

# CHINA Legal Bulletin

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## Executive Summary

### 2010 Wang Jing & Co. Legal Retrospective



2010 was a busy year for Chinese legislators and so to provide our readers with a bit of clarity on the situation, we have set about drafting a glimpse at some of the most important changes to PRC laws and what they might mean for your business. Note that this list is not complete or official but rather a general overview of what we think were some of the more pertinent legal changes. These points include updates on: labor, social welfare, health and safety, contract law, foreign investment, taxes, environmental law, and criminal law.

*By Zach Wortham & Marion Jaeki*

## 2010 Wang Jing & Co. Legal Retrospective

### LABOR LAW: Clarifications of Current Legislation

On the 30th of April of 2010, the Ministry of Human Resources and Social Security published the Notice on Printing and Distributing Special Action Plan of Comprehensively Promoting the Implementation of Labor Contract Scheme in Small-sized Enterprises, requiring local governments to formulate specific implementation plans to ensure that in three years most small-sized enterprises would sign employment contracts with laborers in accordance with the law and to push small-sized enterprises to universally abide by the law with regard to wage payment, work hour management and participation in social insurance.

On September 13, 2010, the Supreme People's Court (SPC) issued its Third Official Opinion on Various Issues Related to the Application of Law to the Handling of Employment Dispute Cases ("SPC Opinion"). The SPC Opinion stipulates that agreements between employers and employees regarding termination of employment and settlement of salary, overtime, severance, and other matters should be upheld as valid unless they violate the law, were signed under threat or deception, or involve major misunderstandings or gross unfairness. This

provides some legal backing for the validity of waiver and release agreements, though it still leaves open the possibility that they may be challenged later on. In another provision, it is said that the employee has the burden of proving that he actually worked the overtime hours he claims. However, if an employee can show that the employer possesses the relevant evidence of his overtime work, and if the employer refuses to submit such evidence, then the employer would bear the consequences for such refusal.

Finally, adjustment of minimum wage standards was first suspended, then as the economy continued to grow many provinces increased their minimum wage standard in 2010. Most increased the minimum wage by over 10%, while Beijing, Shandong and Jilin raised it by more than 20%. Starting on July 1, the minimum wage in Beijing went from 800 RMB/Month to 960 RMB/Month and the minimum hourly wage of part-time workers increased from 9.6 RMB/hour to 11 RMB/hour.



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## **SOCIAL WELFARE: The New Social Insurance Law**



On October 28th, the Social Insurance Law was passed and will take effect on July 1st, 2011. The law specifies the common right of all citizens to access and enjoy five forms of insurance: basic endowment insurance, basic medical insurance, employment injury insurance, unemployment insurance, and maternity insurance.

Some of the more significant provisions include:

1. Foreign nationals working in China may participate in social insurance.
2. Social insurance officials now have greater authority to obligate employers to make payments if an employer does not do so on time or underpays. The authorities may check employer's bank accounts, and then order the bank to directly pay any overdue amounts to the social insurance authorities, they can also demand that the employer offer collateral, or even apply to the courts to freeze, attach, or auction off assets to pay amounts owed.
3. Some of the costs that companies were responsible for in the event of a work injury will now be covered by work injury insurance. This fund will be financed by companies at a rate to be decided by the State Council, and depending on how dangerous their jobs are.
4. A policy goal is to establish a system where out-of-area medical costs are covered by the medical insurance system.
5. Employees may transfer their basic endowment insurance accounts from one residence to another and there will be a new endowment insurance system for rural residents.
6. The law touches on the confidentiality of social security information, saying that social security authorities may not disclose information submitted by employers or employees, or they will be subject to punishment.

## **HEALTH and SAFETY: The Tort Law and Other Major Changes**

### **The New Tort Law**

On December 26th, 2009, the Tort Law was adopted and came into effect on July 1st, 2010. The law contains strict product liability stipulations and provides guidance for determining damages. Among its provisions, the law extends product recall obligations to all products sold in China and does not cap punitive damages. A manufacturer or a seller will be held liable if it has caused harm but fails to take sufficient, effective or timely measures such as warning the public or recalling the product.

The Supreme People's Court released on June 30th, 2010 a Circular on Several Issues Concerning Application of the Tort Law. Under the Circular the following main points are addressed:

- Tort-caused civil litigation after implementation of the Tort Law shall be subject to the Tort Law.
- Those tort-caused civil litigation before implementation of the Tort Law shall be subject to laws and regulations at that time.
- The Tort Law shall be applicable to civil litigation which is caused by tort before implementation of the Tort Law but the damages appear after such implementation.

