

Inaugural Lex Mundi Labor and Employment Law Newsletter

Around the world, Lex Mundi member firm lawyers are active in the many Lex Mundi practice groups and committees. Involvement in these groups allows our members to stay in the forefront of their professions by providing them a global network of legal professionals with similar practice focuses and interests through which they can: exchange information to find better approaches and solutions to client's issues, stay connected to information and issues relevant to areas of legal practice, develop relationships and generate business opportunities through networking with individuals with common practice backgrounds and gain insight into issues relevant law firm management, marketing and technology.

As the world moves towards a global market, there is a corresponding increase in labor and employment issues. In a response to these needs, the practice group is moving towards a business development model that can sell the services of the member firms to multi-national clients interested in a global labor and employment solution.

Terminating an Employee: Top Ten Considerations

By James Bucking, Foley Hoag



Mr. Bucking represents companies doing business in the United States in union-related matters and other aspects of labor and employment law. He regularly advises employers concerning the termination of employees, and represents employers in arbitration, court and administrative agencies in litigation arising out of terminations or other employment decisions.

Most employment litigation stems from the termination of an employee. Approximately 86% of discrimination charges filed with the Equal Employment Opportunity Commission are discharge-related claims. The reasons for this are obvious: terminations cause hard feelings, create economic need, trigger discussions with plaintiff's lawyers over the employee's rights, and remove the powerful litigation disincentive inherent in an ongoing relationship. Win or lose, litigating termination claims is an expensive proposition—and losing them is even more expensive. Six-figure and even seven-figure damage awards are not uncommon. A 2004 survey of damage awards in employment discrimination and wrongful discharge cases tried by jury in the federal district courts revealed a median jury award of \$89,000 with an average award of over \$1,000,000. When confronted with a bad case, high five-figure and six-figure settlements are a real possibility.

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The time to make the most meaningful impact on discharge-related litigation is at the moment of the termination, or before. By the time litigation ensues, it is often too late. There are two components to this strategy: litigation avoidance, i.e., conducting the termination process in a manner that prevents litigation from occurring; and litigation preparation, effectuating the termination so as to enhance the likelihood of winning if litigation does occur. Below are ten tips to accomplish both of these objectives.

1. Investigate fully.

The time to learn the facts is before the termination, not after. As an employer, you have broad authority to conduct an internal investigation. You can compel your employees to talk to you; including the employee you are considering terminating. Take advantage of this right. Talk to supervisors, co-workers and subordinates as appropriate and necessary to learn all relevant facts. Write down what they say. You should also speak with the employee at issue—there is nothing to lose. You may be surprised by what she says. The employee does not necessarily know that you are planning on firing her, so the full defenses may not be up. Oftentimes, employees admit some, most or all of what you believe they have done, perhaps by offering a reason or excuse for their actions or simply to be honest and hope for mercy. These are critical admissions for use in litigation. Even if the employee admits nothing, the interview is still important. At a minimum, you box the employee in to a version of an incident which prevents surprises down the road. Better to know before you fire an employee what she has to say than to hear it for the first time at her deposition. If the employee refuses to speak to you, or is evasive and/or contradictory in her responses, these reflect badly on the employee's credibility in any subsequent litigation. Finally, you should not discount the possibility that your facts are wrong and after a good investigation you decide not to fire the employee. This too is something you would rather learn when there is time to do something about it.

2. Review the documents.

Related to the need to investigate is the need to review the extant documentation concerning the employee about to be fired. Do not bury your head in the sand—

find out what documents exist, and determine how that affects your decision. The most common problem in this regard is the grade-inflated performance reviews common in our workplaces. I cannot tell you how many times employers have asked me about firing a chronically underperforming employee who, it turns out, has years of stellar performance reviews. At a minimum, come to terms with this problem before you fire the employee. It is often a wise move in these situations to postpone the termination and give the employee clear written notice that his performance is not meeting your expectations, with a limited window of correction. But even if you choose not to wait, at least you can craft your message (oral and/or written) concerning the termination to reflect the documentary reality. Another critical source of information which you must review is your records on discipline (or lack thereof) of other employees who were or are similarly situated to this employee. There may be perfectly good reasons for treating employees who seem to be similarly situated differently, but there may not be. This is something you need to consider in advance. Disparate treatment is a very big problem in employment litigation, particularly in discrimination claims. One final point on extant documents: look everywhere for them, not just the personnel file. Check supervisor files, electronic records and emails. These are often better sources of information than the "official" personnel record.

