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China Employment Law Update

Newsletter

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Supreme People's Court issues guidance to ensure more consistent court rulings

On 27 July 2020, the Supreme People's Court (SPC) issued new guidance to all courts instructing them to research earlier court opinions on similar cases ("**Guidance**"), so as to ensure more consistency and predictability in court rulings. The Guidance took effect on 31 July 2020. The Guidance urges judges to research similar cases with similar facts and legal issues when making judgments on certain complex cases. Key highlights of the Guidance include the following:

First, judges are obligated to conduct research on similar cases for complex and important cases in the following circumstances:

- No clear or consistent rule has been established for the pending case in hand
- The pending case will be submitted to a judges meeting or judicial committee for discussion
- The president of the court or chief judge makes such a request or
- Other cases where there is a need to check earlier similar cases

Second, the Guidance indicates that when conducting research on similar court cases and guiding opinions, courts should follow the below order of legal bases:

- "guiding cases" (*zhidaoxing anli*) issued by the SPC - which judges shall (*yingdang*) follow
- "typical cases" (*dianxing anli*) and other cases issued by the SPC - which can be referenced by judges
- "referenced cases" (*cankaoxing anli*) and other cases issued by the local high people's court - which can be referenced by judges
- earlier cases issued by the local upper-level court and the court itself - which can be referenced by judges

In addition, except for the "guiding cases" issued by the SPC, judges should give priority to similar cases ruled on in the previous three years.

Third, if either party in a dispute relies on a similar case when making its arguments, the court has to explain to the parties whether or not it has considered the similar case before delivering the judgment. If the similar case submitted is a "guiding case", such explanation must be included in the judgment.

Key take-away points:

The Guidance does not mean that the PRC will now become a common law system. However, it does allow companies to search for and apply certain previous cases as an example or a guide for judges to consider in similar disputes. In order to unify the application of law as required by the SPC, lower-level courts are expected to put more emphasis on considering previous cases, in particular the "guiding cases" selected and published by the SPC. Therefore, companies are advised to keep a close eye on the "guiding cases" published by the SPC. Further, in the event of disputes, companies are also advised to conduct similar case searches and construct their arguments accordingly.

Supreme People's Court issues judicial interpretation on trade secrets cases

Recently, the Supreme People's Court issued a judicial interpretation on trade secrets cases ("**Trade Secrets Judicial Interpretation**"), effective from 12 September 2020. Following the amendment to the *Anti-Unfair Competition Law* in 2019, this Trade Secrets Judicial Interpretation further clarifies relevant matters involved in trade secret disputes.

The highlights of the Trade Secrets Judicial Interpretation are summarized as follows:

- Customer information, such as the customer's name, address, contact information, and transaction habits, intentions, content, etc., are trade secrets.

  However, if the company claims that a specific customer is a trade secret only based on the ground that it maintains a long-term stable trading relationship with that specific customer, the court will not support this claim. In addition, if the employee can prove that the customer traded with the employee's original company based on personal trust in the employee, and after the employee resigned, the customer voluntarily chose to do business with the employee or the employee's new company, then the court will not uphold this as "obtaining the trade secrets of the former company by improper means".

- If the company takes one of the following measures, the court will hold that the company has taken measures to protect the confidentiality of information (which is one of the mandatory conditions for a company to establish that such information constitutes a "trade secret"):

  - Signing a confidentiality agreement or stipulating confidentiality obligations in the contract

  - Imposing confidentiality requirements through policies, training, written notifications, etc. on employees, former employees, suppliers, customers, visitors, etc. who can access and obtain trade secrets

  - Restricting visitors from visiting, or conducting differentiated management of production and business sites which involve trade secrets such as factories and workshops

  - Differentiating and managing trade secrets and devices carrying trade secrets by means of marking, classification, isolation,

encryption, sealing, and limiting the range of people who can access the trade secrets

- Taking measures such as prohibiting or restricting the use, access, storage, and copying functions of computer equipment, electronic equipment, network equipment, storage equipment, software, etc., that can access and obtain trade secrets

- Requesting exiting employees to register, return, clear, or destroy the trade secrets, including in relation to any devices containing trade secrets that such employees have accessed or obtained, and requesting employees to continue to assume their confidentiality obligations post-termination

- Taking other reasonable confidentiality measures

- If the trade secrets holder has provided preliminary evidence of the benefits obtained by the infringer due to the infringement, but the infringer possesses the account books and information related to the infringement of trade secrets, the court may order the infringer to provide the account books and information at the request of the trade secrets holder. If the infringer refuses to provide it without justifiable reasons or does not provide it truthfully, the court may determine the benefits obtained by the infringer from the infringement based on the claims and evidence provided by the trade secrets holder.

