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China Employment Law Update

Newsletter

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COVID-19 – Government announces several measures to assist employers

In February, the Ministry of Human Resources and Social Security and other authorities announced several measures to assist companies in overcoming temporary difficulties in their business operations as a result of the COVID-19 pandemic. The key measures include:

- Except for people who are subject to mandatory quarantine imposed by the relevant local government, employees who are unable to return to work and are also unable to work from home due to impact of the COVID-19 outbreak may be directed by the employer to take annual leave during the period of absence from work after consultation with the employee. In some cities such as Beijing and Shenzhen, companies are allowed after consultation with employees, to adjust the employees' rest days (e.g. arranging for employees to take rest days during a certain period of time and requiring them to work an additional day every week etc. on their return to work in order to make up for such days). However, there is no specific provision on how the consultation procedure should be conducted.

- After exhausting their annual leave entitlement, if employees are still unable to return to work, the company may pay them in accordance with special rules applicable in a situation where a company's business operations are suspended for reasons that are not attributable to the employees. Under this special rule, employees shall be paid regular salary for the first month of any business suspension. Starting from the second month of suspension, employees can be paid a living fee equal to the amount of 70% to 100% of the local minimum wage (depending on local law requirements). Employers should consult with employees before implementing this special wage payment rule.

- Companies impacted by COVID-19 are encouraged to allow for flexible work schedules. In Jiangsu, companies impacted by COVID-19 can apply to the local labor bureau for approval to implement a special working hour system otherwise known as a comprehensive working hour system. Under this working hour system, companies can arrange for employees to work less than eight hours per day during a period of business downturn and more than eight hours per day during busier business periods without overtime pay, as long as the total hours worked during the approved calculation cycle (i.e., quarter, half year, or full year) does not exceed the standard hours.

- Companies experiencing difficulties in their business operations or economic hardship due to the impact of COVID-19 may consult with their employees through a "democratic consultation process" on the adjustment of their salary or a reduction in their work hours, in order to reduce labor costs and to avoid or reduce the chances of employee layoffs. However, no guidance has been provided on the crucial question of how exactly this consultation should be implemented or whether employee agreement is required.

- Companies may enjoy exemptions from, reductions to or rebates of social insurance and housing fund contributions (*please see below article for further details*).

- In Beijing, starting from 1 March 2020, employers of employees who have been detained in Hubei due to the lockdown of the city, can apply for a temporary subsidy in amount of RMB 1,570 per affected employee per month. Furthermore, if the employees detained in Hubei are unable to work from home, their employers are allowed to pay them no less than RMB 3,080 (i.e. twice the basic living fee in Beijing) per month effective 1 March 2020. Other cities may have their own special subsidies.

Key Take-away Points

Companies should be aware of measures issued at the national and local level aimed at addressing the economic difficulties for employers, so as to take advantage of any possible opportunity to reduce the impact of the COVID-19 outbreak. Companies should also be mindful of legal procedures and processes needed to lawfully implement cost reduction measures, and take a risk-based approach to implementation with full awareness of the legal and employee relation issues involved.

State Council issues measures to increase job stability

In a move to stabilize employment in the face of a slowing economy, in December 2019, the State Council issued a notice on *Further Measures on Job Stability*. In March 2020, the General Office of the State Council further issued another notice on *Measures on Job Stability in Response to COVID-19* (collectively, "Notices"). Key highlights of the Notices for employers include:

- Continuation of temporary reductions in employer contributions to unemployment insurance and work injury insurance: China has lowered the contribution rates for social insurances gradually since 2015. On 1 April 2019, the State Council issued a notice to continue the reductions in employer contributions to unemployment insurance and work injury insurance to 30 April 2020. The Notices further prolong the reductions for another year until 30 April 2021.

- Continuation of return policy for unemployment insurance contributions: Since March 2019, China has implemented a temporary policy for returning a certain percentage of unemployment insurance contributions (generally 50%) to companies that face temporary operational difficulties without implementing redundancies or with only a few redundancies. The Notices have prolonged this policy for another year until 31 December 2020, and allowed the return percentage to be increased to 100% for certain companies (such as all types of companies in Hubei province and small to midsize companies in other provinces).

