

International newsletter

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In this issue...

This quarter we have updates from China, Singapore, Hong Kong and Australia as well as a special global report focussing on gender diversity in the boardroom.

New Sydney office

We are pleased to introduce Jenni Priestley, employment partner based at Clyde & Co's Sydney office. Jenni heads up a team of five employment law specialists and more information about her can be found in our question and answer article inside on page 15.

International Seminar Programme

Our 2013 programme began in January with a workshop panel session on European cross-border restructuring with our partners L&E Global (see our report inside on page 2). Coming up next are:

- Thursday 16 May – Shalini Agarwal on International Assignments to India
- Thursday 13 June – Matt Durham on International Assignments to China
- Thursday 4 July – Rebecca Ford on International Assignments to the Gulf

Maritime Labour Convention

Shipping clients need to know about the ratification of the Maritime Labour Convention which represents the greatest change to regulation of working conditions for seafarers in a generation. At Clyde & Co we have a panel of experts including employment lawyers [Paul Newdick](#), [Heidi Watson](#) and [Peter Roser](#) who will be speaking at various international conventions on the subject. In London, these include the UK based Intertanko and Intercargo Members seminar in March, the International Maritime Employers' Council Conference in April and the Standard P&I Club seminar in July 2013. Also in July, the team will be visiting Singapore where they will be giving a two day training course organised by Informa, as well as separate Clyde & Co seminar.

“Best Managed International Firm”

Clyde & Co have been named “Best Managed International Firm” at the Managing Partner Forum (MPF) Awards in association with the Financial Times and the Harvard Business Review.

The MPF Awards “recognise advisory firms across the professions that have been judged by independent experts as being best managed, thereby making them highly attractive to clients and employees.” The award for “Best Managed International Firm” is for a firm that “can demonstrate that well thought-out strategies have helped its business achieve superior returns and leadership in its chosen markets and sectors”.





European cross border restructuring – Clyde’s join up with L&E Global to advise

Nick Dent, Partner and employment law specialist based in Clyde & Co’s London office reports on a recent panel session at Clyde’s London offices with L & E Global, a worldwide network of employment lawyers.

On 24 January 2013, 82 attendees from HR and the world of employment law descended on Clyde & Co’s London office to attend a seminar hosted by Clyde & Co and their colleagues at L&E Global. The seminar took the form of a case study Q&A, with the HR Director played by Nick Dent (Clyde & Co) seeking advice from a panel of experts from seven European jurisdictions on the pan-European restructuring of BigPharma, a US multi-national pharmaceutical company. John Sander (L&E Global, USA) took on the role of the President Europe of BigPharma.

Proceedings kicked off with President Europe giving his orders to HR Director on how he wants the reorganisation to work.

John: “Nick, I know you and these top-notch attorneys from Clyde’s and L&E Global have all this covered, and we’ll bring this in on time and within budget. Just keep me posted on how we’re doing, so I can report the good news to headquarters.”

John’s demands:

- Solid projections of time and cost
- Business can’t be disrupted
- No changes to be made to the restructuring strategy
- No loss of confidential information
- Reduce number of US-expats
- No adverse publicity

The restructuring plan: slashing about a third of the workforce across six European countries, including total closure of one of two plants in Turin, Italy.

John: “Oh, and Nick, don’t forget: I want all the staff in Europe informed about the restructuring of the European operations at the same time. I don’t want my valuable senior executives being poached because they feel insecure about their jobs.”

Nick sought the assistance and advice of his panel of legal colleagues across Europe.

Having had some previous knowledge that France may be difficult, Nick talked first to Florence Aubonnet of L&E Global, France. His suspicions were confirmed.

Currently there is no certainty in French law. The time limits set for consultation with the works councils are not binding and even where an agreement on the plan is reached with the unions, employees have five years to bring a claim. The key is preparation in advance of the announcement. A ray of hope came with Florence’s reassurance that the law is changing and a new law giving more certainty, security and visibility is expected in June 2013. Florence reassured Nick that the management’s kidnapping by the workforce happens quite rarely, and in practice only happened on one particularly sensitive restructuring consisting of the total closure of the sites.

Nick then turned to Italy for some encouragement that not everywhere was going to be so tricky. Olimpio Stucchi of L&E Global, Italy advised that since both plants in Turin were part of the same group, Italian law required cross-selection in order to close one plant. However, one way to get around this is to create a new company, transfer one of the businesses into that company, and then you should be able to shut it down. No cross-selection necessary.

