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China Employment Law Update

Newsletter

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In This Issue:

For further information, please contact:

Jonathan Isaacs
Head of China Employment Practice
+852 2846 1968
jonathan.isaacs@bakermckenzie.com

Zheng Lu
Partner, Shanghai
+86 21 6105 5922
zheng.lu@bakermckenzie.com

Bofu An
Partner, Beijing
+86 10 6535 3852
bofu.an@bakermckenziefenxun.com

New social insurance guidance for Hong Kong, Taiwan and Macau residents employed in Mainland China

In November 2019, the PRC Ministry of Human Resources and Social Security issued the *Interim Measures on Social Insurance Contributions for Hong Kong, Taiwan and Macao Residents* ("**HTM Measures**"). The HTM Measures will take effect on 1 January 2020.

Key highlights resulting from the HTM Measures include:

- Employers in Mainland China are mandatorily required to make social insurance contributions (including contributions for pension insurance, medical insurance, maternity insurance, work injury insurance and unemployment insurance) for Hong Kong, Taiwan and Macau resident ("**HTM Resident**") employees they employ.
- Employers should enroll HTM Resident employees into the social insurance system by using the relevant HTM Resident employee's valid travel certificate/residence permit, employment contract, etc. as proof of employment.
- Social security authorities should audit employers to check whether they have made social insurance contributions for their HTM Resident employees, as required by the HTM Measures.
- HTM Resident employees can be exempted from pension insurance and unemployment insurance in Mainland China by providing certain documents to prove that they maintain their social insurance status in Hong Kong, Taiwan, or Macau.

Key take-away points:

Employers will need to adhere to the requirements of the HTM Measures and make social security contributions for their HTM Resident employees. In cities where companies have traditionally relied on local regulations and enforcement practice to not make social insurance contributions for HTM Resident employees (e.g. Shanghai), employers will need to comply with the national HTM Measures and may need to change their previous practices.

It is worth noting that the HTM Measures do not distinguish between employees who are working in the PRC under an international secondment arrangement (i.e., employees who have not signed any local PRC employment contract) and employees who are directly hired by PRC entities. Employers will therefore need to closely observe local regulation enforcement practice to assess whether making social insurance contributions for secondees is mandatorily required. While it remains to be seen whether secondees fall under the requirements of the HTM Measures, currently,

making social insurance contributions for secondees is practically difficult (if not impossible) in Shanghai.

PRC holiday schedule announced for 2020

The State Council has announced the adjusted holiday arrangement for 2020. The arrangement provides for certain weekend days to be swapped for working days in order to provide employees with a longer consecutive period of time off work.

Official Public Holiday	Adjusted Holiday Arrangement
New Year's Day (1 day, January 1, 2020)	Non-Working Day: January 1, 2020
Spring Festival (3 days, from January 24 - 26, 2020)	Non-Working Days: January 24 - 30, 2020 Working Days: January 19, 2020 (Sunday) and February 1, 2020 (Saturday)
Tomb Sweeping Day (1 day, April 4, 2020)	Non-Working Days: April 4 - 6, 2020
Labor Day (1 day, May 1, 2020)	Non-Working Days: May 1 - 5, 2020 Working Days: April 26, 2020 (Sunday) and May 9, 2020 (Saturday)
Dragon Boat Festival (1 day, June 25, 2020)	Non-Working Days: June 25 - 27, 2020 Working Days: June 28, 2020 (Sunday)
Mid-Autumn Festival (1 day, October 1, 2020) - this holiday overlaps with the national holiday in 2020	Non-Working Day: October 1, 2020
National Day (3 days, October 1 - 3, 2020)	Non-Working Days: October 1-8, 2020 Working Days: September 27, 2020 (Sunday), October 10, 2020 (Saturday)

Key take-away points

All employers must follow the official public holiday schedule, whereas only Government employers and state-owned employers are required to follow the adjusted holiday arrangement. In practice, however, most private companies in Mainland China (including multinational companies) still follow the adjusted holiday arrangement because employees generally expect to have those additional days off.

