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Newsletter

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Government Further Signals Intent to Reduce Labour Costs for Employers

Recently, the PRC Supreme People's Court ("**SPC**") issued guidance to the lower courts to further consider companies' interests when deciding employment disputes. In the *Circular Concerning Proper Trial of Civil Cases to Facilitate Private Investment* issued by the SPC in September 2016 ("**SPC Circular**"), the SPC urged lower level courts to weigh equally employer and employee protections and to achieve a better balance between employer and employee interests when hearing employment/labour dispute cases.

Specifically, the SPC Circular asks local courts to:

- protect all lawful forms of employment; and
- balance employer and employee interests so that labour costs are reduced and employer market competiveness is increased.

Although the SPC Circular only establishes general principles, local courts can be expected to apply these principles in some fashion to be more balanced when deciding disputes. Currently, courts in China tend to be pro-employee.

The SPC Circular is in line with signals sent by other parts of the Chinese government. As earlier reported in our April 2016 update, various officials voiced support for amending the *PRC Employment Contract Law*, to make employment more flexible. Recent reports in the Chinese media indicate that the finance committee of the National People's Congress is considering such amendments, such as for example reducing open-term contract requirements. In addition, the Chinese government plans to reduce employer social insurance contributions. Both of these legislative actions could reduce labour costs for employers.

Key Take-Away Points:

Employers often find it difficult to terminate employees in China. China requires termination to be based on statutory grounds, and local courts currently have high standards for establishing a valid statutory ground. Open-term contract requirements further exacerbate the problem, since under an open-term contract, there is no contract expiration. This often makes termination of employees quite costly.

If local courts follow through and become less protective of employees, and the Chinese government passes legislative measures to limit mandatory open-term employment, employers could find their labour costs significantly reduced. Reductions in social insurance contributions would also be a welcome development for employers.

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China Aims to Enhance Data Privacy Protections

On December 19, 2016, a draft of the *General Principles of the Civil Law of the People's Republic of China* ("**Draft**") was submitted to the Standing Committee of the National People's Congress for a third reading. The Draft prohibits anyone from collecting, using, processing, transferring, publicizing or selling personal information in violation of the law.

Previously, on November 7, 2016, the NPC also passed the *Cybersecurity Law*, effective from June 1, 2017. This Cybersecurity Law defines "personal information" as all information that can identify a particular person, e.g., name, birth date, ID card number, address and telephone numbers, regardless of whether in electronic or other form.

The Cybersecurity Law contains a number of provisions devoted to personal data protection. For instance, the Cybersecurity Law requires network operators to:

- establish a comprehensive personal information protection system;
- inform each data subject of the purposes, the methods and the scope of data collection and obtain the data subject's consent to the data collection;
- not leak, alter or damage a data subject's personal information; and
- not provide a data subject's personal information to others without the data subject's consent.

It is not clear whether these "network operator" obligations extend to an employer when it collects personal information from employees through a telecommunications network. "Network operator" is broadly defined as an owner or administrator of a computer information network or as a network service provider, so the definition could potentially cover all entities using or administrating a telecommunications network for the promotion and provision of products or services. Regardless, current guidelines already push employers to obtain an employee's consent prior to collection, use or publication of the employee's personal information.

Lastly, the Cybersecurity Law provides that a "critical information infrastructure operator" (which is also broadly defined to include any operator in a key sector, such as public communications and information services) should store within the territory of China any personal information collected and generated from China during its operations. If the information needs to be transferred to an overseas party, the government must conduct a security assessment and approval before the transfer. For employers, the Cybersecurity Law is not clear on whether the data residency requirement and the data export assessment/approval requirement could be interpreted to prevent or restrict the cross-border transfer of employee information. In practice, this interpretation would probably be impossible to implement because it would prevent multinational companies with global human resources systems from accessing employee data in China.