Interesting thought, not the simplest, but food for thought and a possible way round.



Next to Germany, where Kara Preedy also drilled that preparation ahead of any announcement of a final decision is key. The better prepared, the shorter the consultation, and the lower the cost.

Christiaan Oberman explained that the Netherlands was a consensus based society, meaning cooperation between the government, employer and employees is key and that a deal is always reached, in the end. No stress there then.

Belgium too, operating a rule of proportionality, as Filip Corveleyn explained, may not be so bad. However, beware protected workers elected to be works council representatives; even the candidates up for election are protected for these purposes.

Finally the UK, which offers a relatively short consultation period, Nick Elwell-Sutton of Clyde & Co, London advised it is best to kick off early, so that key employees don't start leaving.

Not so bad in the end. As long as we can delay France by six months (to wait for the new law to be implemented), do lots of work upfront before the announcement and become comfortable with sharing information with the works councils because we have a coherent rationale for the restructure, everything should go smoothly.

If you would like further information please contact **Nick Dent** or **Nick Elwell-Sutton**.

The speakers:

- Florence Aubonnet, L&E Global, France
- Filip Corveleyn, L&E Global, Belgium
- Nick Dent, Clyde & Co, London
- Nick Elwell-Sutton, Clyde & Co, London
- Christiaan Oberman, L&E Global, Netherlands
- Kara Preedy, L&E Global, Germany
- John L Sander, Jackson Lewis LLP, US member of L&E Global
- Olimpio Stucchi, L&E Global, Italy
- Stephan Swinkels, L&E Global, Executive Director



Changing landscape of anti-discrimination law in Australia

By Jenni Priestley, Partner and employment law specialist, based in Clyde's Sydney office.

In November 2012, the Australian Government released the *Human Rights and Anti-Discrimination Bill 2012* (the Bill) for public consideration. The draft legislation proposes significant changes to anti-discrimination laws in Australia which, if enacted, will make it easier for claimants to bring claims and place increased obligations on employers.

Framework for anti-discrimination law in Australia

At the national level, anti-discrimination law in Australia is presently characterised by a raft of statutes pertaining to specific categories of discrimination (race, sex, disability and age).

States and Territories in Australia have their own anti-discrimination laws which operate concurrently with the Commonwealth national legislation. The laws overlap in many instances, often enabling claimants to forum shop to take advantage of procedural and substantive difference.

The draft legislation consolidates the national legislation into a single Act. While consolidation is a change welcomed by many, some of the other changes proposed by the Bill are more controversial.

Proposed changes

The following proposed changes are of particular significance to employers.

Reversal of onus of proof

Perhaps the most controversial aspect of the proposed legislation is the shifting of the onus of proof from claimant to employer.

Under the Bill, where an individual is able to demonstrate a prima-facie case, there will be a presumption that the actions of the employer were discriminatory. The burden then shifts to the employer to establish that its actions were not discriminatory or that the conduct was justifiable.

In practice this change in the legislative position may mean that Australian employers will need to invest greater time and energy in defending claims of discrimination as it will be for them to prove that discrimination did not occur.

Uniform test for discrimination

The Bill proposes a uniform test for discrimination based on unfavourable treatment.

The concept of *unfavourable treatment* includes actual and proposed harassment and (controversially) conduct that offends, insults or intimidates the other person. The proposed extension of the scope of the legislation to conduct that offends or insults has been the subject of considerable negative publicity in Australia and it now appears that the Australian government may back down on the inclusion of this aspect of the legislation.

Expansion of grounds of discrimination

In addition to expanding the scope of conduct that may constitute discrimination, the Bill proposes additional grounds or protected attributes on which someone may be discriminated.

Industrial history, medical history, nationality and citizenship are sought to be included as protected attributes in addition to the existing grounds of age, sex, race and disability.

Costs

In most circumstances each party will be required to bear its own costs of representation in proceedings. This change is significant as the possibility of an adverse costs order has previously been something of a deterrent for applicants particularly in relation to spurious claims.



New defences

The Bill departs from the existing regime of specific exceptions applying to different categories of discrimination and introduces a new defence of justifiable conduct in response to all discrimination claims.

Conduct will be considered justifiable if it was undertaken in good faith and for the purpose of achieving a particular aim. Australian employers responding to discrimination claims will be required to demonstrate that the aim is was legitimate, that a reasonable person would consider that engaging in the conduct would achieve that aim and that the conduct engaged in was proportionate to the aim.

Where to from here

The proposed changes to anti-discrimination are likely to make the Commonwealth jurisdiction the forum of choice for claimants.

