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CHINA

Legal Bulletin

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CHINA**

Executive Summary

New Social Insurance Law Takes Effect

The new Social Insurance Law was promulgated by the National People’s Congress on the 28th of October, 2010, and will take effect on the 1st of July, 2011. China’s Social Insurance Law regulates five basic social security insurances that concern all citizens’ interests: basic endowment insurance, basic medical insurance, employment injury insurance, unemployment insurance and maternity insurance. Our experts take a look at some of the main points under this new social insurance regime and analyze its impact on HR management for employers operating in the PRC.

By Deng Yong, Li Minqi, and Zach Wortham

The Changing Face of Employment: Labor Unions

Worker unionization has increased in China over the past few years. Chinese domestic companies and foreign-invested companies operating in China are feeling the effects, but in different ways. Some Chinese firms are turning to union mediators to help deal with worker strikes, while foreign-invested companies are being pressed by the Chinese government to ensure labor unions are represented. In this issue, we provide you with an overview of what the law has to say about Labor Unions, their mission, and how their increased presence could affect your business in China.

By Lin Guiping and Marion Jaeckel

NEWS

China Introduces More New Rep Office Regulations

The Chinese State Council recently issued new regulations to strengthen the administration of representative offices (ROs) of foreign enterprises (FEs) in China. The “Regulations on the Administration of Registration of Resident Representative Offices of Foreign Enterprises” issued on November 19 will take effect on March 1st, 2011. The most noticeable changes in the new provision are:

- ROs should submit an annual report between March 1 and June 30 providing information on the current and legal status of the FE, the ongoing business activities of the RO, and the payment balance as audited by their accounting agency. The registration authorities will issue an RMB 10,000 to RMB 30,000 penalty if ROs fail to provide the report on time, and an RMB 20,000 to RMB 200,000 penalty if the report includes false information. Fraud may also lead to license revocation
- FEs need to designate one person as the chief representative of their ROs; they can also designate one to three others as representatives.
- ROs may not engage in any profit making activities. They will have to pay an RMB 50,000 to RMB 500,000 penalty for any profitable activity, and RMB 10,000 to RMB 100,000 for exceeding the allowable scope of business.
- FEs should announce to the public through media designated by the authorities when they establish new ROs or make any changes to them; ROs that fail to make such announcements may pay an RMB 10,000 to RMB 30,000 penalty.

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PRC Social Insurance Law takes effect



PRC Social Insurance Law Takes Effect

On October 28, 2010 the Social Insurance Law was passed and will come into force on July 1, 2011. The law not only reduces the burden of employers participating in social insurance schemes for their employees, but also reinforces the penalties for illegally functioning enterprises. We provide here a brief introduction of the main points of the new law and how it may affect companies doing business in China today.

The Chinese social insurance structure has been in place and functioning for years and has largely been based on five fields or classifications; basic endowment insurance, basic medical insurance, employment injury insurance, unemployment insurance, and maternity insurance. Specific laws and regulations have been drafted to address each field and most of them have also been covered in local regulations and implementation guidelines. However, the Social Insurance Law is the first law which covers the entire social security framework, covering not only the rules of each insurance policy, but also specific regulations for particular types of insurance.

The Obligations of Employees for Participating in Social Insurance

The Social Insurance Law stipulates that employees are obliged to participate in basic endowment insurance, basic medical insurance as well as unemployment insurance and to bear part of the insurance charges for those policies. Compared to the former social insurance regulations which emphasized that employers should provide social insurance for employees, this law clearly indicates that it is the employee's obligation to participate. Therefore, it may now be possible that when employees refuse or voluntarily opt out of social insurance, enterprises can avoid legal risks.

Consequences If an Employer Does Not Provide Social Insurance for Employees

In order to ensure employers participate in social insurance, the Social Insurance Law details how social insurance premiums will be recovered should an employer not make the relevant payments. Specific measures include: authorities may directly collect unpaid social insurance premiums from an employer's bank account; authorities may also use the courts to seize, seal up, or auction an employer's property up to the equivalent value of the unpaid social

insurance premiums. Similarly, if an employer has not made social insurance payments and the relevant charges have already been paid to the employee, the authorities can recover the social insurance premiums through the methods mentioned above.

Employers Must Report All Terminated Labor Relationships

The Social Insurance Law adds a legal obligation for employers to report the termination of any labor relationship. Which means employers must report to the social insurance agency any terminated labor relationship within 15 days.