Beijing to boost the commercialization of technological achievements

In November, Beijing's top law-making body issued the *Beijing Regulations on Boosting the Commercialization of Technological Achievements* ("**Regulations**"), which will be implemented from 1 January 2020. Under the Regulations:

- Companies that own "technological achievements" shall reward and remunerate their technical personnel who contribute significantly to the creation or transformation of technological achievements. As for the method, amount and time limit of the reward and remuneration, companies can adopt their own policy in accordance with the law or reach an agreement with the technical personnel. If there is no company policy or agreement on such matters, companies should reward and remunerate the technical personnel in accordance with the *Law on Boosting the Commercialization of Technological Achievements* ("**Law**"), most recently amended in 2015.

  Under the Law, companies should pay the technical personnel: (i) no less than 50% of the companies' net income derived from a technological achievement in the event of transfer or licensing of rights to the technological achievement; (ii) no less than 50% of the companies' contributions or shares obtained in the event of using the technological achievement as in-kind investment; or (iii) no less than 5% of the companies' annual profits derived from commercially exploiting the technological achievement, for three to five years consecutively after the technological achievement is transformed and put into production.

- Companies, especially small and medium-sized ones, will receive preferential treatment for commercialization of technological achievements.

- Beijing will make it more convenient for foreign talent to apply for entry visas, residence permits and work permits.

Key take-away points:

The Regulations and the national Law that they implement cover not only patented inventions, but also technological achievements that may not be protected by IP laws.

Although the Regulations, compared with the national Law, increases the standard of reward and remuneration for personnel at research institutions and universities who create technological achievements, they say nothing specifically about personnel working at companies on this point. Therefore, companies in Beijing are still subject to the national standards set out above in terms of rewarding personnel who create technological achievements. However, companies are permitted to adopt their own policy or contract out of the statutory scheme (including providing lower amounts of compensation). Hence, it is advisable for companies to formulate a reward and remuneration policy for their technical personnel.

Ever since the national Law was amended in 2015 and imposed requirements on companies to compensate personnel who create technological achievements, there has been a relatively low number of claims brought by employees based on the Law, likely because of: (i) lack of clarity

regarding what exactly constitutes a "technological achievement"; and (ii) a general belief that the Law is mainly directed at institutions receiving government funding even though the Law as written covers all companies. The introduction of implementing rules in Beijing may increase awareness among employees in Beijing of their compensation rights.

National Online Social Insurance Service System launched

In September 2019, the National Online Social Insurance Service System ("**System**") was launched. The online System focuses on providing nationwide and cross-regional social insurance public services to participating persons and employers. It provides for 18 nationwide social insurance services, including but not limited to cross-regional social insurance transfer and qualification authentication for receiving pension insurance payments.

Through the System, participating persons who are on secondment outside of the PRC are able to apply for social insurance coverage certificates which can be used to apply for exemption from certain social insurance schemes of the host country if the relevant host country has signed and implemented a social insurance treaty with the PRC. Participants are also able to check the status of their applications for social insurance coverage certificates online through the System.

Additionally, the System contains links to municipal/provincial social insurance online systems since many social insurance procedures/applications are required to be completed through the local social insurance system of the relevant city.

Key take-away points:

Although the services available through the System are currently still limited, it has paved the way for important progress to be made by providing an efficient service for social insurance coverage certificate applications and has allowed for the application process to be streamlined and simplified nationwide. We anticipate that there will be an increase in cross-regional social insurance services that will be available online through this national System thereby benefiting employers and employees across the PRC.

Beijing court releases information on typical non-compete restriction cases

On 22 October 2019, the Beijing No. 1 Intermediate People's Court held a press conference and released a report entitled "Ten Typical Cases on Non-Competition Restrictions". The document highlights common issues that have arisen over the past five years in non-compete court cases.

