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China Employment Law Update

Newsletter

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National Government Issues New Enterprise Annuity Rules

In December 2017, the Ministry of Finance and Ministry of Human Resources and Social Security jointly issued the *Enterprise Annuity Rules*, which took effect on February 1, 2018. The new rules replace the old *Enterprise Annuity Trial Rules* issued in 2004.

According to the new rules, the enterprise annuity works as a voluntary pension scheme to supplement the mandatory government-run pension scheme. Once the scheme is fully established, both the employer and the employee will be able to contribute to the funding pool.

The employer's total contributions should not exceed 8% of the total wages paid to all employees. The combined employer and employee contributions should not exceed 12% of the total wages paid to all employees. The employer and employees can negotiate their exact contribution amounts within this framework.

In order to establish the enterprise annuity scheme or to amend it once established, the employer must follow an employee consultation and approval process similar to that used for collective bargaining agreements, which requires the finalized version of the enterprise annuity scheme to be discussed and approved by an employee representatives' meeting or an all employees' meeting. Once discussed and approved, it must then be submitted to the in-charge labor bureau. The enterprise annuity scheme becomes effective if the in-charge labor bureau raises no objection within 15 days. The new rules also include detailed rules on the management of the funds.

Key take-away points:

Enterprise annuity schemes are still not widespread, but may become more common as companies compete for high-end labor talent, since statutory pension benefits are still very minimal.

China Issues New National Standard on Personal Information Security

On January 2, 2018, the Standardization Administration of China released the final version of the national standards on personal information security, *Information Security Techniques - Personal Information Security Specifications*. These voluntary and non-binding standards take effect on May 1, 2018.

The new standards cover similar territory as the previous *Guideline for Personal Information Protection Within Information Systems for Public and Commercial Services* ("**2012 Guideline**"). However, the new standards apply to all entities that are personal information controllers, whereas the 2012

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Guideline was arguably more limited in scope (though the scope of those guidelines was not completely clear).

Under the new standards, personal information controllers are defined as all private or public organizations that have "the power to decide the purpose and method" of processing personal information, which likely will include employers collecting personal information from employees for employment or business related purposes.

The new standards contain much more detailed and comprehensive guidance than the 2012 Guideline and set out new best practices for collecting, storing, using, sharing, transferring, disclosing and handling personal information. According to those best practices, personal information controllers should, among other things:

- adopt encryption and other security measures before transmitting or storing sensitive personal information
- require any personnel who handle personal information to sign a confidentiality agreement
- conduct periodic (at least annual) assessments on personal information processing to determine whether it conforms with the new standards' security guidance and to evaluate its potential impact on the interests of individuals whose personal data is being processed
- conduct a security assessment on the overseas transfer of personal information collected in China
- require its legal representative or main person-in-charge to assume responsibility for the security of personal information.

Key take-away points:

Although the new standards are voluntary and not legally binding, regulators may use the new standards to evaluate whether personal information controllers have duly performed their obligations under mandatory data protection rules, such as the 2016 Cybersecurity Law. Therefore, we strongly recommend employers evaluate their current personal information protection programs under the new standards to identify any potential risks.

Shanghai Issues Three New Regulations on Housing Fund Management

On December 12, 2017, the Shanghai Municipal Housing Fund Management Committee reviewed and approved:

- the *Shanghai Municipal Management Measures on Housing Fund Contributions*
- the *Shanghai Municipal Management Measures on Withdrawing Housing Fund Deposits*, and
- the *Shanghai Municipal Management Measures on Personal Loans from the Housing Fund*.

These three regulations will take effect on April 1, 2018, and together will provide sweeping guidance on housing fund management in Shanghai.

First, the new regulations reiterate important requirements for employers to manage employee participation and contributions in the housing fund scheme. The regulations require the employer to:

- submit an administrative registration for housing fund contributions within 30 days after the company is established, and
- set up the personal housing fund account for each individual employee within 30 days after the employee is enrolled.

The Shanghai Municipal Housing Fund Center may fine the employer CNY 10,000 to CNY 50,000 if the employer does not comply with these procedures and fails to rectify this non-compliance within the time limit specified by the Shanghai Municipal Housing Fund Center.

Second, the new regulations emphasize the requirements for employers to pay into the housing fund for newly hired employees:

- For any new hire who is joining the work force for the first time, the employer must pay the employee's housing fund starting from the employee's second month of employment.
- For any new hire who is switching employers, the new employer must pay the employee's housing fund starting from the first month's salary.
- The contribution base for the newly hired employee's housing fund is the full payable amount of the employee's current monthly salary until the Housing Fund Center adjusts the contribution base on July 1 of each year. At that time, the contribution base for the employee's housing fund becomes the employee's average monthly salary over the last calendar year.
- The employer must still pay the housing fund even if the employee leaves the employer before the end of a calendar month, provided that the termination date occurs after the regular monthly salary payment date.

Third, the new regulations clarify that the housing fund contributions are voluntary for employees who are expatriates, overseas permanent or long-term residents, or Hong Kong, Macao or Taiwan residents. Nonetheless, the contribution base for the voluntary housing fund contributions for these employees must be the same as that used for Chinese employees.

