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Baker & McKenzie

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Abstract
In This Issue:

- Government Announces Overtime Treatment for Special Holiday in September
- Significant Amendments Made to Shanghai Collective Contract Regulations
- MOHRSS Issues Draft Implementation Rules on Employment Contract Law
- Government Makes Moves to Strengthen Security of Personal Data on Internet
- Travel Agencies Required to Sign Employment Contracts with Tour Guides
- Beijing Court Rules Against Employee's Request to Rescind Resignation
- Court Awards Severance to Employee Who Resigned due to Social Insurance Underpayment
- Court Rules Employer Lawfully Terminated Employee who Refused to do Labor Capacity Assessment Following Expiry of Medical Treatment Period

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China Employment Law Update

People's Republic of China

BAKER & MCKENZIE

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In This Issue

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Government Announces Overtime Treatment for Special Holiday in September

The Chinese government announced that September 3, 2015 (Thursday) will be an official holiday to celebrate the 70th anniversary of China's victory in the Anti-Japanese War and World War II. In addition, September 4 (Friday) and September 6 (Sunday) will be switched to give employees three consecutive days off (i.e. from September 3 to September 5), with September 6 being a normal working day.

A recent national notice issued by the Ministry of Human Resources and Social Insurance on August 18, 2015, stipulates that if employees are required to work on September 3, 2015, they will be entitled to compensatory time off, or 200% overtime payment if compensatory time-off cannot be arranged. This overtime rule usually applies to rest days, rather than regular statutory holidays (such as the Chinese New Year, during which employers are required to pay compensation equal to 300% of regular wages for work on such days).

Significant Amendments Made to Shanghai Collective Contract Regulations

On June 18, the Standing Committee of the Shanghai Municipal People's Congress adopted the *Decision to Amend the Shanghai Collective Contract Regulations*, which will take effect October 1, 2015 (the "**Amendment**"). This Amendment may put additional pressure on companies in Shanghai to start collective bargaining and/or enter into collective contracts with employees.

- Union's Role in Collective Bargaining Strengthened

  In addition to the rights under the current regulations to guide employees during a collective bargaining and to send representatives to supervise the collective bargaining, the Amendment provides that the upper-level union may also be engaged as the employees' negotiation representative in the collective bargaining process.

  Further, the Amendment provides that if a company refuses to engage in or delays the collective bargaining process, the municipal and county level union may issue a rectification notice to request the company to co-operate. If the company still fails to co-operate, the union may include this information in the Shanghai Municipal

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Public Credit Information Index. This may then potentially limit the company's ability in participation in government procurement activities, bidding for government projects and in receiving government subsidies. The company may also fall under the authorities' special attention and enhanced penalties may be imposed for its violations of administrative rules (if any).

- Restrictions During Collective Bargaining

The Amendment provides that during the collective bargaining process, the company shall not deny the employees' access to the workplace or fail to provide necessary work conditions. This will significantly limit a company's ability to manage problematic employees during collective bargaining, as putting employees on administrative leave may be deemed unlawful.

Further, the Amendment provides that companies shall not refuse to provide information that is relevant to the issues under negotiation during the collective bargaining process. The Amendment provides that the parties may sign a confidentiality agreement in the event that any material requested by the employees contains confidential information relating to trade secrets. This requirement to provide information which may amount to a trade secret during the collective bargaining process is likely to raise significant concerns for companies.

The Amendment provides that employees must continue to work appropriately in accordance with their employment contracts and are not permitted to place pressure on other employees to leave their jobs by any means. This essentially prohibits strikes and other forms of labor unrest during collective bargaining, though the Amendment itself does not provide companies with any remedy if employees breach these restrictions.

- Substantive Contents of Collective Contracts

Currently, most collective contracts are simply restatements of the law and few collective contracts have substantive terms that impose real obligations and restrictions on the employer.

