In this issue...

This quarter, we cover jurisdictional issues from the UK, and have updates from Hong Kong, Libya, Singapore and the UAE on a variety of issues. From our international alliance partners L&E Global, we have updates from Italy and the US.

On page 22 we introduce you to Simon McConnell, Partner in our Clyde & Co Hong Kong office.

We also continue our series of Employment “at a glance” guides, with a summary of employment law in Qatar. We have prepared a booklet with “at a glance” guides for the MENA region. For a copy of our Guide to employment law across the MENA region, please contact Sara Khoja.

APAC Webinar
Members of our Asia Pacific employment team and Nick Dent held a webinar on 4 March 2015, on restrictive covenants and how they are enforced across the region. The team is planning to hold further webinars in the future.

13th HR Directors Business Summit 2015
In February, Chris Holme was a speaker on a panel at this event in Birmingham, discussing managing risk and recruitment in a global talent pool. Chris spoke about the employment law implications of carrying out background screening and checks, including through the use of social media, on job applicants in global cross border recruitment, and the data protection implications of moving employee information abroad.

If you would like further information about our international employment law services, please contact Nick Dent, Nick Elwell-Sutton or your usual contact at Clyde & Co.
Employment “at a glance” guide - Qatar

The rules governing the employment of individuals working in Qatar are principally governed by Law No (14) of 2004 (Labour Law). The Labour Department of the Ministry of Labour and Social Affairs is the main agency of administration.

The Labour Law excludes the workers of Qatar Petroleum and its corporate establishments whose employment is governed by special laws; it also excludes Government/ public workers whose employment is governed by the provisions of Law No (8) of 2009 (Human Resources Law). In addition, members of the armed forces, the Police, workers at sea, casual, domestic and agricultural workers and dependants are excluded from the Labour Law. The Qatar Financial Centre (QFC) and the Qatar Science and Technology Park also both have their own employment regulations.

This guide will focus on the Labour Law which is issued in Arabic with no official translation.

Issues arising on hiring individuals

Immigration

Immigration rules in Qatar are covered by Law No (4) of 2009 (Immigration Law) which sets out regulations under which expatriates may enter, exit, work and reside in Qatar. The Immigration Department of the Ministry of Interior is the main agency of administration. The Immigration Law defines an expatriate as any individual entering Qatar who is not a Qatari national. Unless an individual is a Gulf Cooperation Council national, they must be sponsored by either a Qatari national, an entity registered to undertake business in Qatar or a resident family member on whom the individual is dependent. This arrangement does not lend itself to short term or casual employment arrangements.

Currently the nationals of some 33 countries, including the United Kingdom, the United States, Australia and Japan, can enter Qatar on an on-arrival visa; other nationalities may enter and register their companies or countries on business visas which must be applied for by individuals or entities authorised by the Immigration Department prior to arrival. Details in relation to such applications may be found on Qatar Embassy websites.

Only a holder of a valid work permit may work lawfully in Qatar. Work permits may only be applied for by an individual or entity registered with the employment authorities. These applicants are known as the worker's sponsor. Sponsorship and immigration are interlinked in Qatar. Once a Qatari entity has been issued with an immigration card it may register with the Labour Department and submit block visa applications. A block visa application should state the gender, nationality and job title of the workers the Qatari entity wants to employ. Once the block visa application has been approved by the Labour Department, passport copies and education certificates if appropriate should be submitted to the Immigration Department in order for each worker to be issued with their work permit; then the employer can proceed to apply for the worker’s residency once they have been relocated to Qatar at the expense of the worker’s sponsor. Dual residency is permitted by discretion in Qatar. The process followed by Qatari nationals to sponsor expatriates is slightly different.

Where workers hold a valid Qatari residence permit they can apply to sponsor their spouses and dependent family members at the discretion of the Immigration Department. The resident will have to demonstrate to the immigration authorities that they are appropriately employed with sufficient funds to do so, i.e. currently only a manager or an individual with a degree certificate earning at least QAR 10,000 per month (some USD 2,700).

Holders of residence permits may work but only for their sponsors. Contract working for other third parties is not permitted unless approved by the Immigration Department. Individuals holding family residencies do not automatically have the right to work and must apply for, and be issued with, work permits to work, subject to some exceptions, e.g. the QFC. Part-time workers can work, subject to the permission of their sponsor/employer, for a Qatari national or an entity registered to undertake business in Qatar; there is no concept of part-time work referred to in the Labour Law itself.
Penalties can be imposed by the Ministry of Interior in relation to breaches of the Immigration Law. These penalties can be onerous, e.g. up to three years in prison and a fine of up to QAR 50,000. The penalties may be levied against any or all pertinent parties.

Qatarisation
It is important to note that there are laws and regulations in place to encourage the employment of nationals from time to time, known as Qatarisation. Specific sectors including banking may be subject to quota requirements to employ Qatari nationals and some organisations have self-imposed quotas, e.g. Qatar Foundation, but otherwise the Labour Department will review new block visa applications on an application by application basis.

Liability
While they reside in Qatar, the worker’s sponsor will be legally responsible for them, including obtaining and renewing residence permits and associated registrations.

The worker’s sponsor will not be liable financially for any of the obligations of the individuals it sponsors unless it specifically agrees to guarantee such obligations, e.g. in a salary letter addressed to a bank for the purposes of a worker obtaining a car loan.

Recruitment
Strictly speaking only 100% Qatari owned entities and Qatari nationals holding valid manpower licences may undertake the business of recruitment for third parties.

Employment structuring and documentation
Employment terms may be for a definite/fixed or an indefinite/unlimited duration. A fixed term is generally understood to be a term during which employment can only be terminated by the agreement of both parties, i.e. notice cannot be given. An indefinite term is one in which notice can be given by either party in accordance with the Labour Law and employment contract and subject to the successful completion of probation.

The Labour Law provides for a single period of probation of up to six months, during which the employer may provide the worker with three days’ written notice to terminate employment if the worker is not able to undertake the work for which they have been employed.

Issues arising during the employment relationship
Wages, annual leave and working time
There is no minimum wage in Qatar, although the Labour Law does stipulate that the Emir can set one. Some Embassies, e.g. the Philippine Embassy, are developing and promoting recommended minimum wage policies for their nationals.

A worker who has completed one continuous year of service is entitled to annual leave with pay. Workers who have been employed for less than five years will receive at least three weeks’ paid annual leave and those who have been in service for over five years will be entitled to at least four weeks’ paid annual leave.

