Human Resources

Introduction

Since the publication of last year's position paper, one issue has been resolved:

- **Amendment to the Labor Standards Law - Consent from the union or labour-management conference for dispatched workers**: In the new version of the amendment to the Labor Standards Law (LSL Amendment) announced by the Council of Labor Affairs (CLA) in July 2010, the requirements regarding dispatched worker proportions have been relaxed.

However, the updated LSL Amendment is not the final version and there is still room to enhance flexibility in the other terms of the amendment.

While the committee acknowledges the government's efforts to resolve the issue mentioned above, all of the other issues raised in last year's position paper remain unresolved and one new issue has been added.

1. Amendment to the Labor Standards Law

With respect to the LSL Amendment, we provide our comments below.

1.1. Reasonable time limit for business entities to respond to proposals for regular employment

This issue was raised in last year's position paper. The LSL Amendment states that if the term of the dispatched workers meets certain conditions, then the workers may notify the business entity of its proposal to form a regular employment contract. Under the CLA's July 2010 LSL Amendment, the business entity only has three days to respond (Article 20-9). The time limit for employers to exercise their rights is insufficient.

RECOMMENDATION

To give business entities enough time to exercise their rights, the CLA should extend the time limit for them to express their objections to within 30 days upon the receipt of the written notice from the dispatched worker.

1.2. Terms and conditions for employees during M&As

This issue was raised in last year's position paper. The original amendment to Article 20 tends to force new employers to assume all the employment terms and conditions of the old employer, as well as retain old employees. This will cause difficulties for the new employers in terms of HR management because they will need to maintain two HR systems in the same company after the employee transfer. It will also reduce the incentive for M&A transactions and will not necessarily benefit employees of the old company.

While the CLA's July 2010 updated LSL Amendment are an improvement over the original version, the committee urges the CLA to take the following suggestions into consideration in the final version:

RECOMMENDATION

The CLA should revise regulations and procedures to allow new employers to propose new employment terms and conditions and refrain from forcing new employers to assume the employment terms and conditions of the old employer.

The CLA should revise regulations and procedures to allow new employers to select and retain specific employees and refrain from forcing the new employer to retain all employees.

In selected cases whereby new employers are required to retain all the employees of the old employer, the new employer should be allowed to make certain employees redundant after the employee transfer.

1.3. Exemption of high-level employees from the requirements of LSL Article 84-1

This issue was raised in last year's position paper. Article 84-1 of the LSL stipulates that employees holding certain positions are exempt from a number of

人力資源

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前言

自從去年建議書出版後，下列議題已被解決：

- **勞動基準法修正案——工會或勞資會議就要派單位使用派遣勞工之同意**：行政院勞工委員會 (下稱「勞委會」) 於民國 (下同) 99 年 7 月間更新之勞動基準法修正案 (下稱「勞基法修正案」) 中，就工會或勞資會議就要派單位使用派遣勞工之同意已予以放寬。

然該版本修正案尚非最終定案版本，且勞基法修正案中尚有其他規定尚待進一步強化其彈性。

去年建議書中所列之其他議題均尚未解決，且本建議書復新增一項議題，本委員會固肯定政府解決上述問題之努力，惟更進一步期盼下列議題之改善：

1. 勞動基準法修正案

就勞基法修正案，謹提出相關建議如後：

1.1 要派單位回覆派遣勞工成立勞動契約意思之合理期限：

本議題於去年之建議書已曾述及。勞基法修正案規定，如派遣勞工之要派契約期間符合一定條件，該派遣勞工得以書面向要派單位提出成立勞動契約之意思。勞委會 99 年 7 月間更新之勞基法修正案第 20 條之 9 仍然規定要派單位僅有三日期限可回覆，實屬過短。

建議

為使要派單位有足夠之之權利行使期間，要派單位以書面表示反對成立勞動契約之意思之期間應延長為於受派遣勞工書面通知之日起三十日內。

1.2 事業單位有併購等情事時之勞動條件：

本議題於去年之建議書已曾述及。原勞基法修正案第 20 條之規定，將使新雇主必須繼續原雇主之所有勞動條件並承受所有舊雇主之員工，勢必將造成員工移轉至新雇主後，新雇主勞動條件一國二制，人事管理困難，同時亦將減低新雇主進行併購之意願，對舊雇主之勞工未必有利。

