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China Employment Law Update - April 2011

Abstract

[Excerpt] From May 1, 2011, it will be a criminal offence for a company to intentionally fail to pay wages as a result of an amendment implemented by the National People's Congress to PRC Criminal Law ("the Amendment"). Both the company and its responsible management will be liable to criminal prosecution for the intentional failure to pay wages. This is a significant departure from the administrative penalties which were previously applicable in such cases.

In order to prove the offence, the following elements must be present: (i) there must be an avoidance of payment of wages; (ii) this can be by means of transferring assets, evasion by going into hiding, or where there is an ability to pay wages but a refusal to do so; (iii) the amount involved is relatively large; and (iv) there is a refusal to pay upon receipt of an order to do so by the relevant governmental authorities.

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Comments

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China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

April 2011

Failure to Pay Wages Now a Criminal Offence

From May 1, 2011, it will be a criminal offence for a company to intentionally fail to pay wages as a result of an amendment implemented by the National People's Congress to PRC Criminal Law ("**the Amendment**"). Both the company and its responsible management will be liable to criminal prosecution for the intentional failure to pay wages. This is a significant departure from the administrative penalties which were previously applicable in such cases.

In order to prove the offence, the following elements must be present: (i) there must be an avoidance of payment of wages; (ii) this can be by means of transferring assets, evasion by going into hiding, or where there is an ability to pay wages but a refusal to do so; (iii) the amount involved is relatively large; and (iv) there is a refusal to pay upon receipt of an order to do so by the relevant governmental authorities.

If the offence is proven, the Amendment provides for imprisonment of not more than three years and/or a fine. If the circumstances are "severe," the term of imprisonment will range from over three to less than seven years in addition to a fine. The legal entity which commits the crime shall be fined, and the persons who control the company and those who are directly responsible for the crime shall be punished in accordance with the above provisions.

Since the term "wages" is defined broadly under the law, employers may potentially face criminal liability for matters such as unpaid overtime wages if they refuse to pay after being order to do so by administrative authorities. However it remains to be seen how the criminal courts will interpret this provision.

On another matter, the Amendment also for the first time criminalizes the bribery of foreign public officials and officials of international public organizations. This provision likely applies to China-based companies (including China subsidiaries of multinationals), employees of those companies, and PRC nationals generally, though the exact scope of activities covered under the provision is not yet clear.

Push for Collective Bargaining and Unionization on Local Level Continues

The Wuxi Regulations on Collective Wage Bargaining in Enterprises ("**Wuxi Regulations**") will take effect on June 1, 2011. Under the Wuxi Regulations, if an employer refuses to bargain with employees, the local

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labor authority may order the employer to remedy the violation within 15 days or the employer can be fined up to RMB 30,000 for failure to do so.

The Wuxi Regulations are groundbreaking in imposing a specific penalty for an employer's refusal to agree to employees' collective bargaining request. Employers will also be required to provide to the employee representatives (typically the company union) information related to the subject matter of the bargaining at least five days prior to the commencement of bargaining. There will be a duty on the company union (if any) to notify the upper level union of the collective bargaining, so that the upper-level union can provide guidance to the employee representatives and supervise the bargaining process. These provisions may help improve the effectiveness of wage bargaining, since the upper-level unions are more experienced and skilled in conducting collective bargaining. Further, the advance provision of information to the employee representatives will enable them to better prepare for the wage bargaining sessions.

In Guangzhou, the local legislature issued the draft Guangzhou Municipal Labor Relation and Collective Bargaining Regulations for public consultation on February 28, 2011. There is little new or novel in these draft regulations and it is unclear when they are expected to be passed.

On March 28, 2011, the Shanghai local labor authority jointly with the Shanghai chapter of the All China Federation of Trade Unions ("**ACFTU**") issued a notice setting out a goal to establish collective bargaining mechanisms in 80% of Shanghai-based enterprises which have formed labor unions by the end of 2011.

The local Chinese media has also highlighted instances where collective bargaining has recently taken place in multinational companies. In March 2011, Carrefour Shanghai reportedly established an employee representative council ("**ERC**") and signed the first collective contract in the company's history. The agreement reportedly provides that collective wage bargaining will be conducted annually each February, and the rate of wage increase for 2011 will be 8%. In Guangdong province, a local Honda company reportedly also reached an agreement with the company union through collective bargaining; under the agreement, the average monthly wage would be increased by about RMB 611. This is the same Honda company in which employees demanded a more representative union during a strike last year. In both cases, the upper-level labor unions reportedly played an active or key role in the collective bargaining process.

