

# ARTICLES

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## TRANSNATIONAL EMPLOYMENT TRENDS IN FOUR PACIFIC-RIM COUNTRIES

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*Transnational employment occurs when employees are sent to foreign countries by their employers to perform services. Transnational employment presents both employers and employees with a great deal of uncertainty. Despite drafted agreements, uncertainty still lingers due to the locally-regulated nature of labor and employment relations. Neither domestic regulations of labor and employment relations nor international law has thoroughly considered transnational employment. While transnational employment relationships have become common, the law has not evolved with this growth. This article will address how four countries in the Pacific Rim have confronted the growing complexities of transnational employment, including their visa processes, related laws and regulations, and their potential shortcomings.*

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## INTRODUCTION

Transnational employment occurs when employers send their employees to perform services in foreign countries. It presents both employers and employees with a great deal of uncertainty.<sup>1</sup> Despite drafted agreements, uncertainty lingers due to the locally-regulated nature of labor and employment relations.<sup>2</sup> Neither domestic regulations of labor and employment nor international law has thoroughly addressed transnational employment.<sup>3</sup> While transnational employment relationships have become common, the law has not evolved with this growth.<sup>4</sup>

This article will analyze the visa processes, related laws and regulations, and potential shortcomings of how four countries in the Pacific Rim have confronted the growing complexities of transnational employment. Part I will address Australia's response to increased demands of migration, including its creation of the Australian Border Force, the ever-increasing complexity of its immigration laws, and both the revisions and the intended simplifications to the visa framework. Part II will discuss Hong Kong's transnational employment legal framework, as well as how Hong Kong's immigration policies and tax laws affect transnational employees both in Hong Kong and abroad. Part III will analyze Indonesia's highly regulated employment law regarding outsourcing, liabilities of the outsourcing company, and Indonesia's obligations to Indonesian workers sent abroad. Part IV will examine Japan's minimum standard laws, how such laws apply to transnational employees, and the penalties for violating these mandatory minimum standards. Part V will analyze and compare these diverse countries' practices.

## I. AUSTRALIA

A. *Introduction*

Australia's laws on transnational employment changed significantly in 2015.<sup>5</sup> Australia is a nation of immigrants, and since the end of the Second World War, the Migration Program<sup>6</sup> has contributed to nation-building.<sup>7</sup> The mass migration of people displaced by the war increased Australia's population base and fueled the nation's industrial-

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1. Cecilia Pérez Martinez, *Where Will the Case Be Heard? Which Is the Applicable Law? Approach to Selected Problems of Transnational Employment Relationships*, 5 AM. U. LAB. & EMP. L.F. 5, 6 (2015).

2. *Id.* at 5.

3. *Id.* at 5–6.

4. *Id.* at 6.

5. See AUSL. GOV'T DEP'T OF IMMIGRATION AND BORDER PROT., BLUEPRINT FOR INTEGRATION (2014) [hereinafter BLUEPRINT FOR INTEGRATION].

6. Australia's program of allocating places for immigrants and attracting workers.

7. Michael Pezzullo, *Immigration and Nation Building in Australia*, ASIA & PAC. POL'Y SOC'Y (Apr. 23, 2015), <http://www.policyforum.net/immigration-and-nation-building-in-australia> [<https://perma.cc/R7DW-2NXX>].

ization. Since the 1980s, the Migration Program has enhanced Australia's competitiveness and productivity in the global marketplace through a focus on highly skilled and educated migrants. However, with the pressures of globalization, the "war on terror," and the never-ending demand for temporary and permanent entry, Australia's immigration laws have become increasingly complex and subject to significant and ongoing changes.<sup>8</sup> Many of the most significant recent changes are focused on preventing threats to national security through regulation of the immigration process.<sup>9</sup>

For example, the mission of Australia's Department of Immigration and Border Protection (the "Department") is "to protect Australia's borders and manage the movement of people and goods across it."<sup>10</sup> Effective July 1, 2015, the Department merged with the Australian Customs and Border Protection Service, establishing the Australian Border Force.<sup>11</sup>

The establishment of the Australia Border Force as the operational enforcement arm of the Department was meant to increase resistance to criminal infiltration and corruption and to enhance government and public confidence in the management of Australia's borders and the movement of goods and people.<sup>12</sup> This is a once in a generation change with profound implications for the management of Australia's borders and immigration law. It reflects a commitment to a strong regulatory and compliance regime.

### B. *The Complexity of Australia's Immigration Laws*

Australian immigration law is a complex scheme that includes layers of both legislation and regulation. It is not only highly codified and rule-based, but also changing constantly and regularly. The Migration Act 1958 (the "Act") contains about 1,048 pages,<sup>13</sup> while the Migration Regulations 1994 (the "Regulations") contains more than 2,233 pages.<sup>14</sup> This ever-changing area of law is under-appreciated, both in regards to its complexity and its importance to Australia.<sup>15</sup>

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8. Maria Jockel, *Australia's Migration Programme: A Guide to an Ever-Changing Landscape*, WHO'S WHO LEGAL (May 2015), <http://whoswholegal.com/news/features/article/32284/australias-migration-programme-guide-ever-changing-landscape> [<https://perma.cc/XZ72-UVU8>] [hereinafter Jockel, *Migration Programme*].

9. *Id.*

10. BLUEPRINT FOR INTEGRATION, *supra* note 5, at 2.

11. *Id.*

12. *See generally id.*

13. *See Migration Act 1958* (Cth) ss 1–507 (Austl.).

14. *Migration Regulations 1994* (Cth) schs 1–12 (Austl.).

15. Maria Jockel, *Commonwealth Legal Convention Paper: The Collision of Law and Policy: Department of Immigration and Citizenship's Administrative Decision-Making Powers and the Law*, L. COUNCIL AUSTRALIA (September 2009), [https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/3\\_1Jockel,Maria.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/3_1Jockel,Maria.pdf) [<https://perma.cc/C8D4-3TTT>] [hereinafter Jockel, *Law and Policy*].

The legislative scheme is rendered more complex by the extensive Departmental Policy Guidelines, which provides direction and guidance to departmental officers regarding how to interpret and understand this complex legislative scheme.<sup>16</sup> Since 1994, the Department has created over 400,000 individual pages of information relating to Australia's immigration laws, of which approximately 100,000 pages relate to citizenship.<sup>17</sup> The Department's policy, procedures, and guidelines relating to its departmental officers play a significant role in immigration decisions.<sup>18</sup>

Some of the Department's policy guidelines are accessible only to senior departmental officers or officers who have the relevant security clearances.<sup>19</sup> The Department's commercial version of its instructions and policy guidelines, available strictly by license, are referred to as LEGENDcom.<sup>20</sup> LEGENDcom only contains policy guidelines that the Department has determined are not "sensitive." There are seven million individual pages in the "Table of Contents" within LEGENDcom as well as sixty million links within LEGENDcom.

The demand for temporary and permanent entry to Australia is reflected in the fact that the Department receives over 13,000 total visa applications each day, worldwide.<sup>21</sup> It is also reflected in the significant revenue from visa fees, which the Department continues to raise.<sup>22</sup> From 2012–2013, revenue from immigration fees and fines was approximately AU \$1.21 billion.<sup>23</sup> This figure rose to approximately AU \$1.65 billion in 2013–2014<sup>24</sup> and approximately AU \$1.87 billion in 2014–2015.<sup>25</sup> The 2016–2017 budget has projected AU \$2.03 billion in revenue from visa application charges.<sup>26</sup>

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16. See Jockel, *Migration Programme*, *supra* note 8.

17. *Id.*

18. Austl. Gov't Dep't of Immigration and Border Prot., *LEGENDcom*, AUSTRALIAN CUSTOMS AND BORDER PROT., <http://www.border.gov.au/Trav/Visa/LEGE> [<https://perma.cc/LW6P-N2SR>] (Austl.) [hereinafter *LEGENDcom*]. Policy guidelines are referred to as LEGENDcom, an electronic database of migration and citizenship legislation that is available to immigration practitioners and general public under paid subscription. *Id.*

19. Some information in this paragraph can only be provided by senior officers of the DIBP who have delegated responsibility for the LEGENDcom software program. The text is based on my 30 years of the author's experience in this area of law and also information provided by a LEGENDcom training officer.

20. *LEGENDcom*, *supra* note 18.

21. See Jockel, *Migration Programme*, *supra* note 8.

22. *Id.*

23. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, ANNUAL REPORT 2013–14, at 307 (2014) (Austl.) [hereinafter ANNUAL REPORT 2013–14]. The actual figure collected in immigration fees was AU 1,658,464,000 and fines was AU 1,533,000 for the year ending 30 June 2014. *Id.*

24. ANNUAL REPORT 2013–14, *supra* note 23, at 304.

25. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, ANNUAL REPORT 2014–15, at 294 (2015) (Austl.).

26. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, BUDGET 2016–17, at 60 (2016) (Austl.).

The July 1, 2015 merger of the Department with the Australian Customs and Border Protection Service created a “global organisation with almost 15,000 people working in more than sixty (60) offices, in more than fifty (50) countries.”<sup>27</sup> It is the “second-largest revenue collection agency for the government.”<sup>28</sup> It is “forecast[ed] to collect AU \$63 billion over the forward estimates, or more than AU \$15 billion per annum” in revenue.<sup>29</sup>

Given the increased movement of people across the globe, the new Department is projected to address an increase of movement across the border over the next four years of some 23% in air and sea travellers, 16.5% in student visas granted, 17% in sea cargo, 54% in air cargo, and 23% in citizenship applications.<sup>30</sup> The new Department focuses on “immigration and citizenship,” “refugee and humanitarian programmes, trade and customs, offshore maritime security, and revenue collection.”<sup>31</sup>

### C. *The Australian Border Force*

The creation of the Australian Border Force as the Department’s operational enforcement arm has a significant role in national security, law enforcement, and security priorities.<sup>32</sup> As an “intelligence-led, mobile and technologically enabled force” working onshore and offshore, the Australian Border Force and its strategic partners operate under the Strategic Border Command to counter threats ahead of the border.<sup>33</sup> The Australian Border Force also employs “sophisticated risk assessments through visa programmes and work[s] with international partners to deliver enforcement outcomes.”<sup>34</sup> The Australian Border Force Commissioner has “significant powers concurrently held by the Secretary of the Department and the same standing as other heads of key national security related agencies as, for example, the Commissioner of the Australian Federal Police (AFP) or the Chief of the Australian Defence Force.”<sup>35</sup>

As the operational enforcement entity, it has a range of priorities, including “Border Force Operations.”<sup>36</sup> These include “Compliance and Regulation,” which encompasses “Border Protection Command Operations,” character consideration, compliance assessment, case man-

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27. BLUEPRINT FOR INTEGRATION, *supra* note 5, at 6.

28. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, PLAN FOR INTEGRATION 14 (2015) (Austl.) [hereinafter PLAN FOR INTEGRATION].

29. *Id.*

30. BLUEPRINT FOR INTEGRATION, *supra* note 5, at 13.

31. *Id.* at 4.

32. AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, CORPORATE PLAN 2015–19, at 10 (2015) (Austl.) [hereinafter CORPORATE PLAN 2015–19].

33. BLUEPRINT FOR INTEGRATION, *supra* note 5, at 12.

34. *Id.*

35. S. LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE, AUSTRALIAN BORDER FORCE BILLS 2015, at 4–5 (2015) (describing the effect of Australian Border Force Bill 2015 (Cth) schs 4–5 (Austl.)).

36. See PLAN FOR INTEGRATION, *supra* note 28, at 20. This is not an exhaustive list of duties.

agement, identity, investigation, removals, status resolution, surveillance operations, and targeted enforcement operations.<sup>37</sup> The Department, together with the Australian Border Force, has “blended teams” with a variety of skill sets, i.e. there are a mix of officers with different vocations and skills who are drawn from different parts of the organization to deliver business outcomes with clear lines of accountability. The mixes can vary, depending on the nature of the task.<sup>38</sup>

The Australian Border Force College has been established to deliver a nationally standardized approach to training with a single culture, purpose, and mission.<sup>39</sup> The National Border Targeting Centre integrates data to fully exploit information, identify threats, defend visa and citizenship programmes, and coordinate border control systems.<sup>40</sup> The analyses of information lodged in relation to visa and related matters inform decision-making as well as assist in law enforcement operations.<sup>41</sup>

The 2015 Australian Border Force Act confers significant powers on the Australian Border Force and the Department. This statute should be read in conjunction with other significant reform statutes, including the 2015 Customs and Other Legislation Amendment (Australian Border Force) Act, the 2014 Telecommunications (Interception and Access) Amendment (Data Retention) Act, the amendments to the 2006 Law Enforcement Integrity Commissioner Act, and the 2015 Law Enforcement Legislation Amendment (Powers) Act. Each of these will be discussed in turn.

The 2015 Customs and Other Legislation Amendment (Australian Border Force) Act<sup>42</sup> and the Australian Border Force Act<sup>43</sup> extend significant operational powers to the new Department. This legislation extends operational powers to include areas of controlled operations under the Crimes Act of 1914, assumed identities under the Crimes Act of 1914, integrity testing under the Crimes Act of 1914, access to stored communications warrants under the Telecommunications (Interception and Access) Act of 1979, and applications for freezing orders under the Proceeds of Crime Act of 2002.<sup>44</sup>

The Australian Border Force Act amends the Law Enforcement Integrity Commissioner Act of 2006, extending the jurisdiction of the Law Enforcement Integrity Commissioner to the Department on a “whole of agency” basis.<sup>45</sup>

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37. *Id.*

38. *Id.* at 24.