- Regulation of companies' practice of redundancies: On one hand, the Notices encourage companies to negotiate with employees about salary adjustments, working hour and work shift adjustments in order to continue the employment relationship and avoid layoffs. On the other hand, for companies that need to implement economic layoffs, governments will instruct them to comply with relevant laws, including

stipulating and implementing compensation plans for employees, notifying the labor union or all employees 30 days in advance, paying severance in accordance with laws, paying unpaid salaries and making back payments for social insurance contributions.

- Supporting flexible working arrangements: The Notices encourage alternative employment arrangements such as temporary, non-full-time, seasonal and flexible employment. Policies will be improved and/or revised in order to further support flexible working arrangements.

Key take-away points:

These measures reveal the central government's commitment to increase job stability. Employers should monitor these newly issued measures and any forthcoming national and local policies closely.

China reduces social insurance and housing fund burden on employers due to COVID-19 outbreak

In light of the outbreak of COVID-19 in China, the national government has promulgated various notices in January and February 2020 to reduce the social insurance burden on employers. These notices will:

1. Reduce pension, unemployment, and work injury insurance contributions. Starting from February 2020, all companies in Hubei Province, as well as micro, small, and medium-sized enterprises outside Hubei, can be exempted from making contributions to the basic pension, unemployment, and work-related injury insurance schemes for up to five months; large companies outside Hubei can make half of the contributions for up to three months. Companies who face severe difficulties in production and operation due to COVID-19 can apply to delay making social insurance contributions for up to six months in principle, during which time no overdue penalties will apply.

2. Reduce medical insurance contributions. Starting from February 2020, employers may make half of the contributions to the basic medical insurance scheme for up to five months, depending on the local rules. Companies can apply to delay making medical insurance contributions for up to six months in principle, during which time no overdue penalties will apply.

3. Reduce housing fund contributions. Companies who are impacted by COVID-19 may apply to delay the housing fund contributions until 30 June 2020. If the companies are located in areas which are confirmed to have been seriously or relatively seriously impacted by COVID-19, such companies may voluntarily choose to contribute to the housing fund before 30 June 2020 after consulting with the employees, and they may determine the applicable contribution rate on their own. On the other hand, if these companies cease making housing fund contributions before 30 June 2020, employees can continue to withdraw housing fund contributions and apply for housing fund loans.

4. Allow for re-fund of unemployment insurance contributions. If the company does not implement any mass layoffs, reduces the number of employees impacted, or satisfies other conditions in 2020, it will receive

50% of the unemployment insurance premiums paid by the company and the employees during the last calendar year (based on a notice issued in March, certain companies may even qualify for a 100% refund, see above article).

Key take-away points:

These policies reveal the China government has taken various action to reduce the social insurance burden on employers, in order to stabilize the economy and employment rates. Local governments will usually promulgate local rules to implement national policies. Employers should review these newly issued polices and forthcoming policies, and make timely applications with government authorities if needed to reduce their employment costs.

PRC lifts restrictions on wholly foreign owned HR service companies

In early January 2020, to echo the latest changes made to the PRC Foreign Investment Law, the Ministry of Human Resources and Social Security amended three regulations and lifted previous restrictions that prohibited foreign investors from setting up wholly foreign owned HR service companies in China.

The main changes include:

- Abolishing the restriction on foreign investors from setting up wholly foreign owned HR service companies in China. In the past, foreign investors (excluding Hong Kong, Macao and Taiwan investors) were required to form a joint venture with a local Chinese company in order to provide HR services in China. (What this meant in practice was that many foreign investors used their Hong Kong, Taiwan or Macao registered subsidiary to act as the direct investors);

- Cancellation of the capital restriction that in joint ventures, the foreign investors' investment ratio should not be lower than 25% and the Chinese investors' ratio should not be lower than 51%;

- Cancellation of the requirement that in a joint venture, both the foreign and Chinese investors should have at least three years' experience in the relevant business field;

- Simplification of government approval procedures for establishing foreign invested human resources companies and cancellation of many restrictions on establishment of branches, increase or decrease of registered capital, share transfer and change of shareholder.

