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New Measures Increase Company Responsibility for Labor Unrest

On July 25, 2016, the Ministry of Human Resources and Social Security issued the *Measures for the Rating of Enterprises' Labor Security Compliance* (the "**Measures**"). Under these Measures, the labor authorities will rate each company each year on its compliance with labor/employment law requirement.

Ratings will be A, B and C, with A being the highest rating. To assign a rating, the labor authorities will gather information about a company's compliance status through routine on-site inspections, document reviews, labor complaints, etc. to determine whether the company complies with labor dispatch rules, contributes to the social insurance fund, etc.

The Measures specifically provide that a company will receive a "C" rating if the company has created labor conditions that give rise to collective unrest or other serious or negative consequences for society. After receiving the C rating, the company can expect to face more frequent inspections, and senior management can expect to receive visits from the labor authorities seeking guarantees of future compliance.

The ratings will be kept in the government's labor inspection compliance files for at least three years. Furthermore, the Measures specify that the labor authorities should establish an information sharing mechanism with union and other government departments to share the company's compliance information (which may include the ratings). By having access to this information, other government departments, such as administrations of industry and commerce bureaus, finance bureaus, housing and construction bureaus, and tax bureaus, can take further actions (including joint actions) against companies for non-compliance with labor regulations.

The Measures do not specify any fines or other specific monetary penalties for receiving "C" rating or otherwise creating conditions that lead to labor unrest. However, such companies may expect increased attention and scrutiny from the government.

Key Take-Away Points:

The Measures suggest that the PRC government is becoming more sensitive to labor unrest. Therefore, every company should exercise greater caution when dealing with matters that could lead to collective labor unrest, for example, mass lay-offs and employee transfers after asset transactions.

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New Salary Payment Regulations in Shanghai

On June 27, 2016, the Shanghai Human Resources and Social Security Bureau promulgated the new *Shanghai Enterprise Salary Payment Regulations* (the "**New Regulations**"), which took effect on August 1, 2016 and replace the 2003 Shanghai salary regulations.

Most of the changes under the New Regulations are designed to more closely align Shanghai's salary payment regulations with Employment Contract Law provisions, other laws and regulations, and court opinions on salary management. For instance, the New Regulations specifically allow the employer and the employee to agree on the timing of the employee's final pay if and to the extent such agreement does not violate laws and regulations. This change is consistent with Article 10 of the Supreme People's Court's official guidance in 2010.

The most important change in the New Regulations clarifies the meaning of "normal monthly salary" when used as the calculation base for employee pay for overtime, sick leave and other statutory leave. When calculating these payments, the employee's normal monthly salary should be:

- the employee's monthly salary as agreed in the employment contract (or the employee's actual monthly salary if different than the monthly salary as agreed in the employment contract);
- the monthly salary for the employee's job position as agreed in the collective contract if there is no agreement on monthly salary in the employment contract (regardless of actual salary paid); or
- 70 percent of the employee's total monthly salary (including bonuses, allowances, subsidies, etc. but excluding overtime pay) if there is no agreement on monthly salary in either the employment contract or the collective contract.

The New Regulations also entitle employees to full salary (instead of sick leave pay) for time under quarantine due to public health prevention and control measures if the quarantine is later lifted because the employee is declared healthy.

Key Take-Away Points:

Companies in Shanghai should familiarize themselves with the New Regulations and ensure employee salary is properly calculated and paid under these regulations. Companies should also consider updating salary payment clauses (e.g., on timing of the final pay) in their employment documentation.

Employers Face Liability for Unpaid High-Temperature Subsidies

On June 21, 2016, the Beijing Work Safety Bureau started conducting inspections to check whether employers are paying high-temperature subsidies to eligible employees. During these inspections, labor authorities have reportedly stated that any employer who fails to pay the high-temperature subsidy may be fined up to RMB10,000. The labor

authorities have not made clear whether this fine will be levied for each individual violation or will be levied once to cover all related violations, though the latter would seem more likely.

Under Beijing's high-temperature subsidy payment rules, employees who work outdoors are eligible for high-temperature subsidies of RMB180 per month from June to August. Employees who work indoors are also eligible for high-temperature subsidies of RMB120 per month from June to August if indoor workplace temperatures reach 33˚C or higher during the day. The rules do not specify the penalty for employers who fail to pay the subsidy, but recent media reports claim the Beijing labor authorities have stated that employers could be fined up to RMB10,000.

Separately, a recently published case in Qingdao Municipality (in Shandong Province) sheds additional light on how far liability for unpaid high-temperature subsidies could extend. In Qingdao, a court ordered an employer to pay an employee for seven years of unpaid high-temperature subsidies (totaling RMB2,680). Since the high-temperature subsidy is considered part of an employee's labor remuneration, there is no time limit for the employee to claim back pay of the high-temperature subsidy while still employed by the employer. Once employment is terminated, the employee has one year from the termination date to bring a claim for back pay of the high-temperature subsidy.

Key Take-Away Points:

Since the high-temperature subsidy is paid infrequently and in relatively small amounts, employers can easily neglect making the payments. However, with the labor authorities emphasizing the high-temperature subsidy during inspections, every employer should review its current high-temperature subsidy payment policy and practices to ensure compliance with the law.

Occupational Disease Approval Procedures Cancelled for Most Construction Projects

Effective July 2, 2016, the PRC Occupational Disease Protection Law has been revised to cancel occupational disease approval procedures for most construction projects.

Under the old law, a company engaging in a construction project (including a project involving technical restructuring or the introduction of new technology) with potential occupational disease hazards was required to follow a series of procedures, including engaging a qualified occupational health institution to conduct an occupational disease pre-evaluation, obtaining various government approvals, and obtaining a post-construction completion assessment from a qualified institution.