Key Take-Away Points:

Although the PRC does not have a unified and comprehensive legal regime stipulating the rights and obligations of information administrators and data subjects, the Draft and the Cybersecurity Law reflect a government push for more data privacy protection. Every company collecting personal data from employees in China should closely follow the legal and regulatory developments in the data privacy field.

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Supreme People's Court Issues Clarification on Three Employment Matters

On November 30, 2016, the SPC issued the *Eighth National Courts Meeting Minutes on Civil and Commercial Trials (Civil Part)* (the "**Minutes**"). The Minutes clarify the following three employment law issues.

First, the courts can adjust non-compete liquidated damages by citing a 2009 SPC interpretation of the Contract Law. Under the principles of fairness and good faith explained in that interpretation, the courts can adjust liquidated damages if the agreed upon liquidated damages amount is significantly above or below the actual losses. The interpretation says that liquidated damages higher than 30 percent of the actual losses is significantly above the actual losses and can be adjusted. The interpretation does not define "significantly below actual losses."

Second, any employee who suffers from a work-related injury caused by a third party is entitled to claim:

(i) from the social insurance fund all work-related injury insurance treatments (such claim does not release the infringer from tort liability); or

(ii) from the employer all work-related insurance treatments except medical expenses if the employer failed to pay work-related injury insurance contributions to the social insurance fund and the employee's physical injuries have been compensated by the infringer.

Third, termination based on a forced ranking system or employee competition is unlawful. Some employers use employee ranking systems or competitions to unilaterally terminate any employee who ranks last or loses a competition. The Minutes deem these terminations as unlawful and entitles the employee to claim reinstatement or monetary remedies.

Key Take-Away Points:

The Minutes are not legislation and do not establish mandatory rules for the lower courts. However, most lower courts usually incorporate the recommendations and interpretations found in these types of minutes into their daily judicial practices. Therefore, all employers should be aware of these Minutes and take them into account during any employment litigation.

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Supreme People's Court Issues Guidance Stating Attorney's Fees May Be Imposed on Parties Bringing Frivolous Lawsuits

The SPC published the *Opinions on Further Classifying Complex and Simple Cases and Optimizing the Allocation of Judicial Resources* ("**SPC Opinion**") on September 13, 2016. The SPC Opinion contain 22 articles outlining high level principles to ensure simple cases are adjudicated in the most efficient manner possible while complex cases are adjudicated in the most

accurate manner possible.

The most significant article for employers allows for fee shifting of attorney fees and other reasonable legal expenses if a party causes direct damages to the opposing party or a third party by misusing litigation privileges, deliberately delaying the litigation or engaging in any other inappropriate behavior.

In addition, the SPC Opinion encourages the electronic submission of litigation materials, requires written judgments in complex cases to state the issues in dispute and the reasoning behind the court's judgment, and permits written judgments in simple cases to render the judgment alone without stating the reasoning behind the court's judgment.

Key Take-Away Points:

Currently, courts in China very rarely award attorney's fees to an opposing party, even if that party wins the case. The SPC Opinion does not clearly identify or provide standards for what would be considered the misuse of litigation privileges, the deliberate delay of litigation or the other inappropriate behavior that would allow fee shifting. Instead, the courts will have wide discretion in determining when fee shifting is appropriate. As yet, no court has ordered fee shifting under the SPC Opinion. However, the fee shifting article potentially could provide protection against false, frivolous and malicious litigation.

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Further Clarification Issued by Various Local Authorities Regarding New Work Permit System

Starting from November 2016, provincial and municipal level labour bureaus and foreign expert bureaus throughout China have issued trial policy guidance to clarify various issues following the State Administration of Foreign Expert Affairs' September announcement regarding the implementation of a new work permit system (please see our October 2016 newsletter). As a recap, foreigners who wish to work in China will be divided into three categories, including Type A (high-level talents), Type B (professional talents) and Type C (foreign nationals who engage in temporary, seasonal, non-technical or service-oriented work that also meets the needs of local labour markets). For now, Type C is only available to foreign interns engaged under government-level agreement.

