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Measures to prevent social insurance fraud formally implemented

The Measures for Administrative Supervision of Social Insurance Funds ("**Measures**") were formally implemented on 18 March 2022. The Measures aim to strengthen administrative supervision of social insurance funds to investigate and prevent acts that harm the social insurance system, such as creating fake employment relationships to fraudulently obtain social insurance benefits. The most relevant parts of the Measures for employers operating in China are the following:

The Measures list several types of conduct that would be considered fraudulent obtainment of social insurance benefits, including but not limited to: (i) faking social insurance eligibility or belatedly making missed premium payments in a way that violates regulations, through means such as fabricating personal information or employment relationships, forging, tampering with or stealing another persons' identity papers that can serve as proof of identity, providing fake supporting documents, etc.; and (ii) fraudulently obtaining occupational injury insurance benefits by carrying out assessment procedures for an occupational injury or one's ability to work based on a fake report of an occupational injury accident or on supporting documents that have been forged or tampered with, or by providing a fake conclusion that an occupational injury was sustained or a fake conclusion as to the assessment of the ability to work.

Based on the above, if an insured person who does not work for a given company causes their social insurance premiums to be paid by that company on their behalf, or if an employee works in a place other than the employer's and a third party in that place is instructed to pay the employee's social insurance premiums on the employer's behalf, then this situation could potentially be determined to be a case of fraudulently obtaining social insurance benefits. Currently, it is common practice for companies who

have employees based in cities without a local registered office to make social insurance contributions through third-party payroll agencies, though some cities are starting to crack down on such arrangements; the Measures are a potential sign that such crackdowns may become more widespread in the future.

Likewise, if an enterprise provides an untruthful supporting document or makes a false statement for an employee in the course of determination of an occupational injury, and such untruthful conduct causes the employee to receive occupational injury benefits, then the enterprise will likewise be deemed to have fraudulently obtained social insurance benefits.

The Measures and the Social Insurance Law provide that entities and individuals that fraudulently obtain social insurance benefits should not only return the benefits obtained but they will also receive a fine (of between two and five times the amount of the benefits) from the administrative authority in charge of social insurance. According to separate administrative measures, fined enterprises could also find themselves on the list of persons with bad social credit in the social insurance area, which would have a significant impact on their reputation and image.

If the circumstances are serious and the fraudulently obtained amount is relatively large, the enterprise and individual(s) involved will be treated as criminal offenders, as is shown by judgments issued in a number of regions and cities around the country. For example, there was a case in Beijing involving the belated payment of missed old-age insurance premiums under a sham employment relationship. The fraudulently obtained amount of old-age insurance benefits was in excess of RMB 170,000. The Beijing Second Intermediate People's Court convicted the business operator that had organized the insurance fraud of criminal fraud and sentenced him to five years' imprisonment and a fine of RMB 5,000.

Key takeaways

The Measures signal the national government's goal of further cracking down on social insurance fraud, particularly in light of the forecasted shortfall in funds needed to pay out pensions to retired persons. As to whether payments on the employer's behalf of the social insurance premiums of employees working in another location could be deemed to be social insurance fraud and thus violate the Measures, companies may need to wait and see how local social insurance authorities interpret and apply the Measures in practice. As noted above, some cities, such as Beijing and Hangzhou, have already started prohibiting such arrangements.

New guidelines issued on handling of employment dispute arbitration and litigation

The Ministry of Human Resources and Social Insurance and the Supreme People's Court jointly issued the Opinion (1) on Issues Concerning the Linking of Employment Dispute Arbitration and Litigation ("**Opinion**") on 21 February 2022. The Opinion implements a new system that provides for a consistent scope of acceptance of cases, unified criteria and effective linkage of procedures for arbitration and litigation. Some of the highlights of the Opinion are as follows:

1. Compensation claims against employees are acceptable

   Previously, arbitration commissions in different regions had no consistent understanding as to whether to accept jurisdiction over compensation-related claims against employees. The Opinion makes it clear that if an employer holds an employee liable for compensating for the loss it has suffered due to the employee's illegal termination of the employment contract or the agreed-upon confidentiality obligation or non-compete requirements, the arbitration commission should accept the case according to law. This clearly provides a channel for an employer to pursue claims against employees.

