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China Employment Law Update - February 2016

Baker & McKenzie

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China Employment Law Update - February 2016

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People's Republic of China



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BAKER & MCKENZIE

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Significant Changes to China's Family Planning Law will Impact Employee Leave Entitlements

On December 27, 2015, the National People's Congress Standing Committee adopted changes to China's *Family Planning Law*, which used to encourage couples to marry and give birth later in life (the so called "late marriage and late birth" policy) and to have only one child.

The amendment to the Family Planning Law ("**New Law**"), which took effect on January 1, 2016, encourages couples to have two children, and eliminates the "late marriage" and "late birth" concepts. These concepts were previously implemented under local regulations by way of providing extra, paid leave for PRC citizens who satisfy the conditions under these policies. For example, if a female employee gave birth to her first child during marriage at a late age, usually 23 or 24, based on local rules ("late birth"), she usually would be granted additional maternity leave on top of the national 98 days' maternity leave. Also, in many cities, the husband would be entitled to "paternity leave" if his wife satisfied the "late birth" criteria and/or he satisfied other conditions under the local rules. In addition, couples who married at a late age would be entitled to extra days of marriage leave. Local regulations varied in these requirements.

Over 10 provinces and municipalities (such as Shanghai Municipality, Guangdong Province, Tianjin Municipality, Zhejiang Province, Fujian Province, Sichuan Province, Guangxi Province, Anhui Province, Shanxi Province, Hubei Province, Jiangxi Province, and Ningxia Province) have released new local family planning regulations amending the leave entitlements (mainly, marriage leave, maternity leave, and paternity leave). In essence, they have removed the terms "late marriage," "late birth," or "one child," and have eliminated the additional leave days previously granted for meeting those conditions. Instead, they provide substitute leave days consistent with the more liberal New Law.

For example, Shanghai's new family planning regulations, effective March 1, 2016, provide:

- 10 days' marriage leave to all employees who legally marry, irrespective of their age of marriage (while previously 7 out of the 10 days of the marriage leave were provided only to employees who satisfied the "late marriage" criteria);

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- additional 30 days' maternity leave (on top of the national 98 days' maternity leave) as long as the employees' childbirth complies with the law (which would apply to the birth of the second child and is irrespective of whether the employee is having a "late birth"); and
- 10 days' paternity leave (as opposed to the previous 3 days provided only to employees whose wife had a "late birth").

In summary, under the new Shanghai rules, more people would be entitled to the extra days of leave with fewer strings attached and in some areas (such as paternity leave), more leave days are provided.

Key Take-Away Points:

Companies operating in multiple cities need to keep track of the new local regulations affecting the above-mentioned leave entitlements in locations where they operate. In addition, companies need to be aware of how these leave entitlements are applied, especially when they overlap with national holidays or weekends.

New Regulations on Residence Permits for PRC-Nationals Take Effect

The new Interim Regulations on Residence Permits promulgated by the PRC State Council took effect on January 1, 2016. Under these new regulations, a PRC citizen who will reside in another city outside his/her original household (*hukou*) location for half a year or more may apply for a residence permit, subject to the citizen having a legal and stable employment, or a legal or stable domicile, or continued education in that city. With this residence permit, the permit holder may have access to various resident entitlements (such as social insurance and housing fund benefits), may benefit from the convenience in some administrative matters (such as passport application, car registration, driver's license application, professional qualification application, etc.), and may have potential eligibility to apply for a local household permit (*hukou*).

In relation to PRC citizens residing outside their original household location, China is in the process of moving away from the old, mandatory "temporary residence permit" (*zanzhu zheng*) system and replacing it with the new, optional "residence permit" system. Currently, the old regulations on "temporary residence permit" have not been officially abolished, and the new residence permit regulations will also need to be implemented through local regulations, which may need to be developed or updated locally in various jurisdictions.

Key Take-Away Points:

While companies may legally employ people without a local *hukou* or resident permit, the *hukou* and residence systems still impact what local benefits individuals may enjoy in the city where they live and this

oftentimes will impact an individual's employment decisions. A more flexible resident permit system may therefore help to make the labor market more mobile, providing a larger potential labor pool for companies to recruit from.

Supreme People's Court Clarifies Issues Relating to Crimes of Jeopardizing Work Safety

The Supreme People's Court released the *Opinion on Issues Concerning Application of Law in Trying Crimes of Jeopardizing Work Safety* ("**Work Safety Opinion**") on December 9, 2015, which came into effect on December 16, 2015.

The Work Safety Opinion clarifies some issues that are unclear under the Criminal Law relating to the crimes of jeopardizing work safety. For instance, Article 134 of the Criminal Law provides that if there is a violation of work safety laws in production or operations, and this violation leads to severe casualties or causes other serious consequences, then those responsible can be sentenced up to three-years in prison; if the circumstances of the crime are extremely serious, then those responsible could be sentenced from three to seven years in prison. However, the Criminal Law does not specify which individuals would be regarded as responsible in the above situation, nor does it define the terms "severe casualties", "other serious consequences" and "extremely serious circumstances". The Work Safety Opinion provides answers to these questions, as detailed below.

