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In This Issue:

Amendment to Work Safety Law issued

Shenzhen issues electronic employment contract dispute settlement rules

Guangdong High People's Court publishes 10 typical labor dispute cases

Jiangsu High People's Court provides guidance on typical employment cases in Jiangsu Province

Shenzhen releases Q&A on employment issues relating to COVID-19

Suzhou Intermediate People's Court publishes guidance on typical cases involving post-termination non-competition restrictions

Shanghai High People's Court rules cessation of employment legal when employee reaches statutory retirement age

Beijing court requires general manager to return salaries due to false background information

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Amendment to Work Safety Law issued

On 10 June 2021, the Standing Committee of the National People's Congress amended the Work Safety Law. The amendments introduce several new rules and also increase the sanctions for noncompliance. The amended law will take effect on 1 September 2021. Some of the main changes and new employer obligations are as follows:

- **Emphasize care for employees**. The amendments require companies to pay attention to the physical, psychological conditions and behavior habits of their employees, and to strengthen psychological counseling and spiritual consolation for their employees.

- **Obtain work safety liability insurance**. The amended law requires companies belonging to high-risk industries (e.g., coal mining) to purchase work safety liability insurance. Other companies are encouraged (but not obliged) to do so.

- **Establish concept of public interest lawsuits**. If the illegal act of a company causes a major accident or hidden danger, which infringes the national interests or social public interests, the people's Procuratorate may file a public interest lawsuit against such company.

- **Increase sanctions for noncompliance**. The amended law increases fines for most non-compliant activities. For certain extremely serious violations, the fines may be up to CNY one hundred million. Other than fines, the company may also face frequent labor inspection, increased insurance contributions, suspension of project approval, etc. There is also a new penalty scheme. Companies who refuse to rectify the non-compliance after being fined may be additionally fined (the additional fine will accumulate on a daily basis based on the original fine amount).

Key takeaway points

Every company should be aware of the new requirements under the amended law to avoid increased noncompliance penalties. The amended law reflects the importance that the government is giving to work safety issues and the increase in fines and liability further underlines this.

Shenzhen issues electronic employment contract dispute settlement rules

On 13 May 2021, the Shenzhen labor bureau and labor arbitration committee issued the Shenzhen Electronic Employment Contract Dispute Settlement Rules ("**Shenzhen Settlement Rules**"). The Shenzhen Settlement Rules provide useful practical guidance on the requirements for an electronic employment contract to be recognized as valid in labor arbitration in Shenzhen and the use of electronic employment contract service platforms ("**Service Platforms**") for the conclusion of electronic employment contracts.

Further to the Ministry of Human Resources and Social Security's general guidance on electronic employment contracts (see our March 2020 update here), the Shenzhen Settlement Rules provide practical guidance on the requirements for an electronic employment contract to be recognized as valid in labor arbitration cases. Specifically:

1. An employee shall be deemed to have agreed to conclude a written employment contract in electronic form if the employee signs an employment contract, or through other forms of data messages, acknowledges their willingness to sign an employment contract, by the following means:

   (i) the employee registers on the Service Platform

   (ii) agrees to apply for a digital certificate

   (iii) confirms their agreement to sign the employment contract

2. To the extent there is no conflicting evidence, the employee's identity shall be taken to be genuine and reliable if the Service Platforms verify any of the following pieces of information: (i) the employee's biometric data; (ii) the mobile phone text message verification information; or (iii) the employee's bank transfer verification information.

   If a party acknowledges that the mobile phone numbers and digital certificates used to verify its identity during the signing of the electronic employment contract is accurate information in relation to that party, but denies that the signing process was operated by itself, such party is under an obligation to prove that it did not sign the contract because the relevant mobile phone and/or digital certificates were out of its control.

3. To the extent there is no conflicting evidence, where the parties use a digital certificate issued by qualified third-party certification service agencies, such certificate shall be deemed to be a valid electronic signature under the Electronic Signature Law.

4. Where the Service Platforms meet the relevant technical requirements outlined in the Settlement Rules and the Service Platforms use third-party electronic evidence preservation, or other technical measures such as hash verification or block chain to certify the key process of signing an electronic employment contract, the electronic employment contract shall be deemed to be complete, accurate and not having been tampered with.

