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Employment & Immigration Update

DOLE Department Order No. 174, Series of 2017: New DOLE Guidelines on Contracting and Subcontracting

The Department of Labor and Employment (DOLE) has issued Department Order No. 174, series of 2017 *(Rules Implementing Articles 106 to 109 of the Labor Code, as amended)* (DO No. 174), which provides a new set of guidelines to govern contracting and subcontracting, last March 16, 2017. DO No. 174 took effect on April 2, 2017. The previous regulation governing contracting and subcontracting is Department Order No. 18-A, series of 2011 (DO No. 18-A).

DO No. 174 substantially maintained the definition of "labor-only contracting" under DO No. 18 -A. The new regulation identifies two arrangements that constitute labor-only contracting. The **first** type is created whereby --

(i) the contractor or subcontractor does not have substantial capital, **or**
(ii) The contractor or subcontractor does not have investments in the form of tools, equipment, machineries, supervision, work premises, among others,

and

(iii) the contractor's or subcontractor's employees recruited and placed are performing activities which are directly related to the main business operation of the principal. The phrase 'usually necessary or desirable to the operation of the company' as an adjunct and alternative to the performance of activities which are directly related to the main business

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DOLE Department Order No. 170, Series of 2017: Implementing Rules and Regulations of the Anti-Age Discrimination in Employment Act

The Implementing Rules and Regulations (IRR) of Republic Act No. 10911 (*Anti-Age Discrimination in Employment Act*) (RA No. 10911) took effect on February 28, 2017 or 15 days after its publication in the *Manila Times* on February 3, 2017.

RA No. 10911 prohibits discrimination against any individual in employment on account of age. However, the law provides for exceptions and allows the employer to set age limitations in only four circumstances identified in Section 6 of the law.

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Special points of interest

- Supreme Court (SC) Decisions
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- Firm Announcements

World Law Group's *Global Guide to Whistleblowing Programs*

The World Law Group (WLG) published the 2nd edition of the WLG *Global Guide to Whistleblowing Programs*, which provides a brief overview of legislation governing whistleblowing programs in each jurisdiction covered.

SyCipLaw partners **Rolando V. Medalla, Jr.** and **Hiyasmin H. Lapitan**, with support from associates **Azyleah V. Ignacio-Ibaviosa** and **Patricia A. Madarang**, contributed the Philippine chapter.

For a full list of jurisdictions covered and to download a free copy of the guide, please visit www.theworldlawgroup.com/Document.asp?DocID=116088.

SyCipLaw is the exclusive Philippine member of the WLG. WLG is one of the oldest and largest networks of leading independent law firms. Its 54 member firms encompass approximately 18,000 legal professionals working from 350 offices in major business centers in 75 countries worldwide. Visit www.theworldlawgroup.com for more information. ◆

POEA-SEC: Determination of Whether an Employee's Illness is Work-Related

SC Decision: G.R. No. 192754, September 7, 2016

As categorically stated by the Supreme Court, "courts are not bound by the assessment of the company-designated physician," and the seafarer is given the freedom of choosing his own medical specialist. In case of conflict, the determination of which diagnosis should prevail would primarily depend on the attendant facts and expertise of the physicians, and the court is not precluded from awarding disability benefits on the basis of the medical opinion of the seafarer's physician. Indeed, to create a sweeping rule that the findings of the company-designated physicians are conclusive would do great injustice to the constitutional protection afforded to laborers.

In *Leonis Navigation Co., Inc. v. Obrero*, the Manning Agency refused to pay total disability benefits claimed by the employee insisting that the company-designated physician's certification that the employee's illness is not work-related should prevail over the opposite findings of the employee-selected physician. The Supreme Court ruled that while there are instances when the court sided with the company-designated physician, there are also cases when it upheld opposite findings. The court stressed that the reason behind the rulings that favor the findings of company-designated physicians is not because they are infallible; rather, it is because of the assumption that they have "closely monitored and actually treated the seafarer" and are therefore in a better position to form an accurate diagnosis. In cases where the seafarer's own physician had a similar opportunity to observe and treat the seafarer, the assumption no longer holds, and the conflicting opinions stand in equipoise. In such instances, tribunals should closely scrutinize the conflicting medical findings.

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Piercing the Veil of Corporate Fiction Applied in Labor Cases

SC Decision: G.R. No. 208535, October 19, 2016

In the recent case of *Leo's Restaurant and Bar Café v. Bensing*, the Supreme Court applied the doctrine of piercing the veil of corporate fiction to protect the rights of a dismissed employee. According to the Court, where it shows that business entities are owned, controlled, and conducted by the same parties, law and equity will disregard the legal fiction that they are distinct and shall treat them as one entity in order to protect the rights of third persons.

In the case of *Bensing*, the employee was hired in 2002 as liaison officer by Kimwa Construction and Development Corporation (Kimwa), which also operated Leo's Restaurant and Bar Café (Restobar), and the Mountain Suite Business Apartelle (Apartelle). In 2005, the employee was also appointed as the HR/Administrative Head of the Restobar and the Apartelle.

Sometime later, the employee was dismissed by Leo Lua, the manager of the Restobar and Apartelle, for allegedly entering into a contract involving the Restobar without the latter's authorization.

She then filed suit for illegal dismissal against Kimwa, the Restobar, the Apartelle, Leo Lua and Amelia Lua (owner of the Restobar and Apartelle). Kimwa denied liability, claiming that the employee resigned from Kimwa in 2005 and transferred to the Restobar and Apartelle for higher pay. Kimwa also argued that the employee no longer has any cause of action against it since the employee already received an advance payment of her benefits, separation pay and other claims from Kimwa. Finally, Kimwa contends that the Restobar and Apartelle, owned by Amelia Lua, was separate and distinct from Kimwa.

