October 2015

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PRC Courts More Willing to Hear Sex Discrimination Cases

Recently, PRC courts have become more willing than they have been in the past to hear sex discrimination cases brought by female employees and job candidates. In the PRC, if a plaintiff brings a civil suit to a court (i.e. files a case), and the suit meets the requirements for acceptance, the court shall place the case on its docket (i.e. accept the case) within seven days; if the suit does not meet the requirements for acceptance, the court shall make a ruling within seven days confirming the rejection of the suit. There was previously a trend whereby courts would not allow sex discrimination cases to pass this initial stage (i.e. acceptance) but this appears to be changing as seen in the cases below.

On August 18, 2015, the Guangzhou Haizhu District People's Court immediately accepted a sex discrimination case on the same date that a female candidate filed it. In this case, the female candidate applied to a restaurant for a position as a chef. After receiving no response, she called the restaurant and was told that only a male candidate would be offered the position. The court heard the case on September 17, 2015 and the final ruling is still pending.

In another case, the Beijing Shunyi District People's Court also speedily accepted a sex discrimination case brought by a female graduate within two days of it being filed with the court (January 27, 2015). In this case, the female graduate applied for a courier position. Although the job advertisement said the position was for male applicants only, the courier company interviewed the female graduate and gave her a trial for two days. The graduate's supervisor orally agreed to hire her and asked her to do the pre-employment physical examination. However, later the company told the graduate that it could not hire her because she is female. The court heard the case on September 1, 2015 and the final ruling is still pending.

Though the final rulings for the two cases are still pending, these cases demonstrate that the PRC courts are becoming more willing to accept sex discrimination cases where in the past there was a reluctance to do so. For example, it took more than one year for the Beijing Haidian District People's Court to finally accept a case (in September 2013), which was reported to be the first sex discrimination case in China that was accepted by a court (though this case was ultimately resolved through mediation) (please refer to our **Newsletter of December 2013**). By contrast, in the above two recent cases, and also in a previous 2014 Hangzhou case

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where the court ruled in the plaintiff's favour and awarded compensation (please refer to our **Newsletter of December 2014**), the courts have swiftly accepted the cases allowing them to progress to a hearing.

If a plaintiff is successful in her sex discrimination claim, she will be entitled to compensatory damages such as actual loss resulting from the discrimination and emotional damage (but not punitive damages).The concept of indirect discrimination (disparate impact), as it exists in the U.S., Canada, the EU and other countries, is not well developed in China.

Key Take-Away Points

Companies should be cautious about including any criteria that are discriminatory in nature when deciding the requirements for a post. Companies may also adopt an anti-discrimination policy, implement training programs and establish compliance and investigation procedures to reduce its risks in discrimination cases.

City in Guangdong Province Imposes *De Facto* Employer Responsibilities for Illegal Use of Labor Dispatch

The Shantou Special Economic Zone, a city area located in Guangdong Province with many foreign-invested factories, issued its own *Employee Rights Protection Regulations* ("**Shantou Regulations**"), which came into effect on October 1, 2015. The Shantou Regulations require a host company to enter into an employment contract directly with a dispatch worker in certain circumstances, such as where the host company is deemed to have formed an employment relationship with the dispatch worker.

According to the Shantou Regulations, a host company will be deemed to have established an employment relationship with a dispatch worker and hence will be required to sign an employment contract with that dispatch worker, if any of the following circumstances occur:

(i) In the absence of renewal of a labor dispatch agreement, the host company continues to use the dispatch worker one month after the end of the employment contract of the dispatch worker;

(ii) the host company uses the dispatch worker in a job position that does not fall within the criteria of being a temporary, auxiliary or a substitute position;

(iii) the host company uses the dispatch worker in a temporary job position for more than six months;

(iv) the dispatch worker is dispatched to the host company (or its subordinate unit) by the labor dispatch agency that is funded by, or established in a partnership with, the host company or its subordinate unit;

(v) the host company continues to use the dispatch worker where the dispatch worker's employment contract has come to an end or is terminated as a result of the shutdown or bankruptcy of the labor service agency or other reasons; or

(vi) any circumstance that is prohibited by the labor dispatch rules occurs.