The changes above are expected to stimulate foreign direct investment in the HR service field and attract more foreign headhunters and employee benefit vendors into the China market.

Key Take-away Point

Going forward, foreign investors in the HR service field will have more flexibility in managing their business presence in China and will no longer be restricted by the complexity of setting up joint ventures. The changes may also lead to companies that have already set up joint ventures in China considering whether to change their corporate structure in the future. The changes will further enable multi-national HR service providers to better align

their business management in various jurisdictions, as they will have more control over their China operations.

Ministry of Human Resources and Social Security issues notice on electronic employment contracts

On 4 March 2020, the Ministry of Human Resources and Social Security (MOHRSS) issued a notice on concluding electronic employment contracts. The MOHRSS notice explicitly confirms that an electronic employment contract can be valid, provided it complies with requirements including the electronic signature requirements.

According to the MOHRSS notice, an electronic employment contract is valid if:

(i) The employer and the employee mutually agree to conclude a written employment contract in electronic form;

(ii) The parties use data messages which can be regarded as written and electronic signatures which are reliable under the *Electronic Signature Law* and other regulations;

(iii) The employer ensures that the generation, transmission, and storage of the electronic employment contract meet requirements stipulated by the *Electronic Signature Law* and other regulations, and ensures that the electronic employment contract is complete, accurate, and not tampered with; and

(iv) The electronic employment contract complies with general requirements for an employment contract under the *Employment Contract Law*.

Prior to the issuance of the MOHRSS notice, it was unclear whether an electronic signature could be validly used to sign an employment contract. The *Electronic Signature Law* stipulates that an electronic signature is generally valid (except for certain types of documents), and does not explicitly prohibit applying electronic signatures to employment-related documents. On the other hand, the *Employment Contract Law* arguably indicates that an employment contract should be signed with a wet signature, since each party is meant to hold one copy of the agreement. This MOHRSS notice now makes it clear that an electronic employment contract can be valid.

Notwithstanding the above, there are still serious practical issues with using electronic employment contracts. In case of disputes, the burden of proof is on the employer to prove the validity of the electronic employment contract. Criteria to determine the validity of an electronic signature are very technical under the *Electronic Signature Law*. In practice, courts may look into whether the electronic signature was certified by an electronic certification service provider recognized by the relevant PRC government authority (e.g. the electronic signature has been certified using a CA digital certificate). We are aware of some cases where the court has recognized the validity of using electronic signatures for employment-related documents, but such cases are still relatively rare at the moment. Some courts are generally sceptical about the reliability of electronic signatures. In addition, during labor audits or when reviewing applications for work injury insurance claims, oftentimes local labor

officials will insist on seeing hard copy employment contracts with wet signatures.

Last but not least, the MOHRSS notice was issued in response to an inquiry from the Beijing Human Resources and Social Security Bureau regarding using an electronic employment contact during the period of epidemic prevention and control. The general understanding is that the application of this MOHRSS notice is not limited to periods of epidemic prevention and control but this point is not entirely clear. Employers will need to observe judicial practice on this issue in the future.

Key take-away Points:

Due to the uncertainty of the application of the notice, current market practice is that wet signatures are still being used by companies to execute employment-related documents, in particular, employment contracts. We anticipate, however, that using an electronic signature / form for employment-related documents will become more widespread in China and this latest MOHRSS notice provides clearer guidance on this issue. Companies may consider using electronic employment documents, but should evaluate / manage the legal risks as well as assessing costs before doing so.

China takes steps to reduce employer's contributions to disabled persons' protection fund

Recently, China has introduced measures to reduce employer contributions to the disabled persons' protection fund (Fund). On 27 December 2019, six government authorities, including the National Development and Reform Commission and the China Disabled Persons' Federation, jointly issued a notice on *Improving Disabled Persons' Protection Fund System and Promoting Employment of Disabled Persons*. On 31 December 2019, implementing rules in support of the notice were issued by the Ministry of Finance.