A Muslim worker is entitled to Haj leave without pay, not exceeding two weeks, to go on pilgrimage once during the period of his service dependent on how such leave is allocated internally from time to time.

The Labour Law provides for a maximum working week of 48 hours, eight hours a day; with Friday being the weekly day of paid rest. In Ramadan this is reduced to a maximum of six hours a day. Workers who are not in a position of responsibility i.e. non-managerial positions, are entitled to a maximum of two hours’ overtime pay a day in accordance with statutory rates, set according to whether overtime is completed on a normal working day, a Friday, during night time or on a public holiday. A worker’s actual working hours should not exceed ten hours a day if overtime is worked.

Family rights
Female workers are entitled to 50 days’ paid maternity leave if they have been in continuous employment for a year or more when they give birth. There is no other provision for family leave.

The Labour Law states that female workers must be paid the same wage as male workers if they undertake the same work. Provisions are also made in relation to vocational workers and minors.
Trade unions
The Labour Law provides that where an entity employs more than one hundred Qatari workers, a single worker’s committee may be formed by those Qatari workers. Striking is permitted under certain circumstances, but amongst other things, the exercise of political or religious activities, the printing and dissemination of materials insulting the State, etc. is prohibited. Workers’ committees should publish their policies and regulations according to certain guidelines.

Social insurance
There is currently no public social security scheme or any retirement pension applicable to non-Qatari workers. However, for Qatar national workers, there are obligations on employers in certain sectors to contribute to a pension fund in accordance with the provisions of Law No (24) of 2002.

A new health insurance scheme was enacted through issuance of Law No (7) of 2013 under the terms of which sponsors will be responsible to contribute to their employee’s health care. The regulations associated with this law have recently been issued, but details concerning premiums etc. are still being settled. Qatari and non-Qatari nationals will be the subject of this new scheme. There are no obligatory insurances other than the new health insurance referred to above. However, some employers may contractually offer workers benefits such as life assurance, permanent health insurance, private medical insurance and company cars.

Issues arising on termination of employment relationship
Business transfers
The Labour Law (Article 52) provides that when an enterprise merges with another enterprise or transfers its ownership in, or its right to manage that enterprise, an employee’s employment will not necessarily terminate. In addition the law provides that employment will not terminate on the death of an employer unless the contract of employment provides that it will conclude because of the death or otherwise.

Sponsorship transfer
Residency may be transferred between sponsors, subject to the discretion of the Immigration Department. In order to transfer sponsorship, an individual must hold a residence permit which has been valid for more than 12 months, a sponsor’s letter of no objection (NOC) and a “clean” Police Report. Where no NOC is provided (there is no obligation to provide one) an individual may not work in Qatar, i.e. be sponsored and employed in Qatar, for a period of two years, although appeals can be made to the Human Rights Department of the Ministry of Interior. Where individuals do not have a residence permit which has been valid for more than 12 months, provided they hold an NOC, they must leave Qatar and re-enter on either an on-arrival or business visa or a work permit in order for their new sponsors to be in a position to apply for a residence permit for them.

Terminating employment
Under the Labour Law, if the service contract is for an indefinite duration either the employer or the worker may terminate it without giving any reasons; notification periods will be dependent on the length of service and the terms of the contract. The employer should pay the worker all their dues for the notice period if the worker continues to work normally during this period. If the contract is terminated without observing the notice period, the party (usually the employer) terminating the contract may be obliged to pay compensation. The Labour Law provides for employers of more than ten employees to implement a disciplinary process and sets out the minimum requirements.

The Labour Law (Art 61) sets out a list of circumstances under which the employer can terminate the worker’s employment without notice or the payment of an End of Service Benefit (EOSB) due to the actions of the worker. The Labour Law also provides (Art 51) for a similar action under which workers can terminate without notice but still receive EOSB if applicable.
The Labour Law (Art 54) provides, in addition to the other monies payable to workers when their employment terminates, that workers must be paid an EOSB. As a minimum, it must equal three weeks’ basic salary for each full year the worker has worked; part years are calculated pro rata and an EOSB is only payable once the worker has completed one full year of employment. The EOSB cannot be contracted out of or waived.

Workers require an exit permit to leave Qatar. Exit permits can be issued for a single exit; the holders of residence permits may be issued with multi-exit visas at the sponsor’s discretion. If a worker wishes to leave Qatar while still holding a work permit, i.e. before a residence permit is issued, they must obtain a re-entry or return visa before leaving, to avoid automatic cancellation of their work permit. Currently, there are tight restrictions on such visas being issued.
Hong Kong: Statutory paternity leave legislation

Simon McConnell, Partner and Michelle Lai, Associate in Clyde & Co’s Hong Kong office comment on the new paternity leave provisions and potential implications for employers.

At the end of last year, the Legislative Council passed the long-awaited Employment Amendment Bill 2014, granting three days’ paid paternity leave to eligible employees. From 27 February 2015, male employees in the private sector are entitled to enjoy three days’ paternity leave at 80% of their average daily wage.

The legislation was recommended by the Labour Advisory Board, a non-statutory body that advises on labour matters, comprising both employer and employee representatives. Lawmakers previously proposed that the period of paternity leave should be increased to seven days with full pay. However, this proposal was rejected by the Legislative Council.

What do the paternity leave provisions say?

Fathers working in the private sector are entitled to a statutory benefit of three days’ paternity leave, with pay at 80% of the employee’s daily wages. These three days may be taken consecutively or separately at any time from four weeks prior to the expected delivery date, to up to 10 weeks after the birth.

To qualify, the father of a newborn child, or a father-to-be, must be employed under a continuous contract and must have given advance notice to his employer. A “continuous contract” means the employee must have worked for the same employer for at least 18 hours in each of the previous four weeks.

In terms of notification requirements, if the employee notifies his employer of his intention to take paternity leave at least three months before the expected delivery date, he must give his employer advance notice of his intended date of paternity leave before taking it. If the employee has not given three months’ notice, he must notify his employer at least five days in advance of the date he is intending to take his paternity leave.

The father will also be entitled to paternity leave pay if he has been continuously employed for a minimum of 40 weeks before taking the paternity leave, and has submitted the child’s birth certificate to his employer as proof of fatherhood. This supporting documentation should be provided to the employer within twelve months of the first day on which the employee takes paternity leave, or if the employee has ceased employment, within six months of the cessation of his employment.