In addition, under a new draft amendment to the Criminal Code, the punishment for stealing Chinese trade secrets to benefit a foreign entity has been increased - the proposed penalty is up to a five-year jail sentence plus penalties in normal cases, and in excess of a five-year jail sentence plus penalties in severe cases.

Key take-away points:

Following the amendment to the *Anti-Unfair Competition Law* in 2019, under which the burden of proof rule has changed, the trade secrets holder will probably have a higher change of success in a trade secrets infringement claim than before. This recent Trade Secrets Judicial Interpretation further clarifies some issues that previously were not entirely clear under the law and may further strengthen a trade secrets holder's position. Companies should follow the guidance under the Trade Secrets Judicial Interpretation such as signing confidentiality agreements, establishing confidentiality policies, etc., to increase their chances of success in trade secret cases.

Seven authorities encourage expansion of scale of internship programs

Seven authorities including the Ministry of Human Resources and Social Security and the Ministry of Education recently collectively issued a Notice about Further Strengthening Internships ("**Notice**"), stipulating that China will expand the scale of internships and improve the quality of internships.

The internships mentioned in the Notice are not general internships provided by companies for college students. Generally speaking, the internships to which the Notice applies are for college graduates who are unemployed within the two year period after leaving college. In addition, unemployed

young persons aged 16-24 are also qualified to participate in the internship program. Any enterprise or institution that would like to offer such an internship program is required to file an application with the local Human Resources and Social Security Bureau to enable them to qualify as an "internship base". The internship program for each intern usually lasts for three to 12 months. During the internship period, the "internship base" (i.e. the company or institution for whom the interns work) will provide a basic living fee to and purchase personal accident injury insurance for the interns. The basic living fee will usually be in the range of 70% to 100% of the local minimum wage decided by the local Human Resources and Social Security Bureau. The local Human Resources and Social Security Bureau will also provide some allowances to the internship base. There is no employment relationship established between the internship base and the intern.

According to the Notice, the government will expand the scale of the internship base and increase internship positions as well as encourage more qualified young people to participate in such internship programs. Further, the government also encourages internship base to increase the basic living fee for interns to the standard equal to the local minimum wage, to purchase additional commercial insurance for its interns and to employ them after the internship program completes.

Key take-away points:

The local provincial or municipal governments have different implementation rules applicable to the internship programs, particularly in relation to the internship base application and applicable benefits for interns and internship bases. Companies that are interested in becoming an internship base should become familiar with the specific local rules and policies for such internships, and the benefits/incentives being offered.

China takes steps to support flexible employment through multiple channels

On 28 July 2020, the State Council issued the *Opinions on Supporting Flexible Employment through Multiple Channels* ("**Opinions**"). The Opinions introduce various steps taken by the government to support flexible employment (which generally includes self-employed workers, part-time employment and emerging employment models). We highlight the key points below.

- Create more job opportunities. The government will expand and upgrade certain industries where part-time workers are commonly used, such as cleaning, retail and construction. The government will boost the development of emerging employment models (e.g., e-retailing, mobile travel, online education, internet healthcare).

- Guarantee workers' benefits and interests. The government will formulate relevant labor and social security regulations for flexible workers working at internet platform enterprises. Internet platform enterprises should consult with their workers regarding remuneration, rest and leave, work safety, etc. The local union is encouraged to consult with the guild or enterprise representative to set up labor quota, working hours, disciplinary policies, etc.

- Improve self-employment business environment. The government will make efforts to eliminate unreasonable restrictions hampering flexible employment, and encourage individuals to start up their own businesses.

Key take-away points:

The PRC government is developing legislation to better protect flexible workers' rights and interests. The Opinion reveals the government's commitment to stabilizing the overall employment environment, likely due to the slowing economy caused by the Covid-19 pandemic.

New guideline issued to improve protection of the rights and interests of online platform workers

On 20 July 2020, the Supreme People's Court and the National Development and Reform Commission jointly issued a *Guideline on Providing Judicial Services and Support to Promoting Improvements to the Socialist Market Economy System in a New Era*.

