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China Employment Law Update

Newsletter

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Guidelines issued regulating university student internships

In July 2019, the Ministry of Education circulated a notice requiring universities to strengthen and regulate their management of student internships. It sets out guidelines for student internship management by the universities.

Under the notice, universities must work together with the internship host entity ("**Host**") to develop an internship plan specifying the objectives, tasks, and evaluation criteria for the internship program. Universities must conduct on-site evaluation of the Host to ensure it is qualified to carry out the internship program. They can then sign an internship cooperation agreement with the Host setting out the rights, obligations and management responsibilities of the parties. No internship program should be arranged without a signed cooperation agreement. Universities are strictly forbidden to entrust any agency or individual to organize and/or manage internship work.

Universities and Hosts must provide students with the necessary work conditions and a safe and healthy environment for internship work. Universities must purchase adequate internship liability insurance or personal injury accident insurance for students in advance. In particular, universities and Hosts are not allowed to arrange for students to work in commercial entertainment establishments (which includes bars, night clubs, KTV parlors, etc. based on previous internship legislation).

Furthermore, except for certain special positions such as clinical internships, the intern students' working hours should not exceed 8 hours per day, and 44 hours per week. The 44 weekly working hours are actually higher than the 40 weekly working hours for normal employees. No overtime and night shifts may be arranged for intern students. In principle, the intern students in an on-the-job training internship should be paid no less than 80% of the wages of the employees in the same post.

The above requirements for university student interns are generally in line with the requirements for vocational school interns (i.e. students from vocational schools who normally engage in blue-collar-type work) set out under the *Administrative Provisions on the Internships of Vocational School Students* issued by the Ministry of Education and four other departments in 2016.

Key take-away points:

This notice extends the requirements for vocational school interns to additionally cover the university student interns. It also clarifies that universities hold the main responsibilities in managing student internships. The Hosts (i.e. the companies) do not have a clear set of legal responsibilities under this notice. While it remains to be seen how this guideline will be implemented in practice, it is advisable for companies to at least meet the requirements under the notice (and not to arrange overtime work or night shifts etc.)

China implements social security treaty with Japan

In August 2019, the Ministry of Human Resources and Social Security announced that China would implement the China–Japan Social Security Treaty starting from 1 September 2019.

Under the treaty, Japanese employees who are seconded to work in China by their employers in Japan will be exempted from making pension contributions in China. However, they still need to make contributions to the other four social insurance funds, i.e., medical, unemployment, maternity and work injury. The treaty will still result in savings for these employers and their Japanese employees because the pension exemption will eliminate the highest cost among China's five social insurance contributions.

The exemption is not automatic. Secondees from Japan must submit to the PRC social insurance authority an official certificate issued by the Japanese social insurance authority that proves they have been making social insurance payments in Japan. A secondee who cannot provide the certificate will need to make social insurance contributions in China — the same as Chinese nationals.

The China–Japan Social Security Treaty is the tenth social security treaty implemented by China. The previous nine implemented treaties were with Germany, South Korea, Denmark, Canada, Finland, Switzerland, Netherlands, Spain and Luxembourg. China has also signed social security treaties with France and Serbia, but has not yet officially implemented them.

Key take-away points:

Any employer wishing to obtain social insurance exemptions for its secondees from Japan should consult with the local social insurance center. The documentary requirements for the exemption may vary by locality. Often local authorities may not even have set procedures in place to handle exemption applications.

Beijing prohibits gender discrimination in employment recruiting

On 20 May 2019, the Beijing Municipal Human Resources and Social Security Bureau, along with eight other government authorities, jointly issued the *Notice on Further Regulating Recruitment Practices to Promote Female Employment.* This notice follows the issuance of the national circular on gender discrimination in February 2019, and aims to emphasize the prohibition on gender discrimination during the hiring process. For details of the February national circular, please refer to this link.

The Beijing notice basically reiterated all of the key issues already addressed in the national notice, and re-emphasized a company's obligations and restrictions during the hiring process. For example, according to the notice, a company may not: (a) impose restrictions based on a candidate's gender or prioritize candidates based on gender; (b) refuse to hire women based on their gender; (c) ask questions about a female candidate's marital and parental status; (d) include a pregnancy test as part of the on-board health examination; or (e) impose childbirth restrictions as a condition of employment.

The Beijing notice also reiterated the administrative penalties for violation of the gender anti-discrimination requirements, and the measures to be taken to promote equal employment for women. These include providing training to female employees who return to work after giving birth.