The Amendment, however, specifies that collective contracts on salary generally should include substantive content such as the annual adjustment range of the employees' average salary.

The Amendment also provides that in a collective bargaining negotiation on salary, the parties may take into consideration factors such as the company's productivity and profitability; the total salary amount and average salary level of the company in the previous year; the employment costs level at the company and in the industry; the average salary level in the industry and the municipality; the official guideline on salary increase and salary standards; minimum wage standards; and the consumer price index.

In addition, the Amendment provides that generally collective contracts should be valid for one to three years, and those relating to salary for one year.

Key Take-Away Points:

In light of the changes under the Amendment, companies should be prepared for collective bargaining requests from employees (potentially under the guidance of upper-level unions), and plan for the response and negotiation strategy in advance.

MOHRSS Issues Draft Implementation Rules on Employment Contract Law

The Ministry of Human Resources and Social Security ("**MOHRSS**") released draft *Implementation Rules on the Employment Contract Law* ("**Draft Rules**") for public comment in June 2015. The Draft Rules provide guidance on a wide range of labor issues and are quite comprehensive. We set out details of key provisions below.

- Changes to severance calculations

  The Draft Rules would make significant changes to the way severance is calculated, which would likely reduce the severance for highly-paid and long-serving employees. Under the PRC Employment Contract Law ("**ECL**"), an employee would be entitled to one month of his/her average monthly salary (subject to a cap of three times the local municipal's monthly average wage publicized for the previous year) for each year of the employee's service with the company, up to 12 months. Under the ECL, the caps for both the maximum monthly average wage amount and the 12-month limit generally only apply to the employee's service period after January 1, 2008. Under the Draft Rules, however, these caps would apply to the employee's entire employment period, including that before January 1, 2008.

- New time limit for certain types of summary dismissals

  The Draft Rules provide that for summary dismissal of employees based on a serious violation of company rules and policies, serious dereliction of duty or graft, or other relevant clauses under Article 39 of the ECL, the employer must terminate within one year from when the employer "knew or should have known" about the violation / misconduct. Based on this new time limitation, employers are advised to act promptly when they discover any potential misconduct.

- Open-term entitlement after signing two fixed term contracts

  The Draft Rules also clarify that employers must sign an open-term employment contract after having signed two consecutive fixed-term contracts with the employee after January 1, 2008, unless the employee requests to sign a further fixed-term contract.

Under these rules, the employer would be unable to simply let the employment contract expire at the end of the employee's second contract term (which is currently allowed in Shanghai although this is not permitted in many other cities). It is, however, unclear whether a duly executed third fixed-term contract would be enforceable, if the employee later challenges it and the employer is unable to prove that the employee proposed the fixed-term contract. The Draft Rules also provide that if the company re-hires an employee within six months, the two contracts would be treated as "consecutive" for the determination of the open-term entitlement.

- Transfer of employees to new affiliated companies

  The Draft Rules provide that if the company establishes a new affiliate company and deregisters the existing company, and transfers its employees to the new company (without substantial changes in the business operations, the employee's work location or job position), the new company should recognize the employee's years of service as well as the number of fixed-term contracts with the previous employer. The Draft Rules clarify that a company is legally required to recognize the employee's number of fixed term contracts with an affiliated (yet separate) company, for open-term entitlement purposes. However, it is unclear whether the same principle of recognizing the number of fixed term contracts (in addition to recognizing the length of service) would apply to an employee's transfer between two unrelated companies in a business transaction or between two existing affiliated companies.

- Options for publication of company policies

  The Draft Rules also clarify several viable options for the publication of the company's policies following the democratic "employee consultation" procedure for the adoption of the company's policies. They include having the employees sign an acknowledgement of receipt of the policies, and organizing employee training on the policies.

Key Take-Away Points:

The Draft Rules appear to address a number of challenging employment issues, and are likely to have a significant impact on the employment practices of companies. However, there is no clear indication on when MOHRSS will issue the final Rules.

