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'HIRING AND FIRING' - HINTS ON COMMON HR STUMBLING BLOCKS FOR FOREIGN COMPANIES

2012 UPDATE

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I. INTRODUCTION

The legal cornerstones of labor and social security law in Taiwan are the Labor Standards Act (LSA), the Labor Insurance Act, and the National Health Insurance Act. However, both labor and social security law further consist of several additional regulations, acts, and decrees, ranging from the Gender Equality in Employment Act, to regulations about occupational hazards. In a nutshell, Taiwan's labor and social security laws are comparable in basic structure to the systems in European countries. However, certain specific differences have proven to be stumbling blocks for foreign companies in Taiwan, and especially for foreign management personnel. This brief shall focus on some of these, as selected topics only.

One particular feature of the current social security situation in Taiwan is the regulation of retirement (pension) payments within the longstanding LSA, as well as the Labor Pension Act (LPA) of 2005. The second particularity is the obligation of the employer to give out "severance pay" to employees, in case of termination of an employment contract. This can be substantial if employees fall under the "old" LSA system, as all foreigners currently do, or if several employees need to be laid off at the same time.

Before the Labor Pension Act was introduced in 2005, Taiwan's system of handling retirement and pensions had been incomplete at best and nearly always insufficient regarding actual amounts paid out. The fast changes in Taiwan labor and social-security law also reflect the fast changes in Taiwanese society, wherein the country moved swiftly from an agricultural, to a manufacturing, and now to a service-based economy. Taiwan's Legislative Yuan has completed a major overhaul of the retirement system, replacing the old patchwork of benefits with a modern system of pension plans within which employers and employees may choose between various levels of contribution and risk allocation and in which portability of pension benefits allows employees to change jobs without losing their retirement package.

I I. "HIRING" IN TAIWAN – ATTENTION RECOMMENDED

Different situations require different solutions: local staff, expatriates, local senior management – foreign companies sometimes stumble over the differences by not sufficiently accounting for them within employment contracts. The content of the contracts, often required in writing when local entities hire foreign employees under Taiwan law, deserves some further discussion.

With regard to local staff, companies with over 30 employees are required to complement the employment contracts with so-called work rules (LSA, Articles 70 and 71), comprehensively regulating matters such as working hours, wage calculations, bonuses and compensation, work leave, and termination of the employment agreement. In view of the frequent and recent legal changes regarding such topics, it is important to have work rules updated accordingly, while failure to do such may result in illegal HR decisions that show up in later litigation. Up-to-date work rules also have the benefit of ensuring that internal procedures match with modern times and expectations, as many companies now have social-media policies, rules on use of the internet and mobile phones during working hours, as well as expectations on data handling that simply did not exist five or 10 years ago when offices were more concerned with personal use of copiers and fax machines.

Foreign headquarters of multinationals and their group HR departments have often been unable to oversee in detail compliance with local requirements for social-security contributions and related accounting requirements. In Taiwan, for example, this may apply to contributions to retirement funds in general for employees who fall under the older pre-LPA provisions of the LSA (notably foreign employees and employees hired before 2005). Since the LPA came into effect, the standardization of pension contributions has of course made compliance much easier. However, important issues of retirement pensions and the provisional reserves for severance payments arise in every M&A deal involving companies mature enough to predate the 2005 change in the law (Article 20, LSA; Article 15 of the Mergers and Acquisitions Act).

When it comes to expatriates, some foreign companies tend to structure the employment based on two or more contracts, including offshore payments. However, practice shows that foreign companies still are only partially aware of legal requirements (and more importantly sanctions) regarding work permits, income taxation, and tax declarations. In order to avoid unnecessary surprises, professional counsel should review suggested employment contracts, offshore structures, and the underlying taxation issues. Conflicts may finally arise out of misunderstandings regarding overlapping allowances and special payments (e.g. parachute provisions, golden handshakes) for local senior management, where sometimes both local mandatory regulations and worldwide group policies apply concurrently, the latter based upon the wording of group standard employment contracts for such senior management. Such conflicts are avoided by proceeding to a clear assessment at the time of hiring, of all applicable future payments.

