

IPBA JOURNAL

IPBA NEWS AND LEGAL UPDATE



Employment Law

LexisNexis
(a division of Reed Elsevier
(Greater China) Ltd)

Publishing Manager
Paul Davis

Editor
Subita Subrayan

Editorial
Wong Yuk Yin

Design
Zoe Yau

Cover Photo
José Luis

Advertising Sales
Tamara Dudziak

Tel: 852-2965-1408
Fax: 852-2976-0840

Email: tamara.dudziak@lexisnexis.com



An imprint of
LexisNexis
(a division of Reed Elsevier
(Greater China) Ltd)

39/F, Hopewell Centre,
183 Queen's Road East,
Hong Kong

Tel: 852-2965-1400
Fax: 852-2976-0840

Internet:
www.lexisnexis.com.hk

Email address:
subita.subrayan@lexisnexis.com

ISSN 1469-6495

IPBA Journal is the official journal of the Inter-Pacific Bar Association. Copyright in all material published in the journal is retained by LexisNexis (a division of Reed Elsevier (Singapore) Pte Ltd). No part of this journal may be reproduced or transmitted in any form or by any means, including recording and photocopying without the written permission of the copyright holder, application for which should be addressed to the publisher. Written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature. The journal does not accept liability for any views, opinions, or advice given in the journal. Further, the contents of the journal do not necessarily reflect the views or opinions of the publisher and no liability is accepted in relation thereto.

IPBA JOURNAL

The Official Publication of the Inter-Pacific Bar Association

No 48 December 2007

IPBA News

- 4 **The President's Message**
- 5 **The Secretary-General's Message**
- 6 **Kuala Lumpur Mid-Year Council Meeting**

Legal Update

- 7 **The Changing World of US Immigration**
This article explains a few of the changes in the US Immigration Law and provides practical tips on how to deal with immigration issues in the post-9/11 era
- 12 **California's Unique Rules on Restrictive Employment Covenants and the Potential for Extra-territorial Effect**
This article sets out some of the difficulties encountered when one attempts to enforce a restrictive employment covenant in California or against an employee with some connection to California
- 17 **Managing Contract of Employment in Mergers and Acquisitions in Malaysia**
This paper discusses the rights of employees in determining if they choose to remain working in their company in the event of a merger and acquisition in Malaysia
- 22 **Enhancement on Protection of Employees**
This article discusses the Employment Contract Law in China
- 26 **Overtime Law and Litigation in the US**
This article is intended to provide an overview of the federal law regarding overtime pay and some of the exemptions to those requirements, as well as a synopsis of significant settlements and verdicts in actions that involved alleged overtime violations
- 31 **Termination of an Employee under Korean Law**
This article discusses the minimum legal requirement under the Labor Standards Act ('LSA') with regard to termination of employment in Korea



INTER-PACIFIC BAR ASSOCIATION

IPBA Council (2007–2008 Term)

Officers

President

Zongze Gao
King & Wood Law Firm, Beijing

President-Elect

Gerold W Libby
Holland & Knight LLP, Los Angeles

Vice President

Rafael A Morales
SyCip Salazar Hernandez & Gatmaitan, Makati City

Secretary-General

Arthur Loke
Arthur Loke & Partners, Singapore

Deputy Secretary-General

Gerald A Sumida
Carlsmith Ball LLP, Honolulu

Program Coordinator

Jose Rosell
Hughes Hubbard & Reed LLP, Paris

Deputy Program Coordinator

Kevin Y Qian
MWE China Law Offices, Shanghai Pudong New Area

Committee Coordinator

Cedric C Chao
Morrison & Foerster LLP, San Francisco

Deputy Committee Coordinator

Urs Lustenberger
Lustenberger Glaus & Partner, Zurich

Membership Committee Chair

Suet-Fern Lee
Stamford Law Corporation, Singapore

Membership Committee Vice-Chair

David A Laverty
International Counsel, Chicago

Publications Committee Chair

Hiroyuki Kamano
Kamano Sogo Law Offices, Tokyo

Publications Committee Vice-Chair

Kap-You (Kevin) Kim
Bae, Kim & Lee, Seoul

Past Presidents

James McH FitzSimons (2006–2007)
Clayton Utz, Sydney

Felix O Soebagjo (2005–2006)
Soebagjo, Jatim, Djarot, Jakarta

Sang-Kyu Rhi (2004–2005)
Rhi & Partners, Seoul

Ravinder Nath (2003–2004)
Rajinder Narain & Co, New Delhi

Vivien Chan (2002–2003)
Vivien Chan & Co, Hong Kong

Nobuo Miyake (2001–2002)
Miyake & Yamazaki, Tokyo

John W Craig (2000–2001)
McMillan Binch Mendelsohn LLP, Toronto

Dej-Udom Krairit (1999–2000)
Dej-Udom & Associates Ltd, Bangkok

Hon Justice Susan Glazebrook (1998–1999)
Court of Appeal, Wellington

Cecil Abraham (1997–1998)
Zul Rafique & Partners, Negeri Sembilan

Teodoro D Regala (1996–1997)
Angara, Abello Concepcion Regala & Cruz (ACCRALAW), Makati City

Carl E Anduri, Jr (1995–1996)
Lex Mundi, Lafayette

Pathmanaban Selvadurai (1994–1995)
Rodyk & Davidson, Singapore

Ming-Sheng Lin (deceased) (1993–1994)
TIPLo Attorneys-at-Law, Taipei

Richard James Marshall (1992–1993)
Glencore International AG, Baar

Kunio Hamada (1991–1992)
Mori Hamada & Matsumoto, Tokyo

Jurisdictional Council Members

Australia: David Laidlaw
Maddocks, Melbourne

Canada: William A Scott
Stikeman Elliott LLP, Toronto

China: Xiumei Feng
All China Lawyers Association, Beijing

France: Jean-Claude Beaujour
Hobson, Paris

Germany: Axel Reeg
Reeg Rechtsanwalte, Mannheim

Hong Kong: Allan Leung
Lovells, Hong Kong

India: Krishan Gopal Singhanian
Singhanian & Co, Solicitors & Advocates, Mumbai

Indonesia: Ira A Eddymurthy
Soewito Suhardiman Eddymurthy Kardono, Jakarta

Japan: Hisashi Hara
Nagashima Ohno & Tsunematsu, Tokyo

Korea: Young-Moo Shin
Shin & Kim, Seoul

Malaysia: Datuk Abdul Raman Bin Saad
Abdul Raman Saad & Associates, Kuala Lumpur

New Zealand: Denis Michael McNamara
Simpson Grierson, Auckland

Philippines: Ma Melva E Valdez
JGLaw (Jimenez Gonzales Liwanag Bello Valdez Caluya & Fernandez), Makati City

Singapore: Kim Teck Kim Seah
A Ang, Seah & Hoe, Singapore

Sri Lanka: Nimal Weeraratne
Varners, Colombo

Switzerland: Douglas C Hornung
Hornung & Partners, Geneva

Thailand: Suchart Thammapiatgkul
Somnuk & Sutee Advocates & Solicitors, Bangkok

UK: Richard Andrew Shadbolt
Shadbolt & Co LLP, Reigate

USA: Ann G Miller
Nixon Peabody LLP, San Francisco

At-Large Council Members

Chile and South America: Jaime Irarrazabal
Philippi, Yrarrazaval, Pulido & Brunner, Santiago

China: Hongjiu Zhang
Jingtian & Gongcheng Attorneys At Law, Beijing

Hawaii & South Pacific Islands:
Lawrence C Foster
Zhong Lun Law Firm, Shanghai

Osaka: Masatoshi Ohara
Kikkawa Law Offices, Osaka

Philippines: Valeriano R Del Rosario
Del Rosario Bagamasbad & Raboca, Makati City

Webmaster: Joyce A Tan
Joyce A Tan & Partners, Singapore

Regional Coordinators

Europe: Patrick Philip Sherrington
Lovells, London

Asia-Pacific: Robin Joseph Lonergan
Macrossans Lawyers, Brisbane

Committee Chairpersons

Aerospace Law

Atul Y Chitale
A Y Chitale & Associates, Advocates & Legal Consultants, New Delhi

Banking, Finance and Securities

Gerhard Wegen
Gleiss Lutz, Stuttgart

Corporate Counsel

Mitsuru Claire Chino
Itochu Corporation, Tokyo

Cross-Border Investment

Roger Saxton
Nash O'Neill Tomko, Sydney

Dispute Resolution and Arbitration

Christopher To
Hong Kong International Arbitration Center (HKIAC), Hong Kong

Employment and Immigration Law

Akshay Jaitly
Trilegal, New Delhi

Energy and Natural Resources

Ignatius Hwang Kin Soon
Freehills, Singapore

Environmental Law

Brad Wylenko
Clayton Utz, Perth

Insolvency

Patrick Shea
Gowling Lafleur Henderson LLP, Toronto

Insurance

Dhinesh Bhaskaran
Shearn Delamore & Co, Kuala Lumpur

Intellectual Property

Jihn U Rhi
Rhi & Partners, Seoul

Bert Oosting
Lovells, Amsterdam

International Construction Projects

Mohan Reviendran Pillay
MPillay Advocates & Solicitors, Singapore

International Trade

Cliff Sosnow
Blake, Cassels & Graydon LLP, Ottawa

Legal Practice

Robert Wai Quon
Fasken Martineau DuMoulin LLP, Vancouver

Maritime Law

Alec James Emmerson
Clyde & Co, Middle East Regional Office, Dubai

Tax Law

Ada Ko
Lane Powell PC, Seattle

Technology and Communications

Dennis Unkovic
Meyer, Unkovic & Scott LLP, Pittsburgh

Women Business Lawyers

Varya Simpson
Nixon Peabody LLP, San Francisco

Committee Vice-Chairpersons**Aerospace Law**

Yu-Lai Jin, *Shanghai Kai-Rong Law Firm*,
Shanghai

Domingo Castillo, *SyCip Salazar Hernandez & Gatmaitan*, Makati City

Rajaram Ramiah, *Wee Ramayah & Partners*,
Singapore

Banking, Finance and Securities

Angela Flannery, *Clayton Utz*, Sydney

Junfeng Wang, *King & Wood Law Firm*, Beijing

Ashley Ian Alder, *Herbert Smith*, Hong Kong

Shourya Mandal, *Fox Mandal*, Calcutta

Iswahjudi Karim, *KarimSyah*, Jakarta

Hajime Ueno, *Nishimura & Partners*, Tokyo

Carine Feipel, *Arendt & Medernach*, Luxembourg

Corporate Counsel

David Laurence Kreider, *Vodafone New Zealand Ltd*, Auckland

Cross-Border Investment

Ulf Ohrling, *Mannheimer Swartling Advokatbyrå AB*, Shanghai

Yong-Jae Chang, *Lee & Ko*, Seoul

Ronald Douglas Husdon, *Greenberg Traurig LLP*,
Costa Mesa

Dispute Resolution and Arbitration

Sumeet Kachwaha, *Kachwaha & Partners*,
New Delhi

Hiroyuki Tezuka, *Nishimura & Partners*, Tokyo

Woo Young Choi, *Hwang Mok & Park P.C.*, Seoul

Rabindra S Nathan, *Shearn Delamore & Co*,
Kuala Lumpur

Juliet Sara Blanch, *McDermott Will & Emery UK LLP*, London

Employment and Immigration Law

Ian Neil, *S.C.*, Sydney

Fiona Loughrey, *Simmons & Simmons*, Hong Kong

Amit Acco, *Kan-Tor and Acco*, Ramat Gan

Energy and Natural Resources

Robert Y Kwauk, *Blake, Cassels & Graydon LLP*,
Beijing

Audrey Ziruo Chen, *Jun He Law Offices*, Beijing

William Rupert Burrows, *Ashurst*, Tokyo

Hemmie Chang, *Ropes & Gray LLP*, Boston

Environmental Law

Jianfeng Ji, *Summit Law Office*, Beijing

Philip Milne, *Simpson Grierson*, Wellington

Stephen Marsh, *Luce, Forward, Hamilton & Scripps LLP*, San Diego

Insolvency

Wendy Jacobs, *Dibbs Abbott Stillman*, Sydney

Sumant Batra, *Kesar Dass B & Associates*,
New Delhi

Rahmat Bastian, *BT Partnership*, Jakarta

Masafumi Kodama, *Kitahama Partners*,
Osaka

Insurance

Frederick Hawke, *Clayton Utz*, Melbourne

Tunku Farik Azim, *Tunku Farik & Wong*,
Kuala Lumpur

Angus Rodger, *Steptoe & Johnson*, London

Intellectual Property

Fengchang Tian, *Ming Cheng Law Firm*, Beijing

Boh Young Hwang, *Bae, Kim & Lee*, Seoul

Aleli Angela G Quirino, *Angara, Abello
Concepcion Regala & Cruz (ACCRALAW)*,
Makati City

Sui Yin Jeffrey Lim, *Stamfod Law Corporation*,
Singapore

Maxine Chiang, Lee, *Tsai & Partners
Attorneys-at-Law*, Taipei

International Construction Projects

Philip Trevor Nunn, *Fried, Frank, Harris, Shriver
& Jacobson LLP*, Hong Kong

Ivan Y F Loo, *Skrine*, Kuala Lumpur

International Trade

Chunqing Jin, *Fangben Law Office*, Suzhou

Shigehiko Ishimoto, *Mori Hamada & Matsumoto*,
Tokyo

Legal Practice

Campbell Bridge, *Maurice Byers Chambers*, Sydney

Zhiqiang Li, *Jin Mao Law Firm*, Shanghai

Satoshi Moriguchi, *Nagashima Ohno &
Tsunematsu*, Tokyo

Hee-Chul Kang, *Yulchon*, Seoul

Maritime Law

Timothy Elsworth, *Ebsworth & Ebsworth*, Sydney

Shuji Yamaguchi, *Okabe & Yamaguchi*, Tokyo

Tax Law

Leonard Glass, *Lawson Lundell LLP*, Vancouver

George Anthony Ribeiro, *Vivien Chan & Co*,
Hong Kong

Ajay Vohra, *Vaish Associates, Advocates*,
New Delhi

Jan Kooi, *Van Mens & Wisselink*, Amsterdam

Sylvette Young Tankiang, *Villaraza & Angangco
Law Offices*, Makati City

Technology and Communications

Akil Hirani, *Majmudar & Co*, Mumbai

Roy Tjioe, *Galindez Tjioe LLLC*, Honolulu

Shanti Mogan, *Shearn Delamore & Co*,
Kuala Lumpur

Women Business Lawyers

Laraine Walker, *Law Society of New South
Wales*, Sydney

Sitpah Selvaratnam, *Messrs Tommy Thomas*,
Kuala Lumpur

Yuejiao Zhang, *Jun He Law Offices*, Beijing

The President's Message



Dear Colleagues,

As the year 2007 is drawing to a close, I believe all of you have been much busier these days.

