China: Employment law update | January 2022

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1. Supreme People's Court and Ministry of Human Resources and Social Security jointly issue guidance on overtime and working hours issues

In brief

The Ministry of Human Resources and Social Security and the Supreme People's Court jointly issued 10 typical employment dispute cases centered around the application of legal standards for working hours and overtime pay, in order to deal with the excessive overtime issue that has received much attention lately. We believe that these typical cases will serve as a yardstick for the handling of similar cases by arbitration institutions and courts around the country.

In our last quarterly newsletter (available here), we published an article titled "Supreme People's Court and Ministry of Human Resources and Public Security expressly state that the "996" work system is illegal". That case involved a work system that was expressly defined to be a serious violation of the law. The following are other significant and interesting cases on the topic of overtime.

Determination of validity of agreement to waive overtime pay

Case summary:

Mr. Zhang was an employee of a tech company. When he entered into his employment contract, he signed an annexed agreement at the request of the company. The agreement included a statement that read: "I voluntarily apply for admission to the Company's Hard Worker Program and waive my overtime pay." Mr. Zhang later resigned for personal reasons and requested to be paid for his overtime. The company recognized the fact that he had worked overtime, but refused to pay for it by reason of Mr. Zhang's voluntary conclusion of an agreement to waive it. Mr. Zhang subsequently applied for employment arbitration, claiming overtime pay. Mr. Zhang won the case.

Key takeaways

We recommend that employers note the following points in their management of employee overtime pay:

- Employers have a statutory obligation to pay for the overtime that they request of their employees. Overtime pay waiver agreements that employers request their employees to sign are at risk of being held void on the basis that they violate mandatory provisions of laws and administrative regulations.
- Implementing an overtime approval system is an effective and compliant way to control overtime costs in the course of employee management. In addition, employers should actually implement the system in practice, or else they may also face the risk of becoming the losing party in an overtime dispute (see below case).

Company's overtime approval system exists in name only

Case summary:

Ms. Wu worked for a pharmaceutical company. The company's overtime management system provided that: "Overtime requires submission of an overtime application for approval in accordance with the procedure. Unapproved overtime will not be recognized as overtime and not be eligible for overtime pay." Based on the work system arranged for by the company, Ms. Wu actually worked from 9 am to 9 pm, six days a week ("**996**"). Ms. Wu submitted overtime applications as required by the company's overtime management system, but the company did not actually implement the approval procedure. When Ms. Wu subsequently discussed the termination of her employment contract with the company, she asked to be paid for her overtime and presented her attendance record, a record of her WeChat chats with department heads and colleagues, minutes of work meetings, etc. The company recognized the authenticity of the evidence, but it refused to pay for the overtime on the grounds that its approval procedure had not been carried out. Ms. Wu then applied for employment arbitration, claiming overtime pay. The case proceeded from employment arbitration to trial at first instance. Both the arbitration institution and the court of first instance supported Ms. Wu's claim.

Key takeaways

Companies can manage their rights as employers by formulating an appropriate overtime approval system as part of their lawfully established overtime system. They should pay for overtime that satisfies the system's requirements. However, the overtime approval system is binding on both the employees and the company. If the company unilaterally fails to implement the approval procedure, it may be held to have arranged for, or agreed to, an employee's overtime and will still need pay overtime pay.

Does additional overtime pay need to be paid under the all-in salary system?

Case summary:

Mr. Zhou's employment contract with an automobile service company stipulated that his monthly salary was inclusive of overtime pay. When he terminated the contract for personal reasons, he argued that since his statutory salary under the standard working hour system was set according to the local minimum wage rate and the company had not paid his full overtime pay, it should pay the difference. The company recognized the fact that Mr. Zhou had worked overtime, but it refused to pay for it on the grounds that the employment contract stipulated that the monthly wage was inclusive of overtime. Mr. Zhou applied for employment arbitration, claiming overtime pay from the company. His claim was ultimately successful. The reason his claim succeeded was that even though his statutory salary under the standard working hour system was set according to the local minimum wage rate and his overtime pay was calculated based on that salary, the salary corresponding to his actual time worked exceeded the salary stipulated in the contract. As a result, the company had not paid his overtime pay in full, according to law.

Key takeaways

The all-in salary system is common in industries where working hours are more fixed and more overtime work is performed. The objective is to stipulate a fixed amount in the employment contract that covers both the statutory salary under the standard working hour system and the overtime pay. Currently, some courts in certain locations (e.g., Guangzhou) may recognize the validity of such a system, though most courts seem to be suspicious of or reject the validity of such systems.

