BAKER & MCKENZIE

October 2016

In This Issue

Labor Authorities Issue New Measures To Publicize Material Violations of Labor Protection Laws

Guangdong Province Issues New Rules on Wages and Maternity Leave

Government Takes Steps to Unify Work Permit System for Foreigners Working in China

China and the Netherlands Sign Social Security Totalization Treaty

Beijing Court Rules Employment Contract Non-Renewal Unlawful Without Prior Notice

Jiangsu Court Rules that Employer Dismissing Employee for Having Romantic Relationship With Co-worker is Unlawful

Shanghai Court Holds Company Liable for Death Caused by Driver Hired for Business Travel

Beijing Court Enforces Employer's Written Promise to Increase Employee's Salary

Beijing

Suite 3401, China World Office 2
China World Trade Centre
1 Jianguomenwai Dajie
Beijing 100004, PRC

Tel: +86 10 6535 3800
Fax: +86 10 6505 2309

Hong Kong

14th Floor, Hutchison House
10 Harcourt Road
Central, Hong Kong

Tel: +852 2846 1888
Fax: +852 2845 0476

Shanghai

Unit 1601, Jin Mao Tower
88 Century Avenue, Pudong
Shanghai 200121, PRC

Tel: +86 21 6105 8558
Fax: +86 21 5047 0020

Labor Authorities Issue New Measures To Publicize Material Violations of Labor Protection Laws

On September 1, 2016, the Ministry of Human Resources and Social Security issued the *Measures for Publicizing Acts in Material Violation of Labor Protection Laws* (the "**Measures**"), which will take effect on January 1, 2017.

Under the Measures, any employer who commits material violations of labor protection laws will see those acts publicized on the local government's official website or in the media, such as a major local newspaper, TV, etc. Material violations will be publicized on a regular basis by the national or provincial authorities every six months, and by municipal and county authorities on a quarterly basis, though such violations may be publicized immediately when deemed necessary by the government. Once publicized, these material violations will become a part of the violator's credit record.

An employer could face this penalty if it:

- deducts from or delays payment of employee labor remuneration without cause or faces judicial assessment of criminal liability for refusal to pay labor remuneration;
- fails to purchase social insurance or to pay social insurance premiums;
- violates the provisions on working hours, rest and leave;
- fails to provide special protection for female employees and underage employees;
- uses child labor;
- violates labor protection laws causing serious adverse social influences; or
- commits other acts in material violation of labor protection laws.

Key Take-Away Points:

These Measures, along with a separate set of measures issued in July this year (Please See August 2016 Newsletter), signal the national government's intent to strengthen the administrative enforcement regime against material violations of labor protection laws, though it remains to be seen how actively local labor authorities will actually use these enforcement measures. Employers in any case should exercise greater care to comply with labor protection laws and regulations to avoid the negative consequences of material violations being publicized.

Follow us on WeChat

Baker & McKenzie's Employment Law Group is pleased to share with you through this Wechat group Employment related hot topics, legal developments, case analysis, seminars and trainings, and other relevant information.

How to follow our Wechat group?

Launch the WeChat app on your mobile, and then:

- Scan the QR code below to find "EmploymentLaw" group (贝克麦坚时劳动法热点话题); or

- Search "贝克麦坚时劳动法热点话题" or "EmploymentLaw" from the public account.

* *QR Reader is required for phones to scan and read the code*

*iOS, Android and Windows Phone – click **Discover** > Scan QR Code > Align the QR Code within the frame to scan, or*

*click **WeChat** > press the **+** button > select **Scan QR Code** > Align the QR Code within the frame to scan;*

*BlackBerry – click **the icon showing two figures** > Scan QR Code > Align the QR Code within the frame to scan.*

* *WeChat is only available in Mandarin*

Guangdong Province Issues New Rules on Wages and Maternity Leave

On September 29, 2016, the Guangdong Provincial People's Congress issued the *Amended Guangdong Provincial Regulations on Wages* (the "**New Wage Rule**") and the *Guangdong Provincial Regulations on Population and Family Planning* (the "**New Family Planning Rule**"), both effective as of September 29, 2016.

The New Wage Rule requires newly-executed employment contracts to specify a wage payment cycle and a wage payment date. However, the New Wage Rule does not provide a penalty for an employer that fails to include these terms in an employment contract.

The New Family Planning Rule extends maternity leave in Guangdong Province from 128 to 178 days. In China, national rules entitle female employees to 98 days of maternity leave after a normal birth. Local rules can provide additional maternity leave days on top of this statutory minimum. Previously, Guangdong Province added 30 days to the statutory minimum for a total of 128 days. Now, Guangdong Province will instead add 80 days to the statutory minimum for a total of 178 days as long as the birth of the child complies with laws and regulations.

Key Take-Away Points:

In response to Guangdong's new wage and maternity leave rules, we recommend companies in Guangdong Province add wage payment cycles and payment dates to their employment contracts and amend their policies and practices to reflect the latest changes on maternity leave.

