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China Employment Law Update

People's Republic of China

June 2017

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Judicial Interpretation Clarifies Issues Concerning Personal Data Criminal Cases

On May 8, 2017, the PRC Supreme People's Court and the Supreme People's Procuratorate jointly issued the *Interpretation of Various Issues Concerning Application of Law in Handling Crimes of Infringing upon Citizen's Personal Data* ("**Personal Data Crime Interpretation**"), which provides more detailed guidelines for handling criminal cases involving infringement of personal data.

Unlike many other countries, China currently does not have a comprehensive personal data protection law. There have been some regulations issued by various governmental bodies to address data protection issues, which have not been well enforced due to the lack of significant punishment for offences. The PRC Criminal Law, amended in 2015, provided a general definition for the "crime of infringing upon citizen's personal data", but left some issues for the Personal Data Crime Interpretation to clarify.

Under the Personal Data Crime Interpretation, an individual's name, ID card number, telecommunication contact details, address, account password, wealth status, geographic tracking records and other information that can identify the individual or reflects the individual's progress of activity are defined as "personal data".

The Personal Data Crime Interpretation prohibits the illegal obtainment, sale, or provision of personal data. The severity of an offence will be determined by reference to the quantity of personal data that has been illegally obtained, sold or provided. For example, it will be a "crime of infringing personal data" if the offender illegally obtains, sells or provides:

- no less than 50 pieces of personal data relating to an individual's whereabouts, content of telecommunication, credit information or property information; or
- no less than 500 pieces of personal data relating to an individual's lodging, telecommunication record, health status or transaction information which may impact the individual's personal or property security; or
- no less than 5000 other pieces of personal data relating to matters other than the above two categories.

An offender can be sentenced to imprisonment for up to 3 years along with a criminal fine. If a company commits a "personal data infringement crime", the in-charge person (for example, the general manager) can be punished according to the above standards for individual offenders, and the company can face a criminal fine.

Along with the Personal Data Crime Interpretation, the Supreme Court has published a summary of several typical criminal cases involving "personal data infringement" handled by the courts in recent years, in order to provide more general guidance. In one of these cases, the internal IT system of a popular hotel in China was hacked, and more than 20 million pieces of its guests' personal data were disclosed online. The offender in the case

downloaded this disclosed personal data from the internet, uploaded it to his website and provided the personal data to subscribers for a charge. It was found to be a serious offence, and the offender was sentenced to prison for 3 years.

Key take-away points:

Although China currently does not have a comprehensive personal data protection law, the various existing regulations require the personal data owner's consent to be obtained for collection, storage, use and transfer of the data. It can be expected that the existing personal data laws will be further revamped to better protect citizens' personal data.

Employers often collect various personal information from employees for HR management and payroll purposes. Therefore employers should review their current practice and/or policies in this regard to ensure compliance with the law.

Beijing High Court Opinion Makes Redundancies in Beijing Much More Difficult

On April 24, 2017, the Beijing High People's Court and Beijing Municipal Labor Arbitration Commission jointly issued new guidance ("**New Guidance**") to further clarify certain controversial issues left unaddressed in earlier sets of court opinions issued in previous years.

One of the most important changes in the New Guidance is the apparent reduced scope of the "major change" termination ground. Under the PRC Employment Contract Law ("**ECL**") if there is a "major change" in the objective circumstances upon which the employment contract was originally agreed, rendering the employment contract unenforceable, and the company and the employee cannot reach an agreement on the amendment of the employment contract through consultation, the company can unilaterally terminate the employee ("**Major Change Ground**"). This termination ground is often used in restructuring situations.

The New Guidance defines "major change" to include only three types of changes: (i) force majeure caused by natural disasters (e.g. earthquakes, flood, etc.); (ii) force majeure caused by the change of laws, regulations and policies; and (iii) change of business scope of companies which are subject to special approval. This is a much narrower scope than previous guidance and court practice. Therefore, it will be risker for companies to terminate employees based on the Major Change Ground for circumstances outside the reduced scope set out above.

Key take-away points:

Often when companies undergo an internal restructure, the "major change" ground is used by employers to terminate employees who refuse to sign a mutual termination agreement. Going forward, companies in Beijing should be more cautious about taking this approach as the risks involved have increased. To the extent possible, Beijing companies should still try to reach mutual termination with employees to avoid potential wrongful termination risks.

