



Cornell University  
ILR School

Cornell University ILR School  
**DigitalCommons@ILR**

---

Law Firms

Key Workplace Documents

---

12-2009

# China Employment Law Update - December 2009

Baker & McKenzie

Follow this and additional works at: <http://digitalcommons.ilr.cornell.edu/lawfirms>

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

---

This Article is brought to you for free and open access by the Key Workplace Documents at DigitalCommons@ILR. It has been accepted for inclusion in Law Firms by an authorized administrator of DigitalCommons@ILR. For more information, please contact [hlmdigital@cornell.edu](mailto:hlmdigital@cornell.edu).

---

# China Employment Law Update - December 2009

## **Abstract**

[Excerpt] On October 30, 2009, an official report on the status of enforcement of the Labor Union Law was submitted to the Standing Committee of the National People's Congress ("NPC"). The report outlined progress and continuing problems in protecting employee and labor union rights. Reflecting the importance of this report, the initial meeting to launch work on the report was attended by Politburo and top-level NPC Standing Committee members. A similar nationwide inspection was launched in 2004 and resulted in a sustained unionization campaign against foreign-invested enterprises.

The following were some specific action points highlighted in the report:

- The report recommended that new national legislation be passed that would encourage and regulate the establishment of employee representative councils ("ERC") in private companies. Current national legislation related to ERCs focuses on state-owned enterprises.
- According to the report, employment disputes doubled from 2007 to 2008, and through the middle of 2009, the number of employment disputes is similar to the number seen in 2008. In order to address this issue, the report suggested that tri-lateral mediation mechanisms, involving the government, labor unions, and employer associations, be encouraged as a means of resolving issues before they become contentious disputes.
- The report also noted that many companies are using labor dispatch arrangements for long-term core positions even though the Employment Contract Law restricts the use of such arrangements to only temporary, substitute, and auxiliary positions. The report recommended that the State Council pass new legislation regulating the use of labor dispatch arrangements.

## **Keywords**

Baker & McKenzie, China, employment law

## **Comments**

### **Required Publisher Statement**

Copyright by Baker & McKenzie. Document posted with special permission by the copyright holder.

# China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

December 2009

To find out more about how our Employment Law Group can add value to your business, please contact:

Andreas Lauffs  
Direct: +852 2846 1964 (Hong Kong)  
andreas.lauffs@bakernet.com

Joseph Deng  
Direct: +8610 6535 3937 (Beijing)  
Direct: +8621 6105 5988 (Shanghai)  
joseph.deng@bakernet.com

Jonathan Isaacs  
Direct: +852 2846 1968 (Hong Kong)  
jonathan.isaacs@bakernet.com

[www.bakernet.com](http://www.bakernet.com)

## Beijing

Suite 3401, China World Tower 2  
China World Trade Centre  
1 Jianguomenwai Dajie  
Beijing 100004, PRC  
Tel: +86 10 6535 3800  
Fax: +86 10 6505 2309

## Hong Kong

23rd Floor, One Pacific Place  
88 Queensway, Hong Kong

14/F 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

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

## Official Report on the Enforcement of the Labor Union Law

On October 30, 2009, an official report on the status of enforcement of the Labor Union Law was submitted to the Standing Committee of the National People's Congress ("NPC"). The report outlined progress and continuing problems in protecting employee and labor union rights. Reflecting the importance of this report, the initial meeting to launch work on the report was attended by Politburo and top-level NPC Standing Committee members. A similar nationwide inspection was launched in 2004 and resulted in a sustained unionization campaign against foreign-invested enterprises.

The following were some specific action points highlighted in the report:

- The report recommended that new national legislation be passed that would encourage and regulate the establishment of employee representative councils ("ERC") in private companies. Current national legislation related to ERCs focuses on state-owned enterprises.
- According to the report, employment disputes doubled from 2007 to 2008, and through the middle of 2009, the number of employment disputes is similar to the number seen in 2008. In order to address this issue, the report suggested that tri-lateral mediation mechanisms, involving the government, labor unions, and employer associations, be encouraged as a means of resolving issues before they become contentious disputes.
- The report also noted that many companies are using labor dispatch arrangements for long-term core positions even though the Employment Contract Law restricts the use of such arrangements to only temporary, substitute, and auxiliary positions. The report recommended that the State Council pass new legislation regulating the use of labor dispatch arrangements.

