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Executive Summary

Draft Labor Contract Law Implementing Guidelines Issued

The State Council recently published guidelines to implement the Labor Contract Law. While these rules have yet to go into effect officially, they do give a good idea as to how labor arbitrators and the courts should be interpreting the Labor Contract Law. We review a number of important issues, such as an employees refusal to sign a labor contract, an employers liabilities for failure to extend a contract, the calculation of training funds and other employee penalties, task-associated employment, and staffing services.

By Maarten Roos and Chen Yan

Why the Number of Labor Disputes is Increasing?

Labor disputes in China are on the rise with the increased public awareness of the newly implemented Labor Contract Law. Wang Jing & Co. partner Pan Lidong and associates show why this is happening, and what the most contentious points are. Among the points discussed as reasons for disputes are overtime pay, severance pay, and social insurance.

By Pan Lidong, Deng Yong, and Jason Leveille

Guangdong Issues Labor Contract Law Interpretations

In an effort to provide more clarity to the courts when ruling on labor disputes, the Higher Peoples court and the arbitration commission of Guangdong Province have issued a set of interpretations which are both far-reaching and extremely significant, showing a surprising shift towards employers rights. The most important interpretations relate to overtime pay, severance pay, the calculation of severance pay, and the arbitration of employment disputes. Every business hiring in Guangdong will be affected by these changes.

By Chen Yan

NEWS FLASH

The recent adoption of the *Labor Contract Law of the Peoples Republic of China (Labor Contract Law)*, the *Law of the Peoples Republic of China on Labor Dispute Mediation and Arbitration (Labor Dispute Mediation and Arbitration Law)*, and numerous implementing guidelines and interpretations, is putting renewed focus on how employment relations should be structured in China. This has led to a surge of queries for the drafting of employment contracts and employee handbooks, and the resolution of labor law disputes in arbitration or litigation.

To support our lawyers in dealing with labor law cases in Guangzhou and Shanghai, former labor arbitrator Ms. Chen Yan recently joined our team. Her strong connections and intricate knowledge of labor arbitration combine well with the Firms broad experience in assisting clients with labor law issues including negotiations and dispute resolution. For more information on how we may assist you, please email or call your usual contact at Wang Jing & Co.

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Draft Labor Contact Law Implementing Guidelines Issued



State Council Provides Insight into how the Labor Contract Law will be Implemented

On May 8, 2008, the State Council published the *Implementing Regulations for the Labor Contract Law of the Peoples Republic of China (Draft) (Implementing Regulations)* to the public for consultation. Although the Implementing Regulations have not been officially enacted and brought into effect, the provisions indicate a trend of legislation which may guide employers in handling labor relationships.

I. Employees refusal to sign a labor contract (Articles 6 and 7)

The Labor Contract Law requires employers to conclude a labor contract with an employee within one month of the date of employment, and stipulates the liability of the employer if it fails to conclude such contract on time. However, it does not stipulate any penalty for employees who delay or refuse to conclude a labor contract on time. To keep equality between the rights and liabilities of the employer and the employee the Implementing Regulations establish the consequences:

(A) If the employee refuses to conclude a written labor contract within one month of the date of employment, the employer may terminate the labor relationship by giving the employee three days notice and without paying any economic compensation;

(B) If the employer fails to conclude a written labor contract between a period of 1 month and 1 year after the beginning date of the employment, the employer must pay double the wages pursuant to the Labor Contract Law and must still conclude the labor contract with the employee. If the employee refuses to sign the contract, the employer may terminate the labor relationship; however, it still must pay normal economic compensation.

It is important to note that the employer bears the burden of proof to show that the employee has refused to sign the labor contract.

II. Failure to offer a new contract after a fixed-term contract expires (Article 20)

If an employer fails to sign a new contract within 1 month after a fixed-term contract has expired, and the employee continues to work for the employer, the employer must pay double the wages. Moreover, failure to pay economic compensation, complete termination procedures or arrange for work handover can all indicate a continuation of the employment relationship.

