This article was published in the *China Law & Practice Vol.27 No.1 (January/February 2013)* on January 1, 2013.

Dismissing employees in Taiwan

The Labour Standards Act sets out the minimum standards for terminating employees in Taiwan. With such rigid legislation, how can employees ensure they are complying with the Act?

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In Taiwan, the Labour Standards Act (LSA) protects all employees. The protection provided by the LSA are compulsory and cannot be diminished or eliminated by an agreement between the employer and employees, although the employer is entitled to offer better terms than required by the LSA. The LSA requirements are essentially the minimum standards.

According to the Act, an employer cannot terminate an employment contract unilaterally unless any of the statutory reasons provided in Article 11 or Article 12 exists.

The statutory reasons for termination provided by Article 12 of the LSA include:

- At the time of entering into the employment agreement, the employee made a false or misleading representation that is likely to cause harm to the employer;
- The employee commits a violent act or an act of gross insult against the employer, the family members or agents of the employer or fellow employees;
- The employee has been sentenced to imprisonment by a confirmed judgment, unless the employee otherwise receives a suspended sentence or a decree to make payment of a fine in lieu of imprisonment;
- The employee commits a material breach of the employment agreement or a serious violation of work rules;
- The employee intentionally damages machinery, tool, raw material, product or other property of the employer; or intentionally discloses any technological or confidential business information of the employer, thereby causing harm to the employer; or
- The employee is, without justifiable reason, absent from work for three consecutive days, or six days in a month.

The statutory reasons for termination provided by Article 11 of the LSA are:

- Where the employer's business is suspended or transferred to a third party;
- Where the employer suffers an operating losses or business contraction;
- Where force majeure necessitates business suspension for more than one month;
- Where a change in business nature requires a reduction in the number of employees and the employee cannot be assigned to another proper position; or
- Where an employee is confirmed to be incompetent in his or her job duties.

The employer may unilaterally decide whether to terminate an employee who meets any of the statutory reasons provided by Article 11 or 12. No negotiation with, or consent from, the employee is required. However, for the termination of an employment contract pursuant to items 1, 2 and 4 to 6 of Article 12, the employer is required to serve a termination notice, either orally or in writing, within 30 days after becoming aware of the particular situation.

Compensation and prior notice

To terminate an employment contract according to Article 12, the employer is not required to provide severance pay or serve prior notice. To terminate an employment contract according to Article 11, the employer is required to provide severance pay and serve prior notice.
The minimum period of the prior notice is determined as follows:

- 10 days for an employee who has served the employer for more than three months but less than one year;
- 20 days for an employee who has served the employer for more than one year but less than three years;
- 30 days for an employee who has served the employer for more than three years.

However, the employer is allowed to pay an amount equivalent to the salary of the above notice period in lieu of giving notice.

According to the LSA, the severance pay to the terminated employee should be calculated as one average monthly salary for each full year of service. Fractional period of service should be paid on a pro-rata basis, but any fraction of one month shall be deemed one month. The average monthly salary is calculated by dividing by six the total amount of six months salary preceding the date of termination (including all regular payments, like overtime pay). An employer is obligated to provide the severance pay within 30 days of the termination date.

The Labour Pension Act (LPA), which took effect on July 1 2005, provides a new pension scheme compulsorily applicable to employees hired after July 1 2005. Those employed before June 30 2005 were given the option to apply the new pension scheme provided by the LPA by June 30 2010. Under the new pension scheme, a different formula is implemented for calculation of severance pay: half the average monthly salary for each full year of service, up to a maximum of six months average salary. Any fractional period of service should be paid on a pro-rata basis. An employee who was hired before June 30 2005 and chose the new pension scheme of the LPA would still be entitled to severance pay for work performed before June 30 2005, calculated and paid according to the LSA.

Compensation for unused annual leave

According to the LSA, an employee who continues to work for the same employer for a certain period of time shall be granted special annual leave on the following basis:

- Seven days for service of more than one year but less than three years.
- 10 days for service of more than three years but less than five years.
- 14 days for service of more than five years but less than 10 years.
- One additional day for each year of service over 10 years up to a maximum of 30 days.

