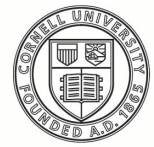

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China Employment Law Update - October 2018

Baker & McKenzie

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Abstract

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Keywords

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China Employment Law Update

Newsletter

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Various new regulations issued on Hong Kong, Taiwan and Macao residents working in mainland China

PRC authorities have recently issued several national notices to repeal the employment permit and work authorization requirement for Hong Kong, Taiwan and Macao residents ("**HTM residents**") working in mainland China. Moreover, HTM residents are now eligible to receive residence permits, providing them with treatment more equal to mainland residents in terms of study, employment and housing.

HTM residents can use their previously issued and still valid employment permits as a proof of employment until 31 December 2018; after which, employment permits will no longer be valid or accepted as proof of employment. HTM residents can use documents such as the employer's business license, employee's employment contract, proof of salary payment or records of social insurance contributions as proof of employment. HTM residents may use such proof of employment to apply for a residence permit for them to receive basic public benefits (such as education and housing), if other required conditions are met. HTM residents have been permitted to apply for and receive residence permits as of 1 September 2018. Please see our immigration group's 13 September 2018 client alert for a full discussion on the effect of this change from an immigration perspective.

Although these changes significantly ease the regulatory burden on HTM residents wishing to work in mainland China, employers and potential employers of HTM residents are facing uncertainty because of the lack of a consistent approach adopted by local authorities and the lack of detailed supporting measures to implement the elimination of the work permit requirement. As the regulatory framework shifts, employers are uncertain about whether they should treat HTM residents exactly the same as mainland residents for all employment purposes, such as for housing fund contributions and entitlement to open-term employment contracts. In Shanghai, there is still uncertainty whether the changes will affect local authorities' enforcement of social insurance requirements (in the past, local Shanghai authorities have not enforced social insurance requirements against foreign nationals).

On 25 October 2018, the Ministry of Human Resources and Social Security publicized a draft of the *Interim Regulation on Social Insurance Contributions for Hong Kong, Taiwan and Macao Residents* for public comment. In the draft regulation, employers are mandatorily required to make social insurance contributions (including contributions for pension insurance, medical insurance, maternity insurance, work injury insurance and unemployment insurance) for HTM resident employees. Employers should enroll HTM resident employees into the social insurance system by using HTM resident employees' valid travel certificate/residence permit, employment contract, etc. as proof of employment. Although this draft has not been passed by the authorities, it indicates that government's plan to have HTM residents who are working in China enrolled in the social insurance system.

Key take-away points:

With the elimination of the employment permit and work authorization application for HTM residents, employment practices are being impacted in many areas. The intended and most direct impact is that employers no longer must sponsor employment permits for HTM residents to legally work in mainland China.

However, due to the lack of detailed supporting measures to implement the employment permit elimination, other impacts that are less direct and perhaps even unintended are being felt throughout the employment law regime. Employers are uncertain about whether HTM residents can or should still be treated differently than mainland residents in other employment areas where distinctions have typically been drawn between these two categories of employees. Until clarification comes from local authorities, the safest path for employers in China is to follow the current trend and to treat their HTM resident employees the same as their mainland resident employees.

Local governments ordered to slow down pursuit of unpaid and underpaid social insurance contributions

The Ministry of Human Resources and Social Security issued a notice on 21 September 2018 ordering local social insurance authorities to refrain from requiring employers to pay all unpaid or underpaid social insurance contributions at one time.

The notice follows the national reform plan issued in July 2018 that directs the tax authorities to act for the social insurance authorities in collecting social insurance contributions starting from 1 January 2019. Please see our August 2018 newsletter for a full discussion of the national reform plan.

The national reform plan has employers worried that the tax authorities will be more aggressive than the social insurance authorities in pursuing employers for unpaid and underpaid social insurance contributions since the tax authorities have greater access to the employee salary data used to calculate social insurance contributions. Recent news seemed to confirm this worry when it was reported that the Changzhou tax bureau is pursuing a local company for CNY 2 million in underpaid social insurance contributions over the last 10 years.