Under the revised law, these administrative approval procedures have been cancelled for most projects other than medical facility construction projects with the potential to produce radiological occupational disease hazards (in which case the reports should be submitted to the health administration authority). In addition, a company can now conduct the occupational disease pre-evaluation and the occupational disease health protection control assessment by itself and likewise examine the design and construction of the occupational disease prevention facilities by itself.

Key Take-Away Points:

Under the revised law, for most construction projects with potential occupational disease hazards, the regulatory burden has been significantly reduced. However, companies will still be responsible for ensuring that construction projects and occupational disease prevention facilities comply with all PRC laws. Furthermore, where occupational disease pre-evaluations, assessments and designs are still required, a company should carefully consider whether it has the knowledge and expertise to properly undertake these activities by itself or whether it should continue to engage a qualified occupational health institution for these services to avoid exposing the company to unnecessary risks.

Shanghai Court Rules Employee Wrongfully Terminated for Refusing Job Reassignment

The Shanghai First Intermediate People's Court ruled that an employer wrongfully terminated an employee for refusing a job reassignment. The court ruled that the employer could not unilaterally adjust the employee's position and shift working hours and thus had illegally dismissed the employee for refusing the reassignment.

The employee originally worked in the administrative department during first shift. On September 9, 2014, the employer reassigned the employee to another department to cover for an employee on maternity leave. In the new position, the employee was required to be available for flexible shift work. The employee submitted a written objection to the reassignment. The employer offered to limit the employee's work in the new department to the first shift, but the employee still refused the reassignment. Eventually, the employer deemed the employee insubordinate for refusing a reasonable job reassignment and terminated the employee's labor contract.

The labor arbitration committee decided that the dismissal was justified, but the courts disagreed. Both the trial court and the appellate court found that the employer adjusted the position and the shift working hours without consulting with the employee. Therefore, the employee had a right to refuse the reassignment and the employer had no grounds on which to terminate the employee's labor contract.

Key Take-Away Points:

An employer should generally consult with an employee before materially adjusting the employee's position or shift working hours through a reassignment even if the reassignment does not impact the employee's salary. Although the Shanghai High People's Court has issued past guidance indicating that unilateral adjustments within reason and for valid business reasons maybe supported by the courts, judges have much discretion in determining what is reasonable. If a change is made without obtaining employee agreement, particularly if it is somewhat significant, the adjustment may be deemed unlawful and the employee will have the right to refuse the reassignment.

Court Rules that Personal Information Form and Confidentiality Agreement Cannot Serve as Written Employment Contract

In a recent case in Suqian City, Jiangsu Province, a court held that an employee's personal information form and confidentiality agreement with the company could not be deemed as a written employment contract. Because there was no written employment contract, the court upheld an arbitration award granting the employee double salary from the employee's second to eleventh month of employment.

The employee joined the company on August 1, 2014 and completed a personal information form the same day. The company and the employee signed a confidentiality agreement the next month. In August 2015, the employee was terminated by the company for being absent from work and for serious violations of company rules.

Although the court held that the personal information form and the confidentiality agreement demonstrated a *de facto* employment relationship between the parties because the documents stated part of the company's and employee's rights and obligations, the court further held that neither the personal information form nor the confidentiality agreement separately or together could be deemed as a written employment contract. First, the personal information form and the confidentiality agreement did not include mandatory employment contract provisions, such as provisions on the term of employment, job description, place of work, working hours, rest and leave periods, remuneration, social insurance, labor protection, work conditions, etc. Second, the personal information form and the confidentiality agreement were intended to obtain the employee's personal information and to impose confidentiality obligations on the employee rather than to clarify the employment relationship or to serve as the written employment contract for that relationship.

Key Take-Away Points:

This case emphasizes the importance of signing written employment contracts with employees, and for such contracts to include the mandatory provisions required for employment contracts. No other employment document, including a personal information form or a confidentiality agreement, can serve as a substitute for a written employment contract. Failure to sign a written employment contract can result in arbitration and court awards granting double salary to employees.

Beijing Court Upholds Transferred Employee's Reinstatement Claim Against Successor Entity

The Beijing Dongcheng District People's Court reportedly ordered a company to reinstate a former employee who had been transferred to the company without any transfer documentation.

In this case, the employee previously worked for a group company under a three-year employment contract. When the business unit where the employee worked was separated into a newly-formed company,

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the employee was transferred to the new company. The employee's employment contract was not amended to reflect the transfer. Instead, the new company simply assumed the employer's role under the original employment contract by paying salary, benefits and social insurance according to the terms of the original employment contract.

Approximately 11 months after the transfer, the new company terminated the employee when it failed to reach an agreement with the employee to amend the terms in the original employment contract (including the identity of the employer). The company cited a "major change in the objective circumstances rendering the contract unperformable" as the grounds for the termination.

When the employee sued, the court ordered the company to continue to perform the employment contract because there had been no "major change in objective circumstances" to render the employment contract unperformable. The court found that after the companies separated and the employee transferred, both the new company and the employee performed under the employment contract for 11 months and neither party objected to continuous performance during that time. These facts showed that the separation of the animation company from the group company did not have any significant impact on the performance of the original employment contract. Therefore, the court held that the existing employment contract remained unchanged after the employer entity underwent a division and the successor entity assumed employer liability for the employee.

Key Take-Away Points:

This case reveals that if a company waits too long after a restructuring to terminate an employee on the ground of a major change in objective circumstances, the courts may reject the termination.