However, the Court found sufficient pieces of evidence that show that Kimwa, Leo Lua, and Amelia Lua owned, managed, and operated the Restobar and the Apartelle. According to the Court, the establishments also continuously employed the employee, previously as liaison

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Can a Project or Fixed-Term Employee be placed under Probationary Employment?

Philippine labor law unequivocally recognizes the practice of placing new employees under probationary employment to afford employers an opportunity to determine whether their new hires are qualified to perform the tasks required of them before they are regularized. However, the law is not equally clear on whether such an arrangement may also be done in relation to project and fixed-term employment.

Project Employees and Probationary Employment

In *Manalo v. TNS Philippines, Inc.* (**G.R. No. 208567, November 26, 2014**), the petitioners were hired by TNS as field personnel on various dates starting 1996 for several projects. They were made to sign project-to-project employment contracts. On October 21, 2008, the petitioners were advised not to report to work anymore because they were being pulled out of their current assignments and that they were not being lined up for upcoming projects. This prompted them to file a complaint for illegal dismissal against TNS.

The Supreme Court ruled in favor of the employees and stated that they were regular employees. The Court also noted in an *obiter dictum* that the employees cannot be considered project employees. Examining the employment contracts, the Court highlighted a provision which gives TNS the option of "renewing or extending the period of [the] agreement for such time as it may be necessary to complete the project or because [TNS needs] further time to determine [the employee's] competence on the job." According to the Court, the quoted portion refers to probationary employment, which runs counter to the very nature of project employment.

To reiterate, however, the statement of the Court is merely *obiter dictum.* As such, it is still unclear whether project employees may be placed under probationary employment, but the statement provides basis to argue that such an arrangement is legally not permissible.

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Termination due to Disease

SC Decision: G.R. No. 218333, December 7, 2016

May an employer refuse to accept back to work an employee who has failed to submit a medical clearance showing that he is fit to resume work?

Under the *Implementing Rules of the Labor Code*, the employer has a duty not to terminate an employee until there is a certification by a competent public health authority stating that the employee's disease is of such nature or at such a stage that it cannot be cured within a period of six months even with proper medical treatment.

In *Marina's Creation Enterprises v. Ancheta*, the employee suffered from a stroke twice, but was later able to present an SSS Sickness Notification stating that he was physically fit to resume work after a period of 90 days. After the 90-day period, the employee reported to work, but the employer required the employee to submit another medical certificate that he is fit to work. The employee was unable to do so and was prevented from resuming work. The employee thereafter filed a complaint for illegal dismissal.

The Supreme Court held that the employer's refusal to accept the employee notwithstanding the SSS Sickness Notification constituted illegal dismissal. The employer cannot terminate an employee until there is a certification by a competent public health authority that the employee's disease is of such nature or at such a stage that it cannot be cured within a period of six months even with proper medical treatment. In this case, however, the employer terminated the employee from employment without seeking the said certification from a competent public health authority. ◆

Legal Resources

ALB: "Anti-Corruption Laws in the Philippines"

The September 2016 issue of the Asian Legal Business (ALB) Asia edition included a regional update entitled "Anti-Corruption Laws in the Philippines", co-authored by SyCipLaw partner **Ronald Mark C. Lleno**. Located on page 16, the article discussed examples of prohibited corrupt practices under Philippine law.

Access the full issue online at https://asianlegalbusiness.uberflip.com/i/724413-alb-september-2016.

The issue also included the results of the ALB M&A Ranking 2016, where SyCipLaw was ranked once again as a tier 1 firm for M&A in the Philippines. ◆

Client Alert: New Implementing Rules for Philippine Data Privacy Act

The National Privacy Commission (NPC) has issued the implementing rules and regulations of the Data Privacy Act of 2012. The rules , promulgated on August 24, 2016, will take effect 15 days from publication in the Official Gazette.

Download the Client Alert at www.syciplaw.com/news/articles/lr/151.

This alert was authored by SyCipLaw partner **Rose Marie M. King-Dominguez** and associate **Aaron Jeric M. Legaspi**. ◆

Legal Resources

Herbert Smith Freehills' *Guide to Restructuring, Turnaround and Insolvency in Asia Pacific*

SyCipLaw partners **Jose Florante M. Pamfilo** and **Franco Aristotle G. Larcina** contributed the Philippine chapter of Herbert Smith Freehills' 1st edition of *Guide to Restructuring, Turnaround and Insolvency in Asia Pacific*. The guide is intended to provide an understanding of the legal framework in different jurisdictions, as well as to address key practical issues commonly encountered, when dealing with companies in financial difficulties.

Aside from the Philippines, it also covers Australia, China, Hong Kong, India, Indonesia, Japan, Malaysia, New Zealand, Singapore, South Korea, Taiwan, Thailand, and Vietnam.

To request for a copy of the guide, please visit www.herbertsmithfreehills.com/latest-thinking/restructuring-turnaround-and-insolvency-in-asia-pacific or email asia.publications@hsf.com. ◆

Implementing Rules and Regulations of Republic Act No. 10173, known as the "Data Privacy Act of 2012"

Pursuant to the mandate of the National Privacy Commission (NPC) to administer and implement the provisions of Republic Act No. 10173 (*Data Privacy Act of 2012*) (RA No. 10173), and to monitor and ensure compliance of the country with international standards set for data protection, the implementing rules and regulations (IRR) of the law were promulgated on August 24, 2016. The IRR seeks to safeguard the fundamental human right of every individual to privacy while ensuring free flow of information for innovation, growth, and national development. It also seeks to enforce the State's inherent obligation to ensure that personal data in information and communication systems in the government and in the private sector are secured and protected.

The IRR seeks to regulate the processing of personal data by any natural and juridical person in the government or private sector. Thus, the law and the IRR should also apply to employers in the private sector.

