China Employment Law Update

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Employers Face New Obligations regarding Occupational Hazard Warnings

On November 13, 2014, the PRC State Administration of Work Safety issued the *Regulations on the Administration of Occupational Hazard Notifications and Warning Signs* ("**Regulations**"), which increase employer obligations in terms of notifying employees of occupational hazards and setting up warning signs at workplaces. In particular, the Regulations require employers to do the following:

- Specify in the employment contract the potential occupational hazards and their consequences, as well as the protective measures and treatments (including position allowance, work-injury insurance, etc.) for such occupational hazards. As for dispatched workers who face occupational hazards, a written notification regarding such hazards is required.
- Set up bulletin boards to make public their occupational hazard prevention and protection policies in the office and production areas respectively.
- Set up warning signs at workplaces and employees' work stations, as well as on equipment, packaging for materials (or products) and storage sites, where there are occupational hazards. The Regulations identify 12 types of work environments where special warning signs are needed.
- For positions that may face severe occupational hazards, in addition to the warning signs, a notification card to the employee regarding the occupational hazard is required. Such notification card should indicate the name of the hazardous factors, physical features, harm to health, exposure limit, protective measures, emergency measures and phone numbers, etc.
- The Regulations also specify rules for the frequency of bulletin board updates, as well as repair and replacement of warning signs and notification cards.

While the Regulations themselves do not contain any penalty provisions for non-compliance, penalty provisions in the *Law on the Prevention of Occupational Diseases* and other implementing regulations would apply. Companies with manufacturing facilities or that otherwise have workplaces where employees may be exposed to occupational hazards

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therefore should strictly comply with the new measures outlined in the Regulations.

New Measures Issued Related to Expats on Short-term Assignments in China

On November 6, 2014, the Ministry of Human Resources and Social Security and other government departments jointly issued *Trial Procedures for Foreign Nationals who will Complete Short-term Work Assignments in China* ("**Trial Procedures**"), which stipulate the requirements to obtain short-term work authorization in China. The Trial Procedures will take effect on January 1, 2015, and they echo recent immigration laws and regulations that indicate a stricter approach towards foreigner nationals' immigration status in China.

Based on the new Trial Procedures, if a foreign national will enter China for certain specified purposes (e.g. to complete certain technical, scientific research, management or guidance related work at the place of a business partner in China, shoot a film or commercial, etc.) and stay for no more than 90 days, he/she must enter China on a Z work visa.

After the foreign national enters China on a Z visa, if the short-term work assignment will last for more than 30 days, he/she should additionally obtain a Residence Permit (with a validity of up to 90 days) from a local public security bureau.

The Trial Procedures also describe several circumstances (e.g. conducting maintenance on purchased machinery or equipment, being assigned to an affiliated branch, subsidiary or representative office, etc.) that will not be treated as a short-term work assignment, and where the foreign nationals should instead use either an M or F visa as appropriate to enter China for a period of stay no more than 90 days.

In the past, as long as foreign nationals maintained employment overseas and were assigned into China for less than three months, they could enter China on an M visa (i.e. a business visa). Now, before a company assigns an employee to complete a certain short-term task in China, the company will need to carefully consider the type of assignment and determine whether the employee will need a Z visa to perform the assignment in China.

National Holiday Arrangement for 2015 Announced

As in previous years, the State Council announced an adjusted holiday schedule (the "**Notice**"), under which weekend days and working days are switched around in order to provide workers with a longer consecutive period of time off from work, presumably to promote national

consumption and travelling and to boost the national economy. The Notice is not compulsory for private companies (other than the days of official public holiday). Nevertheless, the vast majority of companies in China would follow the Notice as a matter of market practice, since this is generally expected by employees.