The draft legislation was referred to the Senate Legal and Constitutional Affairs Committee for review and to take public comment. The controversial nature of the changes proposed is evidence by the fact that the Committee received over 3000 submissions (many from employers and employer groups) in response to the draft legislation.

On 21 February 2013, the Committee issued its final report. The Committee is generally supportive of the Bill, however it has made some important recommendations including:

- Removing conduct that offends, insults or intimidates from the definition of *unfavourable treatment*
- Extending protection to discrimination on the grounds of intersex status, irrelevant criminal record and domestic and family violence
- Extending the definition of *justifiable conduct* to include conduct that was ‘reasonable in the circumstances’

While the final form of the legislation may differ somewhat from the draft released, it is likely that the majority of the changes referred to above will be incorporated.

Australian employers should be alert to the proposed changes. In particular, consideration should be given as to whether existing corporate systems and policies satisfy the requirements to take reasonable precautions and exercise due diligence in respect to the conduct of their directors, employees and agents.

If you would like further information please contact **Jenni Priestley**.



Singapore – latest developments in employment Law

Thomas Choo, Senior Associate and employment law expert based in Clasis LLC's office summarises the review currently underway in relation to Singapore employment law and outlines some changes which have made it more difficult for foreign workers to work in Singapore.

Future reforms for better protection of workers

Singapore's main labour law, the Employment Act, is currently up for review. The last review was in 2008.

The Employment Act generally covers every employee (regardless of nationality) who is under a contract of service with an employer, except:

- Any person employed in a managerial or executive position
- Any seaman
- Any domestic worker
- Any person employed by a Statutory Board or the Government of Singapore

Part IV of the Employment Act, which provides for rest days, hours of work and other conditions of service, also applies only to:

- Workmen earning not more than S\$4,500 basic monthly salary
- Employees earning not more than S\$2,000 basic monthly salary

Given the complexity of some of the issues, the Ministry of Manpower of Singapore (being the ministry of the Government of Singapore that directs the formulation and implementation of policies related to manpower in Singapore) (the "MOM") has announced that the review of the Employment Act will be conducted in two phases.

The first phase, which is envisaged to end in the first quarter of 2013, will look at extending coverage of the Employment Act (to include better protection and working conditions for professionals, managers and executives ("PMEs"), short-term contract workers and low-wage workers), improving employment standards and benefits for employees, and reducing rigidity and augmenting flexibility for employers (such as giving employers the flexibility to provide time-off-in-lieu for work done on public holidays by PMEs). The MOM has also invited members of the public to provide their feedback on these areas.

The second phase, which will commence in the fourth quarter of 2013, will examine more complicated issues that require further study – these "complicated issues" may include enhancing protection for employees in non-traditional work arrangements – such as contract work – and creating better dispute resolution mechanisms for employers and employees.

The National Trades Union Congress (being Singapore's sole national trade union centre) ("NTUC") has put forth its wish list for the upcoming review of the Employment Act. Among other things, NTUC wants at least half of Singapore's resident PME's to be covered by the Employment Act. Currently, PME's are only covered in that they can go to the Labour Court of Singapore for salary claims, and only if they earn S\$4,500 or less per month. NTUC also wishes to raise the salary cap for workers in Part IV of the Employment Act. Other suggestions, aimed at protecting vulnerable workers, include making written contracts and payslips mandatory and ensuring a minimum rest period between shifts for shift workers.

Law strengthened to prevent illegal hiring of foreign workers

The Employment of Foreign Manpower (Amendment) Bill (the "EFMA") took effect from 9 November 2012. From 9 November 2012, employers who illegally hire foreign workers will be punished with higher fines and longer jail terms. The amendments strengthen its enforcement capabilities and ensure compliance with work pass rules. The law had been passed in September 2012 to deal with various ways some employers have devised to get around tighter quotas and higher levies introduced in recent years to slow down the inflow of foreign workers. The EFMA has been amended in three ways:



- **Establish a new administrative penalty regime.** This will allow for more expeditious and effective punishment for those who bend the rules. New Commissioners for Foreign Manpower appointed by the MOM will be authorised to impose administrative financial penalties of up to S\$20,000 per infringement and/or any directions to comply
- **Create new offences and infringements with higher penalties.** This is to achieve greater deterrence, and to ensure that penalties are commensurate with potential profits by errant employers
- **Include new presumption clauses and enhance investigatory powers** to step up enforcement against syndicates and errant employers

Foreign workers to find work passes tougher to obtain

Non-residents in Singapore must hold a valid work pass before they can work in Singapore. There are generally three types of employment passes for professionals, being the Employment Pass, the Personalised Employment Pass and the EntrePass.

