Client Alert

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In this issue

New parental and elder care leave requirements implemented throughout China

In an effort to increase China's birth rate and encourage people to spend more time taking care of elderly parents, the national and local governments throughout China have recently provided employees with various new leave entitlements.

Below is an overview of the number of days of maternity leave, paternity leave, parental leave and parental care leave in eight provinces/municipalities directly under the central government.

When managing these types of leave, companies still need to refer to the specific FAQs or detailed implementing rules of their local government. Some of the issues to note in particular are the eligibility criteria (especially those for parental care leave): whether the leave is automatically extended to make up for statutory holidays/rest days that occur during the leave, whether the number of days is tied to the number of children, whether the leave is calculated based on any 365-day period or the calendar year, whether the leave can be carried over, whether the leave can be broken up, whether the leave can be added to other leaves and salary payment during the leave period.

Area	Maternity leave	Paternity leave	Parental leave	Leave to care for parent
Beijing	98+60 days (extendable by a further 1-3 months, subject to employer consent)	15 days (If the mother voluntarily reduces the 60-day extended maternity leave period, the father's period of paternity leave may be increased by the	5 days per parent until the child turns 3	For an employee who is an only child – not to exceed 10 days in total

Area	Maternity leave	Paternity leave	Parental leave	Leave to care for parent
		same number of days, subject to the consent of each parent's employer.)		
Shanghai	98+60 days	10 days	5 days per parent until the child turns 3	Not applicable
Zhejiang	First child: 98+60 days Second and third children: 98+90 days	15 days	10 days per parent until the child turns 4	For an employee who is an only child – 5 days
Jiangsu	98 + not less than 30 days	Not less than 15 days	Specific implementing measures to be formulated by provincial government	Not applicable
Guangdong	98+80 days	15 days	10 days per person until the child turns 4	For an employee who is an only child – five days; up to 15 days in the aggregate if a parent is hospitalized for an illness
Tianjin	98+60 days	15 days	10 days per parent until the child turns 4	A total of 20 days for an employee who is an only child; a total of 10 days for an employee who is not an only child
Sichuan	98+60 days	20 days	A total of 10 days per parent until the child turns 4	Up to 15 days in the aggregate for an employee who is an only child; up to 7 days in the aggregate for an employee who is not an only child
Chongqing	98+80 days	20 days	One parent may take a parental leave until the child turns 1, or each parent may take a total of 5 to 10 days of parental leave each year until the child turns 6, subject to employer approval.	For an employee who is an only child – not to exceed 10 days in total

New regulations allow employers to request criminal record searches of certain candidates and employees

The *Working Regulations for Criminal Record Searches by Public Security Authorities* issued by the Ministry of Public Security ("**Regulations**") took effect on 31 December 2021. According to the Regulations, public security authorities can provide criminal record searches in any of the following situations:

- Individuals may search, or entrust others with searching, their own criminal records. Search requests for the criminal records of Chinese citizens can be made to the police station of the place of their registered permanent residence or place of residence. Foreigners who have resided in China for not less than 180 days may submit a search request to the immigration administration section of the county- or higher-level public security authority of their place of residence.
- Employers may search the criminal records of their existing or prospective employees, provided that such search is necessary to confirm the individual is not banned from a certain job position due to a criminal record based on relevant laws and regulations.
- When administrative authorities implement administrative permissions or grant employment qualifications, or when notary public offices notarize criminal records, they may search the criminal records of the persons concerned, in accordance with the law.

For the purposes of the Regulations, a person has a "criminal record" if the person's criminal guilt has been confirmed in an effective, written judgment of a People's Court. The Regulations further clarify that if a person has a criminal record but they were under 18 at the time of commission of the crime and sentenced to not more than five years of fixed-term imprisonment, they should be issued with a Certificate of No Criminal Record or a Search Advice stating that they have no criminal record.

The Regulations require all employers that apply for a criminal record search to submit a letter of introduction issued by them in respect of the person submitting the application, valid proof of identity of the person submitting the application, a search application bearing the official seal of the entity (and stating the specific legal provisions on which the application is based), and materials relating to the search target being an existing or prospective employee.