Government Makes Moves to Strengthen Security of Personal Data on Internet

On August 31, amendments to the Criminal Law ("**Amendment**") were issued, which increase the sanctions for illegally selling or providing personal information to others. For serious offences, the sanction has been increased from three years to seven years in prison. If the offender collects the personal information as part of their job role or as a result

of providing a service, the court may impose a heavier sanction upon them within a prescribed range. Further, such criminal sanctions apply to anyone who illegally sells or provides personal information, not just people in certain specified industries.

In addition, the Standing Committee of the National Congress released the draft Internet Security Law ("**Draft**") for public comments in July.

The Draft prohibits individuals and organizations from engaging in activities that would violate internet security, such as disrupting the functioning of another user's network and stealing internet data. The Draft also stipulates that no individual or organization shall steal or obtain a user's personal information and sell or illegally provide such information to others.

The sanctions for internet service providers infringing upon citizens' personal information range from administrative warnings to fines of up to RMB 500,000. For serious breaches, the business license might be revoked by a competent government bureau and the manager responsible may be subject to a fine ranging from RMB 10,000 to 100,000.

Key Take-Away Points:

Organisations collecting personal data such as telecom operators, on-line banks and other service providers, should take steps to review their security and data protection systems in light of the higher sanctions that will be faced for non-compliance.

Travel Agencies Required to Sign Employment Contracts with Tour Guides

On July 30, 2015, the China National Tourism Administration, the Ministry of Human Resources and Social Security and the All-China Federation of Trade Unions jointly issued the *Guiding Opinion on Further Strengthening The Protection of Tour Guides' Employment Rights and Interests* ("**Guiding Opinion**"), which, among other things, requires travel agencies to sign employment contracts in accordance with the *PRC Labor Law* and the *PRC Employment Contract Law*.

Labor service contracts are categorised as civil contracts and are not protected by employment laws. Travel agencies are only permitted to issue tour guides with labor service contracts if they are already employed by another entity and are seeking a second job. There are a number of mandatory terms which must be set out in a tour guide's employment contract and these include a minimum term of not less than one (1) month, as well as other major employment terms and conditions such as job position and duties, work hours and compensation, social insurance, rest and leave, work safety, etc.

In the past, many tour guides were not guaranteed any basic salary, and their income mainly came from the commissions/allowances paid by travel agencies for each tourist group that they served. Some tour

guides forced tourists to go shopping in designated stores in order to receive kickbacks from the stores. This practice sometimes led to serious conflicts between tourists and their guides. To address this situation, the Guiding Opinion requires that travel agencies shall reasonably determine tour guides' base salary, bonus and per-tourist group allowance, and shall make social insurance contributions for them.

Key Take-Away Points:

Under the *PRC Employment Contract Law*, employees who are not given a written employment contract by their employers may claim double salary starting from the second month following the commencement of employment, until a written employment contract is signed or at the end of the 12th month. Thereafter the employees will be deemed to have entered into an indefinite-term employment contract with the employer. With the implementation of the Guiding Opinion, travel agencies should examine their existing employment practices and sign employment contracts with their tour guides, in order to avoid the above risks.

Beijing Court Rules Against Employee's Request to Rescind Resignation

The Beijing No. 2 Intermediate People's Court recently ruled against an employee who requested reinstatement of his employment relationship following his resignation from his employer.

The employee joined the company in October 1997 and entered into an open-term employment contract on January 4, 2012. The employee sent his notice of resignation to his manager by email on December 16, 2013 and immediately received an email accepting the resignation. Two days later, the employee wanted to rescind his resignation claiming that he was entitled to reinstate the employment since he had been forced to resign and the employment de-registration procedure had not commenced at that point.

The court held that since the employee had already resigned and was unable to put forward cogent evidence that he was forced to do so, the employment had been lawfully terminated. The fact that the employee regretted the decision and sought to withdraw the resignation after only two days did not change the fact that the employment relationship had already been terminated and could not be reinstated.