Under the Work Safety Opinion, the persons responsible in the above situation would include the company's in-charge person, managers, actual person in control and investors who are responsible for organizing, directing and managing the production or operation and those who directly engage in the production or operations. If there has been a minimum of one death or a minimum of three persons being seriously injured, or a direct financial loss of no less than RMB1,000,000 is caused in the above crime, then the crime would be considered as having caused "severe casualties" or "other serious consequences", and those responsible could be sentenced up to three years in prison. If there has been a minimum of three deaths or a minimum of 10 persons are seriously injured in the above crime, it would be considered as having "extremely serious circumstances", and those responsible could be sentenced from three to seven years in prison.

Similarly, the Work Safety Opinion also clarifies some undefined terms or unclear issues relating to other work-safety related crimes such as forcing employees to operate in violation of work safety laws and endangering employees' safety, concealing or fraudulently reporting work safety accidents, etc.

Key Take-Away Points:

With serious work safety accidents frequently occurring in recent years, the government is tightening the enforcement of work safety laws. We anticipate that the government will be more active in cracking down on violations of work safety laws, including imposing large fines on companies or individuals responsible, or even pursuing criminal charges against those responsible. Companies and their managers should pay particular attention to the work safety laws and ensure that they are fully compliant.

Highest Court in Shenzhen Issues Clarification on Labor Dispute Matters

In December 2015, the Shenzhen Intermediate People's Court issued further clarification ("**Rules**") on its recent guiding opinion on labor disputes (please see our [December 2015](#) newsletter for details on the original guiding opinion). The Rules provide useful guidance on the following issues:

- **Open-Term Contracts:** If an employee does not request an open-term employment contract before the expiration of the second fixed-term employment contract, the employment relationship will automatically end on the expiration date of the second fixed-term contract. The employee will be deemed as giving up his/her right to an open-term employment contract.
- **Labor Discipline Rules:** Employees are expected to know and abide by a number of well known labor discipline rules that are "recognized by the public", even if these rules are not specifically stated in the company's internal policies. Employees risk termination if they violate these well-known labor discipline rules. The Rules further explain that though violation of labor discipline is not one of the statutory termination grounds listed in the Employment Contract Law, this termination ground is listed in the Labor Law which is still in effect. It seems that this clarification will give companies greater flexibility in terminating employees for misconduct. However, it is unclear what kind of "labor discipline rules" will be considered as "recognized by the public". Therefore, the impact of this clarification will be determined when cases are brought and decisions are made by the local labor arbitrator or the courts.

Key Take-Away Point:

The above two clarifications will be welcome news to companies, as they will make managing employees at least a bit easier in Shenzhen.

Highest Court in Nanjing Finds Labor Dispatch Arrangement Invalid

In November 2015, the Nanjing Intermediate People's Court ruled that an employment contract between a dispatch agency and its dispatched employee was invalid, and found instead that a *de facto* employment relationship existed between the dispatched employee and the host entity. The court took the view that the role of a driver, which the dispatch employee held, was not a substitute job in a transportation logistics services company. The court also found that the role did not fulfil the criteria of either a temporary or auxiliary job position after having examined the terms of the contract and the type of work undertaken.

The dispatched employee had entered into a contract with the dispatch agency in 2010, and the last contract was from September 1, 2014 to August 31, 2016. The court held the last contract (from September 1, 2014 to August 31, 2016) was invalid as it failed to meet the legal requirement that companies may only engage dispatch employees in temporary, auxiliary or substitute job positions.

While the court supported the employee's claim that he had a *de facto* employment relationship with the host entity, the court declined to award the employee double wages as a penalty for the company's failure to enter into an employment contract with the employee.

Key Take-Away Points:

This case demonstrates that at least some courts are prepared to enforce the Interim Provisions on Labor Dispatch, which stipulate that when a company hires a dispatched employee, the role must be genuinely a temporary, auxiliary or a substitute job position. However, not all courts may be willing to entertain claims of *de facto* employment in such circumstances and courts' views on this important issue seem to vary by city (please see our newsletter updates from [February 2015](#) and [October 2015](#)).

Court Dismisses Employee's Claim for Compensation Due to Delayed Income Tax

A Beijing court recently dismissed an employee's claim for compensation from his company, which had withheld but not remitted his individual income tax ("IIT") to the tax authorities.

The employee claimed that the company's failure to remit his IIT for the years 2010 and 2011 meant that he could not meet the local requirements for purchasing a house and car in Beijing, i.e. making more than 5 years' of IIT payments in Beijing. On this basis, he claimed that the company should compensate him for the loss of RMB 730,000.

The company argued that they had already made back payments for the employee's IIT, and had also paid the late penalty charge. They disputed

the fact that there was a direct causal link between the missing IIT and the employee's alleged loss.