As the present case shows, even though the all-in salary system may be recognized by some courts, if the salary for normal working hours (as calculated according to the statutory overtime pay calculation method) is below the local minimum wage rate, the court may judge the all-in salary provisions of the contract to be void on the basis that it violates the statutory provisions on minimum wage and overtime pay. In such a situation, the company may be ordered to make up for the shortfall in overtime pay at the minimum wage rate. Therefore, when companies make provisions for an all-in salary, they should find out how these matters are decided by their local courts and manage the actual hours of overtime worked so as to avoid situations where the salary for normal working hours (as calculated according to the statutory overtime pay calculation method) is below the local minimum wage rate.

Do employees have the right to refuse overtime arranged for by their employers?

Case summary:

Ms. Zhang worked as a deliverer for a newspaper, working six hours a day, six days a week. When a deliverer in the same area left, the company arranged for Ms. Zhang to take over the work, without having consulted Ms. Zhang. Ms. Zhang rejected the arrangement on the grounds that her workload would double and she would need to work at least four more hours a day. Based on its reward and penalty system, the newspaper terminated Ms. Zhang's employment contract for failing to submit to its work arrangements. Ms. Zhang subsequently applied for arbitration, claiming compensation from the company for illegal termination of her employment contract. The arbitration award supported her claim on the grounds that the company's unreasonable increase of Ms. Zhang's workload should be regarded as a revision of the employment contract, and that the absence of Ms. Zhang's consent to the revision constituted disguised compulsion to work overtime. Therefore, the company's termination of Ms. Zhang's employment contract on the grounds of failure to submit to its work arrangements was illegal.

Key takeaways

The Employment Contract Law provides that an employment contract may be revised if the company and the employee so agree. However, current legislation does not specify whether unilateral increase of an employee's workload constitutes a revision of the employment contract, so disputes remain in practice. The present case makes it clear that if a company increases an employee's workload beyond reasonable expectations and thus substantially changes the employee's working hours, the company will be deemed to have revised the stipulations of the employment contract. Rather than act unilaterally, companies should reach agreement with their employees in accordance with the principles of legality, fairness, equality and free will.

Can regulations be used to deny the fact that overtime was worked?

Case summary:

Ms. Chang worked for an internet company. When she joined, the company informed her by email that it practiced a fingerprint-based attendance checking system. The employee handbook provided that: "Time worked after 9 p.m. is considered overtime. Overtime is subject to the department head's approval of an application submitted by the employee." The overtime that Ms. Chang applied for through the work system amounted to a total of 126 hours. The company refused to pay for the overtime worked before 9 pm, arguing that this time did not count as overtime because company regulations specified that overtime was only counted from 9 pm onward. Ms. Chang applied for arbitration, claiming payment of the shortfall in overtime pay. The case went through arbitration and litigation at first and second instance. The arbitration institution and the courts all supported Ms. Chang's claim.

Key takeaways

In judicial practice, companies have the right to formulate and practice regulations that meet the following three conditions: (1) they have been formulated by democratic process; (2) their contents are lawful; and (3) they have been made known to the employees. In the present case, the company had the right to implement an overtime approval system. The overtime approval system was binding on the employees so long as it did not violate laws and regulations, was reasonable, and had been made known to the employees. This case further clarifies that a company's regulations should be both lawful and reasonable. Rules that are obviously unreasonable (as in the present case, where the company claimed that overtime was counted from 9 pm onward because the period from 6 pm to 9 pm was employee dinner and rest time) run the risk of not being accepted as grounds for the company's defense and its refusal to pay overtime pay.

2. Government provides administrative guidance for leading platform enterprises in order to protect gig workers

In our last quarterly newsletter (available here), we published an article about the Guiding Opinion on Protecting Labor Security Rights and Interests of Gig Workers ("**Guiding Opinion**"). To promote the effective implementation of the Guiding Opinion, the Ministry of Human Resources and Social Security, the Ministry of Transport, the State Administration for Market Regulation and the All-China Federation of Trade Unions organized an administrative guidance conference for platform enterprises on 10 September 2021. During the conference, the said authorities jointly provided administrative guidance ("**Administrative Guidance**") to 10 leading platform enterprises, namely Meituan, Ele.me, Didi, Dada, Shansong, Lalamove, Manbang, Daojia Group, Alibaba and Tencent. The four authorities called on the above-mentioned leading Chinese tech companies to take the lead in caring for their gig workers, performing their responsibilities as employers, and fulfilling their social responsibilities.

As part of the Administrative Guidance, the four authorities require the platform enterprises to obtain basic information concerning the gig workers who rely on the platforms for their jobs and in relation to enterprises that provide services with respect to such workers. In addition, the enterprises should ascertain and resolve employment issues and formulate rectification plans in line with the Guiding Opinion. The authorities also put forward the following four specific rectification requirements:

- Gig workers who satisfy the criteria to be considered employees should be offered an employment contract. Those who do not fully satisfy the employment criteria should be offered written agreements ensuring their rights and interests in terms of labor remuneration, rest, labor safety, etc., as required by the Guiding Opinion.
- The cooperation contracts with enterprises that provide worker-related services should be amended and improved, and the platforms should supervise the lawful and compliant use of labor by such enterprises.
- Regulations protecting worker rights and interests should be improved. The platform enterprises should duly take note of the workers' opinions and proposals, provide convenient channels for workers to communicate requests, optimize the platform algorithm rules, and improve the revenue distribution regulations, rest regulations and labor safety and hygiene regulations.
- Worker complaint mechanisms should be established and improved, so as to ensure that worker complaints are responded to in a timely manner and dealt with objectively and fairly.

