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People's Republic of China

BAKER & MCKENZIE

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China's Supreme People's Court Issues Guiding Opinion on Electronic Evidence

The PRC Supreme People's Court issued an *Interpretation on the Application of the PRC Civil Procedure Law* ("**Interpretation**"), which became effective on February 4, 2015.

The Interpretation makes it clear that emails, online chat records, blogs, mobile phone text messages, etc. can be presented to the court as electronic evidence. Although the amended *Civil Procedure Law* specifically included electronic evidence as one form of evidence that can be used in civil disputes, it was not clear in what form the electronic evidence should be presented to the court. The Interpretation provides detailed information on this and clearly defines such electronic evidence as information which is formed or reserved on the electronic medium through email, electronic data exchange, online chat records, blogs, micro blogs, mobile phone text messages, e-signatures, domain names, etc. Moreover, according to the Interpretation, audio and video recordings which are preserved on the electronic medium should also be recognized as 'electronic evidence', rather than 'audio-visual material' which was their previous classification.

The above should make it easier for employers to present evidence in employment disputes, as an increasing portion of communications are sent electronically through various types of devices and generally the burden of proof in employment disputes is on employers.

The Interpretation also provides that the amount of the bond that must be paid to obtain a pre-litigation preliminary injunction can be determined by the court at its discretion based on the specific circumstances of the case. The *Civil Procedure Law* only stipulates that a bond is required for the court to grant the pre-litigation preliminary injunction but it is silent on the amount to be paid as a bond. This unfortunately does not provide companies with much guidance on potential bond costs they would need to pay in case they need an injunction against an ex-employee in a trade secrets theft case or non-compete enforcement case.

Draft Regulations on Mass Lay-offs Released for Public Comment

The PRC Ministry of Human Resources and Social Security released draft regulations on mass lay-offs for public comment (the "**Draft Mass Layoff Regulations**") on December 31, 2014. The Draft Mass Layoff Regulations

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reiterate the requirements on mass layoffs, defined as terminations of 20 or more employees or 10% or more of the workforce, under the Employment Contract Law (the "**ECL**") and also provide additional detailed requirements on the mass layoff procedures, as summarized below:

- In the event a company meets one of the statutory grounds allowing for mass lay-offs, companies may consult with the company union or employee representatives about measures that may be taken to avoid terminating employees or reduce the number of employees to be terminated. Depending on the applicable statutory mass lay-off ground, companies may take measures such as transferring impacted employees to other job positions, enhancing worker skills, reducing working hours, making salary adjustments, etc. For those companies who have taken effective measures to avoid or reduce the impact of mass layoffs, the labor bureau will provide an allowance to fund employees' living subsidies, social insurance contributions, and worker training.
- If the company has to conduct a mass layoff after having exhausted the above alternative measures to reduce the scope of the mass layoff, the company must follow the mass lay-off process stipulated in the ECL. The Draft Mass Lay-off Regulations provide greater detail on what is required as part of the process, such as the exact information that must be communicated to the company union or employees during the mandatory consultation and what information must be included in the mass lay-off plan submitted to the local labor bureau for recordal. If all the relevant information is submitted to the local labor bureau, the labor bureau must issue a notice confirming receipt of the plan and the company may implement the lay-offs 10 days later.
- If the consultation process is not done correctly, the union or employees can demand the company to redo the lay-off process.
- Perhaps most surprising and potentially most troubling for companies is that in the event that the statutory circumstances for conducting a mass layoff arise and 20 or employees are to be terminated, even if the company terminates the employees through *mutual agreement*, the company still needs to provide 30 days' advance notice to the company union or all the company's employees and report to the local labor bureau regarding the number of employees to be terminated. If the company fails to fulfil these requirements, the local labor bureau can order rectification, and impose a fine up to RMB 20,000 if the company refuses to comply with the order to rectify or fails to comply with the administrative decisions.

In summary, the China government wishes to discourage mass layoffs and mass lay-offs would become more onerous under the Draft Mass Layoff Regulations if they are passed in their current form

Local Labor Dispatch Developments in Shenzhen, Shanghai, and Anhui

Following the amendment of labor dispatch rules in the Employment Contract Law in 2012 and the Interim Labor Dispatch Regulations, which took effect in 2014, local governments in the PRC have successively issued implementing rules for the new labor dispatch legislation. Recently several new rules regarding labor dispatch were issued by local governments in Shanghai Municipality, Shenzhen Municipality and Anhui Province.