Key take-away points:

Beijing is the first city in China that has promulgated a local notice to prohibit gender discrimination after the national government issued the circular in February 2019. This shows that the government and the society are paying closer attention to gender equality, though anti-discrimination protection is still weak compared to other countries. Companies in China (especially in Beijing) should therefore review their employment practice in China to ensure they comply with the national law and local requirements. In particular, companies should avoid asking female candidates whether they are married or have children during the hiring process or making hiring decisions conditional upon childbirth restrictions.

Jiangsu province high court issues guiding opinion on annual leave disputes

The Jiangsu High People's Court issued a guiding opinion on annual leave disputes ("**Guiding Opinion**") effective 9 August 2019. The Guiding Opinion provided clarifications on several annual leave issues, in order to give guidance to local courts on how to handle annual leave disputes.

Below are some of the key provisions in the Guiding Opinion:

- If the employer fails to arrange the employee take annual leave, the employee's claim for compensation for statutory annual leave at the rate of 300% of the employee's daily salary shall be upheld. National annual leave regulations also provide for 300% compensation for unused annual leave, but make clear this is inclusive of ordinary salary already paid for days worked and not taken as leave, so only an additional 200% compensation needs to be paid. The Guiding Opinion is not as clear on this point; another provision in the Guiding Opinion seems to indicate that a company would only have to pay the balance in case of unused annual leave but this is not totally clear.

- The statute of limitations for claiming unused annual leave compensation shall be one year. The statute of limitations shall count starting from 1 January of the second year of accrual of the annual leave, but if the employee's employment relationship with the employer has already been terminated before that date, the statute of limitations shall count starting from the date of the termination instead. This provision clarifies that the employees will lose the right to sue for unpaid annual leave compensation during employment if they do not claim compensation for unused annual leave within the next calendar year after accrual of annual leave. However, it is unclear, in the case any unused annual leave is carried forward to the next year after obtaining the employee's consent, when the statute of limitations for those carried-forward annual leave days should start counting if those carried-forward days remain unused the next year.

High courts of Shanghai and Jiangsu issue summary of model employment cases

Recently, the Shanghai High People's Court and Jiangsu Province High People's Court respectively publicized their own list of ten model case studies in relation to employment disputes that occurred during the period from 2016 to 2018. Though China does not have a case-law system with binding precedent, the model cases posted by high people's courts or the Supreme People's Court may provide some guidance to lower courts on the handling of similar cases.

The model cases focused on various traditional topics such as labor dispatch, protection of special employees who are taking maternity leave or long-term sick leave, etc. Below is a summary of a few of the case studies that focused on more recently trending issues.

1. Non-compete issues.

In one Shanghai case, the employee agreed to perform a post-termination non-compete obligation. In consideration of that, the employer granted restricted stock units to the employee during his employment term. Both parties agreed that the employee should repay all economic gains made from the restricted stock units to the employer if the employee breached the non-compete obligation. In other words, the non-compete compensation was paid during the employment term in the form of restricted stock units rather than in cash, and the liquidated damages for breach of non-compete was the repayment of the restricted stock gains; under the law, the non-compete compensation generally should be paid in cash on a monthly basis following termination of employment. However, the court in this case validated the arrangement and supported the employer's claim. The employee who breached the non-compete obligation eventually repaid the employer over RMB 1.9 million of the restricted stock gains.

On Jiangsu case reiterated the principle that the employee should continue performing the non-compete obligation during the non-compete period even though the employee has paid the liquidated damages to the employer for breaching the non-compete obligation. In other words, the employee's non-compete obligation during the remaining non-compete period cannot be avoided by paying the liquidated damages. This position was also set forth in an earlier guiding opinion issued by the Supreme People's Court.

2. Emphasis on employees' fundamental duties.

In these model cases, the courts referred to the employees' fundamental duties of discipline, integrity, care and loyalty more than once, rather than written company rules. In one Shanghai case, the employer unilaterally terminated a senior manager because he attended inappropriate entertainment funded by the employer's distributors and took bribes. The court supported the employer's termination and emphasized that discipline and integrity are the fundamental duties of each employee. In one Jiangsu case, the employer unilaterally terminated an employee because he refused to perform his work assignments. The court found this termination to be legal. The court considered that it was reasonable for the employer to assign the employee to work temporarily in another department to support the business needs of that department. The employee should have abided by such reasonable work assignment in a loyal and diligent manner.

