CHINA LABOR & EMPLOYMENT LAW UPDATE

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New labor protection rules take effect January 1, 2017

Employers face a new compliance rating system as well as the risk of being publicized for violations of labor protection requirements under two regulations that take effect on January 1, 2017.

The Measures for the Rating of Enterprises for Labor and Social Security Compliance will result in employers receiving annual grades of A, B, or C depending on their records in the previous year. Grades will be based on labor bureau enforcement work, including routine inspections, reviews of employer records, and investigations of filed complaints. It is expected that all employers will receive grades starting in 2017 based on compliance for 2016. The rules do not address whether the ratings will be made public.

Grade A is for employers without a record of sanctions. These employers will be rewarded with a reduced frequency of routine labor bureau inspections. Grade B is for employers whose level of labor protection violations is not as serious as Grade C employers; Grade B employers, however, will be subjected to more frequent inspections.

Grade C employers will be the key targets for enforcement of labor protection and will be subject to frequent inspections. Employers may be rated as Grade C if they accumulate records of any of the following:

- receive sanctions at least three times for violations of labor and social security laws;
- commit a violation that results in a mass unrest or serious adverse social impact;
- use child labor or forced labor;
- refuse to timely carry out an order to correct an issue of non-compliance;
- resist or obstruct a labor bureau investigation; or
- undergo criminal prosecution for a violation.

The additional tool that the labor bureau enforcement authorities have is authorized under the Measures for Publicizing Acts in Material Violation of Labor Protection Laws. Under these rules, violations of labor protection requirements may be publicized on the websites of labor bureaus, as well as through major newspapers, TV and other media. While posting of violations will usually be on a quarterly or semiannual basis, the local labor bureaus have the discretion to publicize significant violations immediately.

Employer violations that may be subject to publicizing include:

- large deductions from or delays in payment of employee compensation;
- failure to make social insurance contributions;
- violations of working hours, rest, and leave requirements;
- violations of rules governing the protection of female and underage employees;
- use of child labor;
- violations that become public and result in serious social disorder; or
- other serious violations of labor protection laws.

Amendment of Labor Contract Law moves forward

Efforts to amend the Labor Contract Law (LCL) took a step forward on November 7, 2016. A subcommittee of the National People's Congress referred ten proposals to amend the law to the NPC Standing Committee for consideration. The ten proposals were previously submitted by NPC deputies during the March 2016 NPC session.

Of the ten proposals, only summaries of two proposals have been officially released. One of the two proposal-summaries represents employer interests, and was made by NPC deputy Jiang Weidong, the chairman and president of Shandong-based Wuzheng Group—one of the largest manufacturers of trucks and agricultural machines in China.

The other released proposal-summary was submitted by Liu Li, a deputy that gained fame due in part to her background as a migrant worker from Anhui province. She previously worked in Xiamen as a foot masseuse. Ms. Liu has reportedly pledged to represent the interests of migrant workers in the NPC.

These two proposal-summaries reportedly seek to amend the LCL in the following ways:

- establishing a rating system under which employee compliance of company rules can be tracked;
- expanding the grounds when employers could use liquidated damages clauses to recover losses caused by employees;
- eliminating the employer requirement to pay statutory severance when an employee is terminated without fault of the employer, such as for an employee's lack of performance or failure to return to work after exhausting a medical leave period;
- setting stricter requirements on the timely payment of wages to migrant workers; and
- exempting small businesses from the obligation to pay social insurance.

In March, lawmakers also reportedly proposed to reduce the penalties on employers for not entering into written contacts, and to exempt small businesses from certain restrictions for employee terminations, such as procedures to terminate employees for redundancy.

The Ministry of Human Resources and Social Security is also understood to be reviewing the impact of a controversial provision of the LCL—the rule giving employees the right to demand open-term contracts after the conclusion of two fixed-term contracts. An amendment to modify the rule may be proposed to the NPC at a later date.

It is expected that a formal draft amendment to the LCL will be submitted to the NPC in mid-2017, and will likely be followed by a period for public comment.

Details issued on new work permit system

On November 8, 2016, detailed information was released regarding employee qualifications, application procedures, and required application-documentation under the new pilot system for work permits for foreign national employees. An 86-page notice issued by the State Administration of Foreign Experts Affairs detailed the pilot scheme—a system that will run from November 1, 2016 until March 31, 2017. The pilot scheme is currently implemented in nine regions, including Beijing, Tianjin, Shanghai and Guangdong.