"Personal Data" is defined in the IRR as all types of information pertaining to an individual; namely, personal information, sensitive personal information, and privileged information. "Processing" refers to any operation or any set of operations performed upon personal data including, but not limited to, the collection, recording, organization, storage, updating, modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of personal data. On the other hand, the term "Profiling" refers to any form of automated processing of personal data consisting of the use of such data to evaluate certain personal aspects relating to a natural person, in particular, to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements.

In substance, the IRR allows the processing of personal data provided it complies with the

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DOLE Department Order No. 155-16: Rules and Regulations Governing the Employment and Working Conditions of Collectors in the Debt Collection Industry

Department Order No. 155-16 (DO No. 155-16), issued by DOLE on May 26, 2016, applies to all debt collection entities or agencies employing collectors and similar personnel engaged in purely collection services on delinquent and/or past due accounts of clients through negotiations by telephone and/or personal field visits.

The DO No. 155-16 classifies employees in debt collection industry as either regular employees or commission based collectors. **Regular collectors** are those employed or appointed to fill up regular positions or whose employment is not dependent on the performance or completion of a specific job, work or service, or on the term or duration of a collection service agreement, including **(a)** office-based employees; **(b)** regular collectors; and **(c)** collectors paid with wage and commission. On the other hand, **commission-based collectors** are those whose manner of compensation is purely on commission basis and are not required to report for work on a regular basis and are free from control and supervision of the collection agency/service provider in matters connected with the collection, recovery and curing of accounts except as to the results thereof and subject to prohibitions and limitations mandated by law and government regulatory agencies.

The regular collectors and collectors paid with wage and commission are entitled to the following benefits, as provided for in the Labor Code, as amended, and other labor laws:

1. Minimum Wage
2. Holiday Pay
3. Rest Day of 24 consecutive hours after six consecutive working days
4. Overtime Pay
5. Paid service incentive leave of five days for every year of service

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POEA-SEC: Determination of Whether an Employee's Illness is Work-Related

(Continued from page 2)

The Supreme Court distinguished the case of *Leonis Navigation* from *Philippine Hammonia Ship Agency, Inc. v. Dumadag* in order to avoid confusion in the application of the 2000 Philippine Overseas Employment Agency-Standard Employment Contract (POEA-SEC). In *Philippine Hammonia*, the Supreme Court held that under Section 20(B)(3) of the POEA-SEC, referral to a third physician in case of contrasting medical opinions (between the company-designated physician and the seafarer-appointed physician) is a mandatory procedure that must be expressly requested by the seafarer. As a consequence of the provision, the company can insist on its disability rating even against a contrary opinion by another physician, unless the seafarer signifies his intent to submit the disputed assessment to a third physician. The Court clarified, however, that Section 20(B)(3) refers only to the declaration of fitness to work or the degree of disability. ***It does not cover the determination of whether the disability is work-related.*** According to the Court, there is nothing in the POEA-SEC which mandates that the opinion of the company-designated physician regarding work-relation should prevail or that the determination of such relation be submitted to a third physician. ◆

Can a Project or Fixed-Term Employee be placed under Probationary Employment?

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Fixed-term Employees and Probationary Employment

In *Innodata Philippines, Inc. v. Quejada-Lopez* (**G.R. No. 162839, October 12, 2006**), the employment contracts provided for two periods: **(1)** the fixed-term of one year (from March 4, 1997 until March 3, 1999); and **(2)** a three-month period during which the employer has the right to pre-terminate the employment for the "failure of the employees to meet and pass the qualifications and standards set by the employer and made known to the employee prior to" their employment.

According to the Supreme Court, the tenor of the contracts prevents the employees from acquiring security of tenure. Apart from the expiration of the fixed-term, the employer is given the right to terminate their employment on the ground of their failure to meet work standards which the Court construed as referring to a probationary period. The Court ruled that if an employment contract is for a fixed-term, an employee cannot be dismissed for reasons other than the just and authorized causes under the Labor Code while the contract is in effect.

The ruling in *Innodata* seems straightforward enough. However, the Supreme Court's decision in *OKS Designtech, Inc. v. Caccam* (**G.R. No. 211263, August 5, 2015**) appears to contradict it.

In *OKS Designtech*, the respondent was hired under a fixed-term contract from January 21 to June 21, 2008. Her contract was then renewed for the period June 22, 2008 to June 21, 2009. Several days before the lapse of her extended contract, the respondent received a letter from OKS reminding her of the upcoming expiration of her contract. Claiming to have been summarily dismissed by virtue of this letter, the respondent filed a complaint for illegal dismissal against OKS. The Supreme Court ruled against the respondent, however, and found that she was validly dismissed. The Court looked at the language used in the employment agreements and found that the contracts were valid fixed-term employment contracts. According to the Court, although the contracts provide that the respondent may be terminated prior to the expiration of the contract if she "fails to meet the reasonable standards made known to [her] by the employer", the inclusion of this phrase did not give rise to an implied probationary employment status because she was never employed on a probationary basis. On the contrary, the evidence led the Court to conclude that the respondent's employment was hinged on a stipulated term. Thus, the Court held that the respondent's employment was lawfully terminated upon its expiration on June 21, 2009 without need of any further notice.

To recall, *Innodata* says that a provision in a fixed-term contract giving an employer the right to terminate the employment if it determines that the employee failed to meet certain standards renders the contract invalid as a fixed-term agreement. However, it may be argued that, under *OKS*, a similar provision may be included in a fixed-term agreement as long as **(1)** the employee is indubitably engaged for a fixed-term and not on a probationary basis; and **(2)** the provision granting the employer the right to determine the employee's quality of work is not subject to another period within the fixed-term the parties agreed upon. ◆

Legal Resources

Client Alert: Prohibition on Labor-Only Contracting and the Suspension of Registration of New Contractors

On July 28, 2016, the Department of Labor and Employment issued Labor Advisory No. 10-2016 reiterating the prohibition against labor-only contracting and DO No. 162-2016 suspending the registration of new applicants as contractors or subcontractors under DO No. 18-A.

