

LABOR AND EMPLOYMENT ALERT

CHINESE STATE COUNCIL PROMULGATED IMPLEMENTING RULES FOR THE LABOR CONTRACT LAW

On September 18, 2008, the Chinese State Council adopted and promulgated the much awaited Implementing Rules for the Labor Contract Law (the “Rules”).

- To the disappointment of some and the relief of others, the Rules add little substantive content to the law itself while leaving some key concepts vague, without providing clarifications. However, some technical points in the law are clarified, making it more operational.
- On the controversial provisions regarding non-fixed-term contracts, the Rules simply regroup precisely the same legal grounds already set forth in the law itself for terminating labor contracts by either the employer or the employee, for the sole purpose of dispelling misunderstandings held by some employers that the non-fixed-term contracts cannot be terminated.
- On the critical terms of “material change of objective circumstances” and “material change of objective economic circumstances” as grounds for termination in Articles 40 and 41 of the law, the Rules provide no clarifications.
- The restrictions seen in the previous drafts on the use of contract workers (six-month maximum for non-auxiliary and non-substitute positions or two years’ limit for all positions) were deleted. But the statutory terms for permitted uses, i.e. temporary, auxiliary and substitute positions, are left undefined, creating vagueness that will have to be resolved by labor arbitrators or courts on a case-by-case basis.
- The restrictions on the use of training bonds were deleted.
- The Rules also contain clarifications on the issues of severance and service credit calculations when employees move from one employer to another for “reasons unrelated to themselves.” This rule may mostly apply to employees of restructured state-owned-enterprises (SOEs), but it may also implicitly apply to an M&A between private, foreign-invested companies in China. In such a situation, the years of employment with the first employer may need to be included cumulatively as years of employment with the second employer at such time as

the second employer needs to calculate years of employment in a possible circumstance of severance. However, the second employer might not need to incorporate the employee's years with the first employer, if the first employer has already paid the employee severance at the time of the employee's transfer.

- On the consequences of an employer's failure to enter into a written contract with an employee, the Rules provide that if the employer has sent a written notice and the employee still fails to sign the contract within a month after starting work, then the employer would have the right to terminate the relationship with notice but without severance after the month expires. In addition, the employer must compensate the employee for hours actually worked.
- Where an employer terminates or refuses to renew a labor contract upon its expiration in violation of the Labor Contract Law, and has paid punitive compensation to the employee pursuant to Article 87 of the Labor Contract Law, the employer shall not have to pay severance.

SHENZHEN SEZ PROMULGATED NEW LABOR RULES – A TREND TOWARD INCREASING GOVERNMENT INTERVENTION IN LABOR RELATIONS

This week, the government of the Shenzhen Special Economic Zone (SEZ) adopted its Regulation on Promotion of Harmonious Labor Relations. A draft of this regulation was released in June for public comment. The adopted version dropped restrictive limitations on the use of contract workers (seconded employees) that were written into the draft, apparently to make the regulation consistent with the Implementing Rules of the Labor Contract Law.

The key provisions of the regulation are as follows—

- **Mandatory Annual Collective Bargaining and Government's Power to Intervene in Strikes in Public Utilities Industries.** The regulation contains a provision requiring employers to engage in collective bargaining with their employees over wage adjustments at least once a year. It authorizes the government to issue "orders to restore public order" in collective work stoppages (another name for strikes in China) or plant closings in public utilities and to impose a 30-day "cooling period." During this 30-day period, neither the employer nor the employees may resort to any action that may intensify conflicts. Government agencies, trade unions and relevant trade associations shall use this period to organize negotiations and mediation to push the employer and the employees to reconcile.
- **Mandatory Requirement for One Day of Rest per Week.** Employers must guarantee an "uninterrupted" 24-hour period for employees' rest every week. This places a limit on the employers' right to ask employees on the flexible schedule system and the cumulative hour system to work more than six days per week. This is a major change from the national law on work hours.
- **Priority of Employee's Claims in Bankruptcy Proceedings.** The regulation also provides that, if the employee's wage is less than the local average wage, then claims for employees' medical expenses for work injuries and monthly wages for the three months prior to a company's filing for bankruptcy enjoy priority in bankruptcy proceedings. Under the regulation, security interests in "remaining assets" shall enjoy a priority claim on those assets. The language is somewhat vague on whether "remaining asset" means assets left over

after the employees' claims are settled. The newspaper report on the regulation quoted an expert as saying that it was a revision of the Bankruptcy Law based on the spirit of the Constitution and received approval from the NPC, the Ministry of Labor and the ACFTU. The absolute priority enjoyed by secured creditors over employees' back wage claims arising after the effective date of the PRC Bankruptcy Law was a major concession made by ACFTU to the business community when the Law was adopted. We will have to wait to see, through clarifications by the government, whether this concession is taken back at the local level.

- **Ban on Contingency Fee Arrangements in Labor Disputes.** The regulation contains a provision banning the practice among lawyers of charging only contingency fees in labor disputes. From now on, attorneys will be required to charge their fees according to a fee schedule issued by the local government (local Department of Justice).

SHENZHEN FEDERATION OF TRADE UNIONS LAUNCHED “COLLECTIVE BARGAINING STORM”

The Shenzhen Federation of Trade Unions (SZHFTU) launched a “Collective Bargaining Storm” this week. It sent an “offer” to over one hundred major businesses operating in the city, including Fortune 500 companies, on behalf of the individual unions in these companies. The offer demanded management in these companies to agree within 10 days to start collective bargaining and to enter into a collective contract with their employees by December 5. The local department of labor called the initiative a milestone. A leading official of SZHFTU said that the same skills and tactics used in its negotiation with Wal-Mart will be used in this large scale negotiation.

The goal of this initiative is to set up a collective bargaining mechanism, i.e. a negotiation process to begin at a fixed time each year on matters related to employees' vital interests, such as labor compensation, work hours, rest and leave time, occupational health and safety, benefits, training, labor discipline and work quotas.

The companies targeted in this initiative were selected based on the following factors—whether there was a trade union, whether collective contracts have been signed, the current status of labor relations and the companies' ranking in the world. The companies selected all have trade unions.

SZHFTU will publicly condemn a company if it delays negotiations without good cause. The unions' bottom line for negotiations over wage increases will take into consideration increases in GDP and CPI, employees' costs of living and companies' needs for normal survival. There is no fixed formula for the negotiations.

IBM, VOLVO PLAN TO SET UP TRADE UNIONS IN CHINA

According to the *China Daily*, IBM and Volvo are among the latest batch of Fortune 500 companies doing business in China that plan to set up trade unions in the country, a senior union official said on Friday.

ACFTU, the top trade union in China, launched a three-month national campaign in June. Sony, Canon, FedEx, Intel and Toyota have set up unions since then, said an ACFTU official.

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