In practice, employers conducting background checks on job applicants or employees often require the individuals to do their own criminal record searches and to provide relevant proof. The Regulations set a precedent for entitling employers to search the criminal records of their existing or prospective employees, but it should be noted that the searches must comply with the laws and administrative regulations on employment bans.

Based on relevant laws, persons with a criminal record are barred from certain industries/positions. Examples include main responsible persons of entities engaged in production or business operations; persons active in export business activities; persons engaged in the control of food production and business or in food inspection; persons in key positions relating to cyber safety control or online business operations; registered accountants; and directors, supervisors and officers of companies or commercial banks. (The above list includes only some of the positions involving employment bans and does not specify all prohibited positions, the criminal offenses concerned and/or the period of the ban).

Key takeaways

1. Although the Regulations state employers may search the criminal records of their existing or prospective employees, our inquiries with police stations in several areas show that as of the posting date of this article, many areas (e.g., Beijing and Shanghai) do not yet accept criminal record search applications from employers under the Regulations. We recommend that employers inquire further with their local public security authority as to the implementation status of the Regulations.
2. The processing of criminal records is subject to the Personal Information Protection Law. Given that criminal records constitute sensitive personal information, we recommend that employers formulate compliant privacy policies and get their existing/prospective employees to sign their agreement to them in accordance with applicable statutory requirements.

Regulations on vocational school interns undergo major revisions

After six years, the *Regulations for the Administration of Vocational School Student Internships* (the "**Vocational Intern Regulations**") have undergone a major set of revisions. The revised text became effective on 31 December 2021. Companies hosting vocational school interns should note the following key points:

- **Qualifications of hosting entity**: Entities that host vocational school interns should be operating legally, have no record of illegal or untrustworthy conduct, have no record of breaches of laws and regulations on production safety during the most recent three years, be fully able to host interns, satisfy the professional training requirements and be able to meet the actual requirements for the industry's development.
- **Internship agreements**: The internship agreements should be signed by the vocational school, the hosting entity and the student. Students' internships should not be arranged and managed by intermediary organizations or paid agencies. The internship agreements should be drafted on the basis of the internship agreement templates issued by the relevant authorities. Generally, a student's internship should last for six months.
- **Internship remuneration**: Hosting entities should pay internship remuneration to their interns. In principle, the remuneration paid to interns who work relatively independently may not be less than 80% of the host's salary rate for the same position or less than the minimum rate. In addition, vocational schools and hosting entities should take out appropriate insurance for the interns.
- **Working hours and safety**: In principle, a hosting entity should not arrange for the students to work on rest days or statutory holidays or schedule overtime work or night shifts for them at any time during the internship. The host should abide by the national regulations on working hours, rest and leave. In addition, certain jobs (e.g. work very high from the ground or work involving radiation or toxic chemicals) may not be assigned to interns. The number of interns should generally not exceed 10% of the host's total number of active employees, and the number of interns working in a specific position should generally

not be more than 20% of the total number of active employees in the same type of position. Interns may not be given work outside the scope of their major academic subject.

Key takeaways

The Vocational Intern Regulations impose stricter and more detailed requirements on the hosting of vocational school interns by companies. They also grant law enforcement authorities more regulatory powers. Companies should conduct timely checks on their internal procedures for the hosting of such interns against the newly amended regulations, so as to ensure that they meet the latest requirements. The Vocational School Regulations apply only to a company's internship activities for hosted vocational school students. There are fewer legal restrictions when it comes to other kinds of internships (e.g. active students of tertiary schools other than vocational schools who proactively contact enterprises for internships), so the internship arrangements between those student and their hosts can be more flexible.

Latest amendments to Labor Union Law emphasize party leadership

On 24 December 2021, the 32nd Session of the Standing Committee of the 13th National People's Congress adopted a decision to make 11 amendments to the *Labor Union Law of the People's Republic of China* ("**Labor Union Law**"). Many of the amendments are more rhetorical in nature than having any substantive impact on employee's rights and employers' obligations, some of the changes indicate the direction towards which unions will likely be heading. The amended Labor Union Law has been in force since 1 January 2022. We set out below some of the main amendments:

