department of Hubei Province) provides that if the parties neither renew the labour contract nor carry out the termination procedures upon expiry of the term of the labour

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Instead of using the last full month's wages or 18 working days for the calculation, an employee can choose to use his average wages over the past 12 months immediately preceding the relevant date, subject to a maximum of HK$22,500 (sec 31V of the *Employment Ordinance*).

Maximum long service entitlements

The maximum amount of severance payment is subject to a statutory maximum of HK$370,000 where the relevant date is from 1 October 2002 to 30 September 2003 and HK$390,000 where the relevant date occurs on or after 1 October 2003

Reckonable years

Furthermore, for the purpose of calculating severance payments, there is a maximum number of years of service that will be fully reckonable, of 41 years, where the relevant date is from 1 October 2002 to 30 September 2003 and 43 years where the relevant dates occurs from 1 October 2003 to 30 September 2004.

Set-off of long service payment

An employer's liability to make a long service payment can be reduced by:

- the total sum of the amounts of all contractual gratuities;
- the total sum of the amount of all retirement scheme payments due to the employer's contributions (not due to the employee's contributions); and
- the amount of any relevant mandatory provident fund scheme benefit which represents the employer's contributions

in respect of all the years of service in respect of which that long service payment is payable (sec 31Y of the *Employment Ordinance*).

Making of long service payment

Timing

Long service payments, except those payable on the death of an employee, should be paid to the appropriate employee within seven days of the day of termination.

A long service payment payable on the death on an employee must be paid to:

- the spouse of the employee;
- if there is no spouse, to the children of the employee;
- if there is no child, to a parent of the employee; or
- if there is no parent, to the personal representative (that is, the executor or administrator) of the employee.

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To be eligible for a payment of a long service payment, the spouse, children, parent or personal representative must make an application in a prescribed form to the employer within 30 days following the death of the employee.

The employer must pay the long service payment not later than seven days after receipt of the application from the spouse of the employee. Where there is no spouse, the employer must make the long service payment not later than seven days after the expiry of the 30-day application period. Where there is more than one person entitled to the long service payment (eg, two or more children), the payment will be divided equally between such persons. Employers failing to comply with these provisions are liable to a fine at level five (currently HK$50,000) (sec 31RA of the *Employment Ordinance*).

Written particulars of long service payment

Employers must give written particulars to employees setting out the amount of long service payment and how such an amount has been calculated. An employer who fails to comply with such a requirement, without reasonable excuse, shall be guilty of an offence and shall be liable, on conviction, to a fine at level three (currently HK$10,000). If the written particulars include anything which, to the employer's knowledge, is false in a material particular, or if the employer recklessly includes anything which is false in a material particular, the employer shall be guilty of an offence and shall be liable, on conviction, to a fine at level five (currently HK$50,000) (sec 31ZE of the *Employment Ordinance*).

Transfer of business

When a business is transferred from one owner to another, a termination situation will arise as the transferor will dismiss the employees in the business. Long service payments may therefore become payable. The *Employment Ordinance* provides a mechanism for postponing the payment of long service payments in this situation.

Avoiding long service payments on the transfer of a business

To avoid making long service payments to employees on the transfer of a business, the following procedures must be complied with:

- the transferor must give the requisite notice of termination or payment in lieu of notice; and
- the new owner must offer re-employment immediately following the transfer which the employee accepts.

Note that the legislation does not require the offer of re-employment to be on identical or equivalent terms. However, if the offer of re-employment is not on such terms then the employee will be entitled to refuse such offer and receive a long service payment.

If the above conditions are satisfied, there will be no need to make any long service payments at the time of a transfer of business.

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Contract with notice

If the contract is for an indefinite period and contains provision for notice, then the terms are decided by the parties themselves. If notice is given according to the terms, then at the expiry of the notice period, the termination of the contract would become effective.

Contract without notice

If the contract is for a fixed period without any provision of notice, then the employee does not have the right to resign or terminate the contract unless it is specifically agreed to by the parties by a subsequent agreement. If there is any violation of the terms of the contract, the employer is entitled to claim damages for the breach of contract.

No notice stipulated

If there is no stipulation of notice in the contract of service, then it is implied that according to the circumstances of the case, reasonable notice would be required to terminate the contract of service.

In the absence of any express provision or statutory minimum, the law requires reasonable notice to be given for the purposes of terminating the contract of employment. In establishing what is reasonable notice, the nature of employment, the length of service, local custom or practice are all relevant.

Resignation must be accepted by the employer

A resignation by an employee has to be accepted by the employer in order to make it effective. The employer would be justified in refusing to accept an employee's resignation for the following reasons:

- employee wants to leave in the middle of an assignment in which his/her presence and participation is necessary; and
- employee has a disciplinary enquiry pending.

Retirement

The expression retirement means the stage when a worker retires after having reached the age of superannuation.

- *Government servants*: retirement is provided under *Fundamental Civil Service Rules*.
- *Statutory bodies*: retirement means the age at which the employee has the right to retire under the relevant Statute.

For employees in industrial employment: where Standing Orders are in force and the rules are provided, the workers would be governed by rules under the Standing Orders, irrespective of whether they joined the service before or after the certification of Standing Orders.

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Retrenchment

Retrenchment can end an employee's contract of employment. It means the "discharge of surplus labour or staff" by the employer and can happen due to:

- along period of lay-off;
- rationalisation of production processes; and
- improved machinery or automation or similar other reasons (but not as punishment inflicted by way of disciplinary action).

Retrenchment *does not* include:

- voluntary retirement of the worker;
- retirement of the worker on reaching the age of superannuation;
- termination of the service of the worker as a result of non-renewal of the contract of employment; and
- termination of the service of the worker on grounds of continued ill health.

