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China Employment Law Update - February 2010

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Abstract

[Excerpt] At the start of the new year, Shenzhen authorities announced that in 2010 they will pick 120 companies from the Global Fortune 500 and China Fortune 500 that have operations in Shenzhen, and push for collective bargaining within these companies. The focus will be on setting minimum wage standards and guaranteed wage increases within the companies.

On January 18, a draft set of collective bargaining regulations was submitted to the Shenzhen People's Congress for review. Most significantly, these draft regulations provide that if an impasse occurs in the collective bargaining process and cannot be resolved by the parties amicably, either party may apply for binding labor arbitration on the issues causing the impasse and the arbitration panel must decide on the issue within 15 days of receiving the application. This is similar to what unions in the US are pushing for in the Employee Free Choice Act. Other significant provisions provide that companies with more than 300 employees must sign collective contracts with employees.

Because Shenzhen is often at the forefront of legislative developments in China, if the draft regulations are passed in their current form, it is likely that local governments in other major cities and provinces may follow Shenzhen's lead and adopt similar measures.

Keywords

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Comments

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China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

February 2010

Shenzhen Makes Major Push for More Collective Bargaining in the Private Sector

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Provincial-Level Courts Take Different Positions on Key Employment Contract Law Issues

The Jiangsu High People's Court and Provincial Labor Dispute Arbitration Commission jointly issued the *Guiding Opinion on the Handling of Employment Disputes* (关于审理劳动争议案件的指导意见) ("Jiangsu Opinion") on December 14, 2009. This is part of a trend where, in the absence of any further clarification of the provisions in the Employment Contract Law from the national government, municipal and provincial high courts (such as in Guangdong province, Beijing, Shanghai, and Zhejiang province) have been taking the lead in issuing guiding opinions on important employment-related matters (the Supreme People's Court and the Ministry of Human Resources and Social Security reportedly are working on draft interpretations and implementing measures, but these have not yet been finalized).

One notable provision under the Jiangsu Opinion is that unlike directly employed workers, who would be entitled to demand open-term contracts in certain circumstances, a seconded worker who is hired through a staffing agency would not be entitled to an open-term contract. This is significant since there is an ongoing legal debate on the extent of protection that such indirect hires enjoy under the Employment Contract Law.

The Jiangsu Opinion also interprets a national regulation that is important for employment aspects of M&A transactions. The national regulation provides

that if an employee is transferred from one entity to another “for a reason not attributable to himself”, the new employer must recognize the employee’s prior years of service. Under the Jiangsu Opinion, this rule applies to any business transfer or asset acquisition, even between unrelated entities. By contrast, the Shanghai courts take a somewhat narrower view in that the national rule only applies to “internal” transfers between group companies.

The Jiangsu Opinion further provides that if the employee’s employment contract is extended under certain statutory circumstances (e.g. the employee is pregnant) and the extension renders the employee’s length of service for the employer to exceed 10 years, then the employee may demand an open-term employment contract. The Shanghai courts take the exact opposite view and would not support an employee’s demand for an open-term contract in such a situation.

With regard to non-compete agreements, the Jiangsu Opinion takes the position that a non-compete agreement will be automatically unenforceable if it does not specify non-compete compensation payable by the employer to the employee; whereas Shanghai and Beijing courts take the position that this defect in the agreement can be remedied later.

Greater Restrictions on Number of Foreigners in Rep Offices

The State Administration for Industry and Commerce and the Ministry of Public Security issued the *Circular on Further Strengthening the Registration Administration of Foreign Enterprise Resident Representative Office* (关于进一步加强外国企业常驻代表机构登记管理的通知) on January 4, 2010. The Circular restricts the number of representatives that a representative office may have to only four persons (including the chief representative). In almost all major cities, in order for a foreign national to obtain a work permit for working in a representative office, he must be registered as a representative. Therefore, the ultimate result of this provision will be to restrict the number of foreigners that can work in a representative office.

Greater Mobility for Chinese Workers

National and local authorities have taken steps to make it easier for Chinese workers to move around and work in different parts of China.

Two national circulars issued in late December aim to ensure that a worker’s individual pension insurance and medical insurance accounts can be transferred when the employee moves to a different city, which means the employee will not lose any amounts that have accumulated in these two accounts when the employee moves.

In addition, local governments in many cities have cancelled the temporary residence permit system and now grant full residence permits to migrant workers, and also offer them some of the benefits enjoyed by the local residents.

Step Towards More Individual Privacy Protection in New Tort Liability Law

China passed the new Tort Liability Law (侵权责任法) in December 2009, which will take effect as of July 1, 2010. One notable development is the recognition of individuals’ “right to privacy” as an independent civil right. The new law stipulates that a party that breaches another party’s “personal rights” (including the right to privacy) may be liable for damages in respect of monetary losses and, where applicable, damages for mental distress. However, except for one’s medical history, which is recognized by the new

law as protectable “personal information”, the Tort Liability Law is otherwise silent on what may constitute “personal information.” (In this connection, the government has been working on a draft Individual Data Privacy Law, but there is no indication of when it will be passed since it is not on the legislative agenda for 2010.)