39. *Id.* at 25.

40. BLUEPRINT FOR INTEGRATION, *supra* note 5, at 38.

41. *Id.*

42. Customs and Other Legislation Amendment (Australian Border Force) Bill 2015 (Cth) (Austl.).

43. Australian Border Force Bill 2015 (Cth) (Austl.).

44. Jockel, *Migration Programme*, *supra* note 8.

45. Customs and Other Legislation Amendment (Australian Border Force) Act 2015 (Austl.). (See explanatory memorandum.)

The Law Enforcement Legislation Amendment (Powers) Act of 2015 amended the Australian Crime Commission Act of 2002 and the Law Enforcement Integrity Commission Act of 2006 to clarify that the powers of the Australian Crime Commission examiners includes conducting investigations as that the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity, has the power to conduct hearings.<sup>46</sup> The coercive powers of the Australian Crime Commission examiners and the Integrity Commissioner are expressed similarly in the Australian Crime Commission Act and the Law Enforcement Integrity Commission Act.<sup>47</sup>

This legislation enabled the Integrity Commissioner to conduct hearings to question a witness charged with an offense and to ask such person questions related to the subject matter of the charge.<sup>48</sup> It enabled the Integrity Commissioner to use hearing materials to obtain derivative evidence against the witness and others as well as set out the circumstances in which this material may be used in criminal and other proceedings against a witness.<sup>49</sup>

These legislative changes gave greater powers to the Australian Commission for Law Enforcement Integrity.<sup>50</sup> Such powers, for example, could ensure that the investigations are not hampered by the suspect's traditional right to silence.<sup>51</sup> These coercive powers enable the agencies to obtain information that would not be available through traditional policing methods.<sup>52</sup>

The Australian Border Force Act also amends the Telecommunications (Interception and Access) Act of 1979 to automatically include the Department as an enforcement agency that may have access to telecommunications data and as a criminal law enforcement agency that can seek access to prospective telecommunications.<sup>53</sup>

As an "enforcement agency," the Department can access telecommunications data by prescribing that an "authorised officer" of an "enforcement agency" may permit the disclosure of specified information, if the disclosure of such information would be "reasonably necessary" to enforce a criminal law, or to enforce a law imposing a pecuniary penalty or for the protection of public revenue.<sup>54</sup>

The term "telecommunications data" is not defined in the Telecommunications (Interception and Access) Act.<sup>55</sup> The term is generally

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46. See Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth) (Austl.).

47. See *id.*

48. See *id.*

49. See *id.*

50. Jockel, *Migration Programme*, *supra* note 8.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*; Telecommunications (Interception and Access) Act 1979 (Cth) ss 178–79 (Austl.).

55. See Telecommunications (Interception and Access) Act 1979; Maria Jockel,

accepted as referring to “information about a communication but not its content or substance.”<sup>56</sup> The term also refers to metadata, communications data, and communications associated data.<sup>57</sup>

The above legislative reforms should also be considered in the context of the Migration Amendment (Strengthening Biometrics Integrity) Act of 2015,<sup>58</sup> which expands the type of biometric data that the Commonwealth Government collects and will continue to collect on both Australian citizens and non-citizens.<sup>59</sup> This data is collected in connection with Permanent Family visas, Visitors and Other Temporary visas (including the Subclass 457 Temporary Work (Skilled) Visa), Temporary Family visas, and Student visas. Biometric data is part of heightening the security of the Department’s systems, and it includes an analysis of metadata/data, a whole-of-government approach, and the sharing of information with national and international agencies and partnerships to manage Australia’s borders and the movement of goods and people.<sup>60</sup>

#### D. *Update to the Visa Framework*

The Department’s current review into Skilled Migration and Temporary Activity visas aims to support Australia’s long-term prosperity by attracting and retaining overseas skilled workers, while developing a new and “simplified” visa framework that is “supportive, flexible and responsive” to Australia’s economic needs.<sup>61</sup> The Department implemented the new visa framework, effective July 1, 2016.<sup>62</sup>

Known as a 457 visa, the Temporary Work Visa is “designed to enable employers to address labour shortages by bringing in genuine skilled workers where they cannot find an appropriately skilled Australian.”<sup>63</sup> Eligible occupations include orthoptist, prosthetist, audiologist, mining engineer, petroleum engineer, metallurgist, environmental health officer, occupational health and safety adviser, dental hygienist, dental

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*Migration Programme*, *supra* note 8.

56. Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth) s 187A(1) para 222 (Austl.) (Revised Explanatory Memorandum); Jockel, *Migration Programme*, *supra* note 8.

57. Jockel, *Migration Programme*, *supra* note 8.

58. Migration Amendment (Strengthening Biometrics Integrity) Act 2015 (Cth) (Austl.).

59. Jockel, *Migration Programme*, *supra* note 8.

60. *Id.*

61. *Id.*; DEP’T. OF IMMIGRATION AND BORDER PROT., PROPOSAL PAPER: SIMPLIFICATION OF THE SKILLED MIGRATION AND TEMPORARY ACTIVITY VISA PROGRAMMES (2014) (Austl.).

62. Jockel, *Migration Programme*, *supra* note 8.

63. *Temporary Work (Skilled) (Subclass 457) Visa*, AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION (NOV. 2016), <https://www.border.gov.au/Forms/Documents/1154.pdf> [<https://perma.cc/6QY3-UTVU>] [hereinafter *457 Visa*].

prosthetist, dental technician, and dental therapist.<sup>64</sup> However, the grant of a 457 visa does not automatically guarantee permanent residence.<sup>65</sup>

Employers may sponsor 457 visa holders to work in Australia through a standard business sponsorship or through a labor agreement.<sup>66</sup> Standard business sponsorship is more common.<sup>67</sup> However, a business must enter into a labor agreement with the department if (1) it intends to sponsor overseas works in the meat industry; (2) it intends to sponsor overseas workers to work in the on-hire industries; and (3) it has unique requirements that will prevent it from sponsoring workers under the standard business sponsorship agreement.<sup>68</sup>

Sponsorship obligations have been put in place to protect overseas skilled workers from exploitation.<sup>69</sup> Sponsors must (1) demonstrate that they are not providing less favorable terms and conditions of employment to the overseas skilled workers than to Australian workers; (2) pay travel costs to enable the overseas workers and their family members to leave Australia; (3) keep records of their compliance with all obligations and provide such information to the department upon request; (4) ensure that the overseas workers only work in the approved occupation; (5) pay for recruitment costs; (6) provide training within the industry; and (7) not engage in discriminatory recruitment practices.<sup>70</sup>

Sanctions for non-compliance with these obligations for standard business sponsors include (1) barring the company from sponsoring other overseas employees; (2) barring future applications for sponsorship; (3) cancelling current sponsorship; and (4) imposing civil penalties.<sup>71</sup> For companies in a labor agreement, penalties include (1) suspension of the labor agreement; (2) termination of the labor agreement; and (3) civil penalties.<sup>72</sup>

The 457 visa allows Australian companies to hire foreign workers for up to four years in specified skilled occupations.<sup>73</sup> These visa holders may work in Australia for a period of one day to four years, bring eligible dependents who may work or study in the country, and travel freely in and out of Australia.<sup>74</sup> Eligible dependents include spouses, de facto partners, children, or those who rely on the 457 visa holder for food, clothing, and shelter.<sup>75</sup> A de facto partner may demonstrate such relationship through

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64. *Skilled Occupations*, AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION, <http://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists> [<https://perma.cc/3VTR-ZP3E>].

65. *457 Visa*, *supra* note 63, at 55.

66. *Id.* at 8.

67. *Id.*

68. *Id.*

69. *Id.* at 13.

70. *Id.* at 13–19.

71. *Id.* at 20.

72. *Id.*

73. *Id.* at 3.

74. *Id.*

75. *Id.* at 44.

evidence of co-habitation, joint bank account statements, joint ownership of property, billing accounts in joint names, or other legal documents.<sup>76</sup> A person over the age of eighteen claiming to be a dependent must show that he or she relies on the visa applicant for financial support to meet basic needs for food, shelter, and clothing, or that he or she is wholly or substantially reliant on the visa applicant for financial support due to an inability to work.<sup>77</sup>

### E. *Conclusion*

Australia's borders are now seen as a national asset that holds economic, social, and strategic value.<sup>78</sup> As a nation of some twenty-three million people that is geographically as large as the United States or China, Australia's Migration Program is vital to the nation's economic and social prosperity.<sup>79</sup> Consistently, the purpose of the Migration Program continues to be to "contribute to Australia's economic, demographic, and social well-being."<sup>80</sup>

The new regulatory and compliance environment created by the 2015 legislation aims to collect, analyze, and integrate data, as well as to apply an intelligence-led, risk-based approach to inform strategy, planning, decision-making, and resource allocation. It has significantly affected an already restrictive and highly complex area of law and policy.

This fast-paced and dynamic area of law will continue to change in response to the daily priorities of the government as Australia grapples with globalization and the enormous demand for temporary and permanent entry into Australia. New economic forces, such as the global drop in commodity prices, will introduce new concerns and patterns of transnational employment. Significant and ongoing changes to the law, policy, and the Migration Program, focused on Australia's national interest and the longer-term benefits of migration, are expected to be the norm, rather than the exception, for the foreseeable future.

## II. HONG KONG

### A. *The Hong Kong Workforce*

Hong Kong's society and population have long been in a hybrid state—Chinese sovereignty with some degree of self-rule—that is affected by migration into and out of the city.<sup>81</sup> Its central location in Asia, proximity to China, and its status as an international financial center are a few key features that attract workers from around the world to Hong Kong. Furthermore, with globalization and an increasing number of companies requiring employees to travel overseas, it is common for employees from

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*; Jockel, *Migration Programme*, *supra* note 8.

81. NG SEK HONG, *LABOUR LAW IN HONG KONG* 188 (2010).

various industries to spend time in Hong Kong. This section will discuss the extent to which Hong Kong laws affect transnational employment with respect to employment protection for transnational employees and taxation.

### B. *Transnational Employment*

A Hong Kong company seeking to hire an overseas national as an employee has three different contractual arrangement options: (1) a secondment arrangement, where the employee retains the original contract of employment with the home employer but is sent to provide services to another host entity; (2) a dual contractual arrangement, where the employee retains employment with the home employer but also enters into a separate employment contract with the host country entity; and (3) a direct-hire arrangement, where the employee enters into a new employment contract with the host country entity and terminates the existing employment contract with the home employer. The three types of arrangements have differing consequences on the relationship between the employee and the Hong Kong company.

### C. *Immigration*

#### 1. Right of Abode / Right to Land in Hong Kong

Regardless of which contractual arrangement is reached between the Hong Kong company and the employee, the employee must ascertain whether he or she has the right of abode or right to land in Hong Kong.<sup>82</sup>

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82. Hong Kong permanent residents enjoy the right of abode in Hong Kong. Permanent residents are defined in Schedule 1 of the Immigration Ordinance (Cap.115), permanent residents include

(a) A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region; (b) A Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the Hong Kong Special Administrative Region; (c) A person of Chinese nationality born outside Hong Kong before or after the establishment of the Hong Kong Special Administrative Region to a parent who, at the time of birth of that person, was a Chinese citizen falling within category (a) or (b); (d) A person not of Chinese nationality who has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than 7 years and has taken Hong Kong as his place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region; (e) A person under 21 years of age born in Hong Kong to a parent who is a permanent resident of the Hong Kong Special Administrative Region in category (d) before or after the establishment of the Hong Kong Special Administrative Region if at the time of his birth or at any later time before he attains 21 years of age, one of his parents has the right of abode in Hong Kong; (f) A person other than those residents in categories (a) to (e), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

Immigration Ordinance, (2013) Cap. 115, 68–69, §§ 2(1), 59A (H.K.) (citations omitted).