The last come first go rule

Retrenchment is subject to the rule that only those employees in a particular category can be retrenched on the principle of "Last come first go". The law requires employers to give preference to employ the retrenched workers over others when new positions arise.

Transfer of undertakings

For industrial establishments employing less than 50 workers, contracts of employment will be governed by the common law. At common law, the employer has the right to transfer its business as an absolute prerogative. However, there may be liabilities toward the employees. If the terms of the contracts of employment permit, then the employer can validly terminate the services with the required notice.

For industrial establishments employing 50 or more workers, if the ownership of management of an undertaking is transferred to a new employer, then every worker in continuous service for not less than one year is entitled to notice and compensation as if the worker had been retrenched.

Dismissal as punishment

Dismissal or discharge as a means of punishment attaches a stigma to an employee if his/her services are dismissed. Under the *Industrial Disputes Act*, it is the ultimate and the most drastic disciplinary sanction by an employer for an act of misconduct. It is the termination of services by way of punishment for some misconduct or for unauthorised and prolonged absence from duty. Termination of service not by way of punishment is not tantamount to dismissal.

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Layoffs under Chapter V-B

No worker whose name is borne on the muster-rolls of an industrial establishment to which this chapter applies shall be laid off by the employer except with the permission of the appropriate authority on an application made in this behalf, unless such layoffs are due to a shortage of electric power or due to natural calamity etc.

All the provisions of Act relating to retrenchment (except retrenchment after the expiry of the first 45 days of layoff) shall apply to cases of layoff under this Chapter.

IND ¶80-291 Handling redundancies

Apart from the available legal recourse, there are other types of help for retrenched and laid off employees. Companies may adopt various methods for work force adjustment as indicated below.

Outplacement

Outplacement is relatively a new concept. When labour becomes surplus, some organisations actively assist them in finding a job elsewhere. Multinational firms like the ESSO Refinery provided assistance to its employees like paid leave and reimbursement of travel charges for selection tests and interviews. Though this entails some investment, the benefits outweigh the costs. There is no need to resort to hasty retrenchment and the morale of employees remains high. Those who leave may go to better jobs in terms of pay, skill, prospects and so the organisation retains their goodwill.

Voluntary Retirement Scheme (VRS)

Companies with surplus work force may offer golden hand shakes to employees. The employees are given an option to retire voluntarily with handsome compensation.

Salient features

The salient features of a VRS are:

- it applies only to an employee who has completed ten years of service or completed 40 years of age;
- the scheme of voluntary retirement should have been drawn to result in an overall reduction in existing strength of employees;
- the vacancy caused by voluntary retirement is not to be filled; and
- the amount receivable on account of voluntary retirement does not exceed three months salary for each completed year of service, or salary at the time of retirement multiplied by the balance of months of service left before the normal retirement date.

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Benefits

The benefits available under a VRS are the following:

- the company solves its surplus staff problem;
- the morale of the continuing employees remains high;
- the organisation maintains their goodwill; and
- the company gets tax benefits under the *Income Tax Act*.

Response to VRS

When the Government conducted a VRS for bank employees, the target was to reduce 10% of the staff strength of over 874,000 employees. Once the scheme started, the response exceeded expectations. State-run banks in India that have implemented a VSR include Bank of India, United Bank of India, Punjab National Bank, Bank of Maharashtra, Union Bank of India, Canara Bank, UCO Bank, Syndicate Bank, Indian Bank and the Central Bank of India. Among foreign banks, Bank of America, Citibank, HSBC, StanChart and Grindlays.

Transfer

Transfer is the lateral shift of movement of individuals from one position to another, usually without involving any marked changes in duties, responsibilities, skills needed, or compensation. In case of organisations which have large scale operations, such a tool can be used effectively to accommodate the surplus employees. It also helps to deal effectively with the fluctuations in work requirements and to enhance versatility and competence of key personnel.

Training and upgradation

Training refers to imparting specific skills for specific objectives. Organisations can impart training to employees for more responsible positions. This can be used as an effective method of doing away with redundant positions.

IND ¶80-301 The redundancy programme

It is very difficult to handle an organisational exit. It is an inevitable problem because a company's greatest asset suddenly becomes its greatest liability. Whenever an HR Manager wants to eliminate inefficiencies, the staff who receive attention are bloating wage bills, hampering productivity and damaging profits. It has become almost impossible for any company to offer a life-long employment. Market forces make it imperative that the company upgrades technology, applies business process reengineering and adheres to alliances and joint ventures. All these measures involve the reduction of manpower. This indicates an urgent need for evolving an effective system of managing organisational exit, based on the principles of consistency, compassion and cooperation. This is essential to maintain the morale of the employees who remain.

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INS ¶80-261 Taxation of redundancy payments

This is dealt with by *Government Regulation No 149/2000* on the Withholding of Income Tax Art 21 on Income in the Forms of Severance Pay, Pension Redemption Money and Old Age Allowance or Old Age Security and its implementing regulation, *Decree of the Minister of Finance No 112/KMK.03/2001*. Pursuant to the said Decree, "severance pay" is subject to withholding by the employer of income tax (Art 21 above) at the following rates:

- Income up to Rp25,000,000: exempt
- Income over Rp25,000,000 up to Rp50,000,000: 5%
- Income over Rp50,000,000 up to Rp100,000,000: 10%
- Income over Rp100,000,000 up to Rp200,000,000: 15%
- Income over Rp200,000,000: 25%.

"Severance pay" includes income paid by the employer to the employee in whatever name and form in connection with the expiry of the period of service or as a result of an employment termination, including long service pay and compensation.

It is important from a practical standpoint to notify this withholding obligation to employees in order to avoid any misunderstanding, over who will actually bear the tax liability.

INS ¶80-262 Can pension benefits be deducted from severance pay and not in addition to severance pay?