Key Take-Away Points:

Resignations and terminations do not require the agreement of the other party to be effective and once operative, cannot be withdrawn unilaterally as demonstrated in this case. Employers should still quickly confirm in writing an acceptance of an employee's resignation, in order to further reduce any risk that the employee is able to rescind the prior resignation notice.

Court Awards Severance to Employee Who Resigned due to Social Insurance Underpayment

The Chongqing No.1 Intermediate People's Court recently upheld a human resources manager's claim for severance due to social insurance underpayment and ordered her former employer to pay severance in the amount of RMB 19,000.

The employee received a monthly salary in the amount of RMB 3,000 after she was promoted to the position of HR manager. However, she discovered a clause in her employment contract which confirmed that the company used the minimum calculation base, rather than her individual salary, for her social insurance contributions and hence underpaid social insurance for her. The company used the minimum amount of RMB 1,350 as the salary base for her pension, unemployment, working injury and maternity insurance contributions and the minimum amount of RMB 800 as the salary base for her medical insurance contribution. The employee further discovered that the company underpaid social insurance for its other employees by using the minimum base amount for social insurance calculations. The employee sued the company for severance. The employee's claim was upheld by both the first instance court and the appellate court, which held that social insurance is a mandatory obligation imposed upon employers and it cannot be either waived by the employee or avoided/reduced by agreement between the parties.

Key Take-Away Points:

This case highlights to employers that courts are taking a strict line on social insurance underpayment and it is likely that an employee who brings a claim for severance after resigning as a result of the underpayment will be successful. We recommend that employers undertake an audit to ensure that they are compliant with the mandatory social insurance contribution laws and if not start planning on how to remedy this situation.

Court Rules Employer Lawfully Terminated Employee who Refused to do Labor Capacity Assessment Following Expiry of Medical Treatment Period

In April 2015, the Beijing No. 2 Intermediate People's Court upheld the trial court's ruling that the termination of an employee who refused to do a labor capacity assessment upon expiration of the employment contract was lawful. The employment had already been extended until the end of the employee's medical treatment period ("**MTP**").

The employee went on sick leave for depression prior to the expiry of the employment contract. The employer extended the contract term for a

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further six months in light of the fact the employee was in his MTP. The employer requested the employee to do a labor capacity assessment which he refused to do. Therefore the employer sent a letter to the employee notifying him that his employment contract expired at the end of the six month extension. The employee claimed that he should be entitled to 24 months' statutory MTP and the employer should reinstate him with back payment of sick leave pay from the expiry of the contract until the time of reinstatement.

The court ruled the employee was entitled to a six-month statutory MTP on the basis that he had been in the workforce for less than 10 years and with the company for more than five years. The court held that the extension of the MTP to 24 months was not applicable in this case, because: (a) depression is not one of the diseases (i.e., cancer, psychosis and paralysis) for which the law allows an extension of the MTP; and (b) even if the hospital certified the employee suffered psychosis (depression might indicate the employee had some psychological problems), the employee was required to do undergo an official medical examination to confirm the diagnosis of psychosis in order to be entitled to the extension of MTP. However, the court confirmed that the employee had refused to do the medical examination.

The court took the view that as the employee had refused the employer's request to undertake a labor capacity assessment before the employment contract ended, this was deemed to be a waiver by the employee of his rights. Therefore the employer had fulfilled its obligation of doing a labor capacity assessment before it allowed the employee's employment contract to expire.

Key Take-Away Points:

Although the national law is not entirely clear on this point, some court cases indicate that if an employee is entitled to MTP, there is an expectation by the court that the employer needs to complete a labor capability assessment before it allows the employment contract to expire. We recommend that employers issue written requests to employees to do a labor capacity assessment in those circumstances to ensure there is evidence to demonstrate the employer made good faith efforts to fulfil this step.