



Taiwan Updates

November 2015

Legal Updates:

Recent Important Decisions

1. Pursuant to Articles 2(vi) and 21(1) of the Labor Standards Act, and Article 7(3) of the Enforcement Rules of the Labor Standards Act, changes to wages paid to employees must mutually be agreed upon by both the employer and the employee. Specifically, wage cuts must be mutually agreed upon between the employer and the employee and must receive the consent of each affected employee before coming into effect. In this case, the employer, without having received the consent of each affected employee, informed the employees, by way of an announcement, that it would reduce the 14 month guaranteed annual salary to 12 months. This amounted to an adjustment to the wages provided for in the employment agreement. The employer's notification of the employees by way of an announcement breached the agreement of both parties as set forth in their employment agreement. Such breach was likely to adversely affect the rights and the interests of the employees. As such, this unilateral wage reduction fell within the ambit of Article 14(1)(vi), which provides that an employee may terminate a employment contract without giving advance notice to the employer when such an employer "breaches an employment contract or violates any employment law or administrative regulation in a manner likely to adversely affect the rights and interests of the particular worker." (Supreme Administrative Court, 2015 Decision No. 511)
2. The Act for the Settlement of Labor-Management Disputes mandates that the Ministry of Labor, in order to handle employment disputes, establish a Committee for Dispute Resolution for Unfair Labor Practices (the "Committee"). Committee members are all professionals from outside the Ministry of Labor who are well-versed in Taiwan's labor laws or labor relations. The Committee is meant to be an independent expert committee meaning that the exercise of its powers is not under the direction of the Ministry of Labor and it has an independent status. Its purpose is to carry out rigorous investigations and arrive at a decision on a majority basis. The Committee's decisions are of an irreplaceable and professional nature and its legal mandate is very specialized. As such, its decisions should be granted

considerable latitude and the Administrative Court should not often review such decisions. Such decisions should be respected unless they contain: erroneous findings of fact; incomplete information; irrelevant considerations; clear errors in the application of legal concepts to the facts; interpretations of legal concepts in a way that is clearly incorrect, inconsistent with a prevailing legal provision, or violates generally accepted values, due process, or other aspects of the law. (Supreme Administrative Court 2015 Decision No. 512)

Labor Law

1. In order to provide a reference and standards to be followed to employers and employees concluding covenants not to compete ("CNC"), the Ministry of Labor of Taiwan's Executive Yuan has promulgated the "Reference Principles of Employer-Employee Non-compete Clauses" (the "Principles") on October 5, 2015.

In order for an employer to conclude a CNC with an employee, the employer must be in need of legal protection for its trade secrets or intellectual property rights. Also, the duties or positions of the employee must have involved the employee coming into contact with or using the employer's trade secrets or leading technologies. This does not apply to technologies already in general use. This requirement means that the following conditions must be satisfied:

- (i) The term of the CNC must not exceed two years from the date on which the employee ceases his/her employment.
- (ii) The territory to which the CNC applies must be clearly defined and must not extend beyond the territory in which the employer operates.
- (iii) The CNC must clearly define the occupations that the employee is prohibited from occupying. Further, the range of such occupations is limited to those that are same as or similar to the employee's occupation with its employer and that have a competitive relationship with such employer.
- (iv) The CNC must contain provisions providing compensation to the employee for any disadvantage that he/she may suffer as a result of abiding by the CNC. The employer must pay the employee monthly compensation of at least 50% of the employee's monthly average wage during his/her last position of

employment. Also, the employee's year-end bonus or other payments normally made to such employee may not constitute or replace such compensation.

Violating the above mentioned stipulations could potentially lead a court to find a CNC to be ineffective.

The Council of Labor Affairs, the antecedent of the Ministry of Labor, also published the "Non-Compete Clause Reference Manual" (the "Manual") before. The main difference between the Principles and the Manual is that the Principles eliminate the Manual's requirement that employees must have committed a clear breach of trust or acted in bad faith. That is, according to the current Principles, when determining whether a CNC is valid, there is no need to consider whether the employee committed a breach of trust or acted in bad faith. This position is consistent with the current practice of most Taiwan courts. Further, while the Manual did not clearly address the amount of compensation, the Principles clearly state that such compensation may not be lower than 50% of the employee's monthly average wage during his/her last position of employment.