Key takeaways

The Administrative Guidance provided to leading platform enterprises is the government's latest move to protect gig workers' rights and interests based on the Guiding Opinion. We recommend that employers of gig workers first ensure that their work arrangements for gig workers comply with the Guiding Opinion and take note of the general guidance provided in the Administrative Guidance, and then keep an eye out for further implementing measures from the government.

3. Beijing announces top 10 typical employment dispute arbitration cases of 2021

On 5 November 2021, the Beijing Bureau of Human Resources and Social Security announced the top 10 typical employment dispute arbitration cases of 2021. These are said to have been carefully selected from the more than 110,000 cases handled last year by employment dispute arbitration institutions around the city, in an effort to provide guidance to employment arbitrators on many of the hot issues in employment disputes. The issues arising in these 10 cases that were most noteworthy for employers are set forth below:

- Company rules may not state that employees who work overtime on a day of rest will be deemed to have waived their right to compensatory leave if they fail to "apply" for such leave. Company rules do not relieve companies from their obligation to pay overtime pay.
- The issue of whether an employment relationship exists between livestreamers and the entities using their services should be determined on the basis of the contract between them and the specific way in which the services are used. It should be a comprehensive determination based on the relevant standards to be applied in recognizing the existence of an employment relationship. An employment relationship should not be automatically determined to exist in any case where an enterprise pays remuneration and an individual does work for the enterprise.
- A company may not evade its obligations under the Labor Law by registering a staff member as a small-scale individual business owner and signing a civil contracting agreement with that individual. The arbitration institution will nevertheless determine whether the person is subordinate to, and employed by, the company by means of a comprehensive assessment of the person, the organization and financial factors.
- The rules of an affiliate, such as an enterprise higher up in the organization chart of a group of enterprises, do not automatically apply to downstream enterprises. Rather, they are binding on the employees of a downstream enterprise only after the carrying out of statutory consultation procedures such as democratic discussion, public display, notification, etc.
- An employee who causes their employer to suffer economic loss due to willful conduct or gross negligence in the course of the employee's work will be liable for compensation. When determining the employee's liability for compensation, the arbitration institution will comprehensively consider factors such as the subordination in the employment relationship, the nature of the employee's work, the salary and benefits, the employer's business interests, the degree to which the parties were at fault, and each party's risk exposure.

- Maternity leave and nursing leave should not count toward annual leave. A female employee who has taken maternity leave and nursing leave remains eligible for paid annual leave.
- If an employee breaks company rules by repeatedly inquiring into a colleague's travel itinerary without a work-related reason to do so, the company may terminate the employee's employment contract by reason of serious breach of discipline. Companies should pay more attention to the protection of personal information and use necessary managerial and technical means to prevent unauthorized access to, and use or leakage of, personal information. They should protect the privacy of their employees and customers which in turn will reduce the enterprises' legal risk exposure.
- If a company pays current employees a non-disclosure benefit (paid together with their salary) based on their attendance and agrees with the employees that such benefit will serve as compensation for their maintenance of trade secrets and performance of their non-compete obligation after they leave the company, such non-disclosure benefit should be regarded as part of the salary and not as an advance payment of the mandatory non-compete compensation required for enforcement of a non-compete restriction.

Key takeaways

The top 10 case precedents announced by Beijing involve both new and traditional hot topics, such as the protection of personal information, non-compete obligations, the gig economy and overtime pay. Their reference value is quite high (particularly for employers located in Beijing). It should be noted that these top 10 precedents are arbitration precedents and chiefly reflect the interpretations and analyses of arbitration institutions. Nonetheless, arbitration awards generally are not final (most employment disputes can be brought to court if either party is dissatisfied with the arbitration ruling), so when companies study particular employment law issues, they should still pay attention to the adjudication practice and views of the judicial authorities.

4. Company succeeds in liquidated damages claim against social media influencer

The fallout between a Suzhou-based social media influencer and the company that hired her has recently made it to court and attracted a great deal of public attention. It also led to further discussion of the gig economy.

