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China Employment Law Update - June 2015

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Abstract

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Comments

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Supreme People's Court Issues Draft Meeting Minutes on Labor Issues

In April 2015, the PRC Supreme People's Court issued draft Meeting Minutes regarding civil cases ("**Draft Minutes**") for public comment; the Draft Minutes provide guidance on several labor issues.

The Draft Minutes provide two contrasting opinions regarding remedies for employees when the employer fails to sign an open-term contract as required by law: one opinion is that when an employee is entitled to and demands an open-term employment contract and the employer refuses to sign such a contract, the employer should be deemed to have entered into an open-term contract. The other opinion under the Draft Minutes is that the employee could sue for financial remedies for wrongful termination (i.e., double statutory severance). The Draft Minutes did not indicate which position the Supreme People's Court is more inclined to take. Its position on this issue would likely have a significant impact on local practices which are currently varied.

The Draft Minutes also provide that unless otherwise agreed in the employment contract, the court would support the employees' wrongful termination claims where the company terminates the employees under a "forced ranking" system (i.e. terminating an employee if an employee's performance ranking is the lowest in a group). Under PRC law, to terminate an employee based on the grounds of "incompetence," the employer has the burden of proof to demonstrate that the employee is incompetent (with objective evidence), and that after training or changing roles, the employee remains incompetent. Many local judges have questioned the forced ranking system since employees at the bottom of a group are not necessarily objectively incompetent. However, the Draft Minutes appear to suggest that such terminations would otherwise be upheld if the employee's employment contract specifically provides for a forced ranking system.

In addition, the Draft Minutes provide that if the employer has enrolled the employees in the social insurance scheme, the court would dismiss an employees' social insurance claims regarding the employer's failure to pay social insurance, or in relation to incorrect contribution amounts. Instead, such claims should be brought before the labor administration bureau. However, the Draft Minutes are unclear as to whether the courts should accept employee claims for damages / losses as a result of under-payments (such as loss of pension or out-of-pocket medical expenses, etc.).

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Key Take-Away Points

The Draft Minutes may provide clearer guidance on important labor controversies that often appear before the courts. However, no clear indication has been given regarding when the finalized meeting minutes will be issued.

New Measures Issued To Strengthen the Supervision of Work Safety

The PRC government took a series of measures to strengthen the supervision of work safety. The PRC State Council Released a *Notice on Strengthening Supervision and Law Enforcement of Work Safety* ("**Notice**"), which became effective on April 2, 2015. In addition, the State Administration of Work Safety issued an amendment to four existing work safety regulations ("**Work Safety Amendment**"), which became effective on May 1, 2015. The changes have significantly increased the severity of sanctions for non compliant companies and also increased corporate responsibility to prevent work safety accidents, as summarized below:

- Companies will receive a fine of RMB 20 million in several circumstances, for instance, if a company conceals or falsely reports a serious accident.
- The primary responsible manager will receive a comparatively heavier fine if he or she fails to organize immediate rescue at the time a work safety accident occurs or if he or she leaves the post or even runs away during the accident investigation period. The most severe fines range up to 100 percent of the primary responsible manager's annual income from the previous year.
- If the main decision making body or the primary responsible manager of the company, fails to secure the necessary budget for ensuring the company operates safely, such as ensuring the funding for labor protective equipment or safety production, education or training, the company will receive a fine of up to RMB 30,000, and the primary responsible manager will receive a fine of up to RMB 10,000.
- For companies which produce, manage or store hazardous goods or for mining or metal smelting companies, they will receive a fine of up to RMB 30,000 if they fail to plan emergency rescue procedures or fail to appoint part-time emergency rescue staff.

Key Take-Away Points

The sanctions which non-complying companies will face are more severe following these amendments and demonstrate the government's on-going concern and scrutiny in relation to work safety.

Shanghai High People's Court and Guangzhou Labor Arbitration Committee Clarify Position on Controversial Employment Issues

The Shanghai High People's Court and the Guangzhou Labor Arbitration Committee recently issued minutes of a meeting the purpose of which was to clarify certain controversial employment issues.