In October, we successfully held the Mid-Year Council

Meeting in Kuala Lumpur and I hereby would like to thank the council members who were able to attend.

During the Council Meeting, our council members listened to the reports from the committees and were satisfied with each committee's job this year.

The preparations for the 2008 Los Angeles Annual Conference, under the leadership of Gerold Libby, our President-elect, are well underway, and we are delighted that the conference has attracted over 50 'Friends' which are mostly Law Firms and Institutions from the USA and other parts of the world. Great thanks are due to Gerold Libby and his workmates for their excellent jobs and to their 'Friends' for their kind support.

I also noticed that the IPBA Program Coordinator Mr Jose Rosell and his deputy Mr Qian Kevin and the Chairs Profession Committees are working closely with the host committee with the 2008 Los Angeles Annual Conference for the programs which I am sure will benefit all the participants of the LA Conference.

Last but not least, I again hope that our Council members do more promotion work and have more lawyers join our IPBA family.

For the coming Christmas and New Year I sincerely extend my every best wish to all of you.

Zongze Gao
President

The Secretary-General's Message



Dear IPBA Members,

I am pleased to report that the Mid-Year Council Meeting in Kuala Lumpur held on October 20-21, 2007 was, to describe it tongue in cheek, an 'eventful occasion'. Many

strong views were aired but the shared interest in IPBA, remaining strong and purposeful overcame personal views and preferences, and I am happy to report that we moved IPBA a step forward in revitalizing it as an organization. It will not be wrong to say that Council left the meeting with strengthened relationships, a healthier respect for each other's working styles and a sense of greater optimism as to where we are headed as an organization.

Contributing to this positive and robust mood was the report of a healthier financial position for IPBA on account of the successful Beijing Conference and the prudent measures taken by the Secretariat to keep costs down. Congratulations are in order for our President, Mr Gao and his Beijing Host Committee members when you next meet them in Los Angeles (LA).

One event that was missed by most Council members took place on October 22, 2007,

which was the day after the Council meeting. A meeting that was scheduled to meet members of the Malaysian Bar Council turned out to be an impromptu seminar. This allowed several senior IPBA members to share with the Malaysian lawyers (more than 70 of them) their perspectives of foreign lawyers operating in their own jurisdictions as a heads-up for Malaysian lawyers when their laws will soon allow entry of foreign lawyers. IPBA was represented by its Vice-President, Rafael Morales, Mr Jean-Claude Beaujour (JCM of France), Mr Roger Saxton (JCM of Australia), Mr David Laverty (JCM of USA), Mr Krishan Singhania (JCM of India) and I. It turned out to be a very lively exchange, and what I hope to be a forerunner of a series of seminars that IPBA members could contribute to, say, the Indian Bar, or other Bars, who are in similar situations. The views expressed by the IPBA members were objective and helpful to the participants, and were well received.

Keep well and stay tuned to a revitalized IPBA, and make a commitment to come to the LA meeting.

Best regards,

*Arthur Loke
Secretary-General*

Kuala Lumpur Mid-Year Council Meeting



The Changing World of US Immigration

This article explains a few of the changes in the US Immigration Law and provides practical tips on how to deal with immigration issues in the post – 9/11 era

Christopher L Thomas

Partner

Holland & Hart LLP

555 17th Street, Suite 3200

Denver, Colorado 80202

Tel: 303-295-8352

Email: cthomas@hollandhart.com

Introduction

The events of September 11, 2001 led to sweeping changes in the US immigration law and procedures. Those who employ foreign-born workers in the US deal with a far more complex environment than they did prior to the terrorist attacks.

Overview of Developments in US Immigration Law

The events of 9/11 focused the country's attention on the shortcomings of the Immigration and Naturalization Service ('INS'). The INS had failed to track some of the terrorists who entered the United States on student visas. Six months later, to add to the controversy, the INS mailed approval notices for two of the deceased terrorists that would have allowed them to extend their visa statuses and continue their flight training. These failures, along with a multitude of other problems, led to a universal call for the abolition of the INS.

In response, Congress passed and President Bush signed into law The Homeland Security Act of 2002 (PL 107-296), which led to the creation of the new Department of Homeland Security ('DHS'). The INS was thus disbanded and its functions were merged into three new divisions within DHS, consisting of the Bureau of Immigration and Customs Enforcement ('BICE'), the Bureau of Customs and Border Protection

('BCBP'), and the Bureau of Citizenship and Immigration Services ('BCIS'). Shortly thereafter, on September 8, 2003, DHS dropped the term 'Bureau' from the titles of these three divisions in hopes, perhaps, that the divisions' new names would make them seem less bureaucratic. The initials of these divisions are now, respectively, USICE, USCBP, and USCIS.

With the establishment of DHS, important changes occurred in the former INS's leadership. Some of the new leadership challenged former immigration policy memoranda (which often served as practical substitutions for regulations) and began to implement new policies and procedures (often without notifying the public of the changes). Such amendments, coupled with the problem of many newly hired and untrained immigration officers, have dramatically increased the uncertainty of employers who are seeking to retain or hire foreign employees.

Scrutiny in Applications for Benefits

In April of 2002, just after four Pakistani crewmen had unlawfully obtained visa waivers from a border officer and disappeared into Virginia, the Commissioner of the former INS testified before Congress that he had instituted a 'zero-tolerance policy with regard to INS employees who failed to abide by headquarters-issued policy and field guidance.'¹ This directive understandably made immigration officers nervous. As a consequence, many began to send Requests for Evidence ('RFE's), seeking to verify, and often re-verify, employers' assertions in pending visa petitions and to ensure that cases were properly adjudicated. Such requests have led to longer processing times and backlogs at the service centers. Indeed, even when an employer pays for premium processing

(an approach by which an employer may pay an additional \$1,000 to have a case adjudicated within 15 calendar days), it may find that the USCIS will occasionally issue RFEs that lead to substantial processing delays.

Visa Options for Employers

The world of employment-based immigration involves two types of visas—immigrant and nonimmigrant visas. The immigrant visas (or ‘green cards’) allow foreign-born nationals to work anywhere in the United States on a permanent basis, and those types of visas are beyond the scope of this article. The non-immigrant visas, on the other hand, are employer-specific and temporary in nature.² Because the immigrant visa process can take a number of years, most employers commence the immigration process with petitions for nonimmigrant visas for their employees.

Employers have a number of nonimmigrant visa options to consider. Some of the more common employment-based visa options include the following:

E-1 Treaty Trader/E-2 Treaty Investor Visa

The E visa is available to a foreign national coming to the US, under the provisions of a treaty of commerce and navigation between the US and the foreign state of which he or she is a national, to carry on substantial trade in goods or services or to direct the operations of an enterprise in which he or she (or the foreign employer) has invested or is in the process of investing a substantial amount of capital.³

H-1B Specialty Occupation Visa

The H-1B visa allows a foreign worker to be employed in the US for a period of up to six years in a specialized capacity. The employee must have a Bachelor’s degree or equivalent (*ie* substantial experience at a professional level), and the job offered must require the services of an individual with a degree in the field of specialty.⁴

There is a 65,000 per year limit on the number of foreign workers who may receive initial H-1B visa status during each USCIS fiscal year (with an additional 20,000 allocation of H-1B visas for foreign national who earned a Master’s or higher degree from a US institution). The fiscal year runs from October through September.

L-1 Visa for Intracompany Transferees

The L-1 visa is available to a foreign national who has been employed for at least one continuous year of the three years preceding his or her transfer to the US affiliate of an international firm or corporation. It enables people to enter the

US temporarily to continue to work for the same employer, or a subsidiary or affiliate, in a capacity that is primarily managerial, executive, or involves specialized knowledge.⁵

Free Trade Visas

The TN visa is available to qualified Mexican or Canadian professionals seeking to enter the United States to engage in one of the professions listed under NAFTA. The listed professions are generally specialized in nature (*eg*, engineer, accountant, *etc*), and they usually require a degree in the specific field of endeavor.⁶

Singapore and Chile also have Free Trade Agreements (‘FTA’s) with the US. Under these FTAs, nationals of these two countries enjoy a separate allocation of H-1B visa numbers. To date, since the numerical caps have not been reached in either of these countries, nationals of these countries may apply for H-1B visas at any time.

Finally, Australia has an FTA with the US. Under this FTA, Australian nationals may also apply for an E-3 visa (which is virtually identical to the H-1B category). The numerical cap for this visa category has also not been met, making it possible for Australian nationals to travel to and work in the United States in E-3 visa status at any time.

H-2B Visa

The H-2B non-immigrant visa program permits employers to hire foreign workers to come to the US and perform temporary non-agricultural work, which may be one-time, seasonal, peak load or intermittent.⁷

There is a 66,000 per year limit on the number of foreign workers who may receive H-2B status during each USCIS fiscal year (October through September).

Miscellaneous Options

While employers have a number of additional visa options (*eg*, J-1 training visas, H-3 training visas, *etc*), the foregoing list provides a summary of the most popular non-immigrant options for employers in a variety of industries. Before proceeding with a non-immigrant petition, employers should discuss visa options for prospective employees with competent legal counsel to ensure that they are in compliance with established substantive and procedural requirements.

Immigration-related Enforcement Activity in the United States

Enforcement activities have clearly become more dramatic in the wake of 9/11. The IFCO Pallet Company raids are illustrative. In the case of IFCO Pallet Company, besides the hundreds of allegedly illegal employees who were taken into custody,

several managers were charged with criminal violations and arrested.

In light of these raids and a multitude of similar raids in recent months throughout the country, employers must establish appropriate I-9 compliance programs to avoid liability.⁸ While the Clinton administration tended to focus on civil penalties, the Bush administration has been much more interested in imposing criminal penalties against unscrupulous employers. Employers, therefore, should ensure that their I-9 forms are completed in a thorough and timely manner, that they are on file for the appropriate timeframes, and that they are not knowingly employing illegal aliens. Failure to comply with these federal requirements, in some instances, could lead to criminal prosecution under the broad harboring statute.⁹

Social Security Mismatch Letters

The Social Security Administration ('SSA') has contributed a great deal to the anxiety of employers and foreign nationals with its mismatch letters in the wake of 9/11. The SSA annually reviews W-2 forms and credits social security earnings to workers. If a name and a Social Security Number ('SSN') on a W-2 do not match SSA records, the

SSA often sends a letter to advise the employer of the problem.

An employer's failure to follow appropriate procedures with these letters could lead to liability under the Immigration Reform and Control Act.¹⁰ In the immigration context, employers will need to walk a fine line between demanding documentation that could lead to possible discrimination claims¹¹ and ignoring possible warning signs (such as previous notices from SSA about certain employees, statements made by foreign employees, *etc*) that could lead to a finding of continuing to employ an illegal alien with knowledge or, equally bad, 'constructive knowledge.'¹²

To alleviate some of the confusion relating to mismatch letters, US Immigration and Customs Enforcement ('ICE') has attempted to publish a regulation to address this issue. On August 10, 2007, ICE published a regulation regarding how employers should respond to mismatch letters from the SSA.¹³

The new rule adds two additional examples of scenarios that could lead to a finding that an employer had constructive knowledge. These scenarios involve an employer's failure to take reasonable steps in response to either of two events:



Photo: Bruce Lonngren

The employer receives written notice from the SSA that the combination of name and social security account number submitted to SSA for an employee does not match agency records; or

The employer receives written notice from the DHS that the immigration status or employment-authorization documentation presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records.