In addition, on the request of the employer, the employee must sign a written statement confirming:

– he is the child’s father; and
– the name of the child’s mother; and
– the expected or actual date of delivery.

What can employers do?

An employer who without reasonable excuse fails to provide statutory paternity leave or statutory paternity pay commits an offence and is liable on conviction to a fine at level 5, currently HKD 50,000.

The Government has in fact been promoting various family-friendly practices, paternity leave being only part of the initiative. Employers, especially international companies in Hong Kong, may therefore wish to take this opportunity to review their relevant policies and employee benefits as a whole in response to society’s greater emphasis on family-friendly employment practices.
In terms of market trends, since 2012, eligible full-time government employees in Hong Kong have enjoyed five working days’ paternity leave and many companies currently offer, on a voluntary basis, an average of three days’ paternity leave. Looking at our neighbouring Asian economies as reference, the paternity leave period is five days in Korea, three days in Taiwan and seven days in Singapore (state-funded). Paternity leave rights in Asia are still far behind those enjoyed by employees in Western developed economies.

In light of the new statutory paternity leave provisions, companies in Hong Kong should review their paternity leave policies and procedures. This should include, for example, preparing the prescribed form for employees who intend to take paternity leave, and reviewing the company’s policies on paternity leave to ensure that the companies do not offer less than the statutory requirements. Companies may also consider whether to provide “top-up” benefits to employees, beyond the statutory requirements. As paternity leave is only part of the family-friendly employment practice initiative promoted by the Hong Kong Government, companies may also consider reforming the relevant employee benefits as a whole. Some possible recommendations include family leave, flexible working arrangements and family support facilities (e.g. child care, breastfeeding facilities etc.).

What issues should employers be aware of when formulating family-friendly practices?
Paternity leave policies and other family-friendly employment practices are likely to relate to an employee’s gender and/or marital status. Employers should therefore ensure compliance with the Sex Discrimination Ordinance and the Family Status Discrimination Ordinance (which are currently under review by the Hong Kong Equal Opportunities Commission).

In order to avoid discrimination on the basis of marital status, any paternity leave benefits offered by the company should apply to fathers of a child born both in and out of wedlock. Companies should ensure that their paternity leave policies treat married and unmarried fathers / fathers-to-be equally.

In terms of sex discrimination, the Equal Opportunities Commission has noted that paternity leave and maternity leave are similar in nature. Company policies should reflect this and any inconsistencies in the treatment of mothers and fathers should be justified and reasonable. A special point to note is that in many countries where paternity leave is offered, fathers often do not take advantage of their entitlement for fear of being stigmatised or penalised in the workplace. Companies may therefore consider putting in place complementary measures (such as clear and open guidelines as to the eligibility criteria and procedure for taking paternity leave, and/or other family-friendly measures) to combat any possible negative stereotypes in the office.

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Italy: Employment law reforms

Luca Failla and Sharon Reilly at LABLAW, L&E Global | Italy, outline some important employment law reforms.

Italy is going through significant political, social and legal changes at the moment. As employment lawyers, we are seeing first-hand how these changes impact employers and their Italian workforce. Italy is a work in progress and the end product will hopefully be worthy of the prestigious label “Made in Italy”.

The Jobs Act: making the Italian labour market more flexible

The Jobs Act (the name was taken from Obama’s American Jobs Act 2011) is designed to simplify existing employment law in Italy and to encourage employers to hire new staff.

What changes are being introduced?

Historically, the legislation provided that if the court made a finding of unfair or wrongful dismissal, the sole remedy was reinstatement. Now the goal posts are shifting, and the remedy of reinstatement will practically disappear and be replaced by an award of damages which will be calculated on the basis of length of service.

The remedy of reinstatement will apply only in very specific circumstances, namely:

- unlawful dismissal (where the facts on which the dismissal are based are found to be non-existent)
- discriminatory dismissals
- defective disciplinary dismissals

A very controversial aspect of the reform is that it applies only to new hirings, and will therefore create two tiers of employees and leave companies wide open to claims not only for discrimination, but worse still, unconstitutional action.

Disappointingly, yet again the Italian legislature has failed to seize the nettle and put poor performance as a reason for dismissal on the statute book. This is a real bone of contention, particularly for foreign companies operating in Italy which often have to resort to a more convoluted reason for dismissal, albeit that they have a well-documented case for dismissal for poor performance where this impacts negatively on the business.

What impact will the Act have?

This Act is without doubt innovative - it has been the subject of much discussion throughout the country, which is a sure sign of its importance to Italian businesses. We will have to wait and see to what extent the Act provides momentum in helping to turn around the Italian economy, although the Act will not have an immediate impact as the new provisions on dismissal only apply to employees recruited from 2015. Over time, however, the Act should result in lower dismissal costs, and potentially greater ease in recruiting staff.

All change for Dirigenti (Executives) in the collective redundancy process

What rights did Dirigenti have?

In Italy, although Dirigenti (top level managers) are employees, they enjoyed less protection than ordinary employees, including being excluded from the whole collective redundancy process. However, thanks to a decision of the European Court of Justice in February 2014 and ensuing European legislation, Italy has recently passed its own law which gives Dirigenti greater rights.
What are the changes and what do they mean in practice?

Dirigente must be included in:

– the calculation that triggers collective redundancies, i.e. where a company with more than 15 employees dismisses at least five of them within a period of 120 days

– the information and consultation process with the unions, and the application of the legal selection criteria (technical/organisational needs of the company, family dependants and length of service)

This means that companies will need to set up separate negotiations with the Dirigente unions and (so it appears) apply the selection criteria. However, such criteria do not take into account the special characteristics of the Dirigente relationship, in particular the bond of trust and their fiduciary duties.

In addition, if an employer fails to follow the process correctly, Dirigente would be entitled to damages of up to 24 months’ salary, thus effectively extending rights to them which were previously only enjoyed by employees.

Luca Failla is a Founding Partner of LABLAW and Sharon Reilly, Partner, a dual qualified lawyer. LABLAW, a founding member of L&E Global with which Clyde & Co has a strategic alliance, is an Italian labour and employment law boutique which has its head office in Milan and four branch offices in Rome, Genova, Pescara and Padua.

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Libya: Terminating contracts of employment

John Brooke, Director and Halah Belazi, Legal consultant at Clyde & Co’s Libya office consider issues around terminating employment.