Employers who do not employ the minimum quota of disabled persons (as a percentage of their total workforce) generally must contribute to the Fund. According to the notice and its implementing rules, employer contributions to the Fund will be reduced in the following ways:

1. Application of different discount rates to the collection of the Fund**:** Starting from 1 January 2020 to 31 December 2022, (i) 50% of the due amount of the employer contributions to the Fund shall be collected if the number of disabled employees employed by the employer accounts for 1% or above of the total number of employees but less than the minimum threshold provided by the local government; (ii) 90% of the due amount of the employer contributions shall be collected if the number of disabled employees employed by the employer accounts for less than 1% of the total number of employees; and (iii) employers with no more than 30 employees are exempt from making contributions to the Fund.

2. Reduction in employer contributions by adjusting base amount formula**:** An employer's contributions to the Fund are generally calculated based on the average annual salary from the previous year of all its employees (base amount). The base amount is subject to a local cap (for the purpose of calculating employer contributions) of 200% of the "local

average annual salary". Before the notice, this "local average annual salary" generally referred to the local average annual salary of employees working in *public* companies. The new notice provides, however, that "local average annual salary" should be calculated as the weighted average of the local annual salary of "employees working in public companies" and "employees working in private companies". The effect is that this new calculation formula will lower the local average salary because employees working in private companies on average earn less than those working in public ones. With the decrease in local average salary, the cap will correspondingly decrease, and an employer's contribution amount can be reduced if its base amount is higher than the cap.

3. Clarification on the number of disabled dispatch employees**:** Employers who engage disabled dispatch employees may reach an agreement with the labor dispatch agency on which party will count the number of disabled dispatch employees into its total disabled employee number and total employee number. A disabled dispatch employee can only be counted into one party's headcount, and cannot be included in both parties' headcount.

Key take-away points:

These policies reveal an easing on employer financial contributions to the disabled persons' protection fund, which is particularly relevant in a slowing economy. Employers should review these newly issued policies and any forthcoming national and local policies to ensure they are making the correct disabled persons' protection fund contributions.

Shanghai, Jiangsu, Zhejiang and Anhui provide joint guidance on controversial labor questions

On 30 December 2019, the Jiangsu Province Labor Arbitration Committee issued *Meeting Minutes on Controversial Issues Concerning Ruling on Labor Dispute Cases in Three Provinces and One Municipality in Yangtze River Delta Area*. This covers the consensus reached among the labor authorities, high courts and labor arbitration committees of the Shanghai Municipality, Jiangsu Province, Zhejiang Province and Anhui Province (known as the Yangtze River Delta Area) to provide consistent guidance to the courts and labor arbitration committees in the Yangtze River Delta Area when ruling on labor dispute arbitrations. The minutes are the first interprovincial judicial guidance in China and will likely influence how local judges and labor arbitrators handle labor disputes in the Yangtze River Delta Area.

Key highlights from the minutes include guidance on:

- the limitation period for claims for compensation for accrued but unused annual leave.

- double salary claims for failure to sign a written employment contract with an employee within one month of the commencement of employment. Under this guidance, no double salary is payable provided that (i) the employer has evidence showing that it has proactively tried to fulfill its obligation to sign the written employment contract with the employee but the employee has refused to sign it;(ii) the employee has deliberately caused the employment contract not to be signed by taking advantage of

his/her particular job position; or (iii) the employer is unable to conclude the written employment contract with the employee in a timely manner due to another objective reason.

- the enforceability of a fixed-term employment agreement. If an employee meets the conditions for an open term employment contract but instead signs a fixed term employment contract, the fixed term contract is valid unless the employee can prove the contract was signed as a result of fraudulent misrepresentation, coercion or duress caused by the employer. However, it is unclear under the minutes if the employee can still unilaterally demand an open-term contract before such fixed-term employment contract expires.

- the employer's right to unilaterally adjust employee's position pursuant to business needs. In addition to an employer's right to unilaterally adjust an employee's job position pursuant to the statutory grounds under Article 40.1 (i.e., employee unable to resume original role upon expiration of medical treatment period) and 40.2 (due to performance reasons), an employer may also adjust the employee's job position pursuant to a relevant company policy or pursuant to a clause in the employment contract. Furthermore, in the absence of a relevant company policy or clause in the employment contract, the employer may still unilaterally adjust an employee's position if it is so required due to business operational reasons. Such a unilateral adjustment shall be considered as valid and binding on an employee, provided the employer does not negatively change the employee's remuneration or other employment terms.

