

HUMAN RESOURCES

The Committee would like to take this opportunity to applaud the Taiwan government's efforts over the past few years to make the Taiwan employment market more accessible to foreign professionals, and to make relevant laws more complete and comprehensive. The Committee recognizes the need to balance the opening up of Taiwan's employment market with the revision of relevant labor

regulations in order to increase business competitiveness while at the same time protecting the local labor force.

If Taiwan wishes to bolster its status as an operations center for global companies, it will need a legislative framework for employment issues that supports such development. For globalized operations, questions relating to employee welfare must be balanced with the needs of business in terms of flexibility, efficiency, and optimum use of resources. The Committee believes that a well-balanced legislative framework that encompasses flexibility for business, reasonable protection for employees, and appropriate visa requirements for foreigners will serve to raise Taiwan's profile in the international competition to attract talents.

This year, the Committee is presenting six issues that represent the key areas of concern of its members. The first and the second issues focus on the effort to rationalize the system governing work schedules, including the recording of working hours, regulation of overtime, calculation of average salary, and enhanced consistency of labor inspection standard. The next issues are to regulate the use of labor dispatch through the introduction of a new Protection of Dispatch Workers Act, and in a coordinated issue, the relaxation of the use of fixed-term contracts; the Committee's recommendations outlined below would create greater balance between labor protection and the impact on business. Last but not least, the Committee proposes methods to attract foreign talents and keep domestic ones, so as to create a more competitive and attractive working environment in Taiwan, and proposes enforcement details for the newly amended post-employment non-competition covenants to alleviate the difficulties in applying the new law. These issues reflect the shared desire of the Committee's members to see greater flexibility and predictability in the employment laws in Taiwan.

Suggestion 1: Make the regulation of work schedules more flexible.

According to the 2014 Report on the Manpower Utilization Survey issued by the Directorate General of Budget, Accounting and Statistics, approximately 45% of the Taiwan workforce consists of knowledge-based, white-collar professional workers. In the employment contracts of these workers, salaries are evaluated based on the quality of the work rather than simply on the quantity of working hours. Since promulgation of the Labor Standards Law (LSL) in 1984, Taiwan's economy has developed from its traditional labor-intensive structure to become a knowledge-based, globalized, Internet-based economy. Current labor laws that regulate employer-employee relations based on the traditional labor-intensive model are outdated. In addition, in light of the increasingly aged population and decreasing birth rate in Taiwan, enterprises must enhance labor productivity by helping employees reach a proper balance between family and work. The Committee thus strongly suggests that the LSL be

amended to promote greater working hour flexibility to boost employees' working morale and satisfaction.

1.1 Change to a system of "monthly flexible working hours." Article 30, Paragraph 1 of the LSL states that "the regular working time of workers may not exceed eight hours a day or 40 hours a week." Although the LSL provides for two-week, four-week, and eight-week periods of flexible working hours, there are still many restrictions that pose an obstacle to meeting the needs of modern-day enterprises and knowledge-based white collar workers. The Committee therefore urges amendment of the LSL to regulate the working hours of these employees on a monthly rather than weekly or daily basis, allowing the employer and the employee to agree on the distribution of working hours over a longer period of time for a relaxed arrangement than being confined by daily or weekly working hour restrictions. This would enhance corporate efficiency while still providing worker protection. Contractual agreement between enterprises and employees should determine which employees come under this system and to what extent.

1.2 Restrict overtime rather than reduce total working hours.

Article 30, Paragraph 1 of the LSL was amended in June 2015, effective from January 1, 2016, to reduce statutory working time to 40 hours per week, in response to the current trend for greater work-life balance for employees, as well as to avoid over-fatigue among workers and to fully implement the five-day workweek policy. However, this reduction in working hours inevitably has had a serious impact on industry. Fundamentally, the problem is not the number of hours in the regular work schedule, but rather the amount of overtime that workers may put in. As a complement to the 40-hour workweek, the Committee suggests that the statutory cap for overtime hours be increased to 60 hours per month.

