PROSKAUER ROSE LLP

International HR Best Practices

Tip of the Month

SEPTEMBER 08

A monthly "best practices" alert for multinationals confronting the challenges of the global workplace

This Month's Challenge

A new race discrimination law will soon take effect in Hong Kong. Are your employees ready?

Best Practice Tip of the Month

Employers should train their Hong Kong managers on the new law's prohibitions, update their policies for Hong Kong employees, and make sure complaint procedures are in place.

Law & The Workplace®

Hong Kong Enacts Race Discrimination Ordinance

Hong Kong employers have become increasingly aware of their obligations to maintain workplaces free of discrimination since the passing of Hong Kong's first anti-discrimination ordinance in 1995. On July 10, 2008, Hong Kong added to its employment-related statutes when the Legislative Council passed the long-awaited Race Discrimination Ordinance (the "Ordinance"). The new statute joins the Sex Discrimination Ordinance and Disability Discrimination Ordinance, passed in 1995, and the Family Status Discrimination Ordinance, passed in 1997, on the list of Hong Kong's employment laws. Although there is no specific effective date provided for in the legislation, it is anticipated that the Ordinance will come into effect in the first quarter of 2009.

Prohibited Conduct

The Ordinance covers private employers with more than five employees and protects employees, prospective employees, partners and independent contractors from race-based discrimination in hiring, termination and terms or conditions of employment. The law also prohibits discriminatory harassment, retaliation and "serious vilification." Race is defined by the Ordinance as the "race, colour, descent or national or ethnic origin" of a person.

Like Title VII under U.S. law, the Ordinance specifically prohibits both disparate treatment ("direct") and disparate impact ("indirect") forms of discrimination. An action taken for a mixed motive that is partially lawful and partially discriminatory is deemed discriminatory under the Ordinance. Unlike Title VII, however, the Ordinance exempts from the definition of discrimination decisions made based on race when race is a "genuine occupational qualification," such as when a job involves participation in a dramatic performance, or when the primary function of a job is to provide services to a particular racial group, "familiarity with the language, culture and customs of and sensitivity to the needs of that racial group" is required, and "those services can most effectively be provided by a person of that racial group." Interestingly, an employer that operates "a place where food or drink is (for payment or not) provided to and consumed by members of the public" may lawfully limit hiring to a particular race if "a person of that racial group is required for reasons of authenticity."

In addition, there are broad exceptions for discrimination: (i) based on immigration status; (ii) in favor of expatriates who are acquiring skills to be used outside Hong Kong or possess skills, knowledge or experience not readily available in Hong Kong; and (iii) in favor of people who are permanent residents of Hong Kong, are indigenous to Hong Kong, have a long familial history of residing in Hong Kong, or have lived in Hong Kong for any period of time.

Perhaps of some surprise to U.S. employers, the Ordinance also prohibits discrimination against and harassment of a person because of the race of his or her "near relative," defined as a person's spouse, parent, child, brother or sister, grandparent or grandchild, or a spouse's parent, child, brother or sister, grandparent or grandchild. While courts in the U.S. have wrestled with the question whether Title VII provides such protection, the Ordinance makes clear that association-based discrimination is prohibited.

The Ordinance contains a broad retaliation ("victimization") provision that prohibits an employer from taking an adverse employment action against anyone because that person or someone else has complained of discrimination or participated in a proceeding related to the Ordinance. Thus, even someone only tangentially associated with a person who lodges a complaint or participates in an investigation is protected from retaliation

Individual and Corporate Liability

Unlike Title VII, but like many state statutes, the Ordinance provides that individuals who engage in an unlawful discriminatory practice or aid another person to commit an unlawful discriminatory act can be held personally liable.

An employer can be held liable if an employee's discriminatory act occurs within the scope of his or her employment, whether or not it was done with the employer's knowledge or approval. As in the U.S. though an employer has a defense to liability if it can prove that it "took such steps as were reasonably practicable to prevent the employee from doing that act."

Enforcement and Compliance Issues

As with the existing discrimination ordinances, the Equal Opportunities Commission ("EOC") has been tasked with administering and enforcing the Ordinance. Since the effective date is unclear, the EOC is gearing up by starting an education campaign concerning race discrimination. The Ordinance provides for both administrative and judicial enforcement proceedings, and specifies that available remedies include injunctions, reinstatement, promotion, compensatory and exemplary damages.

Some commentators have complained that the exceptions that allow companies to discriminate in favor of native-born Hong Kongers all but eviscerate the effectiveness of the Ordinance. The importance of these exceptions, like the level of enforcement, remain to be

seen. What is clear, however, is that the Ordinance will likely result in increased litigation for employers.

To avoid violations of the Ordinance and to avail itself of the affirmative defense based on training, employers need to educate supervisors and managers located in Hong Kong about the Ordinance and race discrimination in general. This should not be an onerous task for most multinationals, as they are already familiar with and operating under such laws in other locations. Employers also should review local handbooks or policies to see if they need to be revised to incorporate the Ordinance.

International Labor and Employment Law Practice Group

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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