

China Employment Law Update

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Employment Contract Law moves closer to passage

On April 24, the Standing Committee of China's National People's Congress (NPC) conducted its third reading of the Employment Contract Law (劳动合同法).

The Standing Committee is expected to review and possibly approve the law during its session in late June.

The third draft makes changes in a number of areas, but keeps key provisions from the second draft that was reviewed by the Standing Committee in December 2006 which discouraged the use of fixed-term contracts and required employers to engage in consultations with unions or employee representatives before issuing company rules.

Among the changes in the third draft is a cap on the amount of severance that an employer must pay a terminated employee; severance payments would be capped at 300% of the local average monthly salary for each year of service. The grounds for mass layoffs were expanded in the third draft to include situations when an enterprise "switches production, introduces new technology or revises its business method".

The third draft deleted a controversial provision that required employment contracts between employees and labor service providers, such as FESCO and CIIC, to be renewed unless the employees could be terminated for cause.

A translation of the third draft is available from Baker & McKenzie upon request.

Discrimination against Hepatitis B carriers banned

Discrimination against persons infected with the hepatitis B virus (HBV) was prohibited pursuant to a May 2007 opinion issued by the Ministry of Labor and Social Security.

According to the opinion, an employer is prohibited from discriminating against HBV carriers in recruitment or employment. Certain positions are exempt from the restrictions, including positions in the food services sector and childcare workers.

According to an official of the Ministry of Health, China has approximately 120 million persons who are HBV positive, representing 10% of the nation's total population.

Lawsuits filed by individuals infected with HBV claiming discrimination and unfair termination have become increasingly common. In one recent well-publicized case in Jiangsu province, three employees sued their former employer for unlawful termination after a mandatory annual health examination revealed they were HBV carriers. The case is currently on appeal at the district court level.

Employees entitled to warm weather subsidies

Employers will be required to provide subsidies to the employees on days when the temperature in the work place reaches 33 C (91 F) pursuant to a notice issued in June by the Ministry of Health, the Ministry of Labor and Social Security, the State Administration of Work Safety, and the ACFTU. For employees working outdoors, subsidies are required when the temperature reaches 35 C (95 F).

The amount of the required subsidies are to be determined by local authorities.

In Chongqing, the local government implemented new regulations on June 1 that set a maximum work day of five hours if the temperature reaches between 37 and 40 C (99-104 F). In most cases, employees may also not work between 12 noon and 4 p.m. during these conditions. If the temperature exceeds 40 C (104 F), then employees are not permitted to work. Shenzhen issued a similar regulation regarding warm-weather work in 2005.

Firms accused of using child labor to make Olympics licensed products

Officials in Guangdong are reportedly organizing a joint task force to investigate claims that manufacturers in the southern China province were using child labor to manufacture licensed products for the 2008 Beijing Olympics.

The investigations were sparked by a report released by the PlayFair Alliance 2008 alleging that four companies in Guangdong that manufacture licensed goods were using child labor and committing wage and hour violations.

Beijing Olympic organizers announced that they would also conduct an investigation of manufacturers of licensed products for violations of labor rights.

In a related development, a reported 35,000 police officers raided up to 7,500 brick kilns in Henan and Shanxi provinces in June, freeing hundreds of persons held as forced laborers. The freed individuals reportedly included many children.

The raids were prompted by the efforts of 400 fathers in Henan province who reportedly sought help through on-line websites to look for their children after failing to obtain assistance from local law enforcement officers and labor officials. Up to 1,000 children were reportedly forced to work in kilns in Shanxi.

U.S. labor union delegation visits China

Representatives of the U.S.-based Change to Win labor coalition announced their long-term intention to work more closely with the All-China Federation of Trade Unions (ACFTU) following a five-day visit to China in May. Change to Win includes the International Brotherhood of Teamsters, the Service Employees International Union, and the United Farm Workers.

The first visit by U.S. labor groups to China in decades resulted in the two sides reportedly discussing collective bargaining strategies and how to effectively lobby for labor-related legislation. U.S. labor interests have traditionally boycotted contact with the government-controlled ACFTU.

The U.S. union officials encouraged the ACFTU to be more aggressive in raising wages and working standards in China. Teamsters President James Hoffa reportedly lauded the ACFTU for its campaign to establish unions in foreign-invested enterprises and urged the ACFTU to be more aggressive against state-owned companies.

Communist Party branch drive enters final phase in Shanghai

The effort by the Chinese Communist Party (CCP) to establish party branches in non-state owned enterprises, including foreign-invested enterprises, enters its final phase this summer in Shanghai.