III. Special funds for training (Article 19)

Although the Labor Contract Law specifies that an employer providing an employee with professional and technical training may conclude an agreement specifying the period of service with the employee, it does not mention the standard of special funding. Article 19 of the Implementing Regulations specifies: any training fees paid by an employer which exceed 30% of the average wage of the last year, can be included into a separate agreement which stipulates the period of service and corresponding penalty for breach of contract.

Training funds include training expenses with a payment voucher, traveling expenses during training and other direct expenses arising from training. Regular wages during training are not considered training expenses.

IV. Invalidity of articles which burden the employee with a penalty (Article 26).

Article 25 of the Labor Contract Law stipulates that except for agreements on training and non-competition, an employer cannot demand that an employee bear penalty for breach of contract. The Implementing Regulations confirm that all employment contract terms conflicting with the Labor Contract Law are invalid, which means that even if such penalty clauses were agreed upon before 2008, they are not enforceable.

V. Termination of labor contracts upon completion of specific tasks

The Labor Contract Law only requires an employer to pay economic compensation to a qualified employee upon the expiration and termination of a fixed-term labor contract, but does not hold any stipulations on compensation for a labor contract terminated upon completion of specific tasks. The Implementing Regulations fill in this loophole of the Labor Contract Law by stipulating that an employer still needs to pay economic compensation for such terminations. Hence, an employer can not avoid paying economic compensation by signing a task-based contract.

VI. Staffing Services (Articles 38 and 40)

(A) Article 66 of the Labor Contract Law stipulates that staffing services may only be used for placement of employees in temporary, auxiliary, or substitute positions, but there is no mention of what exactly this means. The Implementing Regulations clarify that temporary, auxiliary, or substitute positions

refer to those working positions which are not in the employers main business and exist no longer than 6 months, or working positions that need to be filled temporarily to replace employees who take leave for study or other reasons.

(B) The Implementing Regulations indicate that a staffing firm may not sign probation agreements with a placed employee.

(C) Except in some legal circumstances, a hiring unit cannot return a placed employee to the staffing firm. In previous practice, a hiring unit usually returned a placed employee to the staffing firm because of business necessity, adjustment of position etc., which resulted in a large amount of random terminations of the staffing service relationship. Hence, the Implementing Regulations forbid the hiring unit from returning the placed employee to the staffing service unless any of the circumstances of Article 39 (grave violation of the employers rules and regulations, commitment of serious dereliction of duty, a situation where criminal liability is pursued, etc.) or of Clause 1 or 2 of Article 40 (the placed employee cannot engage in any other work arranged by the employer for illness, the placed employee remains incompetent for his position after training, etc.) of the Labor Contract Law arises.

VII. Conclusion

Although the Implementing Regulations have not yet been approved they do represent the intent of legislators and the trend of future legislation. Since January 1, 2008, China has seen an increasing number of labor disputes reaching arbitration, and this has led to a number of controversies and inconsistencies in interpretation. It is generally believed that the Implementing Regulations will have a great deal of influence on how future arbitration will be decided.

By Maarten Roos and Chen Yan (picture on right)



Why the Number of Labor Disputes is Increasing?



Common Causes for Labor Disputes

I. Sharp Increase in Labor Dispute Cases Since 2008

Since the *Labor Contract Law* (**Labor Contract Law**) became effective, the number of labor disputes entertained by the labor arbitration institutes at various levels in Guangdong Province surged three times the number for the first half year for same period last year, Guangzhou, Shenzhen, Dongguan, Zhongshan, Foshan and Huizhou accounting for 90% of all cases. In addition, the number of labor dispute cases ascertained in the first half year by courts at various levels in Guangdong Province increase from 24,338 in 2007, to 39,767 this year, up 63%.

II. Causes for Increase in Labor Disputes

As China's social and economic development continues, employees are becoming increasingly aware of their rights. In addition, the official spread of information on labor laws and regulations by the government and media is spurring employees to solve labor disputes by way of labor arbitration and litigation. The *Labor Contract Law* and the **Labor Disputes Mediation and Arbitration Law**, further embody the concept of safeguarding employee rights and interests, leading to the sharp increase in labor disputes.