No, they cannot. Pension benefits should be paid in addition to severance pay if there is a termination of employment. Pension benefits are not related to severance pay for a termination of employment for any other reason than retirement. The severance pay package should be borne by the employer, not the pension fund.

INS ¶80-271 Developments

On 26 October 2004, the Indonesian Constitutional Court issued a ruling in a case (No 012/PUU-I/2003) filed by several labor unions which requested the Constitutional Court to decide that the *Manpower Law* is in violation of the Indonesian Constitution of 1945, to invalidate the *Manpower Law*, and to instruct the Government of Indonesia to revoke the *Manpower Law*. Although the Constitutional Court did not approve the request by the labor unions to invalidate the *Manpower Law*, surprisingly, the Constitutional Court decided that certain provisions in the *Manpower Law*, relating to the termination of employment, are indeed contrary to the Indonesian Constitution of 1945. Such provisions include Art 158 (termination due to employee's serious mistake) (see INS ¶80-071) and Art 160 (termination due to the arrest or criminal conviction of the employee (see INS ¶80-214). Thus, by virtue of this Constitutional Court ruling those provisions do not have binding legal effect. There are, as expected,

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a number of uncertainties in relation to this ruling, not least its precise meaning and implications. It also remains to be seen how this decision could be implemented in practice.

Reducing employment termination liability

INS ¶80-281 Introduction

Generally speaking, it is difficult, if not impossible, for the employer to reduce its exposure to termination liability to less than that set out in the Indonesian labour laws and regulations. Planning devices to reduce exposure should emphasise limiting exposure to these statutory minimums, and generally enhancing the employer's contractual right to terminate and ensuring labour disputes are prevented rather than cured.

It is likely that the significant potential financial burden imposed by law will result in employers continuing to enter into fixed-term contracts (see INS ¶80-291), utilising employee outsourcing arrangements (to the extent permitted by the *Manpower Law*) and hiring independent consultants and/or contractors.

It should be emphasised that in nearly all cases, an amicable negotiated settlement resulting in the voluntary resignation of the employee(s), will be preferable to a long, protracted, expensive and acrimonious dispute resolution process. Accordingly, it is often the case that pragmatism is better than a staunch adherence by the employer to principles.

INS ¶80-291 Fixed-term contract

Since no termination benefits are payable under Indonesian law upon the expiry of a fixed-term contract, an obvious planning device to be considered by the employer is to hire employees only on fixed-term contracts. Such contracts might be as short as six months or one year.

Under a fixed-term contract, if the employer wishes to terminate the employee during the contract, the employee would ordinarily be entitled to termination compensation based on the unexpired term of the contract. However, a fixed-term contract leaves the employer with the option of not renewing the contract at the end of its term, with the result that no termination benefits are payable. It will be apparent that an employee terminated towards the beginning of a fixed term contract may be entitled to greater termination benefits than an employee employed under a contract of indefinite duration because in the latter case the probationary period may not have expired. Conversely, the employee's entitlement will likely be less if he/she is terminated towards the end of a fixed-term contract, or where his employment is not renewed at the end of the fixed term contract.

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(or in cases where no union exists, a person duly selected by more than half of employees as their representative), to discuss steps taken by the employer to avoid the necessity of redundancies and the criteria used to select those subject to layoff.

It is important to note that the aforementioned requirement to consult with the union or employee representative does not grant the union or representative a legal veto power over the employer's plan. However, it is natural and expected that during the period of notice and good-faith consultations, there will be considerable pressure from employees to preserve job security.

The Supreme Court has held that redundancy planning is not a matter subject to collective bargaining between employers and labour unions. Therefore, industrial actions such as strikes in response to proposed Art 31 redundancies are unlawful.

Preferential re-employment

Article 31 *bis* provides that when an employer who has dismissed workers under the provisions of Art 31 wishes to increase headcounts within two years of the redundancy, the employer shall make efforts to re-employ preferentially former employees taking into consideration the positions held by them at the time of redundancy. Because the current LSA does not provide the employer's obligation to rehire former employees but only calls for the employer's efforts to rehire them, it has been subject to criticism as to its effectiveness. Under the amendments to the LSA, effective from 1 July 2007, if an employer who has conducted mass layoffs for managerial reasons wishes to hire workers for the same positions held by the dismissed workers within three years from the redundancy, the employer will be required to re-hire preferentially the former employees. Such provision of the LSA will apply to the layoffs for managerial reasons that would arise on or after the effective date of the amended LSA.

It is, however, to be noted that even the above amendments to the LSA provide only the employer's obligation to re-hire former employees, but do not provide for penalties as a consequence of the employer's non-compliance with such legal obligation.

Report to Ministry of Labour

When an employer intends to dismiss more than 10 personnel as permitted under Art 24 of the LSA, in most cases a report must be filed with the Ministry of Labour at least 30 days prior to the proposed layoffs. The notice needs to be made in the Korean language in a form prescribed by the Ministry.

The form requires, among others, statements regarding the following:

(1) date the notice of layoffs was given to employees;

(2) the method of employee notice;

(3) criteria used by the employer for selecting employees to be made redundant;

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(4) alternatives considered to avoid layoffs (eg shortened work hours, hiring freeze, employee relocation, etc); and

(5) other matters including the employer's plan to rehire laid off employees.

KOR ¶80-041 Employee remedies for unfair termination

Where an employee has been laid off without just cause, the employee's remedies under Korean law are threefold:

(1) Filing an administrative complaint with the Labour Relations Commission seeking a reinstatement order, to put the employee in the same position as before the unjust termination;

(2) Filing a criminal complaint with the local district labour office under the criminal provisions of the LSA; and/or

(3) Commencement of civil litigation seeking damages and a court order returning the employee to duty.