- The Employment Pass (“**EP**”) allows foreign professionals to work in Singapore, and applies to foreigners who earn a fixed monthly salary of at least S\$3,000, and have acceptable qualifications
- The Personalised Employment Pass (“**PEP**”) is for certain groups of existing Employment Pass holders and overseas foreign professionals. Unlike an Employment Pass, which must be cancelled when the pass holder leaves the employer, the PEP is not tied to the employer and is granted on the strength of the applicant’s merit. A PEP holder can remain in Singapore for up to six months between jobs to evaluate new employment opportunities
- The EntrePass is meant specifically for foreign entrepreneurs who would like to start a business in Singapore

The MOM has recently announced certain work-pass criteria changes, which follows earlier government curbs on foreign manpower. Top-tier foreign talent hoping to get a PEP for better job security when they work here, will soon find it tougher to qualify. From 1 December 2012, the qualifying criteria for the PEP has been raised and some of its features will be refined. This ensures that the PEP remains a premium pass for top-tier foreign talent and is in line with recent moves to raise the quality of EP holders. The changes are:

- The availability of PEP to EP holders who earn a fixed monthly salary of at least S\$12,000 and overseas-based foreign professionals whose last drawn fixed monthly salary was at least S\$18,000. This is up significantly from at least S\$3,000 to S\$8,000 or more, depending on the previous EP tier
- An increase of minimum annual fixed salary requirement from S\$34,000 to S\$144,000
- A change in the validity of the PEP from five years to three years
- New PEP holders being able to bring in their parents, spouses and children

If you would like further information please contact **Thomas Choo**.



Gender diversity in the boardroom – a global issue

By Adam Lambert, Partner and Corinna Harris, Professional Support Lawyer both employment law specialists, based in Clyde's London office.

Over the last few years, the issue of quotas for women on company boards has arisen in many countries and significant steps have been taken across the globe to increase women's presence in boardrooms. The fastest rate of change in gender diversity on boards has come from European companies, and this debate has recently resurfaced across the EU, because of a proposal to set a gender diversity target for EU publicly listed companies.

Women in the boardroom – why does it matter?

Gender balance is no longer just seen as an equal opportunity issue, but as an important part of good corporate governance. A study by Credit Suisse in August 2012¹ of 2,360 companies globally from 2005 – 2011 reveals that companies with at least one woman on their board have outperformed those with no women directors, in terms of share price performance.

It is difficult to say why gender diversity leads to better results and indeed it is difficult to identify reasons without exploring gender stereotypes to some extent. Reasons put forward include saying that boardroom diversity:

- Sends a positive signal to the market
- Fosters a better mix and balance of leadership skills on the board
- Enhances a better understanding by the board of customer preferences

Women on boards in the EU

Although a number of EU countries have adopted a quota system to bring about boardroom change, the UK has been opposed to introducing quotas and instead has introduced a number of self-regulatory (and therefore voluntary) initiatives:

- FTSE 100 companies should have a minimum of 25% female board representation by 2015, with one third of all new appointments being women and FTSE 350 companies must set their own challenging targets
- All listed companies should report annually on their boardroom diversity policy, and include gender diversity in the evaluation of the board's effectiveness

The UK Government has also recently published draft Regulations which will require quoted companies to report on the number of men and women managers and board members, as well as other gender statistics about the organisation. These Regulations come into effect for accounting periods ending on/after 1 October 2013.

By contrast, Norway, which has been the front-runner in achieving gender diversity on boards, introduced a minimum 40% quota of both genders in 2005. It has the largest percentage of women on boards in the world. Spain has also implemented a 40% quota, and listed companies have until 2015 to comply. While in France, listed companies must meet the 40% quota by January 2017, and there are also minimum gender diversity criteria for unlisted companies.

Other countries such as Belgium, Italy and the Netherlands, also have quotas but these are lower, between approximately 25-33%.

Following strong opposition from a number of EU member states, the European Commission has published a watered-down gender diversity proposal. This sets a minimum objective for EU publicly listed companies to have 40% women non-executive directors by 2020. So, if this proposal goes ahead, when making non-executive appointments, these companies will have to apply neutral, pre-established criteria and if they don't meet the 40% target, they will have to apply the positive action provisions set out in the EU legislation. That would mean that if a man and a woman are equally qualified candidates, the woman would have to be appointed, unless an objective assessment tips the balance in favour of the man.