If not, the employee must obtain an employment visa before coming to Hong Kong<sup>83</sup> and must acquire permission to enter from an immigration officer or assistant.<sup>84</sup> Failure to obtain such permission is a criminal offense, punishable with a fine and up to three years of imprisonment.<sup>85</sup> The employee may also be subject to a removal order.<sup>86</sup>

An alternative is for the employee to first enter Hong Kong under a visitor's visa.<sup>87</sup> However, the visitor's visa is subject to conditions on his or her stay, including a requirement that the visitor shall not take up any employment, whether paid or unpaid.<sup>88</sup> This may defeat the purpose of entering Hong Kong before an employment visa is granted.<sup>89</sup>

## 2. Immigration Policy of Hong Kong

Foreign persons must consider which Immigration Policy applies to them. At present, applicants who “possess special skills, knowledge or experience of value to and not readily available in [Hong Kong] may apply to come to work under the [General Employment Policy (“GEP”)].”<sup>90</sup> This policy does not apply to “Chinese residents of Mainland China . . . who would apply instead under the Admission Scheme for Mainland Talents and Professionals.”<sup>91</sup>

The GEP is subdivided into two branches: professionals and entrepreneurs.<sup>92</sup> For professionals, the Immigration Department will generally consider the following criteria: “(i) the extent to which the business of the employer is likely to benefit the Hong Kong economy, trade, and industry; (ii) the extent to which the proposed employee is indispensable to that business; and (iii) whether or not a local or resident worker could fill the position.”<sup>93</sup> A genuine job vacancy is required, and the remuneration package must be broadly commensurate with the prevailing market rate.<sup>94</sup> For entrepreneurs, applicants will be those who plan to establish or

83. EMPLOYMENT LAW AND PRACTICE IN HONG KONG 573 (Rick Glofcheski et al. eds., 2010) [hereinafter EMPLOYMENT LAW].

84. See *id.* at 574; Immigration Ordinance, (2013) Cap. 115, 52, §38(1)(a) (H.K.).

85. See EMPLOYMENT LAW, *supra* note 83, at 574; Immigration Ordinance, (2013) Cap. 115, 52, § 38(1)(b) (H.K.).

86. See EMPLOYMENT LAW, *supra* note 83, at 574; Immigration Ordinance, Cap. 115, 52, § 38(1)(b)(ii) (H.K.).

87. EMPLOYMENT LAW, *supra* note 83, at 574.

88. See *id.* at 574–75; Immigration Ordinance, (2013) Cap. 115, 54, § 41.

89. See *id.* at 575. Some employers expect employers to work while his or her visa is being processed, but this is risky and may result in the employee receiving a prison sentence and a fine.

90. IMMIGRATION DEP'T, GOV'T OF THE H.K. SPECIAL ADMIN. REGION, GUIDEBOOK FOR ENTRY FOR EMPLOYMENT AS PROFESSIONALS IN HONG KONG I (2015) [hereinafter GUIDEBOOK FOR ENTRY]. The General Employment Policy does not apply to nationals of Afghanistan, Cambodia, Cuba, Laos, the Democratic People's Republic of Korea, Nepal and Vietnam. See *id.*

91. *Id.*

92. See generally *id.*

93. EMPLOYMENT LAW, *supra* note 83, at 575.

94. *Id.*

join a business in Hong Kong.<sup>95</sup> Apart from education and professional experience requirements, consideration will also be taken as to whether the applicant is in a position to make a substantial contribution to the economy of the Hong Kong Special Administrative Region. Factors for consideration include, but are not limited to, business plans, business turnover, financial resources, number of jobs created locally, and introduction of new technology.<sup>96</sup> Overseas professionals may also consider applying under the Quality Migrant Admission Scheme.<sup>97</sup> This is a quota-based entrant scheme that seeks to attract highly skilled or talented persons from overseas and Mainland China who wish to settle in Hong Kong.<sup>98</sup>

### 3. Dependents

Once an employee obtains an employment visa, the employee's dependents may apply for an entry-dependency visa to join the employee in Hong Kong.<sup>99</sup> However, this will be subject to whether the sponsor, i.e. the employee, is able to show "financial, emotional, and physical" dependency between the sponsor and the applicant.<sup>100</sup> It is normally straightforward to obtain a dependency visa for the employee's spouse or unmarried children under the age of eighteen.<sup>101</sup> However, the dependency visa regime is not a regime for family reunion.<sup>102</sup> It is a strict policy of immigration, which enables certain categories of close family members to remain in Hong Kong when they require the care and financial support of the sponsor.<sup>103</sup> Dependency is, therefore, an essential element of the policy. There are many unsuccessful applications that the Director of Immigration refused on the ground that the applicant was not genuinely dependent on the sponsor. For example, it was found unreasonable that an able-bodied young man would choose to leave behind his children in his home country under the care of their grandparents so he could join his wife in Hong Kong and be her dependent.<sup>104</sup>

Coming to Hong Kong on a dependency visa is attractive to many visa seekers because no employment restrictions are imposed on dependency

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95. *Investment as Entrepreneurs*, IMMIGRATION DEP'T, GOV'T OF THE H.K. SPECIAL ADMIN. REGION, <http://www.immd.gov.hk/eng/services/visas/investment.html> [<https://perma.cc/WJV4-GZF7>].

96. *Id.*

97. *Quality Migrant Admission Scheme*, IMMIGRATION DEP'T, GOV'T OF THE H.K. SPECIAL ADMIN. REGION, [http://www.immd.gov.hk/eng/services/visas/quality\\_migrant\\_admission\\_scheme.html](http://www.immd.gov.hk/eng/services/visas/quality_migrant_admission_scheme.html) [<https://perma.cc/A2KV-TLZD>].

98. *Id.*

99. EMPLOYMENT LAW, *supra* note 83, at 577.

100. *Limbu Santi v. Director of Immigration*, [2014] H.K.E.C. 1599 (C.F.I.).

101. EMPLOYMENT LAW, *supra* note 83, at 577.

102. *Limbu Santi v. Director of Immigration*, [2014] H.K.E.C. 1599 (C.F.I.).

103. *Muhammad Farooq v. Director of Immigration*, [2003] 3 H.K.L.R.D. K19 (C.F.I.).

104. *Thapa Tul Bahadur & Another v Director of Immigration*, [2004] H.K.E.C. 869 (C.F.I.).

visa holders. This is for two reasons. First, in theory, employment restrictions are unnecessary because the holder is a dependent, and therefore, unlikely to be working. Second, such employment restrictions would be difficult to police.<sup>105</sup> To prevent abuse by a sponsor's family members, applications under the dependency policy are strictly monitored.

The prevailing view on dependency visas was aptly stated by Deputy Judge Wong in *HKSAR v. Hon Ngan Siu*.<sup>106</sup> The case was an appeal on sentencing for aiding and abetting an illegal immigrant to remain in Hong Kong. Deputy Judge Wong wrote:

We must realize Hong Kong is a very small city with very limited resources, and for our own protection and our own survival, we cannot afford to allow a large number of people to come and stay here. This does not mean that we are not sympathetic. On the contrary, we are very sympathetic. The simple fact is that we are not in a position to look after others.<sup>107</sup>

#### 4. Permanent Residence

Non-Chinese nationals who have lived in Hong Kong for over seven years may apply for permanent resident status. According to Article 24(4) of the Basic Law of Hong Kong, "Persons not of Chinese nationality who have entered Hong Kong with valid travel documents [and who] have *ordinarily resided* in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region"<sup>108</sup> shall be eligible as permanent residents of Hong Kong. Once permanent residency is acquired, an employment visa is no longer necessary for employment in Hong Kong.

However, those working in Hong Kong as foreign domestic helpers may not rely on Article 24(4) to obtain permanent residency. This is set out in the case of *Vallejos Evangeline Banao v. Commissioner of Registration*,<sup>109</sup> in which two foreign domestic helpers challenged the denial of their applications for permanent identity cards. At issue was the phrase "ordinarily reside," which is one of the key requirements under Article 24(4) of the Basic Law.<sup>110</sup> The Court of Final Appeal found that foreign

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105. Muhammad Farooq v. Director of Immigration, [2003] 3 H.K.L.R.D. K19 (C.F.I.).

106. *HKSAR v. Hon Ngan Siu*, [2002] H.K.E.C. 638 (C.F.I.).

107. *Id.*

108. XIANGGANG JIBEN FA art. 24, § 4 (H.K.).

109. *Vallejos Evangeline Banao v. Commissioner of Registration*, [2013] H.K.E.C. 429 (C.F.A.).

110. XIANGGANG JIBEN FA art. 24, § 4 (H.K.):

Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region . . . shall have the right of abode in the Hong Kong Special Administrative Region and shall be

domestic helpers were allowed to enter and reside in Hong Kong, subject to highly restrictive conditions.<sup>111</sup> For example, each time a foreign domestic helper was given permission to enter Hong Kong, the permission was tied to employment solely as a domestic helper with a specific employer, in whose home the domestic helper was obliged to reside.<sup>112</sup> Further, the foreign domestic helper was obliged to return to the country of origin at the end of the contract and was informed from the outset that admission was not for the purpose of settlement and that dependents could not be brought to reside in Hong Kong.<sup>113</sup> These features resulted in their residence being, in the eyes of the court, far-removed from a traditional understanding of an “ordinary resident.”<sup>114</sup> As such, they were not eligible to apply for permanent residency.<sup>115</sup>

#### D. *Employment Law in Hong Kong*

Employment law in Hong Kong is “imperative” in nature. It is impermissible to deviate from legal standards, even if the employee has agreed to waive his or her legal entitlement by contracting out.<sup>116</sup> However, this does not prohibit arrangements that improve the minimum statutory conditions incorporated into contracts.<sup>117</sup> Thus, the law is the floor, not the ceiling, of the terms and conditions of employment.

##### 1. Minimum Terms and Conditions

The Employment Ordinance (Cap. 57) is the primary piece of legislation providing for the basic rights and protection of employees.<sup>118</sup> It operates to imply certain minimum terms into employment contracts that are either silent as to or inconsistent with the provisions of Cap. 57.<sup>119</sup> Cap. 57 covers a range of employment protection and benefits, such as rest days, holidays, sickness allowance, and maternity protection.<sup>120</sup> Because the employee is defined by the employment contract and not by the employee’s place of origin,<sup>121</sup> Cap. 57 applies equally to locals and foreign employees working in Hong Kong.<sup>122</sup>

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qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

*Id.* art. 24.

111. *Vallejos Evangeline Banao v. Commissioner of Registration*, [2013] H.K.E.C. 429 (C.F.A.).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. HONG, *supra* note 81, at 68.

117. *Id.*

118. Employment Ordinance, (1997), Cap. 57 (H.K.).

119. MICHAEL J. DOWNEY, HONG KONG EMPLOYMENT ORDINANCE: AN ANNOTATED GUIDE (2010).

120. Employment Ordinance, (1997), Cap. 57, 1–5, § 2 (H.K.).

121. FRESHFIELDS BRUCKHAUS DERINGER, EMPLOYMENT LAW IN HONG KONG 301 (2006).

122. HONG, *supra* note 81, at 69.

As of July 2010, employees are protected under the Minimum Wage Ordinance (Cap. 608) regardless of whether they are (a) permanent or casual, (b) full- or part-time, or (c) employed under a continuous contract.<sup>123</sup> Wages payable to an employee shall, when averaged over the total number of hours worked in the wage period, be no less than the Statutory Minimum Wage rate.<sup>124</sup> As of May 1, 2015, the Statutory Minimum Wage rate was HK \$32.50 per hour.<sup>125</sup>

The enactment of the Minimum Wage Ordinance can be seen as a victory for labor unions and employees because it signals the possibility of implementing other quality-of-life employment protections that are lacking in Hong Kong. However, even today, Hong Kong does not have general statutory or administrative regulations on the standard or maximum working hours, except in the case of young persons or children in manufacturing industries.<sup>126</sup> Nonetheless, employers and employees are at liberty to negotiate terms and conditions of the employment contract, provided such terms and conditions meet the relevant requirements of law.

The Hong Kong government had set up the Standard Working Hours Committee in April 2013 to engage in public consultation as well as to collect data and different opinions on working hours.<sup>127</sup> The Committee will then advise the government accordingly on whether a statutory, standard working hours regime or any alternatives are suitable for Hong Kong.<sup>128</sup>

## 2. Mandatory Provident Fund System

Hong Kong has a rapidly aging population that benefits from a formal system of retirement protection under the Mandatory Provident Fund Schemes Ordinance (Cap. 485).<sup>129</sup> All employees and self-employed persons aged eighteen to sixty-four are covered by the Mandatory Provident Fund (“MPF”) system and are required to contribute a percentage of their relevant income as mandatory contributions to the MPF scheme.<sup>130</sup>

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123. Minimum Wage Ordinance, (2011) Cap. 608, 3, § 7(1) (H.K.) (every employee is subject to this minimum wage ordinance with very few exceptions).

124. *Id.* § 8(2).

125. Minimum Wage Ordinance, (2015) Cap. 608, 10, § 3 (H.K.). It must be noted that the Minimum Wage Ordinance does not apply to the following persons: persons to whom the Employment Ordinance does not apply, live-in domestic workers, and specified student interns as well as work experience students during a period of exempt student employment. Minimum Wage Ordinance, (2011) Cap. 608, 3, § 7(2-5) (H.K.).

126. Employment of Young Persons (Industry) Regulations, (1980) Cap. 57C, 85, § 73 (H.K.); Employment of Children Regulations, (1976) Cap. 91, § 70 (H.K.).

127. Hon Leong Che-hung, *Welcome Message*, STANDARD WORKING HOURS COMMITTEE, [http://www.swhc.org.hk/en/welcome\\_message/index.html](http://www.swhc.org.hk/en/welcome_message/index.html) [https://perma.cc/MU58-B8XK].