The pilot scheme divides foreign national applicants into three categories: A, B, and C. Applicants can qualify for a classification through a point system or automatically by meeting certain criteria. A chart listing the point system and qualification standards can be obtained here. Selected eligibility requirements for Category A and Category B are described as follows:

Category A, Leading Foreign Experts (外国高端人才)

- Individuals qualified under the National Talent Introduction Program;
- Individuals who have obtained internationally recognized professional achievements (e.g., former professors from the world's top 200 university professors, former Fortune Global 500 managers at headquarters or senior positions at regional headquarters);
- Senior executives of encouraged foreign-invested enterprises, professors employed by PRC colleges and universities (according to Shanghai local interpretations, employees with annual income of more than RMB 600,000 and individual tax payments of at least RMB 120,000 may evidence qualification);
- Individuals with innovative or entrepreneurial talent (e.g., owners of important technological inventions, patents and other proprietary intellectual property rights that is invested in China to set up a company);
- Individuals under the age of 35 who graduated from top 200 universities with doctorate degrees;
- Individuals who have obtained at least 85 points.

Category B, Foreign Professionals (外国专业人才)

- Individuals with a bachelor degree or above and two years of relevant work experience, and are working as:

  - a chief representative or representative of a representative office;
  - a managerial or technical employee; or
  - a mid-level or higher international assignee.
- Outstanding graduates with a master's degree or above from Chinese universities;
- Graduates with a master's degree or higher from the world's top 100 universities;
- Foreign language teaching staff;
- Individuals who have obtained at least 60 points.

During the pilot scheme period, approvals for Category C (i.e., restricted foreign nationals) will be limited to French students working under the China-France Internship Agreement.

Additional changes to the work authorization system include a requirement for employers to register in an online application system. Only employers and authorized agents are permitted to file applications. Employers, agents, and foreign nationals will receive ratings based upon their compliance with immigration requirements. Employers who provide false information for work permit applications, do not timely file applications, or otherwise hire foreign nationals illegally may receive low ratings and face difficulty when hiring foreign nationals in the future.

The notice also provides that (i) foreign nationals who change job positions with their current employers will be required to file new work permit applications; (ii) employment contracts, assignment letters, and appointment letters may be submitted as supporting documents for work permit applications; and (iii) both non-criminal reports and diplomas must be authenticated.

For more background on the pilot scheme, please refer to our September 2016 update.

China and France sign social insurance agreement

China and France signed a social insurance agreement on October 31, 2016, which addresses the issue of employees subject to the obligation to make social insurance contributions in both countries. Under the agreement, nationals of each country will be exempt from making social insurance contributions when working in the other country if contributions are made in their home countries. The effective date of the agreement to exempt French nationals working in China from contributing to PRC social insurance awaits domestic implementing legislation.

The Social Insurance Law requires foreign nationals, including assignees, working in China to participate in statutory social insurance programs, namely pensions, medical, work-related injury, unemployment and maternity insurance. Employees can be exempted under bilateral treaties. China has also signed social insurance agreements with Germany, South Korea, Denmark, Finland, Canada, Switzerland and Netherlands. According to official media reports, China has been in negotiations with Japan with respect to a social insurance agreement since 2012.

Band 1: Employment
Chambers Asia Pacific Guide, 2014, 2015 & 2016

Outstanding: Labor & Employment in 2016
Asia law Profiles, 2015 & 2016

Tier 1 Law Firm for Employment in 2016
Asia Pacific Legal 500, 2015 & 2016

PRC Firm of the Year, Labor & Employment
China Law & Practice Awards, 2014

Employment Law Firm of the Year
ALB China Law Awards, 2014

Asian-Counsel Firm of the Year
Employment/ Labor–Pacific Business Press, 2010 & 2007

Court rules offshore agreements with employees unenforceable

In a recently published decision, the Shanghai Second Intermediate People's Court upheld a lower court decision that agreements entered into between foreign companies and employees are unenforceable in China, and employees in such instances have no claims for breach under the PRC Labor Law.

According to the intermediate court decision, Che Xiaodong, a PRC national, signed an appointment letter and a supplementary agreement with the Germany-based Kugel-und Rollenlagerwerk Leipzig GmbH (KRW) in 2011 to work as the chief representative of the KRW Shanghai representative office. These documents included terms regarding bonuses and a severance package. Mr. Che also signed a labor contract with FESCO Adecco, which dispatched him to work at the KRW representative office. On July 9, 2014, Mr. Che resigned and sued FESCO Adecco and the KRW representative office in a claim for RMB 523,381 for unpaid bonuses and severance pay. The Jing'an district arbitration tribunal refused to hear the case.

Mr. Che appealed the decision to the Jing'an District People's Court. After first rejecting a motion by Mr. Che to join the KRW parent company as a defendant, the court ruled against Mr. Che on the merits. The court found that neither FESCO Adecco nor the representative office were liable because they were not parties to the appointment letter and supplementary agreement.

The intermediate court affirmed the lower court decision, ruling that because only PRC domestic enterprises can enter into employment relationships, the appointment letter and supplementary agreement were unenforceable as employment agreements in China. Moreover, the representative office and FESCO Adecco could not be held liable because they were not parties to the agreements.

The court did not address whether Mr. Che had any basis for a separate claim against the parent company in China arising under the PRC Contract Law.