1.3 Eliminate attendance records for knowledge-based workers. Article 30, Paragraphs 5 and 6 of the LSL require that "employers shall prepare and maintain worker attendance records for five years," and that "the attendance records specified in the preceding Paragraph shall register the attendance, to the minute, of workers on a daily basis." These requirements may be appropriate for traditional blue-collar workers, but create managerial difficulties when applied to knowledge-based, white-collar workers. The culture of modern, multinational business provides employees with a large degree of autonomy in their work, including flexibility in working hours and even location, which – together with better compensation and benefits – enhances employer-employee relations. The legal requirement to maintain working-hour records is out of sync with the current trend in multinational businesses of emphasizing employees' self-management. It also increases feelings of distrust between employers and

employees, creates obstacles to attracting and developing talent, and as a result discourages foreign investment in Taiwan. The requirement is contrary to Taiwan's goal of becoming an increasingly knowledge-based economy that relies on innovation as the core of its international competitiveness.

The Ministry of Labor (MOL) has promulgated "Guidelines for the Calculation of Working Hours for Field Workers," which apply only to journalists, workers in electronic communication industries, salespersons, and professional drivers. These Guidelines do not come up with a fair standard that could be broadly applied. Therefore, the Committee suggests replacing the rigid requirement of keeping sign-in books or time cards with a system allowing employers and employees to determine "agreed-upon working hours." As a start, the aforesaid Guidelines should be amended to apply to more categories of field workers and those who are working from home. At a later stage, that flexibility could be extended to knowledge-based workers in general.

1.4 Maintain Article 84-1 of the LSL. Article 84-1 of the

LSL specifies that, with the approval of the local labor authority, workers performing special functions in designated industries may have more flexibility in their working hours. The Article states that "After the approval and public announcement of the central competent authority (i.e. the MOL), the following types of employees may arrange their own working hours, regular days off, national holidays and female workers' night work through other agreements with their employers:

- i. Supervisory, managerial personnel or authorized specialists.
- ii. Monitoring or intermittent jobs.
- iii. Other types of jobs of a special nature."

In proposing to fully implement statutory work-hour provisions (i.e. the five-day workweek and reduction of working hours to 40 hours per week), some labor rights advocates are also asking for abolition of Article 84-1 to eliminate a possible loophole through which non-compliant employers may abuse this arrangement.

The Committee believes it is important to recognize that there are indeed special functions in certain industries for which it is necessary to arrange working hours more flexibly. This is particularly true in the case of managerial and supervisory personnel. Thus Article 84-1 should not be eliminated simply out of concern that certain employers will not be law-abiding. Rather, more responsibility should be imposed on the authorities-in-charge to monitor compliance to prevent evasion or violation of the law.

1.5 Calculate average salary over a 12-month period. For the purpose of calculating overtime payments, as well as severance and pension benefits, "average salary" is

defined as the total salary over the six months preceding the date of the calculation, divided by the total number of calendar days for that period. "Salary" is defined in Article 2 of the LSL as compensation that an employee receives for work for which payment is made regularly, and does not include bonuses or commission.

In practice, performance bonuses or commissions will be considered an employee's "salary" if such payments are made regularly. However, the determination of "salary" should be made in accordance with the nature of such payments. For example, even though insurance sales personnel receive performance bonuses or commissions periodically, such payments are in essence a service fee received directly from the clients and not from the employer. Said payments should therefore not be considered "salary" and should not be included in the calculation of overtime payments, severance, and pension benefits.

A salary calculation that uses an average of the last six months' compensation disadvantages companies with distinct seasonality or with significant bonus payments at Chinese New Year. It will inflate pension or severance payments if employees retire or are terminated soon after the peak earnings period. Instead, the salary calculation for severance payment and pensions should be based on an average of the prior 12 months' earnings so as to more accurately reflect actual conditions.