Official Public Holiday	Adjusted Holiday Arrangement
New Year Holiday (1 day)	Non-Working Days: January 1 to January 3; Working Days: January 4 (Sunday)
Chinese New Year (3 days)	Non-Working Days: February 18 to February 24 Working Days: February 15 (Sunday), February 28 (Saturday)
Tomb Sweeping Day (1 day)	Non-Working Days: April 5 to April 6 Working Days: April 7 (Tuesday)
Labor Day (1 day)	Non-Working Days: May 1 to May 3 Working Days: May 4 (Monday)
Dragon Boat Day (1 day)	Non-Working Days: June 20 to June 22 Working Days: June 23 (Tuesday)
Mid-Autumn Day (1 day)	Non-Working Days: September 27 Working Days: September 28 (Monday)
National Day (7 days)	Non-Working Days: October 1 to October 7 Working Days: October 10 (Saturday)

Chinese Government to Provide Employment Subsidy to Certain Enterprises

In an effort to help cushion the impact of changing business conditions and restructurings on employment, on November 16, 2014, the Ministry of Human Resources and Social Security and other government departments jointly issued the *Circular on Issues Concerning Supporting Enterprise Employment Stabilization with Unemployment Insurance* (the "**Circular**"), which requires the unemployment social insurance fund to grant eligible enterprises subsidies for stabilizing employment ("**Employment Stabilization Subsidy**").

In general, the Employment Stabilization Subsidy may apply to companies that are: (a) undergoing a merger or restructuring resulting in a significant change in management control, (b) reducing overcapacity in industries with rampant overcapacity such as iron and steel, cement, aluminum, flat glass or ship building, (c) closing down outdated production facilities in such industries as electricity, coal, iron and steel, cement, non-ferrous

metal, coke, paper making, leather making, printing or dyeing, and (d) other enterprises approved by the State Council.

To apply for the Employment Stabilization Subsidy, a company that falls under the above categories must meet the following conditions: (a) its production and operational activities comply with the national and local policies on industrial restructuring and environmental protection; (b) it has enrolled its employees in the unemployment insurance scheme in accordance with the law and has paid unemployment insurance premiums in full; (c) in the previous year, it had no layoffs or its layoff rate was lower than the registered urban unemployment rate of the covered area; and (d) it has a sound finance system and standardized management and operations.

The local human resources and social security department has the authority to approve the companies' applications and determine the amount of each company's Employment Stabilization Subsidy. The local finance department will fund the subsidy payments accordingly. In accordance with the Circular, eligible companies may, during the period of restructuring, addressing overcapacity, or closing down of outdated production facilities, receive up to 50% of the total amount of its actual unemployment insurance premiums (including the employer's and the employee's contributions) during the previous year, which can be used to pay living subsidies to employees, or pay social insurance premiums , or fund job reassignment training, skills training or other relevant expenses.

In accordance with the Circular, the employment stabilization subsidy policy will be effective until the end of 2020.

Tianjin Regulations Require Host Companies to Pay Social Insurance for Dispatched Workers

Starting from January 1, 2015, host companies of labor dispatch workers in Tianjin (instead of staffing agencies) will be required to pay social insurance for their dispatched workers, according to *Trial Provisions on Issues Relating to Dispatch Workers' Participation in Social Insurance System* jointly issued by the Tianjin Human Resource and Social Security Bureau and Tianjin Finance Bureau ("**Tianjin Social Insurance Provisions**"). The purpose of the Tianjin Social Insurance Provisions is to ensure that the social insurance for the dispatched workers will be paid adequately and thus their social insurance interests could be safeguarded.

In almost all other parts of China, host companies would usually make a payment to the staffing agencies, which should then be used by the staffing agencies to cover the cost of paying social insurance for the dispatched workers. However, in practice some staffing agencies would underpay social insurance contributions for the dispatched workers even though they have received sufficient payment from the host company

to cover the contributions. In such case, the staffing agency may be liable for any harm caused to the dispatched worker as a result of the underpayment, and the host company's liability in such situation.

According to media reports in November 2014, in one recent case ruled on by the Rudong County People's Court in Jiangsu Province, the staffing agency did not pay social insurance for a dispatched worker who suffered a work injury, and the court ruled that the host company should be jointly liable for the dispatched worker's injury and damages, because it failed to ensure that the staffing agency made social insurance contributions for the dispatched worker.