Attorneys' fees, court costs, and the time necessary to prosecute civil litigation tend to discourage aggrieved employees from seeking redress through the court. However, the other remedies are very effective.

Both the Labour Relations Commission and the local district labour office have the authority to order the employee reinstated in his former position with back pay. But that's not the only thing to fear. Employers who think they can gain the upper hand by cutting off pay and benefits may find themselves on the wrong end of the LSA's criminal provisions. It is not unknown (although certainly not common) for managers to be arrested and charged by prosecutors instructed by the district labour office in the course of the dispute.

Under the LSA's current criminal provisions, possible penalties for unfair termination include a jail term of up to five years or a fine of up to KRW30 million. Typical fines range up to five million won, in addition to the order for reinstatement of the affected employee. Such criminal provisions of the LSA have been subject to the criticism that they overly restrict the employer's rights to terminate employees. Under the amendments to the LSA, effective from 1 July 2007, the criminal provisions under which an employer could be subject to criminal penalties simply based on the fact that an employee has been terminated without just cause will be deleted and an employer will be subject to imprisonment of up to one year or a fine of up to KRW10 million only in case the employer has not complied with the Labour Relations Commission's finalised order for reinstatement.

KOR ¶80-051 Payments due at termination

No additional payments are required under current law where the termination is due to managerial reasons. However, employers are still liable for certain compensation, including wage payments for work performed through the date of termination, accrued but unpaid leaves and vacation time, and statutory severance pay.

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- family situation; and
- such criteria as may be formulated in the context of national policies.

It is noteworthy to observe that under sec 30(5A) of the *Industrial Relations Act 1967*, the Industrial Court in making its award, may take into consideration any agreement or code relating to employment practices between organisation representatives of employers and workmen respectively where such agreement or code has been approved by the Minister.

MAL ¶80-481 Compliance with the Code

Although the *Code of Conduct for Industrial Harmony* may not be legally binding, the Industrial Court encourages compliance with the Code. Should there be any blatant disregard to the Code, the Industrial Court may conclude that the retrenchment exercise was carried out *mala fide* and for other co-lateral purposes.

MAL ¶80-491 Collective agreements and the Code

In a very specific situation, where the collective agreement provides that the employer must observe the *Code of Conduct of Industrial Harmony*, strict adherence to the Code is called for. Should there be a failure to observe the Code in such a situation, the trade union may lodge a complaint of non-compliance at the Industrial Court.

MAL ¶80-501 Retrenchment benefits

Recently, the Industrial Court has further elevated the importance of the Code in the context of payment of retrenchment benefits. In *Tang Shipping Agencies Sdn Bhd v Wasli Abdullah & Anor* [2001] 1 ILR 198, the Industrial Court invoked Art 22(c)(ii) of the Agreed Practices annexed to the *Code of Conduct for Industrial Harmony* in directing the company to pay retrenchment benefits of 4½ months based on the last drawn salary to the claimants.

Having regard to the various inconsistent stands taken by the Industrial Courts on the requirement to adhere to the *Code of Conduct for Industrial Harmony*, it is recommended that in abundance of caution, there ought to be compliance with the Code where practicable.

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Managing the retrenchment

MAL ¶80-521 PK form (retrenchment/voluntary separation scheme/temporary layoff and reduction of wages)

Under the *Employment (Retrenchment) Notification 2004* [PU(B) 430], which came into effect on 11 November 2004, the employer is required to submit an employment notification retrenchment form in the PK Form to the nearest Labour and Manpower Department.

The employer is obliged to complete the PK Form and lodge the necessary copies in stages at the Labour Department. The PK Form contains six parts. Parts I to IV must be submitted within 30 days before the retrenchment of employees. Part V must be submitted within ten days after the date of retrenchment whilst Part VI must be submitted within 30 days after the date of the retrenchment exercise.

The legal requirement to submit the PK Form is pursuant to *Employment (Retrenchment) Notification 2004* [PU(B) 430] prescribed under sec 63 of the *Employment Act 1955*. The duty to submit particulars under the PK 1/98 Form applies to all employees, irrespective of the amount of their monthly salary (see sec 63(2) of the *Employment Act 1955*). Any employer who fails, without reasonable cause (proof of which shall lie on him), to forward to the Director General the PK Form or forwards false information shall commit an offence under sec 97 of the Act and shall be liable, on conviction, to a fine not exceeding RM10,000 (see sec 99A of the *Employment Act 1955*).

The duty to submit the form not only applies to an employer but also to an owner or occupier of land who employs a person to work for him. An "owner" is defined as a registered owner of the land whereas an "occupier" refers to a person who resides or has the place of business on the land.

MAL ¶80-531 Informing employees of the retrenchment

One of the common mistakes companies make is to leave the employees in the dark and not keep them updated on the company's plans. Some companies are compelled to take such a course of action for fear of sabotage or other adverse reactions.

It is good industrial relations practice for the employees to be notified well in advance of their impending retrenchment. Although productivity and efficiency may be affected, prior notice, if properly communicated, would minimise the negative impact of the exercise.

It is important to set up a committee to undertake the task of managing the whole exercise. The committee would essentially contain members from senior management and the human resources department. Their task would cover the public relations exercise, the legal intricacies and the compliance of the relevant regulations.

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been given, without waiting for the expiry of the notice period, by paying to the other party a sum equal to the salary at the gross rate of pay which would have been due to the employee during the notice period or the unexpired portion thereof.

SGP ¶80-041 Payment in lieu of notice

The *Employment Act* provides for payment in lieu of working through a notice period. In practice this is usually more relevant to dismissal than to resignation.

Payment in lieu of notice is a separate entitlement from the entitlement to any other payments that might accrue at the termination of employment.