With female employees now being permitted to have two children since the family planning rules were relaxed at the end of 2015, and with Guangdong Province's longer maternity leave period for each birth, employers could see a significant increase in the amount of maternity leave used by their female employees.

Government Takes Steps to Unify Work Permit System for Foreigners Working in China

In September 2016, the State Administration of Foreign Expert Affairs in China announced that a new work permit system for foreign employees will be implemented on a nation-wide level with an effective date of April 1, 2017. Starting from April 1, 2017, the current "Alien Employment License/Foreign Expert License" and "Alien Employment Permit/Foreign Expert Permit" will no longer be issued. Instead, the relevant governing authorities will issue a unified "Work Permit Notice For a Foreigner" and "Work Permit For a Foreigner". The new "Work Permit For a Foreigner" will replace the current Alien Employment Permit/Foreign Expert Permit that provides work authorisation for foreign nationals in China along with Residence Permits. Residence Permit requirements remain unchanged.

Under the new system, foreign nationals will be divided into three categories according to various criteria such as academic background, professional qualifications and the nature of the assignment/employment in China. The three categories of work permits include:

- Type A (encouraged) – Foreign High-level Talent
- Type B (controlled) – Foreign Professional Talent

- Type C (limited) – Foreigner nationals who engage in temporary, seasonal, non-technical or service-oriented work that also meets the needs of local labor markets.

Before the official implementation of the new policy in April 2017, there will be a trial period in several provinces and cities, including Beijing, Shanghai, Tianjin, Hebei, Anhui, Shandong, Guangdong, Sichuan and Ningxia. Information as to the filing process and documentation requirements for different work permit categories are expected to be announced over the next few months.

Key Take-Away Points:

Employers who have foreign employees or wish to assign/hire new foreign employees in China are encouraged to leave more time for preparation of immigration applications. Processes and requirements are expected to change with short notice as the trial period begins.

China and the Netherlands Sign Social Security Totalization Treaty

China and the Netherlands signed the China–Netherlands Social Security Treaty on September 12, 2016. Although the full text of the treaty is not yet publicly available, the treaty addresses social insurance issues encountered by employees working outside their home country, in particular the issue of having to make double contributions in both the host country and the home country for the same employment.

According to published reports on the treaty, an employee who is employed by a Chinese employer and seconded to work in the Netherlands can be exempted from social insurance contributions (e.g., pension and unemployment insurance) in the Netherlands. Likewise, an employee who is employed by a Dutch employer and seconded to work in China can also be exempted from social insurance contributions in China. Without the full text of the treaty available, it is not yet clear whether the employee will be exempted from all five types of social insurance contributions in China or just the pension and unemployment insurance.

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

Key Take-Away Points:

In China, the new treaty will slightly alleviate the cost burden on employees (who are seconded from the Netherlands to China) and on the China host companies. Every eligible company should consider applying for the exemption treatment under the treaty for expats seconded between these two countries.

Beijing Court Rules Employment Contract Non-Renewal Unlawful Without Prior Notice

In a recent Beijing case, the court ruled that an employer's refusal to renew or extend an employee's employment contract was unlawful because the employer did not send a non-renewal notice prior to the contract's expiration date. The fact that the employer and employee were litigating during the notice period about whether the contract had already

been lawfully terminated did not release the employer from the non-renewal notice requirement.

The employee was injured at work and took periodic sick leave as a result of the injury. The employer alleged that the leave was frequently unapproved and thus terminated her employment on August 26, 2013, for serious violation of company rules. The employment contract had a three-year term and would have expired on March 25, 2014.

The employee challenged the termination in arbitration and in court demanding reinstatement. The final court upheld the arbitration and lower court decision that the termination was unlawful and granted the employee's claim for reinstatement. On October 10, 2014, in response to the final decision, the employer notified the employee that it would pay her salary for the reinstatement period from the unlawful termination on August 26, 2013 to the contract expiration on March 25, 2014. The notice also explained that her contract had not been renewed beyond that contract expiration date.

The employee filed another lawsuit to challenge the company's decision not to renew or extend her employment beyond the contract expiration date. The non-renewal of her contract was ruled unlawful because the company did not provide her with a non-renewal notice until October 10, 2014, which was after the employment contract's expiration date on March 25, 2014.

Key Take-Away Points:

According to Beijing labor contract regulations, an employer should notify an employee of its intent to continue or terminate a labor contract 30 days prior to the contract expiration date. Thus, the employer in this case should have provided a non-renewal notice to the employee no later than February 25, 2014. However, the employer did not provide a non-renewal notice during the litigation process either because the employer did not realize it should or because it did not want to confuse the termination issue before the courts. This case shows that the employer still must send a written non-renewal notice to the employee even when labor arbitration or litigation is ongoing.

Jiangsu Court Rules that Employer Dismissing Employee for Having Romantic Relationship With Co-worker is Unlawful

The Huai'an Intermediate People's Court in Jiangsu Province recently awarded over RMB50,000 to an employee unlawfully terminated for having a romantic relationship with a co-worker.

