Taiwan Employment Law for the Busy Executive

A review of some common employer-employee situations and how best to deal with them.

BY JOHN EASTWOOD

For American companies operating in Taiwan and Greater China, it's important to balance local legal needs with global standards and expectations. Often the headquarters will have global or regional templates that local offices are expected to use to ensure conformity, but the busy Taiwan-based executive may not be familiar with the ins and outs of Taiwan employment law, severance conditions, and pension rights. Depending on the size of the operation, companies may or may not have a local HR manager, and executives often worry about whether as a foreign-owned company, they can get away with some of the local practices that supposedly "all" Taiwanese companies use. What we hope to provide here is an overview of some of the common situations and issues that arise.

Under Taiwan law, employers and employees have great latitude to reach employment arrangements that suit the parties involved, but employees' rights and benefits cannot be less than the minimum standards set out in the Labor Standards Act (LSA) and other employment-related laws and regulations. International companies often wish to have an "at-will," "exempt," or "salaried" relationship with their Taiwan employees and mid-level management, but Taiwan's employment law scheme does not permit such an approach.

"Mandate" agreements

While nearly all the employees will be considered to have the full range of rights and protections offered by Taiwan's LSA and Labor Pension Act (LPA), it is possible to separate the treatment of a top-level manager from the rest of the employees through the use of a "mandate" agreement. Essentially, such an agreement appoints the manager to his/her local position and allows for removal from that position with or without cause, which can be a huge benefit in cases where fighting over the cause for termination of a manager could be expensive or embarrassing. Such positions traditionally do not provide for severance payments, unless the agreement with the manager specifically stipulates it. Typical problems that interfere with the greater flexibility and benefits of a mandate agreement include country manager contracts that specifically call the manager an "employee" throughout or that specify that the relationship is to be "subject to the terms of Taiwan's Labor Standards Act."

Treatment of overtime

Overtime matters can be a major stumbling block for multinational companies in Taiwan, which often assume that contracts defining large categories of employees as "exempt" or "salaried" will help them avoid overtime payments. Other than the top-level country manager, essentially all other employees (including other senior managers and mid-level managers) will be treated as having overtime pay rights. While employees may not rock the boat during their period of employment, such issues will often come to a head if a termination is necessary. There have been cases of employees presenting the Taiwan labor authorities with extensive documentation of their overtime work on the way out the door. One method for maintaining some control over overtime practices is to require prior approval from line management before employees perform overtime work.

Fixed-term contracts

Employment contracts in Taiwan are either fixed-term or non-fixed-term. The intent of this distinction is to ensure that employees are not deprived of certain rights, such as severance, job security, and retirement benefits. However, these rights and benefits are often regularly deliberately abused by employers in Taiwan who try to avoid such obligations by keeping employees on a continuous cycle of back-to-back

employment terms.

The LSA requires limiting fixed-term contracts to temporary or short-term work of less than six months, seasonal work of a non-continuous nature, or specified work that can be completed within a specific period of time. Under the LSA, any labor contract for continuous work will be considered a non-fixed-term contract, and the labor authorities and courts will disregard fixed-term contracts in situations where it is demonstrated that the work was actually continuous, such as cases where:

- The employer raises no immediate objection when an employee continues his or her work.
- On the conclusion of a new contract, both the prior contract and the new contract were for a term of more than 90 days, and the period of time between the expiration of the prior contract and the beginning of the new contract did not exceed 30 days.
- The work is not seasonal, temporary (less than six months), short-term (less than six months), or project-specific (must be registered if over 12 months).

Termination and severance rights

Employment in Taiwan is almost never considered to be "at will" (meaning that either party has the right to terminate the relationship at any point without penalty), and the labor laws set strict restrictions on the termination of employment. A dismissal is permissible in the following circumstances:

- The employer is ceasing business or the ownership of the employer is transferred.
- The employer suffers a loss or curtails business operations.
- The operations of the employer are suspended for more than one month by reason of force majeure.
- The business nature of the employer is altered, necessitating a reduction in the number of employees, and there are no suitable job openings for the redundant employees.
- The employee is confirmed to be incompetent to carry out the work assigned to him or her.

In all of those situations, the employer must give notice and pay severance to the terminated employee. There are also some more dire circumstances under which the employer has no obligation to give advance notice or pay severance:

- The employee misrepresents facts at the time of signing the employment contract, thereby misleading the employer, with possible resulting damages.
- The employee commits violence against or insults the employer, the employer's family, the employer's representative, or fellow employees.
- The employee seriously breaches the employment contract or violates the work rules.
- The employee is sentenced by a court in the final judgment to detention or a more severe punishment, and the sentence has not been commuted to probation or a fine.
- The employee purposefully causes damage to or excessively abuses machinery, equipment, tools, raw materials, products, or any articles belonging to the employer, or intentionally discloses the technological or business secrets of the employer.
- The employee is absent from work for three consecutive days, or for six days in a month, without justifiable reasons.

If severance must be paid, then the calculation will depend on when the employee was hired, whether the employee is Taiwanese or a foreigner, and the employee's average pay over the previous six months. The date that the Labor Pension Act came into force, July 1, 2005, is a key date for local Taiwanese employees in that those hired before that time have their severance calculated under the LSA (1 month per year of service), while those hired on or after it have their severance calculated under the Labor Pension Act (1/2 month per year of service). Local Taiwanese employees hired before July 1, 2005 who later "opted in" will have a pro-rata mix of the two rates. Foreign employees are currently not eligible for the Labor Pension Act provisions, and so their severance is covered under the LSA calculation. The severance calculation will generally include salary plus non-discretionary bonuses (earned commissions, guaranteed "14th month" pay, etc.) but not completely discretionary bonuses of the sort that are subject to vague "economic performance of the company" concepts.