Case example

Payment in lieu of notice terminates employment

The employee was the MD as well as the Group Executive Director of a company. The employment agreement provided for either party to terminate the agreement by giving not less than 90 days' notice or the corresponding salary in lieu of notice. The employee tendered his resignation on 31 May 1993 giving 9 months' notice, or any other mutually date. About four hours later, the company handed him a notice of termination and paid him salary for 90 days in lieu of notice and told the employee that he was entitled to a pro-rated bonus when the accounts for the relevant financial year were duly audited. At a board meeting on 2 June 1993, the employee's 9 months' notice period was rejected and the company determined that the termination was effective on 2 June 1993 and paid him salary for 1 and 2 June 1993 (the company having paid the employee on 31 May 1993 for salary up to that date).

The employee subsequently maintained that the effective termination date was 31 August 1993 (which was the date of expiry of 90 days from the employee's letter of 31 May 1993) and that he was therefore entitled to benefits up to that date. There was also a dispute over the calculation of the employee's prorated incentive bonuses for 1992 and 1993.

The Singapore High Court held that the company had validly terminated the employment on 2 June 1993 by making payment of salary in lieu of notice in compliance with the employment agreement. The court held that:

> "It is a basic proposition of law that where there is a provision in a service agreement for payment in lieu of notice the employment terminates when payment is duly made."

The Court rejected the company's method of calculating the employee's 1992 bonus which used the "previous financial year's consolidated balance sheet" and multiplying it by 17/12. The Court also disagreed with the company's assertion that the profit figures for two subsidiaries for seven months should be excluded from the calculation of the employee's 1993 bonus. The Court however allowed the company to write-off a certain debt as this was a proper write-off.

Lai Chong Meng v Chong Lee Leong Seng Company Limited Unreported High Court Judgment, 8 April 1997

See sec 11 of the *Employment Act*.

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SGP ¶80-051 Employment during notice period

When an employee is working through a notice period the contract of service continues until the notice period ends, and the parties' obligations towards each other continue. During this time, there is nothing to prevent the employer from summarily dismissing an employee if the employee acts in a way that justifies such dismissal.

If an employee has resigned and wishes to change his or her mind, the resignation can only be retracted if the employer agrees. This is so even if the employee has given a longer period of notice than necessary. Similarly, an employer can reinstate a dismissed employee at any time with the agreement of the employee.

If an employee has given notice or been given notice and fails to work for part or all of the notice period, the employee will be liable to pay the employer the sum equal to the amount of salary which would have accrued to the employee in respect of the remaining notice period.

SGP ¶80-061 Termination without notice

Either party may waive his right to notice that is due to him.

An employer may, after due enquiry, terminate a contract of service without notice and without payment in lieu of notice on the grounds of misconduct on the part of the employee inconsistent with the express or implied conditions of his employment (see SGP ¶80-101).

An employee may terminate a contract of service without notice and without payment in lieu of notice if he or his dependant is immediately threatened by danger to the person by violence or disease such as the employee did not by his contract of service undertake. See sec 14 and 15 of the *Employment Act*.

SGP ¶80-071 Breach of contract

A wilful breach of a condition of the contract of service will enable the other party to terminate the contract without giving notice.

Section 16 of the *Employment Act* provides that the party who breaks the contract of service is liable to pay to the other party a sum equal to the amount he would have had to pay under sec 11 if he terminated the contract of service without notice.

Failure to pay salary

An employer is deemed to have broken his contract of service if he fails to pay salary.

Absence from work

An employee is deemed to have broken his contract of service if he has been continuously absent from work for more than two days:

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- simultaneously hires other employees;
- dispenses liberal bonuses;
- announces high profits; and
- the expansion of business,

can provide grounds for terminated employees to argue they were improperly terminated. However, where termination is reasonably consistent with the visible facts, an employer can state that there is a need for a reduction in workforce.

Where an employee's contract was terminated while other employees are being hired, or rewarded with bonuses, the employer has no other grounds than to must argue that the employee was incompetent. The employer must take care to establish that the incompetence is confirmed, and that the employer was fair to the employee. Thus it is prudent for an employer to provide the employee with ample notice to improve his behaviour or skills. The employer should also, and to provide at least two warnings to the employee prior to terminating employment. If the a company has multiple supervisors, at least two should prepare written skill evaluations and or performance warnings, so that it will be easier for the employer to prove that the employee's incompetence was confirmed independently by different individuals.

TWN ¶80-021 Employee's right to advance notice

Even with the presence of any of the five conditions listed at TWN ¶80-011, an employer who terminates the employment relationship must provide the employee with advance notice. Employees are generally afforded up to 30 days' notice prior to termination. Employees with only three months, or less than one year of service history are entitled to 10 days' notice. Employees with one to three years of history are entitled to 20 days'notice, and employees with more than three years service are entitled to 30 days' notice (Art 16 of the LSL).

In practice

It is common for foreign employers to send employees home to search for new employment, while allowing the employee to collect one month's salary at the end of the month. It is also fairly common to pay the one month's pay on the day of notice, considered to be pay in lieu of notice. This is most common where retaining the terminated employee in the work place will damage the morale of the retained employees, or cause other employees to resign in solidarity.

TWN ¶80-031 Permissible termination without notice

Under certain circumstances, an employer may terminate an employee without notice. The LSL lists six specific conditions under which the employer need not provide notice of termination:

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(1) where the employee made material misrepresentations at the time of hiring, and these misrepresentations caused damages to the employer; (see cases for "material misrepresentations");

(2) where the employee has committed violence or gross insults to co-workers, or the employer or his family members or agents;

(3) where the employee has committed a gross breach of the labour contract or employment handbook;

(4) where the employee deliberately damaged the employer's property, including deliberate disclosure of trade secrets causing damages;

(5) where the employee is absent without leave for three days in a row, or six days in one month; and

(6) where the employee has been imprisoned (during employment — see cases at TWN ¶80-171) (Art 12 of the LSL).

