

# International Employment Law Update

February 1, 2018

International Employment

## China

### New Foreigner Work Permit Policy

China implemented a new, nationwide work permit policy at the end of 2017 (the “**Policy**”), which combines the ‘Employment Permit’ and the ‘Expert Permit’ categories into a single ‘Work Permit’ category. Foreign employees who currently hold a valid Employment Permit or Expert Permit may either convert these to the new Work Permit now, or wait until the expiration of their existing permit and do this at renewal.

In addition, the Policy categorises foreign applicants for Work Permits into three sub-categories using a scoring system which takes into account a number of factors, including the applicant’s age, educational qualifications, work experience, time spent working in China each year, annual salary and Mandarin proficiency. Applicants are categorised as follows:

Class A	Class B	Class C
High-end foreign talent who score at least 85 points	Foreign professionals under the age of 60 who score between 60 and 84 points (inclusive)	All other foreign applicants who score less than 60 points
Applicants will generally be experts in the science and technology industries, successful entrepreneurs and/or those who have received international recognition in their field	Applicants will likely hold a bachelor’s degree (or higher) and have at least two years of work experience in a relevant field	Applicants are likely to be non-technical or service workers hired on a seasonal or temporary basis
No limit on the number of work permits that can be granted to this class	Grant of work permits is based on labour market demand	Grant of work permits is subject to a strict quota control (further information is expected in this regard this year)

Companies with employees in China should review their current and proposed future expatriate workforce, in order to assess the impact. Please note that the Policy only applies to foreign nationals in China. Residents of Hong Kong, Macau and Taiwan should continue to apply for work permits under the applicable regime.

## India

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### **New Law for Shops and Establishments in the Maharashtra State**

The Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2017 (the “**MSEA 2017**”) came into force on December 19, 2017. The majority of the obligations contained in the MSEA 2017 apply to establishments with at least 10 workers (whereas the previous legislation referred to “employees”). Smaller establishments with less than 10 workers are exempt from most of the obligations.

Some of the more notable changes resulting from the implementation of the MSEA 2017 include the right for establishments to stay open every day of the week (provided that each worker is given at least 24 hours off in a week), and an extension of the maximum permitted number of overtime hours from six hours per week to 125 hours per three-month period. In addition, female workers are now permitted to work between the hours of 21:30 and 07:00, provided certain conditions are met (which include obtaining the worker’s consent and providing transport home).

Despite affording businesses in the Maharashtra State a greater degree of flexibility, the MSEA 2017 does impose more stringent sanctions on employers for non-compliance. Employers may now face an increased maximum fine of INR 500,000 (approximately USD \$7,500) for failure to comply with the new law, and an additional fine of INR 2,000 (approximately USD \$30) per worker employed for continuing breaches. In addition, employees responsible for a breach which results in an incident causing serious bodily injury to, or the death of, a worker risk imprisonment. Employers should review their current HR policies and practices to ensure these are compliant with the new law.

## Italy

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### **Greater Protection for Whistleblowers**

Law No. 179 dated November 30, 2017 (“**Law No. 179**”) came into force on December 29, 2017, and builds on Legislative Decree 231 of 2001 (the law which holds private employers liable for certain criminal offences, unless they adopt measures aimed at preventing the commission of such offences) by requiring employers to implement a set of measures which:

- Require managers, employees and consultants/contractors to report alleged breaches (in good faith and on the basis of their reasonable belief of the facts);
- Provide alternative channels of communication, of which at least one must protect (through technological means) the identity of the whistleblower and ensure this remains confidential;
- Safeguard the identity of the whistleblower and the contents of any disclosure(s) made more generally;

- Prohibit direct or indirect retaliatory or discriminatory action against a whistleblower as a result of a disclosure that has been made; and
- Establish sanctions for any individuals who breach the confidentiality obligations or who take any retaliatory or discriminatory action against a whistleblower.

Law No. 179 further clarifies that any retaliatory or discriminatory acts against whistleblowers can be reported by the whistleblower, a trade union or the works council to the competent labour office. Finally, any dismissal, change of duties and/or other action taken as a consequence of a disclosure will be null and void. In the event that the whistleblower brings a civil claim, the burden to prove that such measures were unrelated to the disclosure immediately shifts to the employer.

## Russia

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### **New Grounds for Unscheduled Checks by the State Labour Inspectorate**

The amendments contained in Draft Law No. 1181957-6 on amending Article 30 of the Labour Code of the Russian Federation came into force on January 11, 2018. These extend the circumstances in which the State Labour Inspectorate can conduct unscheduled checks, without notifying employers in advance. These include where the employer:

- Intentionally avoids entering into an employment contract with an employee;
- Improperly terminates an employment contract; and/or
- Enters into a contract for services with an individual in respect of a working arrangement which, in reality, is an employment relationship.

