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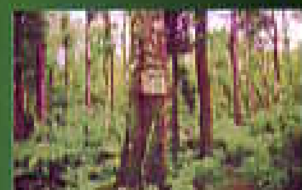

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Workers' Right to Organize Strengthened

Republic Act No. 9481 or "An Act Strengthening the Workers' Constitutional Rights to Self-Organization" signed into law in May 2007 came without a big bang but is expected to have a significant impact on labor's rights and affect employers as well. The new law grants additional influence to labor organizations with the amendment of six (6) provisions in the Labor Code and adding six (6) other new provisions. It took effect on June 15, 2007 after publication in two newspapers of general circulation.

The salient features include the co-mingling of supervisors' union and the rank & file's union, the grant of presumptive legitimacy to a local chapter, the reduction of the grounds for the cancellation of union registration, the bystander rule, and the non-disclosure rule.

The new law permits the supervisors' union to co-mingle with the rank & file's union in the same federation or national union if both work in the same establishment. This could pose a concern to employers as supervisors would be unable to function as the alter ego of management. Conflict of interest situations may arise specially in carrying out disciplinary measures against co-employees, collective bargaining, and strikes. The co-mingling is also being allowed even if supervisors and the rank & file may have different needs and interests.

A new provision allows the chartering and creation of a local chapter that is given presumptive or conditional legitimacy for the purpose of filing a petition for certification election. grant of presumptive legitimacy in Article 234-A does not need prior screening or regulation.

The grounds for the cancellation of union registration have also been reduced from ten to four in Articles 239 and 239-A, limiting it to the following:

a. Misrepresentation, false statement, or fraud in connection with the adoption or ratification of the constitution and by-laws or amendments thereto, the minutes of ratification, and the list of members who took part in the ratification;

b. Misrepresentation, false statement, or fraud in connection with the election of officers, minutes of the election of officers, and the list of voters;

c. Voluntary dissolution by the members; and

d. Voluntary cancellation of registration by the organization itself.

Some employers have expressed the view that the deletion of the other grounds reduces the capability of the government to deal with labor organizations that engage in unlawful activities. There are also several perceived inconsistencies with the other provisions of the Labor Code such as Articles 237

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Labor Law Update

Two decisions were recently issued by the Supreme Court which would illustrate how the doctrine of loss of trust and confidence is applied to the case of a confidential employee performing a non-managerial function and to the case of a managerial employee. there appears to be a difference in the degree of scrutiny applied by the Court, such a ground for dismissal is still from facts established by substantial evidence. To validly dismiss an employee on the ground of loss of trust and confidence, the following circumstances must be present:

1. the loss of confidence must not be simulated;

2. it should not be used as a subterfuge for causes which are illegal, improper or unjustified;

3. it may not be arbitrarily asserted in the face of overwhelming evidence to the contrary;

4. it must be genuine, not a mere afterthought, to justify earlier action taken in bad faith; and

5. the employee involved holds a position of trust and confidence.

Fungo vs. Lourdes School of Mandaluyong

Rodelia S. Fungo (Fungo) was the secretary of the rector of a Catholic school. She had been working in the school for fifteen (15) years prior to her separation from employment. She filed a case for illegal dismissal even though the school presented her resignation letter, application for benefits under the retirement plan, and waiver/quitclaim to prove that her resignation was voluntary. She claims she was compelled to resign after receiving a notice to explain for the terminable offense of breach of trust and being threatened by the rector that her separation pay would be forfeited if she does not tender her resignation. In contrast, the school claimed her resignation was voluntary. They further argued that her separation from service was proper because of willful breach of trust and loss of confidence. It was alleged that she opened the rector's filing cabinet using the key entrusted to her and retrieved confidential files, including the performance appraisal given to the teachers. She attached the performance rating of all the teachers in her letter addressed to the rector, wherein she questioned the low performance rating given to her husband who was also working at the school.

The Court ruled that there was constructive dismissal from employment as the circumstances showed that the school wanted to terminate her employment, but they made it appear that she voluntarily resigned. In the case, the rector told Fungo that he had lost trust and confidence in her and threatened to withhold her separation pay. These compelled Fungo to resign. There is constructive dismissal if an act of clear discrimination, insensibility, or disdain by an employer becomes so unbearable on the part of the employee that it would foreclose any choice by him except to forego her continued employment. It exists where there is cessation of work because "continued employment is rendered impossible, unreasonable or unlikely, as an offer involving a demotion in rank and a diminution in pay."

The Court also ruled that there was no breach of trust and loss of confidence because Fungo showed the documents that she retrieved only to the rector and no one else. She was also given access to the files. To be a valid ground for dismissal, loss of trust and confidence must be based on a willful breach of trust and founded on clearly established facts. breach is willful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. must rest on substantial grounds and not on the employer's arbitrariness, whims, caprices or suspicion. , in order to constitute a just cause for dismissal, the act complained of must be work-related and shows that the employee concerned is unfit to continue working for the employer. The Court ruled that these circumstances were not present and ordered the payment of separation pay and other benefits. (Fungo v. Lourdes School of Mandaluyong, G.R. No. 152531, July 27, 2007)

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(Additional requirements and conditions for federations or national unions), Article 238 (Cancellation of union registration by the Bureau of Labor Registration), Article 241 (Rights and conditions of membership in a labor organization), and Article 249 (Unfair labor practices of labor organizations).