The rule goes on to specify 'safe harbor' procedures for employers which receive mismatched letters. By taking steps in a timely fashion, an employer could avoid a finding that the employer had constructive knowledge that the affected employee was not authorized to work in the US. The safe-harbor procedures include attempting to resolve the mismatch within 30 days of receiving the letter and, if it cannot be resolved within 90 days of receiving the letter, re-verifying again the employee's identity and employment authorization through a specified process.

Interestingly, as of the date of this publication, the future of this mismatch regulation is uncertain. On October 10, 2007, the US District Court for the Northern District of California issued a preliminary injunction in *AFL-CIO, et al. v Chertoff, et al. (N.D. Cal. Case No. 07-CV-4472 CRB)*. The practical effect of the preliminary injunction is that DHS and SSA have been prevented from sending the 2007 SSA mismatch letters they had prepared for over 140,000 employers, and that these two agencies cannot take further steps to implement the mismatch rule until the court issues a final decision on the merits. Even if the government loses the case on the merits, it will undoubtedly seek to republish its final rule following the instructions it will receive from the Court. Moreover, DHS has continued to conduct raids of worksites with alleged unauthorized workers. Companies doing business in the US, therefore, will need to ensure that proper steps are taken to establish effective employee verification programs and to respond appropriately to government notifications about possible work status violations.

New Complications with Contract Labor — Wal-Mart Raids

The Wal-Mart raids raise questions about an employer's obligations with respect to independent contractors. The general rule is that an employer is not required to complete a Form I-9, Employment Eligibility Verification, for an independent contractor.¹⁴ There are, however, a couple of exceptions to this rule.

First, as discussed above, a company may not employ (directly or indirectly) somebody whom its management knows to be unauthorized to work in the US.¹⁵ This 'knowing' requirement for a violation of the statute also includes 'constructive knowledge'. The DHS adopts a broad view of constructive knowledge, asserting that the term includes 'not only actual knowledge, but also knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition'.¹⁶ Under the applicable regulations, knowledge inferred from the facts may arise where the employer: (1) fails to complete a Form I-9; (2) has information available to it that indicates the employee is not authorized to work; or (3) acts with reckless disregard by permitting another individual to introduce unauthorized workers to the workforce. In the Wal-Mart case, DHS relied upon this third requirement, alleging that Wal-Mart officials acted with knowledge, or at least reckless disregard, by permitting independent contractors to introduce unauthorized workers in their stores.

A key lesson of the Wal-Mart raids is that an employer may not circumvent its duty to complete a Form I-9 with an unwarranted claim that an employee is an independent contractor. While the law does not require the employer to complete a Form I-9 for a true 'independent contractor', the law defines this term narrowly.¹⁷ If the employer does not complete a Form I-9 based upon its good faith belief that a worker was an independent contractor, it will need to ensure that it has adequate evidence to support its claim.

The employer should look to several different factors in making a decision about whether to complete a Form I-9 for an independent contractor. Some of these factors include whether the individual or entity (1) supplies his/her/its own tools or materials to perform the job, (2) makes its services available to the general public, (3) works for a number of clients at the same time, (4) directs the order or sequence in which the work is to be done, and (5) determines the hours during which the work is to be done.¹⁸

The consequences for either turning a blind eye to the illegal status of independent contractors or failing to complete I-9 forms for individuals who may not qualify as independent contractors can be severe. On May 18, 2005, Wal-Mart agreed to pay \$11 million to settle allegations it knowingly used illegal immigrants to clean its stores. The settlement clears Wal-Mart of federal charges for hiring illegal immigrants.

Incidentally, though Wal-Mart's managers avoided criminal charges, its independent contractors were not as lucky. The dozen

contractors who actually hired the laborers for work inside Wal-Mart stores agreed to plead guilty to various criminal charges. They also had to pay additional fines (beyond Wal-Mart's \$11 million) to the tune of \$4 million.

The days of turning a blind eye to independent contract labor are over. At the very least, an employer should implement protective policies with respect to all service contracts and require the inclusion of written assurances and contractor compliance standards in all such contacts.

An employer may also want to play an active role in reviewing the legal status of the employees of independent contractors. For example, the employer could demand that its independent contractors provide copies of the I-9 employment verification forms of their employees. That way, the employer can ensure that the contractors have completed the forms correctly, and that they have completed them for all of their employees.

Finally, an employer may want to go as far as to require its independent contract labor to participate in the new Systematic Alien Verification for Entitlements ('SAVE') program (a requirement Wal-Mart has implemented under its new compliance requirements). This program, is operated jointly by DHS and SSA enables employers to verify that all employees are in legal status (though many employers have complained of high error rates in these verification systems). Under this program, an employer is given software that permits it to access the joint database of

both DHS and SSA, to verify the employment authorization of all *newly* hired employees.

An employer's participation in this program is *voluntary*.

The SAVE program has been expanded to all 50 states. To sign up, an employer may visit the following site.¹⁹ The program is free to participating employers.

Conclusion

The immigration landscape in the United States does not appear to be settling any time soon. As seemingly endless layers of security measures and accompanying delays at Service Centers in the US and US Consulates and Embassies overseas complicate the business plans of companies and their foreign-born employees, employers will need to plan international business activity carefully and ensure that they are complying with applicable immigration laws. In addition, employers will need to ensure that they are adhering carefully to the letter of old and new immigration laws, and that they are not opening themselves or their employees to DHS's enforcement options. With so much change, these times can be difficult for employers and their foreign employees. Nonetheless, the assistance of competent legal counsel can do a great deal to ease the concerns of employers and their employees and help to avoid many of the pitfalls and complications that are lurking in the ever-changing world of immigration in the US.

Notes:

¹ Ziglar, Commissioner INS (March 22, 2002).

² INA § 214(b); 8 USC § 1184(b).

³ INA § 101(a)(15)(E)(i); 8 USC § 1101(a)(15)(E)(i).

⁴ INA § 101(a)(15)(H)(i)(b); 8 USC § 1101(a)(15)(H)(i)(b).

⁵ INA § 101(a)(15)(L); 8 USC § 1101(a)(15)(L).

⁶ 58 Fed Reg 69205-19 (December 30, 1993); 58 Fed Reg 69226-28 (December 30, 1993); 58 Fed Reg 68926-28 (December 28, 1993).

⁷ INA § 101(a)(15)(H)(ii)(b); 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

⁸ INA § 274A; 8 USC § 1324a.

⁹ INA § 274(a); 8 USC 1324(a).

¹⁰ INA § 274A(e); 8 USC § 1324a.

¹¹ INA § 274B 8 USC § 1324b.

¹² See 8 CFR 274a1 (l)(1).

¹³ On the date of this article, the newly released regulation had not yet been published in the Federal Register.

¹⁴ INA § 274A(a)(3)(a); 8 USC § 1324a(a)(3)(a).

¹⁵ INA § 274(A)(a) and INA § 274(a); 8 USC § 1324a and 1324(a).

¹⁶ See 8 CFR 274a.1(1)(1).

¹⁷ 8 CFR 274a.1(j).

¹⁸ 8 CFR 274a.1(j).

¹⁹ <https://www.vis-dhs.com/employerregistration>.

California's Unique Rules on Restrictive Employment Covenants and the Potential for Extra-territorial Effect

This article sets out some of the difficulties encountered when one attempts to enforce a restrictive employment covenant in California or against an employee with some connection to California

Pantea Yashar¹

**Brent Caslin
Kirkland & Ellis LLP
Los Angeles, California**

International firms throughout the Pacific Rim use restrictive employment covenants to limit the ability of their employees (or, more accurately, their former employees) to compete after they depart to work for a competitor. The scope of these agreements varies. Some narrowly restrict the former employee from soliciting his former employer's employees or clients for a limited period of time, in a narrow market segment, in a specific geographic area. Others take broader aim, with hopes of keeping key personnel from jumping to specific competitors for a time following termination. The broadest cast a net of preclusion as far as possible, prohibiting any competition of any kind in a given field for all time. Regardless of their breadth, most restrictive covenants serve useful purposes, especially for employers legitimately concerned that a key employee could dart to the competition, taking with him the company's best employees, clients, and ideas.

Attempting to restrict the mobility of vital

employees—and their ability to do harm quickly—is a reasonable and sometimes very necessary goal for competitive firms. If companies doing business across many borders are not careful, they may discover some jurisdictions around the Pacific, such as California, are not hospitable to the enforcement of restrictive employment covenants and attempts to enforce agreements limiting employee mobility can create more problems than the restrictions are worth.

Following this brief introduction, California's somewhat unique rules precluding restrictive employment covenants are set forth. The article then addresses two exceptions to California's general rule, namely, the exceptions allowing for the enforcement of restrictive employment covenants in connection with the acquisition of a company or in connection with the protection of trade secrets. The final section of the article addresses a series of apparently conflicting cases that may justify or, more accurately, attempt to justify the extraterritorial application of California law on restrictive employment covenants to employers beyond California's borders. The cases make clear that even employers with no operations in California should not ignore California's unique rules. They can be dangerous, as will be explained.

California Law Generally Prohibits Restrictive Employment Covenants

The three most common categories of restrictive employment covenants are non-competition agreements, customer non-solicitation agreements, and employee non-solicitation agreements (also called non-poaching agreements). The good news for employers is that reasonable non-competition and non-solicitation agreements are generally enforceable in many jurisdictions in the United States and other jurisdictions in Asia, especially common law countries.² California's rules, which generally hold non-competition agreements void because they violate a unique California statute and public policy concerns, stand in the minority.

Our analysis of California's rules on restrictive employment covenants must begin with California Business and Professional Code Section 16600. That statute states that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.' Relying primarily on Section 16600 and a strong streak of public policy favoring employee mobility, California courts have for many years staunchly refused to enforce agreements that place restrictions on employees' ability to work for a competitor after terminating their employment. *See, eg D'Sa v Playhut, Inc*, 85 Cal App 4th 927, 929 (2000); *Scott v Snelling & Snelling, Inc*, 732 F Supp 1034, 1042 (ND Cal 1990). As one California court opined, '[t]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change.' *Diodes, Inc v Franzen*, 260 Cal App 2d 244, 255 (1968). In other words, in the eyes of California's courts, the employee's right to switch jobs, all else being equal, is more important than the company's right to contract away that ability.

Those doing business in California must take these rules very seriously. They negatively affect the ability of firms to enforce non-compete agreements in California and may set a trap for the unwary company that tries to execute or enforce such an agreement. This is because California courts not only refuse to enforce non-competes in many cases, but they have even found employers affirmatively liable for trying to cause employees to sign restrictive covenants. In *D'Sa v Playhut, Inc*, for example, a worker claimed he was fired because he refused to sign a confidentiality agreement that contained a covenant not to

compete. The California courts agreed with the complaining employee, ruling that an employer may not lawfully make the execution of an unenforceable covenant not to compete a condition of continued employment. Even if an employment agreement contains choice of law or severability provisions that would enable the employer to enforce other provisions of the employment agreement, the Court ruled that demanding a covenant not to compete creates a claim for wrongful termination in violation of public policy. In other words, not only could the employer not enforce the covenant not to compete against its former employee, but the employer could be liable for even trying to cause the employee to sign such an agreement.

Not all of the news from California regarding restrictive employment covenants is bad for employers. Despite the explicit language of Section 16600, and the propensity for California courts to rule for employees and against employers, there are a few exceptions to the general rule that restrictive employment covenants have no place in California. The two most important exceptions, generally speaking, come into effect (1) during M&A transactions or (2) when a firm's confidential information is at risk of being lost to the competition.

The M&A Exception

A non-competition agreement may be recognized as valid and enforceable in California when it is entered as part of the sale of the goodwill of a business, the sale of all or substantially all of a corporation's operating assets together with the goodwill of the corporation, the sale of the ownership interest of any subsidiary together with the goodwill of the corporation, or as part of a partnership dissolution. Cal Bus & Prof Code § 16601-02; *see also Bosley Med Group v Abramson*, 161 Cal App 3d 284, 288-90 (1984). In short, California recognizes an exception when a company is sold because, after all, few would buy a company if the seller could immediately start up another competing enterprise shortly after the acquisition closed.

The M&A exception applies to sales of entire companies as well as partial acquisitions. An example can be found in *Vacco Industries, Inc v Van Den Berg*, 5 Cal App 4th 34 (1992). In that case, Van Den Berg acquired three percent of Vacco's outstanding stock and signed a non-competition agreement. When he later challenged the enforceability of the non-compete agreement, Vacco explained to the court that, in the context of the transaction, three percent was a substantial

interest in the company and the sale of that interest justified the non-compete agreement. The court looked closely at the transaction and determined it was not a sham designed to allow for the enforcement of the non-compete but a legitimate acquisition and sale of a not-insignificant piece of a substantial company. In that context, found the court, the non-compete could be enforced by Vacco so long as its terms were reasonable and fair.