### **Protection Afforded to Whistleblowers Reporting Corruption Offences**

On December 13, 2017, the Russian State Duma completed the first reading (of which there will be three) of Draft Law No. 286313-3 on amending the Federal Law on Corruption Counteraction (the “**Draft Law**”). The Draft Law seeks to provide employees who report corruption offences with enhanced protection. The Draft Law proposes that employees who blow the whistle in this regard should be protected from dismissal, unilateral transfer to another position or any other disciplinary sanction for a period of two years following the making of the disclosure, and may only be dismissed, unilaterally transferred or disciplined with the prior approval of a special compliance committee (to be formed by the company).

## United Kingdom

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### **Proposed Changes to the Taxation of Payments In Lieu Of Notice**

The draft Finance Bill 2017 (the “**Bill**”) proposes some significant changes to the tax treatment of a payment in lieu of notice (“**PILON**”). Where an employer exercises a contractual right to make a PILON, the payment is fully taxable and subject to national insurance contributions (“**NICs**”) as income, in the same way as salary. However, where there is no contractual right to make a PILON, and the employer chooses to terminate the employee’s contract in lieu of notice, any payment made to the employee to cover the amount that they would have received if they had worked their notice in full constitutes damages for breach of contract. Such payment could therefore be paid free of tax up to £30,000, and free of both employer and employee NICs.

The Bill proposes that, from April 6, 2018, all PILONs (contractual and non-contractual) will be taxed as income, and will therefore be subject to income tax and both employer and employee NICs. This would apply only to the basic pay that the employee would have earned during this period.

In addition, any amounts in excess of the £30,000 tax exemption are currently subject to income tax, but not to any NICs. The government has proposed to subject such excess to employer (but not employee) NICs. If passed, this provision would take effect from April 2019.

Although the Bill is only in draft form currently (and its scope subject to change between now and April 2018), employers should carefully consider any proposed terminations that may be made after April 6, 2018, in order to minimise any potential tax liabilities that could arise for both the employer and the employee.

## United States of America

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### Department of Labor Scraps Prior Unpaid Intern Test and Adopts More Flexible Approach

The U.S. Department of Labor (the “DOL”) recently announced that it will apply a new, more flexible test for determining whether interns working for ‘for-profit’ companies are entitled to minimum wage and overtime protection under the Federal Fair Labor Standards Act (the “FLSA”). The new test is set out in [DOL Fact Sheet #71](#) (updated January 2018).

The FLSA requires employers to pay employees minimum wage and overtime. It has long been recognised, however, that certain categories of workers are not employees for the purposes of the FLSA, including unpaid interns. Previously, the DOL applied a strict test that required private employers to establish six different factors to demonstrate that workers were appropriately classified as unpaid interns. Over the past few years, litigation relating to the use of unpaid interns has increased, and the test had been rejected by the courts, including the United States Courts of Appeals for the Second and Ninth Circuits. Decisions issued by those courts favored a more flexible test that holistically examines the relationship between an intern and the employer to determine who the ‘primary beneficiary’ of the relationship is.

The announcement by the DOL is intended to align its enforcement policies with the more recent case law, and to provide DOL investigators with greater flexibility in analysing issues involving unpaid interns on a case-by-case basis. While the new test provides greater flexibility in the use of unpaid interns, given the spate of litigation over these issues in recent years and the fact-specific nature of the test, employers should carefully examine the issue and seek legal advice with respect to their use of unpaid internships.

### Tax Bill Creates New Limits on Deductions for Sexual Harassment Settlements

On December 22, 2017, President Trump signed into law the first major overhaul of the U.S. tax code in 30 years. Nestled among the many components of this bill is a provision limiting the ability to deduct certain settlement payments made in cases of sexual harassment or abuse. Section 13307 of the bill prohibits deductions for (i) settlement payments ‘related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure requirement’, and (ii) legal fees allocated in sexual harassment and abuse settlements. This provision is intended to limit employment practices which currently foster patterns of harassing

or abusive behavior, especially in light of the recent string of high-profile sexual harassment and abuse cases.

The statutory text contains some ambiguities. For example, the provision does not include a definition for the phrase 'related to sexual harassment or sexual abuse'. It is therefore unclear how this provision applies to settlement agreements covering both sexual harassment or abuse claims, and other types of claims (employment or otherwise). In addition, it is not clear whether the denial of a tax deduction for legal fees is contingent on the presence of a non-disclosure clause, or whether the denial of the tax deduction extends to claimant employees, who have traditionally been allowed an 'above-the-line' deduction for legal fees related to employment settlements.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Employment practice:

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