(A) Arbitration and Litigation Fees

The cost of arbitration and litigation of labor fees have been drastically reduced. Previously in Guangdong, as per the *Guangdong Provisions on the Administration of the Collection of Labor Arbitration Fees*, the cost of labor arbitration was calculated proportional to the disputed amount, but with a minimum of RMB 500; in practice, fees often reached RMB 1,000 or more. Together with possible litigation fees (in case of appeal) and other economic costs, this provided a major obstacle for employees to solve labor dispute.

To reduce the economic cost of labor disputes, the State Council's *Measures for the Collection of Litigation Costs*, which became effective on 1 April 2007, lowered the arbitration fee to RMB 10 per case, while the *Labor Dispute Mediation and Arbitration Law* made the labor arbitration free of charge, significantly lowering the barrier to dispute resolution through labor arbitration.

(B) Extension of the Time Limit

Previously, the time limit for applying for labor arbitration was 60 days as of the day the party knew or should have known that his rights had been infringed. Such a tight time limit was easily missed by employees. The *Labor Dispute*

Mediation and Arbitration Law extended this time limit for bringing a case to labor arbitration to one year, giving employees more time to make their claim and protect their rights.

(C) Limiting Contract Termination

Before 1 January 2008, where the employer proposed unilaterally to terminate the employment contract before its expiration, the employer shall pay the employee severance pay based on the number of years the employee worked with the employer, at the rate of one month's wage for each full year worked.

However under the *Labor Contract Law*, where the employer terminates the employment contract in violation of the *Labor Contract Law*, the employee may either demand continued performance of the contract, or demand the employer to pay severance pay at the rate of two months salary for each full year.

Obviously, the more strict conditions and procedures for termination of the labor contract by the employer and the higher standards of severance pay make it more attractive for employees to bring a case to labor arbitration and/or litigation.

III. Subjects of Labor Disputes

According to our experience, the most frequent subjects of dispute are overtime pay, severance pay for termination of the employment contract, and social insurance.

(A) Overtime pay

At present, it is very common for employees to work overtime, since overtime work is not prohibited by law, nor is it generally rejected by employees. However, disputes occur easily when it comes to calculating overtime pay. Employers prefer to exclude bonuses, allowances and subsidies, thus keeping the rate lower and employees prefer to include them.

(B) Severance pay

In any of the following circumstances, the employer shall pay the employee severance pay:

- 1) the employment contract is illegally terminated by the employer;
- 2) the term of the contract expires;
- 3) the contract is terminated at the suggestion of the employer, and the parties reach agreement through negotiation; or
- 4) the contract is terminated by the

employee because the employer violates the legal provisions or the stipulations of the employment contract.

While the *Labor Contract Law* gives a clear definition on the circumstances under which severance pay shall be paid for termination or ending of the employment contract, in practice, causes for termination may vary considerably, and disputes often arise on whether and how much severance should be paid.

(C) Social insurance

In recent years, the State has endeavored to provide all citizens with social insurance coverage, and both employers and employees are increasingly paying attention to this matter. According to law, payment of social insurance funds shall be jointly borne by the employer and the employee, whereby the employer shall bear the larger portion. Currently, social insurance-related disputes cover a wide range of issues, including: whether social insurance has been paid on time and in full according to relevant laws; whether social insurance has been paid based on the employees actual wages and whether such a basis is lower than the standard provided by the local government; and when employers do not pay any social insurance for their employees.

IV. Conclusion

At present, different labor dispute arbitration institutes take different attitudes toward disputes over social insurance; in some regions, arbitrators will instruct employees to submit such disputes to the labor supervision department or the court for settlement. In Guangdong, arbitration institutes should follow the *Guiding Opinions on Several Questions Arising from Applicability of the Law on Labor Dispute Mediation and Arbitration and the Law of Employment Contracts*.