The opposite result usually follows if the Court determines that the ownership transaction was really just cover for a non-compete agreement. In *Bosley Medical Group v Abramson*, for example, a firm offered an individual employment but, shortly afterwards, advised the employee that he would have to sign an independent contractor's agreement and a stock purchase agreement if he wished to stay on with the company. The stock purchase agreement required the purchase of a small number of shares, required the individual to sell shares back to the firm if he left its employment, and precluded the employee from competing for three years in a limited territory if he left the company. After litigation erupted over the enforceability of the non-compete provision, the company argued for application of the M&A

exception because the employee sold his ownership interest in the company back to the company (as he was required to do by contract). The California court, however, saw through what it believed to be a ruse. Looking closely at the facts of the case and the context of the agreements in dispute, the court ruled the stock purchase agreement was technically an ownership transfer but was in reality just a sham agreement devised to justify enforcement of its non-compete provision. In such a circumstance, held the court, the non-compete is unenforceable in California. In short, a phantom stock grant or sham acquisition or sale will not provide cover to a non-compete in California.

In light of these cases, those who buy and sell companies with California operations should know that courts may, despite the general restriction in restrictive employment covenants, prevent former owners from competing for a reasonable time after an acquisition. But California courts, if asked, will look closely at the transaction to make sure it is legitimate and not a hollow transfer designed to allow for the enforceability of a restrictive employment covenant.

The Trade Secrets Exception

In addition to the statutory exceptions, the



Photo: Lisa Klumpp

California courts have created a judicial exception to Section 16600 by taking into account the purpose of agreements designed to protect employers' confidentiality business concerns. *See, eg, Scott v Snelling & Snelling, Inc*, 732 F Supp 1034 (ND Cal 1990). Specifically, California courts will hold valid reasonable covenants restraining competition when necessary to protect the unauthorized use of trade secrets or confidential information. *See id* at 1038; *see also Richard*, 85 Cal App 4th at 935; *Loral Corp v Moyes*, 174 Cal App 3d at 268, 276-80 (1985). In other words, when California's policy against non-compete agreements intersects with a similar policy favoring the protection of trade secrets, the importance of the policy to protect trade secrets usually wins. 'Section 16600 does not invalidate an employee's agreement not to disclose his former employer's confidential customer lists or other trade secrets or not to solicit those customers'. *Loral*, 174 Cal App 3d at 268, 276 (1985).

The intersection usually arises when an employee is given access to a proprietary list of customers or potential customers, agrees to keep the list secret, but then moves to work for a competitor. The first question to ask in such a situation, ordinarily, is whether the 'confidential' contact list really was confidential enough to give it status as a protectable trade secret.³ If so, the answer to the next question is clear—the employee may not use his former contacts in connection with his or her new position despite California's clear policy favoring employee mobility. The employee's agreement to keep the information confidential is valid and enforceable. *See Gordon v Landau*, 49 Cal 2d 690, 694 (1958).⁴ But keep in mind, of course, that California courts will not enforce the non-solicit agreement, preventing the employee from contacting former clients, if the 'secret list' was really no secret at all.⁵

Choice of Law Concerns

Perhaps the most interesting and perplexing area of concern for employers who have operations in California, or who have an employee who flees to work for another company in California, is that California courts sometimes stretch their authority beyond the borders of California to invalidate restrictive employment covenants to the extent they touch upon California, even if a non-compete has a clear choice of law provision that calls for the application of law from some other non-California jurisdiction. A quick review of the

case law in this area reveals some disturbing trends for non-California companies and, unfortunately, inconsistencies that urge caution.

Application Group Inc v Hunter Group, Inc provides a good example from which to start. 61 Cal App 4th 881, 892 (1998). In that case, the issue was whether California law should be applied to determine the enforceability of a covenant not-to-compete in an employment agreement between a Maryland employee and a Maryland employer, when a California-based company sought to hire away the Maryland employee for a new job in California. Hunter, the Maryland based company, had a Maryland choice-of law provision in its employment agreements. Unlike California, Maryland regularly enforces non-compete agreements and so Hunter's non-competition agreement would be enforceable if Maryland law was applied and, as we now know, held void if California law was applied. The employee filed suit in California to invalidate the non-compete provision. The California Court of Appeals applied California rule of law and invalidated the covenant not to compete, reasoning that California has a 'materially greater interest than does Maryland in the application of its law... and that California's interest would be more seriously impaired if its policy were subordinated to the policy of Maryland.' In short, since the employee sued first in California, California law governed and the employee won.

Scott v Snelling & Snelling, Inc provides another example of in-state favoritism. In that case, a California federal court applied California law to determine the enforceability of a covenant not to compete, despite an explicit clause stating that Pennsylvania law should govern the interpretation of the contract. The court reasoned that, although California choice of law provisions gave deference to a contract dictating the law by which the contract should be interpreted, 'California law will not give force to a choice of law clause where the contract contains a provision which violates 'strong California public policy.' Again, a California court applied its own law to a contract written in another jurisdiction containing a provision agreeing to the other jurisdiction's law.

Not surprisingly, decisions outside California do not stretch to apply California law. When a similar case with similar facts was reviewed in a New York court, for example, the results were vastly different. In *Estee Lauder Co Inc v Batra*, New York based Estee Lauder sued a former employee who had gone to work for a competitor

in California, seeking to enforce its non-compete and nondisclosure agreements. Holding New York law applicable to the dispute, the New York court concluded that the management of Estee Lauder is entirely in New York, a significant portion of the employee's responsibilities were centered in New York, and '[j]ust as California has a strong interest in protecting those employed in California, so too does New York have a strong interest in protecting companies doing business' in New York. As the California courts did in *Hunter* and *Scott*, the New York courts applied their home state's rules in support of their home states' policies.

* * *

Restrictive employment covenants are useful and common, and in most jurisdictions around the Pacific, they raise few problems so long as they are drafted with reasonable geographic and time limitations. If California becomes involved in a circumstance because a company does business that jurisdiction or because a departing employee is looking to escape to a new job there, however, employers should be very cautious before attempting to enforce a restrictive covenant against a former employee.

Notes:

- ¹ Pantea Yashar is an associate with Kirkland & Ellis LLP. Brent Caslin is a partner with the firm. Both work on international and domestic commercial disputes from Los Angeles, California.
- ² See, eg, *Wade S Dunbar Ins Agency, Inc v Barber*, 147 NC App 463, 468 (2001) (non-compete agreements in North Carolina enforceable if generally reasonable); *Kallok v Medtronic, Inc.*, 573 NW 2d 356, 361 (Minn 1998) (reasonable non-compete agreements enforceable in Minnesota); Kerry R Weinger, *Offshoring and Outsourcing: A Roadmap for the Employer*, Int'l Human Res Guide § 12:9 (November 2006) (China generally enforces non-compete agreements although recent legislation has put restrictions on duration and requires geographical limitations and consideration); Liu Yen-Ling, *Noncompete Clauses in Employment Agreements*, November 6, 2007 (<http://www.winklerpartners.com/a/features/no-compete-agreements.php>) (explaining the enforcement of non-compete-agreements in Taiwan).
- ³ 'A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an

- advantage over competitors who do not know or use it.' 4 Rest, Torts, § 757 (comment b). But, California courts have held that information readily obtainable through public sources, such as directories, does not derive the independent economic value necessary to the existence of a trade secret. *Scott*, 732 F Supp at 1044.
- ⁴ In *Thompson v Impaxx, Incorporated*, the court stated that '[a]ntisolicitation covenants are void as unlawful business restraints except where their enforcement is necessary to protect trade secrets.' 113 Cal App 4th 1425, 1429 (2003). That said, however, 'no actionable wrong is committed by a competitor who solicits his competitor's employees or who hires away one of more of his competitor's employees who are not under contract ...' *Diodes*, 260 Cal App 2d at 255.
 - ⁵ A similar issue arises when an employee agrees to keep confidential internal employee lists. The use of lists to poach employees for a competing enterprise may run afoul of the agreement and, again, if the list really is a secret, the policy supporting trade secrets will generally prevail over the policy in favor of employee mobility.

Managing Contract of Employment in Mergers and Acquisitions in Malaysia

This paper discusses the rights of employees in determining if they choose to remain working in their company in the event of a merger and acquisition in Malaysia

Gan Khong Aik

Lee Hishammuddin Allen & Gledhill
Level 16, Menara Asia Life, 189 Jalan Tun
Razak, 50400 Kuala Lumpur, Malaysia

Tel: 603-2165-8454

Fax: 603-2161-3933/1661

Email: gka@lh-ag.com

Introduction

In Malaysia, change of ownership of business will give rise to termination of contract of employment.¹ When an employer sells or transfers the ownership of its business to another party, the employees have the rights to determine whether they want to work for the other party who takes over the ownership of the business ('the Transferee'). Without the consent of the employees, the original employer does not have the right to transfer the contract of employment of the employees to the Transferee. The contracts of employment of the employees come to an end when the employer sells or transfers the ownership of its business.

In *Barat Estates Sdn Bhd & Anor v Parawakan Subramaniam & Ors* [2000] 3 CLJ 625, the Court of Appeal said, '... One begins with the premise that every employee has a right to choose his employer. And no person may dictate to another that he shall be the employee of the former. When an employer sells off his business to another, he must give his employees the right to make a choice as to the course he or she wishes to adopt. The employee may, because of an existing relationship, wish to be employed by the former employer in some other business that such employer may have. Or he may wish to seek employment elsewhere altogether. Or he may wish to remain in the same business under a fresh contract with the acquirer of the business. The giving of notice by the former employer upon the sale of a business thus enables the employee to exercise his right to the choice that he is entitled to make. A failure to give notice

deprives the employee of his right to make a choice.'

Not all mergers and acquisitions involve change of ownership of business. In cases where the mergers and acquisitions involve change of ownership of business, the issues pertaining to termination of contract of employment are one of the material and crucial matters which require proper management. In this regard, there are several statutory obligations and liabilities that must be taken into account in managing mergers and acquisitions. The improper management of these employment related issues will have adverse impact over the commercial and financial considerations of the mergers and acquisitions.

Change of Ownership of Business

When dealing with employment related issues in mergers and acquisitions, it is pertinent to first ascertain whether the mergers and acquisitions have the effect of changing the ownership of the business concerned. What then is 'change of ownership of business'? There is no statutory definition for the phrase, 'change of ownership of business'. In its literal sense, it means transfer of business from one owner to another. It must be a transfer of business or part of a business as a going concern so that business remains the same business but in different hands.² If it is a mere transfer of physical assets of the business to the new owner for use at his absolute disposal, it is not a change of ownership of business. However, it is a change of ownership of business if what is transferred is the combination of the assets and the stock-in-trade together with the operations of the transferor in which the assets and the stock-in-trade are engaged.³

It is ruled in *Abdul Aziz Atan v Rengo Malay Estate Sdn. Bhd.*⁴ that business means the activity or undertaking carried on by a person or body of persons and hence, transfer of shares in a company does not amount to change of ownership of business.

Termination of Contract of Employment: Statutory Obligations

In Malaysia, employees can be generally divided into two main categories namely, the employees which are governed by the Employment Act, 1955 and the employees which are not. The Employment Act, 1955 is applicable to the categories of employees as set out in First Schedule to the said Act :

Employee
1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages ⁵ do not exceed one thousand five hundred ringgit a month
2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which —
(1) he is engaged in manual labour including such labour as an artisan or apprentice;
Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one half of the total time during which he is required to work in such wage period;
(2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;
(3) he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work;
(4) he ⁶ is engaged in any capacity in any vessel registered in Malaysia and who —
(a) is not an officer certificated under

the Merchant Shipping Acts of the United Kingdom as amended from time to time;
(b) is not the holder of a local certificate as defined in Part VII of the Merchant Shipping Ordinance, 1952; or
(c) has not entered into an agreement under Part III of the Merchant Shipping Ordinance, 1952 or
(5) he ⁷ is engaged as a domestic servant.

There are few material employment related issues in respect of change of ownership of business. They are notification to Labour Department, notice of termination to the employees, payment of termination benefit to the employees, the effect of collective agreement and the outstanding claims before the Industrial Court as regards the Transferees.

Notification to Labour Department

Employment Retrenchment Notification 2004 requires the employers whose employees' contracts of employment have been terminated due to change of ownership of business, to submit PK form to the nearest labor office 30 days prior to the carrying out of the termination. It is a mere notification. There is no requirement to obtain any approval from the labor office. The employer who fails to submit the notification may be liable for a fine not exceeding RM10,000 under the Employment Act, 1955.⁸

It is not specific as to when exactly the notification has to be submitted. Is it 30 days prior to the date when the termination takes effect or when the notice of termination is given to the employees? As the rationale of the notification is to give notice to the labor office of such termination and to enable them to carry out any investigation they deem fit, it would be prudent for the employers to submit the PK form 30 days prior to the date when the notice of termination is given.

Notice of Termination

The employers have to give notice of termination to the employees. The length of the notice period will be in accordance with the terms on termination stipulated in their respective contracts of employment or if the employees are unionized, in accordance with the termination clause of the collective agreement. The employers are entitled to give payment in lieu of notice of termination if it is so permitted under the contract of employment or the collective agreement respectively.

Where a collective agreement provides that advance notice in relation to retrenchment must be given to the Union, it would be mandatory for

the employer to comply with such provision. Otherwise, the Industrial Court has the power to reinstate the retrenched employees in dealing with the complaint of non-compliance of the collective agreement by the Union.⁹

If the employees are governed by the Employment Act, 1955, section 12(3) of the Employment Act, 1955 makes it mandatory that the length of the notice of termination must be in accordance with the provision provided therein notwithstanding that the terms of the contract of employment provides to the contrary.