勞委會 99 年 7 月間更新之勞基法修正案固已較上開原始規定有所改善，本委員會仍懇請勞委會參酌本委員會以下幾點修正原則建議制訂最終定案版本：

建議

勞委會應修改相關規定與程序，以容許新雇主提出新的勞動條件，不強迫新雇主承繼舊雇主之勞動條件。

勞委會應修改相關規定與程序，以容許新雇主商定留用特定勞工，不強迫新雇主留用所有勞工。

若有少數須留用所有勞工之特殊情形，應允許新雇主在留用後得以人力過剩為由資遣特定員工。

1.3 使高階員工得豁免於勞基法第 84 條 -1 之要件

本議題於去年之建議書已曾述及。勞基法第 84 條 -1 規定某些職位之員工可豁免於勞基法數項限制，包括工時、假日和休假，但目前勞委

requirements under the LSL, including working hours, holidays and leave entitlements. However, the CLA currently limits the type of employees who are exempt from certain provisions of the LSL under the above article to those having specific managerial or supervisory positions.

In reality, some high-level employees have flexible working hours (especially those who work in high-end finance or other service industries), have strong bargaining power and do not necessarily require the protection set forth under the LSL.

RECOMMENDATION

The CLA should establish a ruling stipulating that employees who hold high-ranking positions as well as those whose monthly salary is above a certain threshold amount (eg NT$200,000) should also be exempt from the terms of Article 84-1 of the LSL.

1.4. Differentiation between full-time and part-time employees

This issue was raised in last year's position paper. Under the current structure, there is no distinction between full-time and part-time employees. Part-time employees who only work a certain number of days per week are entitled to overtime payments and other protection. The current structure is problematic since part-time employees only devote part of their time to their employers and therefore should not be treated as full-time employees whose benefits are simply prorated.

RECOMMENDATION

A regulation should be drafted by the CLA to establish and recognize the nature of part-time employment, to specify that part-time employees should be entitled to overtime payment only if they work continuously for more than eight hours a day. Furthermore, part time employees should not be required to be paid at overtime rates or be subject to the protection of Article 39 when they are scheduled to work over weekends.

1.5. Allowing dispatching agencies to hire fixed-term employees

This issue was raised in last year's position paper. The CLA's July 2010 updated LSL Amendment disallows dispatching agencies to hire fixed-term employees except as specifically authorized by a government project or in cases where it is necessary to hire a replacement for an employee whose employment is suspended by law or by agreement.

Nevertheless, because the dispatching agencies hire employees in order to fulfill the enterprises' manpower needs, when the enterprises no longer need the dispatched employees, it is not reasonable to require the dispatching agencies to undertake the cost of retaining those employees under permanent employment conditions.

RECOMMENDATION

To increase the flexibility of the job market, the CLA's Ruling No. 0980125424, "Lao-zhi Er Zhi" should be abolished and the dispatching agency should be granted the freedom to hire fixed-term employees.

2. Regulations governing workers' pension reserve funds

This issue was raised in last year's position paper. According to the CLA's ruling, business entities are allowed to appropriate excess portions of their pension reserve accounts to pay severance fees. The CLA requires business entities to provide reports issued by actuaries to prove that the pension reserves contributed by the business entity is sufficient to cover all current employees' future pension liabilities. However, some local labour authorities have insisted that the employee turnover and death rates assumed by the actuaries not be used in their reports. This has prevented companies from using their pension reserve excesses to pay severance.

RECOMMENDATION

Since calculating excess reserves is a matter of actuarial expertise, the CLA should respect actuarial reports issued by actuaries.

The CLA should accept reasonable turnover and death rates as the basis for actuarial calculations.

會將勞基法規定可豁免於特定條文之員工類型，限制在某些管理或監督職位者。

事實上，部份高階員工可享有彈性工時 (尤其是從事高級金融或其他服務業者)，並具足夠力量可與其僱主談判，不必然須仰賴勞基法之保護。

建議

勞委會應頒布函令，規定員工具較高職位與月薪超過特定門檻者（如新台幣 200,000 元)，亦應豁免於勞基法第84條-1之規定。

1.4 區分全職與兼職員工

本議題於去年之建議書已曾述及。現行架構下並未區分全職與兼職員工，一週內僅工作其中數天的員工即可獲得加班費及其他保障。現行架構顯有問題，蓋兼職員工只奉獻其部分時間予僱主，不應與全職員工等同視之，而僅就其福利比例計算。

建議

勞委會應制定規則，確立並承認兼職僱傭關係之特性，明訂兼職員工僅於一天內工作八小時以上始得請領加班費。此外，兼職員工被安排於週末工作時，不應要求領取加班費或適用任何勞基法第 39 條之保障。