The Shantou Regulations follow the Employment Contract Law and define temporary job positions as those that do not exist for more than six months, auxiliary job positions as those that are not engaged in core business activities but provide supportive functions for the core business, and substitute job positions as those where the employee may be replaced by others when the employee is absent from work due to study, leave or other reasons.

Key Take-Away Points

The Shantou Regulations are significant because this may be the first time (or at least one of the first instances) where legislation explicitly states that illegal use of labor dispatch may result in a *de facto* employment relationship with the host entity. An earlier draft of the national labor dispatch regulations had included a similar provision, but this was taken out of the final version. Also, some other cities may take a different view of this issue; for example, Shanghai authorities seem to take the opposite position of Shantou (please refer to our **Newsletter of February 2015**). In any event, companies should carefully monitor their use of dispatch workers, not only to avoid a finding that they are deemed a *de facto* employer, but also to avoid fines from the labor bureau based on national laws and regulations.

Shanghai Issues New Sick Leave Regulations

On August 17, 2015, the Shanghai Municipal Government issued the amended *Regulations on Standards for the Medical Treatment Periods of Employees in Shanghai Who Contract Illnesses or Sustain Non-work-related Injuries During the Performance of Their Employment Contracts* ("**2015 Regulations**"), which took effect on May 1, 2015. The regulations will remain in effect until June 20, 2020.

The 2015 Regulations supersede the previous 2002 regulations on the same subject, although the content of the two Regulations are almost identical. In Shanghai, an employee is entitled to 3 months' medical treatment period ("**MTP**") in his/her first year of employment with the current employer. The entitlement then increases by one month for each additional year of service with the same employer, up to a maximum of 24 months. During the MTP, a sick employee would be protected from most unilateral terminations (except for termination for "misconduct"). However, upon the expiration of the employee's MTP, the employer may unilaterally terminate the employee if he/she cannot return to their original role or other work assigned by the employer.

Key Take-Away Points

In China, it is generally easy for employees to obtain a doctor's note even when they are not genuinely sick, and in this way gain protection from unilateral termination. Unfortunately, the new Shanghai regulations fail to address how companies should handle such situations or what options they have in suspicious cases of sick leave.

Beijing Court Finds Undergraduate Student's Employment Contract Enforceable

A Beijing court recently found that the employment contract signed by an undergraduate university student with a company was enforceable and provided the undergraduate with employment law protection. The undergraduate was then awarded severance pay for the termination.

The undergraduate entered into the employment contract and started work for the company prior to her graduation. However, the company terminated her employment contract shortly prior to her graduation date. The undergraduate claimed severance pay due to the company's termination of her employment contract. The company rejected this request on the grounds that undergraduates were not recognized to be employees under the *Opinion on Various Issues Relating to The Implementation of the PRC Labor Law* issued by the Ministry of Labor in 1995, and therefore the employment contract entered into by the undergraduate was unenforceable.

The undergraduate filed for labor arbitration. The labor arbitration commission agreed with the company on the point that the undergraduate was not recognized as being able to enter into an enforceable employment contract. However, the court overturned the labor arbitration commission's decision upon the undergraduate's appeal. The court analyzed that when the undergraduate entered into the employment contract with the company, she was already above the statutory minimum age for employment, and the company was aware that she was an undergraduate when signing the employment contract. In those circumstances, the employment contract was the manifestation of the parties' free and genuine will, and there was no reason to deny the enforceability of the employment contract. The court then ordered severance pay for the undergraduate according to the Employment Contract Law.

Key Take-Away Points

Based on national law and guidance, most courts take the position that employment law does not apply to undergraduate students and they are thus excluded from its protection and most statutory benefits stipulated by the employment laws. However, the above case shows that if the agreement between the parties is stated to be an "employment contract", some courts may use this as a basis to provide employment law protection to students, particularly if they are close to graduation. Employers should

therefore be more careful in terms of how they structure their agreements with students.

Shanghai Court Rules that Employment Registration Does Not Equal an Employment Contract

The Jing'an District People's Court in Shanghai reportedly ruled that an employer's online registration of an employee's employment does not constitute a written employment contract. As a result, the court ordered the employer to pay double salary to the employee for not signing a written employment contract as required by law.