Section 12(3) of the Employment Act, 1955 provides, *inter alia*, that, 'Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that — (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law, the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than provided under subsection (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service'.¹⁰

Section 12(2) of the Employment Act, 1955 provides that the length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than —

- (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
- (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
- (c) eight weeks' notice if he has been so employed for five years or more on such date¹¹.

Section 13 of the Employment Act, 1955 however enables the employer to make payment in lieu of notice of termination.

The employers who fail to give the requisite notice of termination may be liable for punishment under the Employment Act, 1955.

Where a collective agreement provides for a period of notice of termination longer than that provided by the provisions of the Employment Act, 1955, the employer is advised to strictly comply with the provisions of the collective agreement to avoid the issues of non-compliance and the risk of its employees being reinstated.¹²



Photo: Stefan Klein

Termination Benefit

The employers are not obliged to pay any termination benefit to the employees who are not governed by the Employment Act, 1955 except where it is expressly provided under the contract of employment, the human resource policy/the employment handbook or the collective agreement.

Employment (Termination and Layoff Benefits) Regulations requires the employers to pay termination benefits¹³ to the employees¹⁴ to whom the Employment Act, 1955 applies.¹⁵

Only employees who have been employed under a continuous contract of service for a period of not less than twelve months¹⁶ ending with the date of termination are entitled to the termination benefits.

The amount of termination benefits payment shall not be less than —

- (a) 10 days' wages¹⁷ for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for a period of less than two years; or
- (b) 15 days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for two years or more but less than five years; or

- (c) 20 days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five years or more and pro-rata as respect an incomplete year, calculated to the nearest month.

Offer for Continuous Employment

The Transferee is not obliged to offer continuous employment to the employees of the Transferor employer.¹⁸ There is an issue as to whether if the Transferee offers to continue employing the employees of the Transferor employer, the employees would still be entitled to termination benefits.

Regulation 8(1) of the Employment (Termination and Layoff Benefits) Regulations provides that where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under the Regulations if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employee under the terms and conditions of employment not less favorable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.¹⁹

Thus, the employers are not obliged to pay termination benefits payable under the Regulations when there is an offer of continuous employment in the manner provided by Regulation 8 of the Employment (Termination and Layoff Benefits) Regulations. However, the employers would still be liable to give the requisite notice of termination to the employees.²⁰

'The giving of notice of termination is mandatory. It is irrespective of whether there is an offer to continue to employ the employee under the terms and conditions of employment not less favourable than that of the previous contract of employment'

— per *Barat Estates Sdn. Bhd. & Anor v Parawakan Subramaniam & Ors* [2000] 3 CLJ 625 and *Radtha Raju v Dunlop Estates Bhd* [1996] 1 CLJ 755.

Collective Agreement

Section 17 of the Industrial Relations Act provides that a collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on the parties to the agreement including in any case where a party is a

trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees.

In *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 CLJ 547, the Federal Court ruled that,

'The transferee of a party to the collective agreement is bound by that collective agreement under Section 17(1)(a) of the Industrial Relations Act, 1967. In this case, the publishing permit for the newspaper of a company was cancelled and the Minister issued to the 1st Respondent the permit to publish the same newspaper which then re-employed 85% of the company. The 2nd Respondent purchased the land, buildings, plants, machineries, vehicles and stock-in-trade as well as the product name of the newspaper. Both the Respondents were held to be the transferees of the company who owned the newspapers and were bound by the collective agreement to which the company was a party. Guided by this decision of the Federal Court, it is not certain therefore whether a closure of the hotel business by the owner can be considered as an alternative approach. It appears that the closure of the hotel business must be a complete closure and the new hotel business must not be related to that business.'

Thus, in deciding whether to make an offer for continuous employment, it is important that the Transferee ascertains whether the employers have entered into any collective agreement with a Union. collective agreement carries with it the financial burden of increment and salary adjustment.

Outstanding Employment Related Claim

The Industrial Court will allow the Transferees to be added as a party to any outstanding claim pending against the employers if it can be established that the principle of *Hochieff Gammon* has been fulfilled. The test under the *Hochieff Gammon* principles is that a party may only be joined for the purpose of enforceability of an award if 'there is business connection' between the two entities. The Transferees have to ascertain as to whether there is any outstanding employment related claims before the Industrial Court. In a case where there is outstanding employment related claims before the Industrial Court, it would be prudent for the Transferees to expressly exclude such pending claims from the take-over²¹ or to obtain indemnity from the employers.

Conclusion

Quite apart from the mandatory provision of the Employment Act, 1955, an employer who is involved in the change of ownership of business has to review and examine the individual contract of employment, human resource policies/ employment handbook and collective agreement, if any to determine the length of the notice of

termination and whether the termination benefit is applicable.

On the other hand, the purchaser of the business has to ensure that it has either obtained the necessary indemnity as regards any outstanding industrial relation claims where it could be held liable or excluded such claims in the take-over.

Notes:

- ¹ *Radtha Raju & Ors v Dunlop Estates Bhd* [1996] 1 CLJ 755.
- ² *Melon v Hector Powe* [1981] 1 All ER 313.
- ³ *Dallow Industrial Properties Ltd v Else* [1967] 2 All ER at 33.
- ⁴ [1986] 2 CLJ 41.
- ⁵ For the purpose of this Schedule, 'wages' means wages as defined in section 2, but shall not include any payment by way of commission, subsistence allowance and overtime payment.
- ⁶ Part XII of the Employment Act, 1955 is not applicable to this category of employee.
- ⁷ Sections 12, 14, 16, 22, 61 and 64, and Parts IX, XII and XIII of the Employment Act, 1955 are not applicable to this category of employee.
- ⁸ Section 97 read together with s 99 of the Employment Act, 1955.
- ⁹ *Dunlop Industries Employees Union v Dunlop (M) Industries Bhd* [1987] CLJ (Rep) 86.
- ¹⁰ Section 12(4) of the Employment Act, 1955 provides that such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.
- ¹¹ Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.
- ¹² Guided by the decision in *Dunlop Industries Employees Union v Dunlop (M) Industries Bhd* [1987] CLJ (Rep) 86.
- ¹³ Regulation 4(1) of the Employment (Termination and Lay-off Benefits) Regulations 1980.
- ¹⁴ The Employment (Termination and Lay-off Benefits) Regulations does not apply to out-worker. Out-worker means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired or adapted for sale in his own home or on other premises not under the control or management of the person

- who gave out the materials or articles.
- ¹⁵ This termination benefits payment shall be in addition to any payment in lieu of notice of termination: Regulation 6(4) of the Employment (Termination and Lay-off Benefits) Regulations 1980.
- ¹⁶ A continuous contract of service for a period of not less than 12 months include two or more periods of employment which are not less than 12 months in the aggregate if the intervening period or periods between one period of employment and another does not in the aggregate exceed 30 days.
- ¹⁷ Wages shall have the meaning assigned thereto under section 2(1) of the Employment Act and 'a day's wages' shall be computed in such a manner so as to give the employee his average true day's wages calculated over the period of 12 completed months' service immediately preceding the date of termination.
- ¹⁸ *SJ Binatetnik Sdn Bhd v Asharul Abidin Shafie* [2004] 1 ILR 640; 'A purchaser of a company's assets does not have the legal obligation to employ the existing employees of the company and whether the purchaser chooses to appoint any employee of the company is entirely within their discretion and right so to do.'
- ¹⁹ Where the offer for continuous employment is accepted, the period of employment of the employee immediately before the change occurs shall be, for the purposes of the Regulations, deemed to be a period of employment under the person by whom the business is taken over, and the change of employer shall not constitute a break in the continuity of the period of his employment: Regulation 8(3).
- ²⁰ *Barat Estates Sdn. Bhd. & Anor v Parawakan Subramaniam & Ors* [2000] 3 CLJ 625 and *Radtha Raju v Dunlop Estates Bhd* [1996] 1 AMR.
- ²¹ *The Co-operative Central Bank Limited (In Receivership) & Ors v Rashid Cruz Abdullah & Ors* [2002] 2 ILR 780.

Enhancement on Protection of Employees

This article discusses the Employment Contract Law in China

Xinzi (Henry) Liao
Danhua (Jojo) Huang

On June 29, 2007, the Standing Committee of the 10th National Peoples' Congress passed and promulgated the Employment Contract Law of the People's Republic of China (the 'Employment Contract Law'), which is deemed as an important milestone in the legislation for human rights protection in China. In the Employment Contract Law, protection is widely extended for the employees in the course of conclusion, performance and termination of the employment contracts with the employers.

Protection in the Course of Conclusion of the Employment Contract

Enforcement of Employment Contract and Punitive Damages

Nowadays a considerable number of employers, especially those small-and medium-sized private companies, exhaust every means to minimize their operational cost, *inter alia*, employees' remunerations take up a significant percentage. As a commonly seen 'cost saving trick', such employers do not sign any written employment contracts with the employees to try to escape from their obligation to make contributions to the employees' social securities. As a result, when disputes arise, the employees may lack convincing evidence to support their claims.

Upon effect of the Employment Contract Law, employers can no longer get away from the compulsively required written employment contracts. Article 10 of the Employment Contract Law states clearly that 'a written employment contract shall be concluded for and upon establishment of an employment relationship'; or a written employment contract shall be entered into, if not simultaneously, within one month from the date of actual employment.' In order to help materialize Article 10, Article 82 of the Employment Contract Law enables a punitive damages mechanism, saying that 'where the

employer fails to conclude a written employment contract with an employee within a period of more than one month yet less than one year from the date of employment, the employer shall pay the employee double wages per month.'

Right of Knowledge

The Employment Contract Law also vests the employees with the right of knowledge to ensure the accomplishment of fairness and free will principles when concluding the employment contracts. The employer shall honestly notify the employees of job duties, working conditions, work premises, occupational hazards, safety and production conditions, labor remuneration and any other information in which the employee is interested



to know to the complete extent¹; otherwise, the employment contract may wholly or partially become void due to the use of fraudulence.² The employer shall thereby compensate the employee for its losses and damages suffered.³

Personal Freedom

The Employment Contract Law forbids the employers to impose unreasonable burden on the intended employees without justification by taking advantage of its superior position in the course of recruitment. For instance, an employer is not allowed to retain the identity card or other certificate of an employee; and requirement of money or properties as deposit for the recruitment from an employee is by no means justifiable.⁴

Protection in the Course of Performance of the Employment Contract

Non-competition Restrictive Covenant

The Employment Contract Law allows the employers to impose non-competition obligation on the employees yet with strict limitations.

Firstly, employees subject to non-competition restrictive covenants shall be limited to the employer's senior management personnel, senior technical personnel and other personnel who are obliged to keep confidentiality.⁵

Secondly, the scope, geographical region and

duration of non-competition restrictive covenant shall be subject to the agreements between the employer and the employee yet to the extent permitted by laws and regulations.⁶

Thirdly, the non-competition restrictive covenant period shall not exceed two years.⁷

Fourthly, the employer shall compensate the employee in consideration of non-competition restrictive covenant on a monthly basis during the non-competition restrictive covenant period.⁸

Probationary Period

The Employment Contract Law, in restraint of the employers' abuse of the probationary period, sets out the upper limit of the probationary period (namely, six months), and the threshold of contract term (no less than three months) at which the employment contract is allowed to be incorporated with probationary period.⁹

Probationary period is a one-off procedure and could only apply to the same employment relationship once. Notwithstanding the employers' right to revoke the employment contract within the probationary period, the probationary period shall be deemed as part of the term of the employment contract. In the case where an employment contract stipulates no employment term but a probationary period, such probationary period shall instead be deemed as the term of the employment contract.¹⁰

In addition to the term of the probationary period, the Employment Contract Law also requires that the wage of an employee during his/her probationary period shall not be less than the lowest wage amount for the same position in the employer or 80 per cent of the wage amount agreed in the employment contract and shall not be less than the applicable minimum wage standard imposed where the employer is located, either.¹¹

Non-fixed-term Employment Contract

A non-fixed-term employment contract shall mean an employment contract without a fixed termination date as agreed by the employer and the employee. The Employment Contract Law defines and describes the applicability of non-fixed-term employment contract in favor of the employees.¹²

There are three circumstances under which a non-fixed employment contract applies, including, 1) where the employee has worked for the employer for 10 years consecutively; or 2) where the employer initially adopts the employment contract with its employees or where a new employment contract is concluded upon restructuring a state-owned enterprise, while the employee then has worked for the employer for 10 years consecutively and will reach his/her statutory retirement age in less than 10 years' time; or 3) where a fixed-term employment contract has been concluded twice



Photo: Eric Brownstone

consecutively between the employer and employee and there is no statutory reason¹³ for the employer not to renew the employment contract.

Under any of the above circumstances, when the employee proposes or agrees upon renewal or conclusion of employment contract, a non-fixed-term employment contract shall be concluded, with the exception where the employee proposes for the conclusion of a fixed-term employment contract.

