

China Employment Law Update

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BAKER & MCKENZIE

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Government Takes Steps to Limit Layoffs

In response to the current economic situation, the Ministry of Human Resources and Social Security (MOHRSS) in a notice issued on November 17, 2008 has called on employers to refrain from laying off employees.

Presumably in response to the MOHRSS notice and out of the concern to prevent social unrest, some local governments have announced or reiterated policies that employers must obtain approval from local labor bureaus before conducting mass layoffs. These approval requirements are more stringent than the mass layoff procedures set out under the Employment Contract Law (ECL) (劳动合同法), which only require companies to notify the local labor bureaus (after consultations with all employees or the company unions, if any). Further, some localities are also now requiring employers in financial difficulties to consult with their employees regarding the possibilities of reducing wages and working hours as means to avoid mass layoffs.

In a related development, an official of the cabinet-level State-Owned Assets Supervision and Administration Commission said on December 16, 2008 that state-owned enterprises should strive to reduce wages of employees and not lay off employees. Further, the MOHRSS announced on December 22, 2008 that companies which are in financial difficulties and are unable to make social insurance contributions may defer payment of social insurance contributions of up to six months in 2009, upon obtaining approvals from the provincial people's governments. MOHRSS had announced earlier that planned increases in minimum wages will be put on hold.

Statutory Holiday Schedule Approved

The 2009 national holiday schedule approved by the State Council on December 4, 2008 is as follows:

- New Year's Day (January 1);
- Spring Festival (January 25-27);
- Tomb Sweeping Day (April 4);
- Labor Day (May 1);
- Dragon Boat Festival (May 28); and
- National Day (October 1-3) and Mid-Autumn Festival (October 3).

The State Council also announced when rest days will be moved in order to create longer holiday periods. For example, the rest day on January 4 (Sunday) will be moved to January 2 (Friday), so that there will be 3 days of holidays from January 1 to January 3. January 4 (Sunday) will be a working day.

For Spring Festival, the rest days on January 24 (Saturday) and 25 (Sunday) and February 1 (Sunday) will be moved to January 28-30, so that there will be 7 days of holidays from January 25 to 31. January 24 (Saturday) and February 1 (Sunday) will be work days.

MOHRSS Announces Regulatory Plan for 2009

The MOHRSS on October 27, 2008 reportedly announced that it is drafting regulations regarding secondment arrangements between staffing agencies, host companies and employees. Also on the agenda is the establishment of a nationwide employment database within three years to monitor the conclusion and performance of employment contracts.

The MOHRSS also plans to formulate Rules for Handling Labor Disputes and Arbitration Cases (劳动人事争议仲裁办案规则) and Regulations Regarding Administration of Social Insurance Archives (社会保险档案管理规定).

Failure to Complete Employee Consultation Procedures Found Not to Bar Termination of Employee

The Beijing Haidian District People's Court reportedly ruled in November 2008 that an employee could be terminated for violation of company rules that were issued prior to January 1, 2008, even if the rules were not later adopted through the statutory employee consultation procedures required by the ECL.

An employee, identified only as Ms. Heng, was a general manager of a Wal-Mart store in Beijing. She was dismissed in February 2008 for breach of company rules for selling insurance plans to her colleagues. A labor arbitration committee awarded her compensation of RMB 180,000 for unlawful termination. The company appealed the ruling and argued that the termination was lawful and severance or compensation should not be due.

The court ruled that although the company rules were issued prior to the effective date of the ECL and employee consultations were later not followed, the rules were binding on Ms. Heng because they had been publicized to all employees. Accordingly, termination was valid and the company did not need to pay her severance or compensation.

This case should be contrasted with a Ningbo case where the court ruled that an employee handbook issued prior to the effective date of ECL was not valid if it did not go through employee consultation procedures. (See China Employment Law Update June 2008.) Thus, the validity of company policies adopted prior to the ECL implementation date will be subject to local interpretation.

Unilateral Demotion Ruled Invalid

The Beijing Dongcheng District Court reportedly ruled in November 2008 that an employer may not unilaterally demote an employee without her consent.

The case was reportedly brought by a manager of a McDonalds restaurant in Beijing, who was identified only as Ms. Chiu. In February 2008, she was demoted to be a cleaner without her consent. The court ruled that it was wrongful for the employer to unilaterally vary her position.

Employee Receives Pro-rata Payment for Untaken Annual Leave

The Shanghai Nanhui District People's Court reportedly ruled in December 2008 that an employee was entitled to a pro-rated payment of her untaken annual leave upon termination. The decision was reportedly the first Shanghai case decided on the Paid Annual Leave Regulations for Employees (职工带薪年休假条例) which became effective on January 1, 2008.

The employee, identified only as Ms. Huang, was a warehouse manager of an unidentified Shanghai company until her resignation in June 2008. The company refused to pay her wages in lieu of her unused annual leave in 2008 and argued that she was only entitled to such payment if she had worked for a full year in 2008.

The court rejected the employer's argument and ruled that Ms. Huang was entitled to 5 days of annual leave because she had been employed for more than one year. As she left in the middle of 2008, she was entitled to annual leave on a pro-rated basis. As the employer was unable to prove that Ms. Huang had taken annual leave in 2008, the employer was required to compensate her at a rate of 300% of her average daily wage for each day of unused annual leave.

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