R.A. 9481 limits the role of the employer in a petition of a certification election because in Article 258-A, the employer is not considered as a party to the proceedings with a right to oppose a petition even if it may have a legitimate interest in the petition.

The new law also amends Article 256 of the

Labor Code by providing that a national union or federation is not required to disclose the names of the local chapter's officers and members where the petition for a certification election was filed by a national union or federation. By the simple expediency of creating a local union, the local union can use the national union or federation and may not be compelled to reveal the names of its officers and members.

Attempts are being made to mitigate the adverse implications of the new law to businesses in the drafting of the Implementing Rules and Regulations of R.A. 9481.

Simplified Processes for Mining Applications Introduced

By: Atty. Rica R. De Guzman

The Department of Environment and Natural Resources (DENR) introduced amendments to the present procedures in the approval of applications for Exploration Permits (EPs), Mineral Agreements (MAs), and Financial and Technical Assistance Agreements (FTAAs). For industry players, DENR Administrative Order No. 2007-15 (the New DAO) abbreviates the otherwise long process of obtaining mining rights in the country and will serve to attract more participants in the mining business. Dubbed as Amendments to DENR Administrative Order No. 96-40 or the Revised Implementing Rules and Regulations (IRR) of Republic Act No. 7942 (the Philippine Mining Act of 1995), the New DAO became effective on August 9, 2007.

1. Areas closed to mining.

Additional areas were identified including: (i) offshore areas within five hundred (500) meters from the mean low tide level and onshore areas within two hundred (200) meters from the mean low tide level along the coast; and (ii) areas for seabed/marine aggregate quarrying.

2. NCIP and LGU Certifications.

The New DAO now requires the submission of the Certificate of Non-Overlap (CNO) or Certificate Precondition (CP) issued by the National Commission of Indigenous Peoples (NCIP) within ninety (90) days from the issuance of the EP, MA or FTAA, as the case may be. For MAs and FTAAs, it is still required to secure the endorsement of the project by at least majority of the Sanggunian concerned prior to commencement of development and/or utilization activities.

3. Publication and Notice Periods.

There is also a significant reduction in the issuance of Notices of Applications for EPs, MA or FTAAs to within five (5) working days instead of fifteen (15) working days. The Regional Offices of the Mines and Geosciences Bureau (MGB) are now given more latitude and authority to act on the applications pending before them without waiting for the Central Office to issue the notices. The period for filing of adverse claims to applications for EPs, MAs and FTAAs was likewise reduced from thirty (30) days to ten (10) days.

4. Approval of EPs by Regional Directors.

The Regional Directors may grant the authority to approve and issue EPs for areas outside of Mineral Reservations upon prior clearance by the Director. The 5-month period for mandatory processing was also removed. Related to this is the re-inclusion of the option previously given to an EP holder under an old DENR administrative order to convert totally or partially its EP to an MPSA or FTAA for the purpose of undertaking detailed exploration, if the exploration activities indicate a resource discovery. All that is required is the filing of a Letter of Intent with the Regional Director and not the MGB Director prior to the expiration of the EP provided the MPSA or FTAA Application shall be filed within 30 days thereafter.

5. Approval of Applications for Renewal of EPs.

In the case of renewals of EPs, while it is still the DENR Secretary who will approve renewals, the previous five (5) months processing period, the lapse of which would result in a consideration that the application for renewal is deemed approved, has now been reduced to one (1) month.

6. Additional Terms and Conditions of an Exploration Permit.

The New DAO adds the following terms and conditions:

A. The Permittee may surrender the Permit or exercise the priority right to apply for a Mineral Agreement or FTAA over the permit area, which application shall be granted if the Permittee meets the necessary qualifications and the terms and conditions of any such agreement.

B. The Permit excludes commercial extraction and/or construction of infrastructures designed for mining development and mining production.

C. The Permit does not grant beneficial ownership of the minerals to the Permittee.

D. The Director/ Regional Director concerned shall cause the cancellation of the Exploration Permit for failure of the Permittee to comply with the terms and conditions under which the Permit is issued.

E. The Permittee shall assume all the exploration risks and shall not be entitled to reimbursement of its expenses.

F. The Permittee shall comply with the minimum ground expenditures during the term of the Permit, ranging from P100/hectare on the 1st year to P1,150 on the 7th year.

7. Transfer or Assignment of Exploration Permit.

The previous rule that any transfer or assignment of an Exploration Permit requires the approval of the DENR Secretary upon the recommendation of the Director of the Bureau has now been amended such that only the approval of the Director is necessary.

8. Cancellation of an Exploration Permit.

The DENR Secretary and Regional Director concerned are now authorized to cancel the permit.