Shenzhen issues first guiding opinion on right of personality

News reports confirmed by the Procuratorate (prosecutor's office) of Shenzhen City indicate that the Procuratorate of Shenzhen City has issued a guiding opinion in September 2019 on enhancing the judicial protection of right of personality through procuratorial functions ("**Opinion**"). The content of the Opinion is not available to the public yet. It is also unclear when this Opinion takes effect.

Based on the news reports, key highlights from the Opinion include the following:

- Right of personality includes right to life, right to bodily integrity, right to health, right to name, right to portrait, right to reputation, right to privacy, right to personal information and right to credit.
- Some actions breaching the criminal law will receive the most attention and be punished. Reports list actions seriously harming personal safety, actions infringing personal information or personal privacy, and actions damaging the social credit system as examples. The last category includes actions infringing a former employer's interests by violating employee's confidentiality obligations owed to the former employer).
- For infringement of right of personality causing serious consequences, the infringer should be ordered to pay the highest compensation within the legal range in order to compensate the victim for his/her mental damages.

Key take-away points:

Since the full content of the Opinion has not yet been made public, its exact implications remain to be seen. For example, whether employers will need to bear any liabilities if one of its employees infringes another employee's right of personality during working hours or on duty, especially if the infringer is a senior manager of the company, is unclear. In any event, the Opinion reflects the importance the Shenzhen procuratorate authority is placing on the right of personality, so employers should take note of this in their policies. For instance, it is advisable for companies to have relevant policies in place to prohibit harassment and bullying at the workplace, as those actions likely infringe employees' right of personality and potentially may expose employers or their senior management to liability.

Shanghai revises rules on work during extreme weather conditions

On 25 July 2019, the local Shanghai government issued a revised *Implementing Opinion on the Suspension of School and Work in Extreme Weather* ("**Opinion**"), which took effect on 1 August 2019.

According to the new rules, an extreme rainstorm is considered to be one with at least 100 millimeters of rain within an hour or 150 millimeters of rain within six hours. An extreme snowstorm is defined to be a storm with more than 10 millimeters of snow within six hours. The standards for extreme typhoon or road icing have also been defined. The government would issue a red alert for extreme weather when conditions meet the new standards.

The measures that employers need to take in case of a red alert for extreme weather remain the same as in the old opinion issued in 2014. These measures include the following:

- employers may temporarily suspend operations when a red alert is issued, apart from government authorities and companies that directly work to ensure basic functions of the city;
- employers should make plans specifying the conditions in which employees would not come to work, or when they should return to work;
- employers should not deem employees to be late or absent, deduct the employees' salaries or benefits, or discipline or terminate the employees who fail to get to work on time due to the red alert.

Key take-away points:

Employers in Shanghai should be aware of the new standards for extreme weather and follow the red alert warnings issued by the local government. Employers should also review and revise their labor discipline or other policies if such policies to see if they are conflict with the Opinion. In particular, employers should make exceptions for employees' lateness or absence due to red alert extreme weather conditions.

Beijing court supports termination of manager for sexual harassment

Recently in Beijing, the Chaoyang District court ruled in favor of a company's decision to terminate a male employee who "jokingly" kissed one of his female colleagues in the workplace.

The male employee joined the express delivery company in 2007 and was a group leader in 2018. In June 2018, one of his female colleagues was temporarily working in the manager's work area due to the power failure at her own work area. The male employee suddenly kissed the female employee, and continued jokingly talking to her. The female employee then submitted a complaint to the company.

During the company's investigation, the male employee admitted to committing the abovementioned acts and wrote a description of the incident. The male employee argued that he was just kidding with the female employee without malicious intent.

The company then unilaterally terminate the male employee without any severance later that month, on the ground that the employee violated company policies. The male employee later sued the company for wrongful termination.

The Chaoyang District court ruled that the male employee's act constituted sexual harassment. Since sexual harassment was clearly defined as a serious violation of company policies in the company's Employee Handbook, the termination made by the company was lawful. The court rejected the male employee's wrongful termination claims.

Key take-away points

Sexual harassment itself is not a statutory termination ground in China. However, if the company clearly defines sexual harassment acts as a "serious violation of company policies" (one of the statutory grounds for termination) in the employee handbook or other enforceable company policies, the company will be in a better position to initiate the termination against the wrongdoer if such acts happen. In practice, it is oftentimes difficult to terminate employees for committing sexual harassment, either due to lack of objective evidence or lack of written company policies.