Among other things, this guideline aims to support entrepreneurship and protect entrepreneurs' rights, to guide the labor force to change their mindsets on working arrangements, and to improve the protection of the rights and interests of the labor force working in non-traditional types of working arrangements, such as couriers and online platform workers. The guideline, however, provides no further details on how the courts will act to improve the protection of the rights and interests of such workers.

The guideline also pledges to strengthen judicial support for promoting employment, protecting employees' equal employment opportunity rights, prohibiting discrimination based on sex and hometown location etc., supporting employees' reasonable claims concerning work injury insurance medical insurance and basic pension (as part of the social insurance program).

Key take-away points:

The guideline reflects the government's general supportive position on new forms of work (such as online platform work) and its aim to strengthen protection for the labor force engaged in new types of working arrangements. It is advisable for online platforms and companies that engage a labor force outside of the traditional employment relationship (such as contractors and freelancers) to devote attention to such individuals' work safety, duly contribute work injury insurance (where possible) or otherwise purchase necessary commercial insurance for such contractors and freelancers to cover potential work injury claims and to follow other applicable requirements that the government may impose on such working relationships.

Jiangsu Province High Court issues guiding opinion on employment disputes relating to COVID-19

On 25 August 2020, the Jiangsu Province High Court, the Jiangsu Province Labor Bureau, and the Jiangsu Province Bureau of Justice jointly issued a

guiding opinion on employment disputes relating to Covid-19. The opinion touches on the following key employment law issues:

First, during the period when an employee is in isolation and cannot perform regular work after being diagnosed with Covid-19, is suspected of having contracted Covid-19, or has been in close contact with a known or suspected Covid-19 carrier, the company should pay the employee's regular full salary during the isolation period. After the isolation period ends, if the employee still needs to be absent from work in order to receive medical treatment, the company should pay the appropriate amount of sick pay during the statutory medical treatment period.

Second, if due to Covid-19, a company arranges its employees to provide services through phone or the internet, the company should either pay the newly agreed salary or continue paying regular salary to the employees if no agreement has been reached in this respect. If an employee works on a rest day and does not take compensatory leave within the six-month period, the company will be obliged to pay the employee overtime payment at a rate of 200% of regular salary. Furthermore, due to Covid-19, a company may temporarily assign its employees to other companies to provide services in accordance with the employment contract or with the mutual consent of the employees.

Third, an employee who cannot work due to government isolation, medical observation or other government emergency measures is protected from termination of their employment and, if the employee's employment contract expires during this period, the employment contract shall be automatically extended until the isolation period ends. However, if an employee conceals his/her illness relating to Covid-19, refuses to accept testing or mandatory isolation, or refuses to return to work without a justifiable reason, the company may summarily dismiss the employee.

Key take-away points:

The Jiangsu opinion is generally consistent with the national rules relating to Covid-19 matters, and also provides additional detailed guidance on salary payment, termination of employment, flexible working arrangements, etc. Companies with operations and employees in Jiangsu should follow the local rules.

National health authorities issue standards for enforcement of occupational health requirements

On 31 August 2020, the National Health Commission of the PRC (NHC) issued standards for supervision and enforcement of occupational health requirements ("**Standards**"). The Standards became effective from the date of issuance.

According to the Standards, local health authorities, when carrying out occupational health supervision and enforcement, will look at a wide range of matters, e.g., the adoption and improvement of occupational disease prevention and control measures, the daily monitoring and regular detection and evaluation of occupational hazards in the workplace, the notification of and warning systems in place for occupational disease hazards, the occupational health training, the monitoring of employees' occupational

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health, any transfer/outsourcing of work that poses occupational disease hazards, etc. If any problem is identified, the local authorities should issue a written opinion on its findings, and investigate and deal with illegal acts in compliance with the law. In addition, information contained in the local authority's findings should be made public and integrated into employers' social credit information.

Key take-away points:

The Standards do not directly apply to employers, as they are meant to address occupational health supervision and enforcement by local authorities. However, the issuance of the Standards clearly signals China's intent to undertake frequent and close inspections of workplaces with a view to preventing and controlling occupational diseases, and inspection results may impact a company's social credit rating. To this extent, employers should be aware of this development.

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