Download the Client Alert at www.syciplaw.com/news/articles/lr/152.

This alert was authored by SyCipLaw partner **Rodelle B. Bolante**, senior associate **Easter Princess U. Castro** and associate **Anne Katherine P. Navarrete**. ◆

ALB: "New Implementing Rules for Philippine Data Privacy Act"

The October 2016 issue of ALB includes a regional update entitled "New Implementing Rules for Philippine Data Privacy Act", authored by SyCipLaw partner **Rose Marie M. King-Dominguez**.

Located on page 11, the article enumerates and discusses the implementing rules and regulations of the Philippine Data Privacy Act of 2012.

Acess the full issue online at https://asianlegalbusiness.uberflip.com/i/739134-alb-october-2016. ◆

Legal Resources

IFLR: "Philippines: Facilitating Creditor-Debtor Dealings"

The October 2016 issue of the International Financial Law Review (IFLR) included An international briefing entitled "Facilitating Creditor-Debtor Dealings", authored by SyCipLaw partner **Russel L. Rodriguez**, senior associate **John Christian Joy A. Regalado**, and associate **Jo Margarette W. Remollo**.

The article discussed the Financial Rehabiliation and Insolvency Act of 2010, which provides more transparent, effective, and efficient dealings between creditors and financially-struggling debtors.

Access the article online at www.iflr.com/Article/3588450/Philippines-Facilitating-creditor-debtor-dealings.html. ◆

ALB: "Evidentiary Issues in Arbitration"

The November 2016 issue of ALB includes a regional update entitled "Evidentiary Issues in Arbitration", authored by SyCipLaw partner **Ramon G. Songco** and associate **Arvin Kristopher A. Razon**.

The article enumerates and discusses the laws that aim to address concerns in resolving disputes in arbitration.

Acess the full issue online at https://asianlegalbusiness.uberflip.com/i/749142-alb-november-2016. ◆

DOLE Department Order No. 174, Series of 2017: New DOLE Guidelines on Contracting and Subcontracting

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operation of the principal, was removed to conform with the wording of Article 106 of the Labor Code.

The **second** type of labor-only contracting is when the contractor or subcontractor does not exercise the right to control over the performance of the work of their employees.

Although DO No. 174 absolutely prohibits a labor-only contracting arrangement, it nonetheless recognizes permissible forms of contracting and subcontracting, provided that **all** the following circumstances concur:

(i) the contractor or subcontractor is engaged in a distinct and independent business;
(ii) the contractor or subcontractor must have a substantial capital to carry out the job farmed out by the principal;
(iii) in performing the work farmed out, the contractor or subcontractor must be free from control of the principal in all matters connected with the performance of the work except as to the results; and
(iv) the Service Agreement ensures compliance with all the rights and benefits for all the employees under labor laws.

While many provisions of DO No. 18-A were retained, DO No. 174 nonetheless introduced new provisions and modified several provisions found in DO No. 18-A. These include:

- DO No. 174 added a definition for "In-house Cooperative", which is as a cooperative managed, or controlled directly or indirectly by the principal or one where the principal or any of its officers owns or represents any equity or interests, and which operates solely or mainly for the principal. Contracting out of job or work through an in-house cooperative which merely supplies workers to the principal is considered an illicit form of employment arrangement under the new DO.

- Under DO No. 174, the definition of the bond now only includes the bond under Article 108 of the Labor Code that the principal may require from the contractor to be posted equal to the cost of labor under contract. Under DO No. 18-A, the bond may also refer to the security or guarantee posted by the principal for the payment of the services of the contractors under the Service Agreement. This clause was deleted in DO No. 174.

- DO No. 174 deleted the term "Net Financial Contracting Capacity" (NFCC).

- DO No. 174 added other forms of prohibited employment arrangements, namely: **[i]** contracting out of job or work through an in-house cooperative; and **[ii]** a catch all provision which includes all other practices, schemes or employment arrangements designed to circumvent the right of workers to security of tenure.

- DO No. 174 removed from the list of prohibited forms of employment arrangements; **[i]** contracting that results in termination or reduction of regular employees and reduction of work hours or splitting of bargaining unit; **[ii]** refusal to provide a copy of employment contract and service agreement; and **[iii]** engaging contracted or subcontracted employees in excess of those provided by the Collective Bargaining Agreement or Industry Tripartite Council.

- DO No. 174 reduced the mandatory provisions in the Service Agreement. The provisions regarding: **[i]** NFCC; **[ii]** ensuring compliance with all the rights and benefits of the employees under the Labor Code; and **[iii]** obligation of the contractor to directly remit the employers' share and the employees' contribution to the Social Security System (SSS), Employees' Compensation Commission (ECC), Philhealth and Pag-ibig, are no longer required to be in the Service Agreement.

- DO No. 174 now provides that the expiration or termination of the service agreement does

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DOLE Department Order No. 174, Series of 2017: New DOLE Guidelines on Contracting and Subcontracting

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not automatically result in the termination of the employment of contractor's employees. Where the termination results from the expiration of the Service Agreement, or from the completion of the job which the employee is engaged, the latter may opt to wait for re-employment within three months, to resign and transfer to another contractor-employer. However, the mere expiration of the Service Agreement will not be deemed as a termination of employment of the contractor's or subcontractor's regular employees.

- DO No. 174 increased the registration fee of contractors to PhP100,000 from PhP25,000 and reduced the effectivity of the certificate of registration to two years from three years. It also increased the capitalization requirement to PhP5,000,000 from PhP3,000,000.

- DO No. 174 now provides that once DOLE cancels the registration of a service contractor, it will no longer be allowed to operate and apply for a new registration as contractor under the same or different name.

