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China Employment Law Update

People's Republic of China

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China Passes General Provisions of Civil Law

On March 15, 2017, the National People's Congress reviewed and approved the *General Provisions of Civil Law*, which will take effect on October 1, 2017. The new provisions will replace the *General Principles of Civil Law*, which have been in place since 1986. Many articles in the *General Principles of Civil Law* have become obsolete or immaterial because of far-reaching and transformative economic and technological developments. The new provisions revise these outdated clauses and add new clauses to better address current conditions in China.

The following are key highlights from the new provisions:

- Statute of limitations extended to three years: The statute of limitations for civil actions has been extended from two to three years.
- Privacy and personal information protected: For the first time in China's civil law, an individual's personal information is deemed as a personal right and is protected from illegal collection, use, processing, trade, dissemination and disclosure. Together with other laws and regulations, enshrinement of these protections in the civil law reflects the urgent need to protect personal information in the age of the internet and big data.

Key take-away points:

While the statute of limitations for employment disputes will remain at one year, certain other types of disputes employers may face (such as discrimination lawsuits, trade secret disputes, etc.) may be considered civil disputes and would be impacted by the new statute of limitations. The new provisions are expected to form the opening chapter in a comprehensive civil code planned for enactment in 2020. According to the legislative schedule, the next step will be integrating the individual laws that deal with property, contract, tort, marriage and inheritance into the civil code.

New Work Permit System Implemented Nationwide

On March 28, 2017, the Foreign Expert Bureau, the Ministry of Human Resources and Social Security, the Ministry of Foreign Affairs and the Ministry of Public Security jointly issued a notice which announced the full implementation of the new work permit system in every city in China. This full implementation follows the trial period in several provinces and cities that started November 2016 (please see our prior newsletters in October and December 2016).

Going forward, all companies that wish to hire foreign employees should submit work permit applications through a unified nation-wide platform. However, the specific process and documentation requirements may still differ from city to city. For example, an application to change one's employer in Shanghai now requires the applicant to provide the degree certificate which should be legalised by a Chinese embassy/consulate, while a copy of the degree certificate will suffice if a foreign national changes employers domestically in Beijing. In most cities, the no-criminal certificate is required to be legalised by a Chinese embassy/consulate for new applications, while the

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original no-criminal certificate issued by the police station will suffice in Shanghai.

According to the notice, relevant authorities are to speed up drafting new regulations on administration of foreign nationals' employment in China and a guideline catalogue for foreign nationals on working in China. The current eligibility criteria and work permit application guidance will be further updated. A series of related policies such as a credit system for foreign nationals and hiring entities will be introduced soon.

Key take-away points:

Pursuant to the new work permit system and the future regulation changes, we anticipate the trend is to encourage high-talent foreign professionals and limit low-end foreign labour. Due to the new work permit system, the required documents will be cumbersome and the processing time will likely take longer. Even in Shanghai, where the policies were more relaxed, one or two months of lead time will be required for documentation preparation before commencing the application process.

Zhejiang Province Issues New Rules on Wages

On March 2, 2017, the Zhejiang provincial government issued the *Zhejiang Provincial Administrative Measures on Wage Payment by Enterprises*, effective as of May 1, 2017. These new rules supersede the previous version of the wage payment rules with the same name issued in 2002 and amended in 2010. The new rules establish payroll and attendance record requirements and revise earlier wage payment rules.

Payroll and attendance records

Under the new rules, the employer must compile and maintain in writing:

(i) payroll records and employee payslips; and

(ii) employee attendance records with monthly employee confirmations of those records.

The payroll records and attendance records should be kept for at least two years. If the employer forges, hides or destroys any payroll or attendance records, the employer can be fined CNY 5,000 to CNY 20,000, and the legal representative or person directly in charge of payroll matters can be fined CNY 1,000 to CNY 10,000.

Amended wage payment rules

Although the key rules on wage payments remain the same as under the old rules, the new rules now require:

- employees who no longer provide normal services to an employer during a business suspension or closure should be paid at least 80% of the local minimum wage
- employee wage payments can now be postponed up to 30 days (from 15 days previously) through collective bargaining or individual employee agreements if the employer encounters difficulty in business operations

- payment of outstanding wages at termination must occur in full within five days of the employer "processing the termination procedures" rather than from the actual termination date
- fines for wage underpayment have been increased to:
  - CNY 10,000 to CNY 30,000 in ordinary circumstances
  - CNY 50,000 to CNY 100,000 in extraordinary circumstances where the failure to pay the wages has impaired public security.

Key take-away points:

Employers in Zhejiang Province should update or establish payroll and attendance record policies and systems to fully comply with the new rules, including with the two-year record maintenance requirement. They should also amend their employment contracts, policies and practices to reflect the wage payment requirements during a business suspension in case those are in conflict with the new rules.

Guangdong Provincial Government and Highest Court in Guangzhou Issue Guidance on Handling Employment Disputes

On March 16, 2017, the Guangdong provincial government issued the *Guangdong Provincial Measures on Handling Employment Disputes*. The measures streamline Guangdong's employment dispute resolution system by aligning it with current practices in national law and rules on dispute prevention, mediation and arbitration. The measures will take effect on May 1, 2017.