On December 31, 2014, the Shanghai municipal labor bureau and Shanghai High People's Court presented their opinions on applying the new labor dispatch legislation. The opinions draw a line between the power of labor bureaus and the power of arbitration tribunals/people's courts on regulating labor dispatch activities. More importantly, the opinions clarify some important issues as follows:

- No employment relationship between the host company and the dispatch worker will be deemed established if the host company uses dispatch workers for excluded positions or in excess of the legally allowed percentage;
- It has been confirmed that the expiration of a labor contract/ dispatch term; the termination of the labor dispatch agreement; the retirement of the employee; or the rectification of illegal dispatch can serve as a legal ground for returning dispatch workers to dispatch agencies.
- Dispatch agencies can also withdraw dispatch workers from the host companies if the host companies do not perform their obligations.
- The opinions also provide some guidance for differentiating between labor dispatch and outsourcing. Generally the application of company policy and the level of control over the workers are important factors to consider when determining the nature of a relationship. The company may exercise partial control of the outsourced worker due to the needs of work safety, quality control and other management needs, as long as such control does not materially change the legal relationship between the company and the outsourced worker.

On January 1, 2015, Shenzhen Municipal Labor Bureau issued *Measures on Supervising Shenzhen Labor Dispatch Agencies* ("**Shenzhen Measures**"). According to the Shenzhen Measures, the Shenzhen government will establish a database and credit files of labor dispatch agencies, host companies and dispatch workers. Labor dispatch administrative permit information as well as unlawful activities of labor dispatch agencies will be recorded in credit files. For labor dispatch agencies who conduct serious unlawful activities, such as, for example, obtaining labor dispatch

administrative permits through fraud, bribery and other dishonest methods, the government will establish a "black list for the labor dispatch industry"; publicize such a list through media and government websites; and keep a record in credit files. The government is working on improving the disclosure and public search function of the credit files.

On January 20, 2015, the Anhui Provincial Labor Bureau issued a notice to implement the Interim Labor Dispatch Regulations. The notice reiterates the requirements of the Interim Labor Dispatch Regulations and requires lower level labor bureaus in Anhui to supervise the transition of labor dispatch mechanisms. All employers must make sure that the ratio of labor dispatch workers does not exceed 10% of the total work force as from March 1, 2016.

New Rules Issued on Handling Cases Where Companies Fail to Pay Wages

On December 23, 2014, the Ministry of Human Resources and Social Security, the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security (the "**Four Authorities**") jointly issued the *Circular on Strengthening the Cooperation regarding Investigation and Punishment of Suspected Criminal Cases of Refusal to Pay Labor Remuneration* ("**Circular**").

Since 2011, in accordance with the *Amendment VIII to the PRC Criminal Law*, failing to pay labor remuneration after the labor authority's order to back pay amounts owed may constitute a criminal offense ("**Article 276-1**"). Pursuing criminal liability in accordance with Article 276-1, however, requires the actions of and cooperation among the local branches of the Four Authorities. After a prior joint circular in 2012 issued by the Four Authorities requiring the cooperation among their local branches, and the Supreme People's Court's official interpretation of Article 276-1 in 2013, the Four Authorities issued this Circular to provide further details on the working rules for their local branches.

In particular, the Circular requires that in cases where the employer fails to provide payroll records, the local labor authorities shall promptly interview the employees and actively collect evidence to prove the relevant facts such as the existence of an employment relationship and the salary underpayment, with the investigation process being recorded or taped. Further, the Circular clarifies that if a company fails to show up at the designated time and place of the investigation or outright refuses to pay employees salary after being confirmed to have received the request from the local labor authority, the local labor authorities may deem such person or entity as engaging in "evasion" as provided under Article 276-1. The Circular also provides guidance on how the public security and prosecuting authorities should handle the wage non-payment cases in different scenarios.

In the effort to mange the common issue of failure to pay wages in China, in January 2015, the Ministry of Human Resources and Social Security also published case summaries of "ten typical criminal cases of failure to pay wages" that were ruled on by local courts in different cities in 2013 and 2014. It is expected that with the promulgation of the new Circular, the labor authorities will take a more active role in managing wage non-payment cases and assisting in pursing criminal liabilities of offenders.

Beijing High People's Court Issues Further Guidance on Employment Disputes

On January 5, 2015, the Beijing High People's Court issued supplementary Meeting Minutes ("**Supplementary Meeting Minutes**") to further clarify certain controversial issues left unaddressed in an earlier set of meeting minutes issued in May 2014 (so called "**Beijing Meeting Minutes II**").

The Supplementary Meeting Minutes mainly focus on the statute of limitations applicable to the "double salary" penalty for the employer's failure to sign an open-term employment contract. Article 82 of the PRC Employment Contract Law provides that if the employer fails to enter into an open-term employment contract according to the law (which generally refers to the requirement to sign an open-term employment contract upon the employee's reaching 10 years of service or after two consecutive fixed-term employment contracts following January 1, 2008), the employer shall pay double salary to the employee, starting from such date when an open-term employment contract should have been entered into. This provision potentially exposes an employer to substantial financial costs if it signs a fixed-term contract when an open-term contract is required.