New Guideline Imposes Job Restrictions on Former Civil Servants

On May 26, 2017, the Organization Department of the Central Committee of the Communist Party of China, Ministry of Human Resources and Social Security, State Administration for Industry and Commerce and State Administration of Civil Service jointly announced the *Guideline on Regulating the Behaviour of Civil Servants after Resigning from Public Service* (the "**Guideline**"), which took effect retrospectively from April 28, 2017.

The Guideline updates the post-resignation restrictions on civil servants originally set out in the PRC Civil Servant Law. While the Guideline generally repeats what is in the existing PRC Civil Servant Law, there are a few important clarifications and additional requirements included in the Guideline, as highlighted below:

- The Guideline has expanded the scope of companies/organizations for which a former senior civil servant is prohibited from working during the restriction period.
- Departing civil servants are now required to submit a statement regarding their future job and must agree to submit follow-up statements of any future job change for the duration of their restriction periods. They must also brief the government authorities in which they are working on their future career plans in a pre-departure meeting. If their future career plans are not in line with the restrictions stipulated in the Guideline, the government authorities may reject the resignation.
- In addition to the penalties already in the PRC Civil Servant Law, the Guideline introduces a new punitive measure requiring the breaching activities to be recorded in the former civil servant's and the new employer's respective individual and enterprise credit records.

Key take-away points:

Employers should exercise greater care to comply with the Guideline when hiring former civil servants, to avoid the negative consequences including potentially losing a new employee, receiving a financial penalty and a negative credit record.

China and Spain Sign Social Security Totalization Treaty

China and Spain signed the China–Spain Social Security Treaty on May 19, 2017. Although the full text of the treaty is not yet publicly available, the treaty addresses social insurance issues encountered by employees working outside their home country, in particular the issue of having to make double contributions in both the host country and the home country for the same employment.

According to published reports on the treaty, an employee who is employed by a Chinese employer and seconded to work in Spain can be exempt from pension and unemployment insurance contributions in Spain. Likewise, an employee who is employed by a Spanish employer and seconded to work in China can also be exempt from social insurance contributions in China. Without the full text of the treaty available, it is not yet clear whether the

employee will be exempt from all five types of social insurance contributions in China or just the pension and unemployment insurance.

The China–Spain Social Security Treaty is the ninth social security treaty signed by China. The previous eight treaties were with Germany, South Korea, Denmark, Finland, Canada, Switzerland, the Netherlands and France.

On June 19, 2017, the previously signed China-Switzerland Social Security Treaty came into effect. Under this treaty, an employee who is employed by a Chinese employer and seconded to work in Switzerland can be exempt from pension, dependent insurance, disability insurance and unemployment insurance in Switzerland. An employee who is employed by a Swiss employer and seconded to work in China can be exempt from pension and unemployment insurance in China.

Key take-away points:

These bilateral social security treaties can slightly alleviate the cost burden on employees who are seconded from the foreign country to China and on the China host companies. Every eligible company should consider applying for the exemption treatment under the relevant treaty if they host secondees who are seconded from countries which have signed the social security treaty with China.

State Administration of Work Safety Highlights Employer Obligations in High Temperature Weather

On May 16, 2017, the State Administration of Work Safety issued the *Notice on Taking Measures to Prevent Sunstroke and Reduce Temperatures for the Summer of 2017* ("**Notice**"). The Notice highlighted several employer obligations to employees who work in a high temperature environment, including:

- arranging for employees to take occupational health examinations before such weather arrives and adjusting positions for employees whose physical conditions are not suitable for working in high temperatures (such as having cardiovascular disease, tuberculosis, etc.);
- prohibiting employers from requiring pregnant employees and minor employees to work outdoors in high temperature weather or indoors where the temperature is 33℃ or higher;
- equipping high temperature workplaces with necessary facilities to ventilate and lower the temperature, and providing employees with necessary individual protective equipment, cooling beverages and healthcare products; and
- making emergency plans for sunstroke, and providing emergency rescue personnel and first-aid medicines.

According to relevant existing national regulations on work in high temperature, "high temperature weather" refers to days in which the highest temperature is above 35℃.

Key take-away points:

The obligations in the Notice are not new, and are already provided in existing relevant national regulations. However, the Notice indicates that the authorities may pay closer attention to ensure employers comply with the specific obligations listed above.

Employers who have employees working outdoors or otherwise working in high temperature should be aware of these obligations. These obligations generally are not applicable to employers whose employees work in air-conditioned places.