2. Effective linking up of mediation, arbitration and litigation procedures

   (1) If the parties reach a mediation agreement under the auspices of a mediation organization, they may apply for an examination by an arbitration commission or seek judicial confirmation. If the arbitration commission does not accept the application for an examination of the mediation agreement or if it does not confirm the mediation agreement, the employee may, under certain circumstances, directly institute an action. This will help reduce sources of disputes and increase the rate of performance of mediation agreements.

   (2) Based on the 2017 Rules for the Handling of Employment-Related Arbitration Cases, the Opinion provides further details concerning the specific matters subject to final arbitration awards. In particular, it specifies that the labor compensation that can be claimed includes the employee's salary for the provision of normal labor during the statutory standard working hours, salary or sick leave salary during paid suspension of work and one month's pay in lieu of notice by the employer. Cases that are simple and involve small amounts will be finally decided on at the arbitration stage. On the other hand, if the matter decided on in an award involves confirmation of an employment relationship, the arbitration commission should render a non-final award (which can then be challenged in court).

3. Examination of evidence during arbitration and litigation stages

   If the party bearing the burden of proof submits evidence during the litigation proceedings that was not submitted during the arbitration proceedings, this party should explain the reason for doing so. During litigation proceedings, the court will not support a party's denial of a fact that the party admitted to during the arbitration proceedings, unless the other party consents to this denial or the fact was admitted due to coercion or a material misunderstanding of the circumstances.

   Therefore, employers should pay close attention to the submission and cross-examination of evidence during the arbitration proceedings, as any admission of evidence during arbitration will likely be referred back to during any later litigation proceedings.

4. Unification of criteria for application of the law

   The Opinion clarifies the criteria for application of the law in common employment disputes, including the following points:

   (1) If an employer terminates an employment contract because the employee committed fraud by violating the principle of good faith and providing false personal information (e.g., academic certificates, résumé, etc.) in connection with the conclusion of the contract, the arbitration commission or the People's Court should not support the employee's claim for severance or compensation.

   (2) If an employer delays the execution of a written employment contract by one year or longer after employment commences and the employee claims double salary for the period more than one year after employment commences, the arbitration commission or the People's Court should not support such claim (rather, the law only provides that the employee should be deemed to be on an open-term contract in such circumstance; the double salary penalty should only apply to the period from the second month of employment to the one year anniversary without a written employment contract).

   (3) If an employer and an employee agreed on a non-compete period and economic compensation, and the employee claims termination of the non-compete restrictions because, due to a reason attributable to the employer, the employee was not paid economic compensation for three months after the employment contract was terminated or ended, the arbitration commission or the People's Court should support such claim.

Key takeaways

The issuance of the Opinion helps to clarify certain gray areas in the handling of employment disputes in China, and will hopefully lead to more predictability and consistency in terms of how arbitration commissions and courts handle employment disputes.

Shanghai's human resources and social security authority issues measures on employment issues arising during the pandemic

On 27 March, the Shanghai Municipal Bureau of Human Resources and Social Insurance issued Several Policy Measures for Full Anti-Pandemic Support for Shanghai's Human Resources and Social Insurance Sector ("**Shanghai Measures**"), which consist of 16 articles aimed at providing employment-related assistance and guidance to enterprises affected by the pandemic. The following provisions are the most noteworthy to employers:

- **Salaries of infected employees** — The Shanghai Measures specify that if employees are unable to provide normal labor because of quarantine measures imposed by a medical institution or the government against COVID-19 patients, carriers, suspected cases and close contacts, etc., their employers should pay them for normal labor while they are quarantined. If employees need to continue to suspend their work after the conclusion of quarantine for reasons of medical treatment, their employers should pay sick leave wages applicable to employees who are in their medical treatment period. If the employer otherwise needs to suspend work or operations, or employees are otherwise unable to come to work due to control measures imposed by the government, the enterprise and the employees should make best efforts to resolve the salary and other such issues through consultations, depending on varying circumstances.
- **Continuation of the policy of phased reduction of unemployment insurance and occupational injury insurance rates** — Specifically, the unemployment insurance premium percentage paid by the employer and the individual employee are both 0.5% and the base premium rate for occupational injury insurance as stipulated by the state for the industry concerned is reduced by 20%.

- **Support for employee sharing** — The Shanghai Measures encourage enterprises in similar industries to swap employees in similar positions to mutually fill vacancies.
- **Time limits for determining occupational injuries and assessing the ability to work** — According to the Shanghai Measures, if the impact of the pandemic prevents an entity from timely applying for the determination of an occupational injury or determination of the ability to work, the time for which the impact of the pandemic persists may be deducted from the application time limit.