1.5 允許人力派遣公司僱用定期員工

本議題於去年之建議書已曾述及。勞委會 99 年 7 月間更新之勞基法修正案，規定派遣事業單位除依行政機關促進就業計畫，或依法律之規定或勞雇雙方之約定停止履行工作需僱用替代性勞工外，不得與派遣勞工訂定定期契約。

惟由於人力派遣業者係為滿足企業人力需求而僱用員工，當該企業不再需要該派遣員工，要求人力派遣業者負擔不定期僱傭契約員工之成本並不合理。

建議

為了加強就業市場之流動性，應廢止前述勞資 2 字第 0980125424 號函，且人力派遣業者應有權依定期僱傭相關法規僱用員工。

2. 勞工退休準備金相關規定

本議題於去年之建議書已曾述及。勞委會於該會相關函示，准許企業動支所提撥之勞工退休準備金帳戶中超額提存部分作為資遣費。該會要求事業單位提供由精算師出具之報告，證明「事業單位所提撥退休準備金經精算已確能支應現有全體勞工未來退休之支用」。惟部分地方勞工局仍要求該精算報告不能將員工之離職率及死亡率當作精算之前提假設，導致雇主無法使用該超額提存之部份支付資遣費。

建議

有無超額提存之情事，係精算問題，勞工主管機關應尊重精算師基於專業出具之精算報告。

勞工主管機關應准許將合理的死亡率及離職率作為精算之前提。

3. Handling of industrial disputes

3.1. Matters requiring collective bargaining agreement and employers' obligations

This issue was raised in last year's position paper. The Collective Bargaining Agreement Law (CBAL) that came into effect on 1 May 2011 increased the obligations of employers. For example, when employees submit a request for negotiations, "both labor and management shall proceed in good faith" and neither side may reject the collective bargaining agreement proposed by the other without reasonable cause. The scope of this requirement is too obscure. The employees may request highly confidential information and, thus, adversely impact the business.

RECOMMENDATION

The CLA should amend the enforcement rules and specify the scope of the information for negotiations required by employees. For example, the information should be restricted to matters relating to the negotiation and not damaging to the rights of the company. In the event that confidential information should be provided, parties participating in the negotiations or having access to the information should be obliged to enter into non-disclosure agreements.

3.2. The rights and interests of union members, directors and supervisors

This issue was raised in last year's position paper. The amendments to the Union Law, effective on 1 May 2011, will cause the following material impacts on the structure and operation of domestic unions:

1) Unions are not required to provide employers with the number of members and name list for the employers' verification.
2) Unions may have up to 27 directors and nine supervisors. Under Article 36, the directors and/or supervisors of the union may be entitled to a certain number of hours of leave to handle union business. There is too much time set aside for union business leave.

RECOMMENDATION

The CLA should require unions to provide their employers with a list of the names of union members for their employers' verification. Otherwise, the employer will be unable to identify whether the person it takes action against is a union member. This would make it difficult to avoid hindering the development of the union.

The appropriate number of directors and supervisors and the time granted for union business leave should depend on the number of employees retained in the enterprise. If an enterprise has the maximum number of directors or supervisors and the amount of business leave given is not reduced, this may be detrimental to the enterprise's operations. The CLA should clearly define the scope of union business. For example, it is necessary to stipulate whether attending other union gatherings and handling personal labour-management disputes will be included in the scope of the above leave for official duties.

3.3. Threshold for unions to negotiate collective bargaining agreements with management

This issue was raised in last year's position paper. The current Union Law does not require any threshold specifying the number or percentage of union members required to negotiate collective bargaining agreements with management. Therefore, regardless of the number of union members, the union can request negotiations with the management on the collective bargaining agreement. Although the union is an important mechanism for employees to express their opinions collectively, it is not cost-effective for the management to enter into negotiations on collective bargaining agreements with unions that are not sufficiently representative of a company's employees.

RECOMMENDATION

The Union Law should be revised by the CLA to prescribe a threshold (eg the union should represent at least 15% of the total number of the employees) for union members to be qualified to initiate and conduct negotiations with the management on collective bargaining agreements.