The Shenzhen Settlement Rules also appear to promote the use of government-operated Service Platforms. The electronic employment contract data provided by a government-operated Service Platform shall be viewed as the most reliable form of evidence and would not be able to be rebutted even if the parties produce conflicting evidence.

Last, the Shenzhen Settlement Rules also make clear that the employer shall bear the corresponding legal liabilities if the employee suffers from any damages due to any technical malfunction of the Service Platforms in relation to the conclusion, administration, transmission, storage and retrieval of the electronic employment contract.

Key takeaway points

There is an increasing trend by the MOHRSS and local governments in certain localities to promote the use of electronic signatures/forms for employment-related documents by providing clearer guidance in this area. Companies may consider using electronic employment documents, but should first evaluate/manage the legal risks before doing so. When choosing the Service Platforms, organizations may wish to consider using government-operated Service Platforms where available.

Guangdong High People's Court publishes 10 typical labor dispute cases

In April 2020, the Guangdong High People's Court published 10 typical labor dispute cases. The 10 court cases cover a wide range of topics such as compensation, annual leave, labor dispatch and work suspension during the COVID-19 pandemic, offering insights into both traditional employment law issues and new employment problems arising from COVID-19 or emerging industries.

Some of the interesting key points arising from the cases are as follows:

- A labor dispatch agency may not unilaterally terminate dispatched workers simply because the labor dispatch agreement between the agency and the host company expires.
- Where an employee is a serial litigant, and tampers with evidence and makes false statements in court, the courts may consider such behavior as dishonesty and penalize the employee for hampering civil litigation.
- Express delivery companies should reimburse the oil expenses that couriers have incurred for using the couriers' own cars at work, unless otherwise agreed.
- Where an employee is objectively unable to file a claim to employment arbitration or courts in time due to COVID-19, COVID-19 should be regarded as a force majeure event and the statute of limitations should be suspended.
- Companies must not hire minors under the age of 16. Where a company uses child labor and consequently, the child suffers any injuries or disabilities or dies, the company must pay the minor or their near

relatives a lump sum of compensation, regardless of whether the injury/ disability/death is the company's fault.

Key takeaway points

The 10 labor dispute cases either restate existing laws and regulations, or represent new trends in Guangdong judicial practice in relation to recent developments in employment law. Companies operating in Guangdong Province should keep a close eye on the local judicial practice.

Jiangsu High People's Court provides guidance on typical employment cases in Jiangsu Province

The Jiangsu High People's Court recently detailed 10 employment dispute cases in Jiangsu Province that may provide guidance to the courts in Jiangsu. Of particular note is that one of the cases relates to the termination of employment for violation of epidemic prevention measures and another relates to employment liabilities upon company liquidation.

- **Breach of epidemic prevention measures**

  In this case, the employee was employed by a labor dispatching agency and then was dispatched to a Nanjing university. Earlier in 2020, the university had formulated and adopted a series of policies on epidemic prevention controls. In May 2020, the university discovered that the employee had left Nanjing before the commencement of the new academic term, without notifying the university and had not undergone quarantine on return to Nanjing in accordance with the university's policies. In addition, the employee commuted between Nanjing and another city, Wuxi, without notifying the university and undergoing quarantine. The Nanjing university returned the employee to the agency on the basis of the employee's violation of the university's epidemic prevention measures, after which the agency terminated the employee. The employee sued the agency for wrongful termination.

  The court ruled in favor of the agency and determined that the termination was justifiable. The court held that the employee’s behavior not only violated the policies of the university, but also was irresponsible vis-a-vis the health of other persons.

  Key takeaway points

  This case demonstrates that violation of epidemic prevention measures implemented by an employer may amount to a serious violation of the employer’s rules and regulations, and such breach may justify summary dismissal. It also highlights the importance for employers to set out clearly in their rules/regulations/policies the types of misconduct that may result in summary dismissal. Such rules/regulations/policies should be adopted in accordance with Article 4 of the PRC Employment Contract Law.

- **Employment liabilities in the event of a company liquidation**

  In this case, the employee commenced employment with a Wuxi company in April 2016, and was injured during work in September 2016. In July 2018, the Wuxi Human Resources and Social Security Bureau determined that the injury was a work-related injury. In November 2018, the company announced the liquidation of the company in a newspaper. In April 2019, the employee was identified by a formal labor ability appraisal committee as having a Grade 8 disability. The company was de-registered in May 2019 based on a shareholders' resolution to dissolve the company. The de-registration documentation filed with the local administration of market regulation indicated that the company did not owe any debts. The employee filed a lawsuit against the members of the liquidation team to claim losses incurred relating to the work-related injury (i.e., medical expenses and nursing expenses, etc.).