Key takeaways

The above-mentioned Shanghai Measures do not contain much new information compared to the national and local measures issued during the pandemic in 2020, though they make it clear that such earlier policies continue to apply to all Shanghai employers. Enterprises should ensure that the salaries of their infected employees and other employees are paid according to law during the pandemic control period.

Shenzhen passes regulations encouraging non-litigious dispute resolution mechanisms

The Regulations of the Shenzhen Special Economic Zone on Diversified Resolution of Conflicts and Disputes ("**Regulations**") were adopted by Shenzhen on 28 March 2022 and became effective on 1 May 2022. Prior to their release, several opinions had been issued at the national level, such as the Opinion on Strengthening the Control of Litigation Sources by Promoting Diversified Resolution of Conflicts and Disputes, the Implementing Opinion on Intensifying the Development of a One-Stop, Diversified Dispute Resolution Mechanism in People's Courts To Promote the Elimination of Conflict and Dispute Sources, etc., encouraging the various regions to explore diversified dispute resolution mechanisms in light of the local circumstances. Some regions (e.g., Xiamen municipality and Jiangsu province) have issued relevant local regulations exploring local mechanisms for the resolution of conflicts.

The following provisions of the Regulations are worth noting:

- The Regulations emphasize the development of employment-dispute mediation organizations and encourage qualified enterprises to establish employment-dispute mediation committees and to provide such committees with office conditions and funding necessary for them to do their work. The Regulations also encourage industrial zones, commercial zones, trade associations and chambers of commerce to establish employment-dispute mediation organizations for their particular zones or trades. The Regulations also require human resources departments to regularly compile statistics on the establishment of employment-dispute mediation committees by enterprises.
- The Regulations specify that employment-dispute arbitration institutions should encourage the disputing parties to settle their dispute through mediation. They stress that non-litigious resolution concepts such as mediation should be implemented throughout the course of the employment dispute. In addition, the Regulations expressly grant employment-dispute arbitration institutions the flexibility to handle their cases in various ways such as written hearings, online hearings, etc.
- The Regulations provide for a recording mechanism for the facts that are not in dispute. Subject to the consent of the parties, the undisputed facts confirmed by the parties during the mediation stage as well as their addresses for service, the assessment reports and the expert opinions could serve as evidence during the arbitration or litigation proceedings.

Key takeaways

The Regulations show that the Shenzhen government encourages and promotes the establishment of diversified dispute resolution mechanisms, including mediation, rather than just the litigation route. This could substantially affect the procedures and time for the resolution of employment disputes in local enterprises. We recommend that enterprises keep an eye open for the issuance of relevant accompanying implementing policies, as this might affect how employment disputes are handled in Shenzhen in the future.

Jiangsu High People's Court publishes top 10 typical employment dispute cases of 2021

Recently, the Jiangsu province High People's Court selected and publicized 10 employment dispute cases from 2021 to provide guidance to lower courts in the province. All are final judgments from courts around the province. Some of the key takeaway points are provided below:

- If an employee fails to truthfully inform the employer of their itinerary while pandemic control measures are in place, the company may terminate the employee for breach of disciplinary rules, acting in bad faith or violation of the national pandemic control policies, even if the employee's conduct had no material consequences for the epidemic control measures. However, to play it safe, we still recommend that companies formulate, improve and lawfully adopt their rules and regulations to reduce the termination risks.
- If a dispute between a company and one of its employees involves a conflict between different provisions of the rules and regulations formulated by the company, and the employee relies on the rule that is favorable to the employee, this claim should be supported by the court. Therefore, we recommend that companies formulate their rules and regulations carefully to avoid conflicting terms.
- Even if a livestreamer has signed a cooperation agreement (rather than an employment contract) with a platform, the livestreamer and the platform could still be deemed to be in an employment relationship if their actual relationship clearly is one of personal and economic subordination. Therefore, we recommend that, in practice, companies adopt a management model that is lawful, reasonable and in line with their own development requirements, based on the different management models and features.
- If a company pays for an employee's specialized training or provides them with specialized technical training, it may sign an agreement with the employee to stipulate the service term and the requirement that if the employee leaves before the expiration of that term, they must repay the prorated portion of the specialized technical training expenses. However, ordinary day-to-day operational training and training provided before the employee takes up their post is not "specialized technical training" as mentioned above.