(For more information about the *Guangdong Guiding Opinions* please see the article on page 4)

By Pan Lidong, Deng Yong, and Jason Leveille

Guangdong Issues Labor Contract Law Interpretations



Guangdong Labor Law Interpretations

The Higher Peoples Court of Guangdong Province and the Arbitration Committee of Labor Disputes of Guangdong Province promulgated the *Guiding Opinions on Several Questions Arising from Applicability of the Law on Labor Dispute Mediation and Arbitration and the Law of Employment Contracts (Guiding Opinions)* on 6 July 2008. The Guiding Opinions serve to guide courts and labor departments throughout Guangdong Province in implementing the recently effective **Labor Contract Law** and **Labor Dispute Mediation and Arbitration Law** and provide extremely significant elaborations on a number of subjects. Most importantly, they signify a remarkable shift in the balance between employers and employees, strengthening the rights of an employer in several crucial areas. Employers and employees in Guangdong Province and elsewhere should take notice.

I. Overtime pay

(A) The calculation base for an employees overtime pay shall be the employees basic pay for normal working hours (thus excluding bonuses, allowances and subsidies), although an employer may also agree to include other pay to calculate overtime.

(B) In the labor contract, the employer and employee may agree that the salary already includes overtime pay, making it unnecessary to pay for overtime in addition to the agreed salary.

(C) Even if there is no written agreement concluded on whether salary includes overtime pay, salary may include overtime pay as long as the employer can adduce relevant evidence to prove that this should be the case.

(D) If overtime pay is to be included in the agreed salary, then the pay for normal working hours shall not be lower than the determined minimum wage.

(E) If overtime pay is not included in the salary and an employee claims for overtime pay, it shall be up to the employer to prove that the employee did not work overtime. To this end, employers are advised always to use electronic records.

Note: The above guidance on overtime seems to go far beyond current provisions of law, and seemingly contradicts previous legal practice. In effect, this interpretation gives employers much greater flexibility in enticing employees to work overtime without providing additional salary, though employers should word contracts carefully to this end.

II. Severance Pay

(A) An employee's claim for termination of an employment contract and payment of economic compensation due to the employer's failure to pay social insurance for him prior to effectuation of the Labor Contract Law shall not be supported.

(B) An employee's claim for termination of an employment contract for the employer's failure to pay social insurance after effectuation of the Labor Contract Law shall be supported, with economic compensation for the period as of 1 January 2008.

(C) An employee's claim for termination of an employment contract and payment of economic compensation due to the employer's failure to pay social insurance in full or on time shall not be supported.

(D) Where an employer unlawfully terminates an employment contract, and thus needs to pay compensation to an employee according to the provisions of the Labor Contract Law, compensation shall be calculated as of 1 January 2008. For the working years prior to 1 January 2008, compensation shall be calculated according to the provisions of the *Labor Law of the Peoples Republic of China* (1994) (**Labor Law**).

III. Conclusion of a written employment contract

Within one month as of the actual start of employment, if the employer and employee fail to reach an agreement in respect of conclusion of an employment contract, the employer may terminate the employment and shall be exempt from paying economic compensation.

IV. Arbitration over employment disputes

(A) The time limit of arbitration, namely 60 days as prescribed by the Labor Law, shall apply to all employment disputes arising prior to 1 May 2008. For employment disputes arising thereafter, the relevant provisions of the Labor Dispute Mediation and Arbitration Law shall apply (i.e. 1 year).

(B) Only the following disputes over social insurance will be accepted for labor arbitration:

1) Disputes arising from the number of years of paying pension insurance;

2) Disputes arising from an employer's failure to pay work injury, medical, unemployment and maternity insurances, which consequently deprives the employee of relevant benefits;

3) Disputes arising from an employer's failure to pay work injury insurance in full, which consequently causes the employee losses in respect of work injury treatment.

Other disputes relating to social insurance, such as those arising from the payment base of pension insurance or housing funds, shall not be deemed labor disputes and thus cannot be brought to labor arbitration.

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