128. *Id.*

129. The Mandatory Provident Fund Schemes Ordinance, (2013) Cap. 485 (H.K.).

130. EMPLOYMENT LAW, *supra* note 83, at 141. In 2015, the requirement is that an employee and his/her employer are both required to contribute 5% of the employee’s

Transnational employees are also required to enroll in an MPF scheme, unless they are either (a) already members of an overseas retirement scheme<sup>131</sup> or (b) employed for less than thirteen months.<sup>132</sup> Employees who provide domestic services in the residences of their employers are exempt persons, and therefore, not required to join an MPF scheme.<sup>133</sup>

### 3. Workers Engaged Overseas Outside Hong Kong

Workers engaged overseas outside of Hong Kong benefit from the protection of the Contracts for Employment Outside Hong Kong Ordinance (Cap.78).<sup>134</sup> Cap. 78 governs contracts entered into in Hong Kong by manual employees or non-manual employees who earn monthly wages not exceeding HK \$20,000 and who are employed to work outside Hong Kong by foreign employers, i.e. those who do not carry on their business in Hong Kong. The ordinance requires the employment contract to incorporate certain minimum terms and conditions.<sup>135</sup> For example, the contract must be in writing and contain particulars such as (1) the rate of wages and payment for overtime work; (2) the number of days and hours of work; (3) the number of rest days and holidays; (4) the provision of food, lodging, and employees' compensation; and (5) the obligation to repatriate the employee and the employee's dependents upon termination of employment.<sup>136</sup> Further, the contract must be approved by the Commissioner for Labour before the departure of the employee.<sup>137</sup> A contract will be refused if the terms are unfair to the employee or do not adequately protect the employee's interests.<sup>138</sup>

## E. Taxation

### 1. Salaries Tax – Territoriality

Taxation is an important concern for employees, especially where employment arrangements involve a cross-border element. As stipulated in Section 8(1) of the Inland Revenue Ordinance (Cap. 112), Hong Kong adopts the territoriality basis of taxation, meaning Salaries Tax is

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relevant income as mandatory contributions for and in respect of the employee to an MPF scheme, subject to a maximum mandatory contribution of HK\$1,500 monthly. Self-employed persons also have to contribute 5% of their relevant income, subject to the maximum mandatory contribution.

131. *Id.* There is no requirement for an overseas retirement scheme to be approved or recognized.

132. *See MPF Employee*, MANDATORY FUND SCHEME AUTHORITY, [http://www.mpfa.org.hk/engm/information\\_centre/faq/employee/mpf\\_employee/index.jsp](http://www.mpfa.org.hk/engm/information_centre/faq/employee/mpf_employee/index.jsp) [<https://perma.cc/5U2H-HSSH>].

133. The Mandatory Provident Fund Schemes Ordinance, (2013) Cap. 485, 6, § 4(1) (H.K.).

134. The Contracts for Employment Outside Hong Kong Ordinance, (1977) Cap. 78 (H.K.).

135. *Id.* at 2–3, § 5.

136. *Id.*

137. *Id.* at 3, § 6.

138. *Id.* at 5, § 11(2).

imposed only on income from any office or employment of profit or any pension arising in or derived from Hong Kong.<sup>139</sup>

In determining whether income is “arising in or derived from Hong Kong,” reference will be made to the contract of employment, and the Commissioner of Inland Revenue will consider factors such as (1) the place where the employee will be paid; (2) the place where the contract was negotiated and entered into; (3) where the contract is enforceable; and (4) whether the employer is a resident in the jurisdiction.<sup>140</sup> The Commissioner is entitled to weigh all of the evidence. As such, none of the above factors are in themselves determinative.

## 2. Unrealistic or Superficial Engagements

Cross-border contractual arrangements tend to attract particular scrutiny, especially when the employee enters into dual contracts or enters into an offshore employment contract but retains a key role in a Hong Kong company. Where it appears that the engagement was unrealistic or superficial, the Inland Revenue Department will examine in greater detail the employment arrangement, instead of only focusing on the external features of the employment. For example, in the Inland Revenue Board of Review Decisions Case No. D10/02, the appellant claimed that his income received should not be taxed because he rendered his services to the company outside Hong Kong.<sup>141</sup> However, the Board’s decision held that the location and source of the appellant’s employment was Hong Kong.<sup>142</sup> The employment of the appellant by the company was held to be patently artificial and commercially unrealistic, as Hong Kong was the second-largest market for the company, and it would be absurd for the employment contract to exclude Hong Kong as a place for the appellant to render services.<sup>143</sup>

## 3. Visits to Hong Kong Not Exceeding a Total of Sixty Days

If an employee is seconded to Hong Kong or on secondment to another country, depending on the duration of the secondment, the employee may not need to pay Salaries Tax.<sup>144</sup> In accordance with section 8(1B) of the Inland Revenue Ordinance, a person who renders services in Hong Kong during visits for not more than a total of sixty days in the basis period of a year of assessment will not be assessed the Salaries Tax.<sup>145</sup> For example, if an employee who is deriving income from Hong Kong employment is sent to another country (e.g. Singapore) to

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139. The Inland Revenue Ordinance, (2015) Cap. 112, 10, § 8 (1A)(c)(i-ii) (H.K.).

140. *Id.* at 10, § 8 (1); EMPLOYMENT LAW, *supra* note 83, at 590.

141. Inland Revenue Board of Review Decisions, Case No. D10/02 (May 7, 2002) (H.K.), <http://www.info.gov.hk/bor/en/docs/d1002.pdf> [<https://perma.cc/NYF9-KH9W>].

142. *Id.*

143. *Id.*

144. *See e.g.*, the Inland Revenue Ordinance, (2015) Cap. 112, 10, § 8 (1B) (H.K.).

145. *Id.*

represent her firm and renders all her services there for the year, she will be exempt from the Salaries Tax. However, if she visits Hong Kong for sixty-one days or more and renders some services in Hong Kong, she will be liable for the Salaries Tax on the whole of her income derived in that year.<sup>146</sup>

#### 4. Exemption if Employee Has Paid Salaries Tax in a Foreign Jurisdiction

Section 8(1A)(c) of the Inland Revenue Ordinance provides that the Salaries Tax will not be chargeable on income derived by a person from services rendered by the employee in any territory outside Hong Kong when the person is already chargeable to and has paid tax of substantially the same nature in that territory.<sup>147</sup> It has been observed that as Hong Kong's salaries tax rate is comparatively low, and employees normally only utilize this tax relief when they are unable to avoid paying foreign taxes.<sup>148</sup>

#### 5. Liability for Salaries Tax if Employment is Located Outside Hong Kong

Even when an employee's source of employment is considered to be located outside Hong Kong, the Salaries Tax will still be chargeable on all income derived from services rendered in Hong Kong.<sup>149</sup> For example, the Salaries Tax may apply where "an overseas employee is seconded to Hong Kong, even if the employee must travel to other countries to perform the employee's duties."<sup>150</sup> This will depend on the circumstances of each arrangement.

### F. Conclusion

It would appear *prima facie* that the employment laws of Hong Kong only affect local employment. However, after examining laws that govern the various aspects of employment, in particular the laws involving transnational employees, it can be seen that local laws have a large impact on transnational employment. With China's new Belt and Road Initiative and the role that Hong Kong can play in this national strategy, it is expected that more foreigners will be interested in knowing more about the employment laws of Hong Kong, especially in regards to immigration issues, employment protections, and tax implications. With the increase in opportunities, it is expected that Hong Kong employment law will receive greater attention in the near future.

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146. INLAND REVENUE DEP'T OF H.K., DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES NO. 10 (2007) (H.K.).

147. The Inland Revenue Ordinance, (2015) Cap. 112, 10, § 8(1A)(c) (H.K.).

148. EMPLOYMENT LAW, *supra* note 83, at 592.

149. *Id.* at 594.

150. *Id.*

### III. INDONESIA

The employment relationship in Indonesia is highly regulated by law. An Indonesian employer may hire employees directly or may hire them indirectly through an outsourcing firm. Still, Indonesian law strictly demarcates the circumstances in which an employer may outsource its labor needs—either domestically or internationally. The laws governing outsourced employees are very different from the laws governing employees who are hired directly. For this reason, understanding Indonesian transnational employment law requires an understanding of the Indonesia’s labor outsourcing laws.

#### A. *Types of Outsourcing*

The general provisions on outsourcing labor in Indonesia are contained in Law No. 13 of 2003 on Manpower (“Manpower Law”), Articles 64–66.<sup>151</sup> The specifics on labor outsourcing are governed by Manpower and Transmigration Regulation No. 19 of 2012 on Requirements for Outsourcing, as amended by Manpower and Transmigration Regulation No. 27 of 2014 (“Outsourcing Regulation”).<sup>152</sup> Indonesian law recognizes two types of outsourcing: (1) business activities (“Work Outsourcing”); and (2) manpower (“Manpower Outsourcing”).<sup>153</sup> The prevailing laws do not clearly distinguish Work Outsourcing from Manpower Outsourcing and, therefore, the outsourcing arrangement should be made as clear as possible in the outsourcing agreement.<sup>154</sup> The most important—and perhaps counterintuitive—requirement is that neither Work Outsourcing nor Manpower Outsourcing may relate to the user company’s core activity.

##### 1. Work Outsourcing

To be considered Work Outsourcing, the work must (1) be performed separately from the company’s core activity, in both its management and performance; (2) be performed under a direct or indirect order from the user, and the user must brief the outsourced employees about the work to be performed to ensure they can meet the standards set by the user; (3) be a support activity of the user as a whole, meaning that the activity is one that supports and enhances the performance of the core activity set forth in the workflow document issued by the association of the business in accordance with laws and regulations; and (4) not affect the production process directly, meaning that the activity is peripheral to the company’s core activity.<sup>155</sup> The test for this final requirement is whether the main production process would continue as normal, even if the work was not performed by the outsourced employees.

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151. Manpower Law, (2003) No. 13 (Indon.).

152. Manpower and Transmigration Regulation, (2012) No. 19 (Indon.) (Amended by Manpower and Transmigration Regulation No. 27 of 2014).

153. *Id.*

154. *See id.*

155. *Id.* art. 3(2).

## 2. Manpower Outsourcing

The Outsourcing Regulation limits the types of work that can be outsourced as Manpower Outsourcing. The following business support activities, which do not directly relate to the production process, may be outsourced as Manpower Outsourcing: janitor or cleaning services, catering services for employees, security services, oil and mining support activities, and transportation services for employees.<sup>156</sup>

### B. *Liabilities*

The key players in an outsourcing arrangement consist of the company providing the outsourced labor, the company using the outsourced labor, and the employees. The outsourcing company and the receiving company each have a separate set of legal responsibilities and liabilities that must be complied with in order for there to be a lawful outsourcing arrangement.<sup>157</sup>

Under the Outsourcing Regulation, an outsourcing agreement must be entered into between the outsourcing company and the company receiving the outsourced labor.<sup>158</sup> This agreement must state that the company receiving the outsourced labor intends to use the services of the outsourcing company by transferring some of its work to the outsourcing company, for which the outsourcing company will receive consideration or a fee.<sup>159</sup> The outsourcing agreement also provides rights, obligations, and liabilities of both the outsourcing company and the company using the outsourced labor.<sup>160</sup>

#### 1. Liabilities of the Outsourcing Company

In both types of outsourcing, the employment relationship remains between the outsourcing company and the employees. As the employer, the outsourcing company must provide its employees all their entitlements under Manpower Law and ensure that the employees' rights are respected, even when they are working at the physical location of the company receiving the outsourced labor.<sup>161</sup>

##### *a. Liabilities of the Outsourcing Company in Work Outsourcing*

Because the prevailing laws do not clearly limit the type of non-core work that may be outsourced to an outsourcing company, the scope of Work Outsourcing is broad.<sup>162</sup> Consequently, nearly any kind of work can be outsourced, so long as the outsourced work cannot be characterized as the core work of the company receiving the outsourced labor.<sup>163</sup>

156. *Id.* art. 17(3) (Indon.).

157. *See* Manpower and Transmigration Regulation, (2012) No. 19 (Indon.).

158. *Id.*

159. *Id.*

160. *Id.*

161. Manpower Law, (2003) No. 13 (Indon.).

162. *See generally id.*; Manpower and Transmigration Regulation, (2012) No. 19 (Indon.).

163. Manpower and Transmigration Regulation, (2012) No. 19, art. 3 (Indon.).

However, the company providing the outsourced labor is limited to providing outsourced labor that falls within the parameters of its business license.<sup>164</sup> For this purpose, it is the responsibility of the outsourcing company to ensure that labor provided to the company receiving the outsourced labor is within the scope of the outsourcing company's business license.<sup>165</sup>

As required by the Outsourcing Regulation, a work outsourcing agreement must include, at a minimum, a statement of the rights and obligations of each party, a guarantee that the employment security and work requirements of the employees are in accordance with the laws, and a statement that the outsourcing company will hire employees who are competent in their field.<sup>166</sup> Therefore, before entering into an outsourcing agreement, the outsourcing company must ensure that it hires competent employees to do the outsourced work.<sup>167</sup> Within thirty days of the signing date of the work outsourcing agreement, the outsourcing company is liable for registering the outsourcing agreement to the local manpower office where the work will be performed.<sup>168</sup> The work may not commence before the registration is done.<sup>169</sup>

In addition to the work outsourcing agreement between the outsourcing company and the company using the outsourced labor, there must also be a written employment agreement between the outsourcing company and the outsourced employees.<sup>170</sup> This agreement may either be a fixed-term or a permanent contract.<sup>171</sup> It is the responsibility of the outsourcing company to ensure that the outsourced employees receive all of the statutory employment entitlements required by law.<sup>172</sup> For example, it is the outsourcing company's responsibility to ensure that the employees are paid. Outsourced employees are entitled to be paid, regardless of whether the company receiving the outsourced labor has complied with its obligations under the outsourcing agreement—i.e., regardless of whether the company receiving the outsourced labor has paid the company providing the outsourced labor. In other words, regardless of what happens between the outsourcing company and the user, the outsourcing company must guarantee the employees' entitlements. In addition to salary, these entitlements include non-salary components such as leave and mandatory enrollment in social security programs.<sup>173</sup>

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164. *Id.*

165. *Id.*

166. *Id.* art. 9(2).