As for the penalty to be paid by an employee who breaches a CNC, the Principles still do not make any clear stipulations in this regard. Thus, it is up to the court to consider, *inter alia*, the combination of objective facts, socio-economic conditions, and the damages suffered by the parties, and to make the deductions set out in Article 252 of the Taiwan Civil Code. Furthermore, if the employee has partially complied with the CNC, the court may take such partial performance into consideration and reduce the penalty in accordance with Article 251 of the Taiwan Civil Code.

2. The Ministry of Labor of Taiwan's Executive Yuan, on October 7 2015, modified the Interpretive Order on Article 2 of the Regulations of Leave-Taking of Workers. The requirements for marriage leave have been relaxed so that it may be taken any time from 10 days prior to the date of the wedding to 3 months after. Further, with the consent of the employer, it may be taken within one year of the date of the wedding.

Intellectual Property

PPH and TW-SUPA Overview of Accelerated Examination

In order to assist companies more quickly obtain patents in important international markets, Taiwan has concluded Patent Prosecution Highway Agreements (PPH) with the United States, Japan, Spain, and South Korea. As of today, a total of 28 applications allowed by the Taiwan Intellectual Property Office (TIPO) have been submitted for accelerated examination in the United States and Japan based on the allowance issued by the TIPO.

The United States and Japan have approved 85.7% and 60% of the Taiwan patents, respectively (Please see the August Edition of Taiwan Updates). Currently, there is a major discrepancy between the approval rates of Taiwan-Japan patent applications and Taiwan-US applications. This discrepancy suggests that Taiwanese patent examiners may not be very familiar with prior art documents drafted in Japanese. This may be the reason that few Japanese prior art documents are cited during the examination process in Taiwan. However, it may be that, at this point, there is not enough data for the Taiwan-Japan examination results to accurately reflect reality. Further tracking and analysis may be needed.

Further, in order to receive faster patent examination, applicants may apply to the TIPO for assistance under the Taiwan Support Using the PPH Agreement Program ("TW-SUPA"). The TIPO may also initiate such assistance itself. Since March of 2012, 364 cases requested by applicants have been examined, and 46 cases initiated by the TIPO have been examined. The approval rate was 82.6% when TW-SUPA assistance was requested by the applicant and 74.5% when such assistance was initiated by the TIPO.

Economic Updates:

Three Point Consensus Achieved during Cross-Strait Banking Talks

The fifth meeting of the Taiwan and Mainland China Cross-strait Banking Supervisory Cooperation Platform recently concluded. During the talks, the parties achieved a three-point consensus. The first point is the continued strengthening of supervisory cooperation; both sides confirmed that the second Cross Straits Financial Development and Supervision Experience Symposium will be held in Taipei in 2016. The second point is the continued promotion of two-way cross strait banking; currently, Taiwanese banks operate 52 branches in Mainland China. Meanwhile, on September 8, 2015 Taiwan's Financial Supervisory Commission approved a request by the Agricultural Bank of China, a Chinese bank, to establish a representative office in Taipei. The third point is the continued support for the establishment of closer cooperation between businesses in the banking industry in both Taiwan and China. This will involve Taiwan banks

reforming their Mainland China branches, setting up new banking subsidiaries to carry on business in the Mainland China, and developing cooperative relations in equity investments. Further, the Mainland China representatives stated that they support Taiwan-funded banks setting up branches in China's free trade zones and indicated that they would provide the necessary assistance. This includes the Fujian Free Trade Zone, where China will actively evaluate the implementation of liberalization measures on Taiwan banks.

Chinese Investors still Prohibited from Establishing IC Design Companies in Taiwan or Investing in Taiwanese IC Design Companies

Chinese companies investing in Taiwan's semiconductor industry are subject to the Measures Governing Investment Permit to the People of the Mainland Area. The Ministry of Economic Affairs, considering that Taiwan's IC design industry mostly consists of small and medium sized businesses, still prohibits Chinese investors from establishing IC design companies in Taiwan or investing in existing Taiwanese IC design companies.