Key take-away points:

The new notice should temporarily slow local governments in their pursuit of unpaid and underpaid social insurance contributions. However, it remains unclear how long the notice will remain in effect and how generous the local social insurance authorities will be in interpreting the notice.

Although the new notice provides employers with some hope that they will not immediately be pursued by the authorities for massive arrears in social insurance contributions, employers should still be aware that local governments have recently been more focused on social insurance non-compliance. Despite the new notice, compliance risks in this area will eventually increase after the tax authorities assume responsibility nationwide for collecting social insurance contributions, even if that enforcement ramps up gradually as the notice instructs. Another draft notice (see below)

indicates the government's intention to become more serious about social insurance compliance. Employers should conduct internal audits to identify any potential exposure from unpaid or underpaid social insurance contributions and should ensure all social insurance contributions are properly paid moving forward.

New regulations issued on college and university work-study internships

On 20 August 2018, the Ministry of Education and Ministry of Finance jointly issued the *Regulations on College and University Work-Study Internships*, which took immediate effect. The regulations supersede the previous regulations on the same subject from 2007 and apply to all on-campus and off-campus work-study internships arranged through the college or university. The new regulations do not apply to internships independently arranged by students themselves, nor do they apply to vocational internships arranged for students of vocational schools as part of their vocational training (which are regulated by a separate set of regulations). Rather, these regulations apply to internships arranged with a college or university so that students may earn money to support themselves during their studies.

According to the new regulations, colleges and universities are encouraged to establish and develop on-campus work-study internships for students and are permitted to develop off-campus work-study internships for students. Off-campus work study internships should be a collaboration between a college or university and a local company. All work-study activity should be managed by the college or university work-study service organization.

The new regulations place the following requirements on off-campus work-study positions:

- **Application**: Any company seeking to establish a work-study internship must apply to the college or university work-study service organization.
- **Tripartite agreement**: A tripartite agreement must be concluded between the company, the work-study service organization and the student. The agreement must specify the student's compensation, each party's rights and obligations, methods to handle injuries suffered during work-study, and dispute resolution mechanisms.
- **Student protections**: The work-study internship may not involve poisonous, harmful or dangerous products that could harm the student's physical or mental health.
- **Ethnic minorities**: The company must respect the manners and customs of ethnic minority students when arranging work-study.
- **Working time**: In principle, total working time for the work-study internship should not exceed 8 hours per week and 40 hours per month. Working time can be extended appropriately during winter and summer vacations.
- **Compensation**: Compensation for the work-study internship is subject to the tripartite agreement, but may not be lower than the minimum wage where the college or university is located.

Key take-away points:

Employers that cooperate with colleges and universities to provide off-campus work-study opportunities for students should comply with the new regulations when hiring and managing those students.

New draft of civil code would enhance protection against sexual harassment

On 5 September 2018, the National People's Congress of the People's Republic of China publicized a new draft of *Several Sections of the Civil Code* on its official website, seeking public comments on the draft. Article 790 of the draft provides more detailed regulations on sexual harassment protections and follows a wider and continuing trend in China to protect people from sexual harassment.

The draft includes the following changes to sexual harassment protection law:

1. **Defines "sexual harassment."** To date, no national law has defined "sexual harassment." Some cities, such as Beijing and Shanghai, have defined sexual harassment in their local regulations. The draft, for the first time on a national level in China, would provide a definition for "sexual harassment." According to that definition, "sexual harassment" means unwelcome behavior against another person in the form of sexual language or actions or by sexual advances against a subordinate. This definition of sexual harassment represents a breakthrough for PRC national law in protecting people from sexual harassment.

2. **Expands the scope of persons protected against sexual harassment to include men.** Under current national laws, sexual harassment is only regulated in the *Protection of the Rights and Interests of Women* and the *Special Provisions on Labor Protection of Female Employees*. Thus, according to these laws, only sexual harassment against female employees is prohibited. The draft will prohibit sexual harassment against "another person" instead of just "female employees," which indicates that the scope of protection will now include both men and women.