The Employment Contract Law also provides automatic conclusion of non-fixed-term employment contract. Where the employer fails to conclude a written employment contract with an employee after one year has lapsed since the date of employment, the employer and the employee shall be deemed to have concluded a non-fixed-term employment contract.

In order to help materialize the non-fixed-term employment contract, Article 82 of the Employment Contract Law also stipulates that if the employer fails to conclude a non-fixed-term employment contract with a employee in accordance with the Employment Contract Law, the employer shall pay the employee double wages per month with effect from the date on which the non-fixed-term employment contract shall have been concluded.¹⁴

Training Expenses and the Default Penalty

In consideration for training expenses spent by the employer on an employee, the employer may request the employee for a period of service by concluding an agreement. Where the employee breaches the agreement on period of service, he/she shall pay default penalty to the employer pursuant to the agreement. To prevent the employers from abusing the default penalty, the Employment Contract Law sets out a limitation on the amount of default penalty, saying that 'the amount of default penalty shall not exceed the training expenses spent by the employer, or the amount of training expenses to be amortized over the unperformed period of service.'¹⁵

Protection in Rescission and Termination of the Employment Contract

Revocation of the Employment Contract by Employees

1) If the employer fails to provide protection or working conditions pursuant to the provisions of the employment contract; 2) where the employer fails to promptly pay remunerations in full; 3) where the employer fails to contribute social security premiums for the employee pursuant to the law; 4) where the rules and system adopted by the employer violate the provisions of laws and regulations and are prejudicial to the employee's

rights and interests; 5) where the employment contract is rendered void.

We should point out that the above item (3) is a new stipulation, while items (1), (2), (4) and (5) are stipulated by the Labor Law of the People's Republic of China.

Under any of the above circumstances, an employee may notify the employer with a 30-day advance notice in writing to revoke his/her employment contract.

Besides, an employee may notify the employer with a three-day advance notice in writing during his/her probationary period to rescind his/her employment contract without any justification.¹⁶ But where the employer uses means such as violence, threat or illegal restriction of personal freedom to coerce an employee into provision of labor or where the employer gives orders which violate the rules or force an employee to engage in any risky work which endangers the employee's personal safety, the employee may immediately rescind the employment contract and shall not be required to give the employer any advance notice thereof.¹⁷

Limitation on Employers' Right to Rescind Employment Contracts

The Employment Contract Law on the one hand strengthens the employees' position in revocation/termination of employment contracts, on the other sets forth limitations on the employer's right to revoke/terminate the employment contracts.

The Employment Contract Law provides five circumstances under which employers are not allowed to revoke/terminate the employment contracts, including, 1) where an employee who has engaged in work exposed to occupational hazards has not undergone pre-termination of employment occupational health check or during the period where an employee is suspected to have contacted an occupational illness or under medical observation; 2) where an employee has contacted an occupational illness or suffered a work injury while working for the employer and is confirmed to have lost his/her labor capacity wholly or partially; 3) during the stipulated medical treatment period of an employee suffering from illness or non-work-related injury; 4) during the pregnancy, maternity leave or breastfeeding period of a female employee; 5) where an employee has worked for 15 years consecutively with the employer and will attain his/her statutory retirement age in less than five years' time.

Before an employer unilaterally revokes/terminates the employment contract pursuant to the Employment Contract Law, the employer shall notify the trade union of the reason for such revocation/termination; and the trade union

has the right to request the employer to make correction if the employer is found to breach any law, administrative regulation or the employment contract.¹⁸

Economic Compensation

As the last but not least resort to protect employees, the Employment Contract Law provides the references and justifications for the employees to claim against employers for economic compensations where and when employment contracts can not be restored. Where the employee has rescinded the employment contract pursuant to the provisions of Articles 36, 38, 40, 41(1), 44(4) and (5) of the Employment Contract Law, the employer should pay for economic damages.¹⁹

As a principle, for each year of service in the employer, the employee shall be entitled to one-month salary. If the employment term is shorter than one year yet no shorter than six months, the employee shall be entitled to one-month salary; if the employment term is shorter than six months, the employee shall be entitled to half-month salary.

Performance of Employment Contract

In addition to economic compensations, where the employer rescinds or terminates an employment contract in violation of the Employment Contract Law, the employee requests for continued performance of the employment contract to be continued, the employer shall continue to perform the employment contract.²⁰

Conclusion

From the above summary, one can clearly draw a conclusion that more protections shall have been provided to employees under the Employment Contract Law. Such protections also reflect the economic developments made in China, that is, China at this stage is willing and able to compensate its employees while such compensations may be available to employees when China opens its door to outside world almost thirty years ago. It may, however, take some time to enforce and implement the Employment Contract Law in reality. There are some ambiguities in the Employment Contract Law that need the clarifications either by judicial explanations or implementing rules/regulations issued by relevant government authorities.

Notes:

- ¹ Article 8 of Employment Contract Law.
- ² Article 26 of Employment Contract Law.
- ³ Article 86 of Employment Contract Law.
- ⁴ Article 9 of Employment Contract Law.
- ⁵ Article 24 of Employment Contract Law.
- ⁶ Article 24 of Employment Contract Law.
- ⁷ Article 24 of Employment Contract Law.
- ⁸ Article 23 of Employment Contract Law.
- ⁹ Article 19 of Employment Contract Law.
- ¹⁰ Article 19 of Employment Contract Law.
- ¹¹ Article 19 of Employment Contract Law.

- ¹² Article 14 of Employment Contract Law.
- ¹³ The statutory reasons are stipulated in Article 39 and item (1) and item (2) of Article 40 of Employment Contract Law.
- ¹⁴ Article 82 of Employment Contract Law.
- ¹⁵ Article 22 of Employment Contract Law.
- ¹⁶ Article 37 of Employment Contract Law.
- ¹⁷ Article 38 of Employment Contract Law.
- ¹⁸ Article 43 of Employment Contract Law.
- ¹⁹ Article 46 of Employment Contract Law.
- ²⁰ Article 48 of Employment Contract Law.

Overtime Law and Litigation in the US

This article is intended to provide an overview of the federal law regarding overtime pay and some of the exemptions to those requirements, as well as a synopsis of significant settlements and verdicts in actions that involved alleged overtime violations

Elizabeth H Lindh
Keesal, Young & Logan

Employers in all industries in the United States ('US') are increasingly confronted with issues regarding the proper classification and compensation of employees under the state and federal wage and hour laws. The wage and hour laws mandate the payment of minimum wages to employees, prescribe the maximum hours that may be worked, and set forth the requirements for overtime pay, equal pay, record-keeping and child labor.

Lawsuits alleging violations of state and federal wage and hour laws are commonplace and frequently concern allegations that employees have not been properly compensated under the laws requiring overtime pay. The costs and penalties associated with the violation of the laws governing overtime can be very substantial. These lawsuits are often brought as class action lawsuits, which can involve hundreds or thousands of members, and can be extraordinarily costly.

Thus, it is critical that employers in the United States familiarize themselves with the laws governing overtime and keep abreast of recent developments. This article is not intended to be a comprehensive treatise, and employers are urged to carefully evaluate the applicability of the federal and state overtime requirements to their workforce.

Federal Overtime Laws

Federal wage and hour laws are codified for the most part in the Fair Labor Standards Act ('FLSA'). Further interpretation of these laws is provided in the Code of Federal Regulations and the Wage and Hour opinion letters and interpretive releases issued under the FLSA. These laws are administered by the US Department of Labor Wage and Hour Division ('DOL').

Among other things, the federal wage and hour

laws generally require that employees be paid a minimum wage of at least \$5.85 per hour, as well as overtime compensation of time and one-half for hours worked in excess of 40 hours per week.¹ The federal law does not require payment of overtime for hours worked in excess of eight hours in a day, although certain states impose that requirement.²

Most states have their own wage and hour laws and wage orders that can differ significantly from the federal law.³ Employers are subject to and must comply with both the state and federal wage and hour laws. It is important to keep in mind that where there is a conflict between state and federal law, or between the FLSA and any other federal law, the law that provides the greater protection or benefit to the employee governs.⁴ For example, employees must be compensated at the higher of the state or federal minimum wage rate and must comply with any state daily overtime requirements.

Applicability of the FLSA

A business must first determine whether the FLSA overtime provisions apply to its workers. The FLSA only applies to employees, which include foreign employees working in the United States on temporary guestworker visas.⁵ Individuals who are independent contractors are not subject to the FLSA.⁶ However, the fact that a business labels or considers an individual to be an independent contractor is not dispositive. Rather, the courts will apply the 'economic realities test' to determine if the worker is in fact an independent contractor.⁷

The vast majority of employers are covered by the FLSA. In general, any employer that is an 'enterprise engaged in commerce or in the production of goods for commerce' is subject to the FLSA and all of its employees are entitled to its protections, unless they are otherwise exempted.⁸ Two criteria must generally be met. First, under the 'commerce test,' the enterprise must have two or more employees engaged in either interstate

commerce or the production of goods for interstate commerce or in handling, selling, or otherwise working on goods moved in or produced for use in interstate commerce.⁹ Additionally, most enterprises need to have annual gross sales or business of \$500,000 or more, exclusive of certain excise taxes.¹⁰

Even if an 'enterprise' is not covered under the FLSA, an employee of the enterprise is still individually covered under the FLSA if he or she is engaged in interstate or foreign commerce, or in the production of goods for interstate or foreign commerce, or 'is employed in any closely related process or occupation directly essential to thereof, in any state.'¹¹

Exemptions to the FLSA Overtime Requirements

Most employees are covered by the overtime provisions of the FLSA, and thus, entitled to overtime pay for hours worked in excess of 40 hours per week, unless they fall within an exemption to the FLSA. Most wage and hour lawsuits involve issues regarding the proper classification of employees, and whether employees are exempt from the minimum wage, overtime, meal and rest period and/or reporting provisions of the wage and hour laws.

Each potential exemption must be reviewed carefully, as some exemptions exempt employees from the overtime provisions or child labor laws only, while others exempt employees from both the minimum wage requirements and overtime requirements, and others provide an exemption from the minimum wage, overtime and child labor provisions.¹²

In addition, federal and state law governing exemptions often differ. An individual who qualifies as exempt under the FLSA may not be exempt under a particular state's law and vice versa. Thus, it is imperative that employers apprise themselves of both the federal and state laws applicable in the states in which they employ individuals.

Employers must also educate themselves regarding any applicable collective bargaining agreements, as these agreements may preclude reliance on an exemption. Collective bargaining agreements can not reduce or waive the benefits afforded under the FLSA, but may provide greater benefits (higher pay, higher overtime premiums, shorter workweeks, etc).¹³

It is important to note that an employer can not confer exempt status on an employee simply by putting an employee on a fixed salary, or giving an employee a glorified title or inflated job description. Nor does the fact that an employee asks or agrees to be classified as an exempt employee or to be paid a fixed salary confer

exempt status on the employee. Rather, the courts will look at the actual compensation and actual duties performed by the employee in determining whether the employee is exempt. If an employee's actual salary or duties do not satisfy the FLSA or state law tests, the employee will not be considered exempt, regardless of the employee's title or how the employer has classified the employee.

Some principal exemptions to the overtime requirements of the FLSA are discussed below. There are numerous other exemptions that are not discussed herein.

The Federal White-Collar Exemptions

Under the FLSA, there are three primary 'white-collar' exemptions: the executive exemption, the administrative exemption and the professional exemption. In order to fall within these exemptions, employees must meet certain salary requirements and perform enumerated duties. The salary test is met if an employee has a salary (or in the case of the administrative and professional exemptions, a fee or a salary) of at least \$455 per week, exclusive of board, lodging or other facilities, or \$23,660 per year.¹⁴

Different states have different salary criteria. For example, in California, in order to meet the salary test, an employee must receive a 'monthly salary equivalent to no less than two times the state minimum wage for full-time employment.'¹⁵ Thus, the current minimum salary in California is considerably higher than the federal minimum, and is equal to \$2,600 per month, or \$31,200 per year, and will increase as of January 1, 2008 to \$2,773.33 per month, or \$33,280 per year.

Notably, if an employee has total annual compensation of over \$100,000 and meets any one of the duties or responsibilities (rather than all of the duties) of an executive, professional or administrative employee set forth below, the employee is considered exempt under the FLSA.¹⁶

The Executive Exemption

In order to qualify as exempt under the federal executive exemption, an individual must meet the salary test described above, and 1) his or her primary duty must be management of the enterprise or of a department or subdivision thereof; 2) he or she must regularly direct the work of two or more other full-time employees (or the equivalent); and 3) he or she must have the authority to hire or fire employees, or 'particular weight'¹⁷ must be given to his or her suggestions and recommendations as to the hiring, firing, promotion, demotion or any other change in employees' status.¹⁸ Individuals who own 20% or more of an enterprise and who are actively engaged in the management of the enterprise automatically fall within the executive exemption.¹⁹

The Administrative Exemption

The federal administrative exemption covers employees who do not necessarily supervise other employees but who work as executive or administrative assistants, in other staff positions (*ie* human resources managers, insurance adjusters, purchasing agents, certain financial services industry representatives) or who perform special assignments.²⁰ In order to qualify under the administrative exemption, an employee must meet the salary test and the employee's primary duty: 1) must be the performance of office or non-manual work directly related to the management or general operations of the employer or the employer's customers; and 2) must include the exercise of discretion and independent judgment with respect to matters of significance.²¹

The Professional Exemption

The federal professional exemption applies to individuals who meet the salary test and who are either in a 'learned' profession or 'creative' profession.²² To be considered exempt as a 'learned' professional, an employee must 'perform work requiring advanced knowledge in a field of science or learning, which is customarily acquired through a prolonged course of specialized intellectual instruction.'²³ Although an academic degree is not absolutely required to establish that this exemption applies, it is considered a good indicator, as long as it is necessary or related to the work performed.²⁴ Included in this exemption are professions in law, medicine,²⁵ engineering, accounting, teaching, various science professions, and pharmacy, and athletic trainers with academic training, among others.

