

The Pacific Rim: Employment Issues & Developments in Hong Kong, China, and Japan

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Labor Law – Hong Kong, China and Japan

- Introduction: three very different systems
- Hong Kong
 - What local employment legislation covers
 - Employment-related entitlements
 - Terminations; and (nb) what issues crop up in practice?
 - Protection of business
- China
 - Importance of written employment contracts
 - Foreign employees (and related recent developments)
 - Termination and protection against it
 - Protection of business
 - Recent key developments
- Japan
 - Overview of employment contracts
 - Termination and difficulties of enforcement
 - Confidential information and post-termination restraints
 - Upcoming legal developments



How it looks:

Hong Kong

- Common law; some derived from UK laws but major differences exist and there are no employee conduct rules
- “Employer-friendly”

China

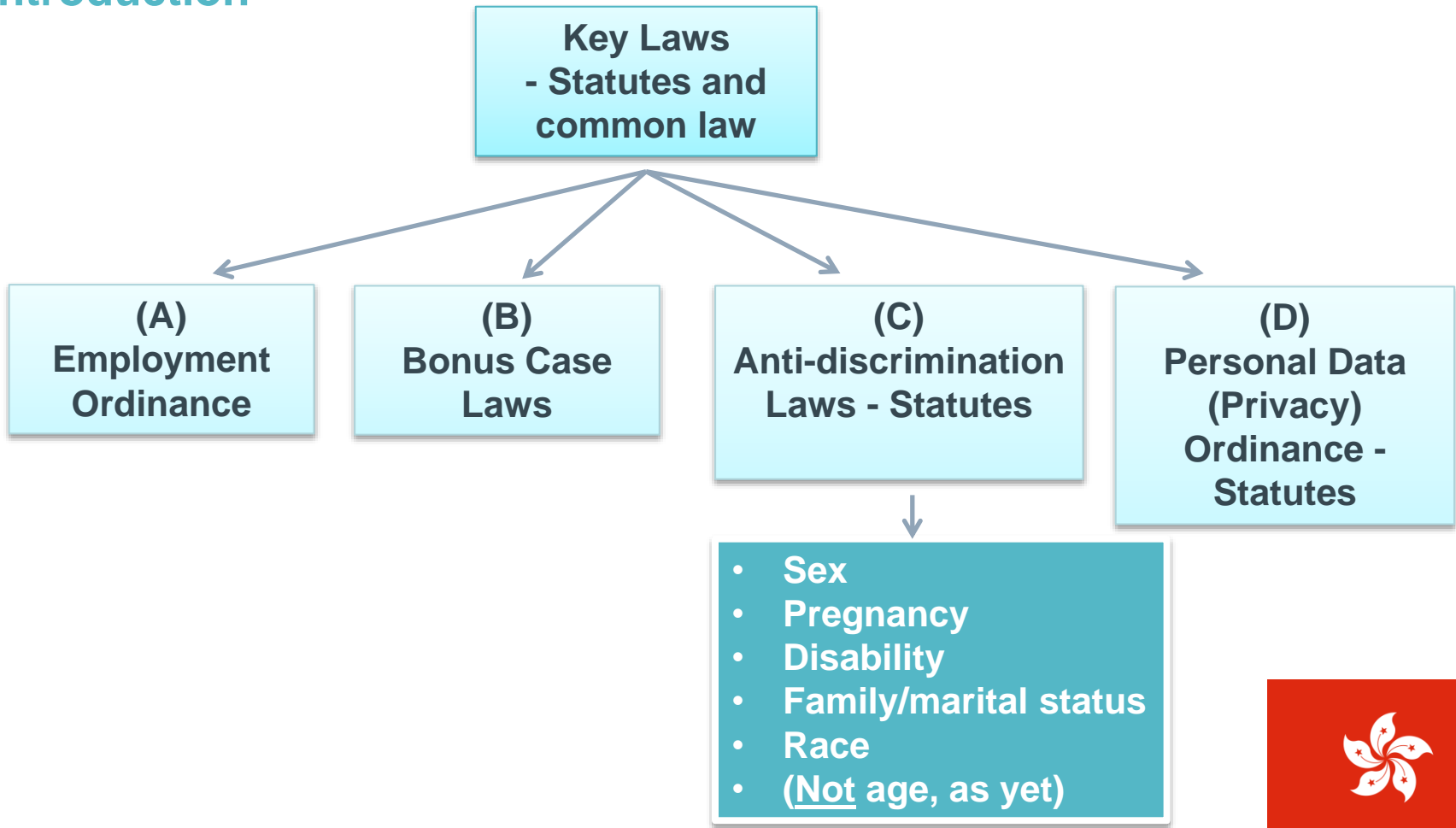
- Civil law; local legislation varies between localities and supplements national laws; influenced by German Civil Code
- Not “employer-friendly” (e.g., difficult to dismiss an employee)

Japan

- Civil law; influenced by German and French Civil Codes
- Not “employer-friendly” (e.g., difficult to dismiss an employee)

Employment Law in Hong Kong

Introduction



Employees' entitlements

- Notice periods (compulsory but can be short)
- Leave: annual, holidays, maternity, paternity, sick
- “Rest days”
- Severance / long service pay
- Protection against deductions or delays
- Minimum wage (HK\$30 per hour)
- Protection against dismissal? – limited



What crops up?