3. Create new documents.

Sometimes the problem with a termination is not that there are affirmatively bad documents, as in the don't-hurt-the-employee's-feelings performance reviews described above, but simply that there are few if any documents describing why you are about to fire this employee. There is nothing wrong with creating such documents—in fact it is a very good idea to do so. I am not saying to fabricate or back-date documents. Rather, you ought to create documents before the termination giving full details about the reason for your decision. Contemporaneous documentation is excellent evidence in litigation. Human memory changes with time; documents do not. It is undoubtedly true that at no future time will you know more about the reasons for the termination, and the details supporting those reasons, than you

know at the time of termination. So write them down to preserve that knowledge. There is another benefit to this strategy as well. I typically advise clients to say little in termination letters concerning the reason for the action. A good back-up document allows you to have a bare-bones discharge letter without losing the benefit of a contemporaneous written record of your motivations.

4. The electronic scourge.

Technology can be your friend, and technology can be your enemy. This maxim applies with force to employee terminations. Employers rightly give much attention to discharge decisions—numerous people are involved, multiple drafts of termination letters and other documents are created, and many emails are sent. The problem is that today's technology keeps a permanent record of the untidy, behind-the-scenes termination process. While this is not revealed to the employee at the time of termination, litigation discovery can reveal it for the entire world to see. A good example is the recitation of reasons for discharge. It is often the case that an employer has multiple reasons to fire an employee, sometimes related and sometimes not. A common discussion before the termination is whether to cite all possible reasons, or just some (or one)—along with related discussions concerning how much proof the employer has as to each incident, whether a particular incident warrants discharge, whether one incident is the precipitating rationale with the others merely ancillary, or whether it really is the combination of incidents that is leading to the decision. Another common discussion is the degree to which prior incidents are relevant—does the current incident warrant discharge in and of itself, or does it only warrant discharge in combination with a prior warning? Where there are multiple options like this in how to frame the discharge decision, at the end of the day one path will be chosen and other paths not chosen. In litigation, if the plaintiff's attorney gets her hands on the paper trail, she will cast these discussions in a cynical light, suggesting that the entire process was a sham designed to come up with a plausible rationale for public consumption whereas in fact, the employer had shifting motives for its predetermined action. Thus, the employer's diligent attempt to structure the discharge in the right way is

punished because there is an electronic record that looks much worse than it really is. In the old days, there was typically no comparable record: superseded drafts of termination letters were immediately discarded, and people spoke about issues rather than emailing or using IM. One strategy for dealing with this is to have an attorney involved at all stages, enabling you to assert the attorney-client privilege to withhold this paper trail. If an attorney is not involved, you should take great care to avoid creating a permanent electronic record that reveals the gory details of your decision-making process

5. Tell the truth.

This is not moral advice but legal advice. By far the worst thing you can do when terminating an employee is being dishonest about the reason for the action. Yet this is a common problem, for the same reason employers routinely give overly generous performance reviews. Employers do not want to have a confrontation or be the bearer of hard truths, so when they want to fire an employee for poor performance, they characterize it as a "layoff." The problem with this scenario in the modern litigation environment is that the majority of termination disputes involve a claim of discrimination, and the majority of discrimination charges turn not on direct evidence (like racial slurs) but on "pretext," i.e., the employer gave me a false reason for my termination creating the inference that the real reason was unlawful discrimination. Now we all know that most of the time, the false reason is given not to cover up a discriminatory reason but rather to spare the employee from hurtful criticism. But in litigation, a good rule of thumb is that no good deed goes unpunished and regardless of the real reason for your dishonesty, it will be portrayed by the employee's lawyer as evidence of discrimination. Having a good reason for termination is not enough—your statements and documentation must square with that good reason, and contrary statements or documentation will work against you.

