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China Employment Law Update - October 2011

Baker & McKenzie

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Abstract
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People's Republic of China

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Social Insurance – Impact on Employers Depends Upon Location

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As China's social insurance schemes are implemented locally, actual enforcement of the new measures may vary by city. It appears to date that amongst the large cities, only Beijing has issued its local implementing rules. We summarize the current policies in some large cities below:

Beijing: The Beijing municipal labor bureau has formulated implementing rules which imply that all foreigners working in Beijing, whether directly hired or on secondment, "shall" (*yingdang*) participate in the social insurance scheme. There appear to be different views at the district level as to whether participation is optional or a mandatory requirement.

Shanghai: Foreign national employees under local contracts can, but are not required to, participate in pension, medical insurance and work-related injury insurance schemes.

Suzhou: It is optional but not compulsory for foreign national employees under local contracts in Suzhou (including the Suzhou Industry Park, which has the right to implement its own social insurance policies within the park), to join the local social insurance system.

Tianjin: Pursuant to a Tianjin 2008 notice, foreign national employees under local contracts may, but are not required to, participate in the social insurance scheme. However, some government officials believe that all foreigners, whether under local contracts or employed offshore and seconded to work in Tianjin, must participate in all five types of social insurance.

Shenzhen: The policies in Shenzhen are unclear. The majority opinion appears to be that foreign national employees must participate in the pension, medical insurance and work-related injury insurance fund schemes.

Guangzhou: According to the municipal tax bureau (in charge of social insurance contributions), foreigners, whether under local contracts or employed offshore and seconded to work in Guangzhou, must participate in all five types of social insurance. However, whether or not the local social insurance scheme has already been open to foreigners may depend on the practice of the district authorities.

Dalian: Employers in Dalian may face significant payroll increases. With the exception of Dalian, the contribution levels are capped in all other

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

23rd Floor, One Pacific Place
88 Queensway, 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

cities. In Shanghai for example, currently an employer would never pay more than approximately USD680 per month (exclusive of housing fund payment). However, the Dalian authorities have removed the cap for employer contributions effective from September 1, 2011. Therefore, an employer potentially would have to contribute approximately 32% of the total payroll for its employees. Local officials were divided on whether foreign nationals must be enrolled in the social security scheme for pension only or for five types of social insurance.

It is clear that local practice varies considerably between different cities as evidenced above. Since it is likely that local jurisdictions will eventually issue local implementing rules, it is important to regularly review local rules and policies to ensure compliance with the latest position.

Shanghai Issues Rules for Mediation of Collective Bargaining Disputes

On August 4, 2011, the Shanghai Human Resources and Social Security Bureau issued its "Rules for the Mediation of Collective Bargaining Disputes" (the "**Mediation Rules**").

The Mediation Rules outline the actions that Labor Bureaus may take to facilitate collective bargaining between the employer and the employees (or labor union).

Under these Rules, the labor bureau in-charge may take the following steps:

- convene a meeting to consider each party's arguments;
- investigate the reasonableness of the parties' stances on the disputed issue(s); and
- engage a third party to assess the reasonableness of each party's stance.

The Labor Bureau will then provide an opinion regarding any outstanding issues upon which the parties cannot agree.

Although the opinion issued by the Labor Bureau will not be legally binding on the parties, in practice it is likely to have a significant impact. For example, if the employer does not follow the opinion there may be the following consequences:

(i) Employees may use the opinion against the employer if and/or when they disclose the dispute to the media. Such a tactic is becoming increasingly common; and

(ii) In the worst-case scenario, if the employees commence a collective action, such as a strike, the local authorities (generally the Labor Bureau) may be more sympathetic to the employees. They may take the employees' side or take no action to intervene in the dispute. This could have serious implications for the employer, as Labor Bureau intervention is often critical for resolving long-term strikes.

Court Clarifies When Employees Become Entitled to Annual Leave

In October 2011, the Shunyi District People's Court of Beijing affirmed the ruling of a Beijing Labor Arbitration Commission in favour of an

employee's claim for compensation for unused annual leave. The court ordered the employer to pay RMB39, 000, which represented compensation for 9 days of unused annual leave.

In the reported case, the employer argued that the employee was not eligible for annual leave on the ground that she had not worked for 12 consecutive months during the period prior to her joining the company. Under applicable regulations, employees become eligible for annual leave once they work for 12 consecutive months either with the current employer or prior employer(s). The company tried to argue that the break in the employee's service meant that she lost her eligibility for annual leave until she attained 12 consecutive months of service with them.