¹Credit Suisse *Gender diversity and corporate performance* August 2012:

https://infocus.credit-suisse.com/data/_product_documents/_shop/360145/csri_gender_diversity_and_corporate_performance.pdf



Aside from dealing with non-executive directors, under the proposal, EU listed companies will also have to set their own self-regulatory targets for 2020 to ensure they have men and women executive directors, and they must report annually on progress.

It will be for the individual member states to decide what sanctions will apply to companies which fail to meet the 40% target.

Diversity developments in Asia

In comparison with Europe, the Asia Pacific region has a low number of women on boards, but significant progress is being made to improve gender diversity. Notably, in Malaysia, public listed companies must have women representing 30% of board directors by 2015.

In December 2012, the Prime Minister of the UAE announced new mandatory guidelines, that every state-owned company and government agency in the UAE must have at least one female board member. Interestingly, the UAE has linked gender and racial diversity: the target will only be satisfied if Emirati women are appointed as directors. At the moment, it would seem that in the private sector there is higher representation from ex-pat women than Emirati women, and although Emirati women represent a larger proportion of the public sector workforce than men, they are under-represented in senior public sector positions.

Although Australia hasn't implemented a gender diversity quota, listed companies have to provide certain information about gender diversity within their organisation in their annual accounts, as well as set targets for increased numbers of women both on boards and in executive positions.

Different approaches to tackling diversity and equality issues

Discussions on how to tackle gender diversity in boardrooms undoubtedly lead to comparisons with how certain countries have sought to include under-represented groups. In some situations, setting quotas inevitably leads to positive discrimination. The criticism often made about this approach is that it can lead to a less-qualified workforce.

Affirmative action, or positive discrimination, policies have been adopted in both South Africa and Northern Ireland to address two very different types of equality issues. In South Africa, positive discrimination legislation was introduced to eradicate inequalities post-Apartheid. Employers had to give preferential treatment to candidates from disadvantaged groups. A different, but still controversial, approach to affirmative action was adopted by the Police Service of Northern Ireland - for over 10 years, they recruited equal numbers of Catholics and Protestants.

Although positive discrimination isn't allowed in the UK, employers can treat disabled people more favourably on account of their disability. Also, positive action in recruitment is allowed. This means that if an employer reasonably believes that people with a protected characteristic, e.g. sexual orientation, or religion or belief, are disadvantaged or under-represented in that area of work, as long as the person with the protected characteristic is equally qualified, the employer can, but doesn't have to, treat them more favourably.

So what then is the solution to gender disparity in the boardroom? Should mandatory quotas, such as those implemented in Norway, be adopted in all countries where there is still a significant gender imbalance in boardrooms? Mandatory quotas undoubtedly have a quick and radical impact, but they are controversial and often polarise opinion – critics argue that quotas lead to under-qualified or token appointments. But setting targets and self-regulation can also be effective, especially where there is an understanding of the positives that diversity brings to businesses.

If you would like further information please contact **Adam Lambert** or **Corinna Harris**.



Clyde & Co Employment “In a nutshell” guides – Hong Kong

It is fair to say that Hong Kong has pursued a laissez-faire approach to the economy and to employment law, in the belief that free competition and minimum intervention would maximise benefits for all. This philosophy has led to a minimalist approach to employment legislation and the general observation that Hong Kong is an employer-friendly jurisdiction.

The Employment Ordinance (Cap. 57) of the laws of Hong Kong (the “Ordinance”) applies to all employers and employees and to all contracts of employment in Hong Kong. The Ordinance provides for the minimum rights and benefits to be enjoyed by employees in Hong Kong and overrules any contractual provisions which purport to reduce or extinguish the rights and benefits given to employees by the Ordinance.

This document provides a summary of the key provisions of the Ordinance.

1. Wages

Statutory minimum wage legislation came into force on 1 May 2011. In essence, wages payable to an employee in respect of any wage period, when averaged over the total number of hours worked in the wage period, should be no less than HK\$28 per hour.

The statutory minimum wage applies to all employees, whether they are monthly-rated, daily-rated, permanent, casual, full-time or part-time, and regardless of whether or not they are employed under a continuous contract¹.

2. Working time

Except in relation to the employment of young persons employed in industrial undertakings where special regulations apply, there are no statutory provisions which prescribe maximum working hours.

3. Leave

In addition to paid statutory holidays, an employee who has been employed under a continuous contract is entitled to not less than one rest day in every period of seven days.