6. Don't be gratuitously cruel.

This is the corollary of "tell the truth." Do not take your truth-telling mission to the point of being mean-spirited. While you should tell the employee he is being fired for poor performance, you do not need to

rub it in. Remember that all you have to do is inform the employee of the reason he is being fired, you do not need to convince him that you are right or win a debate. Hurt feelings lead to lawsuits. To many employees, the termination will be one of the worst and most memorable experiences of their lives. What is to you a business decision is to the employee a highly personal event. The difference between having a lawsuit and not having one may very well be how the discharge was communicated. I have had many cases where it became clear to me during the employee's deposition that had the discharge not been handled the way it was, the employee would not have filed suit. As to the litigation itself, it does not play well before a judge, or especially a jury, for the employer to appear to be cold-hearted. The human factor may make the difference between a win and a loss, or between a small and large damage award.

7. Conduct the termination in a respectful way.

Telling the employee "you are the worst performer in the history of the company" is not the only way to cause an emotional reaction that triggers a lawsuit. The manner by which you give the notice can be equally important. A recent news article reported that a company issued email pink slips to several hundred employees. That strikes me as a bad idea. Another news article quoted an employee who had just won a million-dollar judgment from his former employer as having been "devastated" by being dismissed at 10:30 in the morning in front of all his co-workers. While there are certain business prerogatives that will affect the calculus, a good practice is to be as private, respectful and decent as possible. The employee surely is not enjoying himself—you should not appear to be enjoying yourself either.

8. Have backup.

Just as you plan and document the reason for the termination, you should plan and document the termination itself. Two people should be present whenever possible. Both participants should take detailed notes after the employee has left. Be sure to record anything of substance the employee said. Like the pre-termination interview, the employee may make admissions or other valuable statements while he is being terminated. Also record what you said,

particularly as to the reason for termination. To avoid pretext claims, it is important to have documentation that what you told the employee was consistent with all your other oral and written statements of the reason for discharge.

9. Pay all compensation due.

Fired employees bring lawsuits not just concerning their actual terminations, but for anything else relating to their employment for which they think there may be a claim. Wage claims are one of the fastest growing categories of employment litigation. According to the Administrative Office of the U.S. Courts, claims filed under the Fair Labor Standards Act in 2005 were up 11.7% from 2004 and 46.8% from 2003. Moreover, wage laws tend to be favorable to the employee substantively and procedurally, often allowing the employee to recover double or triple damages, costs of litigation and attorneys' fees, as well as civil and criminal fines. In planning a termination, it is thus important to ensure that all monies due to the employee are paid. In Massachusetts and many other states, all compensation owed to the employee (including accrued but unused vacation pay) must be paid to the employee on the day of discharge—not on the next regular payday. There is another practical point here as well. Employees being terminated are about to lose their future income, which is hard enough for them to accept. Also losing any part of their past income only makes it more likely that they will go find a plaintiff's lawyer or file an administrative claim. You are wise to avoid that.

10. Think about other agreements and commitments, real or potential.

Although most employees are at-will, there are often nonetheless agreements between the employer and employee that you should revisit at the time of termination. Commonly these include non-compete and non-disclosure agreements, but also may include individual employment agreements, severance agreements or other commitments. Make sure you understand and comply with any obligations you have to the departing employee, and make sure she understands any obligations she has to the company. In addition to ensuring the return of company property and other security measures, it is good practice to

review with the employee her ongoing obligations such as protecting trade secrets or observing any restrictive covenants. Even better would be to reduce these reminders to writing. You should also consider whether new agreements are advisable. The most common agreement is a release in exchange for severance pay. Depending on the circumstances, it may be a great investment to pay a few weeks of severance for absolution from litigation.

Regardless of the steps you take, neither employees nor our legal system is predictable enough to guarantee that litigation will be avoided or that you will prevail if a suit is filed. All you can ever hope to do is minimize the risk that a suit is filed and maximize your chances of winning. Following these ten tips will be a big step in that direction.