The court found that the missing IIT did not actually affect the employee's qualification to purchase a house as the employee could use his social insurance records to satisfy the requirements instead. In relation to the car, the court held that even if the IIT had been paid on time, the employee would only have been qualified to participate in the lottery for purchasing a car (in Beijing, there is a lottery for the requisite license plate), but this did not guarantee an entitlement to purchase a car. As a result, the court dismissed the employee's request for compensation.

Key Take-Away Points:

Employers are legally obligated to withhold and remit IIT for employees. Employers should be mindful that missing or late payments not only will lead to late penalty charges, it may even result in employees bringing legal action against them for any provable damages, since certain local benefits are linked to tax payment history.

Beijing Court Ruled Employer Cannot Deem Team Outing as Annual Leave

In November 2015, the Beijing No. 3 Intermediate People's Court ruled that a company cannot deem that an employee attending a team outing equates to his/her taking annual leave, and the company should pay compensation for any unused annual leave accrued by the employee.

The employee claimed that she had 11 days' unused annual leave and the company should pay that to her in lieu of the untaken leave. The company argued that it had organized team outings for the employee's team and arranged for the employee to take holidays in Thailand for seven days and in Beidaihe for five days. They alleged that the employee had used up her annual leave entitlement as a result of these trips.

In the first trial, the Beijing Chaoyang District People's Court ruled the company had arranged the employee to take nine days of annual leave and should only pay compensation for the two remaining days of unused annual leave. However, the Beijing No. 3 Intermediate People's Court overruled the trial court's ruling. The appellate court ruled the employee should be free to decide what to do during the annual leave. If the employer claims that the team outing is an arrangement to let the employee take annual leave, the employer should prove that this has been agreed by both parties or is valid according to company policies. Otherwise, the team outing is not an annual leave arrangement, but rather a benefit provided to the employee in addition to the annual leave. Therefore, the court held that the company should pay the compensation for 11 days of unused annual leave.

Key Take-Away Points:

If a company intends to deem a team outing as an annual leave arrangement, it should specify this in the employment agreement or the employee handbook, and ideally employees should be free to determine their own activities during the trip. Otherwise, the company will be liable to pay out those days which will be categorized as unused annual leave days.

Beijing Court Rules Against Employee's Claim After Signing Settlement Agreement

The Beijing No. 1 Intermediate People's Court recently ruled against an employee who claimed an additional bonus payment after having entered into a mutual termination contract ("**MTC**") with the company.

The employee joined the company in 2010 and signed a MTC with the company in December 2014. This contract provided that the company would pay the employee labor remuneration, including his salary and benefits, and it included a provision where the employee confirmed that he did not have any employment claims against or disputes with the company. Later the employee demanded an additional bonus payment by arguing that the labor remuneration under the MTC included salary only. The company disputed this and provided evidence to show that the employee did not satisfy the bonus payment condition, as he left the company before the bonus evaluation date.

The intermediate court held that the MTC is enforceable, as it does not violate any mandatory laws or regulations, and no party was defrauded, coerced or taken advantage of by the other party when entering into the MTC. Instead, the employee had agreed to waive his claims against the company, and thus, the court ruled against the employee.

Key Take-Away Points:

The above case demonstrates that it is generally difficult for employees to revoke a signed MTC or demand additional payments following the signing of the MTC. However, to reduce the company's risk of being ordered to pay additional payments other than those under the MTC, it is recommended to include a comprehensive waiver and release under which the employee has expressly waived all types of employment claims or entitlements against the company.

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Court Ruled Termination Unlawful Even in Office Shut Down Situation

The Beijing No. 3 Intermediate People's Court recently ruled that an employer's termination of an employee on "major change" grounds was unlawful even though there was an office closure, and ordered statutory damages, compensation for unused annual leave and underpaid wages totalled around RMB 66,000.

An employee was hired by an oil company ("**Company**") as the sales director of the Company's sales department, working from the Beijing sales office. The Company notified the employee, via email, of its decision to immediately shut down the Beijing sales office due to enterprise development strategies and corporate restructuring. Later the Company unilaterally terminated the employee's employment after he completed his work handover procedure and was in negotiation with the Company for mutual termination. The employee then sued the Company and claimed reinstatement.

The court found that the shutdown of the Beijing sales office just affected certain geographic job functions of the employee but had not resulted in the elimination of his entire job function, thereby not satisfying the criteria for a "major change of the objective circumstances". Therefore, the court ruled the termination unlawful. Although the employee originally sued for reinstatement, the employee reportedly amended his claim to ask for monetary damages instead, after the court found several emails of the employee's which demonstrated his intention for mutual termination.

Key Take-Away Points

This case indicates that an office shutdown may not necessarily constitute a "major change" for the purposes of justifying a unilateral termination under Article 40(3) of the Employment Contract Law, if the employee's job function is not entirely eliminated as a result of the shutdown. It also demonstrates that if the company can prove the employee's intention to accept mutual termination, it could help to defend against a reinstatement claim, thereby avoiding the worst case scenario in a lawsuit (i.e., being ordered to taking the employee back).

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