An employee who has been employed under a continuous contract for not less than twelve months is entitled to a minimum of between seven and fourteen days of paid annual leave for each period of twelve months’ employment, calculated on the basis of length of service.

Female employees employed under a continuous contract are entitled to a minimum of ten weeks paid maternity leave. This is paid at the rate of four-fifths of the employee’s average wage over the preceding twelve month period.

An employee who has been employed under a continuous contract for a period of one month or more immediately preceding a sickness day is entitled to paid sick leave at the rate of four-fifths of the employee’s average wage over the preceding twelve month period

4. Retirement schemes

Under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) each employer in Hong Kong is required to contribute an amount equal to at least 5% of an employee’s salary to a retirement scheme that is registered as a Mandatory Provident Fund Scheme (“MPF Scheme”). Each employee will also be required to contribute at least 5% of his salary to the scheme.

Employees with a monthly relevant income of less than HK\$6,500 are not required to contribute their share, but their employers are required to contribute their part.

Since 1 June 2012, the maximum contributions from both employers and employees has been adjusted from \$1,000 to \$1,250 per month.

¹A “continuous contract” requires that an employee must have worked for the same employer during each of the previous four weeks for at least 18 hours in each of those four weeks.

5. Termination payments

An employee who has been employed under a continuous contract for not less than 24 months is entitled to a severance payment if he is dismissed by reason of redundancy or the employee is laid off. The amount of severance payment is two-thirds of one month's pay for each year of employment or HK\$15,000, whichever is less, subject to a maximum payment not exceeding HK\$390,000.

Employees who have been employed under a continuous contract for not less than five years and whose employment is terminated other than by summary dismissal are entitled to a long service payment on termination. The amount of the payment is calculated by reference to the same formula as for severance pay (discussed above) with the same maximum cap.

The right to a severance payment and a long service payment are mutually exclusive. Also, the amount of any contractual gratuity based on length of service is deductible from the entitlement. In respect of a retirement scheme payment, only the employer's contributions may be deducted and not the employee's own contributions or any interest payable thereon.

6. Discrimination legislation

Discrimination on the grounds of gender, pregnancy, marital status (Sex Discrimination Ordinance (Cap. 480)), disability (Disability Discrimination Ordinance (Cap. 487)), family status (Family Status Discrimination Ordinance (Cap. 527)), race (Race Discrimination Ordinance (Cap. 602)) and trade union membership (the Ordinance) is prohibited by legislation in Hong Kong. However, there is no protection against discrimination on the basis of age or sexual orientation nor is there any equal pay legislation.

Each of the anti-discrimination ordinances prohibits "direct" and "indirect" discrimination. Direct discrimination is less favourable treatment by reason of the prohibited ground. Indirect discrimination occurs when the complainant cannot comply with a requirement or condition which has been applied to all but which has a disproportionate impact upon the group that is protected from discrimination.

7. Employee compensation

The Employees' Compensation Ordinance (Cap. 282) requires each employer to purchase an insurance policy for a specified minimum amount covering all its employees in respect of its liability to compensate employees for "injury by accident" or "death" arising "out of and in the course of employment".

8. Income tax

Hong Kong adopts the territoriality basis of taxation, whereby salaries tax is imposed only on income from an office or employment or any pension arising in or derived from Hong Kong. Employees are usually responsible for the filing and payment of their own salaries tax to the Inland Revenue Department.

9. Dispute resolution

As a matter of practice, parties involved in an employment dispute first approach the Labour Relations Division of the Labour Department, which provides an informal and simple mechanism to encourage settlement through voluntary conciliation. In the event that the parties fail to reach settlement through conciliation, a claimant may lodge a claim with the Minor Employment Claims Adjudication Board or the Labour Tribunal, depending on the amount of the claim and the number of claimants involved.

10. Employment visas

All persons having no right of abode or right to land in Hong Kong must obtain an entry permit or employment visa before coming to Hong Kong for the purpose of employment. Applications made to the Immigration Department take around six to ten weeks to process and should be made through the sponsor, usually the employer company in Hong Kong, prior to the employee's arrival in Hong Kong.

If you would like further information please contact **Jezamine Fewins**.



New restrictions on employing staff in China through agencies

Engagement of staff through staffing agencies such as FESCO, rather than entering into direct employment contracts has been a commonplace practice in China. From 1 July 2013 this will change when an amendment to the PRC Labour Contract Law (“LCL”) comes into force. **Matthew Durham, Partner** and employment law specialist, based in Clyde’s Shanghai office explains how the amendment places new and significant restrictions on the circumstances in which companies may engage staff through staffing agencies such as FESCO.