As the violence in Libya intensifies following the battle for Tripoli international airport in the summer of 2014, many foreign companies are considering their future position in Libya and whether or not they will return to the country. During the period 2005-2011, the former regime sought to try and open up Libya’s economy and invited a number of international companies to carry out a wide range of infrastructure projects, many of which required significant amounts of manpower. Those international companies are now nearly all absent from the country although many still have a number of staff on their payroll in Libya.

The Libyan Labour Law was brought up to date and codified in 2010, one of the last things the former regime did before the February 2011 Revolution. It is particularly employee friendly – the former regime promoted itself as being friendly to workers, its title was the Socialist Peoples’ Libyan Arab Jamahiriya.

Although the law is codified, there are a number of procedural and practical steps that are unwritten and require a significant amount of local knowledge in order to ensure that pitfalls are avoided, particularly when terminating contracts of employment.

Termination procedures for unlimited term contracts are fairly straightforward. In the absence of an express term which provides for this, a local Libyan employee is not entitled to a payment on the termination of their employment (such as a redundancy payment in other jurisdictions) and is only entitled to one month’s notice of termination, no matter how long the employee has been employed by the company.

The position for expatriate workers is different. In addition to notice, the Labour Law sets out a formula for calculating termination payments which directly relates to length of service. The reason expatriate workers receive a termination payment whereas local Libyan workers do not, is that Libyan workers are considered to have already received compensation by way of the employer’s contributions into the employee’s social security fund during the course of their employment.

Compensation may, however, be payable when an employer seeks to terminate a fixed term contract. Whilst a fixed term contract can be an advantage in some cases, as it terminates automatically on the expiry of its term, the contract cannot be terminated by the employer before the end of the contract term without the employee’s agreement, and without a compensation payment for the unexpired term of the contract.

However, the Ministry of Manpower has wide-ranging jurisdiction to deal with employee grievances relating to the operation or termination of employment contracts and it also has a great deal of power in terms of the awards it can impose. The Ministry can by its own motion refer any employment-related claim to the local courts, recommend that a certain course of action be taken and even order reinstatement.

Accordingly, companies should carefully document the termination steps they have followed, so they can demonstrate that the reason for termination and the procedure followed were fair. A well-documented termination process should also be followed, even where it is likely that a generous settlement package will be negotiated.
When a company wishes to enter into settlement discussions with an employee, the company should bear in mind that, as there are no statutory means by which employment claims can be compromised, there is nothing to prevent an employee subsequently bringing a claim, even where a settlement agreement has been signed.

For this reason, all the terms of a termination agreement should be set out in writing, in both English and Arabic (even for local Libyan employees). We also recommend that the company arranges for an independent third party (such as a notary public) to witness the execution of the termination agreement.

In addition, as there is no concept of “without prejudice” negotiations in Libyan law, any attempt to negotiate a settlement on the termination of a contract of employment could become evidence the employee subsequently uses before the Ministry of Manpower, or any local court. Care should therefore be taken during preliminary settlement discussions, and with the content of the settlement agreement itself, so that the employee cannot subsequently use this against the company.

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Singapore: A snapshot of employment changes in 2014 and 2015

Julia Yeo, Legal Director in Clyde & Co’s Singapore office comments on significant changes for employers in 2014 and 2015.

The Singapore Parliament has rolled out a number of employment-related legislative changes, which have either recently come into force, or are due to come into force this year. This new legislation and the implications for employers are summarised below.

**Employment Act Amendments**

Most changes to the Employment Act, the principal employment legislation in Singapore, came into effect on 1 April 2014, with others coming into force from 1 April 2015.

**Part IV protection extended to more employees**

- The salary threshold for non-workmen (such as clerical and service staff) has been raised from SGD 2,000 to SGD 2,500 per month
- Overtime pay is however capped at a salary level of SGD 2,250 to help employers manage their business costs

**Greater protection for Professionals, Managers and Executives (PMEs)**

- Except for Part IV benefits, PMEs with a basic salary up to SGD 4,500 per month will now enjoy protection under all the other general provisions of the Act, such as sick leave benefits, salary protection and protection against unfair dismissal
- Importantly, PMEs earning up to SGD 4,500 per month who have at least 12 months’ service with their employer can now seek redress for unfair dismissal through the Ministry (in addition to the usual civil claims route)

**Ensured union representation for transferred employees**

- In a company restructuring, the collective agreement will be extended for 18 months after the date of transfer, or until the expiry of the collective agreement, for unions to represent the transferred employees in the new company.

**Protection against excessive deductions to workers’ salaries**

- Allowable salary deductions are limited to 50% of the monthly salary. Within the 50% cap, no more than 25% can be deducted for
  - housing accommodation, amenities and services provided by the employer as part of the agreed employment terms, or
  - damages or loss caused by the employee’s neglect or default

**Shorter eligibility period for retrenchment benefits**

- In recognition of the current trend of shorter employment tenures, from 1 April 2015, employees who have worked for two years (previously three years) will be eligible for retrenchment benefits

**Flexibility for employers**

- In addition to overtime pay, employers may now give time off in lieu (of at least half a day) for PMEs who have to work on public holidays
- Employers are not required to give paid sick leave or pay the employee’s medical examination expenses for cosmetic consultations and procedures

**Stricter enforcements**

- First-time offenders who fail to pay employees’ salaries will be liable to a fine between SGD 3,000 and SGD 15,000 and/or a six months’ prison term. For repeat offenders, the penalty will be a fine between SGD 6,000 and SGD 30,000 and/or a 12 months’ prison term
- Individuals, such as directors and partners of the company, will also be held accountable for non-compliance, unless they can prove that they have exercised reasonable supervision or there was genuine oversight
- Employment inspectors may enter any workplace to conduct checks, and to arrest people they reasonably believe are guilty of failure to pay salaries
Industrial Relations Act Amendments

Greater union representation for PMEs:
- With effect from 1 April 2015, rank-and-file unions which have been granted recognition by an employer may now represent that employer’s PMEs collectively on specific industrial matters, on bargaining for collective salary agreements and they can also represent PMEs in any re-employment issues
- Senior management and specific categories of executives (such as in-house counsel, those with access to highly confidential information and those whose work has important strategic impact on the company) are however not entitled to collective representation

Personal Data Protection Act

Though not employment-specific legislation, this Act has a significant impact on employers in relation to the processing of their employees’ personal data.

