

China Employment Law Update

People's Republic of China

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Second Draft of Employment Contract Law Issued

On December 24, 2006, the Standing Committee of the National People's Congress (NPC) held the second reading of the proposed Employment Contract Law (劳动合同法). Expectations are that the NPC may approve the law this spring with the new requirements becoming effective later in 2007.

While some of the provisions from the first draft that were most favorable to employees have been deleted or amended in the second draft, the second draft would still have wide-reaching consequences for employers.

Only two fixed-term contracts are permitted under the new draft. If an employee requests to continue the employment after the expiration of the second term, an open-term contract must be signed. Since the second draft lacks a grandfathering clause, the majority of employees could become entitled to open-term contracts when the law becomes effective.

Company rules concerning matters that have a direct bearing on the rights and interests of employees must be discussed with the labor union or employee representatives. While union approval is not required, language is still vague regarding what procedures must be followed by employers to issue company rules. There is a risk that employers would have to consult unions and/or employees on all existing company rules when the law becomes effective.

Significant changes also apply for outsourced labor. Secondment will be permitted only for temporary, auxiliary, or substitute job positions. The list of positions will be announced later.

The second draft allows representative offices of foreign companies to hire their Chinese workers directly, removing a requirement to involve a labor service agency such as FESCO. It remains to be seen whether this change will become law.

For more information regarding the Second Draft, please refer to our recent Client Alert. A translation of the Second Draft is also available from Baker & McKenzie upon request.

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China to Implement National Employee Information Reporting System

Employers in China will be required to report employee information to local labor bureaus starting in 2007, pursuant to the Notice on the Establishment of the Employment Reporting System (关于建立劳动用工备案制度的通知). The requirement is aimed at creating a nationwide database of employment information by 2008 as well as encouraging employers to enter into written contracts with their employees.

The national notice does not indicate whether employers must file information for foreign national employees. In Shanghai, where such a system is already in place, foreign nationals are not included.

ACFTU Unionizes Apple OEM

In December, the All-China Federation of Trade Unions (ACFTU) established a union at Hongfujin Precision Industry Co., a subsidiary of the Foxconn Technology Group located in Shenzhen. Hongfujin is reportedly the largest Taiwanese investor in China and is best known for manufacturing iPods for Apple Inc. The action followed a well-publicized lawsuit last year when the company sued two local Chinese reporters who had written critically about work conditions at the company.

This appears to be the second time that the ACFTU has established a union without management involvement, following a similar action at a Wal-Mart store in mid-2006. Unions in China have traditionally been established in a “top-down” manner with the active participation of management, and union officials continue to press foreign-invested enterprises throughout the country to agree to the establishment of unions.

Province Creates Fines for Discriminatory Hiring Practices

In January, Heilongjiang province became the first reported jurisdiction in China to create fines for employers that discriminate against women during recruitment. Guangzhou is reportedly considering adopting similar fines.

The Heilongjiang fines were included as part of local rules implementing the Law on the Protection of the Rights and Interests of Women (妇女权益保障法). The national law prohibits employers from refusing to hire women on account of their gender and from imposing higher qualifications on female applicants than male applicants. These prohibitions, however, are largely symbolic due to the lack of corresponding penalties.

The Heilongjiang rules provide for fines ranging from RMB1,000 to RMB5,000 per violation. The fines may also be applied against employers who include terms in employment contracts restricting the rights of female employees to marry or give birth.

In addition, Xinjiang, Jiangxi, and Shaanxi provinces have also recently issued regulations implementing the Women's Protection Law. These regulations, however, do not contain fines for discriminatory hiring practices. Shanghai's implementing regulations are still pending.

Employees Prevail in 86% of Shanghai Arbitration Cases in 2006

According to a news release from the Shanghai Municipal Labor and Social Security Bureau, employees prevailed in full or in part in 86% of cases decided by labor arbitrators in the city in 2006. Disputes involving failure to pay wages and social insurance accounted for 64% of all cases.

More than 24,000 cases were accepted for labor arbitration in 2006. More than 5,000 of those cases involved claims against foreign-invested enterprises, an increase of 24% from 2005.

Drafts Completed for Three National Employment-related Laws

Drafts of the Employment Promotion Law (促进就业法), Social Insurance Law (社会保险法), and Law on the Resolution of Labor Disputes (劳动争议处理法) have been completed and are expected to be submitted to the National People's Congress later this year.

The draft Social Insurance Law requires that expatriates who are employed in China participate in China's mandatory social insurance system unless exempted by agreements between China and the employees' home countries.

The Law on the Resolution of Labor Disputes would require an initial stage of mediation in the dispute resolution process. If the parties fail to reach a settlement through mediation, then either party may file for arbitration. The draft law also extends the period when labor claims must be filed from 60 days to three months from the date when the plaintiff becomes aware of a legal claim. The law would also provide that arbitration decisions would be final and could not be appealed to court for cases involving wages, medical fees for work injuries, and pensions where the amounts claimed do not exceed RMB10,000.

The Employment Promotion Law would be the first national law in China aimed at stimulating employment opportunities. The draft law would impose obligations on employers to provide training to their employees. It also indicates that the national government may create tax incentives to encourage employment. In addition, the draft law states that employers may not discriminate during hiring on the basis of age, thereby adding to the protected classes of nationality, race, gender, religion and physical disability covered under existing law.

Shanghai Court Awards Senior Manager Overtime Pay

Last November, Shanghai's Yangpu People's District Court reportedly awarded overtime pay to a senior manager for work performed on Saturdays.

The employee, who was identified only as Ms. Yang, was employed as deputy general manager of an unidentified health foods company from March 2005 to February 2006. Ms. Yang, whose base salary was RMB5,000 per month, was awarded RMB28,680 as back pay for unpaid overtime plus a 25% penalty of RMB7,170.

While the case report lacks detail, it confirms that even senior managers are entitled to overtime pay, unless special approval has been obtained from the local labor bureau. The court did not accept the argument that senior managers typically work long hours and that overtime pay should be considered part of their salaries.

Further, the court relied only on witness statements from former colleagues to conclude that the employee had worked overtime on certain days. Therefore, employers cannot avoid liability by simply failing to establish a system to record attendance.

Clarification

In a clarification to an item in our December 2006 issue of the China Employment Law Update, the decision handed down in the case between Meiya Power Co., Ltd. and a certain employee was issued by a District Court in Nantong in May 2006 (not by the Intermediate Court as stated in the Update). Meiya appealed the decision to the Intermediate Court. However, the Intermediate Court made no finding against Meiya and instead the matter was settled by mediation between Meiya and the employee in September 2006.

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