Shanghai

The Shanghai meeting minutes address the calculation base used to calculate sick leave pay. In the past, the Shanghai local regulations and rules stipulated that the base amount used for calculating sick pay (according to the local formula) and overtime payment should be the same, and the overtime base should be the employee's regular salary. The opinion clarifies that the base amount used for calculating sick pay can be an agreed amount in the employment contract, but this base amount may not be lower than 70% of the employee's normal salary when providing regular work.

In addition, the opinion also stipulates that female employees likely cannot claim overtime payment, if they do not take the statutory one-hour nursing time-off per day during the nursing period, as there is no clear legal basis for such an overtime claim.

Finally, under the national law, if an employee does not sign any written employment contract, he or she would be entitled to an open-term contract one year after the contract's commencement. The meeting minutes provide that both the company and the employee have the legal obligation at that stage to sign a written employment contract. If the company has negotiated other contract terms with the employee in good faith (except for the length of the contract term, which should be open-term by operation of law), and the employee refuses to sign the contract, the company can terminate the employee's contract of employment with severance.

Guangzhou

The Guangzhou opinion addresses issues relating to maternity allowance and salary payment. In Guangzhou, the company is required to pay full salary to the employee during maternity leave, and then the company may apply for a maternity allowance from the social insurance bureau. The opinion clarifies that if the employee has already received salary payment, she cannot further claim maternity allowance or the difference between the maternity allowance and the salary (if the allowance is higher). By contrast, in several other jurisdictions, such as Beijing, local regulations make clear that the company should pass along the difference between the maternity allowance and the employee's salary to the employee.

If the employee fails to cooperate with the company's maternity allowance application (which allows the company to obtain reimbursement from the local social insurance bureau), the company must pay the employee's

salary, but it may make a deduction against her salary to recover any economic loss in accordance with the Guangdong salary payment regulations.

It was also confirmed that, in order to serve a notice effectively, a company should explicitly identify the sender (i.e., the company) and the content of the documents on the mailing envelope, and have it delivered to an address confirmed by the employee. If the employee refuses to confirm receipt of such mail, it will still be deemed as effectively served. If, however, the company does not explicitly provide the required information on the mailing envelope, the company would be deemed to have failed to serve notice to the employee.

Key Take-Away Points

Sick pay rules in Shanghai are different from other cities. Companies may consider stipulating the sick pay base in the employment contract to avoid future disputes.

In practice, employees often refuse to sign an acknowledgment of mail sent from companies, especially in contentious situations. Companies should consider following the Guangzhou opinion when preparing the mailing envelope.

Court Orders Specific Performance of Non-Competition Agreement and Awards Damages to Employer

In a recent non-competition case, a court ordered an employee to pay damages and to comply with the terms of a non-competition agreement. The employee was a senior customer manager and entered into a confidentiality agreement with his employer (the “**Company**”). When the employee later separated from the Company, the parties entered into a post-termination non-competition agreement. This prohibited the employee from engaging in or working for any businesses which competed with the Company during a one-year period following termination.

The employee was later found to have joined a competitor of the Company, and relevant evidence was obtained about this. The Company filed a lawsuit against the employee for his breach of the non-competition agreement. The court found in favour of the Company, and ordered the employee to: (i) repay the non-competition compensation that had been already been paid to him; (ii) pay the Company the liquidated damages stipulated in the non-competition agreement; and (iii) continue to perform the non-competition obligation during the remainder of the non-competition term.

The specific performance ruling means that the employee has to stop working for the competitor. However, the law does not clarify what would happen if the employee refuses to follow the court order to stop working for the competitor; in theory, the court could order administrative

detention (but the chances of this occurring are small in practice) or fine the offender.

Key Take-Away Points

Courts have rarely ordered the specific performance of employees' non-competition obligations in the past, which has rendered the enforcement of non-competition agreements difficult. This situation is changing with courts now being more willing to make such orders, though it remains to be seen how far courts will go in enforcing such orders if there is non-compliance.

Employee Loses Dispute Regarding Length of Medical Treatment Period

It was reported that the Beijing Daxing District People's Court recently ruled against an employee who claimed for sick leave pay and medical expenses reimbursement from her former employer after her employment contract expired.