Employers must notify employees of the purpose behind the collection, use, or disclosure of their personal data and obtain valid consent for this. The Act imposes obligations on the transfer of such data out of Singapore and a limit to the retention and storage of that data. However, there are exceptions to the requirement for consent, such as the use of personal data for the management and termination of employment, evaluative purposes, investigative purposes and in the context of a business asset transaction.

One notable obligation is the mandatory requirement to appoint Data Protection Officer(s), responsible for compliance with the Act.

Protection from Harassment Act

This Act, which came into effect on 15 November 2014, establishes statutory protection from harassment and anti-social behaviour, which includes cyber-bullying and stalking.

Its net is cast wide by:
- open-ended definitions – non-exhaustive illustrations of offending behaviours rather than restrictive definitions of harassment
- no restriction on physical space – cyberbullying and harassment is also an offence
- no restriction on location – acts committed outside Singapore can be caught if the acts are committed against victims in Singapore
- medium-neutral – harassment can take the form of words, behaviour, pictures or any means of communication

Offenders face a wide range of potential penalties, such as fines, imprisonment and community orders. Repeat offenders will face enhanced penalties. Victims may also seek a number of sanctions, such as:
- protection orders, expedited protection orders for victims and affected family members
- orders to cease and desist
- orders to remove offensive materials
- notifications to alert readers of the false facts alleged against the victim
- damages (separate from a fine, which is a criminal sanction)

Although it is not employment-specific legislation, the Act uses a number of workplace scenarios to illustrate what constitutes harassment. It is important that employers review their existing anti-harassment/violence policies, and internet and social media policies, and that they educate employees on what conduct is unacceptable within the workplace.

Stricter enforcement of Tripartite Guidelines on Fair Employment Practices

According to these Guidelines, job advertisements should not stipulate criteria (i.e. age requirements) unless specific attributes are necessary for the job, in which case the reason for the requirement should be stated.

There has been greater emphasis recently on the vigilant enforcement of the Guidelines. The Ministry of Manpower has imposed various penalties for non-compliance, such as the immediate removal of offending job advertisements, making a public apology and the curtailment of work privileges, such as a bar on work pass applications.
Introduction of the Fair Consideration Framework

The Fair Consideration Framework (reported on in the September 2014 edition of our International Newsletter), introduced on 1 August 2014, is a Singapore-first policy. It seeks to promote the hiring of Singaporeans and ensure staff development practices are transparent, based on merit and do not discriminate against Singaporeans.

Employers submitting Employment Pass applications for foreign employees must first advertise their job vacancies on the national Job Bank at least 14 calendar days before they can proceed with their application. The advertisement must be open to Singaporeans and must comply with the Tripartite Guidelines on Fair Employment Practices, for instance, being non-discriminatory.

Certain jobs are exempted from the advertising requirements, such as:
- in companies with fewer than 25 employees
- vacancies with a fixed monthly salary of SGD 12,000 and above
- jobs filled by Intra-Corporate Transferees (a manager, executive or specialist who has worked for the firm outside Singapore for at least one year before the proposed hiring)
- short-term assignments of not more than one month

Requirement under the Tripartite Guidelines for employers to issue payslips

The Guidelines require all employers, as part of good HR practice, to issue itemised payslips to all employees at least once a month and within seven days of the last day of the month. They can either be issued in hard copy or in electronic form.

Increase in Central Provident Fund contributions

The Central Provident Fund is a compulsory savings plan for working Singapore citizens and Singapore permanent residents. All eligible employees and their employers must make monthly contributions.

From 1 January 2015, employers’ contributions increased by:
- 1% for employees aged 50 years or less, or for employees over 65
- 2% for employees aged 51-55 years
- 1.5% for employees aged 56-65 years

What this means for employers

The myriad of changes signifies a shift in the official attitude towards employee rights and employee protection. We can expect to see more employee-friendly legislation in the future, as well as employers being held to task if they fail to follow fair employment practices.

It behoves employers to review their existing hiring and administrative processes, and their internal policies dealing with employee data and employee relations. Non-compliance does not just expose employers to tangible financial penalties but may result in damages which are difficult to quantify, such as reputational loss and the curtailment of privileges.

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UAE: Recruitment and resourcing

Sara Khoja, Partner and Yannick Ramsamy, Associate in Clyde & Co’s Dubai office consider the recent establishment of “Employment Businesses” in the UAE.

Recruitment (or employment) agencies have become increasingly prevalent in the Arabian Peninsular over the last decade, with the relatively transient expatriate workforce proving to be a particularly lucrative market. However, following the global economic downturn, the focus of employers has inevitably shifted from the hiring of permanent employees, to identifying ways of reducing labour costs and increasing efficiency.

The UAE has consequently witnessed the emergence of alternative staffing models, in particular through the establishment of “Employment Businesses”, operating as manpower suppliers. Distinct from “Recruitment Agencies” (which are focused on the placement of employees in permanent roles within the client’s business), Employment Businesses employ individuals directly and sponsor them for work permit and residency purposes. The individuals are then provided to the client on a temporary basis to support the client’s normal workforce during times of peak demand and/or specific projects.

The launch of the Dubai Outsourcing Zone (DOZ) in 2007 has also enabled many outsourcing providers to establish a presence within the region, viewing the UAE as an ideal off-shore location for companies in both Europe and Asia. The division of legal rights and obligations between the parties to these types of arrangement is often uncertain (and contentious) and frequently leaves workers vulnerable to exploitation. Ministerial Resolution No (1205) of 2013 concerning the licensing and regulation of private employment agencies (MR1205) aims at regulating the sector of temporary employment.

Licensing

In order to operate as an Employment Business or Recruitment Agency in the UAE, a business is required to obtain a commercial licence which specifically authorises such activities. Such licences must be renewed on an annual basis.

MR1205 makes it clear that licences to operate as an Employment Business or Recruitment Agency onshore in the UAE will only be issued to businesses wholly owned by UAE Nationals. An additional requirement is that the relevant business is managed by a UAE National, in so far as the position of General Manager must be held by a UAE National. Further, as part of the application process, the applicant must now submit a written undertaking to the Ministry that they will not add or dismiss partners of the business without its consent. This is consistent with the Government’s policy on Emiratisation, which is aimed at increasing the number of UAE national employees in both the public and private sectors.