Beijing court rules preferential tax treatment not applicable to severance upon contract expiration

In July 2019, the No. 3 Beijing Intermediate People's Court upheld the rulings of the Beijing Chaoyang District People's Court and the Chaoyang District Tax Bureau, which held that severance paid upon the expiration of the employment contract cannot enjoy the preferential tax treatment that is applicable for severance paid upon contract termination.

In this case, the company and the employee signed an employment contract with a term from 4 May 2014 to 31 May 2017. Since the employee was during the nursing period at the original contract expiration date, the company notified the employee that her contract would be extended to the date when her nursing period ended according to the law. On 5 February 2018, the company notified the employee that her nursing period would end on 16 March 2018 and accordingly, her employment contract would expire at that time. The company paid RMB 74,256 as the statutory severance upon contract expiration to the employee and withheld RMB 19,259.6 from the severance payment as the individual income tax (IIT) payable to the tax bureau. The employee argued that her severance upon contract expiration should enjoy the preferential tax treatment for severance and therefore should be tax free. The employee sued the tax bureau.

Under the relevant PRC tax regulations, severance upon the termination of the employment relationship can enjoy a preferential tax treatment, under which a severance amount not exceeding 300% of the local employees' average annual salary over the previous year (which currently turns out to be RMB 381,321 in Beijing) is tax free. In this case, the Beijing courts ruled that "termination" and "expiration" of the employment contract have different meanings under PRC employment laws, with "termination" generally referring to early termination of the contract initiated by the employer. Therefore, the preferential tax treatment for severance should not apply to severance payable upon the expiration of the contract at the end of its term.

Key take-away points:

The relevant tax regulations explicitly provide that severance for termination can enjoy the preferential tax treatment. In practice, however, local tax bureaus' position on whether severance paid upon the contract expiration can enjoy this preferential tax treatment may vary by city. In Beijing, after this ruling, it's relatively clear that severance upon contract expiration likely will not enjoy the preferential tax treatment and employers should withhold IIT from such payment. In cities where there is no clear local rule or case precedent, the company may check with the relevant tax bureau regarding their practice.

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Court in Jiangsu province rules that social insurance disputes can be heard in court

Recently, the intermediate court of Huai'an City, in Jiangsu Province, ruled that an employee's loss of a work injury subsidy caused by his employer's underpayment of work injury insurance contributions should be compensated by the employer. The court believed that the employee's loss could not be remedied through administrative procedures, and thus the claim should be heard by the court.

The employer had made contributions to all five social insurance funds, including the work injury insurance fund, but used a base amount lower than the employee's monthly salary. The employee then got injured in a traffic accident in November 2015, and this was deemed a work-related injury by the local labor bureau in April 2016. The employee therefore obtained a lump-sum injury subsidy from the work injury insurance fund, but the payment was lower than it should have been due to the employer reporting a social insurance contribution base amount lower than the employee's actual salary.

The employee first sued the company in labor arbitration, but the labor arbitration committee refused to admit the case. Then the employee sued in a district court in Huai'an City. The district court believed that the company already made work injury contributions for the employee, and therefore should not be liable for any insurance benefits that are supposed to be paid by the insurance fund. Therefore the district court rejected the employee's claim for his reduced injury subsidy.

The employee later appealed to the intermediate court of Huai'an City. The intermediate court overruled the district court's ruling. The intermediate court took the position that this type of social insurance dispute can be heard by the courts as an employment dispute. In this case, although the company made work injury insurance contributions, the underpaid contributions directly resulted in the employee receiving a reduced lump-sump subsidy, and thus the company should compensate for the employee's direct loss.

Key take-away points

This case was selected to be inserted into the People's Court newsletter, which is likely seen as an endorsement of the court's position (though technically there is no binding court precedent in China).

Under a previous official guiding opinion issued by the Supreme People's Court, if an employer *completely failed* to enroll an employee into the social insurance system and as a result the employee failed to obtain social insurance benefits, the employee could sue the employer for damages and the courts should admit the case. However, the guiding opinion is silent on whether courts should admit cases in which an employee sues the employer for damages caused by the employer's *underpayment* of social insurance contributions. In this case, the local court expanded on the guiding opinion to rule that courts may award damages suffered by employees as a result of simple underpayment of contributions.