The Chaoyang District ACFTU chapter in Beijing issued a public letter stating that Beijing will expand the program of having the tax authorities collect union fees from all employers located in Beijing this year. Companies that have not formed labor unions will need to pay a union preparation fee equal to 2% of its total payroll. This is the same amount as the union fee that companies with unions would have to pay. Since the ACFTU itself does not have authority to impose this fee on companies, it remains to be seen whether the local Beijing government will issue a notice or set of regulations which will make payment of this fee a legal

requirement. This development is an indicator that employers located in the Chaoyang District, Beijing are likely to face increased unionization pressure this year.

The above local developments appear to be consistent with the national ACFTU's collective bargaining and unionization plans publicized in January 2011. These plans included goals to establish collective bargaining mechanisms in all Fortune 500 companies and at least 80% of other enterprises that have formed labor unions by the end of 2013. They also aim to establish labor unions in at least 95% for Fortune 500 companies and other foreign invested enterprises (90% of all enterprises nationwide) by the end of 2013.

New Regulations Ban Smoking in the Workplace

On March 10, 2011, the PRC Ministry of Health promulgated the *Implementing Rules to the Regulations on the Administration of Hygiene in Public Places* (the "**Hygiene Rules**"), which formally come into force on May 1. According to the Hygiene Rules, smoking is banned in all indoor public places, such as stores, hotels, restaurants, hospitals, cinemas, and other indoor workplaces. The business owners of workplaces (and other indoor public spaces) must take measures to ensure that employees, customers and other individuals entering the workplaces do not engage in smoking, and they must also place "no smoking" warning signs in conspicuous areas.

The local health authorities may inspect and audit the status of enforcement of the smoking ban in workplaces from time to time, by way of on-site inspections, inquiries, and other means. Business owners who violate these provisions may be ordered to rectify the violation, and failure to do that may render the company liable to a fine of up to RMB 10,000. If the business owner refuses to cooperate with the health authorities' inspection and supervision, it may be fined up to RMB 30,000; and in serious circumstances, the relevant authorities may order the cessation of its business operations and/ or even revoke its business license. However, it remains to be seen how aggressively these provisions will be enforced, as smoking is very prevalent in China and it may take some time before restrictions on smoking become a commonly accepted norm.

Crackdown On Foreigners in Guangdong Province

New regulations governing foreigners, including foreign workers, in Guangdong Province will take effect on May 1, 2011. The regulations target foreigners with expired passports, work permits, and visas. They place reporting obligations (including fines for failure to meet these obligations) on those who may come into contact with foreigners such as employers, hotel staff, schools, landlords and other private citizens. Those who report foreigners overstaying their visas or engaging in unauthorized

employment, may be rewarded. Employment-specific provisions include employer obligations to sponsor foreign workers for work permits and to maintain separate records for foreign workers. Employers may be fined up to RMB 3,000 for failing to track visa validity, monitoring and requesting timely visa renewal or failing to require departure upon visa expiry. In addition, employers face fines of up to RMB10,000 for failing to verify the content of work permits and visa applications. The regulations also state that the provincial government will publish a list of jobs which foreign workers may hold based on an assessment of what skills are available in the local labor market, which will clearly impact upon the success of work permit applications. Several positive duties are also placed on the employer, including the duty to report foreign workers who fail to leave China upon the expiration of their visas.

The Guangdong regulations supplement the existing national law and implementing rules governing foreigners in China. These rules already impose penalties on employers for hiring foreigners without work permits, including fines from RMB5,000 to 50,000 and all expenses associated with repatriating the foreign worker.

First AIDS Employment Discrimination Case Goes Against Plaintiff

In March 2011, the Intermediate People's Court in Anqing Municipality (Anhui Province) gave a ruling in China's first AIDS discrimination case. The claim was brought by an HIV-infected individual against the Anqing City Board of Education for refusal of employment. The court held that the refusal of employment to AIDS carriers in the teaching profession is a reasonable exception to the anti-discrimination laws because teaching professionals have frequent contact with students.

