China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

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In This Issue

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Chinese Leadership Urges the Building of Harmonious Labor Relations

On March 21, 2015, the Communist Party Central Committee and the State Council issued an *Opinion on the Building of Harmonious Labor Relations* (the "**Opinion**"). The publication of the Opinion reinforces the fact that China's senior leadership is putting more focus on the issue of China's increasingly agitated workforce.

The Opinion was issued in the context of a period of economic and social transition in China. Labor relations have become "increasingly pluralistic, labor tensions have entered a period of increased prominence and frequency, and the incidence of labor disputes remains high". The Opinion refers to issues that need to be addressed, like unpaid wages to China's legions of migrant workers and unpaid/underpaid social insurance contributions, and it highlighted the growing number of labor strikes and protests.

One prominent example is a recent strike that took place over housing fund benefits in March 2015, in Dongguan, Guangdong Province. It was reported that employees of several factories which supply well-known fashion brands went on strike because of the city's new housing fund policy, which restricts the circumstances under which employees can withdraw the funds (i.e. the new local housing fund policy does not permit withdrawal upon unemployment or separation from the employer).

According to the Opinion, the local Party committees and government should "make the building of harmonious labor relations an urgent task". Key implementation measures listed in the Opinion are as follows:

(i) Protecting employees' fundemental rights and interests according to the law, e.g. entitlement to salary, leave, labor safety and health, social insurance and job training;

(ii) Providing written employment contracts and promoting collective bargaining in relation to employment terms;

(iii) Promoting employee representative councils, encouraging transparency in relation to corporate matters, and promoting the system of appointing employee directors and employee supervisors (i.e. encouraging employee representatives to serve as members of the board of directors and the board of supervisors).

These high-level measures are similar to those advocated in the past by government and union officials. It remains to be seen how the government will actually enforce these measures in practice.

Key Take-Away Points:

The publication of the Opinion demonstrates that China's senior leadership is taking the current unrest amongst China's workforce seriously. However the steps proposed in the Opinion lack legal force and are not sufficiently detailed and therefore are unlikely to be effective in addressing the current problems.

Draft Patent Law and Draft Regulations on Employee Service Inventions Released

In April 2015, the national government released the draft amended version of the Patent Law ("**Draft Patent Law**") and draft regulations on employee service inventions ("**Draft Service Invention Regulations**") for public comments.

From an employment perspective, one of the most noteworthy revisions in the Draft Patent Law is that it has narrowed the definition of employee inventions. Under the Draft Patent Law, while inventions made by an employee in performing job duties shall be deemed as employee inventions, and shall belong to the company, inventions created by an employee by using the company's resources shall belong to the employee, unless the company can prove it was created in the course of performing job duties or unless otherwise agreed by the company and the employee. In contrast, the current PRC Patent Law states that inventions created in performing job duties or by *mainly* using the company's materials or technical resources should both belong to the company.

The Draft Service Invention Regulations have kept the majority of the controversial provisions (such as the minimum reward and annual remuneration standards for employee inventor(s)) from an earlier draft issued in April 2014 (please see our earlier newsletter article on this **here**). The current Draft arguably still allows companies to avoid the default requirements on the reward and remuneration by reaching agreement with employees or implementing company policies, provided that such agreements or policies do not deprive employees of their legitimate rights nor set unreasonable conditions on the employees' claims and use of such rights. The exact meaning and scope of this restriction on the ability of the company to set different terms through agreement or company policies, however, is not clear.

Key Take Away Points:

It is now even more crucial for companies to enter into well-drafted agreements with employees and to adopt comprehensive company policies to address employee invention issues in order to safeguard companies' legal IP rights and seek to control the costs relating to compensation for inventions.

China and Canada Sign Agreement on Social Security

China and Canada signed an "Agreement on Social Security" (the "**Agreement**") on April 2, 2015, in Ottawa, Canada. The Agreement aims to address the social security problems encountered by employees working outside of their home country, such as making contributions to both the Canadian Pension Plan and the comparable pension fund in China in respect of the same employment. It is anticipated that this might result in savings for employees relocating between the two countries, as well as their employers; Canadian companies and their employees sent to work temporarily in China may continue to contribute to the Canadian Pension Plan (and would not need to make contributions in China), while Chinese companies operating in Canada and their employees posted there will continue contributing to China's pension program (and would not need to make contributions in Canada). The other four types of social insurance funds in the Chinese system (i.e. medical, unemployment, maternity, and work injury), do not seem to have been addressed in the Agreement based on published news reports.