1.6 Revise the penalties for work rules violations.

Article 70 of the LSL and Article 38 of the Enforcement Rules of the LSL (EROLSL) stipulate that employers who hire 30 or more workers must establish work rules. The work rules must be reported to the applicable local labor authority and must be displayed publicly in a place where all workers can see them. Employers failing to comply with the work rules requirement will be subject to administrative penalties in the amount of NT\$20,000 to NT\$300,000. Article 80-1 of the LSL further prescribes that the competent labor authority shall make public the name of any violating company and the responsible person of the company, as well as order the violator to make improvements within a specified period. If improvements are not made within the specified period, violators will be punished consecutively for each violation after the said period expires.

The consequences of violating the work rules requirement are severe, and instead of providing a reasonable period of time for the violators to rectify the situation, the LSL imposes immediate penalties. Making public the names of the violators (both the company and the responsible person) will undoubtedly significantly damage their reputations.

The Committee believes the consequences of violating the work rules requirement should be amended to encourage

compliance and not merely impose punishment. If the violators fail to comply after first being given a certain period of time to make improvements, penalties could then be imposed. Publicizing the violators' names should be the last resort.

Suggestion 2: Improve consistency in applying labor inspection standards.

In the past two years, the labor authorities have conducted labor inspections on a large scale based on Article 72 of the LSL, Article 21 of the EROSL, and other relevant regulations. In the course of undergoing the labor inspections, enterprises have noticed that labor inspectors tend to apply inconsistent standards to different industries and different workplaces, leaving companies unclear as to what standards they should follow. This lack of clarity could result in increased numbers of administrative appeals and litigations, wasting the nation's administrative and judicial resources.

This Committee suggests that MOL review the current labor legislation, which was written from the perspective of a traditional labor-intensive economy, and use the labor laws of major developed countries as reference in enacting amendments regarding employers' obligations to maintain working-hours records as well as the adoption of a flexible working-hours policy (see Suggestion 1). Through these changes, the LSL can accomplish its goal of strengthening employer-employee relations and promoting social and economic development. Before the laws are amended, the MOL should assist local labor authorities to provide sufficient training of inspectors to help them follow consistent inspection standards.

Suggestion 3: Revise the proposed draft of the Protection of Dispatch Workers Act.

3.1 Gradually phase in the 3% workforce ceiling. In response to an increasing number of labor dispatch disputes, the MOL in February 2014 released the draft Protection of Dispatch Workers Act, which has not yet been approved by the Executive Yuan. One of the key points in the draft is a cap on the engagement of dispatch workers at 3% of a company's total workforce. Such a 3% ceiling would have an enormous adverse impact on industries, especially in the manufacturing sector, which employs the largest number of dispatched workers.

To mitigate the potential impact, one possible solution would be to gradually phase in the implementation over a period of time. It could be stipulated, for example, that within three years of implementation of the law, the number of dispatched workers may not exceed 10% of total workforce of the enterprises requesting labor dispatch, with the proportion reduced five years after implementation to 5%, and further decreased 10 years after implementation to 3%. At the same time, we

recognize that some industry sectors continue to object even to setting a 3% cap as an ultimate goal, and we hope that the authorities will further research actual industry conditions and needs before making a final determination.

3.2 Strengthen the regulations on dispatching institutions. In an effort to protect the rights and interests of dispatched workers, the draft imposes various requirements on the company requesting the labor. In practice, however, most requesting companies diligently follow the rules and provide a safe, sound working environment and conditions for both regular employees and dispatched workers. More often, it is the dispatching institutions, which are the legal employers of the dispatched employees, that contravene the rights and interests of the dispatched employees through various methods, such as failing to execute non-fixed term employment agreements with the dispatched workers, failing to provide them with statutorily required employee benefits and insurance, etc. The Committee suggests that the government require dispatching institutions to be registered with the local labor authorities and also set basic qualifications for participation in the dispatch service industry (for instance, that the applicant has a good performance record, provides comprehensive employee training, and implements a business plan). To help prevent non-compliance, dispatch service companies should also be required to report regularly to the competent authority. Otherwise, law-abiding dispatch service companies will be at a disadvantage competing with those doing business in a gray area or illegally.