I I I. "FIRING" – CAREFUL STEPS ARE THE WAY OF CHOICE

The cultural and practical environment in Taiwan for an employer to terminate employment contracts has greatly changed during the past few years, arising from a balance of factors that include the global economic situation, higher unemployment rates, as well as a greater awareness of workers' rights (by employees) and the rule of law (within Taiwan). All have resulted in a greater willingness of disgruntled fired employees to attack their former employers via administrative and litigation means. Given that once complaints, whether reasonable or unreasonable, go into the Labor Bureau or court systems a company can incur fines, court-ordered reinstatement or back wages, as well as legal expenses, getting into litigation requires an evaluation of the risks against the benefits. The additional downsides of calculating things wrongly to fight the wrong fights in this new age of social media include a tarnished corporate image, poor employee morale, and consumer backlash. Employers that move too quickly to appease unreasonable complaints with settlements can find this only encourages more people to file complaints and leaves existing employees jealous and frustrated at the payouts given to their former coworkers. The risk of such complaints should be minimized or avoided by carefully planning, communicating and implementing the termination of employment contracts to ensure full compliance with the law.

There are no cookie-cutter solutions where "one size fits all" in employment situations. Rather, in order to appropriately assess the specific risks and choose appropriate strategies, it's important to consider the position of the particular employee within the company, the degree of confidentiality of the assigned work, and existing relationships between the employee and other company staff, etc. Many multinational companies have found out, to their detriment, that local working relationships and office culture may be quite different from the stricter company loyalties expected at the regional and global headquarters levels. What this may mean is that confidences expressed from the top down about workforce reduction or specific employee terminations may move fast within a local Taiwan office. In one recent example, a multinational's Taiwan office in-house counsel took active steps to warn local employees who were about to be subjected to a company investigation and to interfere with the company's efforts to conduct the probe.

Similar to other jurisdictions, Taiwan law provides that the employer may dismiss an employee by ordinary termination for certain legitimate reasons, but subject to an advance notice, in order to protect the interests of the employee (Article 11, LSA). Furthermore, the employer may dismiss an employee without advance notice, in cases of grave misconduct of the employee (Article 12, LSA), including serious violations of the work rules. In addition, so-called fixed-term contracts (in principle limited to a maximum duration of one year) are automatically terminated on the expiration of the contract.

Finally, labor law contains certain provisions protecting the employee from being dismissed, among others, during maternity leave, or while being absent for receiving medical treatment (Article 13, LSA). Article 11 of the Labor Standards Act stipulates five legitimate motives for an ordinary termination, with advance notice, of a labor contract. In other words, any ordinary termination requires by law one of these motives, lest the termination be illegal and subject to a fine.

In most situations, an employer may base a termination notice on only one of the following three motives: a) the company is generating losses (Article 11, item 2, LSA), b) a change of business scope requires a reduction of the work force and the employee concerned cannot be assigned to another appropriate position (Article 11, item 4, LSA), and c) the employee concerned is incompetent (Article 11, item 5, LSA). Therefore, it is paramount that the employer mentions the motive for termination within the termination notice and ensures that the motive is backed up with sufficient evidence. In practice, and if the business-related motives (items 2 and 4) do not apply, it is suggested that the motive of "incompetence" be documented in writing, in the form of at least two written warnings, where the lack of ability is indicated, and which may later serve to prove that the employee was in fact unable to fulfill the assigned work in a satisfactory manner.

As a last resort, and if further complications are to be expected, the employer may opt for professional outplacement services, being a keystone within a larger termination agreement, and which may allow the employee to quit the company with both the necessary face saving, and a certain financial assurance.

IV. SUMMARY

HR is one of the key factors for commercial success, and the continuously developing legal and cultural environment in Taiwan will further emphasize the importance of good governance of HR issues.

Awareness of local labor laws, including social security-related laws, has become a must for international companies in Taiwan, with the ultimate goal of legal compliance. Sufficient attention shall be paid to the drafting of employment contracts, including the work rules in case of larger companies. Equally, decisions to dismiss employees should be planned and implemented in such a manner that litigation risks, and therefore costs, are minimized and at best avoided.

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