Work Rules

An internally published set of company "work rules" is quite normal within many Taiwan workplaces, and they are legally required for companies with 30 or more employees. An up-to-date set must be submitted to the local labor authorities, and the employees must have access to it. Companies, including those with fewer than 30 employees, may include their work rules within the employment contracts. But it is necessary to notify and receive consent from the employees before any change to the work rules can be made that is detrimental to the rights or benefits of the employees.

Still, work rules can be extremely helpful in laying out with great specificity all sorts of company expectations that aren't covered in typical employment contracts or in the provisions of the LSA. The terms of the LSA greatly restrict the circumstances in which an employee can be terminated without a notice period or severance rights. Managers who lack suitable work rules may therefore find themselves stuck with blatant employee misbehavior that is not covered by the narrow terminology of the LSA requirements. Just because employees haven't broken any office equipment, hit any managers, been convicted of any major crimes, lied about their background, or explicitly broken the terms of the employment contract should not give them license to do a whole range of other things considered intolerable in an international company. In addition, the terms of the LSA often appear aimed at manufacturing environments instead of the dynamics of white-collar offices.

With a good set of work rules, a company can provide itself with sufficient legal cover for handling the disciplining or firing employees in a flexible and sensible way that supports the maintenance of international HR standards. Such rules can cover a wide range of issues, including personal use

of computers and other office resources, ethical and moral conduct, honest dealings within the office, and the handling of sensitive business information.

The work rules should not be left for those "gotcha" moments when employees are found lying about customer orders, sending inappropriate emails, running a web business or writing a novel from their cubicle, or committing sexual harassment. Training sessions should be conducted to ensure that employees understand the expectations under which they are working, and it's better to be proactive than reactive. Some of our clients hold annual training sessions to cover such subjects as:

- Corporate policies and work rules
- Antitrust/unfair-competition laws
- U.S. Foreign Corrupt Practices Act requirements and local anti-bribery laws

The importance of paying attention to trade secrets and intellectual property issues is not confined to Taiwan's technology-rich environment. The close economic and cultural ties across the Strait to the People's Republic of China mean that information can move fast beyond borders and into the hands of existing and future competitors.

Trade Secrets

Trade secrets can include a wide swath of information, from production methods and future plans, through to customer preferences and needs, sales and financial data, and many other types of key non-public information about your company and its operations. While many employment agreements will include provisions regarding the protection of confidential information, it is also vital to pay attention internally to how confidential information is treated. Employees should be trained in how and when to label materials as "confidential," how to restrict access to certain files or documents, how to maintain a "clean desk" policy, what are appropriate shredding or document-destruction procedures, etc. Even in this modern day and age, enormous amounts of key information are still simply thrown out with the trash, allowing competitors and investigators access to a wealth of non-public information. Reasonable procedures need to be in place to protect confidential information from disclosure, as this factor will certainly arise in any subsequent dispute.

Intellectual Property

It should be made clear to employees that their working time efforts go to the company, and many companies explicitly state in the employee agreements that the economic rights to any inventions, improvements, copyrightable works, etc. developed by the employee are to be treated as "works for hire" and belong to the employer. Companies should also monitor their own trademarks to ensure that there are no obvious gaps in coverage, as this is a fairly common way for disgruntled employees to try to get revenge. One of the standard clauses in the employment contract should state that even after termination of the employment relationship, the employee shall not file or register any trademarks, service marks, or domain names that are the same or similar to those used by the employer for the company or its products or services.

Non-Competition Agreements

Non-compete obligations for employees are a regular source of headaches, for no matter how much multinational companies try to combat the "myth of irreplaceability," the fact is that managers hate to see former key personnel working for a competitor, using their insider knowledge to steal away customers. Taiwan's Council of Labor Affairs released a set of guidelines that, while not mandatory, are referenced regularly when Taiwan courts look into the validity of a non-compete obligation. Generally, the term covered by the agreement should be two years or less, as anything longer risks invalidating the non-compete in its entirety. The geographic scope also needs to be reasonable, so that the former employee is not prevented from earning a living; barring future employment within Taiwan will often work, and many companies will block "Greater China" (Taiwan, Hong Kong, Macau, and the People's Republic of China). If there are specific competitors you have in mind, it can be worth specifying them.

Compensation in exchange for the non-compete is useful. Some companies state in the employment agreement that compensation for the non-compete has been factored specifically into the employee's regular salary, while other companies will actually set aside fairly significant amounts of compensation to go to employees after their departure in exchange for a time in which the employee is expected not to work. For particularly sensitive research or management positions, a specific compensation in exchange for a non-compete period can be useful in demonstrating the conscious decision of the former employee to violate the contractual obligation.

Non-competes should be reserved for key management, customer-service, sales, or technological positions, as Taiwan courts tend not to enforce such provisions for low-level administrative employees. In one extreme case we are aware of, a Taiwanese company was threatening a former secretary with a non-compete provision that included a penalty of more than a full year of her salary at the company. If you have concerns about trade secrets being disclosed to competitors by your lowest-level employees, a better solution is to more effectively control the flow of sensitive information internally.

Conclusions

Good employment practices are not that difficult to implement, but they do require attention to advance planning, clear communications, and follow-up training. It's a lot easier to deal with typical employer-employee problems proactively at the time of hiring, in the employment rules, and through regular communications than to try to clean up messes after the fact when relations have soured or distrust has seeped into the employer-employee relationship.

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