'Creative' professionals are individuals whose primary duty is work that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Examples of 'creative' professionals are musicians, actors, writers, some painters, some cartoonists, some writers and journalists, graphic artists, and composers.²⁶

Computer Employee Exemption

Computer programmers, systems analysts, software engineers and other 'similarly skilled workers in the computer field' may be exempt as professionals under the FLSA if they are paid on a salary or fee basis equal to at least \$455 per week (exclusive of board, lodging or other facilities) or \$27.63 per hour and their primary duty consists of: '1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; 2) the design, development, documentation, analysis, creation, testing or

modification of computer systems or programs, including prototypes based on and related to user or system design specifications; 3) the design, documentation, creation, testing or modification of computer programs related to machine operating systems;' or 4) a combination of these duties.²⁷ This exemption does not apply to individuals engaged in the manufacture or repair of computer hardware and related equipment or to individuals who are not primarily engaged in computer systems analysis and programs (*ie* engineers, drafters and others involved with computer-aided design software).²⁸

Outside Sales Exemption

The federal outside sales exemption applies to employees who are customarily and regularly engaged away from the employer's place of business and whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities. There are no salary requirements for this exemption.²⁹

The Seamen Exemptions

Seamen on foreign vessels are exempt from the minimum wage and overtime requirements of the FLSA.³⁰ Seamen on American vessels are exempt from overtime only.³¹ A 'seaman' must perform service aboard a vessel 'which is rendered primarily as an aid in the operation of such vessel as a means



Photo: Daniela Andreea

of transportation³² Sailors, stewards, engineers, radio operators, firemen, doctors, pursers, cooks are generally considered 'seamen' if they perform the activities of a seaman for at least 80 per cent of the workweek.³³ Employees engaged in loading, unloading, the construction of docks or other structures or engaged in dredging operations are considered to be engaged in industrial or excavation work, and are not generally 'seamen' under the FLSA.³⁴

Costs Associated With Wage and Hour Violations

The costs associated with violations of the wage and hour laws can be enormous. If a violation is found, the employer will be required to compensate the aggrieved employees for any unpaid wages.³⁵ Additionally, liquidated damages are mandatory for FLSA overtime violations unless the employer proves that it acted in good faith and had reasonable grounds to believe that its conduct was consistent with the law.³⁶ Prejudgment interest on back pay may also be awarded.

Additionally, under the FLSA, the Wage and Hour Division of the DOL can assess penalties against the employer of up to \$1,100 for each repeated or willful violation of the federal minimum wage or overtime requirements.³⁷ Many states also impose significant penalties for wage and hour violations.

Further, if there is a violation of the overtime requirements of the FLSA, the employer is not only be responsible for its own attorneys' fees, but is also responsible for the plaintiff's attorneys' fees and costs.³⁸

Litigation Involving Overtime Issues

Wage and hour lawsuits can and often are brought by individual employees on behalf of themselves. However, a growing trend in employment litigation is class action or collective action lawsuits alleging violations of the federal and/or state wage and hour laws. These suits can involve thousands of class members and can be very complex, time-consuming and expensive.

Multiple plaintiff actions under the FLSA are generally referred to as collective actions. They differ procedurally from traditional class actions in that in an individual must 'opt-in' by providing written consent to the court (as opposed to traditional class actions where qualified individuals are part of the class unless they opt out) to become part of the class.³⁹ Additionally, some courts have held that the standards for establishing an opt-in class under the FLSA are less stringent than the standards to determine whether a class exists in a traditional class action.⁴⁰

Due to the risks and costs associated with wage and hour class or collective actions, they often result in substantial settlements. For example, in *Rosenburg v International Business Machines Corp*, Dkt No C-06-0430 (ND Cal), 32,000 system administrators, network technicians and other technical employees in 15 states sued IBM for improperly classifying them as exempt and failing to pay them overtime. The case settled for \$65 million.

In November 2007, the *Staples Overtime Cases*⁴¹ brought by operations managers and sales managers who alleged that they were misclassified as exempt employees and denied overtime pay were settled for \$38 million.

In *Lin v Siebel Systems, Inc*, No CIV435601 (Cal Super Ct, San Mateo), 800 California software engineers claimed that they were misclassified as exempt employees, were not paid overtime wages, and that the company failed to properly record their hours worked under the wage and hour laws. The case settled for \$27.5 million.

In 2006, Wells Fargo settled *Gerlach v Wells Fargo & Co*, 2006 WL 824652 (ND Cal March 28, 2006), a case brought by 4,500 Business Systems Consultants and e-Business Systems Consultants alleging that they were improperly classified as exempt in order to avoid paying overtime wages. The case settled for \$12.8 million.

In *Goddard v Longs Drug Stores*, No RG04141291 (Cal Super Ct, Alameda) and



Robotnick v Longs Drug Stores, No BC312591 (Cal Super Ct, Los Angeles), over 1,000 drug store managers and assistant managers alleged that they were improperly classified as exempt employees ineligible for overtime wages and were not afforded rest and meal breaks in violation of California law. The case settled for \$11 million.

The financial services industry has been hit hard by wage and hour class actions alleging that stockbrokers and other employees are misclassified as exempt. These have resulted in eight figure settlements in some cases.

Cases that proceed to trial can result in large monetary judgments. For example, in *Morgan v Familydollar Stores, Inc.*, 2006 WL 1388201 (ND Ala March 31, 2006), a jury rendered a verdict of \$16.6 million for willful violations of the FLSA overtime provisions where store

managers were improperly categorized as exempt.

Conclusion

The risks and costs associated with wage and hour violations in the United States are simply too great to ignore. It is essential for employers to keep apprised of the federal and state wage and hour laws and to comply with them. Employers need to carefully and continually evaluate their workforce and ensure that their employees are properly classified and properly compensated.

Keesal, Young & Logan has offices in Los Angeles/Long Beach, San Francisco, Seattle, Anchorage and Hong Kong, with employment practices in each office dedicated to advising clients in various industries and litigating diverse employment issues.

Notes:

- ¹ 29 USC §§ 206(a)(1) & 207(a). Effective July 24, 2008, the federal minimum wage will increase to \$6.55 per hour, and effective July 24, 2009, the federal minimum wage will increase to \$7.25 per hour.
- ² Alaska, California, Colorado and Nevada have daily overtime requirements that impose the maximum hours that may be worked in each day before overtime pay is required.
- ³ For example, California, Colorado, Connecticut, New York and Vermont have industry wide wage orders that set forth the requirements for particular industries.
- ⁴ 29 USC § 218(a); 29 CFR § 778.5.
- ⁵ See *Castellanos-Contreras v Decatur Hotels, LLC*, 488 F Supp 2d 565 (ED La 2007).
- ⁶ See 29 USC § 207; 29 CFR § 780.1 ('These requirements are applicable, except where exemptions are provided, to employees.');
- ⁷ See *Donovan v Tehco, Inc.*, 642 F2d 141 (5th Cir 1981).
- ⁸ See *Real v Driscoll Strawberry Assocs, Inc.*, 603 F2d 748, 754 (9th Cir 1979).
- ⁹ 29 USC § 203(s).
- ¹⁰ 29 USC § 203 (s)(1)(A)(i).
- ¹¹ 29 USC § 203(s)(1)(A)(ii); 29 CFR §§ 779.261-779.264.
- ¹² See *Zorich v Long Beach Fire Dept & Ambulance Serv, Inc.*, 118 F3d 682 (9th Cir 1997); 29 CFR §§ 776.8-776.17.
- ¹³ 29 CFR § 780.2.
- ¹⁴ 29 CFR § 541.4.
- ¹⁵ 29 CFR § 541.600.
- ¹⁶ Cal Lab Code § 515 (a).
- ¹⁷ 29 CFR § 541.601.
- ¹⁸ 29 CFR § 541.105.
- ¹⁹ 29 CFR § 541.101.
- ²⁰ 29 CFR § 541.203. While the regulations generally state that insurance claims adjusters meet the duties requirement of the administrative exemption, recent cases holding otherwise and a DOL opinion letter have made this less clear. See DOL Opinion Letter 2005-26, August 26, 2005.
- ²¹ 29 CFR §§ 541.200-541.204.
- ²² 29 CFR §§ 541.300-541.304.
- ²³ 29 CFR § 541.301(a).
- ²⁴ 29 CFR § 541.301(d).
- ²⁵ Individuals licensed and engaged in the practice of law or medicine are exempt from the salary and fee requirements. 29 CFR §§ 541.304 & 541.600(e).
- ²⁶ 29 CFR § 541.302.
- ²⁷ 29 CFR § 541.400.
- ²⁸ 29 CFR § 541.401.
- ²⁹ 29 CFR § 541.500.
- ³⁰ 29 USC § 213(a)(12).
- ³¹ 29 USC § 213(b)(6).
- ³² 29 CFR §§ 783.31 & 783.37.
- ³³ 29 CFR §§ 783.30 & 783.32.
- ³⁴ 29 CFR § 783.34.
- ³⁵ 29 USC § 216(b).
- ³⁶ 29 USC § 216(b).
- ³⁷ 29 USC § 216(b); 29 CFR § 579.5.
- ³⁸ 29 USC § 216(b).
- ³⁹ 29 USC § 216(b); 29 CFR § 790.20.
- ⁴⁰ See *Grayson v K Mart Corp.*, 79 F3d 1086, 1096 (11th Cir 1996), *cert denied*, 117 SCt 435, 136 LEd2d 332, *cert denied* 117 SCt 447, 136 LEd2d 347.
- ⁴¹ Judicial Council Coordination Proceeding No 4235, Lead Case No 816121 (Cal Super Ct, Orange).

Termination of an Employee under Korean Law

This article discusses the minimum legal requirement under the Labor Standards Act ('LSA') with regard to termination of employment in Korea

Sang Hoon Lee

Lee & Ko

In connection with termination of employment, Korea does not recognize the concept of 'termination at will' which is readily recognized in common law countries. Certain legal limitations apply to termination of employment. The minimum legal requirement for termination of employment are contained in the Labor Standards Act (the 'LSA'), and these legal requirements will be discussed below.

Substantive Limitation (Requirement of Just Cause)

General

Scope of Employee

Under the LSA, an employee, including a probationary employee, may be terminated only for 'a just cause.' The termination provisions of the LSA dealing with just cause for termination apply to a workplace which has five or more employees.

Under the Korean Commercial Code ('KCC'), a director or statutory auditor of a company (who is appointed at a general meeting of shareholders) is considered to be under the 'mandate' relationship with the company and thus is not considered an employee for the purpose of the LSA. However, to the extent the director or the statutory auditor performs executive, managerial or other corporate functions under the supervision of the representative director of the company he or she would be considered an employee. The representative director of a company is not considered an employee because he or she is the highest-ranking officer in charge of the management of the company.

Just Cause Requirement

'Just cause' is not defined in the LSA, however, its definition may be inferred from court precedents. Courts define the term 'just cause' as 'a cause that is attributable to the employee to a point where the employment contract may not be continued under socially accepted principles'. In practice, the following categories are generally recognized as a just cause: (i) serious failure to perform work due to long period of absence due to sickness or incarceration, (ii) serious violation of internal employment regulation, (iii) conviction of serious crime; or (iv) falsification of resume, (v) disclose of trade secret, (vi) sexual harassment, *etc.* In practice, there are not many court precedents that deal with the termination due to poor performance, and the courts tend not to find poor performance alone to justify the termination. It would be likely that the determination of just cause in cases of termination due to poor performance must be made based on a clear and objective standard.

Termination Based on Managerial Reasons

Article 24 of the LSA allows layoff based upon managerial reason as the termination with just cause when certain requirements are met. Under the LSA, there are five rules (detailed below) which apply to laying off excess employees.

- (i) **Imminent managerial necessity.** The LSA requires an 'imminent managerial necessity' before an employer terminates employees for a managerial reason. Mergers and acquisitions ('M&A's) and transfer of business units to starve off 'business deterioration' are deemed to be an imminent managerial necessity under the LSA. Currently, however, there is no



Photo: Carlos Santa Maria

established court precedence on the precise meanings of the ‘imminent managerial necessity’ or ‘business deterioration’ as requirements for layoff of employees. In general, the court has espoused the following three theories in interpreting the phrase imminent managerial necessity:

- i) the employer should face insolvency;
- ii) the employer is reasonably expected to face insolvency or deterioration of business in the near future; and
- iii) the employer needs to restructure its operation, irrespective of the possibility of its insolvency.