  The court held that the company was required to pay compensation to the employee for the work injury suffered by the employee since the company had not purchased social insurance for the employee. In addition, the members of the liquidation team had not informed the employee about the liquidation of the company, despite knowing that the employee had suffered a work injury and that the company had not paid any work injury benefits to the employee. The court found that the members of the liquidation team knowingly failed to notify the employee in writing of the dissolution and liquidation of the company in accordance with the law when they knew that the company owed debts to the employee. The court ruled in favor of the employee.

  Key take-away points

  This case demonstrates that employers may be liable to compensate employees for work injuries suffered where the relevant employee is unable to claim benefits from the social insurance fund due to a reason attributable to the employer (e.g., the employer's nonpayment of social insurance). It also makes clear that work injury compensation constitutes employment liabilities that are subject to protection under the PRC Company Law and Enterprise Bankruptcy Law.

Shenzhen releases Q&A on employment issues relating to COVID-19

In June 2021, the Shenzhen municipal labor bureau issued an official online Q&A to address common employment law questions relating to the COVID-19 pandemic. The Q&A explains that Shenzhen is conducting large-scale COVID-19 testing for people living in the city in accordance with the city's relevant rules on proactive COVID-19 management. Therefore, if an employee refuses to take a COVID-19 test without a justifiable reason, the employer can require the employee to take personal leave without pay. The Q&A also provides that, if an employee refuses to travel to a low-risk area which was formerly a high-risk area and the employee cannot provide a valid justification for the refusal, the company has the right to take disciplinary action against the employee in accordance with applicable laws, the employment contract and relevant policies.

In addition to the above, the Q&A also covers the following issues:

- payment obligations during medical treatment/observation/isolation periods
- extension of employment contracts which have expired without having been renewed during the COVID-19 pandemic
- termination protections applicable to employees who are unable work due to having COVID-19 or are suspected of having COVID-19
- types of employee misconduct/insubordination in relation to COVID-19 that may lead to termination of employment

Key takeaway points

While the Shenzhen Q&A technically is not a legally binding document, it provides useful practical guidance for employers on the management of employees during the ongoing COVID-19 pandemic, as it reflects the current views and policies of the local labor authorities. Employers operating in Shenzhen should follow relevant local guidance and ensure that their internal company policies reflect the latest local guidance if and as appropriate.

Suzhou Intermediate People's Court publishes guidance on typical cases involving post-termination non-competition restrictions

On 30 April 2021, Suzhou Intermediate People's Court (the highest court in Suzhou) published information on typical cases involving post-termination non-competition restrictions in an employment context. We highlight below the main points for employers to note:

- **Paying non-compete compensation lower than the legal standard will not necessarily invalidate the non-compete restriction**

  Company A and its employee signed a non-compete agreement, which provided that the monthly non-compete compensation would be RMB 7,208. After the employee left Company A, he joined a competitor, Company B. Company A paid non-compete compensation to the employee based on the agreed amount in the contract, amounting to a total of RMB 122,536 for 17 months.

  The court found that the employee's total compensation for the 12 months before the termination with Company A was RMB 350,034. The court held that although the monthly non-compete compensation RMB 7,208 was lower than 30% of the employee's average monthly compensation for the 12 months before the termination (which is the amount stipulated in the Supreme Court's judicial interpretation), this did not in itself invalidate the non-compete restriction. According to the spirit of the Supreme Court's labor dispute judicial interpretation, even if the agreement between the employer and the employee is silent on the amount of the non-compete compensation, such compensation can still be made up by the employer to the amount stipulated under the law and will not necessarily lead to the invalidation of the non-compete agreement. Therefore, the court ruled that Company A should make up the amount of the non-competition compensation to the amount

prescribed under the law, and found that the employee had violated the non-compete restriction and should pay liquidated damages.

- **Employee found to have breached non-compete obligation**

  In this typical case, an employee served as a sales manager in Company C (a packaging company) and signed a non-competition agreement with the company. After the employee resigned, the employee helped Company D (established by his wife) to promote products that were competitive to Company C's customers. At the same time, the employee was making social insurance contributions through a separate transportation company.