### **Administrative Measures for Food Production Licensing**



The General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) released the Administrative Measures for Food Production Licensing (Measures), which took effect June 1st, 2010. Under the Measures, enterprises which fail to acquire food production licenses are not allowed to be engaged in the business of food production. During the establishment of food production enterprises, the industrial and commercial administration

authorities shall examine and approve the names of the enterprises and a food production license must be acquired from the local quality supervision authorities. Similarly, AQSIQ released the Provisions for Supervising and Administering Production of Food Additives (Measures) which took effect June 1st, 2010. Under the Measures, enterprises must acquire a food production license for their production of food additives. Enterprises which apply for food additive production licenses shall submit the following materials: food additive production license applications, copy of the applicants' business license, standards of food additives used in the production, etc. The Measures also state that enterprises must conduct factory examination for the food additives before they are sold in the market.

### **MOH Released the Provisions for the Administration and Licensing of Food Imports without National Food Safety Standards**

The Ministry of Health (MOH) formulated the Provisions for License Administration of Imports of Food without National Food Safety Standards (Provisions), so as to regulate the examination and licensing of imported food without national food safety standards. Under the Provisions, importers must submit the following documentation to the examination institutions if they plan to import food without national food safety standards, including the application forms, crafts, corporate standards, inspection measures, testimonials of approving offshore production and operation and etc. The Provisions also require importers and operators of food without national food safety standards to establish records of their food import and sales.

### **New Mandatory Product Certification**

New regulations require that 132 products deemed hazardous to human, animal or plant health must receive inspection prior to leaving the factory, being sold, or being used for other business purposes. Goods for export or import also must comply with inspection. The regulations provide a mechanism to ensure that new products receive certification and to punish companies that violate the law.



## **CONTRACT LAW: SAIC Strengthens the Supervision of Contract- Related Illegal Activities**



The Supervision and Management Measures for Contract-related Illegal Activities (Measures) were implemented by the State Administration for Industry and Commerce on October 13th, 2010. According to the Measures, any party may not, by taking the advantage of a contract, falsify a contract, fabricate its status as a party to the contract, appropriate others' names to conclude a contract publicize or use untrue information to encourage others to enter into contracts, or commit other frauds. Meanwhile, operators that enter into standard contracts with consumers may not exempt themselves from the following liabilities in the provisions: liabilities for consumers' personal injury and those for consumers' property loss due to willful misconduct or gross negligence.

## **FOREIGN INVESTMENT: Five Measures for Specific Areas of Increased Investment**



Five measures were adopted to attract foreign investments in 2010. The policy of attracting foreign investments focused on optimizing foreign capital utilization structure, persuading the foreign investors to transfer their investments to middle and western China, diversifying the measures of utilizing the foreign investments, deepening the reform of foreign investment management, and tightening the foreign exchange administration system.

The first measure is intended to optimize foreign capital utilization structures. The government modified the Foreign Investment Industrial Guidance Catalogue. More fields are opened to foreign investment and foreign investment is being encouraged in high-end manufacturing, hi-tech industry, modern service, new energy, energy saving and environmental protection. The measures of Industrial Restructuring and Revitalization Plans are also applicable for qualified foreign investors.

The second measure encourages foreign investors to invest more money in middle and western China. Foreign investors are encouraged to set up labor intensive enterprises which meet environmental protection requirements in order to enjoy capital and logistical support.

The third measure speaks to the diversification of foreign capital utilization. Foreign capital is now allowed and encouraged to be invested in the restructuring of state-owned enterprises through mergers and acquisitions. In addition, measures will be taken to promote the construction of foreign-funded guarantee companies for small- and medium-sized enterprises, to enlarge the financing channels for foreign investors and to allow financial institutions to provide more credit support to foreign investors.

The fourth measure is meant to deepen reform for foreign investment management, which requires comprehensive clearance of the approvals of foreign investment projects and the minimization of foreign investment examination and approval.

The fifth measure focuses on creating a good investment environment. More incentives are being provided in economic zones and the construction of economic cooperation zones will be accelerated. The management system for foreign exchange has been improved and the procedures for foreign exchange principal settlement have been simplified.

## **TAX: Policies to Promote Employment and Long-term Investment**

### **Representative Office Changes**

On the 20th of February, 2010, the

State Administration of Taxation released the Interim Rules on the Implementation of Reform of the law governing ROs ("the Rules"). One significant change is that ROs are now subject to heightened taxation. According to the Rules (effective retroactively from the 1st of January 2010), the deemed profit rate has been changed to "no less than 15%" of expenses pursuant to Article 8 (compared with 10% under the former tax rules). Due to these new measures, many ROs may find that are now paying more taxes than a service WFOE or a FICE.