- Under DO No. 174, the principal is deemed the direct employer of the contractual employees in case of a finding that **(i)** the contractor is engaged in labor-only contracting, **(ii)** the contractor is engaged in other illicit forms of employment arrangements under Section 6 of the regulation, **(iii)** there is a violation of the contractors' employees' rights under Section 10 and the required contracts Section 11, and **(iv)** the principal engaged with a delisted contractor.

With the issuance of the new regulation and the government's recent pronouncements on its campaign against contractualization and "end of term" agreements, we expect more inspections and audits and stricter enforcement of labor standards, rules and regulations by the DOLE. Corporations that engage the services of contractors or subcontractors are therefore encouraged to review DO No. 174 and ensure that its service contractors are duly registered and are in good standing with the DOLE and that its service agreements are compliant with the requirements of the new regulation. More importantly, such companies should review its contracting arrangements to ensure that it is not engaged in labor-only contracting or other illicit forms of employment arrangements. In reviewing its service contract arrangements, companies can be guided by the elements of permissible job contracting, all of which must be present, as provided in DO No. 174. ◆

DOLE Department Order No. 170, Series of 2017: Implementing Rules and Regulations of the Anti-Age Discrimination in Employment Act

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The IRR clarifies that an employer who wishes to invoke any of the exceptions must, prior to implementation, submit a report to the DOLE Regional Office which has jurisdiction over the workplace. The submission of the report gives rise to the presumption that the age limitation in employment set by the employer is in accordance with the IRR, unless the contrary is proven by the court. On the other hand, failure to submit the report gives rise to a presumption that the employer is not allowed to set the age limitation.

The IRR also provides that the employment age of children shall be in accordance with Republic Act No. 9231 (*Act Providing for the Elimination of the Worst Forms of Child Labor and Affording Stronger Protection for the Working Child*) and its IRR, Article 381 of the Labor Code, as well as other applicable rules and regulations. The IRR provides that the employer may require, upon hiring, that the child or the guardian submit proof of the child's age. In addition, the IRR states that all individual and/or collective bargaining agreements, employment contracts, and company policies that were entered into or established prior to the effectivity of the RA No. 10911 and its IRR shall be respected as agreed upon by the parties.

A copy of the IRR is available at the DOLE website at www.dole.gov.ph/issuances. ◆

Legal Resources

AILA Global Migration Section Digest

WELCOME

SPOTLIGHT INTERVIEW SERIES

Focus on The Philippines

AILA GMS Fall 2016 Digest: Spotlight Interview Series—Focus on the Philippines

SyCipLaw partner **Russel L. Rodriguez** contributed to the first Global Migration Section (GMS) Digest of the American Immigration Lawyers Association (AILA). The interview discussed the practice of immigration in the Philippines, the process of sending employees to the country, qualification of same sex spouses for dependent status, and a hot topic in Philippine immigration.

Download a PDF copy of the digest at www.syciplaw.com/news/articles/lr/156.

AILA, founded in 1946, is a national association of more than 14,000 attorneys and law professors who practice and teach immigration law. It is a nonpartisan, nonprofit organization that provides legal education, publications and information, professional services, and expertise. Visit the AILA website for more information: www.aila.org. ◆

Firm Recognition

Legal 500 Asia Pacific 2017

In its latest rankings, Legal 500 Asia Pacific 2017 recommends SyCipLaw as a top tier firm in 15 practice areas, including Employment, Immigration, Law firms in Cebu, and Law Firms in Davao.

Thirteen SyCipLaw lawyers are listed as "Leading Lawyers", including **Rodelle B. Bolante** for Immigration, **Leslie C, Dy** for Employment, and **Amer Hussein N. Mambuay** for Employment.

The editorial also recommends 21 SyCipLaw lawyers, including **Rodelle B. Bolante** for Immigration, **Dominador Maphilindo O. Carrillo** for Law Firms in Davao, **Alan C. Fontanosa** for Law Firms in Cebu, **Luisito V. Liban** for Employment, **Marianne M. Miguel** for Employment, and **Russel L. Rodriguez** for Shipping.

View the firm's complete rankings at www.legal500.com/firms/31156/offices/30499.

The full Asia-Pacific results may be found at www.legal500.com/assets/pages/asia-pacific/asia-pacific.html.

The Legal 500 series is one of the world's largest legal referral guide. As an independent guide, firms and individuals are recommended purely on merit. ◆

JobStart Philippines Program now Institutionalized by Law

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The JobStart Trainee. A JobStart registrant will be considered as a trainee and not as an employee of the participating employer for the duration of the training program. In order to be a qualified JobStart trainee, the person must:

(1) be a Filipino citizen;
(2) be 18 to 24 years old (those who are 17 years old may also register provided that they are 18 years old at the time of training);
(3) have at least reached high school level;
(4) not be employed, studying or training at the time of registration; and
(5) must have less than one year of accumulated work experience.

JobStart graduates are to be given preference in the hiring of workers by the participating employers. After life skills training, the PESO will assess and determine whether the JobStart trainee is ready to be referred for decent employment or would require further training.

The JobStart Training. The law divides the training period into three phases, namely:

1. JobStart Life Skills Training: This is to be conducted by the PESO with technical assistance from the DOLE for a period of ten days, with at least one life skill being taught in each day of the program. The JobStart trainee will receive a daily allowance for the duration of the life skills training to be provided by the PESO with funding support from the DOLE.

2. JobStart Technical Training: The JobStart technical training shall allow the trainee to acquire a qualification or a set of competencies aligned with the appropriate Technical Education and Skills Development Authority (TESDA) training regulations, as applicable, and be qualified to get a National Certificate or Certificate of Competency. The prescribed period for technical training is up to three months. However, upon recommendation of the employer and the approval of the PESO, a trainee may be exempted from this phase and move directly to the JobStart Internship. The period may also be shortened depending on the competency of the trainee.