- Entitlements on termination
- Disputes regarding bonus – discretionary or not?
 - An employer’s discretion in relation to discretionary bonuses is not unfettered
 - Exercise of discretion governed by common law
- Discrimination complaints vs discrimination proceedings
- Contractual disputes
- Labor tribunal claims
- Competition
 - Injunctions
 - Restrictive covenants
- Stress at work



Terminations and redundancies

NB

- Prohibitions on termination – pregnant, maternity leave, sick leave

- Discrimination issues

Methods of termination

- Resignation by employee (by notice or payment in lieu)

- Dismissal by employer (by notice / payment in lieu, and summary dismissal)

- Expiry of a fixed term

- Constructive dismissal

- Mutual agreement

Redundancies

- No special rules or procedures

- Entitlement to statutory severance pay



Other termination issues

- The “new” issues
 - Stigma damages – 2013 case
 - Bonus – 2014 case – implied anti-avoidance term
- Payout of notice vs. garden leave
- Pro rata end of year payment / bonus (if applicable)
- Statutory severance payment or long service payment (if applicable)
- Discrimination – retaliation – are these relevant?



Confidential information and post-termination restraints

- Confidential information
 - Express
 - Implied
 - Only “trade secrets” are protected after cessation of employment
- Post-termination restraints
 - Generally considered a restraint of trade
 - Must protect a legitimate business interest
 - Must be no wider than is necessary to protect that interest
- Remedies:
 - Injunction – effective if obtained; can be ordered within a few hours or days
 - Damages



Employment Law in China

Introduction

Key Legislation

- Labor Law (Jan 1, 1995)
- Labor Contract Law (Jan 1, 2008)
- Promotion of Employment Law (Jan 1, 2008)
- Labor Dispute Mediation and Arbitration Law (May 1, 2008)
- Social Insurance Law (July 1, 2011)
- National regulations, administrative notices and judicial explanations
- Local implementing rules, circulars and court opinions

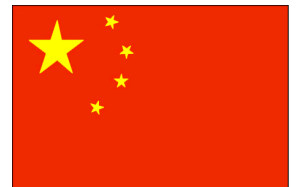


Overview of employment contracts

- Best practice: employment contracts should include:
 - Employer's name, address and legal representative
 - Employee's name, address and resident ID card number
 - Duration of term (unless open-ended)
 - Job description and place of work
 - Work hours and leave
 - Compensation (including overtime)
 - Details of working conditions and labor protection
 - Adherence to work rules
 - Covenants (confidentiality, IP assignment and inventions, non-competition)
 - Data protection clause

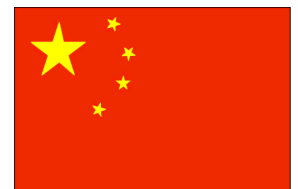
- Changes to contract terms
 - Difficult to impose unilateral changes
 - Employee consent is required for amendments

- Key entitlements: maternity leave, medical treatment period, statutory paid annual leave, statutory severance



What crops up?

- Termination of employment by employer only available in very limited circumstances and is governed by statute
- Double pay rule: Requirement to have a written employment contract
- Twice renewal rule: If a fixed-term contract has been renewed twice consecutively since 2008, on the second renewal (i.e., for a third term), the employee is entitled to receive an open-ended contract
- Labor dispatch regime:
 - Return of dispatched workers to labor dispatch agency
 - Issues relating to notice and consent
 - Protection against termination



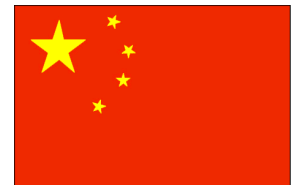
Recent key employment developments

Labor dispatch regime

- The number of dispatched workers that can be used is limited to **10%** of the **user entity's total workforce** (which includes both dispatched workers and the user entity's own employees)
- Dispatched workers restricted to substitute, auxiliary or temporary positions
- RMB 5,000-10,000 per dispatched worker if non-compliance is not rectified within the time period specified by the relevant labor authorities (increased from RMB 1,000-5,000)

Non-compete compensation (Supreme Court's Judicial Interpretation (2013))