## Use of Mediation to Resolve Labor Disputes Reinforced

In response to challenges arising from a sharp increase in labor disputes since 2008, the government has continually been trying to promote the use of mediation to resolve labor disputes. This policy has been formally endorsed in the Opinion on Reinforcement of Labor and Personnel Dispute Mediation (关于加强劳动人事争议调解工作的意见) ("Opinion") issued on October 30, 2009 by the Ministry of Human Resources and Social Security ("MOHRSS"), the Ministry of Justice, All-China Federation of Trade Unions ("ACFTU"), and the Employer's Federation.

The Opinion encourages the establishment of labor dispute mediation committees at the enterprise level. Since such committees would normally operate under the supervision of the enterprise union, the Opinion indirectly also puts pressure on

companies to establish unions. If the Opinion is successful, fewer labor disputes would reach arbitration panels and courts, and disputes could be resolved in a more timely manner.

The Opinion is specifically concerned with serious labor disputes on a mass scale, and it advised the labor bureaus, along with unions and enterprise representatives, to establish an emergency mediation and coordination mechanism, to properly settle serious collective labor disputes on a timely basis.

The Supreme People's Court in July set forth guidelines on judicial recognition of decisions and agreements reached in non-litigation forums. In particular, it created a summary judicial procedure to validate and enforce settlement agreements reached through mediation.

## **National and Local Governments Expand Coverage of Social Insurance System**

On October 21, 2009, MOHRSS issued a notice providing that all Chinese nationals who have permanent residency abroad are covered under the social insurance system.

This notice will make it easier to fully implement the general policy of the national government to allow overseas Chinese to participate in China's social insurance system. In some local jurisdictions, overseas Chinese who obtained overseas permanent residency could not be enrolled in the local social insurance system because they did not have a PRC Identity Card. Now, overseas passports can be used instead of PRC Identity Cards.

Also, on October 10, 2009, the Shanghai Human Resources and Social Security Bureau issued a notice, which provides that foreigners, overseas Chinese and people from Taiwan, Hong Kong and Macau (collectively, "Expatriates"), who have obtained valid work permits in Shanghai, may participate in the urban pension, medical insurance and work injury insurance system in Shanghai (though this is not mandatory).

Since national regulations were issued in 1996, Expatriates were supposed to be subject to the same mandatory social insurance requirements applicable to PRC nationals. However, there has been little to no implementation of this requirement at the local level, so in practice, it was impossible to enrol Expatriates in the social insurance system. The Shanghai notice represents one of the first local implementations of the 1996 national regulations.

A new law on social insurance is still in the process of being drafted and hopefully will address social insurance issues for Expatriates and overseas China in more detail.

## **Amendments to Shenzhen Wage Regulations May Lower Overtime Burden**

Amendments to the Shenzhen Wage Regulations officially took effect on October 21, 2009. The new regulations allow the employer to limit the calculation base for overtime compensation to "normal working hour wages". In the past, the basis for calculating overtime in Shenzhen was an employee's "standard wages", which included any fixed monthly payments such as subsidies and allowances. Employers in Shenzhen may therefore consider revising their contracts to take advantage of the new amendments to minimize their overtime burden.

## **Court Rules That Strikes Are Not Force Majeure Events**

A Shanghai local court recently held that strikes do not amount to *force majeure* and ruled that a Shanghai company must compensate its customer, a Suzhou company, for

failing to deliver orders to the Suzhou company on time due to an employee strike. As a result, the Shanghai company was ordered to pay a penalty equal to two times the deposit amount in accordance with the terms of the sales and purchase contract. The Shanghai court confirmed the principle that strikes are generally not considered a *force majeure* event that justifies rescission of contracts because, by their nature, strikes can be avoided by human efforts and by improving labor relations between employers and employees.

## **Court Rules Termination of Employee for Instigating a Strike Unlawful**

On August 10, 2009, an employee in a nonunionized company in Shanghai organized a one-day strike to demand a salary increase from the management. The company terminated the employee.

The Shanghai arbitration commission ruled in favor of the employee that the termination was unlawful. The company then appealed to the Shanghai People's Court of the first instance. The court held that the company had the burden of proving that the employee's actions (instigating the strike and discussing the strike at work) were serious enough to justify immediate termination without compensation. The court found that the company had not met its burden of proof and ordered the company to compensate the employee for unlawful termination.