First Ever Ruling on Sex Discrimination Case Issued in Zhejiang Province

On November 12, 2014, a female graduate was awarded RMB 2,000 as compensation for emotional distress in a sex discrimination case. According to the media, this is the first case in Zhejiang Province where a woman has successfully obtained relief in a sex discrimination claim. In September 2013, a district court in Beijing for the first time ever in China agreed to hear a sex discrimination case, though the case was ultimately resolved through mediation.

In this case, the female graduate applied to a cooking company for an office administration position. After receiving no response, she called the cooking company and was told that only men would be accepted for the position. The woman brought suit in the Hangzhou Xihun District People's Court (in Zhejiang) claiming that the cooking company refused to employ her based on her sex. The court ruled that the company discriminated against the woman based on her sex in violation of the law, and thus ordered RMB 2,000 as compensation for emotional distress.

In a separate discrimination-related case, in November 2014, the Liping County People's Court (in Guizhou Province) refused to accept an HIV discrimination case. The case has been appealed to the intermediate people's court, and the final ruling is not reported yet. According to the media, this is the sixth HIV discrimination case ever in China, and in the prior five cases, none of the plaintiffs obtained favorable rulings (though in two cases, the plaintiffs obtained compensation through mediation).

Under PRC law, discrimination against an employee or job candidate on the basis of race, ethnicity, sex, religion, pregnancy, marital status, disability, communicable disease carrier status, and migrant worker status is prohibited. In practice, the enforcement of anti-discrimination rules is rare, and PRC courts are generally reluctant to accept or rule on the merit of discrimination cases.

Retired Employees Fail in their Severance Claims

In two separate cases, employees who reached the statutory retirement age failed in their severance claims against their employees. In one case, a Foshan employee reached the statutory retirement age in 2011 and started to receive pension benefits from the social insurance funds. However, after reaching the retirement age, the employee continued to work for the company. In September 2011, the employee and the company signed a new "employment contract" with an open term, under which the employee continued to work with the company till the company closed its business in August 2014.

The retired employee then claimed for severance for the ending of his "employment" due to the company's closure. The arbitration tribunal and people's court in Foshan both dismissed the employee's severance claim because the employment relationship between the employer and employee had ended as a matter of law once the employee reached the statutory retirement age and started to receive pension benefits; therefore, the relationship between the company and employee should have been deemed a labor service relationship (*laowu guanxi*), and not an employment relationship (*laodong guanxi*), despite the fact the parties signed an "employment contract". Only employees are entitled to severance upon company closure.

A similar ruling was issued by a Kunshan People's Court in Jiangsu Province recently. An employee reached his statutory retirement age in November 2011 and continued to work with his original employer after retirement till January 2014, when the original employer terminated him. The employee then claimed for severance for such termination. The Kunshan People's Court overruled the employee's claim of severance because after the employee reaches statutory retirement age, the relationship between the original employer and the employee automatically converted to a labor service relationship rather than an employment relationship.

Allowance Deduction as Disciplinary Action Ruled to Be Unlawful

In a recent case, the Qingpu District People's Court in Shanghai ruled against an employer who deducted an employees' skills allowance for late arrival and browsing the internet during work time.

Before taking the disciplinary actions, the company confronted the employee with his attendance records and internet browsing records, and informed him that the company would reduce his salary and cancel his bonuses as disciplinary actions. The company prepared meeting minutes and then issued the employee a written notice on the disciplinary actions.

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Should you wish to obtain further information or want to discuss any issues raised in this newsletter with us, please contact:

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The employee signed both documents. Later, the employee found that in addition to his salary reduction and bonus cancelation, the company also deducted his skills allowance, and thus sued the company for back payment.

The company submitted the written notice signed by the employee as evidence in court, but the employee argued that the statement that language stating that "the employee's skills allowance will be zero" was later added by the company without his agreement. The court reviewed the various pieces of evidence and found that first, in accordance with the company's salary payment policies, the skills allowance is not a part of an employee's bonus as the company claimed (so the language on bonus cancellation should not cover the deduction of the skills allowances), and second, the statement regarding the skills allowance cancellation in the notice was added after the employee's signature and is therefore not binding on the employee. The court thus ordered the company to pay back the employee's skill allowance.

This case demonstrates that companies should carefully and accurately document its decisions on disciplinary actions before issuing documentation to the employee.