The Danish Act on Stock Options

By Claus Juel Hansen, Kromann Reumert



Mr. Claus Juel Hansen is a partner of the Danish Lex Mundi firm Kromann Reumert. Handling collective labor law issues as well as individual employment law, Claus has particular expertise in bonus and incentive schemes, including stock-based

remuneration and the remuneration and employment conditions of directors and managers.

The Danish Act on Stock Options entered into force on July 1, 2004. The Act significantly affects the enforceability in Denmark of customary provisions in stock option plans purporting to restrict employees' right to exercise stock options following termination of their employment.

Most importantly the Act means:

An employee who is terminated by his employer for any reason but misconduct will retain all rights to stock options already granted, whether vested or unvested. The employee will also be entitled to receive a share, proportionate to the length of his employment in the accounting year, of the grants to which he would have been entitled according to agreement or custom, had he still been employed at the end of the accounting

year or at the date of grant. The employee's rights are mandatory and cannot be deviated from to the detriment of an employee—not even with his specific consent.

An employee who himself resigns his position by giving notice of termination to his employer will automatically forfeit all his rights to stock options already granted whether vested or unvested. The employee will also forfeit his rights to any future stock options that the employee could have expected to receive had he continued his employment. The Act does not prevent an employer from allowing an employee more extensive exercise rights.

Background

The enforceability of customary provisions in stock option plans purporting to restrict employees' rights to exercise stock options following termination of their employment has been questioned by Danish courts in recent years.

With a view to clarifying the legal situation in respect of stock options an Act on Stock Options in employment relations (the "Stock Option Act") was adopted by the Danish Parliament and entered into force on 1 July 2004.

All Employees Compromised by the Stock Option Act

The Stock Option Act applies to all employees, i.e. not just salaried employees but also ordinary workers. However, the Act is not applicable to members of the Danish company's management to the extent such managers are not considered salaried employees.

Options to Buy Existing Stock or Subscribe to New Stock

The Stock Option Act applies to rights granted to employees at a later time to buy existing stock, to subscribe to new stock and to the award of restricted stock. The Act does not apply to stock that has been granted to employees or purchased at a discount by employees and where the employees become immediate owners of the stock, regardless of whatever lock-up arrangements may be attached to such stock.

Termination by the Employee

If an employee himself resigns his position by giving notice of termination to his employer, the Stock Option Act says that all his rights to stock options will lapse automatically. This will apply both to stock options that have already been granted and that have already vested as well as to unvested stock options and to any future stock options that the employee could have expected to receive had he continued his employment.

This principle will in most cases leave the employee in a worse position than is normally stipulated in a standard stock option program where only his unvested stock options would lapse and where he would have been entitled to exercise his vested stock options in a limited period of typically 3 months after termination.

However, the Stock Option Act may be deviated from to the favor of the employees and therefore, to the extent such customary exercise rights are included in the stock option agreements, it must be assumed that employees will be entitled to rely upon those. Otherwise one must assume that an employee who resigns his position under the new rules will simply exercise his options prior to giving notice of his termination in order to avoid his rights being forfeited.

Termination by the Employer

If an employee is given notice of termination by his employer for any reason but misconduct, the Stock Option Act says that he will retain all rights to stock options. This will apply to all stock options that have already been granted and that have already vested as well as to unvested stock options. In addition the employee will even be entitled receive a share, proportionate to the length of his employment in the accounting year, of the grants to which he would have been entitled according to agreement or custom, had he still been employed at the end of the accounting year or at the date of grant.

This principle will in most cases leave the employee in a far better position than is normally stipulated in a standard stock option program where his unvested stock options would lapse and where he would only be entitled to exercise his vested stock options in a limited period of typically 3 months after termination. All unvested stock and all vested stock not exercised within the exercise window would normally lapse.

The Stock Option Act cannot be deviated from to the detriment of the employees—not even with the employees' specific written consent. Accordingly, such customary provisions in stock option programs will not be valid and binding upon the employees and the employees will instead be allowed exercise rights as stipulated in the Stock Option Act—most importantly a right to exercise all stock options granted whether vested or not for the full exercise period set out in the stock option program. It is of significant importance to companies granting or considering granting stock options to Danish employees to be aware of these consequences that are likely to be unintended and may create material accounting and stock exchange concerns.