The employer had a policy prohibiting any employee from entering into a romantic relationship with another employee. Breach of the policy was punishable by summary dismissal without severance. When the employer discovered an employee was having a secret romantic relationship with a co-worker, the company dismissed the employee for violating the company policy, which was also stipulated in the employee's employment contract. The employee challenged the dismissal in court.

The court ruled that the company policy violated the freedom to marry enshrined in the marriage law (even though the two employees never married, the court apparently broadly interpreted this right to cover freedom to form romantic relationships), and that such company rule

was thus invalid. Therefore, the court invalidated the company policy and ordered statutory damages for wrongful termination.

Key Take-Away Points:

This case reveals the risk of unilaterally terminating an employee simply for having a romantic relationship with a co-worker, even if company policies explicitly prohibit this.

That said, romantic relationships between employees can harm a business. Therefore, to both protect the company's interests and mitigate the risk of wrongful termination, any employer that wishes to restrict romantic relationships should consider adopting a more reasonable and more limited policy that does not create a blanket prohibition with summary dismissal as its remedy. For example, the employer might consider a policy that restricts only relationships between superiors and subordinates, or that otherwise create a conflict of interest.

Even with these or other limitations, the policy could be challenged in court and its validity would be subject to court discretion.

Shanghai Court Holds Company Liable for Death Caused by Driver Hired for Business Travel

In a recent Shanghai court case, a Shanghai company was held liable for RMB1,000,000 for a wrongful death caused in a traffic accident by a driver temporarily hired by the company's employee.

To handle an intellectual property matter in Hebei Province, an employee working in the Shanghai company's intellectual property protection department contacted a driver he knew and asked the driver to take him to Hebei. The driver was a part-time employee of a car rental company and drove the employee to Hebei in one of the car rental company's cars; however, no contract was ever signed with the car rental company. During the trip, the car was involved in a traffic accident killing one person. The police concluded the driver hired by the Shanghai company's employee was responsible for the accident.

The deceased's family sued the employee and the Shanghai company. The Xuhui District People's Court of Shanghai originally held that the Shanghai company was not liable for the driver's conduct, but on appeal, the Shanghai First Intermediate People's Court reversed the original judgment and remanded the case for new trial due to the lower court's failure to ascertain facts and its erroneous application of law. At the conclusion of the new trial, the Xuhui District People's Court of Shanghai held that an employment relationship did exist between the Shanghai company and the driver because the Shanghai company's employee, as the representative of the Shanghai company, hired the driver with pay to perform a job duty. Thus, the driver was deemed to work for the Shanghai company, which made the Shanghai company liable for the death caused in the accident during the performance of those job duties.

Key Take-Away Points:

As shown by this case, a company might assume tort liability for the actions of an individual directly hired by its employee for the purpose of performing the company's work assignment. Under tort law, the company could claim compensation from the employee (i.e., the driver in this case) if the employee caused the injury intentionally or through gross

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

Jonathan Isaacs
+852 2846 1968 (Hong Kong)
jonathan.isaacs@bakermckenzie.com

Zheng Lu
+86 21 6105 5922 (Shanghai)
zheng.lu@bakermckenzie.com

Bofu An
+86 10 6535 3852 (Beijing)
bofu.an@bakermckenzie.com

negligence. However, a more prudent approach would be to mitigate this tort risk completely by directly contracting with a corporate or institutional service provider rather than directly hiring or paying an individual independent contractor, because there is always a risk that an individual independent contractor will be deemed an employee of the company.

Beijing Court Enforces Employer's Written Promise to Increase Employee's Salary

In a recent Beijing case, the Beijing Third Intermediate People's Court held that a company's written promise to increase its employee's salary was enforceable and that the employee could receive RMB160,000 as back payment and statutory severance upon terminating the employment contract.

In March 2014, the company informed the employee in writing that his monthly salary would be increased from RMB11,000 to RMB16,000 effective that month. The employee did not respond to the written notice, and the company did not pay the salary increase. One year later, the employee terminated the employment contract claiming unpaid salary. The employee brought his claim to arbitration and to court seeking back payment for the promised salary and payment of statutory severance.

The company argued that the salary increase was conditional upon a share transfer deal between the company and a third party. When the share transfer deal fell through, the company's financial situation did not improve as expected; thus, the company decided not to increase the employee's salary.

The arbitration committee and the court of first instance both ruled for the company. They concluded that the company had discretion to rescind the promise up until it began performance of the promise. As long as performance had not begun, the employment contract remained unchanged.

The court of second instance reversed the judgment for the company. The Beijing Third Intermediate Court held that the salary increase promise was valid and enforceable from the date the written notice was issued to the employee. The court reasoned that the promise in the notice conferred a benefit to the employee and was not refused by the employee; thus, the written notice should be deemed as a mutual consent to change the salary provision of the employment contract.

Key Take-Away Points:

This case puts companies in Beijing on notice that a unilateral written promise to an employee can immediately modify the employee's contract even if the employee takes no action to accept the promise. Failure to perform the promise can result in court awards granting back payment and statutory severance to the employee.