Employers are Not Required to Provide Endowment and Medical Insurance for Part-time Employees

It is a legal liability for employers to participate in social insurance for full time employees. But that is not the case for part-time employees. The Social Insurance Law clearly indicates that part-time employees can participate in basic endowment insurance/medical insurance and pay for the insurance by themselves, but that it is not necessary for employers to provide the basic endowment insurance/medical insurance for part-time employees.

However, it should be noted that employers must pay employment injury insurance premiums for part-time employees, otherwise should an employee suffer an injury while at work, the employer may be liable for any expenses related to that injury.

Employers are Not Responsible for Expenses from Death for Non-work Related Injuries

Prior to the Social Insurance Law, the expenses incurred by an employee's death even when not due to work-related injuries were the responsibility of the employer. This was a burden on the enterprises' business costs. The Social Insurance Law will transfer the aforesaid liability to the social insurance agency and will be felt significantly by enterprises with aging employees.

Changes to Work-related Injury Qualification

Injuries and/or deaths caused by criminal negligence will be deemed as work-related injuries, while injuries or deaths caused by drug addiction will not qualify. Therefore, less serious criminal acts will no longer stop employees from enjoying the benefits of work-related injuries. The Social Insurance Law

PRC LEGAL UPDATE:

December 1, Urban Construction Tax and an Education Surcharge will go into effect

In guofa[2010]35, the State Council directed that foreign enterprises will pay additional taxes in January 2011 for income derived from the month of December 2010.

The urban construction tax rates are set at 7 percent, 5 percent and 1 percent of a company's turnover tax depending on whether the business is located in a city, county town or a place other than a city or town. The education surcharge is fixed at 3 percent of a company's turnover tax. The turnover tax consists of value-added tax, consumption tax and business tax.

These surtaxes are levied as a percentage of the combined total of other taxes and the taxes can be up to 10 percent of a company's turnover taxes or 1 percent of the net turnover of a company. They should be paid monthly along with VAT, CT and BT.

China's FDI Increases 7.86% in October

China continued its upward trend of attracting FDI for the 15th consecutive month in October, according to the latest data released by the National Bureau of Statistics of China.

Foreign direct investment into the country came to US\$7.66 billion for the month of October, a year-on-year increase of 7.86 percent. China's FDI inflows came back to pre-financial crisis levels for the first time in September and continued to show acceleration through October.

PRC Social Insurance Law takes effect



also stipulates that even though an employee is sentenced to a criminal penalty, his benefits for work-related injuries shall not be influenced. The foregoing changes mean that employers are no longer exempted from the charges of work-related injuries which may have been caused by the aforesaid reasons.

Injury Insurance Fund Payments are Expanded, While Employer Responsibility is Decreased

The Social Insurance Law now allocates some charges which used to be paid by employers now be paid by the employment injury insurance funds. The charges paid by injury

insurance funds include: food subsidies for hospitalization, travel, room and board expenses for medical treatment, nursing care fees during the injury period, and lump-sum medical subsidies enjoyed when the employment contract is terminated. Such changes should alleviate the burden on employers and hopefully provide a better environment for employees and the companies they work for.

Conclusion

With the promulgation of the Social Insurance Law, the structure of the social insurance system in China will be more clearly

understood and transparent. The changes should allow enterprises to operate more efficiently and respond to difficult situations such as the death of an employee with a clear understanding and according to the law. The Social Insurance Law is just another example of how China is making its business landscape come on line with international standards and should provide confidence to employees and employers as to how the future will develop.

By Deng Yong, Li Minqi and Zach Wortham

The Changing Face of Employment: Labor Unions in the PRC

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Chinese workers have always been particularly attuned to their legal rights. But after two decades of sustained development, workers are also now aware of global norms and their ability to demand better. Recently a spate of strikes in large, foreign-funded companies have taken place bringing renewed attention to the fact that problems still can and do exist in some enterprises. In 2009 about 684,000 cases were

reported to labor arbitration committees, while more than 319,000 labor dispute cases were heard by the courts, according to statistics from the All-China Federation of Trade Unions (ACFTU).

Concerned by the rise in the number of lawsuits between employers and employees in labor arbitration courts, the NPC Standing Committee amended the Trade Union Law in August 2007 and has launched an effort to enforce it.

Primary function of Trade unions

Historically, the primary function of the ACFTU was to act as an intermediary between the workers and the government. Over the past two decades, its principal role has been to help resolve disputes between workers and investors in an effort to promote political and economic stability so that the country could continue to attract foreign investment. As private industry increased and displaced state owned companies China's unions saw a decline in their power.

