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China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

October 2014

Amendment to Safe Production Law Effective December 1

On August 31, 2014, the PRC Standing Committee of the National People's Congress issued an amendment to the 12-year old Safe Production Law ("**Work Safety Amendment**"), to address ongoing safety problems and provide more effective safety protection to workers. The Work Safety Amendment will come into force on December 1, 2014. The changes will significantly increase the severity of punishment for non compliant companies and also tighten those companies' responsibilities to prevent work safety accidents, as summarized below:

- Companies will receive comparatively heavier fines for work safety accidents according to the severity level of the accident, with the most severe fines ranging up to RMB 20 million.
- In addition to possible criminal liability, penalties will also be imposed on the primary responsible manager if the accident occurs due to his/her failure to comply with the law. This will range from 30% to 80% of the manager's annual income for the previous year based on the seriousness of the accident.
- Possible administrative or criminal liability will be imposed on the primary responsible manager for failure to organize immediate rescue at the time a work safety accident occurs or if he or she leaves their post or even escapes during the accident investigation period.
- Work safety inspection authorities can order companies to suspend operations or construction or cease usage of facilities or equipment. They are authorized to force a company to suspend operations by cutting off the electricity supply or supply of civil explosives, to compel the company to carry out its work safety duties.
- Workplace safety training must be provided to directly-employed employees, dispatch employees and student interns. The fine imposed on any employer for failure to provide training and failure to rectify such a non compliance within the time limit ordered by relevant authorities can be up to RMB 100,000.

According to media reports, the frequency of work safety accidents in recent years prompted the public to urge the government to make legislative change and to take steps to address the inadequate sanctions and absence of an effective supervision system under the current law.

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Supreme People's Court Provides Guidance on Online Data Protection

On June 23, 2014, the PRC Supreme People's Court issued the *Provisions on Various Issues Regarding the Handling of Tort Lawsuits of Personal Rights Invasion by Using Information Networks* ("**Interpretation**"); this took effect on October 10, 2014. The Interpretation mainly provides guidelines on the circumstances in which the release of data by an online service user ("**User**") and/or an online service provider ("**Provider**"), and the failure of supervising such release by a Provider, shall constitute a tort and the relevant liabilities that may arise.

The Interpretation will be relevant to employers in the following situations:

(1) Employee's online posts infringe employer's rights

According to a formal decision issued by the Standing Committee of the National People's Congress, Providers are responsible for administering data posted through the online service they provide. Based on the Tort Law, when an employer finds that an employee (a User) has posted any information online which breaches the employer's rights (e.g. rights of name, reputation, etc.), the employer can notify and request the Provider to delete such information. If the Provider fails to take necessary action (e.g. delete, shield, break the link, etc.) after receiving a notification from the employer, the Provider shall be jointly liable with the relevant employee (User) for any increased damage as a result of the Provider's failure to take action in time.

Prior to the Interpretation being issued, it was not clear how to serve a notification to the Provider and how to determine whether actions had been taken in time by the Provider. The Interpretation sets out more specific guidelines for how exactly to notify a Provider and how to determine whether the Provider has taken appropriate steps in reaction to a notification.

(2) Employer's online posts infringe employee's rights.

An employer can also be a User who may post information that potentially breaches their employees' rights. According to the Interpretation, if a User "publicizes" (*gongkai*) online a person's personal data, including genetic data, medical records, criminal records, home address, and private activities, and causes damage to the person, the User and the Provider could be held liable for tort. The Interpretation also provides some exceptions to the above breaches of privacy, such as if the individual consented to the publicizing or if the information posted by the User was already publicized by the individual himself.

If the breach of privacy is not very serious, the sanctions include an apology and the removal of the material. If the publication causes damage to the employee's property or has caused serious mental harm to the employee, then the employer would be liable for compensating for those

losses. The people's court will base the assessment on an analysis of the relevant facts and can make an award up to RMB 500,000 on a case by case basis.

Therefore, in order to avoid dispute, if an employer needs to post an employee's personal information, sensitive information in particular, generally it should obtain the employee's written consent in advance. Such consent needs to specify the scope of the proposed publication.

Guangdong Province Issues Collective Bargaining and Collective Contract Regulations

On September 25, 2014, the Standing Committee of Guangdong Provincial People's Congress issued the *Regulations of the Guangdong Province on Collective Bargaining and Collective Contract* ("**Guangdong Collective Bargaining Regulations**"), which will take effect on January 1, 2015.

According to the Guangdong Collective Bargaining Regulations, if no less than half of all employees or employee representative council members demand that a collective bargaining process be initiated, the company union or the upper level union (if the company has no company union) should send a written demand to management for collective bargaining; this puts more power in the hands of ordinary employees to initiate collective bargaining by placing pressure on the unions to be more proactive. Management must respond within 30 days after receipt of the demand notice. During the collective bargaining process, employees shall not engage in disruptive activities, such as blocking entrances or exits of the company's facility.

The Guangdong Collective Bargaining Regulations also contain a provision making clear that if a company is facing difficult economic circumstances, it can bargain to freeze or even reduce wages.

