

China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

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China Passes Law to Address Entry and Exit of Foreign Nationals

At the end of June, the National People's Congress passed the *Law of the People's Republic of China on Entry and Exit Control*, which takes effect July 1, 2013. While there are existing regulations and notices related to the entry, exit and employment of foreigners, this is the first law in China to comprehensively address these issues. In the coming months, implementing regulations are expected on key provisions ranging from the new "talent" visa category to the employment of foreign students.

Foreigners are prohibited from engaging in activities not consistent with the purpose of the visit or stay in China, which can be a basis for being denied future entry. A foreigner may be "removed" (*qiansong chujing*) from China for illegal residence or employment, and in such a case will not be permitted re-entry during the next one to five year period. Violation of the new law under "serious" circumstances may lead to "deportation" (*quzhu chujing*), resulting in a 10-year bar. Foreign nationals may also be subject to administrative fines depending on the type of violation, and even be detained for five to 15 days.

A foreign national is deemed to be illegally employed if he or she: (1) works without having secured either a work permit or related residence permit; (2) engages in activities beyond the scope permitted by the work permit; or (3) is a foreign student engaging in activities beyond the scope permitted by the work-study position.

Employers may be subject to fines of RMB10,000 per illegally employed person, up to a maximum of RMB 100,000, as well as a confiscation of any income derived from the illegal employment.

For our full Alert on this subject, you may click on the following link:

<http://www.bakermckenzie.com/alchinaentryexitcontrollawaug12/>

New Regulations Regarding Work in High Temperature Environments

On June 29, 2012, the State Administration of Work Safety, Ministry of Health, Ministry of Human Resources and Social Security and All China Federation of Trade Unions jointly promulgated the amended Administrative Regulations on Measures to Control High Temperature (the "High Temperature Regulations"), which would supersede the previous 1960 regulation on the same subject.

The High Temperature Regulations require employers to carry out special labor protection measures in a high temperature environment, as well as impose several restrictions on employers for operating in extreme temperatures. In particular:

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- If, according to the official weather forecast center's report of the same day, the highest temperature during the day will be 40°C or above, outdoor operations should be suspended for the whole day;
- If the highest temperature is forecasted to be 37°C to 40°C, employees should not work outdoors for more than 6 hours that day, or work outdoors within the 3 hours during which the highest temperature is reached; and
- If the highest temperature is forecasted to be 35°C to 37°C, employers should take measures (e.g. shift work) to reduce individual employees' consecutive outdoor work, and outdoor overtime work is not permitted.

Besides, employers should conduct health checks for employees engaging in high temperature work, and bear the costs of the health checks. Further, employers are not permitted to arrange pregnant employees and minor employees to work outdoors where the temperature is above 35°C, or work indoors where the temperature is above 33°C. For any suspension of work due to high temperature, employers cannot reduce the employees' salary.

Employers are also required to pay a high temperature subsidy to employees who work outdoors when the temperature is 35°C or above according to the official weather forecast center's report of the same day, or otherwise in a workplace when the indoor temperature is 33°C or above. The law, however, is silent as to how the indoor temperature should be recorded and/or monitored, and whether there is a minimum duration of such high temperature for the purposes of the subsidy. With respect to the subsidy amount, the High Temperature Regulations refer to local rules that are promulgated by the provincial labor authorities from time to time.

With regard to penalties, if an employer violates relevant work safety provisions related to the health of employees, the employer may be ordered to rectify the non-compliance, suspend operations, or be pursued for criminal liabilities in very serious situations.

CIRC Issues Salary Compensation Guidelines for Insurance Company Executives

The China Insurance Regulatory Commission (“CIRC”) recently issued a set of guidelines concerning the salary compensation system of insurance companies, which will take effect on January 1, 2013. The guidelines include restrictions on the methods insurance companies may use to compensate and incentivize salaried directors, non-employee supervisors and senior managerial personnel, in order to implement more control over risk management in the insurance industry. While not legally binding, companies in the insurance sector are still advised to abide by the guidelines as the CIRC is the supervisory body in this sector. The China Banking Regulatory Commission issued similar guidelines in 2010 that apply to banks and financial institutions under the jurisdiction of the CBRC.

The guidelines include certain requirements and restrictions regarding salary compensation practices at insurance companies, such as how much performance incentive can be offered as a percentage of an employee's base salary, the time period over which a performance incentive may be paid, how much benefits and allowances may be paid in cash, a requirement to file any medium or long-term incentive with CIRC for recordal, and restrictions on salary increases for relevant personnel based on the risk level category assigned to the company by CIRC.

In addition, the board of directors of a company should conduct annual self-evaluations of the company's salary compensation system and submit an annual report to CIRC. The CIRC may implement supervisory measures in relation to non-compliant actions, though no direct fines are mentioned in the guidelines.

Shenzhen Passes First Local Legislation Focused on Equality between the Sexes

On June 28, 2012, the *Regulations on the Promotion of Sex Equality* (“**Sex Equality Regulations**”) were passed by the Shenzhen Municipal People’s Congress Standing Committee; they will become effective on January 1, 2013. While various national laws and local regulations already contain provisions related to sex discrimination and sexual harassment, this is the first piece of legislation exclusively addressing the issue of sexual equality.