- **Emphasizing continued leadership by the Party**: While under existing law, unions are already meant to work under the leadership of the Party, the new amendments further emphasize and strengthen the Party's role. The definition of a labor union has been further amended to clarify that it is a mass organization of the working class voluntarily formed by employees and led by the Communist Party of China. It functions as a bridge and a hub through which the Communist Party of China communicates with employees. The amendments make it very clear that labor unions remain subject to leadership by the Party.
- **Stressing the right of workers to join and organize labor unions**: Provisions have been added that require a labor union to adapt to changes in the development of the enterprise, such as the enterprise's form of organization, structure of the workforce, employment relationships, types of employment, etc., and to protect according to law the right of the workers to join and organize labor unions. This is meant to address the growing diversity of workplace relations (particularly in the gig economy) and emphasize the union's continuing role as workplace structures change.
- **Developing the basic duties and democratic participation methods of labor unions**: A union should "improve the employment relationship coordination mechanism" and "build harmonious employment relationships." "Democratic elections and democratic consultations" have been added as democratic participation methods, and establishing "a labor union work system that has extensive contacts and serves the employees" has been added as an important basic duty of labor unions.
- **Improving labor union rights**: The wording of some of the existing provisions regarding unions' rights and powers has been clarified. For example, "late payment of salary" has been added as one of the employee rights abuses that unions should defend against. Another example concerns a labor union's right to attend the employer's meetings where matters concerning the material interests of the employees are discussed. The scope of such matters has been expanded by the revised legislation from "salaries, benefits, labor safety and hygiene, and social insurance" to include "working hours, rest, leave, protection of female employees," etc.

Key takeaways

The latest amendments to the Labor Union Law show that the Communist Party of China has strengthened its leadership of labor unions. They also reflect the government's focus on safeguarding the right of employees to form and join labor unions and protect workers' rights and interests while adapting to social developments. Based on the amended Labor Union Law, we may see the labor unions of enterprises, or the labor unions at a higher level, strengthening their supervision of employee management and protection of employment-related rights and workers' interests.

Guangzhou city further clarifies procedures for implementing mass redundancies

On 30 December 2021, various local Guangzhou government authorities, including the Guangzhou Municipal Human Resources and Social Security Bureau, jointly issued *Opinions on Issues Relating to Employers' Workforce Reductions* (the "**Opinions**").

The Opinions reiterate and emphasize the provisions of the Employment Contract Law on the preconditions for economic downsizing, the circumstances in which downsizing is permitted, employees that may not be downsized, employees to be retained on a priority basis, severance payment and rates, legal liability for illegal dismissal, etc. The Opinions further clarify and elaborate on the legal procedures to be followed by employers during economic downsizing:

1. The employer should explain the situation to the labor union or all the employees 30 days in advance, listen to their opinions and keep a written record of such communication and explanations.
2. The employer should put forward a workforce reduction plan. The Opinions specify that the workforce reduction plan should include a clear statutory basis for the reduction, the positions to be downsized, the number and percentage of employees to be dismissed, the downsizing criteria, the list of employees to be dismissed, the timing of the reduction, the steps in which the reduction will be implemented, details of employment contract expirations and terminations, severance rates and payment methods, the plan for payment of salaries and social insurance premiums owed, etc.
3. The employer should solicit the opinion of the labor union or all the employees on the workforce reduction plan and revise and improve it based on the feedback of the union or employees.
4. The employer should report in writing to the local administrative authority for human resources and social insurance on the course of its preparations for the workforce reduction and the finalized workforce reduction plan. The written report should include the reasons for the reduction, basic information on the employees to be dismissed, a statement as to whether the employer has explained the situation to the labor union or all employees and listened to their opinions, the name and contact details of the person in charge, etc. The workforce reduction plan and relevant supporting documents (such as the minutes of the meetings in which the reduction is explained to the union or all the employees) should be attached to the report.

   This step implies the human resources and social security authority's procedure for substantive examination of downsizing matters. If the authority has comments or proposals concerning the workforce reduction plan, the employer must resolve each issue and report back in writing, make revisions in line with the authority's comments and finalize the plan.
5. The employer should formally announce the workforce reduction plan, carry out the employment contract termination procedures with the employees to be dismissed, pay severance to those employees in accordance with the relevant regulations and pay the salaries and social insurance premiums (and other such fees) owed.