   The JobStart trainee will receive a training allowance from the JobStart unit for the duration of the technical training.

3. JobStart Internship: The period for JobStart internship period should not be more than three months or 600 hours. The total daily training hours shall be eight hours exclusive of not less than 60 minutes time off for the regular meals. Upon entry into the internship stage, the participating employer shall provide the JobStart trainees with a daily stipend of not less than 75% of the prevailing minimum wage in the city or municipality where the establishment is located. The law also contains provisions on the payment of overtime pay, night shift differential, and holiday pay to JobStart trainees.

   Notably, a JobStart trainee will no longer be required to undergo a probationary period at the end of the internship phase should the trainee be hired in the same establishment upon completion of the program provided that the trainee has also completed his or her technical training within the training plan prepared by the same participating employer.

Termination of Training Program. An employer may terminate the training contract on the following grounds:

(1) habitual absenteeism of the trainee;
(2) willful disobedience by the trainee of the establishment's rules, or insubordination of a lawful order of a superior;
(3) theft or malicious destruction of the establishment's property or equipment by the trainee;
(4) engaging in violence or other forms of misconduct in the training or establishment's premises by the trainee; and
(5) inefficiency or poor training performance for a prolonged period despite warnings duly given to the trainee.

On the other hand, a JobStart trainee may terminate the training contract on the following grounds:

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JobStart Philippines Program now Institutionalized by Law

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(1) substandard or harmful working conditions within the establishment's premises;
(2) cruel and inhumane treatment; and
(3) prolonged or continuing illness.

Either party may furnish the other party a notice of intent to terminate the training contract for cause as listed above. Furthermore, the replacement of a JobStart trainee in an establishment is allowed subject to the cause of termination. In case the termination is caused by the employer, the JobStart trainee may still be referred to other participating employers. In case the termination is caused by the trainee's non-adherence to program guidelines, a new trainee may still be provided to the employer provided that there are other trainees available for deployment.

Penalties for Violation. Any violation of the provisions of the JobStart Law or its implementing rules and regulations will be subject to the general penalty provided for in the Labor Code, as amended. Employers found offering unregistered JobStart programs will also be subjected to program closure proceedings without prejudice to the filing of administrative, criminal or civil liabilities. The DOLE Secretary may file the necessary civil and/or criminal cases in case of **(a)** fraud or deceit committed in connection with the employer's participation in the JobStart program; and **(b)** failure to comply with the conditions or obligations prescribed under the law or its implementing rules and regulations. ◆

DOLE Department Order No. 155-16: Rules and Regulations Governing the Employment and Working Conditions of Collectors in the Debt Collection Industry

(Continued from page 4)

6. 13th month Pay (PD No. 851)
7. Paid maternity leave of 60 days for normal delivery or 78 days for caesarian section delivery (RA No. 8282)
8. Paid paternity leave of seven days (RA No. 8187)
9. Paid parental leave of seven days for solo parents (RA No. 8972)
10. Paid leave of ten days for victims of violence against women and their children (RA No. 9262)
11. Paid special leave of not more than 60 days for women who underwent surgery caused by gynecological disorders (RA No. 9710)
12. Retirement Pay (RA No. 7641)
13. Safe and healthful working conditions as provided under the Occupational Safety and Health Standards.

On the other hand, the collection agencies or entities are not precluded from providing commission-based collectors with the aforementioned benefits.

Note however that DO No. 155-16 does not apply to the following:

1. Collectors of office and/or household utility bills (*i.e.* telephone, water, cable television and electricity) engaged by utility companies;
2. Collectors engaged directly by a company, office or establishment other than a collection entity or agency as an employee performing collection activities, by phone or by field visit, as his primary duty or as incident to his duties and responsibilities;
3. Agents of real estate/realty brokerage, insurance, pre-need plans and other similar business, entities or persons performing collection activities as part of sale and/or service transaction of the parties, and the relationship that exist between the parties is contractual in nature governed by the applicable provision of the Civil Code; and
4. Collectors of pay "bayad" remittance center. ◆

Image Credits: *On cover: "Irrigation Development" by Richfinder, used under CC BY-SA 3.0 / Cropped from original. On page 2: Logo courtesy of World Law Group. On page 4, Cover image courtesy of Herbert Smith Freehills. On page 7: Cover image courtesy of AILA GMS. On page 9: Badge courtesy of Asian-MENA Counsel. On page 10: Badge courtesy of Asialaw Profiles. On page 11: Photo courtesy of IFLR, Badge courtesy of Chambers Asia-Pacific.*

Firm Recognition

2016 Asian-Mena Counsel—In-House Community Firm of the Year

SyCipLaw was once again recognized by the In-House Community Firms of the Year 2016 in nine categories, including Most Responsive Domestic Firm of the Year and Employment Firm of the Year.

The award recognized law firms that have made a significant impression on 1,000 polled in-house counsel in the past year. Participating in-house counsel voluntary nominate any firm and were asked, among other things, for comments on quality and value of service. The results indicate private practice teams whose service have been of meritorious quality and who have been responsive to their clients' needs.

The e-edition of the 10th Annual Representing Corporate Asia & Middle East Survey, including Asian-Mena CounselFirms of the Year, 2016 may be accessed at www.inhousecommunity.com/article/10th-annual-representing-corporate-asia-middle-east-survey-including-firms-of-the-year-2016/. ◆

Firm Recognition

Asialaw Profiles 2017

Asialaw Profiles has once again recognized SyCipLaw as an outstanding firm in the Philippines in eleven categories, including Labour & Employment.

The rankings also lists eight SyCipLaw lawyers as leading lawyers, and 16 SyCipLaw lawyers are recommended in their editorial, including **Dante T. Pamintuan** and **Leslie C. Dy** for Labour & Employment.