3. **Establishes more detailed obligations for employers.** Current national law only states that employers must prevent and prohibit sexual harassment against women, without providing any details as to the exact measures employers should take to fulfill their obligation. The draft provides employers with more details, e.g., employers must take measures to prevent sexual harassment in their companies, establish sexual harassment complaint procedures and formulate sexual harassment settlement solutions. Despite these slightly more detailed instructions for employers, many local regulations still contain more detailed requirements for employers, especially in terms of preventative measures. For example, Jiangsu Province requires employers to formulate anti-sexual harassment policies, provide training to employees and establish effective employee complaint channels.

Key take-away points:

The draft would represent a potential breakthrough in protection against sexual harassment if it passes in its current form. The draft provides more

detailed definitions and obligations and extends protections to both male and female employees. All employers should be prepared to update their policies, procedures and employment contracts as necessary to comply with the new law once it passes as is expected.

Employers can now use education department websites to verify job applicant and employee education history

The PRC Education Department issued a notice on 23 July 2018 implementing an online system allowing students and employers to check a person's higher education history using student diploma and ID information.

The China Higher Education Student Information and Career Center will maintain a database of higher education history collected from colleges and universities and place that information on two websites. Information about student graduation certificates earned since 2002 from domestic higher education institutions can be viewed at www.chsi.com.cn. Information about student degree certificates earned since 1 September 2008 from domestic higher education institutions can be viewed at www.cdgdc.edu.cn.

Employers can access these government-run websites via a membership to verify the authenticity of a job applicant's or an employee's education history. Membership on www.chsi.com.cn requires an annual subscription priced from CNY 200 to CNY 1,000, whereas membership on www.cdgdc.edu.cn is free.

Key take-away points:

Unfortunately, a common issue in China is job applicants and employees misleading employers about their educational history and providing fake graduation and degree certificates that can be difficult for employers to discern from the real thing. By using these websites, employers can verify the authenticity of the employee's education documents. Employers might be able to revoke an employment offer or unilaterally terminate employment during the probationary period if the applicant or employee fails to provide authentic information, depending on the language in the offer letter and employment contract.

Social insurance blacklist proposed in new draft regulations

On 16 December 2018, the Ministry of Human Resources and Social Security released for public comment the *Draft Regulations for Managing a Blacklist for Serious Social Insurance Violations*. The draft instructs local social insurance centers to place any entity or individual that seriously violates social insurance laws on a blacklist. The blacklist will be shared on local and national credit information platforms and will be made available to all government authorities.

Blacklisted companies and individuals will face restrictions in "government purchasing, transportation, bidding, manufacturing approvals, license reviews, financing and loan applications, market access, tax benefits, rewards, etc."

Serious violations that could land a company or individual on the blacklist include: failing to rectify unpaid social insurance contributions as requested by the authorities; making false declarations or submitting falsified documents to participate in the social insurance scheme; defrauding the labor authorities for social insurance benefits; and failing to repay to the social insurance fund any work injury benefits paid on behalf of the employer, its legal representative or a third party (that should have originally been paid by such party).

The maximum period for a company or individual to remain on the blacklist normally will not exceed five years. For first-time offenders, the initial blacklist period will be one year. If the offender fails to rectify the violation or commits a new social insurance violation during the first year, the blacklist period will be extended to two years. If the offender commits a new social insurance violation after being removed from the blacklist, the new blacklist period will start at two years. In certain circumstances, a blacklisted company or individual can be removed early from the blacklist if the offender rectifies the non-compliance as requested by the authorities, provides a written commitment to guarantee future compliance, etc.

Key take-away points:

In China, non-payment and underpayment of social insurance contributions is a widespread problem. The social insurance blacklist could be a significant step in fixing this problem by hindering violators in a variety of future business and personal transactions.

Shanghai court rules camgirl not employee of live streaming platform

Recently, a Shanghai court ruled that a cooperation agreement signed between a “camgirl” (a woman speaking or performing on social media over livestream) and a live streaming platform did not create an employment relationship between them. Thus, the camgirl was bound by the cooperation agreement in accordance with general civil law principles and was liable for liquidated damages for violating the exclusivity clause in that agreement.