Key takeaways

The Opinions continue to apply the provisions of the *Employment Contract Law* and the *Implementing Regulations for the Employment Contract Law* concerning the circumstances in which downsizing is permitted, without any further explanation or elaboration of such circumstances. However, the Opinions do specify procedural requirements for workforce reductions by employers, such as the reporting process, the content of the documents, etc. They also empower the human resources and social security authorities to become directly involved in the downsizing process, coordinate the process and resolve relevant issues. This further clarification of the workforce reduction procedures may signal the standardization of how such procedures will be handled by the local authorities in the future.

Guangdong province implements new regulations concerning the human resources services market

The *Regulations of Guangdong Province Concerning the Human Resources Market* ("**Regulations**") were formally implemented on 1 January 2022.

Enterprises should note the following key points:

- **Regulation of employment activities**: Based on relevant provisions of national laws, the Regulations set out some dos and don'ts for human resources service providers. The following are examples of the don'ts:

  Don't:

(1) Engage in employment agency activities without a human resources service permit

(2) Forge, alter or transfer a human resources service permit or engage in business activities beyond the permitted scope

(3) Publish sham recruitment information or information with discriminatory content

(4) Seize workers' I.D. cards or other identification documents, or collect deposits from workers

(5) Provide entities or individuals with services such as forging supporting documents, fabricating employment relationships, etc., for use in social insurance procedures

- **Information protection requirements**: The Regulations require human resources service providers to observe relevant national regulations concerning cybersecurity, management of online information services and personal information protection, and to fulfill their related confidentiality obligations. The Regulations clarify that jobseekers have the right to require human resources service providers and network operators to delete personal information that is being used illegally or in breach of a contract and to correct errors in their personal information. Such providers or operators should cooperate.
- **Discriminatory text prohibited**: To protect the equal employment rights of vulnerable groups, the Regulations emphasize that the recruitment information provided by employers should be true, lawful and free of any content that discriminates on the basis of ethnicity, race, sex, religious beliefs, disability, etc. Employers may not refuse to hire women or subject women to higher employment conditions by reason of their sex, except for jobs that are identified by national regulations as being unsuitable for women. Therefore, when human resources service providers publish recruitment information, they should examine the relevant content in accordance with the law.
- **Annual reporting obligation**: The Regulations require commercial providers of human resources services to file truthful reports on their business operations with the competent human resources and social security administrations of the county or higher-level government of their place of business registration by the end of February each year. The annual report should include the particulars of their administrative permits or filed particulars, the paid-up amount of their registered capital, information on their business activities, financial details, etc.

Key takeaways

The Regulations are binding on human resources services providers that come under the jurisdiction of Guangdong Province. We remind Guangdong providers of such services to pay attention to the new legally binding provisions. Employers looking for Guangdong providers of human resources services are reminded to engage those that are qualified under the Regulations. Their human resources service agreements with those providers should clearly stipulate the rights, obligations and responsibilities of the parties.

Supreme People's Court holds ex-employees liable for infringement of former employer's trade secrets

Recently, the Intellectual Property Court of the Supreme People's Court handed down a final judgment in a civil dispute case involving infringement of trade secrets.

Company A believed that Mr. Cheng and other ex-employees (totaling 10 ex-employees) breached their non-compete and confidentiality obligations to Company A in the following ways: after leaving Company A, they successively joined Company B, which Mr. Cheng set up as the sole shareholder. In the course of their business activities, the ex-employees continually disclosed and used, or permitted Company B to use, technical and business secrets of Company A that were in their possession or to which they had access. In addition, they used patented products to compete against Company A and improperly obtained transaction opportunities, thereby harming Company A's competitive advantage. Company A demanded that the employees cease their unfair competition activities, such as their infringement of its business and technical secrets, jointly compensate Company A for its economic losses and its expenditure (totaling RMB 10 million) for the protection of its rights, and bear the court costs.

As a final judgment, the Supreme People's Court found that Company B and some of the ex-employees infringed Company A's technical secrets, as well as business secrets consisting of customer information. The court ordered the payment of RMB 3 million for Company A's economic losses and RMB 100,000 in reasonable expenses incurred when pursuing protection of its rights. Some of the ex-employees were ordered to bear joint and several liability. The main points of the judgments are as follows:

1. Mr. Cheng and five other employees bore non-compete and confidentiality obligations under Confidentiality Agreements signed with Company A. Before leaving Company A, the six persons disclosed to and permitted Company B to use business

secrets in their possession. This conduct continued after they left Company A. Their conduct constituted infringement of Company A's business secrets.