Visit the Asialaw Profiles 2017 website for the firm's full rankings: www.asialaw.com/firms/sycip-salazar-hernandez-and-gatmaitan/f1355#/analysis. ◆

Chambers Global 2017

Chambers Global 2017 ranked SyCipLaw as Band 1 Corporate & Finance and Projects, Infrastructure & Energy. www.chambersandpartners.com/global/firm/3072/sycip-salazar-hernandez-gatmaitan.

Chambers Global also ranked five SyCipLaw lawyers and the firm's international law firm networks.

The complete Chambers Global 2017 guide may be accessed at www.chambersandpartners.com/guide/global/2. ◆

Piercing the Veil of Corporate Fiction Applied in Labor Cases

(Continued from page 2)

officer and thereafter as Administrative Officer/HR Head of the Restobar and the Apartelle. Moreover, while acting as Administrative Officer/HR Head of the Restobar and the Apartelle, the employee was required to temporarily report at Kimwa's Main Office. Apart from this, the notice of her termination was written under the heading "Kimwa Construction & Dev. Corp."

Based on the foregoing, the Court ruled that the employee was continually employed by Kimwa, the Restobar, and the Apartelle from the time she was assigned in Kimwa until she was appointed Administrative Officer/HR Head of the Restobar and the Apartelle. The Court thus treated these three entities as a single entity accountable for the dismissal. ◆

A Refresher on the Types of Visas (and the Related Qualification Requirements for Foreign Nationals Working in the Philippines)

(Continued from page 12)

three years.

Special Non-Immigrant Visa. This type of visa is provided under Department of Justice (DOJ) Department Circular No. 24-12. It is granted to those employed as executives, supervisors, specialists, consultants, contractors or personal staff at enterprises registered with the Export/Special Economic Processing Zones, Philippine Economic Zone Authority, Board of Investments (BOI), and Authority of the Freeport Area of Bataan. This is also granted to those employed in enterprises that have existing agreements with the government, or any subdivision, agency or instrumentality thereof.

Multiple Entry Special Visa for Foreign Personnel of Regional or Area Headquarters of Multinational Companies. This visa is provided under Executive Order No. 226 (*Omnibus Investments Code of 1987*). The holder of this type of visa must be employed by a company licensed by the BOI and the Securities and Exchange Commission (SEC) to establish a regional or area headquarters in the Philippines.

With respect to **Immigrant Visas**, there are only three types namely, Quota Immigrant/Preference Visa, Non-Quota Immigrant Visa, and Temporary Resident Visa.

Quota Immigrant Visa. This is granted only to nationals or citizens of countries which grant reciprocal immigration privileges to Filipino citizens. Some of the requirements to be admitted into the Philippines as permanent residents include entry into the Philippines under a lawful admission status, no record of any derogatory information against the applicant in any law enforcement agency, non-violation of any law or ordinance, and possession of sufficient capital amounting to at least US$40,000 for a viable and sustainable investment in the Philippines. Issuance of said visa is limited to 50 persons for a calendar year.

Non-Quota Immigrant Visa. This type of visa is not subject to any numerical limitation but is limited to certain applicants such as the wife or the husband or the unmarried child under 21 years of age of a Filipino citizen.

Temporary Resident Visa. This applies to foreign nationals whose countries do not grant permanent residence and immigration privileges to Filipinos. Under the principle of reciprocity, nationals of the following countries are not granted permanent residence and immigration privileges in the Philippines: Albania, Cuba, Iran, Laos, Libya, China, Korea, South Africa, USSR and Vietnam.

In addition to the work visa, foreign nationals who intend to stay in the Philippines for employment purposes must also obtain an **Alien Employment Permit** (AEP) from the DOLE as required under the Labor Code of the Philippines. An AEP is required only if the work or assignment in the Philippines lasts for at least a year. An AEP, however, is not required from all kinds of foreign nationals working in the Philippines. The DOJ has recently issued an opinion that exempts foreign personnel of regional headquarters or regional operating headquarters from securing AEPs. For a foreigner to be exempt from an AEP, he must be: **(1)** a non-immigrant who has been admitted on a multiple entry visa; **(2)** he is an executive of the applicant company; and **(3)** he will work exclusively for the regional headquarters or regional operating headquarters in the Philippines. ◆

Implementing Rules and Regulations of Republic Act No. 10173, known as the "Data Privacy Act of 2012"

(Continued from page 4)

requirements of RA No. 10173 and other laws allowing disclosure of information to the public; provided further that it adheres to the principles of transparency, legitimate purpose, and proportionality.

The IRR specifies the criteria to be observed in the lawful processing of personal information and enumerates specific measures for the protection of personal data. Personal information controllers and processors, for example, are required to implement reasonable and appropriate organizational, physical, and technical security measures that aim to maintain the availability, integrity, and confidentiality of personal data. These measures are to be implemented to protect personal data against natural dangers such as accidental loss or destruction, and human dangers such as unlawful access, fraudulent misuse, unlawful destruction, alteration and contamination.

To ensure the compliance of personal information controllers and processors with their obligations under the law, the IRR requires them to register their processing systems, to provide notification of automated processing, to submit an annual report of the summary of documented security incidents and personal breaches, and to comply with other issuances of the Commission. Furthermore, the IRR classifies the rights to which every data subject is entitled. These rights include the right to be informed, right to object, right to rectification, right to erasure and blocking, and right to damages.

The penalty of imprisonment ranging from six months to seven years, and fines ranging from PhP100,000.00 up to PhP5,000,000.00 may be imposed for violating the provisions of RA No. 10173, its' implementing rules and regulations, and other issuances and orders of the NPC. Such violations include unauthorized processing, accessing due to negligence, improper disposal, processing for unauthorized purposes, unauthorized access or intentional breach, concealment of intentional breaches, malicious disclosure, unauthorized disclosure, or any combination or series of the abovementioned acts.