Currently, expatriates are able to obtain a commercial licence to run a Recruitment Agency within one of Dubai’s Free Zones and in the Dubai International Financial Centre, the latter, which operates independently from Federal Law, is the base for a large number of individuals working in the professional services sector.

Under MR1205, businesses which do not hold the appropriate licences are at risk of investigation by the authorities and the sanctions which may be imposed include imprisonment of the business’ General Manager and/or fines of up to AED 100,000.

Protection of workers

A further objective of MR1205 is to prevent malpractice within the recruitment industry and ensure that businesses comply with their responsibilities to the workers they recruit. To safeguard against abuses, businesses intending to operate as Recruitment Agencies onshore in the UAE are required to submit a bank guarantee of AED 300,000 in favour of the Ministry. For Employment Businesses, the
guarantee is increased, to a limit of AED 1 million. These guarantees must be renewed annually and may be called in by the Ministry, in whole or in part, at any time if the Recruitment Agency or Employment Business fails to comply with its obligations.

Under MR1205, Employment Businesses are also now required to pay a deposit of AED 2,000 in respect of each worker brought into the UAE and to undertake all legal obligations as an employer (such as the provision of housing and health insurance and the payment of the individuals’ salaries). MR1205 specifically provides that these deposits may then be used by the Ministry to compensate workers engaged by the Employment Business to the extent they are not provided with their contractual entitlements.

In order to promote transparency and workers’ rights, MR1205 also includes a number of additional prohibitions and conditions, principally on Employment Businesses, but some also apply to Recruitment Agencies.

**Outsourcing and offshoring**

The outsourcing market is something which the UAE has, for several years, been seeking to tap into, presenting itself as a viable alternative to the more traditional offshore locations of India, China and the Philippines. However, instead of directly competing with the established operations in these countries, the UAE, through the Dubai Outsourcing Free Zone, is positioning itself as a place where companies can place their more senior or more qualified employees, who may be attracted by the associated tax and lifestyle benefits.

The legislation also seeks to encourage the recruitment of a skilled workforce – and indications from the Ministry suggest that new licences will be granted to those who want to provide skilled individuals to carry out administrative or business support roles (for example in the back office or accounts department) or professionals who want to work flexibly (for example engineers, teachers etc.), as opposed to those who intend to supply blue collar workers.

From a legal perspective, the more limited regulation surrounding business transfer arrangements and the provision of outsourcing services within the UAE also provides businesses with greater flexibility to adopt alternative staffing models. For example - when a business ceases to outsource a function in the UAE, workers assigned to the function will return to the Employment Business or outsource provider, without further implications for the client or any new service provider. It will also be possible for the Employment Business or outsource provider to dismiss the workers at the end of an assignment without carrying out a consultation process as would commonly be required in other jurisdictions such as Europe, Australia and New Zealand.

One issue that is yet to be fully addressed in the context of outsourcing in the UAE, is the assignment or supply of employees of an Employment Business to the client. At present there are no licence activities available within the DOZ that permit a business to provide manpower supply services. Practical solutions may be available, however these will require a dialogue with the Free Zone Authority and at present there is no standard procedure for such applications. Even where permission to operate as a manpower supplier is obtained by the business, the ability of the Employment Business to assign expatriate employees to a client is not clear-cut.

As is the case across the region, the right of an expatriate to be in the UAE is inextricably linked to their employment (with the onshore employer or the relevant Free Zone Authority acting as the individual’s sponsor for work permit/ID and residency purposes). The terms of an expatriate’s visa, whether they are based onshore or in one of the Free Zones, will also prohibit the individual from working for an entity other than the employer identified on their visa and those sponsored by a Free Zone Authority will be prohibited from working outside that Free Zone. It follows therefore that expatriate employees of an Employment Business will contravene the conditions of their visa and the regulations issued by the Free Zone if they work for a client of the Employment Business.

One way round this general prohibition is for the Employment Business to obtain special permission from the relevant Free Zone Authority. Such permission may be granted on a case by case basis and will usually only be granted in respect of a finite assignment or project. Whether employees of an Employment Business will ever be authorised to work at a client’s premises on a long term basis (and therefore effectively become integrated into the client’s business) remains uncertain.
Failure to obtain permission for such arrangements is not without repercussions. For example, if an Employment Business based within the DOZ is found to be in breach of the TECOM Employment Regulations (which also apply to employers based in the DOZ and specifically prohibit employees from working outside the relevant Free Zone) the Free Zone Authority may impose financial penalties. In extreme cases, it is also open to the Free Zone Authority to suspend or revoke the Employment Business’ licence and/or impose restrictions on the ability of the Employment Business to recruit additional employees. The degree to which these rules are enforced is unclear. However, spot checks or inspections of premises have been known.

**The future for manpower supply**

MR1205 demonstrates the Government’s determination to promote a transparent employment intermediary sector in the UAE and ensure greater protection for temporary workers. However, the actual effect of these changes and the viability of alternative staffing arrangements in the UAE will take time to assess and it will be interesting to see how these arrangements develop in practice.

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UK: New EU jurisdiction rules for non-EU employers

Nick Dent, Partner and Corinna Harris, Professional Support Lawyer at Clyde & Co’s London office summarise the new rules on jurisdiction in employment contract disputes brought by employees working in the EU, against non-EU employers.

The new Recast Brussels Regulation replaces the 2001 Brussels Regulation and applies to claims brought from 10 January 2015. Under the Regulation, special jurisdiction rules apply to individual employment contracts, to protect employees as the perceived weaker party to the contract.

This article focuses on one particular aspect of these rules which has changed, the new jurisdiction rules for non-EU employers who employ staff in the EU.

Non-EU employers
Previously, employees could only sue a non-EU employer in an EU member state if:
 – that employer had a branch, agency or other establishment in that member state, and
 – the employment dispute related to that branch, agency or other establishment

Now, employees can also sue them in a member state:
 – where the employee habitually works, or
 – where the business that engaged the employee is situated

So, for example, an employee who routinely works in France for a company situated in Hong Kong which has no branch or establishment in the EU can now choose whether to sue the company in France or in Hong Kong.

The impact of an exclusive jurisdiction clause
An exclusive jurisdiction clause will only be effective if it is entered into after an employment dispute has arisen, or where it is the employee who seeks to rely on it.

So in practice, employees can choose to bring a claim in any permitted jurisdiction under the new rules that is best for them, irrespective of any exclusive jurisdiction clause in their employment contract.