Specifically, the measures:

- require employers to establish internal negotiation mechanisms with employees and to respond timely to employee complaints and claims;
- require mediation organizations to close labor dispute mediation within 15 days after receiving the mediation application;
- allow the labor arbitration commission to adopt simplified procedures by shortening the evidence submission and defense periods and by issuing decisions based solely on documentary evidence without holding a hearing;
- require employers facing a major change in circumstances that renders performance of employment contracts impossible to develop a working plan, which can include employee adjustment plans, employment contract amendment, termination or renewal plans, etc.
- allow the labor arbitration commission to request the local trade union, industry association or competent administrative department to participate in arbitration and assist in mediation during group labor disputes involving more than 50 employees; and
- require arbitration parties in an employment dispute to corroborate the source of audio, video and electronic evidence (audio and video evidence must be accompanied by a transcript of the recording).

On March 27, 2017, the Guangzhou Intermediate People's Court published eight judicial guides for trial judges. One of these judicial guides addresses employment disputes and includes the following topics: dispute resolution procedures, identification of employment relationships, employment remuneration, social insurance benefits, and termination and severance.

Specifically, the judicial guide reiterates that:

- a company policy can be recognized as valid even without first going through the employee consultation procedure if the policy complies with all laws and regulations, contains no obviously unreasonable provisions, and has been publicized or notified to employees with no employee objections raised; and
- a company must establish a service relationship with any employee who reaches the statutory retirement age even if the employee is not entitled to a pension.

Key take-away points:

Guangdong is streamlining its labor arbitration procedures to reduce arbitration-related burdens and time delays.

Additionally, employers in Guangdong need to handle group labor disputes carefully, and should prepare comprehensive working plans when dealing with employment relationships impacted due to a major change in objective circumstances.

It should also be noted that the courts in Guangzhou have reiterated their flexible attitude in dealing with the employee consultation procedure for adopting employee handbooks and other employment-related policies, and that individuals who work passed the retirement age will be deemed to have a service relationship even if they do not enjoy pension benefits.

Unilateral Termination Without Notifying Upper-Level Union Ruled Unlawful

In a recent case in Suzhou, the court ruled that a unilateral termination without notifying a union in advance was unlawful, even though the company itself had no union.

A company sought to temporarily assign an employee to assist other departments. While refusing the temporary assignment, the employee threatened and argued with his supervisor. The police were called to handle the dispute. Afterwards, the company unilaterally terminated the employee because the altercation was a serious violation of its employee handbook.

Although the court agreed that the employee had seriously violated the employee handbook, the court ruled the termination unlawful because the company had failed to notify the upper level union before terminating the employee. According to Jiangsu Province regulations, a company should notify a union of a unilateral termination in advance. If the company has not established a union, then the upper level local union should be informed instead. In this case, the company had no union and did not notify the upper level union. Therefore, the court ruled the termination unlawful and ordered double statutory severance as the legal remedy.

Key take-away points:

National law is silent on whether a company is required to notify the upper level union of a unilateral termination decision if it has not established its own union. However, companies in Jiangsu Province should provide this notification to the upper level union according to Jiangsu regulations. In other jurisdictions such as Shanghai where local regulations do not provide clear guidance, courts would have more discretion in this regard.

WeChat Screenshots Help Employee Claim Overtime Pay

Recently in Shanghai, the Jing'an District Court admitted WeChat screenshots into evidence to support an employee's claim for overtime pay.

After losing an arbitration claim seeking unpaid overtime following a mutual termination, an employee brought the claim to court. At trial, in addition to submitting email correspondence and attendance sheets, the employee also submitted two screenshots of WeChat conversations to support the overtime claim. In one of the WeChat conversations, the employee's manager asked the employee to work on the weekend.

Based on the WeChat screenshots and the other evidence submitted, the court found that the employee had worked overtime and therefore ruled that the employer should pay the employee CNY 5,724 in unpaid overtime.

Key take-away points:

As communication through social media platforms becomes increasingly common in the workplace, employers need to be aware that work-related communications on social media platforms may be admitted into evidence against them. Likewise, employers should remember to check social media platforms for work-related communications containing favorable evidence that may be used in a dispute.

Tianjin Court Refuses to Reinstate Pregnant Employee

In a recent Tianjin case, the court rejected an employment reinstatement claim from an employee who discovered her pregnancy shortly after the non-renewal of her employment contract.

Shortly before the employee's employment contract was set to expire, the employer offered to renew it under the same terms. The employee declined to renew since her sales performance under the contract had been poor. The employer and the employee then agreed to end the employment relationship by signing a non-renewal agreement.

Shortly after the non-renewal, the employee discovered she was four to six weeks pregnant, meaning she had been pregnant before the non-renewal agreement. The employee demanded the non-renewal agreement be revoked and her employment be reinstated because:

(i) she was pregnant when the employer ended the employment relationship; and

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(ii) the non-renewal agreement did not reflect her genuine intent since she was unaware of her pregnancy at that time.

Article 45 of the *PRC Employment Contract Law* provides that if an employee is pregnant when the employment contract expires, the employment contract term should be extended until the employee's nursing period ends. However, the Tianjin court opined that this article was not applicable in this case since the employer was also unaware of the employee's pregnancy when ending the employment contract. Thus, the court ruled that the employer did not end the pregnant employee's employment while knowing about her pregnancy and that the non-renewal was lawful.

Key take-away points:

Although the case report did not specify the role the employee-signed non-renewal agreement played in the court's factual determination that the employer did not know about the pregnancy, based on our experience, the court would have been more likely to reinstate the employee if the employer had merely sent a unilateral non-renewal notice. Therefore, use of a non-renewal agreement when an employment contract expires, while not required, can help reduce the risk of an employee successfully challenging a non-renewal.

Employers should be aware this decision by the Tianjin court may not be representative of all jurisdictions. Some courts might revoke the non-renewal agreement and reinstate the employee based on the view there was a "major misunderstanding" when the agreement was entered into, though if the agreement includes certain irrevocability language, this may reduce such risk.