The court rejected the company's argument and ruled that once the employee works for 12 consecutive months anywhere, then she will always be entitled to annual leave no matter whether she switches employers or takes any breaks from work in the future.

This case clarifies that companies should grant annual leave to all new hires once they join the company as long as the employees satisfy the requirement of having worked 12 consecutive months at any time in the past for any employer.

Expired Work Permit Leaves HK Employee Without Remedy

In October 2011, the Luohu District People's Court of Shenzhen reportedly affirmed a Shenzhen Labor Arbitration Commission's ruling dismissing all employment-related compensation claims raised by a Hong Kong employee against her Shenzhen employer upon termination of employment. The reason for the dismissal was that her current employment contract was signed after her work permit had expired.

The employee originally entered into a three-year employment contract with her Shenzhen employer. As she was unable to provide the medical certificate required for renewal of her PRC work permit, her work permit expired, but despite this, the parties concluded a second employment contract when her first contract expired. The court ruled that the second employment contract between the parties was invalid due to the employee not having a compliant PRC work permit and that it should only be treated as a commercial contract. Thus, she was not protected against termination and not entitled to severance and other employment benefits.

The case shows that Hong Kong residents (as is the case with foreign nationals) do not enjoy the protection of PRC employment law if they do not have a valid work permit.

Court Rules that Charging Employees Fees for Work Uniforms is Unlawful

In October 2011, the Chongqing No. 2 Intermediate People's Court upheld a district court ruling in favor of an employee, Mr. Huang, who successfully claimed a refund of the uniform fees and deposit charged by the company.

Mr. Huang signed an employment contract with the company on January 1, 2008. Upon commencement of his employment, the company charged him RMB500 as fees for the company uniform and RMB50 as deposit for his work card. When Mr. Huang's employment was terminated, he sued

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

Andreas Lauffs
+852 2846 1964 (Hong Kong)
andreas.lauffs@bakermckenzie.com

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

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

Leading Law Firm for Employment Law in Hong Kong – *ALB Employment and Labour Law Survey 2011*

Tier 1 Law Firm for Employment (China / Hong Kong) – *Asia Pacific Legal 500, 2009-2011*

Band 1 Law Firm for Employment (China / Hong Kong) – *Chambers Asia 2011*

Leading Law Firm for Labour and Employee Benefits in China – *PLC Which Lawyer? 2011, 2010, 2009, 2008, 2007 Yearbook*

Ranked No. 1 Employment Law Firm – *PLC Which Lawyer? Global Employment Top Ten Firms Leading in China*

International Employment Firm of the Year in China – *China Law & Practice Award 2011, 2008*

China Client Choice Award – *International Law Office 2008, 2007, 2006, 2005*

his former employer for a refund of the uniform fees and deposit. The court supported his claims, ruling that the PRC Employment Contract Law specifically prohibits employers from requiring the employee to provide a deposit or collect property from the employee under some other guise, and therefore the charging of uniform fees and a work card deposit is illegal.

It is a common practice to charge employees for work uniforms in China, especially in service industries. Companies should be reminded that they must not charge employees for ordinary business expenses of the employer.

Employer Arrested in Shenzhen for Failing to Pay Back Wages

According to a September 29, 2011 case report, the People's Procuratorate (the equivalent of a prosecutor's office) in Bao'an District, Shenzhen City, approved the arrest of a contractor (the "**Contractor"**) for failing to pay a significant sum of wages to his employees.

This is the first application in Shenzhen to arrest an individual for intentionally failing to pay wages, under the recently amended Criminal Law ("**Criminal Law Amendments**"). Under the Criminal Law Amendments, employers who maliciously fail to pay wages to their employees are subject to criminal penalties. For further information on the Criminal Law Amendments please press this link.

An engineering company engaged the Contractor for a construction project in early 2011. The Contractor in turn hired the employees for the project and promised to pay them upon completion of the project in late June or early July 2011. The Contractor received funds from the engineering company during the course of the project as compensation, part of which was used to pay the employees their daily living expenses.

On June 30, 2011, the Contractor still owed the employees around RMB200, 000 and went into hiding. In early July 2011, the engineering company reported the matter to the police after being approached by the employees for their unpaid wages. Although the Contractor appeared in court, he still refused to pay the employees the unpaid wages. After conducting an investigation, the local People's Procuratorate found that the Criminal Law Amendments applied because the Contractor had failed to pay a relatively large sum of unpaid wages and there was no financial basis for his refusal to pay.

This case demonstrates that prosecutors are prepared to enforce the Criminal Law Amendments as a way to punish employers who maliciously fail to pay wages to their employees.