The cooperation agreement between the camgirl and the live streaming platform stated that the camgirl would provide live broadcasts exclusively on the platform for three years and that the camgirl could not provide similar broadcasts on any other platforms during the contract term. After signing the cooperation agreement, the camgirl started broadcasting on the platform while the platform used its resources to promote the camgirl. At no point did the platform instruct the camgirl about the frequency, duration or content of her broadcasts. One year later, the platform found the camgirl provided similar live broadcasts on a competing platform. The platform sent cease and desist letters to the camgirl and the competing platform asking them to immediately stop the broadcasts, which continued nonetheless.

The platform then sued the camgirl claiming liquidated damages for her providing similar live broadcasts on other platforms in violation of the cooperation agreement's exclusivity clause. The camgirl argued that the cooperation agreement was actually an employment contract; therefore, the platform was not entitled to liquidated damages because the PRC employment law's broad restrictions on imposing liquidated damages against

employees does not include an express exception for breach of an exclusivity clause.

The court sided with the platform. The court ruled that no employment relationship had been established because the platform provided no instruction to the camgirl on the frequency, duration or content of her broadcasts and thus allowed her full control over those broadcasts. Since no employment relationship had been established, the cooperation agreement between the camgirl and the platform was a general civil contract, which bound the camgirl by its exclusivity clause and entitled the platform to liquidated damages.

Key take-away points:

In recent years, disputes between online platforms and their freelancers have increased. Most cases involve freelancers claiming *de facto* employment relationships with the online platforms. Online platforms are taking greater care to avoid creating employment relationships when interacting with their freelancers.

This case provides guidance for those online platforms. Shanghai courts will focus on the control of a freelancer's work in determining whether an employment relationship has been established. The Shanghai courts will likely rule that no *de facto* employment relationship exists between the online platform and the freelancer if the online platform exerts no control over the freelancer's work and the freelancer remains solely responsible for their daily work and work results. Thus, to reduce employment risk, online platforms should avoid providing specific instructions to freelancers in regards to daily work. For example, online platforms should avoid setting the freelancer's minimum working time and specific daily work requirements. General requirements on work quality can probably still be provided to the freelancer without creating a *de facto* employment relationship.

Shanghai court requires employer to issue a "proof of termination" in recognition of employee's lawful resignation

A Shanghai court recently rejected a middle school's arguments on appeal and required the middle school to issue a proof of termination (*lizhi zhengming*) to a teacher who resigned.

The teacher applied twice in six months to resign from the middle school but was denied both times by the school. The teacher then unilaterally notified the school of the resignation and left the school. The middle school refused, however, to issue a proof of termination to the teacher. The arbitration tribunal upheld the teacher's request for the proof of termination. The school appealed the arbitration award to the first instance court.

On appeal, the school claimed that the teacher could not resign without the school’s permission because the employment contract contained a provision that the teacher would be liable for breach of service agreement for resigning before the end of service period if the school had sponsored training for or provided a special benefit to the employee. The school said that it had handled the application for the teacher's Shanghai household permit (i.e., *hukou*), which should be deemed as a special benefit. Therefore, according

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to the school, the teacher should have provided service until the minimum service period expired; otherwise, the school could reject the resignation.

The teacher argued that PRC law and the employment contract allowed the teacher to resign even if the school objected. The teacher further argued that the school's handling of the *hukou* application was not a special benefit; thus, the teacher was not bound by the service agreement and should not be liable for any unserved portion of the service period.

The first instance court agreed with the teacher's arguments and ruled that the school had no legal or contractual ground on which to refuse the teacher's resignation. The court further ordered the school to fulfill its legal obligation in issuing a proof of termination as the teacher's resignation was lawful.

Key take-away points:

According to the *PRC Employment Contract Law*, an employee can resign from a company as long as the employee provides the company with 30 days' written notice. Unless the employee fails to provide this notice, the employer has no legal basis to restrict the employee's right to resign. Even if the employee's resignation were to breach a service agreement between the employer and employee, the employer would only be permitted to claim liquidated damages or costs from the employee. The employer would not be permitted to refuse to issue the proof of termination. Under the law, employers are legally required to issue a proof of termination any time there is a separation of employment, regardless of the reasons for the termination; this proof of termination is important, because new employers generally would require such proof before hiring a new candidate.

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