- Non-compete not enforceable if payment of compensation is delayed for longer than 3 months due to employer's fault
- If employer intends to cease enforcing non-compete during non-compete period, 3 months' notice is required
- Continued enforceability against breaching employee throughout post-termination non-compete period if employer so requests



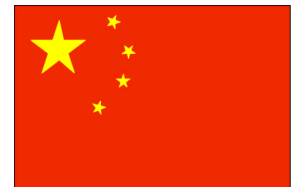
Foreign employees

- Employment structure
 - Secondment
 - Direct employment
 - Dual contract
- Work and residence permits
- Law on entry and exit of foreigners: visa regime
- Termination documents and logistics
 - Termination letter/agreement for relevant jurisdiction(s)
 - Termination notice to union required for unilateral termination
 - Repayment of social insurance contributions (pension)
 - Requesting return of original work permit
 - Cancellation of work permit and residence permit after termination



Termination in China

- Methods of termination
 - Unilateral termination by employer
 - Unilateral termination by employee
 - Automatic termination of employment contract
 - Mutual agreement (most common)
- Termination during probationary period
- Payments on termination of employment
- Protection against termination
- Redundancies
 - Economic or mass layoff (at least 20 employees or 10% of staff if less than 20 employees)
 - Consultation with union/employees and notification to labor authorities
 - Certain categories of employees given preference for retention
 - Entitlement to severance and notice



Confidential information and post-termination restraints

- Confidentiality agreements and non-compete agreements are permitted
 - But limited to senior management personnel, senior technical personnel and other employees with an obligation to keep the employer's information confidential
- Post-termination non-competition clauses are regulated:
 - May not exceed two years from termination
 - Payment of financial consideration to former employee must be made during period of restraint (monthly)
 - If the amount of consideration is not stipulated in the clause or agreed upon in advance, the court may order the employer to pay 30% of the employee's average monthly salary for the preceding 12 months
- Remedies:
 - Injunction? In practice not ordered?
 - Damages



Employment Law in Japan

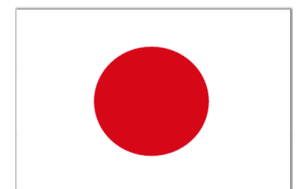
Introduction

Key legislation



Types of contracts

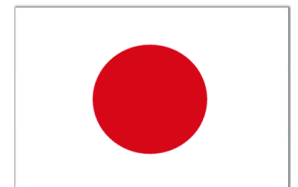
- Fixed-term contracts (generally do not exceed three years)
 - For casual, part-time and dispatched workers
- Open-ended contracts
 - For permanent workers



Overview of employment contracts

Minimum terms and conditions generally found in the employer's work rules (mandatory for employers with 10 or more employees) and must cover:

- Duration of term
- Place of work
- Description of the employee's work
- Wages (including calculation, payment methods and increments)
- Leave entitlements (annual leave, sick leave, maternity leave, bereavement leave, child care leave, family care leave)
- Provisions for retirement, working hours, rest periods, holidays, vacations and shift work
- Termination



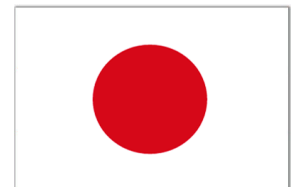
What crops up?

Termination

- Resignation by employee (by notice or payment in lieu)
- Dismissal by employer (by verbal or written notice in lieu, and immediate dismissal)
 - Reasons include: poor performance, physical or mental disability, breach of internal rule and redundancy
 - Notice must be given unless the dismissal is for strong reasons attributable to the employee and the employer obtains the approval of the relevant government agency for the dismissal
- Expiry of a fixed term and reaching the retirement age or death

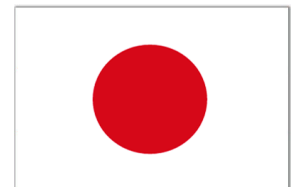
NB

- Mutual agreement



Termination – general principles

- A dismissal of an employee without an objective and logical reason is invalid (Article 16 of Japanese Labor Contract Act).
 - In practice, the Japanese courts apply a very strict test to determine what constitutes an “objective and logical” reason.
- If a dismissal is determined to be invalid, the legal consequences are generally
 - obligation to reinstate the employee (unless the employee does not wish to be reinstated); and
 - payment of unpaid wages until the time the employee is reinstated/agrees to retire, with 6% annual late-payment interest; and
 - depending on the circumstances, payment of monetary damages for pain and suffering may be awarded.
- Dismissal on the basis of poor performance is very difficult
- Redundancy