TWN ¶80-041 The law on redundancy

Employers are free to terminate employees, with advance notice required where economic conditions have made an employee's position redundant (Art 11(3) of the LSL). There is no specific legislation on layoffs, and Taiwan's economic history has been one of economic growth and development from an agrarian economy to an industrial one. There has not been a perceived need for redundancy legislation.

Nevertheless, redundancy is recognised as a necessary ground for termination to ensure that companies in Taiwan can continue to rapidly develop. Disputes that are brought for improper termination can be brought to the CLA, or to a local district court. The number of administrative claims filed with the CLA has tripled in the past three years. The number of civil lawsuits filed in the courts is not known, as the Taiwan courts do not record the number of employment disputes separately from general economic cases.

Taxation of redundancy payments

Severance payments are taxable income to the employee who receives them, as are payments in lieu of advance notice of termination, or other payments related to retirement, termination, or resignation (Art 14, Category 9 of the *Income Tax Law*).

TWN ¶80-051 Non-competition agreements

There is no legislation regarding non-competition agreements, and there are no Supreme Court opinions on the issue, and so there are no binding precedents on this subject. However, most Taiwan High Court cases on this issue list five factors for determining whether a non-competition agreement is enforceable or whether it violates an employee's constitutional right to work. The five factors are:

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THA ¶80-071 Constructive dismissal

Neither the LPA nor any other provision of Thai law has a concept of constructive of unfair dismissal. However, reference should be made to certain sections of the *Labour Relations Act* ("LRA"), sec 121–123, that define certain unfair labour practices:

- under sec 121(1) of the LRA, an employer may not terminate any employment or do any act (our emphasis) which may result in an employee being unable to continue working, where the employee has engaged in certain actions, as specified under that section;
- under sec 121(2) of the LRA, an employer may not terminate any employment or do any act (our emphasis) which may result in an employee being unable to continue working for the reason that the employee is a member of a trade union.

In such cases, the employee has a right to make a complaint to a Labour Relations Committee, which has power to take action against the employer. This administrative right must be exercised by the employee first, before the employee may bring proceedings in the Labour Court.

Wrongful dismissal

THA ¶80-091 Definition

The concept of unfair dismissal is not found in the *Labour Protection Act*; it appears in the *Labour Courts Act*.

Matters to be taken into account

In trying a case of dismissal or other labour case, the court shall take into account the conditions of work, the cost of living, the hardship of the employee, wage rates or the rights or other benefits of employees working in the same type of business, the status of the business of the employer and general economic and social conditions, in order to be fair to both parties (sec 48 of the LCA).

These are matters that the court is entitled to take into account in trying any case that is within the jurisdiction of the Labour Court, in accordance with sec 8 of the LCA.

Power of the court to order reinstatement or damages for unfair dismissal

In a claim relating to a dismissal, if in the court's opinion the dismissal was unfair, the court can order reinstatement of the employee, at the same wage rate as at the date of dismissal. If the court believes that the parties cannot work together, the court will assess the losses of the employee, taking into account his age, length of service, the hardship of the employee at the time of dismissal, the reasons for the dismissal and compensation the employee is entitled to receive sec 49 of the LCA.

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The principle here is that in any claim relating to a dismissal, where the employer cannot prove that the dismissal was for a reason under sec 119 of the LPA, then he will be liable to pay to the employee:

(1) severance pay calculated under sec 118 of the LPA; and

(2) any other monies that the employer is bound by contract or the LPA to pay to the employee (eg holiday pay, overtime pay, overtime pay during holidays, unpaid annual holiday).

In addition, if the court holds that the dismissal was "unfair" then the court has power to award compensation in addition to any severance pay, or to order reinstatement. There is no definition in the LCA of what "unfair" means.

Section 49 goes onto consider the matters to be taken into account when the court has held that the dismissal was "unfair" which are:

> "the age, length of service, and the hardship of the employee at the time of hearing the case, the reasons for the dismissal and compensation the employee is entitled to receive."

Under sec 48 of the LCA, the court can take into account any of the following matters, when deciding any case within its jurisdiction, including cases of dismissal:

> "the conditions of work, the cost of living, the hardship of the employee, wage rates or the rights or other benefits of employees working in the same type of business, the status of the business of the employer and general economic and social conditions, in order to be fair to both parties."

These are very general and broad guidelines, to be applied to the facts of the case under consideration.

Over and above this, a line of decided Supreme Court cases have considered the circumstances that may be regarded as amounting to unfair dismissal, and the guidelines for compensation that may be awarded in cases of unfair dismissal.

Circumstances where the dismissal may be regarded as unfair

- Dismissal without cause
- Dismissal without any fault of the employee
- Dismissal by imposition of a penalty upon a default by the employee, but the penalty imposed is not in accordance with the work rules or is in violation of the work rules
- Dismissal on the grounds that the employee is in default, but the employer cannot produce witnesses or evidence to prove such default.
- Dismissal that is discriminatory.

Guidelines for compensation in cases of unfair dismissal

Where the court holds that the dismissal was unfair, the general guideline is that an employee should expect to be awarded one month's wages for each

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Calculation of the number of years of employment

The number of years of employment, in the case of a gratuity paid or any other like payment, shall be the number of years by reference to which such gratuity or other like payment is calculated in accordance with regulations.

Interpretation

In ascertaining the number of years of employment in cases other than those for gratuity payments or any other like payments, a fraction of a year shall be treated as one year if it amounts to 183 days or more, and shall be disregarded if it is less than 183 days.

***De minimis* amount**

If the amount of tax assessed is less than 5 Baht, there shall be no collection (sec 48(5) of the RC).