According to the report, immediately after the commencement of employment, the company completed the online employment registration on the Shanghai labor authority's official website and started making social insurance and housing fund contributions for the employee. However, the company never signed a written employment contract with the employee. The company argued that even though the parties did not sign a formal employment contract, the online employment registration that carries information such as identifying the employer and the employee and the type of employment, should be deemed as the parties' written employment contract in an electronic form.

The court did not agree with this argument, because: (a) the online registration was not signed by both parties and thus does not form a valid contract, and (b) the online registration does not include all of the mandatory contents (e.g., employment contract term, work location, and salary) that are required for an employment contract.

Key Take-Away Points

Companies should track employees' employment contract status carefully. Under PRC law, companies must sign a written employment contract with all full time employees within one month after the employee's commencement date. If a written employment contract is not signed, the company will be liable for double salary from the second month of employment until the earlier of (i) the date when it signs a written employment contract with the employee or (ii) the one year anniversary of the employee's employment. After that, if the company still has not signed a written employment contract, the parties will be deemed to have entered into an open-term employment contract, and the company would still be obligated to sign a written employment contract.

Recent Court Cases Focus on Specialized Training When Deciding on Training Costs Recovery

As demonstrated in two recent Beijing cases, a key factor that courts will look at in training bond cases is whether the employee was provided specialized technical training. Companies that spend large amounts on training employees often expect the employees to remain with the company for a certain minimum service period, and will try to recover the training costs if the employee leaves before the end of the service period.

In August 2015, the People's Court in the Haidian District in Beijing ruled against an employer claiming training costs against an ex-employee who resigned from the company allegedly in violation of the minimum service period under a training bond. The court took the view that the training the employer provided to the employee did not constitute "specialized technical training" and thus the training agreement providing for a minimum service period was unenforceable.

In this case, the company was in the business of air conditioner maintenance and repair, and the employee was an air conditioner maintenance worker. The company sent the employee to an air conditioner manufacturer for technical training seven times during his employment. The court believed that this constituted basic training for a regular job at the company, and was not for a sufficiently specialized role, and therefore, the company could not impose a minimum service period on the employee.

Under the PRC Employment Contract Law, employers may demand reimbursement of training costs in accordance with a training bond agreement in certain situations. If the employer has funded specialized technical training for the employee from a separate training fund allocated for that purpose, then they may impose a minimum service period and require the employee to return a portion of the training costs (pro-rated based on the portion of the service period still remaining) if the employee fails to fulfil the minimum service period.

The Beijing High People's Court wrote a commentary following this case, stating that the training which will qualify for enforcing a training bond should include that offered for "specialized" positions and aimed at improving the employee's "specialized" knowledge and skills, and that regular on-the-job or before-the-job trainings will not qualify.

In another recent Beijing case, a pilot learned to his detriment that his position did constitute a "specialized" one. The Beijing court ruled in favor of an airline that brought a claim against a former employee (pilot) for training costs of 1.4 million yuan.

The employee joined the airline in September 2001 as a pilot. In 2012, the pilot terminated his employment contract with the company and afterwards successfully sued the company for unpaid annual leave and overtime, and the court also ordered the airline company to complete all

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termination procedures and handover the pilot's license back to him. In 2013, the company then brought its own claim against the pilot for 3.34 million yuan, which related to training costs that they had incurred in relation to his employment. The final court decision was only recently issued.

The court held that the airline had to heavily invest in training the pilot over a number of years in order to ensure that he had the appropriate skills and experience to undertake his duties. In light of this significant financial investment, it was reasonable to be compensated for the training costs. However, the airline failed to provide enough proof of expenditure on training costs to substantiate its full claim for 3.34 million yuan and was awarded 1.4 million yuan instead.

Key Take-Away Points

Employers should be aware that costs incurred for training may not entitle the company to impose a minimum service period, even if a training agreement is signed. Courts may distinguish between the types of training and types of positions subject to a training requirement to determine the enforceability of the training bond. Companies may evaluate and re-structure their current training programs offered to valued employees to increase the likelihood of the enforcement of their training bond.