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Several Issues about China Labor Law

Jason Tian

Recently, the High People's courts in both Shanghai Municipality and Jiangsu Province issued their respective interpretations regarding employment issues, which are employer-friendly to some extent.

We single out certain issues that concern employers mostly.

1. Default of written employment contract

You may have come to know that if an employer fails to enter into a written employment contract within the first month from establishment of labor relationship, the employer will have to pay two times the salaries received by the employee during the period of default of such written contract (other than the first month) till the default period reaches one year. According to *Opinions on Several Issues regarding Application of the Labor Contract Law* issued by Shanghai High People's Court on March 31, 2009 ("**Shanghai Opinions**"), upon deciding whether an employer needs to pay two times the already received salaries, courts should "take into consideration whether the employer has consulted with the employee in a bona fide manner and whether the employee has refused to enter into the employment contract and other circumstances; in case that the employer has faithfully and honestly consulted with the employee and the employment contract was not concluded because of Force Majeure, un-anticipated circumstances or refusal to sign by the employee, the employee shall not be entitled to double salaries during the default period. Refusal to sign the contract shall be deemed that the employee unilaterally terminates the labor relationship.

2. Form of amendment to the employment contract

According to Article 35 of the *PRC Labor Contract Law*, the employer and employee may amend the employment contract upon mutual agreement in a written instrument, one copy of which shall be held by each of the employer and employee. However, as per the Shanghai Opinions, such written instruments include but not limited to salary statement, notice of change of job/positions. It appears that such interpretation has run against the national law and regulations.

Strictly speaking, the *PRC Labor Contract Law* makes it difficult for an employer to easily change an employee's job contents and salaries agreed in the employment contract. While Shanghai Opinions may help to relieve the problem to certain degree, in light of our reservation as to the validity of this piece of interpretation, we believe it is wiser to avoid such problem by smartly drafting the employment contract or corporate bylaws with a view to preserving the right to reasonably change the duties and responsibilities according to commercial and operational needs. We believe courts would like to respect such stipulations to ensure that employers enjoy sufficient control in its human resources practice. We note that Jiangsu High People's Court issued on February 27, 2009 a circular entitled "*Guidelines on Proper Trial of Labor Disputes under Contemporary Macro Economic Circumstances*" ("**Jiangsu Guidelines**"), which provides that employers shall have the right to adjust contents of work and salaries of employees in accordance with the corporate bylaws or as agreed in the employment contract, provided that employers shall have the burden of proof in respect of the reasonableness or lawfulness of such adjustments.

INSIDE THIS ISSUE

In this issue of "**Employment**", we introduce several labor issues that arise very frequently in the course of corporate operation, such as overtime pay, non-competition, based on judicial interpretation issued by local High People's Courts in Shanghai and Jiangsu.

These interpretations represent the efforts by the court system to redress the balance between employers and employees, which is widely seen as undermined by the enactment of PRC Labor Contract Law.

3. The one month salary in lieu of one month notice

Under the *PRC Labor Contract Law*, an employer may terminate an employment contract by giving a one-month advance notice to the employee or giving one month salary in lieu of such one-month advance notice. According to Article 20 of the *Implementation Rules of the PRC Labor Contract Law*, the one month salary shall be determined according to the salary of the previous month of termination. However, as per Shanghai Opinions, “the salary of the previous month” may be too high or too low,

which may be unfavorable to either the employer or the employee, thus not helpful to promote and build harmonious labor relationship. Therefore, it is the Shanghai High People’s Court’s opinion that the “salary of the previous month of termination” shall mean the normal salary of employee. If the salary of the previous month of termination cannot represent the normal salary, the one month salary in lieu of one month notice shall be determined as the average of the salaries of the twelve months prior to termination of employment.



4. Non-competition

It is the common understanding that a non-competition clause shall not be binding on the employee if the employer does not pay compensation to such employee after termination of employment. However, the Shanghai Opinions seems to challenge this understanding. It provides that in the event that if the employment contract stipulates the non-competition obligation but without stating whether the employer will pay compensation to the employee or without specifying how much should be paid, such non-competition clause may still be held valid and binding since the parties have had a meeting of mind regarding non-competition. The parties may negotiate the amount of compensation, and in case of failing agreement thereon, the employer shall pay 20-50% of the normal monthly salary earned by the employee before termination, each month during the non-competition periods.

Non-competition is a major concern among employers. We still recommend clients to well draft the non-competition clause in a complete manner, providing for all necessary elements to avoid future disputes.

Meanwhile, we notice that, the Jiangsu Guidelines is more loyal to the common understanding in this regard. It reiterates that failure to pay compensation during the non-competition period in accordance with law and the employment contract will render the non-competition clause unbinding upon the employee. Further, if the compensation is lower than that set forth in the *Regulation of Jiangsu Province on Labor Contract*, which prescribes that the annual compensation shall not be less than one third of the total income of the last year of employment, the non-competition obligation shall not bind the employee.

5. Overtime pay

Overtime pay is one of the most concerned issues among employers. However, neither the *PRC Labor Law* nor the *PRC Labor Contract Law* has distinguished the ordinary employees and senior managerial employees, which has caused confusion in reality. There are cases where general managers claimed daunting sum of overtime pay, posing both legal and ethical issue before judges.

Now, according to the Jiangsu Guidelines, if in the employment contracts with senior officers, the salaries are set at a relatively high level and such senior officers have expressly waived its right to overtime pay, the courts will respect such agreements and will not support claims for overtime pay by such senior officers. It shall be noted that the Guidelines does not give guidelines as to how much salary will be regarded as “relatively high”.

Also, the Jiangsu Guidelines is silent on who are senior officers. But according to *PRC Company Law*, senior officers shall mean the general manager, deputy general manager, financial controller of a company and the secretary of board of a listed company as well as other senior officers as so provided in the articles of association thereof.

If you have any comments as to the above, please feel free to contact us as shown below.

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About Mr. Tian and his services:

Mr. Tian graduated from the renowned law school, East China University of Political Science and Law in Shanghai, and before joining Zhong Yin Law Firm, he served as senior translator at Clifford Chance LLP for 1 year and as an attorney-at-law at Zhonglun Law Firm for 2 years. His **legal services** cover FDI, M&A, real estate businesses (investment, sale, purchase, leasing and property management of both residential and commercial properties), corporate governance of FIEs etc. and other general legal businesses such as tort, employment.

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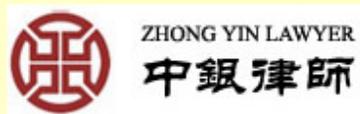
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