The Agreement will come into force once both Canada and China have complied with the legally mandated approval procedures in their respective jurisdictions. The text of the Agreement will be made available at that time.

China has reportedly also commenced bilateral social security agreement negotiations with 15 other countries. Bilateral agreements have already been signed with Germany, Korea, Denmark and Finland.

Key Take-Away Points:

The requirement for foreigners to make social insurance contributions has been in place since 2011. It is noteworthy that the process of entering into bilateral agreements has taken significant time and to date only five agreements have been signed. This means that there are still a significant number of expat employees who are making social insurance contributions in two countries, meaning increased costs for expats and companies alike.

New Regulations Issued to Strengthen Prevention and Control of Occupational Hazards

On March 23, 2015, the State Administration of Work Safety issued the *Eight-point Regulations on Occupational Hazard Prevention and Control by Employers* ("**Eight-point Regulations**") to further prevent and control occupational hazards at the workplace.

Under the Eight-point Regulations, employers must establish and improve the accountability process for preventing and controlling occupational hazards. This includes, ensuring their workplaces meet

the requirements for preventing occupational hazards, setting up safeguards for occupational hazards and ensuring the effective operation thereof, and providing their employees with qualified protective gear. Other requirements imposed include setting up warning signs or notice cards at their workplaces and operational posts, regularly conducting occupational hazard testing, providing training on occupational health for their employees, and arranging for employees to have occupational health examinations and creating archives for the supervision of occupational health.

Key Take-Away Points:

Most of the requirements imposed by the Eight-point Regulations are not new, and simply summarize and further emphasize employers' key obligations under the existing detailed regulations that many employers are failing to comply with in practice. However, they do indicate the trend of increased government attention being paid to workplace safety issues.

Dispatch Employee's Open-Term Contract Claim Upheld by Court

The Beijing Dongcheng District People's Court reportedly upheld a dispatch employee's open-term contract claim on December 17, 2014 and ordered the labor dispatch agency and host entity to be jointly liable for (i) double wages, in the amount of RMB 4,724, for failure to enter into an open term contract and (ii) remedies for wrongful termination in the amount of RMB 66,864.

In this case, the employee was converted from a direct-hire to an indirect employee, in the position of delivery services operator. This arrangement was made through a labor dispatch agency. At the time of renewing his third one-year employment contract with the agency, the employee requested to enter into an open-term contract with the agency. However, the agency refused his open-term request and terminated his employment contract approximately three months after his third fixed-term contract expired.

Key Take-Away Points:

This case demonstrates that while the law is vague as to whether a dispatch employee has the right to demand an open term contract, the courts in Beijing tend to find in their favour when ruling upon these issues (courts in other locations may take a different view on this issue). Companies should be aware that they may not be able to avoid entering into open-term contracts with dispatch employees and consequently should carefully monitor their dispatch employees' fixed-term contracts, to evaluate the risks of renewal following the expiry of the first fixed-term contract.

Beijing Court Takes Public Position on Dismissals for Violation of the One-Child Policy

The Beijing Second Intermediate People's Court (the "**Court**") reported in a recent press conference that labor disputes involving female employees' violations of the one-child policy have been on the rise since 2013.

According to news reports, the Court takes the position that a female employee's violation of the one-child policy *per se* does not constitute a ground for unilateral termination. The employees should still be entitled to time off in accordance with female protection laws, although they are not entitled to the additional "late" birth maternity leave provided under the family planning regulations. These employees will also be responsible for the medical costs in relation to the childbirth and are not entitled to salary payment during the time off.

If the employer wants to terminate an employee's employment for violation of the one-child policy, this must be stipulated in the company's rules. However, termination for a first breach of the one-child policy may not be a reasonable position for an employer to take. According to the news reports and as seen in one reported case, the judges at the Court have taken the position that having a second child in contravention of the one-child policy should not be deemed as a "serious" violation, although having a third or fourth child could be categorized as "serious." In one reported case, the Beijing Second Intermediate People's Court ruled that the employee violated the general "good faith" principle by submitting medical certificates issued by a Beijing hospital for sick leave when the employee was actually travelling abroad to give birth. The employee had also taken additional "late" birth maternity leave to which she was not entitled and therefore the Court upheld the company's unilateral termination decision.