The PRC Employment Promotion Law and several subsequent laws and regulations specifically ban employment discrimination in the recruitment process against candidates carrying infectious diseases including HIV, AIDS and the Hepatitis B virus. There are exceptions for certain types of positions where work by infectious disease carriers pose a significant health risk as determined by the health authorities or pursuant to law. In this case, the teaching profession was found to constitute one of the exceptions to the anti-discrimination rules despite the lack of data showing that a risk to health and/or spread of infection is possible through this medium.

Company's Service Period Policy Held Invalid

In March 2011, the Huangpu District Court in Shanghai ruled against a real estate property management company in its claim seeking to recover certain housing benefits received by a former employee. The company claimed that the employee received special discounts with a value of approximately RMB 150,000 under the company's housing benefits scheme when she purchased an apartment from the company's affiliated entity. The scheme provides that if the employee's employment with the

company is terminated or if she voluntarily leaves the company within three years after signing the property purchase contract, the employee is obligated to refund the company the discount benefits received. The employee resigned from the company in 2010 and did not refund the company as per the agreement.

The Huangpu District Court ruled that the employee was not obliged to pay the company the amount claimed because: (i) the company's service period policy contravenes PRC employment law, and (ii) as the employee purchased the apartment from the company's affiliate entity, the company itself did not suffer any economic loss and thus does not have grounds to claim damages.

Although national law does allow for employers to claim back training-related expenses if employees leave before an agreed time, and Shanghai courts have allowed the recovery of certain advance benefits offered by an employer in the event of early termination, the benefit offered by the employer in this case did not fall into either of these two categories.

Recent Cases Demonstrate the Importance of Maintaining Proper Employment-Related Documentation

In March 2011, the Shanghai Minhang District People's Court ordered a construction company to pay compensation to a former employee for wrongful termination on the grounds that the employee handbook was not specific enough in defining misconduct. In the reported case, the company asserted that its employee handbook granted it the right to summarily terminate an employee after an employee has cumulatively received three written warnings, that a written warning can be given for an unexcused day of absence, and that the employee's departure from her post for part of the day constituted one day of unexcused absence. Although the employee handbook did provide that leaving one's post without approval can constitute an unexcused absence from work and that one day of unexcused absence from work during working hours can lead to a written warning, the court found that the employee handbook was silent on how long the period of unauthorized absence must be before it would constitute one day of unauthorized leave.

In another recent reported case, an employment dispute arbitration tribunal and a first instance court in Shandong Province (which were not identified in the news report), upheld an employee's wage payment claim and ordered the employer to pay RMB 11,000, which represented five months of salary during the year prior to termination. This was on the basis that the employer had failed to provide any wage payment records to prove the actual payment of wages for those months. Under the Wage Payment Regulations, employers are required to keep written wage payment records regarding salary amount, payment date and employee's signature for a minimum period of two years. In addition, the Measures for Administration of Accounting Archives require original payroll records to be retained for a minimum period of 15 years.

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Both cases above demonstrate that unless employers retain comprehensive written documentation on employee-related matters, the courts are likely to find against them if employees bring claims against them.

Termination of Employee who Refused to Work Overtime Held Illegal

In March 2011, the Suzhou Intermediate People's Court in Jiangsu Province ruled against an employer and held it liable for double severance and other compensation for termination of an employee who refused to work overtime. The court ruled in the employee's favor because it found that it was illegal and unreasonable for the employer to demand the employee work overtime based on his individual circumstances.

The employer alleged that the employee refused to work overtime when requested by his supervisor and that the employee verbally abused and threatened to assault his supervisor and manager during the discussion that took place about work arrangements. This alleged behaviour was a breach of the company regulations. The company's employee handbook provided that the employer was entitled to terminate without notice in such circumstances.

The Suzhou Intermediate People's Court held that the employer should notify and seek agreement from the employee when arranging overtime. In this case, it was unreasonable for the employer to demand that the employee work overtime because he had explained that he was unwell. The employer failed to provide evidence of the employee's verbal abuse of his supervisors and managers. As a result, the court held that the termination was illegal and the employer was ordered to pay double severance and other compensation to the employee.

This case demonstrates that generally employers must seek an employee's agreement when it arranges overtime and that the employee may refuse such a request if such request is illegal or unreasonable.

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