167. *Id.*

168. *Id.* art. 10.

169. *Id.* art. 10(2).

170. Manpower and Transmigration Regulation, (2012) No. 19 (Indon.).

171. *Id.*

172. *Id.*

173. *Id.* art. 29.

The non-salary components also include adequate facilities and the religious holiday allowance.<sup>174</sup> Adequate facilities may include transportation, a prayer room, a canteen, a rest area, a medical clinic, etc. In this type of outsourcing, the employees can work in the physical facility of either the company providing the outsourced labor or the company receiving it. If the latter, it is the responsibility of the company providing the outsourced labor to ensure that adequate facilities are provided, but the company providing the outsourced labor may agree with the company receiving the outsourced labor to have the receiving company provide the facilities. Similarly, it is the outsourcing company's responsibility to ensure that its employees work according to their employment agreement and the prevailing laws.<sup>175</sup> For example, the outsourcing company must make sure that its employees only work the number of hours allowed by law and are paid for any overtime work. In essence, the outsourcing company must ensure that the outsourced employees receive all the wages, terms, and entitlements of employment required by both the prevailing laws and the employment agreement.<sup>176</sup>

*b. Liabilities of the Outsourcing Company in Manpower Outsourcing*

Like Work Outsourcing, any manpower outsourcing arrangement must be drawn up in a written agreement between the outsourcing company and the user.<sup>177</sup> After signing the manpower outsourcing agreement, the outsourcing company must register the agreement with the manpower office where the work is to be performed.<sup>178</sup> To do so, the outsourcing company must submit its valid operating license and draft employment agreement with its employees, either as a fixed term or a permanent employment contract.<sup>179</sup> Otherwise, the outsourcing company's operating license will be revoked.<sup>180</sup>

The outsourcing company is liable for managing the outsourced work as agreed under the outsourcing agreement until its completion. The outsourcing company may not assign or sub-contract all or part of the work to another outsourcing company.<sup>181</sup> Therefore, it is important to ensure that the outsourcing company has a sufficient number of employees and capacity to manage the work under the outsourcing agreement. However, if the user cannot continue the Manpower Outsourcing Agreement and transfers it to a new outsourcing company, the new outsourcing company must honor the existing employment agreements and may not

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* art. 17.

178. *Id.* art. 20.

179. *Id.* art. 20(2).

180. *Id.* art. 23(1), art. 27(1-2).

181. *Id.* art. 18.

change the existing terms, unless the changes benefit the employees.<sup>182</sup> The new employer must also acknowledge the employees' length of service.<sup>183</sup>

With regard to the relationship between an employer and its employees, the Outsourcing Regulation requires certain provisions to be included in the employment contract, especially if it is a fixed-term employment contract. Otherwise, the employees will be deemed "permanent" employees. The provisions that must be included in the fixed-term employment agreement are as follows: (1) a guarantee of continuing employment; (2) a guarantee of the workers' entitlements under the prevailing laws, regulations, and agreements; and (3) a guarantee that the workers' length of service will be recognized by the successor company if the outsourcing company is replaced.<sup>184</sup>

The guarantee of the workers' entitlements must cover the following rights: leave of absence, as eligible according to the length of service; social security; religious holiday allowance; rest time of at least one day per week; compensation, if the fixed-term employment agreement is terminated by the outsourcing company before its expiration through no fault of the worker; a wage adjustment according to the accumulated length of service; and other entitlements under the prevailing laws and regulations and the previous employment agreements, if applicable.<sup>185</sup> If the outsourcing company fails to provide the above guarantees, the outsourcing company is liable, and the employee is entitled to file a complaint in the relevant Industrial Relations Court against the outsourcing company.<sup>186</sup>

As the employer, the outsourcing company must guarantee all the employees' statutory entitlements.<sup>187</sup> In this type of outsourcing, the employees usually work on the premises of the company receiving the outsourced labor. As such, the outsourcing company must make sure its employees work properly and perform the scope of work agreed to under the outsourcing agreement and guarantee that the employees receive their entitlements under the employment agreement and prevailing laws.

In addition to its liabilities under the outsourcing agreement and the Outsourcing Regulation, the outsourcing company also has liabilities as the employer to its employee under the employment agreements because the employment relationship exists between them and not between the employee and the company receiving the outsourced labor. However, as described below, this does not mean that the company receiving the outsourced labor has no responsibilities to those workers.

## 2. Liabilities of the Company Receiving the Outsourced Labor

The primary responsibility of the company receiving the outsourced labor is to pay the contracted-for fee to the outsourcing company.

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182. *Id.* art. 32.

183. *Id.*

184. *Id.* art. 29(2).

185. *Id.* art. 29(3).

186. *Id.* art. 31.

187. *Id.* art. 29.

However, the law treats the commercial procurement of outsourced labor as different from the procurement of commodities. Consequently, the liability of a company receiving outsourced labor does not end merely by paying the prescribed fee to the outsourcing company.

*a. Liabilities of the User in the Work Outsourcing*

Before a company may receive outsourced labor, that company must report the type of work that will be outsourced.<sup>188</sup> This report must be submitted to the local manpower office of the geographical region where the work will be performed.<sup>189</sup>

As explained above, the employment relationship remains between the outsourcing company and the employees. The employer is the outsourcing company, not the company receiving the outsourced labor. However, the company receiving the outsourced labor may be deemed the employer if it does not comply with its reporting obligation. Under these circumstances, the company receiving the outsourced labor would be liable for the employees' entitlements under the prevailing laws, including their salaries.

The company receiving outsourced labor must, therefore, be careful with any outsourcing arrangement. Otherwise, the outsourcing company could claim that the company receiving the outsourced labor is the employer and therefore is liable for the employees' entitlements. For example, if an employee is terminated and knows that the company receiving outsourced labor has not complied with its reporting obligation, the outsourcing company may claim that the user is liable for the severance package and must follow the procedure for termination of employment.

*b. Liabilities of the User in Manpower Outsourcing*

In this type of outsourcing, the rights and obligations of the parties must be stated very clearly in the outsourcing agreement since the employees will be working in the user's office. The outsourced employees working in the user's office under outsourcing arrangements will most likely not receive the same benefits as the employees who are employed directly by the user under their employment agreements. To overcome this disparity, the parties can agree to back-to-back liability under the manpower outsourcing agreement, e.g. the parties can agree that the user must provide facilities such as a prayer room and maintain safety in the work area which, according to the prevailing law, is the employer's liability.

### 3. Liabilities Due to an Occupational Accident

Generally, employees are entitled to security for occupational safety and health. All employers must maintain an occupational safety and health management system integrated with the company's general

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188. *Id.* art. 5.

189. *Id.*

management.<sup>190</sup> The Indonesian Civil Code (hereinafter “ICC”) requires all employers to ensure the safety of all of their equipment, work tools, and work areas, and to provide their employees with not only instructions on procedures but also warnings to ensure their safety.<sup>191</sup> Otherwise, the employer must compensate any employee who is injured due to an occupational accident. Further, if the employee dies because of an occupational accident, the employer must compensate the employee’s heirs.<sup>192</sup>

In both types of outsourcing, a guarantee of the rights of the employee, including occupational safety and health rights, must be included in the outsourcing agreement.<sup>193</sup> Both parties must, therefore, ensure that the safety of the work area is maintained. However, in outsourcing, as explained, the outsourcing company still holds employer status relative to the outsourced worker. Accordingly, if an occupational accident occurs, the outsourcing company is liable to the employee for any injury and consequential loss suffered. The outsourcing company is still deemed the employer even if the occupational accident was caused by the failure of the company receiving the outsourced labor to maintain the safety of the work area. However, if the outsourcing agreement does not contain clear provisions on the allocation of liability from occupational accidents, the outsourcing company may argue that liability lies with the company receiving the outsourced labor for causing the occupational accident due to its failure to maintain the safety of the work area.

Transfers of liability to compensate employees for occupational accidents are allowed under the ICC.<sup>194</sup> Therefore, the outsourcing company may, by agreement, transfer liability for occupational accidents to the company receiving the outsourced labor. Neither company will be held liable if it can be proved that the occupational accident occurred due to *force majeure* or the employee’s failure to follow instructions or the correct procedure.<sup>195</sup>

### C. *Transnational Employment*

The broadness of the definition of outsourcing has raised many questions from business players as to whether international outsourcing is possible in Indonesia. In practice, it is common for a principal company domiciled outside Indonesia to place its foreign employees in its Indonesian subsidiary. However, even if the work to be done by the foreign employee is non-core work, this arrangement may not fit the definition of permissible outsourcing under Indonesian law. The employer must address several additional issues.

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190. Manpower Law, (2003) No. 13, art. (87)(1) (Indon.).

191. Indonesian Civil Code, art. 1602(w)(1).

192. *Id.* art. 1602(w)(3).

193. Manpower and Transmigration Regulation, (2012) No. 19, art. 9, art. 28 (Indon.).

194. Indonesian Civil Code, art. 1602(w)(5).

195. *Id.* art. 1602(w)(2).

### 1. Secondment Arrangements

If a foreign employee works in Indonesia on behalf of a principal company and generates income from Indonesia, this may trigger the principal company to be deemed to have a Permanent Establishment in Indonesia.<sup>196</sup> If the employment is formally between the foreign worker and the Indonesian subsidiary, and the principal company outside Indonesia has paid or is paying the worker for a certain continuous period of time, the principal company will be deemed to have a Permanent Establishment in Indonesia.<sup>197</sup> The effect of this is that both the worker and the subsidiary are subject to income tax on the worker's wages as non-resident tax subjects. Accordingly, the individual or entity must register with the Indonesian Tax Office and file individual income tax returns in the *Badan dan Orang Asing* (BADORA or Foreign Body and Citizen) Tax Office with jurisdiction over the domicile. As a practical matter, the consequence is that the principal company may be subject to double taxation. The regulation usually specifies the requirements and the length of time for which a foreign worker must be paid for a company to be considered a Permanent Establishment, which can vary from country to country.

To avoid Permanent Establishment in Indonesia, many companies enter into a secondment arrangement. However, the Indonesian Manpower Law does not recognize the term "secondment."<sup>198</sup> In practice, "secondment" could have one of two meanings. The first possible meaning is "an assignment of work" under which an employee is assigned to perform work in a subsidiary company for a certain period of time. The employee remains employed by the seconding company (i.e., the original employer). This means that the employee remains on the seconding company's payroll, even though, for all practical purposes, the employee's work is being done for and paid by the company to which the employee is seconded. The second possible meaning is a "pure" secondment, whereby an employee is transferred by the seconding company to another company for a fixed term during which the employee will be employed and paid by the company to which the employee is seconded. At the end of the secondment term, the employee will return to the seconding (original) company. The secondment term will be recognized as part of the employee's term of service.

An "assignment of work" is more common with Indonesian employees. A "pure secondment" is usually used for foreign employees because the company in Indonesia where the employee works is the

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196. Law No. 7 of 1993 Concerning Income Tax (last amended by Law No. 36 of 2008) ("Law 7") in Article 2 (5) defines a Permanent Establishment as a business entity used by individuals who are not domiciled in Indonesia or individuals who have "been present in Indonesia for not more than 183 (one hundred eighty-three) days" in any 12 (twelve) month period. Law 7 also regulates which entities may be deemed Permanent Establishments.

197. *Id.*

198. *See generally* Manpower Law, (2003) No. 13 (Indon.).

foreign employee's sponsor for the employee's Indonesian work permit. As the sponsor, the company is deemed to be the employer. Consequently, the company must consider the entitlements of the foreign employee, including registering the employee in the social security program if the employee has been working in Indonesia for six months or more. The company must obtain a work permit for the foreign employee, which is only valid for one year but can be extended with approval from relevant authorities.<sup>199</sup>

## 2. Exporting Labor

The Indonesian government tries to reduce unemployment through its overseas manpower placement program, and the percentage of Indonesian workers placed overseas has increased over the last three years.<sup>200</sup> This placement has been specifically regulated by the Indonesian government, such that an outsourcing arrangement is not suitable if a company wants to transfer Indonesian labor abroad.

The Export Labour Company in Indonesia is called PPTKIS (Implementer of Private Indonesian Manpower Placement). In general, there are no restrictions on providing Indonesian manpower services abroad, whether for skilled, unskilled, domestic, or professional workers. However, there are limitations on the types of domestic work that Indonesian workers can do abroad through this program: housekeeping, baby sitting, family cooking, caretaking, family driving, gardening, and working in child care.<sup>201</sup> The key requirement is that there must be a good match between the requirements of the position and the employee's interests, skills, and talents.

Before an Indonesian worker is transferred abroad, the company seeking to export the labor must file its business license and appropriate permits with SIPPTKI (Implementer of the Indonesian Manpower Placement Permit). The company seeking to export the labor must provide shelter for the Indonesian workers in Indonesia and have a representative of the company in the destination country where the Indonesian workers are placed. The company may also provide training for the Indonesian employee. The company seeking to export the labor must recruit only eligible Indonesian employees, and the recruitment process must follow certain procedures.<sup>202</sup>

Once an Indonesian employee passes the recruitment process, the employee must sign an employment agreement with the company

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199. Minister of Manpower Regulation, (2015) No. 35 (Indon.), art. 37(1) and art. 39(2).