Benefits from provident funds

Money or any benefit derived from a provident fund under the law governing provident funds paid upon termination of employment by reason of reaching retirement age, becoming incapacitated or deceased, is exempt from tax, subject to regulations (*Ministerial Regulation No 126* (23 February 1966)).

Tax on compensation received under the law on labour protection

Compensation received by an employee under the law governing labour protection but excluding compensation received by an employee or worker for reason of retirement or termination of an employment contract, is exempt from tax. This is limited to that portion of compensation not exceeding remuneration or salary for the last 300 days of employment, and not exceeding 300,000 Baht (*Ministerial Regulation No 126* concerning income exempt from income tax (23 February 1966)).

This tax exemption applies to severance payments only. Damages for unfair dismissal awarded under sec 49 of the LCA and unpaid wages would still be subject to tax.

THA ¶80-241 Redundancy checklist for employers

Where the employer is considering making redundancies, he should:

- prepare a checklist of those employees who are likely to lose their positions, paying particular attention to their current wages (as defined in the LPA) holiday entitlement and years of service;
- consider the reason for the redundancy and the liability for severance payments or special severance payments that may arise;
- calculate the potential severance payments or special severance payments that may arise; and
- consider whether it is possible to offer the employee alternative employment without the employee suffering loss of status at the same salary or better.

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THA ¶80-261 Special cases of termination

Transfer of business

Transfer of employee's rights

Where an employer has changed, due to a transfer of employment by inheritance, or for any other reason, or where the employer is a juristic person, there has been a change in its commercial registration, or transfer or merger with any other juristic person, all the employee's rights against the former employer shall survive and are transferred to the new employer in their entirety (sec 13 of the LPA).

This obligation applies to a transfer of a contract of employment from one employer to another employer. A transfer of shares in a company from one shareholder to another person does not amount to a transfer of employment for this purpose, even if a controlling shareholding was being transferred.

The position may differ in a transfer of business that is effected by a transfer of assets rather than shares, and where employees' contracts of employment are one of the assets transferred to a new juristic person. In such case, an employee's rights are preserved, and the transferee entity will step into the shoes of the assignor in relation to the employee's accrued rights. This will be particularly important in relation to the future calculation of any severance payment or special severance payment. In such a transaction, the transferor and the transferee may choose to incorporate some of the indemnity against claims, brought against either or both of them by transferred employees.

How the relationship of the employer and the employees is restructured depends on the chosen method of "acquisition" of the employees from the existing employer by the new employer. Typically, two forms of structure tend to dominate, though other structures may be used, subject to the agreement of all parties concerned:

- *The employee is dismissed by his current employer*. Either the current employer or the new employer will accept liability to pay the statutory severance payment and provide an indemnity for other claims that may be made. The new employer will then offer a new contract of employment to the employee, but will not accept any accrued period of continuing employment.
- *The employee resigns from his current employer*. Upon resignation, the existing employer has no obligation to pay severance pay. The new employer will then offer a new contract of employment to the employee. The new contract may include, as may be agreed by the parties, a deemed period of continuing employment, which will be beneficial to the employee when calculating any future liability of the employer for severance payment and many other employment protection rights based upon years of continuous employment.

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For the purpose of calculating the number of days of annual leave or other benefits the worker is entitled to, the duration of duty is still accounted as working time of the employee in the enterprise.

To fill the temporary vacancy, the employer may need to recruit new employees/workers under fixed term or seasonal term contracts.

Upon completion of the duties, the employee must return to the enterprise on the date stipulated under the notice of discharge of duties and upon this date the contract resumes its validity. The employer has the obligation to provide the employee the work under his/her contract. If no work is provided, the employee is still entitled to full payment of wages/salaries and other benefits in accordance with his/her contract from the date the contract is resumed, not from the date his/her work is resumed.

If without valid reason, the employee does not show up at work within five days (Art 10 of *Decree 44/2003*) after the date his/her contract resumes validity, the employee may be dismissed in accordance with statutory disciplinary procedures and have his/her contract terminated.

VIT ¶80-021 Temporary arrest or temporary imprisonment

When an employee is under temporary arrest or temporary imprisonment charged by competent authorities of Vietnam pending investigation or prosecution, the employee will not be able to continue his/her contract and in this case, his/her contract is automatically suspended from the date the employee is arrested until release upon expiry of temporary arrest or imprisonment terms, or under a decision or judgment by the competent People's Court. The suspension period may last several months. If the arrest or imprisonment is charged in direct relation to the employment relationship, some criminal cases, the *Labour Code* obligates the employer to pay the employee an advance of 50% of his/her salary for the immediate preceding month for each month of the suspension period. The suspension period may be up to 12 months.