PRC LEGAL UPDATE:

China Considers Locating a 'Free Zone' in Shanghai

Reports say that the National Development and Reform Commission and the Development Research Center of the State Council are leaning towards awarding Shanghai the country's first "free zone."

China already has 16 free trade zones, also known as bonded areas, since 1990. However, the "free zone" would be different from the current free trade zones, where customs exempts tariffs on commodities imported to the area and do not impose tariffs if they are not for

export. The new proposed "free zone" refers to a specific area where favorable taxation and administration policies are set up for both import and export.

China to Allow Foreign Capital into Medical Organizations

China recently released a circular allowing for the first time foreign capital involvement in China's medical institutions.

The Chinese State Council gave permits to foreign enterprises to establish both profitable and non-profit medical institutions in China. The circular clarifies that China will offer favorable policies to Hong Kong, Macau and Taiwan investors who are interested in founding medical institutions and also

encourages all kinds of foreign investment in medical organizations across China's middle and western regions.

The circular says China will gradually relax restrictions on foreign share proportions in jointly invested medical institutions, and will finally open up the market to wholly foreign-owned medical organizations after first opening up several trial locations.

The government will simultaneously simplify the licensing procedures for foreign investors interested in establishing medical organizations. According to the circular, jointly-invested medical institutions need to get approval from provincial authorities, while wholly foreign invested medical organizations need to apply for a license from China's Ministry of Health and Ministry of Commerce.

The Changing Face of Employment: Labor Unions in the PRC



The Labor Contract Law calls for all businesses to have some form of representation and therefore the ACFTU plans to have trade unions established in 90 percent of the country's corporate enterprises by 2012.

Officially, Labor Unions are charged with improving the quality of the rank of workers, representing and organizing workers to participate in management and supervision of the enterprises, and negotiating a collective contract system. Bylaws and important decisions related to the employees' vital

interests should also be supervised by the labor unions. However at the present time, there are no legal penalties if companies don't take a union's opinion into consideration.

Requirements for Employee Representation

The Trade Union Law covers nonprofit organizations, government agencies, domestic and foreign companies. The Thirteenth Article of the Foreign Enterprise Law prescribes that "workers of the enterprises with foreign investment shall establish trade union

organizations according to law to conduct trade union activities and safeguard the legitimate rights and interests of the workers. The foreign-invested enterprises should provide the trade unions of their own enterprises with necessary conditions for conducting activities." Labor unions should be established within foreign-invested enterprises when the number of union members reaches the set level according to relevant laws. In practice this set level can be easily reached, especially in large enterprises.

Companies with fewer than 25 union members	3 options: (1) Establishing a basic-level trade union separately. (2) Establishing a basic-level trade union by the members of 2 companies or more. (3) Electing an organizer to organize activities for the members. Note: The elected organizer is not equal to a union and doesn't have the same rights.	A full-time trade union chairman should be appointed in the union of an enterprise or public institution with 200 workers or more . The union can also give up this right.
Companies with 25 union members or more	Unions should be set up	

It is also important to note that foreign companies that establish labor unions are required to pay 2% of their payroll as dues for unions.

Sanctions:

Any company which does not allow its employees to form a union is in violation of the law.

The Labor Department may take legal action against any company, which refuses to allow employees to unionize.

Civil and criminal damages maybe levied	(1) In case of obstruction of workers to organize trade unions (2) If the firm: > prevents trade unions from performing their duties > changes the position of a union member due to the performance of union duties > or harasses a union member due to the performance of union duties
Compensation of twice the annual income maybe required as compensation	(1) If members or workers involved in trade unions activities are fired (2) If union members are fired due to the performance of union duties Note: Trade union committees elected by union members have terms of 3 or 5 years. It is forbidden to terminate their labor contract or to change their work position during this term. The duration of the labor contract is automatically extended to match the term.
Corrective action by the government may be levied	(1) If the firm prevents the union from organizing an employee congress or other rightful activity ; (2) In case of illegal revocation or merger of trade unions organizations ; (3) In case of unjustified refusal to carry out consultation on an equal footing ; (4) Or if the firm prevents the labor union from investigating in favor of an employee.

Conclusion

Although unions have increased costs for foreign-invested companies in China, many still find the country to be a cost-effective location to do business. The best strategy for Western employers in China is to make sure their operations are fully compliant with all

labor laws and that their employees are treated in accordance with basic good practices - given contracts, paid on time, and treated according to the law. Foreign investors should be prepared to work with the Chinese union, and be prepared to adapt to any new developments as China's

labor environment is changing rapidly. China is eager to put global norms in place in several aspects of its economy and this includes unionization.

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