If the employee is dismissed according to Article 11 of the LSA and has not taken all their annual leave before the termination day, the employer is required to compensate them for the unused leave in cash on the basis of his or her salary. However, if the employee is terminated according to Article 12 of the Act, the employer is not required to provide compensation for unused leave.

Redundancy

Redundancy is not necessarily a valid reason for dismissing employees. Only when redundancy is caused by suspension of the employer's business or transfer to a third party, operating losses or business contraction, is an employer entitled to terminate its employees according to Article 11 of the LSA.

The Act does not define operating losses or business contraction. According to Supreme Court precedents, business contraction means an obvious decrease in the production or sales amount of the original business, and the operating losses shall be decided from the financial report or the balance sheet. If a company's business revenue shrinks over several years, it may assert that it has suffered business contraction although it still remains profitable. To maintain profitability, the company is allowed to reduce its operation costs by laying-off employees.

The basis for statutory termination because of a change in nature to the business requiring "a reduction in the number of employees" where "the employee cannot be assigned to other proper positions" is very limited in scope. Restructure or reorganisation of a company would not be deemed a change in business nature unless based on a justifiable and reasonable need of its business operation. For example, the reorganisation is owing to the business discontinuing its manufacturing function. Even if such restrictive criteria are met, they may not be considered valid grounds for termination, unless there is reasonable need to reduce the number of employees and no other suitable jobs or positions are available. The company should first try to transfer any redundant employees to another job or position internally. If more on-the-job training or education courses are required for the new job or position, the employer is responsible for providing it, unless the training or education courses would cause material inconvenience and becomes an obstacle to the employer. Moreover, if the company has other similar divisions, which are operating normally or are expanding in a way that would require more employees, the courts would deem that there was no reasonable need for the company to lay off the employees.

In general, moving certain functions to other affiliates or outsourcing to a third party is not considered a change in nature of the business. Since affiliates are different legal entities, any position of other affiliates would not be deemed as a position of the employer, and transfer of employees to an affiliate would require employee consent. The existence or lack of suitable jobs or positions available to employees would be examined based on the employment positions and capacity of the employer, rather than its affiliates.

Incompetence

The employer is allowed to review and assess the performance of employees and demand improvement because of poor performance or failure to achieve designated targets. When devising performance targets, the employer cannot discriminate against employees on grounds such as race, class, language, belief, religion, political membership, ethnic origin, place of birth, gender, sexual orientation, age, marital status, appearance, disability, and past labour union membership.

When the employer identifies employees with poor performance, they may demand improvement and can collect evidence supporting the employee's incompetence. It is suggested that the employer have the employees undergo a performance improvement plan, which will list all the criteria for evaluating their performance. The local courts hold the view that if the employee fails to accomplish tasks or achieve performance targets owing to deficiency in professional capability, academic qualification, skills, physical capacity, or mental state, he or she can be deemed incompetent. The courts also hold that if the employee is found to have repeatedly neglected to carry out his or her duties, they can be deemed incompetent.

Termination as a last resort

It is the court's general view that the employer cannot claim another legal basis than what was cited in the termination notice to support the legality of the termination when challenged by the terminated employee. Whether the termination is justified for statutory reasons is subject to the court's review of the relevant facts, in the event of litigation initiated by the terminated employees. Judges of the labour

courts tend to hold a pro-employee outlook. To protect the interests of workers, the general principle adopted by the local courts is that termination should be a last resort. The courts usually apply a high threshold in determining whether there was any justifiable reason for terminating an employee. Hence, the issue of whether the employer had valid grounds to terminate employees would be subject to the court's review on a case-by-case basis. The terminated employees may file lawsuits against the employer for reinstating their employment with the employer and claiming salary accrued before they are reinstated on the grounds of wrongful termination.

In the case where no statutory cause provided in Article 11 or 12 of the LSA exists, or to simply avoid court consideration of wrongful termination altogether, the employer may try to terminate employees by mutual consent. The employer may offer compensation in exchange for an employee agreement to terminate employment. In this regard, the employer may consider offering a lump-sum compensation offer equivalent to the aggregate of statutory severance pay, payment in lieu of advance notice, and compensation for unused leave, which the employees would be eligible for if terminated.

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