  During the course of the employment arbitration and litigation, the employee provided social insurance details made through the transportation company to prove that he was not engaged in a competitive business. However, after reviewing the facts of the case, the court determined that the employee had violated the non-compete restriction and ruled that the employee should pay Company C liquidated damages.

Key takeaway points

An ex-employee may still be in breach of a non-compete restriction if the ex-employee provides services to a competitor company (despite being employed and contributing to social insurance via a non-competitor company). Please note that courts in different cities may take a different approach on non-compete issues. For example, unlike in Jiangsu, in some cities, non-compete compensation lower than the legal requirement may entail risks of invalidating the non-compete agreement. Therefore, companies should check the local requirements when dealing with non-compete issues.

Shanghai High People's Court rules cessation of employment legal when employee reaches statutory retirement age

The Shanghai High People's Court recently denied an employee's claim demanding compensation for wrongful cessation of employment in a situation where the employee had reached statutory retirement age, but had not yet started to enjoy pension insurance benefits. In this case, the company sent a notice to the female employee who had just reached 55 years old (the statutory retirement age for female managerial employees) informing her of the cessation of her employment. The employee then filed a complaint against the company with the labor arbitration committee, claiming wrongful termination. The employee argued that as she had not started to enjoy her pension insurance benefits, (notwithstanding the fact that she had reached the statutory retirement age), under the PRC Employment Contract Law (ECL), the company was not entitled to end her employment.

This dispute arose primarily due to apparent inconsistent provisions in the ECL and the Implementing Regulations of the ECL. The ECL provides that an employer may end an employee's employment when the employee starts to enjoy pension insurance benefits. On the other hand, the Implementing

Regulations of the ECL provide that an employer may end an employee's employment when the employee reaches the statutory retirement age.

In this Shanghai case, the labor arbitration committee ruled that the ending of employment was legal, and rejected the employee's claim. The employee then filed a claim with the court. Both the first instance court and appellate court decided that the company was entitled to apply the Implementing Regulations of the ECL to end the employment relationship since the employee had reached the statutory retirement age. The employee then applied for a retrial with the Shanghai High People's Court. The Shanghai High People's Court subsequently rejected the employee's claim and ruled that an employer may apply either the ECL provision or the Implementing Regulations provision when ending the employment relationship.

Key takeaway points

This case provides welcome guidance on an issue that has caused some controversy in practice due to the difference in the wording of the ECL and its Implementing Regulations. The Shanghai High People's Court has now clarified that an employer may end the employment contract either when the employee reaches the statutory retirement age or when the employee starts to enjoy their pension insurance benefits. Although technically, there is no binding court precedent in China, this case at least provides guidance on this issue that lower courts may refer to.

Beijing court requires general manager to return salaries due to false background information

In a recent Beijing court case, an employee was forced to return to his employer part of salaries he received during the employment period. The company had hired the employee as general manager with a monthly salary of RMB 90,000. The company required the employee to provide original copies of his diploma and related authentication certificates during the recruitment and on-boarding processes, but the employee failed to do so, claiming that the original copies were missing. The employee subsequently passed his probationary period and resigned from the company after six months of work.

After the employee had left employment, the company conducted an internal investigation and discovered that all the education and business experience-related information provided by the employee were false. The company sued the employee: (i) arguing that the employment contract was invalid because of the employee’s fraudulent conduct; and (ii) claiming a return of part of salaries paid to the employee.

The employee admitted that he had falsified his educational background and business experience. However, he also argued that he was competent for the position of general manager because of his experience and capability. The employee further contended that the company should have checked his educational background and business experience at the time of recruitment or before the expiration of the probationary period, in a timely manner.

The court supported the company’s claims and held that the employment contract between the company and the employee was invalid due to the employee's fraudulent tactics. The employee was also required to return part

of his salaries received in the amount of RMB 300,000, which was decided at the court's discretion.

Key takeaway points

Historically, courts have been reluctant to require an employee to return salary because of the employee's misconduct. Submission of false background information by an employee may lead to the employment contract being declared to be invalid. Where the employment contract has been declared invalid, the employer can also try to claw back any inappropriate salary payment made to the employee. However, in order to avoid having to rely on this course of action, employers should ensure that they conduct adequate background checks during the recruitment process.

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