## **Employment Contract for Expatriate General Manager Ruled Invalid**

The Changping District People's Court in Beijing reportedly ruled in November that a general manager's employment contract was invalid when the board chairman of a high-tech company in Beijing signed an employment contract with and appointed himself as the general manager.

The court ruled that the dispute was not covered by the Employment Contract Law because the appointment was not approved by a board of directors' resolution, as required by the Company Law. As a result, the court rejected the expatriate's claim as general manager for RMB 464,000 in severance and unpaid wages after his departure from the company. This case shows that if a general manager is not properly appointed in accordance with the Company Law, his employment contract may be ruled invalid.

## **Court Rules that Termination for Refusal to Sign Employee Handbook Is Invalid**

On November 26, 2009, the No. 1 Intermediate People's Court in Beijing reportedly ruled that a company's modified employee handbook was unenforceable because the modification did not follow a democratic procedure. Therefore, the court ordered the company to reinstate an employee that it terminated for refusing to sign a notice of the modification.

The employee, who was identified as Mr. Hou, was a chief guard in an electrical distribution room of an unidentified company. In 2008, the company issued a notice to employees stating that it modified the section of the employee handbook regarding disciplinary actions against employees who sleep at work, and demanded employees sign the notice. After stating that part of the notice was inconsistent with the relevant industry standards and refusing to sign it, Mr. Hou was summarily dismissed by the company on the grounds that his refusal constituted a serious breach of company rules regarding following proper instructions from the company's management and supervisors.

The court reportedly held that a proposal to modify a company rule that affects the immediate interests of employees can only be adopted after it is first discussed by

the employee representative council or by all employees, and company management goes through consultations with the union or employee representatives. Since the company unilaterally modified its company rules, the employees are entitled to reject the modification. As a result, the court ruled that the company lacked a legal basis to terminate Mr. Hou on the grounds of a serious breach of company rules. The court therefore invalidated the company's unilateral modification notice and ordered a reinstatement of Mr. Hou.

This case is another example showing that courts enforce the consultation requirement under Article 4 of the Employment Contract Law. Therefore, even seemingly small amendments to an employee handbook or manual require consultation.

## **Court Protects Employee's Right to Set Up a Union Without Employer's Approval**

In November 2009, the Xicheng District People's Court in Beijing reportedly upheld an employee's statutory right to set up a union and therefore ordered RMB 400,000 in severance payment for a union chair who was terminated for setting up the union without the employer's approval.

The union chair, who was identified as Ms. Cui, was reportedly an HR manager at Aiqi Advertising (Beijing) Co., Ltd. ("**Aiqi**"). After Aiqi was acquired by Reed Advertising (Beijing) Co., Ltd. ("**Reed**"), Ms. Cui signed an employment contract with Reed to become Reed's HR manager. During Reed's pre-establishment period, Ms. Cui sought help from the street-level union to establish Reed's enterprise union. Under the street-level union's guidance, Reed's enterprise union was established and Ms. Cui was elected as the union chair by an e-mail vote, and the street-level union approved her appointment. Reed, however, terminated Ms. Cui on the grounds that she, rather than Reed's legal representative, signed and affixed Aiqi's company chop on the application letters to establish the union.

The court held that because Ms. Cui was legally entitled to set up the union and because employees' statutory right to join unions cannot be obstructed or restricted by any organization or individual, the establishment of the union did not damage Reed's legitimate rights. The court therefore decided the termination was illegal and awarded Ms. Cui severance.

This case is an example of a court supporting unionization by employees without the approval of employers. Most company unions are set up following negotiations between the local ACFTU and management, in which case management has the opportunity to select management-friendly employees to sit on the union committee.

---

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This Update has been prepared for clients and professional associates of Baker & McKenzie. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases. No responsibility for any loss occasioned to any person acting on refraining from action as a result of material in this Update is accepted by clients, authors or Baker & McKenzie. If advice concerning individual problems or other expert assistance is required, the service of a competent professional adviser should be sought.

### **Data Privacy**

Please contact Stephanie Kam by telephone +852 2846 1582 or e-mail: [chinalaw@bakernet.com](mailto:chinalaw@bakernet.com) should you wish your details to be added or deleted from our mailing list.

©2009 Baker & McKenzie  
All rights reserved.