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China Employment Law Update - August 2010

Abstract

[Excerpt] Recently, various preliminary steps have been taken by the government and the All China Federation of Trade Unions (“ACFTU”) to further push collective bargaining and increase “democratic management” at all companies. However, it is apparent that the government and ACFTU are still considering how exactly to implement this policy and no concrete steps have actually been taken so far.

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Comments

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China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

August 2010

ACFTU Pushes Forward Collective Bargaining and Democratic Management at Enterprises

Recently, various preliminary steps have been taken by the government and the All China Federation of Trade Unions (“**ACFTU**”) to further push collective bargaining and increase “democratic management” at all companies. However, it is apparent that the government and ACFTU are still considering how exactly to implement this policy and no concrete steps have actually been taken so far. Some of the more significant recent developments are as follows:

- At the national level, an amendment to the *PRC Labor Union Law* is reportedly being considered by the ACFTU and the National People's Congress (“**NPC**”), which is expected to be passed into law by the second half of 2011. Among other things, the draft amendments reportedly stipulate more detailed procedures on how to form an employee representative council (“**ERC**”) to strengthen democratic management at enterprises, and try to encourage more collective bargaining at the industry-wide level (currently, collective bargaining is mainly done at the company level). ERCs are somewhat comparable to Works Councils and normally co-exist with enterprise unions. Another amendment reportedly under discussion is to have all companies pay the union fee (equivalent to 2% of the company's payroll) to the local tax bureau, rather than directly to the company union's bank account like is the case in most cities. This would give the government greater control over how union fees are paid and allocated, so that practices such as companies negotiating with the ACFTU for lower union fees would likely no longer be possible. In a related local development regarding unions fees, local authorities and ACFTU officials in Beijing are planning to have Beijing join the ranks of other localities (e.g. Jiangsu province) in requiring companies without unions to pay a “union preparation fee”, which would be the same amount as the union fee, to the local tax bureau.
- In Guangdong Province, a third draft of the *Guangdong Enterprise Democratic Management Regulations* was posted on the provincial government's website for public comments on August 23. The draft sets out a detailed procedure on how to form an ERC and a description of the ERC's powers. The draft also stipulates that a company may be forced to engage in collective wage bargaining if one-third or more of the employees of a company makes such

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

a request. If the company does not respond to such request within the required time (15 days), does not provide conditions or information necessary for the collective bargaining, or bargains in bad faith, and as a result a strike or work slowdown takes place, the employer may not terminate the striking employees. This would be the first time that a law provides specific protection to striking workers since the PRC Constitution abolished the right to strike in 1982. On the other hand, the draft states that if the employees strike either without first requesting collective bargaining or during collective bargaining, they may face legal consequences.

- Meanwhile, the Shenzhen People's Congress issued a draft of the *Shenzhen Economic Zone Collective Bargaining Regulations* ("**Shenzhen Collective Bargaining Regulations**") for public comment in August 2010. Under the draft, the employees may request the employer to provide information and materials necessary for collective bargaining, which may not be unjustifiably refused by the employer (with narrow exceptions). The draft Shenzhen Collective Bargaining Regulations also prohibit collective bargaining in bad faith, which is defined to include (a) either party willfully delaying the bargaining process by focusing on minor procedural issues, and (b) either party persistently sticking to its position or resisting the other party's reasonable proposals without justification. Employers may be fined for conducting collective bargaining in bad faith, with fines up to RMB50,000, if they fail to correct the violation as ordered by the competent labor bureau.
- In a related development, a draft of the *Payment of Wage Regulations* is under review at the national level, which reportedly contains a provision that if an employer unjustifiably declines employees' request for collective bargaining over wages and fails to correct such violations within the period given by the competent authorities, the employer may be fined up to RMB200,000.
- The national ACFTU, as well as the Beijing ACFTU, have publicly announced that they are considering plans to have the salary of the union chairman paid directly by the ACFTU rather than the company in order to ensure independence from company pressure, though again no concrete implementation steps have been announced. On a related point, the ACFTU has also discussed training professional collective bargaining representatives to be dispatched to companies to assist employees with collective bargaining, and even sending in individuals from outside the company to be union chairman.

New State Secrets Law

The amended *Law on Protection of State Secrets* (“**State Secrets Law**”) was adopted by the Standing Committee of the NPC on April 29, 2010, and is set to take effect on October 1, 2010. The State Secrets Law has received much attention following the highly publicized arrests and sentencing of four Rio Tinto executives and the sentencing of a US geologist.

Among other changes, one major revision specifically requires Internet service providers and other network operators to cooperate with public security officials, state security officials, and prosecutors in the investigation of any leak of state secrets that may have occurred through the use of their Internet or media networks. The Internet service providers and network operators also are charged with affirmative duties to keep records related to any leak of state secrets, to report such leak to the government authorities, and immediately cease the transmission of any relevant information. The amended law also lists more specific types of actions in relation to state secrets that may lead to criminal penalties.