The Sex Equality Regulations define the terms “sex equality” and “sex discrimination” and recognize the concept of “disparate impact” in a discrimination context. Further, the Sex Equality Regulations recognize certain exceptions to the rule against sex discrimination, such as affirmative action-type measures taken to expedite factual sex equality and special measures taken to protect women’s physical health and safety, particularly for women who are pregnant, giving birth, or are in their nursing periods.

The Sex Equality Regulations specifically impose fines up to RMB 30,000 on employers that violate the sex equality principle by imposing restrictions, refusing to hire candidates, or increasing the hiring standards on the basis of the individual’s sex, marriage status, or pregnancy status, during the recruitment process. The regulations, however, do not specify penalties for alleged sex discrimination in other employment-related decisions, such as promotion or termination.

The Sex Equality Regulations provide a detailed definition on “sexual harassment,” which includes unwelcomed sexual advances, or any conduct, remarks, words, images, or electronic information of a sexual nature, and using submission to sexual advances as an express or implied condition for receiving an employment offer, promotion, compensation benefits or awards (which is typically known as *quid pro quo*). Employers have certain obligations with respect to sexual harassment, i.e., take precautionary measures to prevent sexual harassment, provide training to employees, and take appropriate measures if a sexual harassment incident takes place.

Under the Sex Equality Regulations, a separate government authority will be set up to hear any sex equality or sexual harassment claims. Such claims can also be directly submitted to the courts.

Although China has had laws and regulations specifically protecting the rights and interests of women, and generally requiring fair employment practices, for many years now, actual discrimination claims have still been relatively rare. It remains to be seen whether this new step by Shenzhen’s government will encourage employees to raise complaints about sex discrimination to the government or the courts.

Highest Court in Guangdong Province Clarifies Position on Key Employment Issues

Recently, the Guangdong Province High People’s Court and Guangdong Province Employment Dispute Arbitration Commission jointly issued meeting minutes (“**High Court Minutes**”) to provide guidance to lower-level courts and arbitral panels on several significant employment dispute questions. Although the High Court Minutes do not officially bind the lower courts and arbitration panels, it is likely that the courts and arbitration panels will be guided by the High Court Minutes.

Pursuant to the High Court Minutes, upon expiration of an employee’s second consecutive fixed term contract following January 1, 2008, once the employee

unilaterally demands the renewal of the employment contract on an open-term basis, the employer has to enter into an open-term employment contract with the employee. This is in contrast to the position taken by Shanghai courts that both parties have to agree to renew for a third term before the employee can demand an open-term contract, though Guangdong's position seems in line with the position taken by courts in most other localities.

Moreover, if an employment contract due to expire is extended by operation of law, e.g. for pregnancy or sick leave, and as a result the affected employee would have worked for his/her employer for at least ten years, then the employee would be entitled to an open-term contract. This position also is the opposite of the position currently taken by the Shanghai High People's Court on this issue, though is similar to the position taken by the Jiangsu Province High People's Court.

The High Court Minutes also provide important guidance regarding when and to what extent an employer may unilaterally adjust an employee's job duties.

With respect to severance pay, the High Court Minutes seem to mark a significant departure from the Employment Contract Law ("**ECL**") and how most courts currently interpret it. Under the High Court Minutes, an employee's average monthly salary, which is used to calculate severance, would be subject to a cap for his/her entire period of service and not just the post-January 1, 2008 period of service as stipulated in the ECL. This may significantly reduce severance pay for long-serving, highly paid employees.

CSRC Issues Draft Rules for Employee Stock Purchase Plans

On August 4, 2012, China Securities Regulatory Commission ("**CSRC**") issued for public comment draft measures for the administration of employee stock purchase plans for listed companies ("**ESPP Rules**"). The ESPP Rules would only cover companies listed on the mainland China stock exchanges; overseas listed companies would not be affected by the ESPP Rules.

Under the ESPP Rules, listed companies would be allowed to collect payments from employees to purchase stock in the company, though there would be a number of restrictions on the ESPPs that listed companies may offer, such as restrictions on how much the employee may contribute, an imposition of a mandatory lock-in period, and restrictions on the number of shares that may be offered under an ESPP.

Although some news reports indicate that the ESPP Rules may be issued in September, no firm timeline has been publicly set by the government.

Court Awards Employee RMB 1 Million for Service Invention

According to a report in June, the Guangdong Province High People's Court awarded an employee RMB 1 million for a patented invention created by the employee during employment.

In the reported case, the company had been granted two patents based on two service inventions developed by the employee. In 2009, the company licensed to another entity the right to utilize one of the two mentioned patents. In 2010, the employee filed a complaint to the Shenzhen Intermediate People's Court ("**Shenzhen Court**"), claiming a total amount of RMB 20 million as the employee inventor. The employer argued any amounts payable to the employee under the Patent Law had already been included in the bonus paid to the employee.