Implications for non-EU employers
This new rule is specifically designed to enable employees to choose which of the applicable jurisdictions is most favourable for them. The jurisdiction they choose is likely to be influenced largely by cost and convenience. So in many cases, employees will opt to bring an employment claim in the courts of the member state in which they habitually work.

Inevitably, therefore, the implications of this new rule for non-EU employers who employ staff in the EU is that they face an increased risk of having to defend employment claims in the courts of a member state, which in most cases will be more costly and inconvenient for them.

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UK: The territorial scope of unfair dismissal and whistleblowing rights

Nick Dent, Partner at Clyde & Co’s London office comments on some recent decisions on whether overseas employees can bring claims in a UK employment tribunal.

With increasing numbers of employees working in overseas offices, or even working abroad remotely for employers based in Great Britain, the issue of whether overseas employees can access UK employment rights is becoming more and more significant. To bring an unfair dismissal claim against their employer, an employee will need to demonstrate a “sufficiently strong” connection to Great Britain to make it appropriate for a UK employment tribunal to hear their claim.

A number of recent cases have shed further light on this test. The courts will decide if this connection exists by carefully considering all of the features surrounding the individual’s employment, particularly whether the employee’s work serves the overseas or domestic part of the business. It has recently been confirmed that overseas employees seeking to bring whistleblowing claims must similarly establish that they have a “sufficiently strong” connection to Great Britain.

Recent important decisions

Three cases have recently confirmed and expanded on the “sufficiently strong” connection test. It is now clear that there is no single factor which will dictate whether an overseas-based employee has the requisite connection to Great Britain. In Creditsights Ltd. v Dhumna (2014), a British national working in Dubai for a British subsidiary of a US company was dismissed for alleged gross misconduct. He attempted to bring an unfair dismissal claim in Great Britain. The Court of Appeal confirmed that establishing whether he had a sufficiently strong connection to Great Britain involved a careful consideration of all the facts surrounding his employment. The technical set up of the overseas business, the location of the employee’s clients and the way the employee was being paid were identified as pertinent to the extent of the employee’s “connection”.

This approach can have results which some employers may consider surprising: the courts have held that an employee living and working in Australia had a close enough connection to Great Britain to bring a claim against her employer. In Lodge v Dignity & Choice in Dying & Anor (2014), Mrs Lodge, an Australian citizen, worked as Head of Finance for a British charity under an employment contract governed by English law. Initially based in their London offices, in December 2008 she returned to Australia for personal reasons but kept her job, working remotely via a virtual private network. In June 2013 Mrs Lodge resigned and brought constructive unfair dismissal and whistleblowing claims in England. The Employment Appeal Tribunal (EAT) concluded, having considered all of the features of her employment arrangement, that although she worked in Australia, all of her work was done for the benefit of her employer in London. The EAT said it was immaterial that she was a “virtual employee”, not a “physical employee”. Mrs Lodge was therefore allowed to bring her claim.

It has recently been made clear that the “sufficiently close connection” test will also apply to overseas employees attempting to bring whistleblowing claims. The case of Smania v Standard Chartered Bank (2014) concerned an Italian living and working in Singapore. His only connection to Great Britain was that his employer’s head office was in London. He was dismissed, having made allegations of financial malpractice against his employer, and sought to bring a whistleblowing claim. The EAT found that it was equally important to establish a sufficiently strong connection to Great Britain in claims for whistleblowing as in unfair dismissal claims. It concluded that an employment tribunal here did not have jurisdiction in relation to a whistleblowing claim brought by an Italian...
banker living and working in Singapore, because there was not a sufficient connection to the UK, and there was no basis for applying a looser test in whistleblowing cases.

**What this means for employers**

As more and more businesses adopt flexible and remote working, and with technological advancements allowing more employees to work in overseas offices, employers should keep in mind that such employees may still have recourse to employment rights before an employment tribunal in Great Britain. As *Lodge* has demonstrated, this is the case irrespective of whether the employee is sent abroad by their employer or chooses to go themselves.

It may seem counter-intuitive that in the case of *Lodge*, an employee who is physically so very far removed from the UK can bring UK proceedings. However, the decision very much turned on its own facts, focusing on the fact that there was no Australian business and the employee was wholly and exclusively working for the UK business. If there had been an Australian group company to which the employee had been contracted and had supplied even some services, the result in all likelihood would not have been the same, even if they had primarily still been servicing the UK business. This highlights how very fact-sensitive a question it is whether there is a sufficiently close connection to Great Britain. The courts will decide whether an employee can bring a claim on a case-by-case basis, carefully considering all of the facts surrounding the employment set-up.

Employers should therefore think carefully about the arrangements that they have in place for employees working abroad, giving particular consideration to the part of the business an employee is working for. A key consideration is whether the employee works for the benefit of a part of the business based in Great Britain or abroad. It doubtless does not make sense to let the employment jurisdictional issues dictate the working patterns that are adopted – that would be to let the tail wag the dog – but it is important to be conscious of the potential for employees to claim UK jurisdiction in these circumstances and there may be ways of contracting with expats/remote workers which improve the employer’s position. As the *Smania* decision confirms, there is a point at which the UK tribunals will draw the line and refuse to assume jurisdiction.

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US: Immigration legislation and changes to watch out for in 2015

Specialists in labour, employment and immigration law at Jackson Lewis, L&E Global United States, discuss significant changes to US immigration law which are being introduced this year.

President Barack Obama’s announcement on 20 November 2014, regarding executive action that he plans to take on immigration reform, has put into motion a number of changes to US immigration law in 2015 that could be significant.

While Congress moves to block the President’s actions, as well as to introduce its own reform legislation, and many states challenge the executive action, other major legislative and regulatory developments are taking place that immigration attorneys will be watching.

Revisions to Adjustment of Status

Adjustment of Status is the process by which individuals who have been sponsored for permanent residence by a family member or employer can apply to become a permanent resident. New adjustment regulations would reflect revisions to how the State Department uses the Visa Bulletin, as well as accelerate the period when the Adjustment of Status applications can be submitted. Currently, an individual cannot file for Adjustment of Status until a visa number is available. The President’s executive action would allow an individual with an approved immigrant visa to apply for Adjustment of Status despite the fact that a visa number is not available, which would provide benefits to them and their families, including greater flexibility in employment and travel. It will also become easier for foreign workers to switch employers.