Below are some of the main points arising from the publication that employers should be aware of when considering non-competition clauses:

- The absence of agreement on non-compensation compensation does not necessarily render the non-competition restrictions invalid, and the company may be required to pay non-competition compensation in accordance with legal standards.

- If a company does not intend to enforce a non-compete restriction, the company should explicitly waive the non-compete restriction before the employment contract terminates. In the absence of such a waiver, the company may be required to pay an additional three months of non-competition compensation.

- Business scope is not the sole factor for determining whether two companies are competitors. For example, in one case, an employee entered into a non-competition agreement with Company A. After leaving Company A, the employee joined Company B. The business scope of Company A and Company B as indicated in their business license both included economic and trade consulting. The court ruled that the overlap of business scope alone was not enough to prove that Company B had a competitive relationship with Company A. As such, the court rejected Company A's claim. The judge opined that, in determining whether there is a competition relationship, in addition to the business scope of the two companies, multiple factors should be comprehensively considered, such as the companies' actual business operations, the work conducted by the employee in the case, whether the competition constitutes horizontal or vertical competition, and direct or indirect competition.

- The amount of liquidated damages for violation of a non-competition restriction should be determined based on various factors. For example, in one case, the employee and Company C agreed on liquidated damages of RMB 500,000 for breach of the non-competition restriction. The court found that the employee's joining of Company D had breached the non-competition restriction, but adjusted the level of liquidated damages to RMB 300,000 after considering various factors. The law does not clearly stipulate how to determine the amount of liquidated damages. In practice, the court may adjust the amount if it believes that the agreed amount is unreasonably high, after taking various factors into account such as the employee's position, salary level, mastery of trade secrets, degree of fault, and amount of non-competition compensation, etc.

Key take-away Points:

Employers should carefully draft any non-competition agreement, to stipulate the scope, period, compensation, etc. of the non-competition restriction. A liquidated damages clause is strongly recommended, since it is difficult to prove actual damages suffered by an employer as a result of breach of the non-compete restriction. If an employer does not intend to enforce the non-competition clause, it should notify the employee of the waiver before or at the time of termination to avoid incurring additional financial losses.

Hangzhou court rules against employer for discrimination based on applicant's hometown

In November 2019, the Hangzhou Intermediate Court ruled that a company had infringed a job applicant's equal employment opportunity rights by rejecting her job application because of the location of her hometown. The court ordered the company to issue a public apology in a nationwide newspaper and pay RMB 10,000 in compensation to the job applicant.

By way of background, in July 2019, the applicant had applied through an online job application platform for the positions of legal counsel and chairman

assistant at an international hotel in Zhejiang province. Both job applications were rejected by the company, and the applicant received a reply on the platform noting the reason for the rejections was that the applicant was originally from Henan Province. The applicant subsequently filed a labor dispute case with the local court claiming (i) unlawful discrimination and infringement of her equal opportunity rights, (ii) a verbal apology from the company, (iii) a public apology to be published in three nationwide newspapers for 15 days, and (iv) compensation in the amount of RMB 60,000 for emotional harm suffered.

In defence, the company claimed that the remark sent to the applicant about her Henan origin was simply an internal reference note which had been mistakenly sent to the applicant as the rejecting reason. The company insisted the actual reason for rejecting the job application was that the applicant had no relevant work experience. The court ruled that the employer had failed to provide sufficient evidence to prove the remark was simply a careless mistake and found that the company's rejection of the job applications constituted employment discrimination. The company was ordered to issue a public apology in a nationwide newspaper and pay RMB 10,000 compensation to the job applicant for emotional harm suffered and litigation costs.

Key take-away points:

Currently, PRC law explicitly prohibits discrimination based on sex, disability, religion, race, and ethnicity/nationality and against infectious disease carriers and migrant workers. There is no clear legal basis for employees claiming unlawful discrimination based on other grounds (such as age or hometown location). In general, most anti-discrimination laws in the PRC are not rigorously enforced by the courts or relevant government agencies. However, this case demonstrates that the courts may be prepared to extend the scope of anti-discrimination protection in certain circumstances. Employers should exercise care to avoid potential discrimination issues in recruitment and during the employment relationship and should be mindful of the potential negative publicity that may be attracted as a result of discriminatory practices being found to have taken place.