Government Issues New Labor Arbitration Rules

On May 8, 2017, the Ministry of Human Resources and Social Security issued the amended Rules on the Handling of Arbitration Cases Involving Labor and Personnel Disputes and Rules of Arbitration Organizations for Disputes over Labor and Personnel, both of which are effective from July 1, 2017.

For employers, the key impact of the new rules is that arbitration procedures and settlement of disputes may be simplified. For example, in any dispute over non-compete compensation in which the amount is no more than the total of 12 months' minimum wages, the arbitral award shall be final. Also, in certain cases where the facts are not in dispute and the amounts involved are relatively small, subject to both parties agreement, a simplified and shortened arbitration process may be used.

Finally, if the parties in a dispute have reached a settlement privately without involving the arbitral tribunal, they can apply to the arbitration commission and relevant mediation institute to review and approve the settlement agreement and recognize it as an official mediation agreement, as if it had been negotiated under a mediation institute (for example, the enterprise labor dispute mediation commission). The relevant mediation institute and the arbitrator will approve the settlement agreement if they consider its form and contents to be legally effective. Previously, only cases that involved an arbitral tribunal would be able to have an official mediation agreement issued.

Key take-away points:

In China, arbitration is a mandatory procedure and one of the most important steps for employers when resolving labor disputes. To ensure employers are effectively dealing with disputes and protecting their rights, employers should be aware of the above changes and take them into account during any employment disputes, especially those changes relating to final awards, simplified case handling, and mediated agreements.

Shanghai Pudong Court Issues White Paper on Employment Dispute in 2016

On April 26, 2017, the Shanghai Pudong District Court ("**Pudong Court**") issued a White Paper on Employment Dispute Judgments for 2016. The White Paper showed that the number of employment disputes filed before the Pudong Court fell from 3196 disputes in 2015 to 2283 in 2016. However, the number of employment disputes relating to companies in the Shanghai Pilot Free Trade Zone ("**FTZ**") have increased, accounting for over 40% of all disputes in 2016, compared to 20% in 2015. Most of the companies involved

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Honourable Mention: In-house Community Employment Firm of the Year (Hong Kong) – *Asian-MENA Counsel Representing Corporate Asia & Middle East Survey, 2015*

Honourable Mention: In-house Community Employment Firm of the Year (China) – *Asian-MENA Counsel Representing Corporate Asia & Middle East Survey, 2014*

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Winning Law Firm for Employment & Industrial Relations (International Firms) – *China Business Law Journal, China Business Law Awards, 2013*

International Law Firm of the Year: Employment – *Chambers China Awards, 2012*

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in FTZ related employment disputes were service industry companies, and a large number of individuals involved in disputes were senior management and senior technical staff.

The White Paper details the expansion of internet and mobile application-based companies and other network platform operators, which have introduced new kinds of employment structures challenging the traditional understanding of the employee/employer relationship. In 2016 the Pudong Court dealt with an increased number of cases in which individual service providers working for online companies (such as online couriers) claimed they had an employment relationship with the network platform operator. However, the White Paper did not provide any guidance on how such disputes were handled.

Employee Termination for Stealing Colleague's Flower Upheld by Court

The Shanghai Qingpu District People's Court recently rejected a double statutory severance claim from an employee who was summarily dismissed for stealing his colleague's pot of flowers.

The employee said that he told his colleague that he wanted a pot of flowers and when he subsequently took the pot of flowers from his colleague's office, he intended to notify his colleague afterwards. When asked about the pot of flowers, the employee immediately admitted he had taken the pot of flowers, apologized to his colleague, and returned them to him. His colleague denied all of the employee's statements.

The employee argued that the company has no authority to determine whether his actions constituted "stealing", as the company was not the police. The company took the position that the employee's removal of the pot of flowers without the owner's consent should be deemed as theft, even though he was not subject to any criminal charges brought by the police. The company argued that its internal Human Resources Management Rules explicitly allow the company to summarily terminate an employee for theft, and therefore, the termination was lawful. The court ruled in favor of the company and dismissed the employee's wrongful termination claim.

Key take-away points:

This case shows that some courts may not focus on the actual value at stake or losses when determining whether the employee's misconduct was severe enough to warrant a summary dismissal. The employer should formulate internal policies that specify in detail what types of misconduct will lead to a summary dismissal, as this can strengthen the employer's position in any labor dispute. For the policies to be enforceable, the employer should go through the proper adoption procedure in accordance with PRC law.