The company and the employee signed a three-year employment contract from November 30, 2009 to November 29, 2012. The employee started to take sick leave in May 2012 due to myasthenia gravis. After the employee's employment contract expired on November 29, 2012, the company stopped her pay and social insurance enrolment, which led to the employee bringing a claim for salary back payment and medical expenses reimbursement. She claimed that she should be entitled to 24 months' statutory medical treatment period ("**MTP**"). Under PRC law, if an employee is currently in the MTP when the employment contract expires, the employment contract should automatically be extended until the end of the employee's MTP.

The court ruled against the employee and took the position that in accordance with the national regulations on medical treatment periods for non-work related illnesses and injuries (the "**MTP Regulations**"), the employee was entitled to a three-month MTP on the basis that she had been in the workforce for less than ten years and with the company for less than five years. Therefore, when the employment contract expired in November 2012, she had already exceeded the MTP. The court held that no extension of the MTP was applicable in this case, because: (a) myasthenia gravis is not one of the diseases (i.e., cancer, psychosis and paralysis) for which the implementing rules of the MTP Regulations allows an extension; and (b) the employee had not obtained the labor authorities' approval for an MTP extension.

It is important to note, however, that some courts have interpreted the MTP rules differently, and have required that the employer first complete a labor capability assessment on the employee before it allows the employee's employment contract to expire.

Key Take-Away Points

Employers should carefully follow the local rules on MTP management (some cities such as Shanghai have their own local rules which are different from the above-mentioned MTP Regulations) and may need to complete a labor capability assessment before it allows the employment contract to expire.

Court Rules Termination of Female Employee for Making False Statement About Her Family Circumstances Unlawful

The Shanghai Huangpu District People's Court ruled that the termination of a female employee for lying about whether she had a child was unlawful. The employer was ordered to reinstate the employee.

The employee declared that she had a child when filling in the on-boarding documentation. This was not correct and two years later she informed her employer that she was pregnant. The employer, a training centre, took the view that the employee's false statement constituted deception and thus terminated the employee based on violation of the employment contract and company policy. The employer contended that its decision centred on the fact that the employee had been dishonest rather than whether or not she had a child.

The court held that whether or not the employee had a child, was irrelevant to the decision to hire her, as acknowledged by the employer. Therefore, as the employer had not relied upon the employee's false statement, the court ruled that the employee's false statement should not be deemed as deception and ruled against the company on that basis. The court noted that the false statement was made by the employee because of a concern that she may face discrimination.

Key Take-Away Points

The outcome of this case is similar to a 2012 Beijing decision, where the court ruled in favor of a pregnant employee who was dismissed for lying about her marital status in a job application. These cases indicate that PRC courts may not uphold summary dismissal for providing false personal information if such information is not deemed directly relevant to the decision to employ, particularly in the case of protected employees.

Employer Fined RMB 10,000 for Failing to Complete Employment De-registration Procedure

With the assistance of the enforcement department of the Beijing No. 2 Intermediate People's Court, an engineering company (the "**Company**"), was reportedly ordered by the Beijing Chaoyang District Labor Inspection Division to pay a penalty in the amount of RMB 10,000 for failing to complete the employment de-registration procedure for a former designer employee. However, the Beijing No. 2 Intermediate People's Court rejected the employee's claim for RMB 100,000 in damages.

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The Company reportedly failed to issue the written proof of termination (*lizhi zhengming*) after the employee's employment contract expired and continued to pay her social insurance. The employee filed a complaint with the Beijing Chaoyang District Labor Inspection Division, which consequently conducted an investigation and ordered the Company to pay a penalty in the amount of RMB 10,000 for failing to complete the employment de-registration procedure. The employee sued the Company as the documentation remained outstanding and claimed for severance, back salary pay and RMB 100,000 in damages on the basis that she was unable to be re-employed due to the Company's failure to issue the proof of termination and transfer her social insurance account. The court found that the employee failed to present sufficient evidence to prove that she had effectively requested the Company to issue the proof of termination and transfer her social insurance, and held that written proof of termination is not a prerequisite condition for future employment and hence rejected her damages claim.

Key Take-Away Points

This case highlights to employers that it is important to complete the employment de-registration procedures in a timely manner for departing employees. This will reduce the risk of being fined by the labor bureau and/or being sued for damages.

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