200. Research, Development and Information Body of Ministry of Manpower and Transmigration, 2014, Data Center and Information. Jakarta, [http://pusdatinaker.balitfo.depnakertrans.go.id/adminpusdatin/ebook/34619800\\_1427085375.pdf?file=34619800\\_1427085375.pdf](http://pusdatinaker.balitfo.depnakertrans.go.id/adminpusdatin/ebook/34619800_1427085375.pdf?file=34619800_1427085375.pdf).

201. Attachment to Minister of Manpower Decision, (2015) No. 1 (Indon.).

202. Minister of Manpower and Transmigration Regulation, (2014) No. 22 (Indon.).

seeking to export the labor. This employment agreement must contain, at a minimum, the names of the employee and the company, the position for which the employee is being hired, the type of work the employee will be performing, the rights and obligations of the parties, the terms of employment, the working hours, the salary payment mechanism, and a description of how disputes will be settled.<sup>203</sup> This employment agreement must be in the Indonesian language, in English, and in the language of the country in which the employee will be working. The three versions of the agreement have the same legal force, and if there is a conflict, the language differences must be reconciled. The employment agreement is made for two years and is extendable for another two years.<sup>204</sup> In this arrangement, the company exporting Indonesian labor must be fully liable for the security, welfare, repatriation, and protection of the Indonesian worker.

#### IV. JAPAN

##### A. *Introduction*

###### 1. Overview of Minimum Employment Standards in Japan

Japanize labor practices and minimum standards can be generally characterized as follows:

First, violations of overtime wage restrictions are common. Detailed restrictions imposed on work hours and the required payment of overtime premiums are often disregarded. Many employees work overtime, sometimes by up to 100 hours per month, without proper compensation. Requirements for overtime wage exemptions are often misunderstood, and many managerial employees are not paid the overtime wages to which they are entitled. Consequently, nearly all employers in Japan have some potential liability for unpaid wages.

Second, even if an employment contract is for a specific duration, the legal employment relationship may continue beyond the period provided in the agreement. This is because, by law, a fixed-term employment contract may be automatically extended or even converted to an indefinite-term employment contract after it has been maintained for a certain period of time, as discussed below. Termination of an indefinite-term employment contract is severely restricted<sup>205</sup> under well-developed case

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203. *Id.* art. 27(1).

204. *Id.* art. 29(2).

205. Validity of even punitive dismissal is interpreted to a limited extent. Situations where punitive dismissal is valid without doubt are when the employee: commits a crime, is absent from work for more than two (2) weeks, or lacks a particular license required for the job. For non-punitive dismissals, even if the discharge is for the purpose of restructuring due to the employers' financial troubles, employers must fulfill certain requirements, such as explaining the necessity of workforce reduction, attempting alternative methods including the reduction of recruitment or solicitation of voluntary retirement, reasonably selecting the dismissed employees, and providing a sufficient explanation to the employee. Ordinary dismissals for any other reason

law and administrative notices.<sup>206</sup> As a result, when employers wish to dismiss their employees, negotiating with and persuading them into voluntary resignation is often the quickest and most practical way to terminate the employment relationship.

Third, despite the strict regulations protecting employees, legal remedies are minimal, and therefore, the regulations are underenforced. This tendency is particularly true of claims for overtime wages. One explanation for underenforcement is the Japanese expectation of lifetime employment: beginning in the high economic growth period in the late twentieth century, an employee's obedience to the employers is a *quid pro quo* for lifetime employment and a guarantee of retirement allowances. Another explanation for underenforcement is the low level of remedies available for damages in litigation. The administrative conciliation procedure is weak and provides an even lower level of remedy. The gap between the strict regulations and inadequate legal remedies sometimes causes confusion in employers' risk analysis and decision-making based on minimum standards.

## 2. Structure of Japanese Employment Law

The Japanese Constitution contains a few abstract provisions about minimum employment standards. For example, Article 27, Clause 2 provides that "standards for wages, hours, rest and other working conditions shall be fixed by law."<sup>207</sup> This serves as the constitutional basis for the minimal working condition standards found in the Labor Standards Act and gives a fundamental legal basis to the interpretation of labor law in favor of employees.<sup>208</sup>

The Labor Standards Act is the most important administrative regulatory law for employment relations.<sup>209</sup> It includes provisions for working hours, resting hours, holidays, wages, labor-related discrimination, and required work rules to be provided by employers.<sup>210</sup> The interpretation of the Labor Standards Act relies not only on the many judicial precedents but also on exceedingly detailed administrative notices.<sup>211</sup>

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such as lack of ability are void except when the employer has attempted to improve the employee through education or training.

206. Administrative notices, or "tsu-tatsu," under Japanese law are originally internal documents sent from a higher administrative agency (e.g. Health, Labor and Welfare Ministry) to a lower administrative agency (e.g. local Labor Standard Inspection Offices). It notifies the lower agency of the proper interpretation of relevant laws so that all government agencies are able to share the same understanding about application of the law. Traditionally those administrative notices are issued frequently in certain legal areas including labor law, as well as medical regulation or financial regulation. The notices are disclosed to the public, and work as practical standards in the interpretation of law.

207. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 27 (Japan).

208. *See id.*

209. Roudou Kijunhou [Labor Standards Act], Law No. 147 of 2004 (Japan).

210. *Id.*

211. *Id.*

The Labor Contract Act governs the employment relationship from a contract law perspective.<sup>212</sup> It was implemented in 2008, and as such, is relatively new.<sup>213</sup> It codified judicial precedents interpreting the Labor Standards Act.<sup>214</sup> The Labor Contracts Act also contains several important, minimum-standard regulations for fixed-term employment contracts, as discussed below, as well as general provisions for all employment contracts. Such provisions include procedural requirements for work condition changes that adversely affect workers.<sup>215</sup>

## B. *Minimum Standards*

### 1. Minimum Standards Applicable to General Workers

#### a. *Work Hours*

The most controversial minimum standard under Japanese employment law is for working hours and overtime wages. Working hours are set at eight hours per day and forty hours per week, although there are many exceptions. Notwithstanding the law, it is estimated that approximately 30% of male workers and 9.8% female workers in Japan, as an entire-industry and entire-employee average, work more than forty-nine hours per week.<sup>216</sup> Interval-based regulations like that of the EU—the regulation that allows workers a minimum of eleven hours rest in a twenty-four hour period—have not been introduced in Japan. Only a few large corporations have adopted such policies on their own accord.

Absent an agreement between labor and management, called “Saburoku Kyoutei” in Japanese, it generally is impermissible for an employer to require an employee to work overtime.<sup>217</sup> If a “Saburoku Kyoutei” is in place, the employer can require employees to work up to forty-five hours per month in addition to the baseline maximum of eight hours per day and forty hours per week, but for one month only.<sup>218</sup> This one-month limit may be extended only when labor and management make a special agreement in addition to the regular overtime agreement.<sup>219</sup> This agreement can be made in situations where temporary need arises for a yearly limit of six months. Overtime agreements must be made at every branch of a company’s workforce and must be renewed every year. No overtime work is allowed without these agreements.

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212. Rōdō kijun-hō [Labor Contract Act], Law No. 128 of 2007 (Japan).

213. *Id.*

214. *Id.*

215. *Id.* art. 28.

216. Statistics Bureau, Ministry of Internal Affairs and Commc’ns, *2014 Labor Force Survey*, <http://www.stat.go.jp/english/data/roudou> (last visited Jan. 3, 2017) (Japan).

217. Rōdō kijun-hō [Labour Standards Law], Law No. 49 of 1947 (Japan) (amended through Law No. 107 of June 9, 1995).

218. *Id.*

219. *Id.*

*b. Exceptions to the 40-Hour/Week Rule*

For overtime work, the employer must pay an overtime wage that is 25% higher than the usual wage.<sup>220</sup> The 25% overtime premium applies to up to sixty hours of overtime work per month. When exceeding sixty hours, aside from certain small-and-medium-enterprises (“SMEs”), a 50% premium should be paid.<sup>221</sup> However, when the following methods are used, employers can have employees work overtime without having to pay overtime wages.

First, the employer can make a labor-management agreement for the “Discretionary Labor System for Professional Work” and submit it to the Labor Standards Inspection Office.<sup>222</sup> Such an agreement can specify the time period that employees are expected to work without overtime payments. This exception applies only to nineteen kinds of professional occupations, including researchers, editors, designers, securities analysts, university professors, lawyers, accountants, and architects.

A second exception is a “System for Work Time Outside of the Workplace,” which is generally used for salespeople who work outside their company offices.<sup>223</sup> This is a system of deemed worktime for employees working outside the workplace whose clocking in and out of work cannot be strictly managed. A labor-management agreement must be agreed upon and submitted to the Labor Standards Inspection Office. In addition, if a modified working schedule or flexible-hours system is set up in the workplace rules, the work in a given week may exceed forty hours as long as the average work time per week does not exceed forty hours.

*c. Exceptions for Supervisors and Managers*

The most disputed exception to these working-hour rules is the “Supervisor or Manager” exception.<sup>224</sup> As employers need not pay overtime wages to workers that fall into this category, many companies promote employees without attaching the appropriate substantive management authority merely to avoid having to pay them for overtime work. When these workers claim appropriate overtime pay from employers, typically after they have voluntarily quit their job, the court will rule in favor of these employees, who are then entitled to recover their unpaid overtime. Accordingly, the existence of employees in such nominally managerial positions is a large risk for employers. In due diligence conducted prior to the mergers and acquisitions of Japanese companies, the number of these nominal managers and their hidden overtime wages are crucial points of consideration for buyer companies.

In administrative notices and court cases, a “supervisor” or “manager” is defined as an employee given the same position as corporate

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220. *Id.* art. 37.

221. *Id.*

222. Roudou Kijunhou [Labor Standards Act], Law No. 147 of 2004 (Japan).

223. *Id.*

224. *Id.* art. 41.

directors<sup>225</sup> for working conditions and work management. Whether an employee is a “supervisor” or a “manager depends not on his or her job title, but is decided through comprehensive consideration taking into account the following points: whether the employee has participated in the business owner’s managerial decision-making processes and has been given supervisor-level authority for labor management of other employees; whether the employee has discretion over the start and end or other aspects of working hours; and whether the employee, in comparison to other standard employees, has been awarded remuneration in accordance with the given authority level.<sup>226</sup>

When back-overtime wages are claimed by these nominal managers or supervisors, courts in most cases rule that the employees have not been properly categorized as managers or supervisors and that the employer is required to pay the employees their unpaid overtime salary. There are many examples of such cases, including cases involving a fast-food chain shop manager,<sup>227</sup> a bank’s branch sub-manager,<sup>228</sup> and a hotel head chef in charge of choosing the work hours for other chefs.<sup>229</sup>

On the other hand, there are few examples where the worker was ruled as being a “manager” or “supervisor,” and therefore, was not entitled to overtime pay. One of these few examples included a head of the Osaka branch of a securities company with over thirty subordinates, whose position was ranked at the top 4.5% among all the employees.<sup>230</sup> Additionally, a deputy-director of a taxi company with the highest salary among all employees after the CEO was found to be a manager.<sup>231</sup>

Still, it is common practice in Japan for employees with work experience of fifteen years or less to be promoted to “a section manager” (or “ka-chou” in Japanese) with a few subordinates, far from the equal rank to corporate officers required by the courts. “Ka chou” employees are typical examples of “nominal supervisors or managers” who are entitled to—but often do not receive—payment for the overtime that they work.

225. Japanese labor law firmly differentiates employees (defined as those who are hired based on an employment agreement) and corporate officers (defined as those who are hired based on an engagement agreement, including directors and auditors). Roudou Keiyakuhou [Labor Contracts Act] art. 2, para. 1, art. 6 (Japan); Kaishahou [Companies Act] art. 329 para. 1, “Minpou” [Civil Code] art. 656, art. 643 (Japan). Protection of labor law never applies to the latter.

226. See Akemi Nakamura, *McDonald’s Told to Pay Overtime to Manager*, JAPAN TIMES (Jan. 29, 2008), <http://www.japantimes.co.jp/news/2008/01/29/news/mcdonalds-told-to-pay-overtime-to-manager/#.V8Zd2JMrKb8> [<https://perma.cc/EM8B-PHMS>].

227. See *id.*

228. Shizuoka Chihō Saibansho [Shizuoka Dist. Ct.] Mar. 28, 1978, Labor-Related Civil Decisions Vol. 29, No. 3, 273 (Japan).