However, in the wake of the promulgation of a Chinese Government plan to boost the development of China's indigenous IC industry, Intel entered the Chinese market by investing in Tsinghua Unigroup, a Chinese equity firm that owns Spreadtrum Communications and RDA Microelectronics, two Chinese IC design companies. There is now fierce competition in the IC design industry in the Chinese market.

Taiwanese companies now face highly competitive pressure from domestic Chinese companies, such as Tsinghua Unigroup's Spreadtrum, which enjoy the active support of the Chinese government and a home market advantage. As such, the Taiwan's Ministry of Economic Affairs will carefully assess whether it should relax the rules governing Chinese investment in the IC design industry, particularly the area of alliances in different industries (both upstream and downstream industry chain relationships).

Government Updates:

TIFA Meeting Takes Place Successfully in Taipei during October

The ninth meeting of the Taiwan-US "Trade and Investment Framework Agreement" ("TIFA") was held in Taipei on October 1, 2015. The US was represented by Deputy Trade Representative Robert Holleyman. American representatives from the US Trade Representative, the State Department, the Ministry of Commerce, the Ministry of Agriculture, and the American

Institute were also sent to attend.

TIFA is an important mechanism for dialogue in Taiwan-US trade relations. It is also an important platform for in-depth consultations on trade and investment issues. This year, the US recognized specific measures adopted by Taiwan following the 2014 TIFA talks, including: enhancement of trade secret protection; implementation of important commitments relating to pharmaceuticals; simplification of the registration procedures for chemical products; relaxation of restrictions on the establishment of offshore data centers by financial institutions; increases in staffing and funding for Taiwan's Intellectual Property Office; and dealing with the problem of piracy on and near Taiwan university campuses. During the TIFA talks, Taiwan explained its efforts to join the Trans-Pacific Partnership. The two sides also engaged in in-depth discussions on improving the process for bringing medical equipment to market, reducing legal barriers to the registration of chemical products, and a number of agricultural issues.

ECFA, Mainland Affairs Commission hopes to conclude agreement before the end of 2015

Negotiations between Taiwan and Mainland China concerning the Economic Cooperation Framework Agreement ("ECFA") took place in Beijing on September 28 and 29, 2015. Both parties again reached a consensus on the principle of open markets. The consensus is based on equal consideration for both parties, markets that are open to the industries of both parties and have complementary and reciprocal cooperation as a goal, and avoid free riding by third parties.

Taiwan seeks to rely on the principle of complementary industrial cooperation in order to protect its panel industry from the emerging "red supply chain," a plan devised by the Chinese government to foster a domestic supply chain for China's high-tech manufacturing sector. Specifically, Taiwan hopes to obtain zero tariff treatment for Taiwanese panels entering the Mainland market. Also, Taiwan hopes that China is open to the principle of relying on Taiwanese production when Chinese production is insufficient. Both sides hope to complete negotiations before the end of the year.

Cultural Updates:

Asia Pacific Traditional Art Festival takes Place in the Ilan Centre for Traditional Arts

The 2015 Asia-Pacific Traditional Arts Festival took place in Ilan at the National Centre for Traditional Arts from October 17 to November 1. In 2000, the National Center for Traditional Arts began hosting the festival, which provides an opportunity for artists from each Asia-Pacific nation to interact with one another in areas including music, dance, fine arts, drama, and crafts.

The festival also involves art and academic seminars, exhibitions, and other activities. This year, a total of 27 countries were invited to participate in the festival, which is now in its thirteenth year. In all there were 86 foreign teams, and nearly 1000 artists. Audience participation totaled 670,000 people. The music and dances of the Asia-Pacific nations were a major theme. The style of each nation's art was on display, and traditional knowledge of Asia-Pacific arts was shared and discussed. One could witness the construction of a shared Asia-Pacific cultural life.

The Taiwan Updates content on Taiwanese law and regulations is meant to provide an overview of the latest legal developments in Taiwan. Due to the generality of this overview, the information contained herein may not be applicable in all situations and should not be acted or relied upon without special legal advice. For more information or advice on specific legal issues, please contact Lee and Li directly. Our contact information is provided below.

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