Understanding the impact of the amendment and having a strategy is key. There has been considerable inaccurate and/or rather alarmist commentary on the amendment to date. In reality, however, there is no need to panic as the practical implications of the changes are mostly less severe than may appear at first sight. In addition, if the changes are to be enforced, there will need to be further legislative guidance on definitions and interpretation.

We set out below a summary of the changes, together with analysis of what they mean and recommendations on what to do next.

1. Restrictions on use of staffing agencies

Staff category

Going forward companies will not be able to use staffing agencies to engage all their staff (as many currently do). Use of this structure will be limited to certain specific categories of employee:

- Temporary staff (i.e. staff engaged for six months or less)
- Auxiliary staff (i.e. staff engaged in non-core business of the company)
- Substitute staff (i.e. staff standing in for or covering the role of permanent employees who are on leave)

There is no meaningful definition of “non-core business”.

Threshold by total number

In addition to the restrictions by category, companies also will be limited to having a certain percentage of total staff hired through staffing agencies. The percentage has not been released and is likely to vary by location within China. Informal reports suggest that the threshold may be set at 25% – 30% of total staff, although this is subject to confirmation in due course.

Analysis and recommendations

The amendment does not mention representative offices of foreign companies, which are required by law to use staffing agencies to engage their staff, as they are prohibited from entering into direct employment contracts. We assume that the position for representative offices will remain the same for the time being, but await confirmation of this. Alternatively, representative offices will need to be permitted to enter into direct contracts with their staff.

In general this formal restriction on the use of staffing agencies by companies (which are legally able to enter into direct employment contracts with their staff) is not a huge surprise. The original intention had been to implement this when the LCL was passed in 2007, but the final wording was compromised. In recent years this practice has been discouraged by the PRC labour authorities but without formal and express legislation as now.

Many companies use this structure thinking that it shields them from liability because legally they are not the contractual employer. In practice this is rarely the case, because (i) the agencies pass on all liability they incur to the company in the service contract; and (ii) the LCL allows expressly for agency and company to have joint and several liability, so employees already have a basis to claim against the company.

In any event, companies should still be able to use staffing agencies (as they can currently) to handle payroll, social insurance, taxes and other HR administrative functions for them, even though the employees have a direct employment contract with the company. This is often overlooked. That said, the restrictions will be difficult for companies which have headcount issues and use agency arrangements to disguise actual headcount.



The amendment expressly allows for existing agency arrangements (entered into before 28 December 2012 when the amendment was actually issued) to be valid until they expire. So there is no need for companies to immediately jump and move to direct contracts for all staff. Companies will, however, need to look at this going forward and deal with agency staff as their agency employment contracts expire. This will actually give companies an opportunity to assess performance and consider whether they want to give a direct employment contract to an individual at the relevant time. Another point which is not clear is whether these “legacy” agency arrangements, while ongoing, will be included in the numbers for the purposes of the threshold re percentage of total staff engaged through staffing agencies.

One specific advantage of the amendment is the introduction of specific temporary and substitute categories of employee, as previously staffing agencies by law had to give a minimum two year employment contract to the employee. As a result, this was not a good mechanism for engaging temporary staff (as this term is understood in some other jurisdictions, such as the UK) to arrange cover for staff on maternity leave or similar circumstances, because the agencies would not allow staff to be just returned to them by the company at the end of the relevant period for which the temporary staff were required by the company.

2. Equal pay for equal work

The amendment says there must be equal pay for equal work regardless of how an employee is hired, whether on a direct contract or through a staffing agency. This is important and will need to be addressed by companies if there is a discrepancy.

At this stage, there is no definition of what constitutes “equal work”. This gives labour authorities and labour arbitration commissions the opportunity to interpret this as they see appropriate.

Analysis and recommendations

Again, this provision is not a huge surprise. A general principle of equal pay for equal work already exists in the PRC, but has not been formalized until now or enforced. In our experience, it is good practice anyway for companies to apply this principle to help maintain an ethical and harmonious workplace, as this is an issue that arises frequently in the context of employee dissatisfaction and disputes.

3. More stringent qualifications for dispatch agencies and penalties for non-compliance

The amended LCL also brings in new qualification requirements for the staffing agencies themselves. Agencies must be duly qualified and the threshold for registered capital has increased from RMB 500,000 to RMB 2 million.