Guangdong court upholds employee's claim for "equal employment rights" after being dismissed because of pregnancy

The Xiangzhou District Court in Zhuhai Municipality recently upheld an equal employment rights claim of a female employee who was dismissed by her employer due to her pregnancy.

The employee applied for sick leave after she discovered that she was pregnant. The company did not approve her sick leave application and summarily dismissed her on the same day. The employee suffered a miscarriage one month after the termination of employment. The employee claimed that the company had infringed her equal employment rights by dismissing her immediately after it had gained knowledge of her pregnancy. The employee alleged she was depressed because of the termination of her employment, which resulted in her miscarriage. The company, on the other hand, argued that this case was a labor dispute, which should be heard at first instance by the arbitration tribunal. The company further contended that

the employee's employment was terminated due to her habitual lateness, not her pregnancy.

The court ruled that this case was a tort dispute, rather than a labor dispute, because the employee's claim was compensation for damages arising from an equal employment rights infringement. The court found that although the employee had a poor attendance record, the company had failed to discipline her for such misconduct and had summarily dismissed her after it gained knowledge of her pregnancy. The court took the position that the company terminated the employment contract because of the employee's pregnancy (which is prohibited under PRC law). The company had therefore infringed the employee's equal employment rights by subjecting her to discriminatory treatment during her employment. The court ruled that the company should offer a written apology to the employee and pay CNY 10,000 in compensation for the employee's mental suffering (amongst other maternity related payments).

Key take-away points:

The "equal employment rights" claim is a new cause of action introduced by the Supreme People's Court in a notice effective 1 January 2019. This case is reportedly the first one dealing with an equal employment rights dispute in Guangdong province. It serves as a reminder that companies should be familiar with the requirements in relation to equal employment, and treat employees equally during recruitment and the performance of an employment contract.

Beijing court ruled against employer for recovery of CNY 336 million investment loss from employee

In October 2019, the Beijing Third Intermediate Court ruled against a securities company's claim for compensation from its project manager for loss incurred in an investment project.

A Beijing-based securities company incurred a total loss of around CNY 500 million in an investment project. The project manager who was responsible for the due diligence and later project management was sued by the company for approximately CNY 336 million (part of the total loss suffered by the company). The employee was also asked to return a paid project bonus of CNY 1.78 million that the company had paid to the employee.

The company argued that due to the employee's negligence in the project, the company's asset management business had been suspended by the China Security Regulatory Commission for six months, which caused both reputational and economic losses for the company. In addition, the company's total loss in the project managed by the employee had exceeded CNY 500 million. As the employee was the chief responsible person for the project, the company argued that the employee should bear part of the total loss and return the bonus associated with project.

The court held that the company had failed to establish a direct link between the company's loss and the diligence of the employee. The court further reasoned that the project involved several aspects, and the whole operation was collectively decided and implemented by various departments of the company. As such, it would be unfair to ask any single employee to bear all

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the risk and liability. Furthermore, the company also failed to prove that the relevant company policy in relation to claw-back of the project bonus had been notified to the employee. The court therefore rejected both of the company's claims.

Key Take-away Points

This case demonstrates the difficulties faced by employers when trying to require employees to compensate them for any loss related to business decisions of the company. In order to avoid the need to try to recover such losses, employers may therefore need to focus more on prevention measures, such as strengthening their internal control and disciplinary policies, and to make sure that all relevant policies have been implemented through the necessary statutory procedures to ensure enforceability.

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www.bakermckenzie.com
www.fenxunlaw.com

Baker McKenzie FenXun (FTZ) Joint Operation Office
Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC

Tel: +86 21 6105 8558
Fax: +86 21 5047 0020