229. Okayama Chihō Saibansho [Okayama Dist. Ct.] Mar. 27, 2007, Labor Judicial Precedents No. 941, 23 (Japan).

230. Osaka Chihō Saibansho [Osaka Dist. Ct.] Feb. 8, 2008, Labor Judicial Precedents No. 959, 168 (Japan).

231. Fukuoka Chihō Saibansho [Fukuoka Dist. Ct.] Apr. 26, 2007, Labor Judicial Precedents No. 948, 4 (Japan).

## 2. Other Minimum Standards

Other minimum standards include the minimum wage, annual holidays, and parental leave.<sup>232</sup> Minimum wage varies regionally by prefecture and is updated every year. Tokyo has the highest minimum wage: 907 yen in 2015 and 888 yen in 2014.<sup>233</sup> Annual holidays of up to ten days are given to employees who have worked for more than six months,<sup>234</sup> and employees who have worked for more than six and one-half years are entitled to twenty holiday days per year.<sup>235</sup> One year of parental leave is given to employees who have been employed for more than a year, as well as eight weeks of maternity leave for female employees.<sup>236</sup>

Retirement allowances are not mandatory and are not included in the minimum standards.<sup>237</sup> In practice, however, over 90% of companies with 100 or more employees<sup>238</sup> have a retirement allowance system to attract talent. Bonuses are not required by employment law either, but many companies provide bonuses twice a year, in summer and in winter. In the above-mentioned overtime wage disputes, sometimes employees argue that their bonuses should be included in the calculation of their basic hourly wage, which can be calculated by dividing a year's total salary by the number of work hours in the year. The bonus may be regarded as a part of the salary when the fixed amount is paid as previously determined, regardless of the performance of the employee.

## 3. Fixed-Term Employment and Minimum Standards

For fixed-term employment contracts, there are several unique minimum-standard provisions. First, fixed-term employment contracts cannot be entered into for periods exceeding three years.<sup>239</sup> An exception, with a longer limit of five years, applies to workers with specialized knowledge, technical ability, or experience (e.g. lawyers, accountants,

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232. Roudou Kijunhou [Labor Standards Act], Act No. 147 of 2004 (Japan).

233. *Japan's Minimum Hourly Wage Raised ¥18 for Fiscal 2015*, JAPAN TIMES (Aug. 25, 2015), [http://www.japantimes.co.jp/news/2015/08/25/national/japans-minimum-wages-see-fast-paced-rise/#.WG\\_obBsrK00](http://www.japantimes.co.jp/news/2015/08/25/national/japans-minimum-wages-see-fast-paced-rise/#.WG_obBsrK00) [<https://perma.cc/2A2B-4KWQ>]; *Hike Proposed of ¥18 per Hour in Minimum Wage*, JAPAN TIMES (Jul. 29, 2015), [http://www.japantimes.co.jp/news/2015/07/29/business/economy-business/japan-panel-backs-%C2%A518-per-hour-minimum-wage-increase/#.WG\\_qRBsrK00](http://www.japantimes.co.jp/news/2015/07/29/business/economy-business/japan-panel-backs-%C2%A518-per-hour-minimum-wage-increase/#.WG_qRBsrK00) [<https://perma.cc/642B-L9D5>].

234. Roudou Kijunhou [Labor Standards Act], Act No. 147 of 2004, art. 39(1) (Japan).

235. *Id.* art. 39(2).

236. *Id.* art. 65; Svati Narula, *Why Did Only 2% of New Fathers in Japan Take Paternity Leave Last Year?*, WORLD ECON. F., <https://www.weforum.org/agenda/2016/01/why-did-only-2-of-new-fathers-in-japan-take-paternity-leave-last-year/> [<https://perma.cc/H75E-T7TS>].

237. Roudou Kijunhou [Labor Standards Act], Act No. 147 of 2004 (Japan).

238. *Survey of Retirement Payment*, CABINET SECRETARIAT (2014).

239. Roudou Kijunhou [Labor Standards Act] art. 14, para. 1 (Japan).

Ph.D.s, and designers) as well as age-limited retirees who are re-employed by the same company.<sup>240</sup>

Second, due to the recent amendment of the Labor Contract Act in 2013, when fixed-term employment contracts are repeatedly renewed for a total of more than five years, workers can convert their contracts to indefinite-term employment contracts.<sup>241</sup> The above amendment applies to fixed-term employment contracts that began after the effective date of April 1, 2013. Accordingly, in 2018, or five years after April 2013 onward, large volumes of fixed-term contracts are expected to convert to indefinite-term contracts.<sup>242</sup>

Third, it is illegal to use fixed-term employment status as a reason to discriminate in working conditions between indefinite and fixed-term workers. This point was brought up in case law a long time ago and was finally passed into law with the above April 2013 amendment.

Finally, in cases where a fixed-term employment contract was repeatedly renewed in the past, termination may be deemed invalid at the end of the contract period, when the worker has a reasonable cause to expect renewal of the contract. When the termination is determined to be invalid, the contract will be regarded as an indefinite-term employment contract.

Fixed-term employees often have been hired for the purpose of adjusting the workforce under unstable economic conditions. Due to the amendment of the Labor Contract Act in 2013, companies are required to prepare alternative measures for workforce adjustment or possible downsizing.<sup>243</sup> If employers try to persuade their employees to voluntary resign, monetary compensation for such negotiation will be recognized as potential debts.

#### 4. Minimum Standards and Foreign Employees

The foreign labor market is highly regulated in Japan. The Japanese government has a stance towards increasing acceptance of foreign workers, but eligibility is mostly limited to highly skilled persons in white-collar professions. There is no visa category for other types of workers, such as store clerks, childcare workers, or clerical workers, who are neither at the level of high-skilled translators nor are engaged in international business.

The “technical intern” visa is often misinterpreted. As of October 2013, 137,000 technical interns from emerging countries reside in Japan and work in factories or construction sites.<sup>244</sup> The stated purpose of this technical intern system is to educate people from developing countries

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240. *Id.* at art. 14, para. 1, item 1 and 2 (Japan).

241. *See* Rōdō kijun-hō [Labor Contract Act], Law No. 128 of 2007 (Japan); Roudou Keiyakuhou [Labor Contract Act] art. 18 (Japan).

242. *See id.*

243. *See id.*

244. Ministry of Justice of Japan “Ginoujishshu Seidoni Kansuru Kiso Shiryō” [Basic data regarding technical intern system] <http://www.moj.go.jp/content/001128653.pdf> (last visited Feb. 21, 2017) (Japan).

who will then go on to promote economic and industrial development back in their home countries.<sup>245</sup> In reality, however, the work done by these technical interns mostly consists of production line work in food-stuff factories or unskilled labor at construction sites. They are used as supplementary workers in fields where Japanese workers are difficult to acquire.

The technical intern visa is given “as provided on the employment contract . . . for activities with the purpose of acquiring knowledge, technique or skills for use in work.”<sup>246</sup> Technical interns have the same status as workers, and all labor law regulations apply, including minimum wage, work hours, and overtime compensation. Companies that hire technical trainees consist mostly of smaller companies, including subcontractors of construction giants. These are sometimes a hotbed of labor law violations for failing to meet minimum standards.

### C. *Effects of Minimum Standards Violations*

#### 1. Effects on Employment Conditions

Employment law regulation of minimum standards are “mandatory provisions.”<sup>247</sup> Even if the violation of minimum standards is based on the mutual consent of the worker and the employer or is written into the work-rules, the consent or work-rule is void because the minimum standards are non-waivable terms.<sup>248</sup> The working conditions automatically change to the minimum standards of employment law.<sup>249</sup>

#### 2. Risk of Monetary Claims

The main risk for employers that violate minimum standards is in monetary claims from workers. Japanese civil procedure does not have a collective litigation system comparable to class action in the United States. However, there is potential risk of claims from all the other employees whenever a single employee raises an issue. As a result, this risk increases for employers that have not paid overtime wages to either general employees or to “nominal supervisors or managers.”

Due to the statute of limitations, the right to claim overtime wages expires two years after the expected original payment date.<sup>250</sup> Japanese workers are often wary of worsening relations with employers during employment and wait until after resignation to file for overtime pay. As the overtime wage no longer accrues monthly once an employee resigns, workers will then lose claims to overtime pay on a monthly basis as time passes. The statute of limitations ceases once a lawsuit is filed. Even if the lawsuit was not initiated immediately, in cases where the worker

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245. *Id.*

246. Shutsunyuukoku Kanri Oyobi Nammin Nintei Hou [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319 of 1951, Table I (Japan).

247. Roudou Kijunhou [Labor Standards Act] art. 13 (Japan).

248. *Id.*

249. Rōdō kijun-hō [Labor Contract Act], Law No. 128 of 2007, art. 11 (Japan).

250. Rōdō kijun-hō [Labour Standards Law], Law No. 49 of 1947, art. 115 (Japan).

sends an invoice to the employer and then files for a lawsuit within six months, the statute of limitations can be suspended for up to six months after the date the invoice was received by the employer. Accordingly, workers generally send an invoice to their employer immediately after the termination of their employment.

Overtime wages are likely to be a problem for professionals such as system engineers or nursing service staff that have irregular work hours and in industries that suffer from a chronic lack of qualified workers. Overtime work for a single employee per month frequently exceeds 100 hours in Japan, which shows the impact of the risk. Moreover, court judgments usually include an order to pay the equivalent additional payment as a penalty, in addition to the overtime pay from the two years. This means that when an employer loses in litigation, the final payment by the employer will be twice the unpaid overtime wages for the two years.

### 3. Penalties

Criminal penalties may be imposed when certain minimum standard regulations are violated. Although rarely applied in practice, if employers make their employees engage in overtime work without an overtime agreement, they are subject to imprisonment for up to six months and a fine of up to 300,000 yen.<sup>251</sup> Also, for employers who entered into a fixed-term agreement for more than three years, a fine of up to 300,000 yen may be imposed.<sup>252</sup> The Labor Standard Inspection Offices may conduct an on-site investigation when several employees report the violation of the minimum standard regulations, and they may then issue an order for business improvement.<sup>253</sup>

### D. Conclusion

Although workers are heavily protected with minimum standards provided by a layer of laws, administrative notices, and judicial precedents, many workers do not make use of their legal rights and remedies. This difference between legislative protection and the actual remedies causes companies to have potential liabilities that are not disclosed in their accounting documents. Foreign companies hiring employees in Japan should pay attention to the potential risks of monetary claims that may arise when the minimum standards are violated.

## V. ANALYSIS

### A. Background

Australia's complex immigration laws create an additional complication for transnational employment. On July 1, 2015, the Australian Border Force was created to "protect Australia's borders and manage

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251. *Id.* at art. 119.

252. *Id.* at art. 120.

253. *Id.* at art. 99.

the movement of people and goods across it.”<sup>254</sup> While receiving over 13,000 visa applications daily, in the face of the increased complexity of the immigration laws and the creation of the Australian Border Force, the trend in Australia would appear to be towards limiting transnational employment within the country. Within the next five years, the Australian Border Force is expected to create a regulatory response to improve coexistence with Australia’s Migration Program.<sup>255</sup>

Like Australia, Hong Kong has seen an increase in transnational employment due to globalization.<sup>256</sup> While Hong Kong has implemented structured laws to facilitate transnational employment, there is some pushback, particularly when it comes to dependents.<sup>257</sup> As noted by Deputy Judge Wong, Hong Kong is small and has limited resources, and as such, “for [their] own protection . . . [they] cannot afford to allow a large number of people to come and stay. . . The simple fact is that [they] are not in a position to look after others.”<sup>258</sup>

Indonesia’s use of transnational employees is highly regulated.<sup>259</sup> Indonesia recognizes two types of labor outsourcing: business activities and manpower.<sup>260</sup> Business activities, or Work Outsourcing, include work that is performed separately from a company’s core activity—that is, support activities that enhance, yet are peripheral to the core activity.<sup>261</sup> Manpower Outsourcing is limited to business support activities that do not directly relate to the production process.<sup>262</sup> Often, when a principal company domiciled outside Indonesia places foreign employees to work in Indonesia for its subsidiary, the arrangement does not fit within the definition of permissible outsourcing.<sup>263</sup> This arrangement may lead to the foreign company having Permanent Establishment in Indonesia, subjecting it to income tax on the workers and the subsidiary.<sup>264</sup> To avoid Permanent Establishment, companies may enter into secondment arrangements, which have two potential meanings.<sup>265</sup> First, secondment arrangements may allow an employee to work for the subsidiary while remaining an employee of the original company.<sup>266</sup> Second, a secondment arrangement could mean that the employee is transferred to the subsidiary company but will return to the original company at the end of

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254. *See supra* Part I-A.

255. *See supra* Part I-E.

256. *See supra* Part II-A.

257. *See supra* Part II-C-3.

258. *Id.*

259. *See supra* Part III.

260. *See supra* Part III-A.

261. *See supra* Part III-A-1.

262. *See supra* Part III-A-2.

263. *See supra* Part III-D.

264. *See supra* Part III-D-1.