3.3 Loosen the restriction on using fixed-term contracts for short-term dispatched workers and stipulate the permissible causes for terminating employment contracts with long-term dispatched workers.

Enterprises tend to engage dispatched workers to make use of their work force more flexible. Unlike the outsourcing of functions such as security, cleaning, and other services, where the service provider is engaged in one particular type of work, dispatching companies send personnel to the requesting companies to do different kinds of work as required. An individual dispatched worker cannot be suitable for all kinds of work, and the dispatching companies cannot guarantee that it will constantly be able to provide the same kind of work or offer a constant wage. The Committee thus suggests that dispatched workers be separated into two categories: the "registered type" (usually short-term) and the "long-term type." For the registered type, we recommend that dispatching companies be allowed to offer a fixed-term contract in the same way as other enterprises (see Suggestion 4 below).

The employment contract for the long-term type of dispatched workers is permanent by nature. When the

dispatch service agreement expires or if no suitable work can be provided to the dispatched workers, the dispatching company should be allowed to terminate the employment contract with severance payment. In such a scenario, however, the currently available grounds for termination under the LSL cannot be applied, which gives rise to labor disputes. Due to the unique nature of the relationship between the dispatching company and the dispatched workers, the Committee suggests that the law clearly stipulate the permissible causes for terminating employment contracts with long-term dispatched workers (for example, when the dispatch service agreement expires and no suitable work can be provided to the dispatched worker), so as to protect the interests of both employers and employees.

Suggestion 4: Loosen regulations on fixed-term employment contracts.

4.1 Permit employers to use fixed-term contracts to meet temporary needs for additional human resources.

Fixed-term contracts and labor dispatch are popular practices in Taiwan because the current LSL imposes excessive constraints on employers regarding termination of employment, thus depriving employers of the HR management flexibility needed to survive in today's highly competitive markets. The Committee considers that the use of labor dispatch and fixed-term contracts work hand-in-hand. The member firms that the Committee represents report that the use of labor dispatch is sometimes driven by the stringent and inflexible requirement of fixed-term contracts under the current LSL. We therefore suggest that if the use of labor dispatch is tightened under the new law, then regulations on fixed-term contracts should be relaxed. In particular, the current law requires fixed-term contracts to fit into one of four categories stipulated in the LSL. Instead, the Committee suggests that an employer should be able to use fixed-term contracts as long as it has a temporary need for additional human resources.

4.2 Adopt more flexible standards for reviewing fixed-term contracts for specific work.

As mentioned above, under the current LSL defines four categories of fixed-term contracts: temporary, short-term, seasonal, and fixed-term contracts for specific work. A fixed-term contract for specific work requires that the nature of the work be non-continuous, with the duration of work not exceeding one year (unless the labor authority grants approval for a longer period). Due to the diversity of business needs, enterprises may require personnel to perform specific fixed-term work for more than one year, but such fixed-term contracts are often disapproved because of the rigid standards applied. An example was a proposed contract with a

high-ranking manager to undertake certain tasks to reach a short-term goal. High-ranking management is not ordinarily considered fixed-term work, but in this case the task to be performed was non-continuous. The application for this fixed-term contract was rejected. Another example was a Taiwanese citizen employed by a foreign parent company who was assigned back to Taiwan to work on a technology-transfer project for more than one year. Again, the nature of this position is not normally fixed-term, but the technology-transfer project is non-continuous work, which requires a fixed-term contract. The application by a member firm of this Committee was also rejected.

In practice, more flexible standards for reviewing a fixed-term contract for specific work are needed to accommodate different situations in response to the fast-changing business environment. An adjustment to address the need for talent to perform non-continuous work to fulfill specific tasks to achieve a short-term goal will increase employers' hiring flexibility and the strategic deployment of human resources.