No Other Salary Rights

In the court cases already decided in Denmark in respect of stock options there has been certain doubts as to whether employees would also be entitled to claim payment of holiday allowances and holiday bonuses calculated on the basis of the value of stock options. Moreover, it has been debated to what extent statutory compensation rights that are calculated on the basis of the amount of employees' salary, e.g. compensation for unfair dismissal, should take into account the value of stock options.

The Stock Option Act eliminates this uncertainty since it stipulates that the value of stock options shall not be taken into account when calculating holiday allowances, holiday bonuses and statutory compensation wholly or partly calculated on the basis of salary.

Obligation of Information

The Stock Option Act introduces an obligation for the employer to give the employees certain information about stock option programs, inter alia, the time of grant, conditions for grants, exercise time, exercise price, the rights of employees upon termination and the financial aspects of participating in a stock option program. This information must be given in Danish. The employees will be entitled to a compensation (the level of which is left at the courts' discretion) if the employer does not comply with his obligations of information.

Effective Date

The Stock Option Act entered into force on July 1, 2004 and applies to all grants of stock options made after that day, even if the underlying program was established before July 1, 2004. Grants made before July 1, 2004 are not subject to the Stock Option Act. Such grants will be subject to those principles of Danish employment law as may be laid out by the Supreme Court in cases already pending before the court and in future cases.

Forum Selection Clauses are Enforceable

By Barry Waters, Murtha Cullina LLP



Mr. Waters has been practicing law with Murtha Cullina LLP since 1981. His practice is concentrated in employment litigation covenant not to compete, duty of loyalty and trade secret cases. He has written and lectured extensively on

employment law issues, principally in New England, and as far away as Monterey, California and New Delhi, India. He is admitted to practice in Connecticut and Massachusetts and has represented clients in the courts in all six New England states. In November, 2007, Mr. Waters will be inducted into The College of Labor and Employment Lawyers.

As corporations expand their markets from regional, national and international, business seeks uniformity in the application of laws. Unfortunately, legal systems are slow to adapt to accelerating market changes. The insertion of a forum selection clause in contracts can be an effective method of mitigating the effects of varying laws in multi-state and multi-national organizations. A forum selection can be a particularly effective tool in achieving enforceable non-competition, non-solicitation and confidentiality agreements.

U.S. Law Background

The United States Supreme Court established the framework for determining the validity and enforceability of forum selection clauses in two landmark admiralty cases, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d

513 (1972) and Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), which, under Second Circuit precedent, apply equally in diversity cases. See Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990). In Bremen, the Supreme Court reversed what had been courts' long-standing hostility to forum selection clauses, and concluded that such clauses are presumptively valid and "should control absent a strong showing" that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Bremen, 407 U.S. at 15, 92 S.Ct. 1907. For example, the clause may be held unenforceable if "enforcement would contravene a strong public policy of the forum in which suit is brought," *id.* at 15, 92 S.Ct. 1907, or if "the contractual forum [is] so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court," *id.* at 18, 92 S.Ct. 1907.

Bremen dealt with a freely negotiated contract between two sophisticated business entities, and focused extensively on contract formation issues. In Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991), however, the United States Supreme Court extended Bremen to forum selection clauses in adhesion contracts, such as passenger cruise tickets. Shute sued Carnival Cruise Lines in her home state of Washington for an on-board injury that occurred when its ship was off the coast of Mexico. The contract on her passenger ticket designed Florida as the forum of choice, and Carnival Cruise moved to dismiss the case. The Supreme Court declined to adopt a rule that "a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining," noting the positive policy values served by enforcing such clauses, and concluding that such clauses "may well be permissible," under the Bremen test. *Id.* at 593, 111 S.Ct. 1522.