Ms. Wang and a Suzhou company signed a Social Media Influencer Agency Agreement in May 2018. The company promoted Ms. Wang as an influencer. In April 2019, the parties entered into another Social Media Influencer Agency Agreement, which stipulated Ms. Wang's performance obligations and details regarding the sharing of profits and other rights and obligations of the parties. In addition, the parties executed an employment contract that set out Ms. Wang's salary and probation period, etc. Ms. Wang later wished to terminate her contractual relationship with the company, but the parties failed to reach an agreement regarding the amount of liquidated damages. The dispute went to the Suzhou Industrial Zone District People's Court at first instance and the Suzhou Intermediate People's Court at second instance.

The courts analyzed the core issues in dispute, one of which was whether the dispute was an employment dispute or a civil dispute. The courts held that the employment contract was a contract between the platform (as the employer) and Ms. Wang (as the employee) that established their employment relationship and specified their rights and obligations. The Social Media Influencer Agency Agreement, on the other hand, was a comprehensive contract concerning Ms. Wang's development in the media performance business, which involved multiple rights and obligations, including agency, brokerage, and copyright issues, etc. The two contracts were interrelated but also independent from each other, and they regulated different legal relationships. The courts determined that the dispute had arisen from the parties' performance of the Social Media Influencer Agency Agreement. The courts held that Ms. Wang had in fact breached the agreement and that the platform had the right to claim liquidated damages from Ms. Wang pursuant to the agreement.

Key takeaways

Employers need to follow closely the developments in the gig economy as well as government guidelines in this area (e.g., the "Guiding Opinion on Protecting Labor Security Rights and Interests of Gig Workers" issued by the Ministry of Human Resources and Social Security and seven other authorities in July 2021 (see also our previous article titled "New Measures To Protect the Labor Security Rights and Interests of Gig Workers" here)).

Employers should take time to understand the different engagement models and formulate corresponding internal rules and regulations. An important aspect to note is whether a relationship between the company and the worker is an employment relationship or a civil relationship, as this will affect the validity of provisions on liquidated damages. If it is determined to be an employment relationship, liquidated damages will be applicable only in very limited circumstances permitted by law. If it is determined to be a civil relationship, the provisions on liquidated damages will not be subject to such limitations.

5. Ministry of Human Resources and Social Security and three other authorities issue document supporting young people from Hong Kong and Macao to take up employment or start a business in the Greater Bay Area

On 23 September 2021, the Ministry of Human Resources and Social Security, the Ministry of Finance, the State Administration of Taxation, and the Hong Kong and Macao Affairs Office of the State Council issued the "Opinion on Supporting Young People From Hong Kong and Macao To Take Up Employment or Start a Business in the Greater Bay Area" ("**Opinion**") which aims to implement the state's overall requirements for the development of the Guangdong, Hong Kong and Macao Greater Bay Area (**GBA**) and promote exchanges between Hong Kong and Macao and the mainland.

The term "young people from Hong Kong and Macao" means Hong Kong and Macao residents with Chinese nationality who are not older than 45 years. The Opinion focuses on developing employment opportunities for young people from Hong Kong and Macao. It assures the provision of services and offers them supportive policies if they are willing to take up employment or start a business in the GBA. The highlights of the Opinion are as follows:

1. Developing employment opportunities: GBA enterprises (especially those in advanced manufacturing industries, strategic new industries and modern service industries) are encouraged to develop employment opportunities and guide young people from Hong Kong and Macao in finding work in various types of enterprises. To cooperate with the government of the Hong Kong Special Administrative Region in duly implementing the Greater Bay Youth Employment Scheme, enterprises that do business in both Hong Kong and the GBA should be guided in recruiting young people from Hong Kong.
2. Enhancing employability: GBA enterprises are encouraged to provide high-quality skills training to young people from Hong Kong and Macao who need it. The relevant authorities will support such training by providing occupational training subsidies. GBA employers are encouraged to provide employment internships for young people from Hong Kong and Macao. Those that do will be given employment internship subsidies as specified in regulations, with reference to the subsidies for enterprises that take in young people from the mainland.
3. Facilitating unemployment registration: Young people from Hong Kong and Macao who lose their jobs in the GBA will be permitted to carry out unemployment registration procedures in the area where they live or work or the area where they are registered for social insurance purposes, with reference to the unemployment registration procedures for workers from the mainland. They will be eligible for services such as employment guidance and job referrals.

Key takeaways

In the wake of the continuous development of the GBA and the abolition of the Hong Kong and Macao resident work permit system, more and more young people from Hong Kong and Macao are finding work in the mainland. In terms of policy, the state strongly supports the employment of such people in the GBA and encourages the flow of talent and further cooperation between the mainland on the one hand and Hong Kong and Macao on the other. However, the above policy statement is only very generally worded, with few specifics in terms of actual measures the government will take to achieve these goals. It remains to be seen whether Guangdong Province will subsequently issue detailed implementing rules for the Opinion in order to support young people from Hong Kong and Macao who come to work in the GBA and employers that provide them with jobs.

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