Tianjin case shows that seeking criminal enforcement of trade secret theft is getting easier

Recently, the Tianjin Intellectual Property Court tried a criminal case involving an employee's infringement of his employer's trade secrets. Its judgment has drawn much attention in the Chinese media.

The defendant, surnamed Zhao, worked in the sales department of a foreign-invested company in China. During his time with the company, he stored many of its documents on a mobile hard drive provided by it. No authorization for such storage had been given. After leaving the company, he took the drive with the documents with him. Previously, the company had taken steps to protect its trade secrets, such as the execution of employment contracts, issuance of employee manuals, sending of emails, displaying of reminders during computer start-up, etc. Ultimately, the court held that the employee had infringed the company's trade secrets and sentenced him to 10 months' imprisonment and a fine of RMB 60,000.

In the past, the most difficult thing to prove in criminal cases involving an employee's infringement of their employer's trade secrets was often the amount of loss that the employee had caused the employer to suffer, or the fact that the employee's illegal income from the infringement was high enough to open a criminal case, i.e., at least RMB 300,000. As a result, many trade secret infringement cases that only involved the obtaining of such secrets could not be treated as criminal offenses. To a certain extent, this situation diminished the law's deterrent effect in terms of employees' criminal liability for infringement of their employers' trade secrets.

This difficulty was eased on 14 September 2020, when the Supreme People's Court and the Supreme People's Procuratorate issued the Interpretation (3) of Several Issues in the Specific Application of the Law in Criminal Cases of Infringement of Intellectual Property Rights. The judicial interpretation provides expressly that "if a trade secret of the rights holder was obtained by improper means but has not been disclosed, used or licensed, the amount of loss may be determined based on a reasonable license fee for the trade secret." Zhao's case was the first in China (since the issuance of the judicial interpretation) where the amount of loss suffered by the holder of rights in the trade secret was determined based on a reasonable license fee and where the defendant was successfully convicted and penalized accordingly.

Key takeaways

It has become common in the judicial practice of many countries to determine the amount of damages for intellectual property infringement based on a reasonable license fee. However, this method was not common in China's judicial practice. In reliance on the 2020 judicial interpretation, the amount of loss in Zhao's case was determined based on a reasonable license fee, and Zhao was convicted of trade secret infringement involving solely the obtainment of such secrets (without having to prove actual damages suffered). The case marks a new chapter in the trial of this kind of case in China and reflects the trend in judicial practice to strengthen the protection of intellectual property rights and trade secrets. This trend is more beneficial to rights holders, and particularly to employers' protection of their own interests.

The case also serves as another reminder for employers to take necessary steps to protect their own trade secrets. Their inclusion of provisions on confidentiality obligations, data security, etc., in their employment contracts, confidentiality agreements and employee manuals, and their provision of relevant training, emailing of security reminders and displaying of reminders during computer start-up, etc., are recognized as valid protection measures.

Guangdong province court issues first equal opportunity case judgment in favor of pregnant employee

Guangdong province's first equal employment rights case was recently concluded. The worker, who had been fired on account of her pregnancy, claimed lost salary for the period of pregnancy and for the unused maternity leave as well as compensation for mental distress. The claims were supported by the court, which confirmed that her dismissal because of her pregnancy constituted discriminatory treatment.

The plaintiff in the case, surnamed Fan, joined Company A in 2019. One month later, she discovered that she was pregnant. The day she informed the company of the news, she was told she did not need to come in anymore. The next day she was barred from entering the workplace. In March of the same year, she applied to the Zhuhai Employment Dispute Arbitration Institute for arbitration, claiming payment of the salary shortfall, overtime pay, double salary for failure to sign an employment contract and double severance for illegal termination of the employment contract. The parties reached a settlement agreement in July, with Company A agreeing to pay a settlement amount of RMB 6,000. Fan suffered a miscarriage during the arbitration period.

Fan subsequently initiated an equal employment rights suit against Company A. The court of first instance, namely the Zhuhai Xiangzhou District Court, supported her claims, holding that Company A's summary dismissal of Fan upon learning of her pregnancy constituted an infringement of her equal employment rights. In its judgment, the court ordered Company A to apologize to Fan in writing and to pay her RMB 2,064 in lost salary during the pregnancy period, RMB 1,875 in lost salary for her unused maternity leave and RMB 10,000 in compensation for mental distress. Being dissatisfied with the judgment, Company A filed an appeal. After more than two years, Company A recently withdrew its appeal and the first instance judgment was executed.