Finally, according to the new regulations, the Shanghai Municipal Housing Fund Management Committee will simplify the administrative procedure for individuals to withdraw housing fund deposits and will adopt strict measures for examining and approving personal loans from the housing fund.

Tianjin Municipal High People's Court Provides Guidance on Labor Disputes

On November 30, 2017, the Tianjin Municipal High Court issued the *Guidance on Handling Employment Disputes*, which took effect on

1 January 2018. This guidance to Tianjin lower courts will significantly influence how district judges handle labor cases in Tianjin.

Key highlights from the guidance include:

- **Certain retirement age workers are deemed as employees protected by employment law**: A work agreement with a person who has received pension insurance benefits or has drawn a pension is a labor service relationship rather than employment relationship. However, if an employee reaches retirement age but does not receive pension insurance benefits or draw a pension due to the fault of the employer, then the employee's relationship with the employer will continue to be deemed as an employment relationship rather than a labor service relationship.

- **Simplified employee consultation requirement for HR policies**: The Employment Contract Law provides that a company should first allow all employees or an employee representative council to discuss an HR policy (such as a handbook) and offer opinions on the HR policy, and then consult with a union or other employee representatives about the policy. The guidance appears to state that consultation with just one of these groups would be sufficient to satisfy the consultation requirement.

- **Employees may assert entitlement claims to year-end bonuses**: An employer may not refuse to pay a year-end bonus if the employee can prove the bonus is actually a part of the work remuneration. However, no further guidance was provided regarding how this would be determined.

Key take-away points:

The Tianjin guidance addresses several controversial labor dispute issues. Some provisions in the guidance favor employers, such as the simplified consultation process. However, other provisions could increase the burden on employers. In particular, depending on the nature of the bonus, employers might have to pay a year-end bonus to a former employee even if the employee leaves the company before the bonus payment date.

Guangzhou Issues New Regulations on Population and Family Planning Management

On December 15, 2017, the Guangzhou city government issued its *Population and Family Planning Service and Management Regulations*, which took effect on February 1, 2018, and simultaneously abolished the *Measures for Population and Family Planning* issued in 2013. The new regulations contain a number of notable changes.

First, the new regulations create a new type of leave called caregiver leave for any employee who is an only child and has parents older than 60 years old. The regulations state that an employer *may* (*keyi*) grant such leave, implying that it is not a mandatory entitlement. The caregiver leave (if granted) entitles the employee to up to 15 cumulative leave days each year to care for a parent receiving in-patient treatment. The employer should pay the employee's full salary and benefits for the leave days and may not treat the leave days as absences.

Second, the new regulations clarify the leave that may be granted to an employee whose wife has a pregnancy surgically terminated; similar to the caregiver leave above, it appears from the wording this leave is not a mandatory entitlement. If the leave is granted, the employee would be entitled to:

- one day of caregiver leave if the pregnancy is terminated before the last day of the fourth month of the pregnancy
- five days of caregiver leave if the pregnancy is terminated on or after the last day of the fourth month of the pregnancy.

Finally, the new regulations clarify the leave entitlement for the employee who undergoes surgery to terminate a pregnancy. This leave, in contrast to the above, is likely a mandatory entitlement. The employee is entitled to:

- 42 days of leave (down from 45 days under the old regulations) if the pregnancy is terminated on or after the last day of the fourth month of the pregnancy but before the last day of the seventh month of the pregnancy
- 75 days of leave if the pregnancy is terminated on or after the last day of the seventh month of the pregnancy.

Key take-away points:

Employers in Guangzhou should be aware of and implement the changes in local leave entitlements and be prepared to answer questions employees may raise in relation to the new rules.

New Tax Bulletin May Reduce Tax Exposure for Companies Seconding Expats to China

On February 9, 2018, the State Administration of Taxation ("**SAT**") issued Bulletin 11 regarding several issues relating to the implementation of China's tax treaties. One of the key issues addressed relates to how to determine when a service permanent establishment ("**PE**") exists. The PE risk is often the main complication/issue when overseas companies second expats to China for work.

Foreign companies that second employees to work in China would welcome Bulletin 11's replacement of the six-month threshold with 183 days for the determination of a service PE. The six-month threshold is typically seen under some of China's tax treaties signed prior to 2008, such as the China-US tax treaty. China used to have a "one day equals one month" rule under Guo Shui Han [2007] No. 403 ("**Notice 403**"), i.e., each calendar month in which the non-resident enterprise has personnel present in China even for just one day may count for one month for the determination of the six-month threshold for a service PE. Although the "one day equals one month" rule was repealed in 2011, some Chinese tax bureaus still follow this approach in practice because the SAT had not issued any new rule to replace it.

With the clarification provided under Bulletin 11, a foreign enterprise from jurisdictions that have a six-month threshold in their tax treaties with China will now have more certainty on mitigating the service PE risk in a situation where it assigns employees to China for a limited time but over the course of multiple months (for example, 10 days each month in 10 consecutive

months). This may reduce the Chinese tax exposure for both the foreign enterprise and its employees. *Please refer to our upcoming tax client alert for more details*.