- an employer's right to dismiss employee for misconduct in the absence of clear policy. If an employee violates the laws, administrative regulations or labor discipline rules that the employee must comply with and the breach seriously affects the business operations or management order of the employer, an employer is entitled to summarily dismiss the employee. If the employee subsequently claims for wrongful termination based on the argument that the relevant company policy or the employment contract does not clearly cover the wrongdoing, or the relevant company policy has not been duly adopted by the employer, such argument should be considered to be invalid.

Key takeaway points:

Companies operating in Shanghai, Jiangsu, Zhejiang and Anhui should welcome this guidance for the clarity and consistency it brings on controversial labor dispute issues in the Yangtze River Delta Area. Employers will also in particular welcome how the guidance has addressed certain matters such as the right of the employer to unilaterally adjust the employee's position in certain circumstances pursuant to business needs or the possibility to dismiss the employee based on the employee's misconduct without clear supporting company policies. Note these meeting minutes were issued by the Jiangsu Province Labor Arbitration Committee, copying (and not jointly issued by) the labor authorities, high courts and labor arbitration committees in the Yangtze River Delta Area. It remains to be observed as to whether this joint guidance will be followed in practice by the courts/labor arbitration committees.

Guangzhou issues guiding opinion on employment disputes

In December 2019, The Guangzhou Employment Dispute Arbitration Commission and the Guangzhou Intermediate People's Court (the highest court in Guangzhou) formulated opinions on certain employment issues (Opinions), in order to ensure consistency in the application of the law by arbitrators and judges.

Some of the more interesting guidance in the Opinions include the following:

- Where an employer ends the employment contract with a female employee during her pregnancy, confinement, or nursing period on the grounds that the employer

  (i) is declared bankrupt in accordance with law;

  (ii) has its business license revoked;

  (iii) is ordered to close or deregister; or

  (iv) decides on early liquidation,

  the employer should pay the female employee benefits relating to her pregnancy, confinement, or nursing period in a lump sum. It is unclear, however, what benefits this is referring to and whether this means that full salary for the employee's remaining pregnancy, confinement and nursing periods must be paid out in a lump sum.

- Where an employer clearly specifies a certain educational degree, work experience, etc. as job entry requirements, and the employee is dishonest or lies in the job application about fulfilling such requirements, the employer has the right to insist that the employment contract is null and void, unless the employer does not take action within a reasonable period of time. It is unclear within what time period the employer may end the employment contract due to employee's dishonest acts or whether this time period can be extended if employer was originally unaware of the dishonest acts and only discovered them later.

- A dispatched employee (i.e. an employee indirectly hired through a staffing agency) who is unlawfully returned by the host company to the staffing agency is not entitled to reinstatement in the host company. However, during the time the employee is not re-dispatched after being returned unlawfully, the host company and the employing entity should jointly pay the employee the level of pay he / she received immediately prior to being returned.

- In a mass layoff situation, if the employer meets the criteria for the number of employees affected by a mass layoff as required by law, explains the reasons for the layoff to its labor union or to all the employees 30 days in advance, and reports the lay off to the local labor supervision department, it is unlikely that a wrongful termination claim by employees will be sustained solely on the ground that the employer has failed to file an official mass layoff "recordal". In other words, simply reporting the lay-off to the labor bureau, rather than a full-fledged recordal filing, will suffice.

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- An employee can unilaterally terminate the employment contract and demand a severance payment if the employer alters the pay structure of the employee, lowers the basic pay standard, or unilaterally raises the standards of performance-related pay, bonuses, etc. to such a degree that the employee is adversely affected.

Key take-away points:

The Opinions reflect a concerted effort made by the Guangzhou Employment Dispute Arbitration Commission and the Guangzhou Intermediate People's Court to unify their standards of application of law in addressing certain employment issues. Employers should be aware of the Opinions since they cover a wide spectrum of employment law matters such as benefits for pregnant/nursing female employees, probation periods, job entry requirements, labor dispatch, mass layoffs, and unilateral pay adjustments.

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