## **Two Departments Promulgate Tax Policies to Support and Promote Employment**

The Ministry of Finance and the State Administration of Taxation jointly promulgated the Circular on Employment Supporting and Promoting Tax Policies (the Circular).

The Circular stipulates that if, over the next 3yrs, commercial enterprises, service enterprises (except certain categories), processing enterprises and small community enterprises sign 1-year (or more) labor contracts with new hires and pay the relevant social security fees, the enterprises are entitled to a reduction of the business, urban construction and maintenance, educational, and corporate income taxes. The reduction is RMB 4,000 per person per year, and the figure may be changed upward or downward by 20 percent.

## **SAT Allows Firms to Deduct Losses from Taxable Income**

The SAT promulgated the Announcement on Handling of Issues Concerning Making up Losses of Previous Years with Increased Taxable Income, which came into effect December 1st, 2010. In accordance with Article 5 of the Enterprise Income



Tax Law, taxable income which has increased, upon examination by the tax authority, may be allowed to make up for losses incurred by the enterprise in the previous years. However, each loss may only be deducted from the taxable income of an enterprise within a five-year period. This clarification of how losses from previous years are handled should help ease the tax burden of enterprises that have incurred losses, but also have generated earnings recently.

## ENVIRONMENTAL LAW: Regulating the Framework of the Renewable Energy Sector

### The New Tort Law

The Tort Liability Law does not create any new environmental Tort outside of existing Chinese law and practice, but it does reinforce liability for polluters and shifts the burden of proof on to the accused in certain cases.

1. Article 66 indicates that an injured plaintiff needs only to provide prima facie evidence about the likelihood that the polluter's action caused the damage. The polluter is then required to refute the evidence.

2. Article 68 of the Tort Law further states that a plaintiff can claim compensation from a polluter or a third party if the environmental damage was caused by a third party. This means that polluters may be liable for damages even if the pollution was not caused directly by their actions.

### Revision of the Renewable Energy Law

On December 26th, 2009, the standing Committee of the National People's

Congress passed an amendment revising the Renewable Energy Law. This revised law came into effect April 2010.

The revised law says that the state council energy department, in conjunction with the state power regulatory agency and the state council finance department should "determine the proportion of renewable energy power generation to the overall generating capacity for a certain period." Energy related enterprises refusing to buy power produced by renewable energy generators may be fined up to double that of the economic loss of the renewable energy company.

### New Energy Projects Must Comply with Stricter Requirements

China has unveiled new rules requiring new energy projects to undergo strict energy-saving assessments before they can gain approval from regulators, in an effort to improve energy conservation and efficiency. The new regulations mandate that third-party institutions should perform the assessments and government agencies should conduct the reviews. Proposed energy projects that do not comply with the energy-saving requirements will be rejected, while the actual energy use of approved projects will be monitored closely.

## CRIMINAL LAW: The Scope of Criminal Law

### SPP and MPS issue Provisions on Standards for Filing and Prosecution of Criminal Cases under Public Security Organs' Jurisdiction (II)

The Supreme People's Procuratorate

(SPP) and the Ministry of Public Security (MPS) jointly issued the Provisions of the Supreme People's Procuratorate and the Ministry of Public Security on Standards for Filing and Prosecution of Criminal Cases under Public Security Organs' Jurisdiction (II) (Provisions), specifying the standards for filing and prosecution of 86 types of economic criminal cases under the jurisdiction of the economic crime investigation department of public security organs. Most notably whoever issues stocks or corporate or enterprise bonds without the approval of the relevant competent departments of the state shall be registered and prosecuted if any of the following circumstances is involved:

1. the amount of issued stocks or bonds is over RMB 500,000;
2. though the above amount standard is not reached, the unauthorized issuance leads to the purchase of stocks or corporate or enterprise bonds by more than 30 investors;
3. the issuer cannot make payment or return in time;
4. other serious consequences or other serious circumstances.

### Conclusion:

As China's economy continues to grow and globalize, the country's body of laws will continue to be updated and tailored to match the specific needs of the country and accepted international principles. 2010 was a year which featured amazing growth and development in many aspects of the Chinese economy. Look for 2011 to be more of the same with a special focus on the energy, high tech, and green sectors.

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# Happy Year of the Rabbit!

## ... from Your Trusted Advisors at Wang Jing & Co.

*This newsletter is published by the Corporate & Commercial Group of Wang Jing & Co, a PRC law firm assisting Chinese and multinational clients in business operations in China and abroad.*

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