The IRR is available online at www.gov.ph/images/uploads/20160825-IRR-RA-10173-data-privacy.pdf. ◆

SyCipLaw wins 2017 IFLR Philippine Law Firm of the Year

SyCip Salazar Hernandez & Gatmaitan won the **National Law Firm of the Year (Philippines)** at the IFLR Asia Awards 2017. **Marievic G. Ramos-Añonuevo**, head of the firm's Banking, Finance & Securities group, and **Rocky Alejandro L. Reyes**, head of the firm's Special Projects group, received the award on the firm's behalf. Partners **Angel M. Salita, Jr.**, **Philbert E. Varona**, and **Melyjane G. Bertillo-Ancheta** were also on hand to represent the firm.

Two transactions handled by the firm were also shortlisted for deals of the year categories: Tiwi MakBan project bond for Debt & equity-linked deal of the year and Light Rail Manila Corporation's LRT project for Project finance deal of the year.

The IFLR Asia Awards celebrate legally innovative teams and deals in the Asia-Pacific region. The awards ceremony took place on March 2, 2017 at the Island Shangri-La in Hong Kong. The full list of winners is available at the IFLR website: www.iflr.com/Article/3666181/Asia-awards-2017-winners-revealed.html. IFLR will also be publishing the list of award winners and coverage of the awards in its special awards issue of IFLR magazine in April. ◆

Firm Recognition

Chambers Asia Pacific 2017

Chambers Asia Pacific 2017 ranked SyCipLaw as Band 1 in all categories applicable to Philippine firms, including Employment. The firm's complete rankings may be found at www.chambersandpartners.com/asia/firm/3072/sycip-salazar-hernandez-gatmaitan.

Chambers Asia-Pacific also ranked individual lawyers. Among the 19 ranked SyCipLaw lawyers, three are cited for Employment: **Leslie C. Dy** (Band 1), **Marianne M. Miguel** (Up and Coming), and **Lozano A. Tan** (Band 2).

The complete Chambers Asia Pacific 2017 guide may be accessed at www.chambersandpartners.com/guide/asia/8.

Chambers guides are the culmination of thousands of in-depth interviews by the largest research team of its kind and are trusted globaly to objectively rank the world's best lawyers and law firms. ◆

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A Refresher on the Types of Visas (and the Related Qualification Requirements for Foreign Nationals Working in the Philippines)

Section 9 and Section 47 of Commonwealth Act No. 613 as amended, otherwise known as the "Philippine Immigration Act" provides for the different types of Philippine visas.

There are five types of **Non-Immigrant Visas** namely, Temporary Visitor/Tourist Visa, Treaty Trader/Investor Visa, Pre-Arranged Employment Visa, Special Non-Immigrant Visa, and Multiple Entry Special Visa for Foreign Personnel of Regional or Area Headquarters of Multinational Companies.

The Temporary Visitor/Tourist Visa. This is also known as the Entry Visa, since this is applicable to "visa-required nationals" or nationals from countries who are not entitled to the no-visa entry privilege, and is required from them in addition to the appropriate work visa or permit. Temporary visitors coming for business or for pleasure or for reasons of health should also obtain this visa. However, the term "business" is limited to those temporary in character and cannot be construed as gainful employment on a regular and/or commercial basis. The duration of the visit under this type of visa is for a period not to exceed 59 days.

Treaty Trader/Investor Visa. This is granted to a foreign national who seeks to enter the Philippines solely for the purpose of developing and directing the operations of an enterprise in the Philippines in which his employer has invested or is actively in the process of investing a substantial amount of capital. The length of stay allowed to the foreign national under this visa is coterminous with the contract with his employer. Presently, the Bureau of Immigration issues this type of visa only to foreign nationals from the USA, Germany and Japan.

Pre-Arranged Employment Visa. The standard work visa in the Philippines is known as the Pre-Arranged Employment Visa. This visa is granted to aliens seeking admission into the Philippines for purposes of employment. The length of stay allowed under this visa is one to

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JobStart Philippines Program now Institutionalized by Law

Republic Act No. 10869 (*JobStart Philippines Act*) (RA No. 10869), signed into law on June 29, 2016, institutionalizes the nationwide implementation of the JobStart Philippines Program, which aims "to shorten the youth's school to work transition by enhancing the knowledge and skills acquired in formal education or technical training by jobseekers in order for them to become more responsive to the demands of the labor market." Implemented by the DOLE and the Public Employment Service Offices (PESO) of local government units, the program must include full employment facilitation services such as registration, client assessment, life skills training with one-on-one career coaching, technical training, job matching, and referrals to employers either for further technical training, internship, or for decent employment.

Role of Employer. The law prescribes certain requirements in order for an employer to participate in the program. One of these requirements is that the employer must have the capacity to provide for up to three months internship or work experience to JobStart trainees, with a commitment to pay at least 75% of the daily minimum wage for the relevant city or municipality.

A participating employer is allowed to take in JobStart trainees only up to a maximum of 20% of its total workforce. However, the employer is prohibited from taking in the same trainee to be part of the former's engagement in a similar training program such as the Dual Training Program and the National Apprenticeship Program.

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Publisher's Note: *Employment & Immigration Update is published by the Employment & Immigration Department of SyCip Salazar Hernandez & Gatmaitan (SyCipLaw) as part of its services to its clients and is not intended for public circulation to non-clients. It is intended to provide general information on legal topics current at the time of printing. Its contents do not constitute legal advice and should in no circumstances be relied upon as such. Specific legal advice should be sought in particular matters. Reproduction of this Update or any portion thereof is not authorized without the prior written consent of SyCipLaw. For feedback, please email info@syciplaw.com.*