265. *Id.*

266. *Id.*

the employee's term of service.<sup>267</sup> The latter type of secondment is more common in Indonesia.<sup>268</sup>

Like Australia and Hong Kong, Japan limits the acceptance of transnational employees, and the foreign labor market is highly regulated.<sup>269</sup> In Japan, employment laws regulate mandatory minimum standards.<sup>270</sup> Employers and employees cannot contractually agree to a violation of these minimum standards;<sup>271</sup> these standards serve as the default working conditions for all employees.<sup>272</sup> These minimum standards include overtime wage requirements, extension of fixed-term employment, and restrictions on termination of indefinite-term employment.<sup>273</sup>

### B. *Employer Requirements*

In Australia, sponsors must: (1) demonstrate that they are not providing less favorable terms and conditions of employment to the overseas skilled workers than to Australian workers; (2) pay travel costs to enable the overseas workers and their family members to leave Australia; (3) keep records of their compliance with all obligations and provide such information to the Department upon request; (4) ensure that the overseas workers only work in the approved occupation; (5) pay for recruitment costs; (6) provide training within the industry; and (7) not engage in discriminatory recruitment practices.<sup>274</sup> Sanctions for non-compliance with these obligations for standard business sponsors include: (1) barring the company from sponsoring other overseas employees; (2) barring future applications for sponsorship; (3) cancelling current sponsorship; and (4) imposing civil penalties.<sup>275</sup> For companies in a labor agreement, penalties include: (1) suspension of the labor agreement; (2) termination of the labor agreement; and (3) imposition of civil penalties.<sup>276</sup>

In Hong Kong, laws of minimum employment terms require employers to guarantee transnational employees minimum protections and benefits, such as rest days, holidays, sick leave, and maternity protection.<sup>277</sup> While there are minimum wage regulations, there are no maximum working hour regulations, and such terms must be negotiated on an individual contract basis.<sup>278</sup> Further, Hong Kong has implemented minimum contract terms and conditions for Hong Kong natives working abroad pertaining to wages, overtime wages, the number of work days and hours per week, the amount of holiday days and rest leave, the compensation

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267. *Id.*

268. *Id.*

269. *See supra* Part IV-B-4.

270. *See supra* Part IV-C-1.

271. *Id.*

272. *Id.*

273. *See supra* Part IV-A-1.

274. *See supra* Part I-D.

275. *Id.*

276. *Id.*

277. *See supra* Part II-D-1.

278. *Id.*

for food and lodging, and the obligation of repatriation of the employee and his or her dependents upon termination of the employment.<sup>279</sup>

Indonesia imposes liabilities on both the outsourcing and the receiving company based on the type of outsourcing.<sup>280</sup> Regardless of the type of outsourcing, the outsourcing company must ensure that the employee's rights are respected while on location.<sup>281</sup> For work outsourcing, the outsourcing company must ensure that the labor provided to the receiving company is within the scope of the outsourcing company's business license.<sup>282</sup> Further, the outsourcing agreement must include a statement of the rights and obligations of each party, a guarantee of employment security, an outline of the work requirements, and a statement that the outsourcing company will only hire competent employees.<sup>283</sup> Additionally, the outsourcing company must ensure that there are adequate facilities, such as a medical clinic and a prayer room, and that there is allowance for religious holidays.<sup>284</sup>

For manpower outsourcing in Indonesia, the outsourcing company must similarly draft a written agreement and ensure that it has a valid operating license in the field.<sup>285</sup> The outsourcing company is liable for the management of the outsourced work and may not assign or subcontract any part of the work to another outsourcing company.<sup>286</sup> The employment contracts must include the guarantee of the employee's entitlements, the guarantee of continued employment, and the guarantee that their length of service will be recognized if a successor company takes over.<sup>287</sup> The primary requirement for the receiving company, regardless of the type of outsourcing, is to pay the employees.<sup>288</sup> Prior to receiving outsourced labor, the receiving company must report the type of work that will be outsourced and submit the report to the local manpower office.<sup>289</sup> For manpower outsourcing, the receiving company must respect the agreed-upon obligations in the labor agreement.<sup>290</sup> Moreover, regardless of the type of outsourcing, the receiving company must ensure the safety of all equipment, work tools, and work areas, as well as provide instructions on safety procedures.<sup>291</sup>

In Japan, minimum standard laws apply to both domestic and foreign workers. Pursuant to the minimum standards, working hours are set

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279. *See supra* Part II-D-3.

280. *See supra* Part III-B.

281. *See supra* Part III-B-1.

282. *See supra* Part III-B-1-a.

283. *Id.*

284. *Id.*

285. *See supra* Part III-B-1-b.

286. *Id.*

287. *Id.*

288. *See supra* Part III-B-2.

289. *See supra* Part III-B-2-a.

290. *See supra* Part III-B-2-b.

291. *See supra* Part III-C.

at eight hours per day and forty hours per week.<sup>292</sup> Absent an express agreement, employees are forbidden from working overtime.<sup>293</sup> For work up to sixty hours per week, 25% overtime premium must be paid, and 50% must be paid for overtime exceeding sixty hours per week.<sup>294</sup> However, there are two agreements that allow overtime work without overtime pay. The first is the Discretionary Labor System for Professional Work, which allows certain professionals, including lawyers, editors, designers, and architects, to work without overtime payments during specific time periods.<sup>295</sup> The second type is the System for Work Time Outside of the Workplace, which is applicable to salespeople who work outside of their offices.<sup>296</sup> Additionally, supervisors or managers need not be paid overtime wages for overtime work.<sup>297</sup> Other minimum standards in Japan include minimum wage, holiday leave, and parental leave.<sup>298</sup> For fixed-term employment in Japan, the maximum period of employment is limited to three years generally and five years for workers with specialized knowledge, technical ability, or experience, such as lawyers or Ph.D. holders.<sup>299</sup> Violation of these minimum standards may result in monetary claims by workers and even criminal penalties and fines.<sup>300</sup>

Australia's regulations focus on non-discriminatory practices both in the recruitment process and during the course of employment, while Hong Kong, Indonesia, and Japan focus on allowing leave for religious holidays. Hong Kong and Japan also require parental leave. Both Australia and Indonesia require safety training in the field for transnational employees. Hong Kong requires a minimum wage but does not regulate maximum work hours. Japan also regulates minimum wage, but sets out specific rules regarding maximum work hours and overtime wages. Australia mandates sponsorship to be cancelled or blocked in the future for violations and allows for the imposition of civil penalties. Japan allows for criminal sanctions, such as fines and incarceration, and allows aggrieved employees to bring monetary claims against employers. It appears that the main focus of all four countries is to ensure the rights of the transnational employees. Australia accomplishes this through its anti-discrimination requirements, and the other three countries accomplish this through the requirement of leave for religious holidays.

### C. *Immigration*

Australia's immigration laws are a complex legislative scheme, including layers of both legislation and regulation consisting of upwards

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292. *See supra* Part IV-B-1-a.

293. *Id.*

294. *See supra* Part IV-B-1-b.

295. *Id.*

296. *Id.*

297. *See supra* Part IV-B-1-c.

298. *See supra* Part IV-B-2.

299. *See supra* Part IV-B-3.

300. *See supra* Part IV-C.

of 3,000 pages.<sup>301</sup> In addition to the legislation and regulation, substantial guidelines exist to help interpret the complex scheme, but some of the guidelines are only accessible to senior officers or those with high security clearances, not to those applying for status in Australia.<sup>302</sup> Moreover, the creation of the Australian Border Force has focused on compiling information to help identify and exclude threats from the country.<sup>303</sup> However, Australia does allow for migration of transnational employees. Known as a 457 visa, the temporary work visa is “designed to enable employers to address labour shortages by bringing in genuine skilled workers where they cannot find an appropriately skilled Australian.”<sup>304</sup> The 457 visa allows Australian companies to hire foreign workers for up to four years in specified skilled occupations.<sup>305</sup> These visa holders may work in Australia for a period of one day to four years, may bring eligible dependents to Australia, and may travel freely in and out of Australia.<sup>306</sup> However, the receipt of a 457 visa does not automatically guarantee permanent residence.<sup>307</sup>

In Australia, eligible dependents include spouses, de facto partners, children, or those who rely on the 457 visa holder for food, clothing, and shelter.<sup>308</sup> A de facto partner may demonstrate such relationship through evidence of co-habitation, joint bank account statements, joint ownership of property, billing accounts in joint names, or other legal documents.<sup>309</sup> A person over the age of eighteen claiming to be a dependent must show that he or she relies on the visa applicant for financial support to meet basic needs for food, shelter, and clothing, or that he or she is wholly or substantially reliant on the visa applicant for financial support due to an inability to work.<sup>310</sup>

In Hong Kong, those who possess special skills or experience of value may apply to work as a transnational employee.<sup>311</sup> Hong Kong allows three contractual arrangement options for transnational agreements.<sup>312</sup> The first agreement allows the employee to retain the original contract while providing services in a foreign host country.<sup>313</sup> The second agreement permits the employee to retain his original contract of employment and enter into a separate employment contract with the entity in the host country.<sup>314</sup> The final type of agreement terminates the

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301. *See supra* Part I-B.

302. *Id.*

303. *See supra* Part I-C.

304. *See supra* Part I-D.

305. *Id.*

306. *Id.*

307. *457 Visa, supra* note 63, at 55.

308. *See supra* Part I-D.

309. *Id.*

310. *Id.*

311. *See supra* Part I-C-2.

312. *See supra* Part II-B.

313. *Id.*

314. *Id.*

employee's contract with the host country upon entry into a contract with the entity in the host country.<sup>315</sup> In granting transnational employment visas, factors to be considered include the extent to which the business will benefit the Hong Kong economy, the extent to which the transnational employee is indispensable to the business, and whether a local resident would be able to fill the position.<sup>316</sup>

Pursuant to Hong Kong law, dependents of transnational employees may apply for an entry-dependency visa so long as they are able to demonstrate financial, emotional, and physical dependence on the transnational employee.<sup>317</sup> Dependency is an essential element of this visa, and applicants are rejected if they do not demonstrate that they require the care and financial support of the transnational employee.<sup>318</sup> Dependency visa holders do not face employment restrictions because dependents often do not work and because policing such restrictions would be difficult.<sup>319</sup>

There is currently a trend amongst migrant workers from Indonesia to seek work in other Asian countries, such as Japan, Singapore, Hong Kong, and Malaysia.<sup>320</sup> This is most likely due to the labor surplus in the country.<sup>321</sup> As a result, Indonesia's analysis focuses on exporting rather than importing labor. In Indonesia, the PPTKIS does not limit the amount of Indonesian workers that may provide manpower services abroad, regardless of whether the work is skilled, unskilled, domestic, or professional.<sup>322</sup> There are some restrictions regarding the type of domestic work that Indonesian workers may perform abroad, but the main focus is whether the position matches the employee's interests, skills, and talents.<sup>323</sup> Before exporting labor, shelter and training must be provided.<sup>324</sup> The arrangement is for two years, and the exporting company must be wholly liable for the security, welfare, repatriation, and protection of the Indonesian worker.<sup>325</sup>

In Japan, eligibility for transnational employees is largely limited to highly skilled, white-collar professionals.<sup>326</sup> Japan does not offer visas for other types of workers, who are not highly skilled translators

315. *Id.*

316. *See supra* Part I-C-2.

317. *See supra* Part II-3-C.

318. *Id.*

319. *Id.*

320. INT'L ORG. FOR MIGRATION, *LABOUR MIGRATION FROM INDONESIA* 4 (2010), [https://www.iom.int/jahia/webdav/shared/shared/mainsite/published\\_docs/Final-LM-Report-English.pdf](https://www.iom.int/jahia/webdav/shared/shared/mainsite/published_docs/Final-LM-Report-English.pdf) [<https://perma.cc/YQ3C-VGQA>].

321. Graeme Hugo, *Indonesia's Labor Looks Abroad*, MIGRATION POL'Y INST. (Apr. 1, 2007), <http://www.migrationpolicy.org/article/indonesias-labor-looks-abroad> [<https://perma.cc/UWD8-PG72>].

322. *See supra* Part III-D-2.

323. *Id.*

324. *Id.*

325. *Id.*

326. *See supra* Part IV-B-4.

or engaged in international business.<sup>327</sup> However, Japan does host the technical intern visa, which allows employees from developing countries to receive education in Japan that will allow them to promote economic and industrial development in their home countries.<sup>328</sup> Technical interns are granted the same status as workers and all minimum labor standards apply, including minimum wage, maximum work hours, and overtime wage requirements.<sup>329</sup> However, technical interns are often hired by smaller companies, and such arrangements could create a hotbed of labor law violations if companies failure to adhere to the minimum standards.<sup>330</sup>

Australia limits the amount of time that a transnational employee may work in Australia to four years.<sup>331</sup> Similarly, Indonesia only exports transnational employees for two years.<sup>332</sup> Both Australia and Japan only hire highly skilled transnational employees.<sup>333</sup> Additionally, Australia, like Hong Kong, requires the employer to demonstrate that it could not find a native employee to fill the position intended for the transnational employee.<sup>334</sup> Both Australia and Hong Kong allow dependents to live with the transnational employee.<sup>335</sup> Australia defines dependents as spouses, de facto partners, children, or those who rely on the transnational employee for food, clothing, and shelter.<sup>336</sup> Similarly, dependents seeking to move to Hong Kong with the transnational employee must demonstrate financial, emotional, and physical dependence.<sup>337</sup>

## CONCLUSION

While the law regarding transnational employment is often troublesome for both employers and employees, Australia, Hong Kong, Indonesia, and Japan have drafted laws and regulations to help ease the process. Although the four countries generally focus first on the protection of their own local or transnational employees, each has recognized the need for foreign employees in certain fields. Despite these regulations, uncertainty remains due to potential differences in the laws of the sending and receiving countries. Until internationally recognized laws and regulations are implemented, this uncertainty will continue to linger.

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327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *See supra* Part I-D.

332. *See supra* Part III-D-2

333. *See supra* Part I & Part IV.

334. *See supra* Part I-D; Migration Act 1958 (Cth) s140GB-140GBA; Part II-C-2.

335. *See supra* Part I-D & Part II-C-3.

336. *See supra* Part I-D.

337. *See supra* Part II-C-3.