The court seems to have stressed one theory over the others depending on the economic climate involved (*eg*, during the recent economic crisis, the court has imposed less stringent requirements on employers wishing to lay off its employees). It seems that now the court is basing more and more of its decisions on the second or third theory mentioned above: in other words, the employer does not have to actually face the insolvency to lay off its employees. However, as noted above, this is an area where there is no clear-cut answer.

- (ii) **Efforts to Avoid Layoffs.** The LSA says that the employer should use his best efforts to avoid layoffs. As examples of such efforts, the following may be cited: suspend taking new employees; suspend operation of the business; decrease work hour; reduce salary and other expenses; change work

assignment; retraining; and invite early retirees. If layoffs are necessary, there must be a rational basis for selecting employees to be laid off. In general, a rational basis is understood to mean: that day workers should be terminated before terminating others; and, that termination should be based on individual work review, experience; and, degree of skill. LSA further expressly states that discrimination based on sex of the employee is forbidden.

- (iii) **Consultation with labor.** Management must negotiate with the employees’ labor union (representing half or more of the total workforce), or where there is no union, a representative elected by vote of half or more of the workers. Additionally, at least 50 days’ notice must be given to labor union or representative before the effective date of layoffs, during which time management and labor union or representative will coordinate in good faith the matters related to layoffs (*eg*, method of avoiding layoffs, basis for selecting employees to be laid off, *etc*).
- (iv) **Government report.** In the following cases, the employer must report to the Ministry of Labor: i) if the employer has 99 or less employees and wants to terminate ten or more such employees within one month; ii) if the employer has 100 to 999 employees and wants to terminate ten percent or more of such employees within one month; and, iii) if the employer has more than 1,000 employees and wants to terminate 100 or more of such employees within one month. Please note that the employer has to include in its report the following: reason for termination of employment; expected number of employees to be terminated; contents of the consultation with the representative of employees; and schedule for planned termination of employment.
- (v) **Good-faith effort to re-hire.** Where an employer has laid off workers due to managerial necessity, if the employer subsequently hires new workers within the following two years, the employer is required to make a good-faith effort to locate and offer positions to its former employees.

In practice, however, it is very difficult to satisfy all the requirements relating to termination of employees. Thus, many companies try to circumvent the situation by employing voluntary resignation system where the companies pay

monetary compensation as special termination fee in addition to the salaries earned and obligor severance pay (*see below*) to employees who volunteer to resign. There is no set standard for the special termination fee amount which usually is in the range of amount representing six months to 30 months salary. One related issue would be that some of the employees who are essential for the business might also volunteer for resignation. Thus, if the employer intends to employ the voluntary resignation systems, then it would be helpful if it had the discretion to select the target employees.

Procedural Limitation

The LSA does not specifically require any disciplinary procedures to be taken before terminating an employee, and therefore, it is not necessary to convene a disciplinary committee meeting or hearing where the employee is provided with an opportunity to defend himself or herself. But, if the company's regulations or work rules provide for such procedures, then termination may be invalidated if the procedures are not followed. By the same token, termination of an employee without obtaining consent of the labor union would be invalid, if the collective bargaining agreement contains provisions requiring such consent; provided, however, that if the collective bargaining agreement merely requires the employer to consult with the labor union before terminating an employee, the employer may be able to terminate an employee without obtaining labor union's consent as long as the labor union was consulted on that issue.

Other Statutory Limitations

Notice of Termination

According to Article 26 of the LSA, the employer must give the employee at least 30 days prior notice of termination, or in lieu thereof, pay compensation of at least 30 days ordinary wages, regardless of the cause of termination. This requirement applies to a work place which has less than five employees as well. Violation of this requirement may result in imprisonment up to two years or criminal fine of up to KRW 10 million.

In addition, according to Article 26 of the LSA, in case of the workplace which has five or more employee, the notice of termination shall be effective when it is given in writing including the reason and the date of termination.

However, there are certain limited exceptions to the prior notice requirement, including those cases i) where (a) the employer's business cannot

be continued due to a natural disaster, war or other unavoidable reasons or (b) the employee in question has intentionally caused substantial interference to the employer's business or intentionally caused property damages to the employer as determined by the order of the Korean Ministry of Labor, or ii) where the employee (a) has been hired on a daily basis and has worked for less than three consecutive months, (b) has been hired for a fixed period not exceeding two months, (c) has been hired as a monthly paid employee and has worked for less than six months, (d) has been hired for a seasonal work for a fixed period not exceeding six months, or (e) the employee is in a probationary period not exceeding three month.

Time Limitation on Termination

An employer may not dismiss an employee during a period of suspension of work for medical treatment of occupational injury or disease and within 30 days immediately thereafter. Further, an employer may not dismiss any female employee during a period of suspension of work for childbirth and within 30 days immediately thereafter. The foregoing prohibitions do not apply where the employer has paid a lump sum compensation provided in Article 84 of the LSA or where the employer cannot continue to conduct a business. If the employer terminates an employee during the above-mentioned period, its officers may be subjected to imprisonment up to five years or criminal fine up to KRW 30 million may be imposed on the employer.

Severance Payment

If an employer has five or more employees, upon termination of the employment relationship for any reason including managerial necessity, each employee who has been employed full time for at least one year is entitled under Article 8 (1) of the Employee Retirement Benefit Guarantee Act to a minimum severance payment equal to not less than 30 days average wages for each year of service (including partial years pro rata). The average wages is calculated by dividing the total wages paid to the employee during the last three months of service by the number of days in the three months. Currently, the obligation to pay severance payment applies to a workplace which has five or more employees. However, this obligation will be expanded to apply to workplaces which has less than five employees as well after 2008 (the effective date has not been determined yet).

The employer must pay all wages including severance within 14 days from the date of

termination of the employee; provided that the foregoing period may, under special circumstances, be extended by mutual agreement between the employer and the employee. Failure to pay all wages including severance as above will be subject to an imprisonment up to three year or a fine up to 20 million KRW.

Article 8 (2) of the Employee Retirement Benefit Guarantee Act permits payment of severance to an employee before the termination of his employment with respect to the period of his service up to the date of such payment if such employee requests such payment. After such payment, the number of years of service is counted anew from the date of such payment.

Effect of Wrongful Termination

In case an employer violates the LSA (*eg*, it terminates employee without just cause), the employer may be required by the court in the civil proceeding i) to reinstate the wrongfully terminated employee; ii) to pay the unpaid salary accrued during the period between the wrongful termination and the reinstatement; and, iii) to pay condolence money if the violation of the LSA in question is exceptionally serious (*eg* the wrongful termination did not only lack a just cause but was also aimed at harassing the employee).

However, in addition to the foregoing requirements or as an alternative to the foregoing requirements (depending on how the wrongfully terminated employee seeks redress), the employer may also be ordered by a labor commission (a body established within the Ministry of Labor) to reinstate the wrongfully terminated employee. Although the enforceability of such order by a labor commission is doubtful due to absence of a provision granting the enforceability of such order, in many cases, terminated employees tend to use a labor commission to obtain redress as it is less costly and less time consuming than a court proceeding. Under the revision of the LSA, after July 1, 2007, failure to comply to an re-instation order issued by a labor commission for wrongful

terminations will be subject to an administrative fine (to enforce performance) up to 20 million KRW; and failure to comply to a conclusive remedial order will be subject to an imprisonment up to one year or a fine up to 10 million KRW.)

Fixed-Term Employees

As of July 1, 2007, the Act on Protection of Fixed-Term and Part-Time Employees has become effective, and unless one of the six exemptions mentioned below applies, the term of employment of fixed-term employees cannot exceed two years.

If the fixed-term employee's period of employment exceeds two years, the employee will be regarded as a regular employee and the limitations as discussed above will apply, including the prohibition on termination without just cause.

As mentioned below, the term of employment of fixed-term employee may be longer than two years if there is a reasonable ground for having a longer term as follows:

- (i) if it is necessary for completion of business or particular function;
- (ii) if it is necessary to fill the vacancy of an employee who is on leave of absence or secondment ;
- (iii) if it is necessary for the employee to fulfill education or vocational training;
- (iv) if the employee is 55 years old or older;
- (v) if the employee's professional knowledge and skill is necessary for the employer or the position is offered in accordance with the government's social benefit or unemployment policies, as determined by the Presidential Decree; and
- (vi) any other reasonable circumstances as determined by the Presidential Decree.

The foregoing limitation with respect to the term of employment applies to any new employment contract that is entered into or any existing employment contract that is renewed, on or after July 1, 2007.



An Invitation to Join the Inter-Pacific Bar Association

The IPBA is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organizing conference in Tokyo that was attended by more than 500 lawyers from throughout Asia and the Pacific. It is now the pre-eminent organization in the region for business and commercial lawyers, with over 1,600 members from 70 jurisdictions.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy, they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organizations throughout Asia and the Pacific, the IPBA plays a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees overleaf. All of these committees are active and have not only the chairs named, but a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic four-day conference, usually held in the first week of May each year. Previous annual conference have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul and Bali, attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also co-operated with other legal organizations in presenting conferences — for example on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal*.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

• Standard Membership	US\$195 / ¥23,000
• Three-Year Term Membership	US\$535 / ¥63,000
• Lawyers in developing countries with low income levels	US\$ 100 / ¥11,800
• Young Lawyers (under 30 years old)	US\$ 50 / ¥6,000

Annual dues will cover the period of one year starting from January 1 and ending on December 31. Those who join the Association before August 31 will be registered as a member for the current year. Those who join the Association after September 1 will be registered as a member for the rest of the current year and for the following year.

Qualified lawyers who attend the IPBA Annual Meeting and Conference and pay the non-member conference fee will be automatically registered as a member for the then current year ending on December 31.

Membership renewals will be accepted until July 31.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

IPBA has established a new Three-Year Term Membership category which will come into effect from the 2001 membership year.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the Association by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US\$500) for the then current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ('Associate Member'), who may take part in any Annual Conference, committee or other programs with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates US\$500 / ¥50,000

Payment of Dues

Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your co-operation is appreciated in meeting the following conditions.

1. A US dollar cheque should be payable at a US bank located in the US. US dollar cheques payable in Japan may be returned to sender depending on charges.
2. A Japanese yen check should be payable at a Japanese bank located in Japan.
3. Japanese yen dues shall apply to all credit card payment. Please note that the amount charged will not be an equivalent amount to the US dollar dues.
4. Please do not instruct your bank to deduct telegraphic transfer handling charges from the amount of dues. Please pay related bank charges in addition to the dues.

IPBA Secretariat

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp Website: www.ipba.org

See overleaf for membership
registration form



IPBA SECRETARIAT

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp Website: www.ipba.org

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

- Standard Membership.....US\$195 or ¥23,000
- Three-Year Term Membership.....US\$535 or ¥63,000
- Lawyers with low income levels in developing countries.....US\$100 or ¥11,800
- Young Lawyers (under 30 years old).....US\$ 50 or ¥ 6,000

Name: Last Name _____ First Name / Middle Name _____

Birthday: year _____ month _____ day _____ Sex: M / F

Firm Name: _____

Jurisdiction: _____

Correspondence Address: _____

Telephone: _____ Facsimile: _____

Email: _____

CHOICE OF COMMITTEES:

- | | |
|---|--|
| <input type="checkbox"/> Aerospace Law | <input type="checkbox"/> Insurance |
| <input type="checkbox"/> Banking, Finance and Securities | <input type="checkbox"/> Intellectual Property |
| <input type="checkbox"/> Corporate Counsel | <input type="checkbox"/> International Construction Projects |
| <input type="checkbox"/> Cross-Border Investment | <input type="checkbox"/> International Trade |
| <input type="checkbox"/> Dispute Resolution and Arbitration | <input type="checkbox"/> Legal Practice |
| <input type="checkbox"/> Employment and Immigration Law | <input type="checkbox"/> Maritime Law |
| <input type="checkbox"/> Energy and Natural Resources | <input type="checkbox"/> Tax Law |
| <input type="checkbox"/> Environmental Law | <input type="checkbox"/> Technology and Communications |
| <input type="checkbox"/> Insolvency | <input type="checkbox"/> Women Business Lawyers |

METHOD OF PAYMENT (please read each note carefully and choose one of the following methods):

- US\$ Check/Bank Draft/Money Order
– payable at US banks in the US only (others may be returned to sender)
 - Japanese yen ¥ Check/Bank Draft
– payable at Japanese banks in Japan only (others may be returned to sender)
 - Credit Card – **Please note that Japanese yen dues shall apply to payment by credit cards.**
 VISA Master Amex (Verification Code): _____
Card Number: Expiration Date: _____
 - Bank Wire Transfer – Please make sure that remitting bank’s handling charges are paid by the remitter him/herself.
to The Bank of Yokohama, Shinbashi Branch (Swift Code: HAMAJPJT)
A/C No. 1018885 (ordinary account)
Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan
- Signature: _____ Date: _____

PLEASE RETURN THIS FORM WITH REGISTRATION FEE OR PROOF OF PAYMENT TO:

Inter-Pacific Bar Association
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp