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## China Makes Two Major Moves in Its Social Insurance System

Recently, the Chinese government made two major moves related to its social insurance system. First, China started implementing the social security totalization agreements signed with Canada and Finland. Second, China issued a plan to potentially merge China's maternity and medical insurance programs.

### Social security totalization treaties

Although the social security totalization treaties with Canada and Finland were signed in 2015 and 2014 respectively, China did not implement the China-Canada treaty until January 1, 2017 and the China-Finland treaty until February 1, 2017.

Under the treaties, employees who are hired by entities in Canada or Finland but seconded to work in China can be exempted from certain social insurance contributions in China. For Canadian secondees, the exemption covers pension contributions. For Finnish secondees, the exemption covers both pension contributions and unemployment insurance contributions. All of these exemptions are likewise available to Chinese secondees working in Canada and Finland.

However, both treaties are clear that the exemptions are not automatic. Seconded employees unable to provide proof of enrolment in their home country's social security scheme must fully contribute to the host country's social insurance scheme.

### Maternity and medical insurance merger

According to the *Trial Plan for Merging Maternity Insurance and Medical Insurance*, the merger of the maternity and the medical insurance programs will be tested on a trial basis in 12 designated cities. Major first-tier cities such as Beijing, Shanghai, Shenzhen and Guangzhou are not included among the trial cities.

The trial will begin by July and then last approximately one year. If the government considers the trial a success, the maternity and medical insurance program merger will be extended nationwide. If extended nationwide, the current Social Insurance Law will need to be amended.

#### Key take-away points:

Since pension contributions are the most costly of the five social insurance contributions in China, the social security totalization treaties with Canada and Finland will significantly reduce costs for seconded employees from Canadian and Finnish companies in China.

Although the maternity and medical insurance reform will not reach major first-tier cities like Beijing and Shanghai for at least another year, companies should monitor the trial program to understand whether and how the insurance merger might be implemented nationwide.

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## Government Announces Policy to Fingerprint Foreigners Entering China

On February 9, 2017, the Ministry of Public Security in China announced that the Chinese border control authorities will start to collect the fingerprints of inbound foreign nationals aged from 14 through 70 at the nationwide open entry ports. This new policy is based on the "Law of the People's Republic of China on the Administration of Exit and Entry" which stipulates that the Ministry of Public Security may implement certain measures to collect the biological identification information (such as fingerprints) for passengers passing through the border if required.

Shenzhen is the first city to implement this policy on a trial basis. Immigration officers at Shenzhen airport will instruct foreign nationals to leave ten fingerprints as part of the process to go through the immigration desk to enter China. It is expected that other open entry ports will follow this policy in batches as instructed by the Ministry of Public Security.

According to the Ministry of Public Security, the fingerprints collection process may be waived under certain circumstances, for example, for foreign nationals who hold diplomatic passports or visas and individuals who cannot provide any of the ten fingerprints. Business travellers should expect to be requested to leave fingerprints when entering China in the coming months which may prolong the immigration clearance process.

## Government Signals Intent to Change Laws to Improve Workplace Safety

On January 4, 2017, the State Council issued the *Plan on Occupational Disease Prevention for Years 2016 to 2020*. This plan follows the *Guidance on Pushing Forward Reform and Development in Work Safety* announced in December 2016. Together, the plan and the guidance signal China's clear intent to reduce occupational disease hazards and workplace accidents.

The plan aims to establish a system in which occupational disease prevention becomes a shared responsibility that includes government regulation, industry self-regulation, employer accountability, employee participation and public supervision. The plan also suggests improving laws and regulations on evaluating occupational disease hazards, examining employee health and diagnosing occupational diseases.

The guidance aims to strengthen laws, safety standards and government supervisory mechanisms to more effectively prevent workplace accidents. The guidance also suggests amendments to criminal laws to expand criminal liability for employers that fail to address potential safety hazards or refuse to follow instructions from the work safety administration.

#### Key take-away points:

The government appears to recognize the severity of occupational disease hazards and workplace accidents for both employees and society at large. Although the guidance and the plan are broad guidelines rather than finalized laws and regulations, they represent important steps toward creating those final laws and regulations to more effectively protect employee health and ensure workplace safety.



## Government Working on Various Measures to Further Develop Data Privacy Protections

Although China currently has no comprehensive data privacy law, China is taking steps toward protecting personal information through various national, local and sector-specific rules, regulations and guidelines. Some of the recent developments are summarized below.

### Privacy in credit rating information

In 2016, the Chinese government proposed an initiative to develop a national credit rating system. As part of this initiative, the Standing Committee of the Shanghai Municipal People's Congress recently issued a draft regulation on establishing this credit rating system. In general, the draft creates a credit rating scoring system with associated incentives and penalties, categorizes credit-related information, and provides rules on the collection and sharing of information.

In terms of collecting and sharing information, the draft:

- prohibits the collection of certain private information, such as religious belief, genetic information, fingerprints, blood type and disease history
- requires written consent from an individual before a credit service organization or other enterprise or institution can collect any income, bank deposit, market security, commercial insurance, real estate or tax information
- limits any collected information that impacts negatively on an individual's or entity's credit rating to only be used and disclosed for five years.

### Protection of consumer financial information

The People's Bank of China issued the *Implementation Measures for Protecting Financial Consumers' Rights and Interests*.

The implementation measures:

- require an individual's financial information collected in China to be stored, processed and analyzed in China
- generally prohibit Chinese financial institutions from releasing to an overseas party the financial information of an individual located in China
- require the transfer of personal financial information to an overseas entity in a cross-border transaction to be authorized by the relevant individual and to meet the requirements established in laws and regulations.

The above measures would likely impact companies' ability to conduct financial background checks of prospective employees.

### Elimination of cyber fraud

As part of the campaign to crack down on cyber fraud, the Supreme People's Court is reportedly drafting a judicial interpretation on the criminal infringement of personal data.



## Guidelines for security of personal information

On December 20, 2016, China's National Information Security Standardization Technology Committee issued for public comment a draft national standard called the *Information Security Techniques — Personal Information Security Specifications*. The draft aims to set out general principles for personal data protection in terms of collection, storage, transfer and publication of personal data. Such draft guidelines would be similar to another national standard document providing guidance on the handling of electronic personal information that took effect in 2013.

### Key take-away points:

Every employer should monitor for regulatory changes in China's personal data privacy laws and regulations. Based on those changes, each employer should review its company policies and contracts to: (i) ensure internal compliance with those changes in the collection, use, storage and transfer of its employees' personal information; and (ii) ensure its employees are also aware of and compliant with China's data privacy rules while fulfilling their job duties.

## Guangdong, Tianjin and Jiangsu Enhance Protections for Female Employees

Recently, Guangdong Province and Tianjin Municipality changed their local rules on protecting female employees, while Jiangsu Province released draft regulations on this same topic. These regulations demonstrate a continuing trend among local governments to strengthen workplace protections for female employees.

On February 1, 2017, the *Implementing Measures of Guangdong Province for Regulations on the Labor Protection of Female Employees* took effect to supersede the 1989 implementing measures on the same subject. The measures address and clarify several key issues on maternity leave and benefits, nursing leave, and non-discrimination. The measures provide more generous leave than national law for pregnancies that end in miscarriage (e.g. 75 days of leave for a miscarriage during the third trimester of pregnancy). Furthermore, if an employee needs to take leave to avoid miscarriage as instructed by a doctor, the leave period should be treated as sick leave. The measures' other most noticeable change clarifies the employer's payment responsibility for maternity allowance. During maternity leave, the employer must pay any shortfall between the maternity allowance paid by the maternity insurance fund and the employee's average monthly salary over the past 12 months before childbirth.

The *Provisions of Tianjin Municipality for Protecting the Rights and Interests of Women* will take effect March 1, 2017. According to the provisions, an employment contract with a female employee should include provisions on the protection of female employees and may not restrict her right to marriage and childbirth. In addition, if the employee experiences difficulties in caring for her baby after the maternity leave period ends, the employee may take up to six months' nursing leave with employer approval at 80% of her base salary if the parties cannot agree on an adjusted salary during this period. This nursing leave period may not be a factor in decisions about the employee's future promotions, salary adjustments, or service year calculations.



On February 9, 2017, Jiangsu authorities publicized the draft *Regulations on the Implementation of Special Provisions for the Labor Protection of Female Employees*. The draft includes more generous miscarriage leave than national law, and includes increased rest entitlements and working hour restrictions for employees in their first trimester of pregnancy. It also gives female employees the right to resign and demand severance if a company fails to take effective action to prevent sexual harassment. The provincial government is still in the process of collecting public comments on the draft. There is no timeline on when the draft will be promulgated.

**Key take-away points:**

Local governments in China are enhancing protections for female employees. Employers should stay informed about these latest developments and update policies, procedures and employment contracts as necessary to protect female employees in accordance with local laws and regulations.

## Zhejiang Province High Court Provides Guidance on Numerous Labor Dispute Issues

On December 30, 2016, the Zhejiang Province High People's Court issued a *Reply to Several Issues Concerning Ruling on Labor Dispute Cases* to guide lower courts when ruling on controversial labor dispute issues. The high court's reply should significantly influence how local judges handle labor dispute cases in Zhejiang Province (where Hangzhou and Ningbo are located).

The following are key highlights from the guidance:

- **Bonus:** An employee cannot recover an unpaid performance bonus if the employer denied the bonus based on a duly adopted employee handbook/company policy that provides the bonus is conditioned on employment as of the bonus payment date.
- **Sick leave:** An employer can extend an employee's probationary period by the number of sick leave days used by the employee during the probationary period.
- **Resignation:** Even if an employee has submitted a resignation with 30 days' notice, the employee and employer are deemed to have agreed to continue the performance of the original employment contract if, after the 30 days: (i) the employee continues to work; and (ii) the company does not object to the employee continuing to work.
- **Non-compete:** An employer is not required to pay three months' non-compete compensation if the employer waives the non-compete obligation when employment terminates.
- **Medical treatment period:** Employees who suffer from certain severe diseases (such as cancer, psychosis and paralysis) do not automatically qualify for the maximum statutory medical treatment period (i.e. statutory sick leave), which is 24 months. Instead, the medical treatment period should be determined by the employee's total working years and specific service years with the current employer. If the employee does not recover before the end of this medical treatment period, the employee can apply to extend the medical treatment period.



### **Key take-away points:**

Companies operating in Zhejiang province should welcome this guidance not only for the clarity it brings on controversial labor dispute issues but also for its specific positions on certain of those issues — particularly the enforcement of employee handbook bonus policies. However, companies operating outside Zhejiang province should not assume courts in other provinces and cities will reach similar conclusions on these issues. Those companies should ensure that they are familiar with the local court view on these issues.

## **Former Employee Ordered to Publicly Apologize and Pay Legal Costs for Defaming Employer**

Recently, a Shanghai court ordered a former employee to publish a written apology in the media and pay part of the employer's legal costs for defaming the employer.

Following termination of employment, the former employee emailed former colleagues and the employer's customers alleging that while still employed the employer had among other things forced her to sell expired-warranty or unregistered products in violation of Chinese laws, stolen her personal information by installing malware on her cell phone, and terminated her employment unfairly as soon as there was a slowdown in work. Some individuals receiving the emails were sympathetic and expressed outrage about the employer's alleged behavior.

The former employer sued under tort law claiming reputational infringement. The former employer claimed that all the allegations in the former employee's emails were untrue and that those emails resulted in the loss of potential business opportunities for the employer. The court ruled in favor of the employer and ordered the former employer to publish a written apology in the media and pay part of the employer's legal costs.

### **Key take-away points:**

Employers concerned with how to prevent a former employee (whether terminated unilaterally or mutually) from disparaging the employer's reputation should welcome this case.

This case shows that employers can use the tort theory of reputational infringement to protect themselves against defamation by former or current employees.

## **Shanghai Court Upholds Termination of Senior Executive with Large Personal Debt**

The Shanghai Hongkou District People's Court recently rejected an employment reinstatement claim from a company executive who was delinquent on a large personal debt and had been declared by the PRC Supreme People's Court as a person with an unreliable credit rating.

The executive was delinquent on a CNY 10 million personal debt. Due to this large delinquent amount, the PRC Supreme People's Court added the executive's name to the blacklist of persons with an unreliable credit rating. Once the executive's name was added to the blacklist, the company could no





longer register the executive as the director of the company. Therefore, the company terminated the executive.

The Shanghai court upheld the termination and denied reinstatement because anyone delinquent on a significant personal debt is restricted by law from working as a director, supervisor or other senior manager. Although the court did not cite the specific law that provides this restriction, the Company Law applies in these exact circumstances to restrict a person from senior executive positions. Also, the news report did not state what termination ground under the Employment Contract Law ("**ECL**") was used to justify the termination.

#### **Key take-away points:**

This court ruling indicates the possibility for companies to terminate an employee who fails to meet the qualification requirements for senior executive positions under the Company Law. However, the Company Law's personal credit requirement is not listed as a statutory ground for termination under the ECL itself. Therefore, companies should still be cautious and not solely rely on the Company Law to terminate a senior executive for an unreliable credit rating. To strengthen the termination position, the company may try to connect the requirements under the Company Law to the statutory termination grounds under the ECL, such as by stipulating that a fulfilment of Company Law requirements for senior executives is a condition of employment and that failure to abide by Company Law requirements may be considered a serious breach of company rules.

## **Chongqing Court Holds Two Employees Partly Liable for Their Employer's Losses from Scam**

In a recent Chongqing court case, two employees were held partly liable for the employer's CNY 670,000 in losses caused by their breach of job duties and gross negligence in falling for a scam.

One employee, the company accountant, invited the other employee, the company cashier who managed the company's bank accounts, to an online social media chat group after receiving instructions to do so from the social media account of the company's managing director. In the group chat, the company cashier received an instruction from the managing director's social media account to transfer company funds. The instruction asked for CNY 670,000 to be transferred to the bank accounts of two unknown persons. The cashier followed the instruction without confirming it with the managing director in person.

After the employer discovered the fraudulent transfers, it sued the two employees. Although the employees argued to the Chongqing court that the law provides only two circumstances when an employee is required to compensate an employer for damages (i.e. the employee violates a training bond agreement or a non-compete agreement), the court held that the employer could recover based on the employment contracts with the employees.

The Chongqing court cited as the governing law the *PRC Tentative Regulation on Salary Payment*, which allows an employer to recover any damages attributable to the employee in accordance with the employment contract. The employment contracts with the company accountant and



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company cashier each stated that the employee should compensate the company for damages caused by employee conduct in breach of law, company policy, labor discipline or job duties. The Chongqing court found that the accountant and the cashier were overly credulous and failed to observe basic financial processes and thus acted in breach of their job duties. The court also found that the employees were grossly negligent by not exercising the appropriate care and caution when executing payments for the company. Therefore, they were liable for the company's damages.

However, the Chongqing court further ruled that the employer was also at fault because it had not established any formal written financial policies. Therefore, the court held that the two employees were each liable for only 10% of the total damages suffered by the employer.

### **Key take-away points:**

All employment contracts should include a clause on compensation for damages caused by the employee's wrongful conduct during the performance of duties. However, in judicial practice, the employee's conduct giving rise to compensatory liability seems to be limited to intentional wrongdoing and gross negligence. Claims for compensation based on slight fault or mere negligence in fulfilling job duties have less chance of being supported by the courts.

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