Employer in Zhuhai Fined CNY 190,000 for Violating Overtime Hour Limits

On January 5, 2018, the Zhuhai Municipal Human Resources and Social Security Bureau publicized a case in which a manufacturing company was administratively fined approximately CNY 190,000 for violating overtime limits for 1,905 employees.

According to the published case report, in order to meet production needs, the employer arranged for its employees to work excessive overtime hours, i.e., more than 100 overtime hours on average per employee during the month reviewed, with one employee working 147 overtime hours. Under PRC law, overtime is generally limited to one hour per day, and in special circumstances, up to three hours per day, but may not exceed 36 hours per month. Although the employer consulted with the labor union and the employees in advance and fully paid the overtime compensation in accordance with law, the labor bureau still found that the employer violated the overtime hour limits. Therefore, the labor bureau issued a rectification letter and fined the employer CNY 100 for each employee whose rights were abused.

The CNY 100 fine per employee represents the lowest fine amount permitted by law. Fines can be as much as CNY 500 per violation. According to the report, because the company cooperated with the investigation and had paid overtime compensation to the employees for the overtime worked, the fine was relatively lenient.

Key take-away points:

In practice, local labor authorities throughout China have rarely punished violations of overtime hour limits, particularly if companies had paid overtime compensation for the hours worked. Instead, their overtime enforcement has normally focused on non-payment or under-payment of overtime compensation. This case was likely published to put employers on notice that the Zhuhai labor authorities intend to more aggressively enforce overtime hour limits.

Shanghai Court Upholds Employer's Claim for Data Recovery Costs

Recently, the Shanghai Intermediate People's Court No. 2 upheld an employer's claim for almost CNY 10,000 as compensation for data recovery costs when an employee locked a work computer and deleted work data during the separation handover process.

The employer entered a mutual termination agreement with the employee and paid severance after the employee completed the exit procedures. Although the employee's work computer was returned to the employer during the exit procedures, it was still locked by the password set by the employee. The employer notified the employee by WeChat, SMS and a lawyer's letter requesting the password and the work data stored on the computer. The

employee refused to cooperate, so the employer had to engage a third party to unlock the computer. After the computer was unlocked, the employer found that the employee had deleted important company data, including accounting information, orders, client contacts, etc. The employer had to pay additional fees to recover the deleted data and filed a court claim to recover those costs.

The court held that the employee had an obligation to conduct the handover process in good faith. This handover process not only included returning company property but also included returning company data. By refusing to cooperate and deleting company data, the employee had violated this good faith obligation and was therefore liable for the costs to unlock the computer and to recover the missing data.

Key take-away points:

This case shows that courts may be open to company claims against employees who delete important company information from company computers or systems. In order to increase the company's chances of winning such a claim, we recommend the mutual termination agreement contain clauses that specify the company property to be returned and that condition payment of severance on the return of all company property in an acceptable form; the contract may also include wording under which the employee must compensate the company for any damage to company property, whether it be in physical or electronic form.

Beijing Court Rules Employee Entitled to Annual Bonus After Resignation Date

Recently, a Beijing intermediate court upheld a lower court judgment that an employee was entitled to an annual bonus even though the employee resigned from the company before the bonus payment date.

After giving notice of resignation on March 4, 2016, the employee's last day with the company was March 31, 2016. Although the company paid all other employees annual bonuses for 2015 on March 27, 2016, the company did not pay an annual bonus to the employee.

The employee filed a court claim arguing that the 2015 annual bonus should have been paid because it was part of the employee's wages for the year 2015. To support this argument, the employee submitted a provision from the employee handbook that contained an annual bonus formula calculating the bonus payment based on employee work performance.

The company argued that the annual bonus was discretionary. To support this argument, the company presented two additional provisions from the employee handbook. First, the employee handbook stated that the company had discretion on whether to pay the annual bonus. Second, the employee handbook contained a policy that barred employees from receiving an annual bonus if the employee resigned before the bonus payment date.

The first instance court ruled that the employee was entitled to the annual bonus. The court agreed with the employee that the calculation formula showed the annual bonus was a reward for the employee's work performance and was therefore part of the employee's wages. Since paying wages is a major legal duty that cannot be circumvented by the employer, the company

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policy stating no bonus would be paid if the employee resigns before the bonus payment date was invalid. The company appealed, but the intermediate appellate court upheld the judgment.

Key take-away points:

In recent years, disputes over annual bonuses have been increasing. Most of these cases involve employees demanding their annual bonuses after their employment contracts have been terminated. The labor law provides no guidance to courts on how to resolve whether an annual bonus is a mandatory wage payment or a discretionary bonus payment.

This case shows that Beijing courts believe an "annual bonus" is a mandatory wage payment if the bonus serves as a reward for the employee's performance. As a mandatory wage payment, it must be paid even if the employee resigns before the bonus payment date. To avoid the risk of having to pay an annual bonus to an employee who resigns or is terminated before the bonus payment date, employers should not provide employees with detailed calculation methods for annual bonuses. Instead, the employee handbook and the employment contracts should state that a key purpose of the annual bonus is to incentivize employees to remain with the company.

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