The Supplementary Meeting Minutes, nonetheless, interpret this to mean that there is a one-year total "look back" period from when the employee brings such a claim. This interpretation is based on the idea that the employee's right to bring the "double salary" penalty claim accrues on a per-day basis. Therefore, in Beijing, it is clear that the maximum "double salary" penalty for failure to sign an open-term contract is limited to 12 months, provided that the employer raises such a defence. Although the Minutes are not the law, they are generally followed by the lower courts and arbitration commissions.

Companies seeking to avoid signing an open-term contract with employees should be aware of the potential penalties outlined above. Since each city might have varied interpretations of the law as to whether and when an open-term contract is required (for example, Shanghai has very different rules on this issue than Beijing), companies should be alert to these nuances in order to properly manage its contract signing practices and related financial risks.

The Supplementary Meeting Minutes also clarifies that if an employee provides services to and later has disputes with a company that does not

have a business license or whose license has been cancelled or expired, the employee can bring labor claims directly against all shareholders of the company as co-defendants according to the Employment Contract Law, if the local company does not exist or is insolvent. Companies often engage individuals for services at the time of their establishment prior to obtaining a business license. This clause potentially may entitle such individuals to bring employment law claims (such as overtime or work injury claims, etc.) against the investors (such as the offshore parent company), during the time when the local entity is being established.

Anhui Province High People's Court Issues New Guiding Opinion on Employment Disputes

On January 20, 2015, the High People's Court of Anhui Province issued the *Guiding Opinion on Several Issues Concerning the Trial of Labor Dispute Cases* ("**Guiding Opinion**"), which shed light on some of the controversial and common issues faced by courts in labor disputes, such as enforceability of company rules and policies which are not adopted according to the law, double salary penalties and social insurance back payment issues.

The 2008 Employment Contract Law ("**ECL**") requires companies in China to go through the statutory consultation procedures when adopting or materially amending any company rules or policies that have a direct impact on employees' interests. The Guiding Opinion clarifies that if the company rules and policies were formulated before the effective date of the ECL and were not duly adopted in accordance with the ECL, they can still be enforceable, as long as they do not violate laws, are not significantly unreasonable, and have been publicized or notified to employees.

In addition, the Guiding Opinion also states that an employee cannot claim double salary penalty for not concluding a written employment contract, if he/she agrees to sign the employment contract that is retroactively effective to when employment commenced, or if his/her employment contract is extended by operation of law (such as automatic extension because the employee is in her lactation period at the contract expiration date). Furthermore, if the employee is assigned to work for a new company for reasons not attributable to himself/herself, and the new company does not sign an employment contract with the employee, the employee cannot demand double salary, if he/she is still employed under an employment contract by the first employer.

The Guiding Opinion further provides that if an employee signed a waiver and release of social insurance contributions (in exchange for some form of social insurance allowances, etc.), but later made a claim for back payment of social insurance, then the company is entitled to claim back payment of the sums already paid as social insurance allowances,

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if any. The Guiding Opinion does also provide that the company should make the back payment within a reasonable time designated by the social insurance bureau, otherwise, the employee can immediately terminate the employment contract and demand severance payment.

Employers Risk Findings of Unlawful Termination If Notice Not Delivered Properly

In a recent case reported in Beijing, the employee took sick leave and was not able to provide proof that she had submitted the medical documents supporting the sick leave to her employer. The employer alleged that the employee had taken unexcused leave of absence and then terminated the employee's employment. However, the termination notice was delivered to the employee's address specified in her ID card rather than the one specified in her employment contract. The court found that the termination notice was not properly delivered to the employee, and thus (by also taking into account other elements in favour of the employee) ruled that the termination was unlawful and the employee must be reinstated.

In another reported case, the employee stopped coming to work after an altercation with the management. The employer stopped paying salary in response, and subsequently published a termination notice in a local newspaper stating that the employee's employment with the employer was terminated. The employee later filed a lawsuit claiming for back payment of salary. The court upheld the employee's claim and ruled that the termination was unlawful, because the employer did not try any other means to serve the notice to the employee such as by phone, text message, email and/or registered mail, before publishing it in the newspaper.

The above cases illustrate the importance of proper delivery of termination notice to employees, which is oftentimes ignored by employers in practice. Where an employee can be reached by phone, email, post, or by phone, then employers should first try to deliver the termination notice by email, registered mail, or text message. If the employee is terminated on the spot, the employer should also try to obtain a signed receipt of termination notice. Only when the termination notice cannot be delivered to the employee by any of the above means, may the employer publish the termination notice in the newspaper.