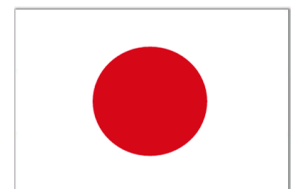


Confidential information and post-termination restraints

- Confidential information
 - Trade secrets may be protected but courts will consider:
 - the nature of the trade secret
 - the method by which it was kept confidential
 - size of the company

- Post-employment restrictive covenants are generally unenforceable
 - Contrary to the freedom to choose one's employment under the Constitution

- Limited exceptions
 - Necessary to protect the employer's legitimate business interests
 - Employee usually receives compensation for complying with non-competition obligations



Upcoming legal developments in Japan

- Proposed amendment to Labor Standards Act (July 2014)
 - Expand categories of employees who will not be entitled to overtime pay
- Recent amendments to equal opportunity laws (1 July 2014)
 - Expand the concept of impermissible discrimination
 - Amend current guidelines on sexual harassment



Q&A

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Fiona Loughrey heads the award-winning Simmons & Simmons China employment team, which consists of around 16 fee-earners in Hong Kong, Beijing and Shanghai. The firm has been named “Employment Law Firm of the Year” 12 times in the period 2000 to 2014 (at Asian Legal Business Awards and its predecessor event the Asia Law Awards, held annually in Hong Kong since 2000); is the only law firm ranked by Chambers Asia in tier 1 for both Hong Kong and PRC employment law; was named “International Firm of the Year for Labour & Employment” at the China Law & Practice Awards, in 2012, 2013 and 2014; and was named as an International winner for Employment and Industrial Relations, at the China Business Law Awards in 2014

Fiona was one of the first lawyers in Hong Kong to specialise in employment law, and has been advising in this area since the late 1980s. She is admitted as a solicitor in England (1985), Hong Kong (1987) and Australia (ACT) (1990). She has extensive experience of advising financial institutions and multi-national employers in various sectors, and has a special interest in discrimination and privacy laws.

Fiona is a vice chair of the Legal Committee of the Hong Kong General Chamber of Commerce. She was the chairperson of the Publicity Sub-committee of the Inter-Pacific Bar Association organizing committee for its 2015 meeting in Hong Kong, and of the employment and immigration law committee of the association for two terms, before stepping down in 2013. She also chaired the Employment Law Committee of the Hong Kong Law Society for two terms, until 2015.

She has received many awards, including:

- “Leading Individual” for Employment Law in Asia-Pacific Legal 500 and in Chambers Asia, most recently in 2015
- “Leading Expert” and a “Standout Lawyer” in employment by Chambers Asia, in 2013 and 2014 respectively
- “Best in Labour and Employment” and an “Outstanding Practitioner” at the Euromoney LMG Asia Women in Business Law Awards, in 2011 and 2014 respectively
- “Leading Individual” for Hong Kong by PLC Which Lawyer? in 2012
- listed in the International who’s who of Management Labour & Employment lawyers
- voted “External Lawyer of the Year” by the Asian-Counsel In-House Community Awards (as determined by votes of in-house lawyers), in 2010
- three times “Hong Kong Labour Lawyer of the Year” at the China Staff Awards, in 1998, 1999 and 2004



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Lesli Ligorner joined Simmons & Simmons in early 2012 as an employment partner based in Shanghai. She has worked as a lawyer in China since 2006 and is a market-leading employment specialist in the PRC. She is admitted to the bars of New Jersey (1997) and New York (1998). She has broad knowledge and experience in helping high-profile multinational clients navigate the PRC regulatory environment.

Lesli's experience cuts through many industries, with a focus on the financial services, technology, and life sciences sectors. She trains employees on workplace anti-harassment and diversity policies, codes of conduct, FCPA compliance and best practices for human resources and compliance professionals. She counsels companies globally on compliance matters with respect to FCPA and UK Bribery Act. She conducts and supervises investigations into anti-corruption and employment-related misconduct. She regularly speaks and publishes articles on employment and anti-corruption-related topics. Lesli is also a founding member of the Asia Turnaround & Transformation Association.

Lesli has received many awards, including:

- Lesli was recognised as a "Leading Individual" for Employment in China by Chambers Asia in 2015; and by Asia-Pacific Legal 500, most recently in the 2014/15 edition
- She was named as a "Leading Individual" for Dispute Resolution (Anti-Corruption) and for Corporate Investigation / Anti -Corruption by Chambers Asia in 2013 and 2015 respectively
- She was recognized as Labour & Employment "Lawyer of the Year" by China Law & Practice and Euromoney LMG Asia Women in Business Law Awards, in 2013
- She was ranked in Chambers Global Guide 2013
- She was named as one of two "Attorneys Who Matter" by Ethisphere in the Labour & Employment category from 2011 to 2013
- She was described by Chambers Asia as a "capable pair of hands", in 2013; and a "go-to name for PRC employment matters", in 2012