Below the executive level, non-competition agreements are rarely negotiated. Often, employees are required to sign these agreements as a condition of employment. Many U.S. courts have held that forum selection clauses even in non-negotiated agreements are enforceable. See, e.g., United Rentals, Inc. v. Pruett, 296 F. Supp. 2d 220 (D. Conn. 2003). Pruett had lived

his entire life in California, where he worked in sales in the construction equipment industry. He signed an employment agreement containing non-competition, non-solicitation and confidentiality clauses in California for work to be performed for United Rentals, Inc. in California. The agreement provided for the application of Connecticut law and providing Connecticut courts as the exclusive forum for the resolution of all contractual disputes. When Pruetz left United Rentals and took a job in California with a competitor, United Parcels brought suit in federal court in Connecticut. The court held that the forum selection clause was enforceable even though it would cause Pruetz to defend himself 3,000 miles away from home and his place of employment.

In Pruetz, the court applied Connecticut conflict of laws principles to determine that California law would apply notwithstanding the choice of law provision.¹ More recently, in Yavuz v. 61 MM, Ltd., 465 F.3d at 418, (10th Cir. 2006), the Tenth Circuit Court of Appeals ruled that “under federal law the courts should ordinarily honor an international commercial agreement’s forum-selection provision as construed under the law specified in the agreement’s choice-of-law provision.”

In Yavuz, 165 F.3d at 430, plaintiff was a Turkish citizen involved in various international business transactions with Mr. Adi, a dual Syrian and Swiss citizen. One of the transactions involved an investment in real estate in Tulsa, Oklahoma. Yavuz sued Adi and others under U.S. statutes in federal court in Oklahoma. However, the agreement of the parties contained a choice-of-forum clause that simply stated: “Place of courts is Fribourg.” While European Union law presumes that forum selection clauses are exclusive (see Jacob Webb Yachee, *Choice of Law Considerations in the Validity and Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA, J. Int’l & Foreign Aff. 43, 61 (2004)), under U.S. laws this forum selection clause is ambiguous and would likely permit suit in any number of courts outside of Fribourg, including a federal court in Oklahoma.

Presumably, the principle articulated in Yavuz that in international commercial contracts courts must look to the law of the contractually-selected forum to determine whether that forum is the *exclusive* forum for resolving contractual disputes would also be applied to non-competition agreements in employment contracts. This principle greatly enhances the probability that multi-national corporations can move toward more uniform enforcement of non-competition, non-solicitation and confidentiality agreements through the use of forum selection and choice of law provisions in non-competition agreements.

Employment Laws Affecting Merger and Acquisition Activities in Taiwan

By Matt Liu, Tsar & Tsai, Taiwan



Matt Liu is an associate partner of Tsar & Tsai Law Firm in Taiwan and specialized in the areas of corporate, M&A, labor, antitrust, and insurance/ reinsurance. Matt has advised many multinational companies on a broad range of employment-related matters,

including formulating their employment strategies when doing M&A and/or group restructuring in Taiwan.

Increasing M&A transactions in a broad range of sectors such as cable TV, telecommunications, banking, insurance, and information technology by both multinational corporations and private equity funds have been seen in Taiwan. An important component of such M&A transactions is to deal with the employees of the target. In Taiwan, several employment laws have to be carefully considered as the acquirer formulates its employment plan.

Traditionally, the Labor Standards Act was the only legislation that governs the termination of employees. The Labor Standards Act was enacted in 1984, a time when M&A was not as popular as it is nowadays in Taiwan, and did not provide for up-to-date employees termination and transfer mechanisms commonly seen in M&A transactions in some other jurisdictions.

¹ The Pruetz court then transferred the case to a federal court in California under the Doctrine of “Forum Nonconveniens” pursuant to 28 U.S.C. § 1404(a).

Under the Labor Standards Act regime, the target to an M&A transaction had to terminate all of the affected employees and was responsible for the severance and pension liabilities to such employees. Then the acquirer had to hire the desired employees as new hires. Under such regime, unless the target, the transferred employees and the acquirer reach an agreement on matters such as the acquirer's recognition of the transferred employees' seniority at the target, the acquirer's compensation to the target for the target's severance and pension liabilities to the transferred employees, and the target's compensation to the acquirer for the transferred employees' pension reserves accumulated during their employment with the target, the transfer of the desired employees would be difficult and sometimes time consuming. Further, the Labor Standards Act stipulated the grounds on which an employer can terminate employees, which rendered termination of employees affected by an M&A transaction very difficult in some cases.