Key takeaways

Equal employment rights protection covers the recruitment process and the employment contract performance process. The present case offers guidance on equal employment rights remedies during the employment contract performance process. In particular, it is worth noting that in citing the Employment Promotion Law, the court held that equal employment rights infringement disputes can run in tandem with employment-related arbitration proceedings. Such suits are not subject to prior institution of employment-dispute arbitration proceedings and their claims do not overlap with employment dispute arbitration claims. In other words, discrimination claims may be treated as civil claims separate from any employment-related claims. When settling employment disputes with employees, companies should carefully structure any settlement agreements to ensure potential civil claims, such as discrimination claims, are also covered.

Guidance provided on employment disputes relating to pandemic control measures

Recently, cases handled by the Jilin Provincial High People's Court related to employment issues arising during the pandemic have been reported on in the national media, as a way to provide guidance to employers and employees about how such issues should be handled.

1. Salary reductions due to the pandemic are subject to conditions

   Due to the impact of the pandemic, an automotive parts and components company in Jilin issued a Salary Settlement Plan for Contract Workers During the Pandemic in early 2020. The plan stated that during the pandemic, the company would pay its employees 70% of their regular salary. However, the company had not reached agreement with its employees on the salary plan. In March and April 2020, a company employee surnamed Qi was only paid 70% of his salary, pursuant to the plan, even though he had a full attendance record. Due to the cut, Qi terminated his employment contract with the company and demanded economic compensation for the company's failure to pay his salary in full.

   The company argued that it had legal grounds to reduce employee salaries, claiming that the Notice of the General Office of the Ministry of Human Resources and Social Security on Duly Handling Employment Relationship Issues During the COVID-19 Pandemic Control Measures ("**Pandemic Notice**") permitted enterprises facing production or operational difficulties due to the pandemic to pay their employees' salaries at lower rates.

   The court ruled that the Pandemic Notice provisions are only aimed at enterprises that face production or operational difficulties due to the pandemic and have suspended work or production. According to the employee's WeChat records with the company's general manager, which the employee provided during the proceedings, the general manager acknowledged that he had required the employee to put in the full amount of work during March and April 2020 and that he had promised that the employee would be paid his full salary. This shows that the company had not suspended work or production due to the pandemic during the period concerned. Furthermore, the company failed to provide evidence of operational difficulties that prevented it from paying its employees during the period. Based on the foregoing, the court ruled in favor of the employee.

2. Violation of the company's pandemic control measures does not necessarily constitute a serious disciplinary offense

   Due to the pandemic control measures, a real estate management company in Jilin required the security staff to strictly enforce the access measures and only permit registered vehicles to enter the area managed by it. One day in February 2020, an owner of real estate in the area arrived in his car and asked to enter so he could return home. Following his repeated requests to be let through, and given that the cars behind him were unable to enter, a security staff member surnamed Zhao took pity on him and allowed him to pass. Upon discovering what had transpired, the person in charge of the company dismissed Zhao for having violated the company's management regulations. Zhao took the company to court, claiming economic compensation for the company's termination of his employment contract.

   During the trial, the court ascertained that Zhao had indeed violated the company's management regulations by permitting an outside vehicle to enter the area on Zhao's own authority and that he had done so while pandemic control measures were in place. However, as his conduct did not constitute a serious disciplinary offense under the company's rules and regulations and had not led to serious consequences, there had been no sufficient legal basis for the company's termination of Zhao's contract. Accordingly, the court ordered the company to pay Zhao economic compensation in the amount of RMB 10,000.

Key takeaways

The court practice in most parts of China appears to be that individual consent of the affected employees should be obtained before reducing their salaries due to operational difficulties arising from COVID-19, though some courts may allow for salary reduction by simply going through an employee consultation process (rather than obtaining each employee's consent), provided that the pandemic situation is relatively serious and the reduction is fair and reasonable. Companies should carefully consider local court practice on this issue before implementing a salary reduction.

In addition, employers should consider revising and improving their rules and regulations and should strictly regulate how they deal with disciplinary offenses relating to violations of pandemic control measures. However, companies should note that an employee's violation of the company's pandemic-related regulations does not mean as a matter of course that the employee may be dismissed due to having committed a disciplinary offense. Companies should take the relevant facts and the consequences of the violation into account when deciding on a reasonable and appropriate penalty based on the provisions in their company rules.

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