An earlier draft of the regulations, issued for public comment in April 2014 (*please see our Newsletter of April 2014 which can be accessed via this [link](#)*), granted employees the right to strike if management fails to respond to or refuses the demand for collective bargaining without justification. In addition, the draft also allowed termination of employees for cause if the employees went on strike during the collective bargaining process. Such provisions would have been the first time that PRC law gave specific guidance regarding the legal rights of striking workers. However, the Guangdong Collective Bargaining Regulations in their final form do not contain these provisions.

Similarly, Guizhou and Shanxi also promulgated regulations on collective bargaining of wages, which will also take effect on January 1, 2015. These regulations provide that both the employer and the employees may propose collective bargaining, and the other party must respond within 20

days. If the company fails to conduct collective bargaining as proposed by employees, the local authority will keep a record of this and may make the company's refusal public. In Guizhou, a company that refuses to conduct collective bargaining will be unable to pass the annual employment review.

Shanghai High People's Court Issues Internal Opinion on Labor Disputes

In October 2014, the Shanghai High People's Court issued an internal Opinion on Handling Labor Disputes ("**Opinion**"), which clarified several controversial employment issues.

The Opinion addresses the extent to which foreign nationals locally employed in Shanghai receive protection against termination similar to foreign nationals. For example, normally an employee could sue for reinstatement or double severance if an employer cannot justify a dismissal on one of the statutory grounds. Under the Opinion, if an employer refuses to reinstate a foreign employee who sues for unlawful dismissal, then a court may dismiss the employee's reinstatement request, since, according to the High Court, the employer can deregister the foreigner's employment permit during the litigation process in any event, rendering reinstatement impossible.

The Opinion also states that if the foreigner claims monetary damages for a wrongful termination, in the absence of any stipulated damages in the employment contract, the foreigner can only claim "actual damages" suffered, in accordance with the PRC Contract Law. The Opinion seems to suggest that the "double statutory severance" under the Employment Contract Law is not a default remedy available to foreign employees, if not specifically stipulated in the contract.

The Opinion also states that the company has the right to terminate an employee on the grounds of "serious violation of company policies" if the employee, after being re-assigned to a new position by the company, fails to report to either the new or the old position. The Court takes the position that a company is allowed to adjust the employee's position due to the change of its operational structure or business scope or the change of the external market, provided that such adjustment is lawful and reasonable. The employee has the right to negotiate such re-assignment (if the employee thinks the re-assignment unreasonable), but cannot refuse to report to work.

Further, the Opinion clarifies that any agreed-upon liquidated damages for the employee's violation of the confidentiality obligation during the employment period is not enforceable, since the PRC Employment Contract Law does not specify breach of confidentiality as one of the allowable circumstances where liquidated damages can be agreed upon by the company and the employee. Therefore, the employer must

prove actual damages resulting from the employee's violation of the confidentiality obligation.

Sino-Finland Social Security Treaty Signed

Both the Chinese and Finnish governments signed the Sino-Finland Social Security Treaty in September. The purpose of the treaty is to resolve the social insurance issues for Chinese and Finnish employees who work in the other treaty country. The full text of the treaty is not yet publicly available, and both governments will need to adopt the treaty through internal legislation procedures to make it enforceable as national law.

So far, the Chinese government has been in negotiations for bilateral social security treaties with 15 countries and regions that it has close economic and trade relationships with. To date, China has only signed social security treaties with South Korea, Germany, Denmark and Finland.

Dismissal of Pregnant Employee On Grounds of Fraud Upheld by Beijing Arbitration Committee

In a recent case, the Beijing Municipal Labor Arbitration Committee ("**BMLAC**") ruled in favor of an employer who dismissed a pregnant employee based on her providing false medical certificates.

The employer was suspicious of the authenticity of the medical certificates and made inquiries with the hospital which issued them. The hospital provided a written testimony to the employer stating that although the stamps of the hospital's seal on the certificates were authentic, the signatures of the doctor who supposedly issued the medical certificates were false. The employer dismissed the employee in accordance with its employee handbook, which provided that an employee could be immediately dismissed if he/she engaged in any fraudulent act. The employer considered the employee's submission of medical certificates with false doctors' signatures, a fraudulent act. The employee filed for labor arbitration to challenge the dismissal and the BMLAC agreed with the employer and upheld the dismissal.

The BMLAC took the view that, given the hospital's statement confirming that the medical certificates were not signed by their doctors and the fact that the employee had no other medical evidence to support her sickness, there was a high possibility that the medical certificates were false. The BMLAC confirmed that the employer's dismissal of the employee was legitimate and no severance was payable as the employee handbook clearly provided that such behaviour would justify immediate dismissal.

In practice, many employers are suspicious of the genuineness of medical certificates submitted by employees, but it is often difficult to verify such

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

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concerns. This case demonstrates that checking directly with the issuer of the medical certificate is one option. One potential alternative option that is sometimes tried would be to require the employee to submit to a second medical assessment at a clinic nominated by the employer. However, without a clearly stipulated right to require this in either an employment contract or policy in the employee handbook, an employee likely may refuse a second medical assessment, and even with such a clearly stipulated right, the law is unclear whether any disciplinary action could be taken against an employee refusing to cooperate.

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