Currently, a foreign worker who is being sponsored by an employer cannot switch employers without their new employer sponsoring a new and expensive green card process until the Adjustment of Status has been pending for 180 days, and then only if the new position is in the same, or a similar position, to the sponsored position. The President’s guidance directs the US Citizenship and Immigration Services (USCIS) to issue better guidance on what constitutes “same or similar” positions.

Easing of demand on H-1B visas

The H-1B visa category is essential to many businesses that wish to employ foreign nationals in professional positions. Each year, the government makes 65,000 new H-1B visas available (this limit is commonly referred to as the “H-1B cap”) for individuals who have not recently, or who have never held H-1B status. The actual number of visas available under the cap is lower because of set-asides for certain countries under Free Trade Agreements. Further, under the advanced degree exemption, an additional 20,000 H-1B numbers are available for individuals who have obtained a US Master’s degree or higher. For Fiscal Year 2015, which began on 1 October 2014, USCIS received more than twice as many H-1B applications than there were visas available, and for Fiscal Year 2016 (USCIS will accept petitions from 1 April 2015), the demand is expected to be higher. Both President Obama and Congress have taken steps to ease this demand.

Sciences, Technology, Engineering or Mathematics (STEM) students

The STEM Program allows foreign graduates in Sciences, Technology, Engineering or Mathematics to obtain longer periods of post-graduate work authorisation if they go to work for employers who participate in the government’s E-Verify program. The original STEM program allows for an additional 17 months of employment authorisation. The Administration is expected to publish proposed rules in the spring that would:

- increase the number of years that STEM graduates can remain in the US under post-completion optional practical training (OPT) — this would be for students on F-1 visas earning degrees at US universities in STEM fields, and
allow individuals whose first college degree is in STEM, but whose second degree is not (such as MBAs with undergraduate engineering degrees), to also qualify for STEM OPT.

H-4 Dependents
The Department of Homeland Security expects to publish a final rule shortly regarding work authorisation for the spouses of H-1B workers being sponsored for green cards. This would allow certain spouses of individuals with H-1B work authorisation to obtain work authorisation cards that are not restricted (i.e., they can apply for jobs anywhere). As the permanent residence process can take four to ten years for some sponsored foreign workers, this would be a significant benefit for their spouses, who otherwise would need to obtain their own H-1B visas, or would have to wait until the end of the process to seek employment in the US.

Senate Bill would raise H-1B cap
A new bipartisan Senate Bill, the Immigration Innovation (I-Squared) Act, would initially raise the H-1B cap from 65,000 visas per year to 115,000. Thereafter, the cap would be adjusted according to demand, to a maximum of 195,000 visas and a minimum of 115,000.

PERM Regulations to be revised
PERM Labour Certification is the way employers will typically sponsor a foreign worker for permanent residence. It is done through the Department of Labour and has not been updated for approximately ten years. The President’s executive action calls for the Department to streamline the PERM process and, perhaps, to allow it to work through a significant backlog of cases and reduce the processing time to less than six months.

Clarification of specialised knowledge for L-1B visa program
Under the L-1B Visa Program, multi-national employers may transfer workers to the US if they have “specialised knowledge” needed in the US. USCIS has long taken a narrow, and sometimes inconsistent, view of what constitutes “specialised knowledge”, making it difficult for employers to use this category. However, two developments in 2014 could change this.

A federal appeals court in Washington DC rejected the USCIS’s determination that L-1B “specialised knowledge” cannot be “inherent knowledge a person gains as a result of his or her upbringing, family and community traditions, and overall assimilation to one’s native culture necessarily falls into the realm of general knowledge.” The ruling could broaden the range of professionals eligible for these visas. In addition, in response to the President’s executive action, USCIS has stated that it will issue clear, consolidated guidance on the meaning of “specialised knowledge.”

Promoting research, development and entrepreneurs
Policy guidance will be issued allowing “researchers, inventors and founders” to qualify for National Interest Waivers (“NIW”) under the Employment-Based Second Preference category. The goal is to expand the use of the category for foreign nationals whose work will benefit the US. In addition, USCIS will develop a program to permit such individuals to enter the US temporarily to pursue these activities prior to obtaining the NIW.

Inter-agency cooperation on worksite enforcement
US Immigration and Customs Enforcement’s coordination with the Department of Labour regarding worksite enforcement will be strengthened. Better cooperation among ICE worksite enforcement, Department of Justice (Office of Special Counsel), the National Labour Relations Board, and the Equal Employment Opportunity Commission will also be addressed. Increased coordination and cooperation is expected to lead to more workplace investigations.

John L. Sander is a Shareholder in the New York office of Jackson Lewis P.C. An American workplace law firm, Jackson Lewis is a founding member of L&E Global with which Clyde & Co has a strategic alliance. The firm employs over 780 attorneys practicing in 55 locations nationwide.

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International Newsletter March 2015
Meet Simon McConnell, Partner in Clyde & Co’s Hong Kong office

When did you start with Clyde & Co?
September 2012 – I joined along with a group of other partners in Hong Kong and Australia. This coincided with the opening of the Sydney and Perth offices.

How did you get here?
I practised in Melbourne initially. When SARS calmed down in 2003, I was asked to move to Hong Kong – which I did the following year, and I’ve been here ever since.

Why Hong Kong?
So many reasons! Hong Kong is an international financial centre. It is on the doorstep to China. It is at the heart of Asia. It has wonderful people and fantastic food.

Tell us a bit about what the employment team does
The Hong Kong employment group is very fortunate, in that it fits very seamlessly into the firm’s top ranked employment practice in London – we have regular interaction with the London team, and work with them to support numerous clients. The APAC employment team also works together closely. For example, we all hosted our first Webinar – together with Nick Dent – on 4 March, which was a great success.

What sort of work do you do in Hong Kong?
We do mainstream employment work, such as employment contracts, employment advice and applications for Hong Kong work visas. We also do – and in fact this is the majority of our employment practice – contentious matters (and litigation) around breaches of duty, misuse of confidential information, restrictive covenants, team moves; all the interesting and exciting issues!

What are your hobbies/interests?
Hong Kong is an incredibly social city, and the dividing line between work and social activity can be hard to identify sometimes. Otherwise, golf and tennis are my sports. A trip into Mission Hills Golf Course in Guangdong, Southern China, for a round at one of their 16 or so golf courses is always a favourite!

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