Fines for non-compliance with the new provisions on staffing through agencies (RMB 5,000 – RMB 10,000 per agency employee) can apply to both agency and to “accepting entity” (i.e. company).

Analysis and recommendations

The change re capital plays into the hands of the “big players” such as FESCO as it may well remove some of the smaller competition. It is probably driven by the government’s wish to help ensure that agencies are able to cover any liabilities owed to employees.

The immediate impact is that companies and representative offices need to check that the staffing agency they use either does (or will) meet the qualification criteria before 1 July 2013. Foreign companies should also check that the agency’s license expressly includes services to foreign companies, as this is not always the case.

The potential penalties for non-compliance are significant, given that the agency or the “accepting entity” could be fined for non-compliance. In theory, this means that the company could be fined for non-compliance of the agency. In practice, this would be harsh on a company and we expect that the first step would be for the labour authorities to require the relevant non-compliance to be rectified, but technically it could apply.

In extreme circumstances, an agency can also have its business license revoked. It is not clear whether, in this scenario, the staff engaged through that agency would then be deemed employed directly through the company. Going forward, companies can avoid this if they check their current arrangements and consult with their agency providers.



4. Summary and what to do next

The LCL amendment on the use of staffing agencies reflects the ongoing concern of the PRC government to maintain social stability. Direct employment contracts with companies are seen as a means of providing security to employees, which in turn contributes to stability.

There is a need for further guidance and clarification to help effective implementation and it remains to be seen how fervently the changes will be enforced in practice. Companies do not need to take immediate radical actions, but should definitely have this issue on the radar and start to plan ahead:

- Look at what agency arrangements they have in place currently
- Check with their agencies re meeting the qualification criteria
- Address any pay inequality issues between direct and agency staff by 1 July 2013
- Watch for any new national or local implementation guidance or clarifications

Going forward, companies will need to assess whether to give direct company contracts to agency staff when their current agency employment contracts expire. As the minimum duration of these agency employment contracts is two years, this will be an ongoing process.

The biggest problem really will be for companies with headcount issues (i.e. a practical not legal issue) and they will need to consider how to deal with this internally.

As ever with doing business in China, it is vital to have a strategy!

If you would like further information please contact **Matthew Durham**.



Meet Jenni Priestley



Jenni Priestley

Partner, Sydney, Australia

When did you start with Clyde & Co? September 2012.

How did you get here?

- Bachelor of the Arts; Sydney University
- Bachelor of Law; Sydney University
- Worked with Allens in Sydney for 12 years before moving to Clyde & Co

Briefly describe your day in Sydney:

I usually try and get in early around 7:30am. The one downside to working in Australia is the time-zone issues so there are usually quite a few emails to get through in the morning from clients based overseas and from our international offices. Throughout the day, I am often in Court for a hearing or otherwise engaging with clients locally and internationally.

Major challenges you have faced and how you dealt with them:

Being involved in the establishment of Clyde & Co Australia in 2012 has been an interesting and rewarding career challenge. Setting up a new law firm in Australia has thrown up all kinds of unexpected little hurdles (I now know it takes six weeks and a credit check to lease a photocopier!) but overall has been a fantastic experience.

Greatest accomplishment/memorable moment:

I think I would have to say making it through the last year of madness with my newborn twins, a one year old and a new job. It's been a balancing act but I wouldn't change anything.

If you could relive the last ten years, would you do anything differently?

That's a tough one. I've always believed that you are a product of your experiences, both good and bad. I have no complaints so I probably wouldn't do anything differently.

How would a colleague describe you in three words?

- Driven
- Pragmatic
- Open-minded

How do you unwind after a long day in the office?

Although I'm not sure it really counts as unwinding, I try to get home for the craziness that is the hour before bedtime for my kids. Beyond that, I love to get to the beach of an evening in the summer, to test out new restaurants with friends and to watch B grade movies from the comfort of my couch.

Where do you see yourself in ten years?

Having been involved in starting up the new Australian offices last year, I hope that in ten years I will still be with Clyde & Co Australia. I am looking forward to seeing and being part of the continued growth and development of the firm in Australia for both domestic and international clients.



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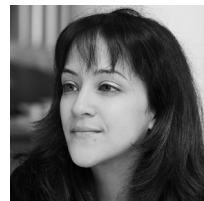
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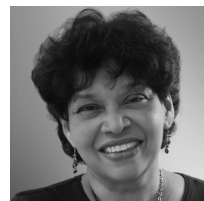
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