Suggestion 5: Create more incentives to attract foreign talent and keep domestic talent.

5.1 Provide incentives for enterprises to offer more competitive compensation to attract talent.

Limited by the overall market size and salary level in Taiwan, enterprises here are often unable to offer internationally competitive compensation. Besides the lack of inducements for foreign professionals to work in Taiwan, a related problem is that many domestic professionals are lured to foreign countries by high compensation. The Committee suggests that, in addition to loosening the work experience requirements for foreign professionals and simplifying the procedures for applying for a visa, the government provide enterprises with certain favorable tax treatment or other measures to encourage them to hire domestic or foreign professionals with an internationally competitive compensation.

5.2 Amend the provision of "in serious violation of applicable laws and regulations" as a cause to annul the work permit.

Article 73 of the Employment Service Act (ESA) deals with circumstances under which a foreign worker's employment permit shall be annulled. Item 6 states that "Other than the above, the employed foreign worker has been in serious violation of applicable laws and regulations in the Republic of China." This provision is too general and ambiguous, leading to unnecessary deportations of foreign professionals, interrupting their service in Taiwan. In one case cited by a member firm of this Committee, a foreign professional who had been working in Taiwan for six years with no misconduct, was

injured when he fell while riding a motorcycle under the influence of alcohol. Although no one else was hurt, a criminal suit for drunk driving was brought against him.

The employee expressed deep remorse for his negligence, willingly appeared in court, and paid a fine of NT\$100,000. In the end, the court gave him a two-year suspended sentence. However, his work permit was immediately annulled after the court decision, he was then forced to leave Taiwan within a set period of time, and re-entry into Taiwan was banned for three years. The member firm tried to file an administrative appeal, but in vain. In this case, and many others, the penalty seems out of proportion to the offense, and creates an atmosphere that may dampen foreign professionals' willingness to come to Taiwan to work.

To prevent unnecessary deportations of foreign professionals, the Committee suggests that Item 6, Article 73 of the ESA be amended to conform to the standard set forth in Item 3, Paragraph 1, Article 12 of the LSL, which is: "Where a worker has been sentenced to temporary imprisonment in a final and conclusive judgment, and is not granted a suspended sentence or permitted to commute the sentence to payment of a fine."

Suggestion 6: Specify the enforcement details for post-employment non-competition covenants in the EROLSL.

The newly amended Article 9-1 of the LSL sets four requirements for post-employment non-competition covenants. On February 4, 2016, the MOL accordingly announced draft amendments to Articles 7-1, 7-2, and 7-3 of the EROLSL. However, neither Article 9-1 of the LSL nor the Amendments elaborate on how the new rules apply to post-employment non-competition covenants executed prior to the enactment of the new law.

Further, regarding the "reasonable compensation" requirement under Subsection 4, Paragraph 1, Article 9-1 of the LSL, Article 7-3 of the Amendments provides that determination of the reasonableness of compensation should take into account such factors as "whether the amount of monthly compensation is at least 50% of the employee's average monthly salary at the time of termination" and "whether the amount of compensation is sufficient to maintain the employee's living needs during the term of post-employment non-competition." However, the employees who would be subject to post-employment non-competition covenants are usually higher-ranking personnel with salaries well above average. Some may have a monthly salary of hundreds of thousands of New Taiwan dollars. If employers are required to pay monthly compensation at 50% of the average monthly salary at the time of termination, it would impose a heavy burden on employers.

The Committee suggests that the MOL specify in

the Amendments that Article 9-1 of the LSL does not apply retroactively, and also to specify that the above-mentioned two factors in determining the reasonableness of compensation are two alternative options. To alleviate difficulties in applying the new law, the section should be reworded to define reasonableness as: "whether the amount of monthly compensation is at least 50% of the employee's average monthly salary at the time of termination, or is sufficient to maintain the employee's living needs during the term of post-employment non-competition."