2. Mr. Cheng had established Company B as its sole shareholder. Mr. Cheng was the company's actual controller and directed Company B's business activities. Despite being well aware that Company A's six former employees were subject to non-compete and confidentiality obligations, Company B and Mr. Cheng obtained and used in their business activities the customer information provided by the six former employees. The conduct of Mr. Cheng and his Company B infringed Company A's business secrets.

3. The three other Company A employees were under no statutory or contractual non-compete obligations after their departure from Company A or the expiration of their non-compete agreements, so they were free to join new employers at their discretion. Furthermore, Company A was unable to prove that the three ex-employees used the customer information they obtained during their time with Company A to pursue improper gain for Company B. Therefore, the court determined that the conduct of these three persons did not constitute an infringement.

4. The court did not support the claim for an order of cessation of the infringement, because: (1) the time that lapsed from the time that Mr. Cheng and the other five persons left Company A to the time of the trial at second instance already exceeded the term of the non-compete obligation under the contract, and (2) the value of customer information and the competitive advantage diminished with the passage of time and the changes in market supply and demand. A permanent prohibition on their access to the competitive market would not be beneficial to the development of an equal, fair and orderly market environment. Moreover, the amount of compensation ordered had been sufficient to compensate Company A for the economic losses caused by the infringement of its business secrets. A further order for cessation of the infringement would no longer be necessary or timely.

Key takeaways

Companies can protect their rights and interests by improving their rules and regulations and adopting various confidentiality-related measures, such as entering into Employee Handbooks, Confidentiality Agreements, Non-compete Agreements, etc., with their employees. The term of an employee's confidentiality obligation should be relatively long or even permanent. However, it should be noted that the court may exercise discretion and hand down a judgment based on the specific facts, the social effect, etc. When determining the amount of compensation, the court will not necessarily support a permanent confidentiality term or order cessation of the infringement.

Beijing court rejects employee's claim that "proof of termination" affected his future employment prospects

In a recent Beijing court case, an ex-executive sued his former company, claiming that the "proof of termination" (*lizhi zhengming*) issued to him by the company negatively impacted his ability to find new employment. The executive had served as the company's president and director, and upon leaving the company for personal reasons, the company issued a proof of termination, a document that employers are legally required to issue to all departing employees regardless of the reasons for departure. Following consultations, the company issued him a proof of termination that stated the executive's period of service, his positions of president and chief risk control officer, and his resignation from those posts for personal reasons. The document additionally mentioned that the executive should unconditionally cooperate with the company in dealing with its risk matters (if any) arising from the time he worked for the company, since he held important management posts in the company. The executive signed the proof of termination.

After the court of first instance rejected the executive's claim, the appeals court (the Beijing Second Intermediate People's Court) held that the law does not spell out what content may not be included in a proof of termination and that the executive provided insufficient evidence to support his claim that certain content should not be added to the proof. The appeals court based its judgment on the following points:

1. The executive confirmed with his signature the content added by the company to the proof of termination.

2. The law does not spell out what content may not be included in a certificate of departure.

3. In addition, the executive provided insufficient evidence for his claim that the company coerced him into signing the proof of termination and that the certificate affected his reemployment. Accordingly, the appeals court rejected the appeal and upheld the original judgment.

Key takeaways

The law provides that a proof of termination should specify the term of the employment contract, the date of termination or ending of the employment contract, the position(s) held and the period of service with the employer concerned, but it does not spell out what content may not be included. It is not illegal to add objective statements to a proof of termination, but in practice it is not common for such a certificate to contain additional content. Therefore, employers should be cautious when they add content that is in excess of the statutory requirements. If the employer deems it necessary to add such supplementary content, the additional content should be limited to objective statements. If the employer's purpose is to obtain the departing employee's written confirmation of their major post-departure obligations (e.g., confidentiality obligations, cooperation obligations, etc.), we recommend that the employer sign a separate written agreement with the employee containing such obligations.

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