Eligibility criteria – The authorities introduced a comprehensive foreign talent assessment system to divide foreigners into 3 categories, including various lists of achievement criteria and a score-based system. Applicants may apply for Work Permits based on either the achievement criteria or the score-based system.

Filing process – In general, all foreigners who wish to work in China should obtain a "Work Permit Notice", and then a "Work Permit" after arrival in China on a Z (work) visa. A unified national-wide platform has been launched for the new work permit system where all the applications must be submitted on-line through this platform, followed by physical document submission after obtaining pre-approval from the authorities. The entire process for the "Work Permit Notice" and the "Work Permit" takes at least 25 work days. For Type A applicants, the processing time may be shortened. It is also possible for certain applicants to apply for the "Work Permit" directly, for example, a Type A applicant who is already in China may apply for the "Work Permit" directly without a Z (work) visa.

Document requirements – In addition to the basic personal documents, applications must now include a legalised degree certificate and a no-criminal record certificate. For Type A applicants,

certain documents may be waived.

Key Take-Away Points:

During the pilot program, labour bureaus have large discretion as to the implementation method of the new work permit system. It is expected that further guidance or explanatory notes will be published in the coming months, including how to renew or transfer existing Employment Permits to the new Work Permits. Employers are encouraged to initiate immigration applications early so that there are sufficient lead time to cater for unexpected changes.

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China and France Sign Social Security Totalization Treaty

China and France signed the China–France Social Security Treaty on October 31, 2016. Although the full text of the treaty is not yet publicly available, published reports say that the treaty will exempt expatriate employees, sailors, flight attendants, diplomatic staff, civil servants and government employees from making social insurance contributions in the other treaty country. Thus, depending on the exemption scope, the treaty could alleviate the cost burden on an employee seconded between the two countries, as well as on the employer or the host company of that employee.

However, without the full text of the treaty available, the extent of the savings remains unclear because it is not yet known whether the exemption scope will cover all five types of mandatory social insurances in China. Moreover, even if all five mandatory social insurances are covered, the extent of the savings will still depend on exactly how China and France implement the treaty.

The China–France Social Security Treaty is the eighth social security treaty signed by China. The previous seven treaties were with Germany, South Korea, Denmark, Finland, Canada, Switzerland and the Netherlands.

Key Take-Away Points:

In China, the new treaty will slightly alleviate the cost burden on an employee (who is seconded from France to China) and on the employer or the host company of that employee. Every eligible company with employees seconded from France to China should monitor the local implementation of the treaty and take full advantage of the exemption as implemented.

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Guangdong Province People's Courts and Unions to Work Together in Solving Labour Disputes

Recently, the Guangdong High People's Court and the Guangdong Federation of Trade Unions jointly issued a notice that seeks to increase collaboration between the courts and the trade unions to better prevent and solve labour disputes. The notice explicitly requests the people's courts at all levels and the trade unions at the prefecture-level to establish connections and communication systems between them by the end of 2016.

In summary, the notice requires the courts and trade unions to:

- strengthen information sharing
    - trade unions will provide the courts with basic information about labour disputes, especially large-scale collective labour disputes

    - the courts will assist the trade unions during mediation of difficult labour disputes, e.g., the courts will provide the trade unions with professional guidance and with interpretations of applicable laws;
- solicit guidance and suggestions from each other when the trade unions draft employment and labour policies and when the courts draft judicial interpretations and opinions affecting employment and labour rights;
- collaborate to prevent social stability from being affected by serious labour disputes; and
- establish an interconnected litigation and mediation system whereby the courts entrust trade union mediation organizations and lawyers to mediate labour disputes before or after they are filed with the courts.

Key Take-Away Points:

As labour disputes have increased in China, local courts in Guangdong province may increasingly rely on trade unions to prevent or mediate those disputes before they can find their way into the court system. The Guangdong notice further encourages and formalizes the role of trade unions in mediating labour disputes so that the burden on the courts is reduced.

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