In addition, the Tort Liability Law formally imposes vicarious liability on employers if their employees commit a tort against a third party “in the course of carrying out their job duties”; this codifies and affirms similar provisions that were previously mentioned only in judicial interpretations to the Civil Code. What is new in the Tort Liability Law is that the vicarious liability provision in the law specifically covers employees who are hired through labor staffing agencies. If the staffing agencies are found to be at fault, they will become jointly liable along with the host company where the secondees are sent.

Guangdong Issues Implementing Rules to the Employment Promotion Law

Guangdong Province has recently issued its own implementing rules to the Employment Promotion Law which took effect on January 1, 2010. The rules supplement the national law by providing for specific policies to achieve the goals of promoting employment opportunities. The most significant aspect for employers is that the rules establish a registration system whereby employers (including foreign-invested enterprises) must inform the local authorities when employees join or leave the employer. There is a penalty of up to RMB 300 for each employee for whom the employers have failed to register. Details about implementation will likely vary by city.

Bonus Payment Issues Become Increasing Focus of Court and Labor Disputes

In January 2010, the Changning District People’s Court in Shanghai reportedly rejected a bonus claim by a female employee who was summarily dismissed on grounds of serious breach of company rules by Dell (China) Co., Ltd. Shanghai Branch. Although the employee was entitled to participate in the company’s 2008 incentive bonus plan, the court ruled that the company was not obligated to pay the employee the bonus because the employee lost her eligibility for the bonus payment due to the termination for “cause” and her unsatisfactory performance.

Aside from court actions like the one described above, bonus issues have also been leading to collective labor disputes. On January 15, 2010, approximately 2,000 employees of United Win Technology Limited, a key producer of iPhones, reportedly organized a strike at the company’s plant in the Suzhou Industrial Park as a result of a rumor that their annual bonus for the year of 2009 would be canceled.

Agreement on Calculating Statutory Annual Leave Based on Non-Calendar Year Ruled Invalid

An Employment Dispute Arbitration Panel in Beijing Xuanwu District ruled that the “calendar year” must be used as the basis for calculating an employee’s statutory annual leave entitlement, and that an employer and employee cannot agree to use another 12-month period for this purpose.

In this case, the employer and the employee orally agreed to calculate the statutory annual leave with reference to the one-year period starting from the employee’s commencement date with the company. The employee took all

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his annual leave days in one month and took no annual leave during the next calendar year. Despite the fact that the employee used all his annual leave days for the time frame period agreed upon by the parties, the arbitration panel ruled that because the employee did not take any annual leave during the following calendar year after he joined the company, the employer is required to pay 300% compensation for the employee's unused statutory annual leave for that year.

Companies that calculate employees' annual leave entitlement based on their own company policies and not based on the calendar year are therefore exposed to legal risk.

Foreign Boss Blocked from Leaving China after Non-compliance with Court Order for Salary Payments

On September 26, 2009, a foreign restaurant owner, Lynd Ma, was reportedly stopped at the Shanghai Pudong Airport by the police when he tried to leave China for travel to Bali with his family. The police took this action at the behest of the Huangpu District People's Court in Shanghai, which had ordered Mr. Ma to back pay approximately RMB 157,000 in owed salary and wages for the employees at his restaurant, as well as additional amounts owed under commercial contracts. Because the value of the property of the restaurant was not sufficient to repay the debts, the court took the measure of restricting Mr. Ma from leaving China.

In another case involving a boss who fled after not paying employees the wages owed, the Sanshui District Court in Foshan seized the assets in a bank account belonging to the wife of a factory owner from Guangzhou in order to back pay wages and severance for the factory's fourteen female employees. The court took this action to enforce a ruling by an arbitration panel in favor of the employees after finding that there was no property in the factory and that the factory boss had apparently fled and could not be found.

Court Holds that Employer May Claim Damages from Employee for Harm Caused to Third Party

In 2009, an intermediate people's court in Huaibei, a city in Anhui Province, reportedly ruled that an employer has the right to claim damages from its employees after the employer had to compensate a third party for damages caused by the employees. After two employees of a transportation company lost the property of a customer, the employer had to compensate the customer for the damages caused. The employer then sued the two employees for indemnification.

By reference to a Supreme People's Court interpretation, the court ruled that the employer may have recourse against the employees after it has assumed the liability for compensating the customer. The court further ruled that based on the general principle that the law should protect the weak, it would be unfair to have the employees assume all the liability. Instead, the liability to be assumed by the employer and the employees respectively must be assessed in accordance with the degree of fault of both parties. By analysing the details of the case, the court ruled that the two employees were jointly liable for 30% of the damages.

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