3. 勞資糾紛處理

3.1 有團體協約需求之事項與僱主之義務

本議題於去年之建議書已曾述及。於 2011 年 5 月 1 日起施行之團體協約法增加了僱主之義務，例如當員工提出協商要求時，勞資雙方應本誠實信用原則進行團體協約之協商，且無正當理由不得拒絕他方所提團體協約之協商。惟此一要求之範圍極不明確，且員工有可能要求僱主提供高度機密之資訊，從而恐有害於僱主之業務經營。

建議

勞委會應於施行細則中明確規定員工得要求提供之協商用資料之範圍，例如僱主受員工要求而提供之協商用資料，應限於與協商事項相關者，且不應損及僱主經營權利。如有必要提供機密資訊，參與協商或可取得該等資訊之人員應有簽署保密協定之義務。

3.2 工會會員、董事與監察人之權利與利益

本議題於去年之建議書已曾述及。工會法之修正條文已於 2011 年 5 月 1 日起施行。該修正將會對下述關於國內工會架構與運作產生重大影響：

1) 工會不須提供僱主會員數量以及名單以供僱主確認。
2) 工會最多可擁有 27 位理事及 9 位監事，新工會法第 36 條針對工會理事及監事處理工會事務給予之公假時間過長。

建議

勞委會應要求工會有義務提供僱主其工會會員名單以供僱主確認。否則僱主無法識別將採取行動之對象，是否為工會一員。此亦使僱主避免妨礙工會發展變得困難。

工會理監事數量及所賦予之工會公假時間，應依據企業之員工數量而定。若企業之工會有27位理事及 9 位監事，且所賦予之工會公假時間並未減少，將有害僱主之經營。勞委會應明確界定工會公假之範圍，例如明訂參加其他工會之聚會或處理個人之勞資糾紛是否亦屬處理工會事務之範疇。

3.3 工會與經營階層協商團體協約之門檻

本議題於去年建議書中已曾述及。現行工會法並未對與經營階層進行團體協約之工會會員數量或比例規定任何門檻。因此無論工會會員之數量為何，工會均得要求與經營階層協商團體協約。雖然工會係員工集體發表意見之重要機制，若經營階層須與不足充份代表公司員工之工會，進行團體協約之協商，實不具意義且不符成本效益。

建議

勞委會應修改工會法，針對工會會員發動和進行與經營階層協商團體協約之資格，設定門檻（例如該工會應至少代表所有員工數量之 15%）。

3.4. Efficiency of the new mechanism introduced in the Settlement of Labor Disputes Law

This is a new issue. A new mechanism, the "decision-making" procedure, for settling labour-management disputes is introduced in the amended "Settlement of Labor Disputes Law" (Settlement Law). However, there are already mediation, arbitration, conciliation, and litigation procedures available. Pursuant to the Settlement Law, if the parties are not satisfied with the decision made through the "decision-making" procedure, they still have to go through a complicated administrative or civil lawsuit. As such, the new mechanism might take more time and further complicate relations between labour and management.

RECOMMENDATION

The CLA should simplify the recently introduced "decision-making" procedure in the Settlement Law to resolve labour-management disputes in a more efficient way. For example, the CLA could make the "decision-making" procedure binding without court approval. According to Article 48 of the Settlement Law, even if the parties do not dispute the decision of the "decision-making" procedure within 30 days of receipt thereof, it has to be approved by the court before it can be binding as a final and conclusive judgment. This undermines the intended purpose of the "decision-making" procedure as an alternative mechanism of dispute resolution. Instead, the CLA should revise regulations and procedures to waive the requirement to gain the court's approval for the decision-making procedure to be binding as long as the parties do not dispute the procedure within 30 days.

3.4 勞資爭議處理法新裁決機制之效率

本議題係本委員會首次提出。新修正之勞資爭議處理法新增加了「裁決」機制作為解決勞資爭議之程序。然而，原本已有調解、仲裁、訴訟等程序可資適用。依據勞資爭議處理法，如當事人不服依「裁決」機制所為之裁決決定，仍須透過冗長之行政或民事訴訟解決爭議。因此，該新機制恐將花費更多時間且更加複雜化勞資雙方之關係。

建議

勞委會應簡化勞資爭議處理法所新增之「裁決」機制，以期更有效率地解決勞資爭議。舉例而言，勞委會應賦予「裁決」機制拘束力，無待法院核定。依勞資爭議處理法第48條，即使雙方當事人均未於裁決決定書正本送達三十日內就同一事件向法院提起民事訴訟，該裁決決定仍須經法院核定後方有與民事確定判決同一之效力。如此設計恐不符合新增「裁決」機制以為訴訟外紛爭解決機制之初衷。勞委會應修改相關規定與程序，使裁決決定於當事人未於三十日內提出異議後即有拘束力，無待法院核定。