Key Take-Away Points:

It is generally risky to unilaterally terminate an employee's contract for violating the one-child policy. However if employers intend to dismiss, then the right to terminate on this basis must be set out clearly using detailed wording in the company disciplinary policy. Generally, courts are likely to take a strict view when examining the reasonableness of the company's policy. Employers may prefer the approach of deducting the employee's wage during the time off for having additional child(ren) in violation of the one-child policy. Courts in other cities may take a different view on this issue.

Court Rejects Evidence Obtained from Popular Social Media Platform

In April 2015, the Chongqing Municipality No. 5 Intermediate People's Court ruled that a company's termination decision made on the ground of serious violation of company policies was wrongful. The court took the view that the relevant company policy relied upon for the termination was not sufficiently "publicized" when the company sent it to the employees through an employee QQ group (QQ is a popular social media platform in China). The employee who allegedly violated the relevant company policy successfully claimed that he was not a member of this QQ group and was unaware of the policy.

Under PRC law, in order to dismiss an employee for serious violation of company rules, the company rules must be adopted through an employee consultation process, which includes, among other steps, publicizing the company rules to all employees. The judge in this case later commented that from an evidentiary perspective, it is often difficult to verify evidence (including text or voice messages) posted on an electronic medium such as QQ or WeChat. This is because this type of electronic medium often involves multiple accounts and multiple communication parties, resulting in difficulty in verifying identities and facts. In addition, messages posted on such media can be modified, tampered with or deleted, and even the account can be easily deleted, which would affect the reliability of the relevant evidence, unless such evidence is preserved in a timely manner and notarized. By contrast, mobile phone text messages are more reliable as they are preserved in the mobile back-up system. It is likely that in this case, there was no evidence proving that the employee was a member of the QQ group and was, thus, aware of the policy.

The PRC Supreme People's Court has recently issued an Interpretation effective on February 4, 2015, specifying which types of electronic evidence are acceptable as forms of evidence, such as online chat records, blogs, micro blogs, electronic data exchange, mobile phone text messages, e-signatures, etc. Further details about the Interpretation can be accessed via this link **here** to our newsletter.

Key Take-Away Points:

This case shows that even though electronic evidence obtained through modern communication media, such as QQ, WeChat, or blogs, is acceptable in arbitration / court, courts are still very sceptical about the reliability of such electronic evidence. Therefore, in order to use information on such mediums as evidence in the arbitration or court, it is still necessary to undertake the procedural requirement of notarization by notary officials to preserve and strengthen the reliability of such evidence. Notarization is currently a commonly used means to preserve evidence sent through emails, and will likely be frequently used to preserve evidence sent through WeChat or blogs going forward.

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Beijing Court Rules Employees to Pay Liquidated Damages for Breach of Non-Competition Agreement

The People's Court of Haidian District ordered 10 employees in Beijing to pay their former employer liquidated damages for breach of a non-competition agreement.

The employees worked for an educational company as teachers, and had signed a non-competition agreement prohibiting them from working for any competitor of the company during the employment and for a period of one year following termination. The agreement provided that the company would pay the employee each month, an amount equal to 50% of his/her average monthly pay during the final 12 months of employment. It provided that if the employee violated the non-compete obligation, he/she was required to pay liquidated damages equal to five times the compensation paid to the employee for the non-compete.

In March 2014, the employees resigned from the company together and subsequently joined a rival educational company. The former employer then issued proceedings against the employees for breach of the non-competition agreement and claimed liquidated damages. The employees denied the fact that they worked for the rival educational company and they also argued that the penalty amount was too high. The court was presented with evidence proving conclusively that an employment relationship existed with the rival company. In addition, the business license and other evidence indicated that the new employer was a direct competitor of the former one. Based on those findings, the court ordered the employees to pay the plaintiff company a penalty ranging from 70,000 to 300,000 RMB respectively which was calculated based on their salary.

Key Take-Away Points:

In a non-competition agreement, employers should clearly specify the period of the non-compete term, the amount of compensation to be provided for the term and the liquidated damages for a breach. Also, the court will consider the duration and impact of the breach of the non-competition agreement when determining what level of damages to award. Finally, the employee's intentions may be taken into account in these cases and acting in concert with other employees may lead to a higher award of damages.