9. Maximum Areas Allowed under a Mineral Agreement.

An important change introduced by the new DAO is the reduction of the maximum area that corporations, partnerships, associations or cooperatives may apply or hold for onshore mining in one province from one hundred (100) blocks or approximately eight thousand one hundred (8,100) hectares to five thousand (5,000) hectares for metallic mineral and two thousand (2,000) hectares for non-metallic minerals per final mining area and, in case of onshore mining in the entire Philippines, five thousand (5,000) hectares per final mining area subject to the IRR .

10. Additional Terms and Conditions of a Mineral Agreement.

A. A stipulation that the Contractor shall assume all the risks which are inherent and incidental to the mining operations such that it will not be entitled for reimbursement of expenses even if no minerals in commercial quantity are developed and produced;

B. A stipulation that the financial records of the Contractor related to the mining operations shall be opened to Government inspection and audit;

C. A stipulation that the Mineral Agreement does not grant beneficial ownership of the minerals to the Contractor; and

D. A stipulation that the Contractor shall execute a firm commitment, for ground expenditures.

Lastly, the amendment introduced an increase in the final mining area during the development/construction/operating period under a mineral agreement.

TRADEMARKS
Frequently Asked Questions (Part Two)

6. How do I obtain registration of my mark?

You may file an application for registration directly by hand with the Intellectual Property Office or online using the forms made available by the same agency. You are given the opportunity to claim a priority filing date if a trademark application for the same mark had been filed in another country. The IPO will examine the mark to determine whether it complies with the formal and substantive requirements of registrability. You are required to file a declaration within three (3) years from the filing of the application that it is using the mark in commerce.

Once the IPO determines that the mark complies with the agency's requirements, the mark will be published to allow the public to file any opposition to the registration of the mark. If an opposition is filed within thirty (30) days from publication of the mark, the IPO will adjudicate the matter and decide whether to rule in favor of the opposition and deny the registration of the mark or to dismiss the opposition. When the period for the filing of the opposition has expired without any opposition being received by the IPO, said agency will issue a Certificate of Registration after payment of the required fee. Upon issuance of the certificate, the trademark shall be published in the IPO Register.

7. How long does a registration last?

A Certificate of Registration shall remain in force for ten (10) years and is renewable for periods of ten (10) years. The registrant, however, is required to file a declaration of actual use and evidence to that effect within one (1) year from the fifth anniversary of the date of registration of the mark. Otherwise, the mark will be removed from the IPO Register.

8. Can I sell my mark?

Yes. The registered mark and even a mere application for registration of a mark may be sold, assigned or transferred with or without transferring the business using the mark. The only requirement is that the sale, assignment or transfer be done in writing and recorded with the IPO to have an effect on third parties.

9. Can I license my mark?

Yes. Licensing allows you as licensor the discretion to control the quality of the goods or services in connection with which the mark is used. The license may cover the registration of the mark or merely the application for registration thereof. The license contract must be recorded with the IPO to have an effect on third parties. The IPO shall keep the contents of the license confidential but publish a reference to such recording.

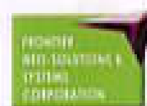
10. When is my mark infringed?

Your registered mark is infringed when, in the course of trade or business, another person, without your consent as owner:

(a) Uses any reproduction, counterfeit, copy or colorable imitation of your registered mark or the same container or a dominant feature thereof in connection with the sale, offering for sale, distribution, advertising of any goods or services, including preparatory steps necessary to carry out the sale, where such use is likely to cause confusion, or to cause mistake, or to deceive; and

(b) Reproduces, counterfeits, copies or colorably imitates your registered mark or dominant feature thereof and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising, where such use is likely to cause confusion, or to cause mistake, or to deceive.

Infringement of the registered mark takes place regardless of whether there is an actual sale of goods or services using the infringing material.



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Sim v. NLRC and PCI-Equitable Bank

Corazon Sim was a manager of the Frankfurt Representative Office of PCIBank. She received a notice of dismissal from the Senior Officer, European Head of PCIBank, and Managing Director of PCIB- Europe on the ground of loss of trust and confidence. Sim was charged with the mismanagement and misappropriation of 3,000,000 lire from the bank's account for the *Radio Pilipinas sa Roma* radio program of the company. The bank said that the program was already off the air when the withdrawal was made.

The Court upheld the dismissal ruled that being a managerial employee, loss of trust and confidence is a valid ground for dismissal. The mere existence of a basis for believing that a managerial employee has breached the trust of the employer would suffice for his or her dismissal. The Court held: "[when an employee accepts a promotion to a managerial position or to an office requiring full trust and confidence, she gives up some of the rigid guaranties available to ordinary workers. Infractions, which if committed by others would be overlooked or condoned or penalties mitigated, may be visited with more severe disciplinary action. A company's resort to acts of self-defense would be more easily justified."

In addition, the Court ruled that labor arbiters have original and exclusive jurisdiction over claims arising from employer-employee relations, including termination disputes involving all workers, among whom are overseas Filipino workers. *(Sim v. NLRC and PCI-Equitable Bank, G.R. No. 157376, October 2, 2007)*

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