- If the arrest or imprisonment is charged in direct relation to the employment relationship and the employee is convicted and imprisoned or is prohibited to continue work duties under an effective judgment or decision of the court, the contract is terminated by law. In this event, the employee will not have to refund the advance of salary to the employer. Other than this advance, although the *Labour Code* does not provide a clear stipulation, it can be presumed that the employer will not have to pay the employees any statutory wages/salaries, bonuses or benefits unless its own policies or the labour contract provides otherwise during the suspension period. The suspension period will not be accounted for any purpose.
- If the arrest or imprisonment is charged in direct relation to the employment relationship and the employer is found at fault, the employer is obligated to renew the contract and pay the employee all statutory wages/salaries, bonuses or benefits and the social insurance (Art 13 of *Decree No 114/2002* for the period of contract suspension. The advance can be deducted from the payment. The suspension period is accounted as normal working time of the employee in the enterprise.
- If the arrest or imprisonment is charged in direct relation to the employment relationship and the neither the employer or employee is found at fault but the authority is found at fault, the employer is obligated to renew the contract. The suspension period is accounted as normal working time of the employee in the enterprise. The authority shall have to refund the employer the advance and pay the employee all statutory wages/salaries, bonuses or benefits, including all statutory social insurance contribution for the period of contract suspension.
- If the arrest or imprisonment is charged in direct relation to the employment relationship and the employee is convicted but is remised from imprisonment, or is not prohibited to continue work duties under an effective judgment or decision of the court, the employer is obligated to renew the contract. However, the employer has the right to assign, at its own discretion, the employee to the old job or to other work depending on the charged violation or offence. In this event, the employee will not have to refund the advance of salary to the employer. Other than this advance, although the *Labour Code* does not clearly stipulate, it can be presumed that the employer will not have to pay the employee any statutory wages/salaries, bonuses or benefits unless its own policies or the labour contract provides otherwise during the suspension period. However, the suspension period is still accounted as working time of the employee for the enterprise, for the purpose of calculating the number of days of annual leave and other benefits the worker is entitled to.
- If the arrest or imprisonment is charged not in direct relation to the employment relationship and if the employee is released at the end of the temporary arrest or imprisonment, the employer is obligated to renew the contract. However the employer has the right to assign, at its own discretion, the employee to the old job or to other works depending on the charged violation or offence. In this event, the employer is not required to advance salary/wage for the suspension period (Art 13.3, *Decree No 114/2002* on Salaries). Although the *Labour Code* does not clearly stipulate, it can be presumed that the employer will not have to pay the employees any statutory wages/salaries, bonuses or benefits unless its own policies or the labour contract provides otherwise during the suspension period. The suspension period is not accounted for any purpose.

Since in most cases, the employer may be obligated to resume contracts of those employees who have been under temporary arrest or imprisonment, the employer may need to recruit new employees/workers under fixed term or seasonal term contracts to fill the vacancy. Although a salary advance is statutory, it is impractical in reality. If the advance is not statutorily refunded, the employee in question will be entitled to receive it from the employer when released.

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under the *Labour Code* or when the employee has abandoned his/her job for more than five consecutive days and failed to show up or provide appropriate reasons and subsequently five days after he/she receives notice from the employer on such abandonment. By violating the *Labour Code* provisions on giving notice of termination may also make the employee initiated termination wrongful. By law, if a termination is wrongful, it is null and void. An employee who has wrongfully terminated employment will have to compensate the employer an amount equal to one half month's salaries/wages and salary allowances However, the laws do not provide measure how such remedy to the employer can be enforced. The Code does not obligate the employee to be reinstated to his/her position and neither may the employer wish to do so in practice.

An employee who makes a wrongful termination will not be entitled to termination support allowances.

The employee will also be obligated to compensate the employer all training fees and expenses incurred by the employer during the course of service for the employee. The training fees and expenses under compensation include: expenses for trainers, training materials, classes, machinery and equipment, materials for practice, accommodation, food, travel, per diem wages, scholarship, fellowship etc. The employer has the right to calculate the compensation levels.

VIT ¶80-191 Wrongful termination by employer

A termination by the employer is wrongful if:

- it is decided by an unauthorised officer of the enterprise. The unauthorised officer is any officer of the enterprise, other than the General Director, who does not have the written authorisation from the General Director or is not authorised by the enterprise's statute to make a decision on termination of the employee contract;
- it is made by the employer upon any grounds or events that are not provided for by the *Labour Code* as discussed; and/or
- a termination is made in violation of the procedures required under the *Labour Code* in making the decision of termination, specifically such as:
  - — no prior consultation and/or agreement with the union; or
  - — if no agreement is reached with the union, no report is made to the provincial labour authority; or
  - — decision on termination is made before the 30-day, or 20-day, in case of lawful dismissal, deadline after report submission expires.

By law, if a termination by the employer is wrongful, the termination is null and void. Reinstatement and compensation to the employee must be made.

A wrongful termination may subject the employer to administrative penalties.

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Offence by employer	*Fine*
Unilateral termination of employment of a female worker on grounds that she gets married, pregnant, is on maternity leave, or is nursing babies of under 12 months old (violation of Art 111.3 of the *Labour Code*). (Art 15.2.a)	VND10,000,000

Reinstatement and compensation

Reinstatement means the restoration of a dismissed or discharged worker to his/her original post. Upon an order of reinstatement, the employee concerned is entitled to be reinstated as if never dismissed or discharged, along with all back pay, allowances and other privileges. Thus the employer is obligated to compensate the employee all salaries/wages, allowances and other privileges for those days the employee cannot work due to wrongful termination until the date the employee is reinstated.

If after a wrongful termination is made by the employer, the employee accepts or agrees to termination of contract, the employer must compensate the employee all salaries/wages, allowances and other privileges for those days, from the date of wrongful termination until the date the employee accepts or agrees on termination. In addition to such compensation, the employer must also pay the employee the statutory termination support allowance ordinarily paid for mutually agreed terminations.

Under the Amendment *Labour Law*, in addition to the compensation for loss of salaries/wages, the employer will have to pay the employee another compensation equal to the employee's two months salaries/wages and salary allowances. The Amendment *Labour Law* allows the employer to make an offer for additional compensation to the employee for termination of contract, if the employer does not want the employee reinstated and only if the employee agrees to termination.

Wrongful dismissal

VIT ¶80-211 General

Wrongful dismissal is not defined under the *Labour Code*. Ordinarily, if a dismissal is made on grounds other than the statutory reasons under the *Labour Code*, or is made by an authorised officer or without following proper disciplinary procedures, it amounts to wrongful dismissal.

If a dismissal is determined to be wrongful by a competent authority, which is either the provincial People's Committee or the Labour Court, the employer is obligated to withdraw the decision on dismissal, make an open apology, reinstate the employee and pay compensation.

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