Although many of these new requirements are specifically imposed on the telecommunications industry, the increased monitoring may be relevant for other companies as well, since the government’s increased vigilance may have an impact on employees’ use of company-provided Internet/Intranet and computer systems to transmit information overseas and companies may need to be more careful than before regarding such transmissions. While the newly amended law has somewhat clarified the previous definition of what constitutes a state secret and what types of actions may lead to criminal liability, government officials still retain broad discretion to determine what type of information would fall under this definition.

Employee Challenge to Change in Sales Commissions Plan Successful

In August 2010, the Minhang District People’s Court in Shanghai held a textile company liable for the back pay of sales commissions and severance to an employee. The employee had resigned from the company after the company had unilaterally amended its sales commission plan resulting in reduced sales commissions for the employee. The calculation of sales commissions had been set forth in a sales commission plan, which included a clause stating that the company could reasonably amend the plan at its own discretion. The company later unilaterally amended its sales commission plan by calculating the commissions according to the sales collection amount instead of the gross sales revenue, which substantially reduced the

employee's commission. The employee refused to accept the lesser commission amount, and resigned. The Court ordered the company to pay the employee the commission (which was held to constitute part of her salary) according to the original plan. The Court also awarded severance, since the employee resigned as a result of the Company's failure to fully pay the employee's salary in a timely manner.

This case shows that the ability of a company to unilaterally amend non-contractual benefits plans to the detriment of employees may be challenged if consultation procedures under Article 4 of the Employment Contract Law are not followed, despite any language in such plans giving the company the right to unilaterally amend the terms of such plan.

Employer Ordered to Sign Open-Term Contract After Two Fixed-Term Contracts

On July 29, 2010, the Chengdu Qingyang District People's Court reportedly ordered a company to enter into an open-term employment contract with an employee, a Mr. Fan, effective from January 1, 2010, and to pay double wages for the period between January 1 until the time an open-term contract is executed. Mr. Fan reportedly was transferred to work with the company from one of its sister companies in December 2007 and signed two consecutive one-year employment contracts after 2008. Before the second contract was to expire on December 31, 2009, the company informed Mr. Fan of its decision not to renew his contract and rejected Mr. Fan's request to sign an open-term employment contract.

This case reflects the opinion of some courts that at the end of the second fixed-term contract after 2008, the employer is required to enter into an open-term contract with the employee, regardless of whether it intends to renew the employment contract, upon the employee's request to enter into an open-term contract.

Employee Raises Successful Claim for Emotional Distress

A court in Tianjin ordered a company to pay RMB333,000 in damages for emotional distress caused to one of its former employees. In order to prevent employee theft, a shoe manufacturing company conducted a body search of every employee everyday before they left work. After one employee was terminated in April 2008, the employee was diagnosed with schizophrenia. She then sued the company for RMB333,000 in damages for emotional distress caused by the body search. The Dongli District People's Court in Tianjin entrusted a forensic psychiatry institution to provide an independent professional

opinion. The institute issued a report testifying that the employee's schizophrenia was in part caused by the body search. The court adopted the report and supported the employee's claim for damages for emotional distress. The legal basis for such decision is a Supreme People's Court interpretation on compensation for emotional distress in tort claims, under which an individual may claim damages if he/she suffers an illegal breach of his/her right of dignity and/or right of freedom.

Employee Successfully Sued for Defaming Company

A court in Shanghai awarded RMB7,000 to a real estate advertising company for defamation by an employee. As a result of an employee's dissatisfaction with her compensation and the management in the company, her boyfriend posted several articles on the Internet with false statements about illegal conduct by the company. The company sued Ms. Jiang and her boyfriend for damages in relation to the defamation. The Shanghai Jing'an District People's Court deemed the articles as defamatory. Also, the Court ruled that though the articles were not posted by the employee herself, she had provided implied consent to her boyfriend's behavior and was therefore jointly liable for the defamation.

While the case shows that companies in some cases may be able to successfully claim for damages from employees or ex-employees for publicly making defamatory comments about the company, obtaining a substantial award from the court may be difficult.

Manager at Two Stores Claims Double Wages and Loses

A local manager who was posted to work in two different stores in Shanghai sought to claim double wages from the company after being terminated on the grounds of incompetence. The employee claimed that since he managed two stores (which were branches under the same company), each store should pay him salary. The Zhanglin District Court in Shanghai dismissed the manager's claims in August 2010. The Court held that the manager's claim for double wages could not be justified because the employment contract expressly allows the company to assign the manager to divide his time between two stores.

The case demonstrates the importance of including flexible language in an employment contract.

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

Tax Bureau Orders Back Pay of 15 Years of Social Insurance Plus Late Fee

The local tax bureau in Haikou city in Hainan province ordered a local company to back pay 15 years of unpaid social insurance contributions plus a late fee penalty equal to 0.2% of the unpaid contributions for each day of delay in payment during the past 15 years. The total back payment amount reportedly was RMB4,193,700, and after adding in the late fee penalty, the total amount reached RMB27,215,000. It is reported that in 2008, the tax bureau ordered the company to back pay the contributions several times, but the company rejected such orders.

While normally, local authorities are willing to allow back payments without penalty, this incident shows that authorities are willing to impose a substantial penalty if a company continually refuses to abide by administrative orders for back payment of social insurance.

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