According to the report, the Shenzhen Court took the view that the company should pay the employee compensation for the patented invention under the

Patent Law and its implementing regulations. However, since the employee failed to prove the amount of profits made by the company, the Shenzhen Court ruled that the employer should pay the employee RMB 1 million as compensation (and dismissed the other claims of the employee) by making reference to the highest amount of damages for patent infringement stipulated in the Patent Law. Under the Patent Law, this remedy should be used when it is difficult to determine the profit earned by the infringing party as a result of the infringement. The Guangdong Province High People's Court upheld the ruling of the Shenzhen court.

Under the implementing regulations of the Patent Law, if an employer is granted a patent for a service invention created by an employee, the employer should pay the employee compensation. If the company has not signed any agreement with the employee or does not have any company policies regarding the compensation amount, the employer must compensate the employee in accordance with a statutory scheme (for most types of patents, this involves remuneration equal to 2% of after-tax profit or 10% of a license fee, and a RMB 3000 reward payment).

Some may question the legal basis for the court to award compensation for the service invention by making reference to the damages available for patent infringement, because it is the employer instead of the employee who is the owner of the patent, and therefore there is no real patent infringement at issue. However, the above case should give companies greater impetus to stipulate their own compensation plan for employee inventions either in agreements with employees, or in the company's policies, in order to avoid bearing a potentially significant remuneration expense.

“Part-time” Employee Ruled to Be a *De Facto* Full-Time Employee

A Nanjing court ruled in July 2012 that an employee who worked under a “part-time” employment contract was in fact a full-time employee, because the employer violated rules on working hours, salary calculation and timing of payment that apply to part-time employees.

The Employee signed an employment contract with his employer, a government-run institute in Nanjing. The employment contract provided that he should work on a part-time basis. The Employee was later terminated without cause, and he brought a lawsuit to the court claiming for severance pay. His employer argued that he was not entitled to any severance because he was not a full-time employee. The court found that the Employee's daily working hours exceeded 4 hours and weekly working hours exceeded 24 hours, which is not consistent with the law on part-time employees' working hours. Furthermore, the court found that the Employee was paid on a monthly basis, rather than every 15 days or less. Finally, the court pointed out that the monthly wage was calculated with reference to the monthly minimum wage for full-time employees, rather than being paid on an hourly basis as required for part-time employees. The court thus found that the Employee was actually a full-time employee of the Nanjing entity, and awarded severance pay to him.

This case illustrates that employers should strictly follow the rules applicable to part-time employees. Otherwise the employees may be deemed to be full-time employees and thus be entitled to the more stringent protections available to full-time employees, e.g. severance pay and protection from at-will terminations.

Termination of Pregnant Employee During Probation Period Upheld by Court

In July 2012, the Shanghai Jing'an District Court reportedly ruled in favour of an accounting firm that had terminated a pregnant employee for her failure to meet the employment conditions during the probation period.

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In this case, the company terminated the employee for her lack of writing skills, financial accounting and audit practice capability. The court held that the termination was lawful since PRC laws and regulations do not prohibit the company from terminating pregnant employees for failing to meet the employment conditions during the probation period. In addition, the employment contract with the employee and the employee handbook did not stipulate any restrictions on such terminations.

The above ruling is in line with national law, but in contrast to the position taken by the courts in Beijing. Under Beijing court meeting minutes issued in 2010, companies may not summarily dismiss employees with special protection status (i.e., employees in their statutory medical treatment period, or in their pregnancy period or nursing period) even if they fail to meet the employment conditions during the probation period, except in narrow circumstances. The above further shows that even on important basic legal questions, the courts in different cities may take opposite views.

Termination of Employee for Defamation Held Unlawful

In a recent case reported on July 29, 2012, the Nanjing Xixia District People's Court ruled in favor of an employee who was summarily dismissed by the company for serious violation of company rules by defaming another employee. The company was ordered to pay approximately RMB 15,000 as double severance for the wrongful termination.

The employee was found to have slandered a colleague on several occasions by spreading rumors about the colleague's "private affairs" with another female staff member, which resulted in a quarrel between the two in late 2010. In light of the situation, the company transferred the employee to another job position in January 2011. However, two months later, the company still dismissed the employee for the alleged reason that the conflict between the employee and his colleague had not been resolved and the effects of the slander committed by the employee could not be mitigated.

The court found that under the company's rules and policies, an employee who defames, slanders or otherwise harms another employee's reputation may be disciplined up to a serious demerit on their record, and that summary termination may not be used unless the employee conducts vicious assaults, violence, insults or threats against others. Thus, the court ruled the termination decision to be inappropriate and ungrounded in the company rules. In addition, the court found the company had failed to prove the employee's continuing slander after the job adjustment and the continuing negative influence of his past misconduct.

Based on the above, companies should ensure the termination circumstances listed in their handbook and policies are specific and reasonable enough to facilitate the justification of any potential employee termination. In addition, if companies initially take an action in relation to misconduct other than termination, there is a risk that courts may not allow companies to take a second action based on the same misconduct.

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