To meet the need of M&A transactions, the Business Merger and Acquisition Act was enacted in 2002. Under the Business Merger and Acquisition Act, in the cases of merger, asset acquisition and spin-off, the acquirer and the target may negotiate on what employees the acquirer would like to retain upon the effectiveness of the transaction. For the retained employees, the target may issue to them a notice which sets out the employment conditions offered by the acquirer at least thirty days prior to the effective date of the transaction. Upon receipt of the notice, the retained employees will have ten days to decline the offer in writing. The retained employees who do not decline the offer within the ten-day period will be deemed to accept the offer and transferred to the target on the effective date of the transaction, with their seniority at the target being recognized by the acquirer and their accumulated pension reserves set aside by the target being transferred to the acquirer. For the non-retained employees and the retained employees who decline the offer, the target will have to terminate them on the effective date of the transaction with advance notice (or pay in-lieu of the advance notice) and pay the severance pay and pension required under the Labor Standards Act.

As the awareness of labor right grew, the Mass Redundancy of Employees Protective Act was enacted in 2003 to protect employees from mass redundancy. The Mass Redundancy of Employees Protective Act is applicable to an employer if the number of the employees to be laid-off by it within a certain period of time meets any of the conditions set there under. In the case of an M&A transaction, the term "lay-off" under this Law refers to both of the "non-retained" employees and the retained employees who decline the acquirer's offer. Where the Mass Redundancy of Employees Protective Act is applicable, an employer is required to notify the labor authority and the relevant agencies or personnel (including the labor union, the representatives of the labor-management conference, and all of the employees) of the mass redundancy plan and publish the same at least sixty days before the occurrence of any of the conditions. Within ten days of the submission of the mass redundancy plan, the company is required to negotiate the terms of the mass redundancy plan with the employees. If any side refuses to negotiate or the negotiation falls apart, the labor authority may intervene to form a negotiation committee to negotiate the mass redundancy plan. The negotiation committee may propose an alternative plan where appropriate. The agreement reached by the negotiation committee, upon approval by the court, is binding on all employees. Besides, the labor authority, after the formation of the negotiation committee, is required to provide on-site job transition consultation and job training services to the employees. The employer cannot prevent the labor authority from providing such services to the employees. Since the application of the Mass Redundancy of Employees Protective Act will complicate the transaction and increase the associated cost, the acquirer and the target are advised to seek legal advice when structuring the employee lay-off plan so as not to trigger the application of this Act.

Lex Mundi: The Mark of Excellence for Legal Services

Whether your legal matter is in your backyard or half a world away, Lex Mundi is the mark of excellence for legal services globally. Lex Mundi, the world's leading association of independent law firms, offers access to more than 20,000 lawyers practicing in more than 160 elite law firms in 560+ offices around the globe. Clients of Lex Mundi member firms benefit from the worldwide reach, the exceptional global expertise, cost-effective legal representation and local market knowledge practically anywhere legal issues arise. Lex Mundi member law firms provide:

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Lex Mundi Labor and Employment Desk Book

The Lex Mundi Labor and Employment Desk Book is a multi-jurisdictional survey represents a country-by-country overview of some key labor and employment laws. Each Lex Mundi member firm was asked to respond to a series of questions, regarding their jurisdiction. The topics include, but are not limited to, family leave act, drug testing of employees, and legal obligations to an employee upon termination.

The Desk Book is available on the Lex Mundi website and can be viewed in its entirety or by individual jurisdiction at:

http://www.lexmundi.com/lexmundi/Labor_and_Employment_Desk_Book.asp.

If you would like more information about the Lex Mundi Labor and Employment Practice Group, please contact Jami de Lou, Practice Group Coordinator, at 713.328.4532 or email jdelou@lexmundi.com.