The drive is the result of a September 2006 instruction from the CCP's Organizational Department to provincial and municipal party branches to intensify efforts to establish party branches in private enterprises. Companies targeted are those with at least 100 employees and smaller companies with revenues over RMB 5 million. According to the CCP Charter, party branches should be established in companies and other work units that have at least three CCP members.

Local CCP organization departments have set their own targets and organization strategies. For example, the Shanghai authorities announced

goals of 80% of private enterprises having their own party branches by June 30, 2007 and 90% by the end of September 2007, when the campaign is scheduled to end. Beijing CCP authorities announced that their campaign would last until the end of 2008, with a goal of 80% of companies having CCP branches.

The organization drive appears intended to implement a requirement in the Company Law that companies should have CCP branches, as well as boosting the presence of the CCP in private enterprises. The Beijing branch of the CCP explained in a public document that the establishment of CCP branches in private enterprises was intended to “further expand the scope of the Party’s involvement, strengthen the Party’s influence... and provide solid assurance for the consolidation and expansion of the foundation for the Party’s political power.”

In a related development, the ACFTU published its “Blue Paper” in May in which it clarified that employee representative congresses should be promoted in private enterprises; in the past, such congresses existed mainly in state-owned enterprises.

Shanghai approves sexual harassment rules

On April 26, the Standing Committee of the Shanghai People’s Congress approved an amendment to local regulations specifying acts that may constitute sexual harassment. The regulations state that sexual harassment can occur through speech, words, images, electronic information, and physical contact.

The regulations also require that employers not only investigate complaints from female employees, but also take steps to prevent sexual harassment. The regulations do not provide further details on what types of preventative measures may be required or what penalties may be imposed by labor bureau authorities on employers who fail to comply. The regulations also give female employees the right to file civil suits for harassment.

The regulations aim at implementing sexual harassment prohibitions in the Law on the Protection of the Rights and Interests of Women (妇女权益保障法). A 2005 amendment of this law represented the first effort in China to outlaw sexual harassment. The amendment, which targeted both employment and non-employment related sexual harassment, was faulted for being ineffectual due to its failure to define behaviors that constitute sexual harassment.

Beijing Labor Bureau launches summer crackdown

The Beijing Labor Bureau has announced that a crackdown on labor violations is being conducted from May 15 through August 31. The

industries that are targeted for compliance investigations include professional services, construction, the garment industry, hotels, and restaurants.

Investigators are verifying whether employers have concluded written contracts with their employees and whether social insurance, wage payment, minimum wage, work hours, and leave requirements were satisfied.

The Labor Bureau reportedly stated that names of employers found to be not in compliance will be publicized through the mass media. The records of these employers will also be entered into an on-line system operated by the Beijing Administration Industry and Commerce that allows the public to access information about companies.

Initial reports of the crackdown showed that of 1,205 employers that were investigated, 208 had not signed labor contracts with their employees, 28 had not made wage payments in a timely manner, and 132 had not registered their employees with the social insurance system. Sanctions on these employers were not announced.

Union sues Shanghai company to pay union contribution

A Shanghai district court in May issued an order requiring an unidentified Shanghai engineering and design company to pay RMB 320,000 in outstanding union contributions. The case was reportedly the first time in Shanghai that an enterprise union had successfully pursued a claim through the courts to order an employer to pay union contributions.

The employer has reportedly stopped paying union contributions, which are assessed at 2% of total payroll, following a reorganization in August 2004. The union chairman reportedly had the backing of the upper-level union authorities in Fengxian district to initiate the suit in an effort to stem the widespread practice of employers failing to make required contributions.

Change in work location ruled not sufficient grounds to claim severance

A People's Intermediate Court in Xinxiang, Henan province ruled in June that the relocation of a company to the suburbs was not sufficient grounds for employees to terminate their contracts and be entitled to severance.

Five employees reportedly sued Xinxiangshi Industrial Pump Co., Ltd. for severance claiming that they were constructively terminated after the company required them to work at a different location. The company reportedly was forced to move due to an order by the environmental protection authorities.

The lower court ruled for the employees on the basis that the change in the location of employment was a change in the conditions of employment, and therefore grounds for the employees to terminate their contracts and claim severance.

The Intermediate Court reversed on the basis that the change in location was not sufficient to determine that the employees' contracts could not be performed. The court reportedly noted the contracts did not specify a specific work location and that the company had committed to providing transportation subsidies and food and housing benefits to the employees as a result of the relocation.

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