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Client Alert

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Newly amended *Law on the Protection of the Rights and Interests of Women* takes effect on January 1, 2023

The newly amended *Law on the Protection of the Rights and Interests of Women*, adopted by the Standing Committee of the 13th National People's Congress on October 30, 2022, came into effect on January 1, 2023. The new law imposes new requirements on employers in the following respects:

Prevention and cessation of sexual harassment

The latest amendments to the *Law on the Protection of the Rights and Interests of Women* expressly define sexual harassment of women, in line with the principles on sexual harassment laid down in Article 1010 of the *Civil Code*. In addition, they require employers to take steps to prevent and stop sexual harassment of women. These steps chiefly include formulating company rules prohibiting sexual harassment, identifying the department and persons in charge of handling sexual harassment complaints, providing education and training to employees and managers, establishing complaint channels, putting in place an investigation and disciplinary system, assisting victims in protecting their rights, providing necessary counseling, etc.

Prohibition of sex discrimination

The amendments codify and strengthen the provisions on sex-based discrimination during recruitment that are included in the *Notice on Further Regulating Recruitment Activities in Order To Promote the Employment of Women* issued in 2019. In particular, the law prohibits discriminatory actions such as restricting a job to men or favoring men for the job, inquiring about or investigating the marital status of female applicants, including a pregnancy test as part of the pre-employment physical examination, imposing marriage-related, maternity-related or other such restrictions as conditions for employment, implementing different recruitment criteria for men and women, etc. In addition, the newly amended law prohibits employers from practicing sex-based discrimination with respect to the promotion of female employees and the assessment of their

professional skills, etc. Employers must not reduce the benefits of female employees, or restrict their promotion or the assessment of their professional technical titles/positions, etc., by reason of their being married, pregnant, on maternity leave or nursing, etc.

Special protection for female employees

The amendments also state that provisions on special protection of female employees must be included in the employment contracts between employers and their female employees. Collective contracts should also include provisions on the equality of men and women and protection of the rights and interests of female employees. In addition, employers are required to regularly arrange for their female employees to undergo gynecological examinations, mammograms and other health checkups addressing the special needs of women. However, the law does not specify how frequent such examinations should be.

Legal responsibility of employers

The newly amended law greatly strengthens the remedies available to protect the legitimate rights and interests of women. If a woman's rights or interests are infringed, the labor authorities, in conjunction with the labor union and the Women's Federation, may investigate and impose a deadline for rectification. If an employer fails to take necessary steps to prevent and stop sexual harassment, the local authorities may impose punishments on the main person(s) in charge who are directly responsible and other persons directly responsible, depending on the seriousness of the infraction. The law also stipulates that sex-based discrimination (including but not limited to sex-based discrimination with respect to recruitment, promotion and assessment of professional technical titles/positions) should be among the items subject to labor inspections conducted by the local labor authorities. Employers that violate relevant regulations can be fined between RMB 10,000 and RMB 50,000. In cases of employment discrimination or sexual harassment, the local prosecutor's offices are not only allowed to issue written suggestions but they may also initiate public interest litigation.

Key takeaways

The amendments are the legislative response to the issues of sexual harassment in the workplace and sex-based discrimination that have been occurring frequently in the past few years. They strengthen the responsibility of the competent authorities and employers and flesh out the available protection for the rights and interests of female employees. Employers should timely revise their corporate policies based on the relevant provisions of the *Law on the Protection of the Rights and Interests of Women*, improve their prevention of sexual harassment and strengthen their protection of the safety and health of their female employees.

Shanghai amends rules related to parental leave

On November 1, 2022, the Shanghai Municipal People's Government issued the amended *Several Regulations of Shanghai Municipality on Family Planning Incentives and Subsidies* ("**Incentive Regulations**"). The amendments are designed to supplement and clarify another set of family planning regulations in Shanghai.

Article 3 of the Incentive Regulations provides that when a couple has a child in accordance with the law, the husband and wife are each eligible for five days of parental leave per year until their child is three years old. It also provides that if the couple has more than one child under three years of age, they are entitled to an additional five days' leave for each additional child. Each year's parental leave entitlement is counted from the child's birthday, and such parental leave must be used up during each annual period. The parental leave entitlement may be taken consecutively in one go or on non-consecutive days. Employees should receive regular pay during such leave.

Employers should note the following points in particular:

- Couples who produce children lawfully are eligible for one instance of paternal leave for each child.
- The number of days of paternal leave is counted according to the number of children rather than the number of births. For example, if a couple produces twins, the husband and the wife are each eligible for 10 days of parental leave per year until the twins are three years old.
- Parental leave is calculated on an annual basis from the child's date of birth rather than by calendar year.
- The salary applicable to normal work days does not include year-end bonuses or salary payments for special circumstances such as commuting subsidies, work meal subsidies, housing subsidies, middle or night shift subsidies, summer heat subsidies, overtime pay, etc.

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In most cases, the phrase "couples who produce children in accordance with laws and regulations" refers to couples with no more than three children. Exceptions are children who have been determined to suffer from non-hereditary disabilities, ethnic minority children whose parents moved to Shanghai and previously obtained an additional-child permit from the authorities of their original place of registered residence, and other such special cases. Employees who satisfy the conditions, including those whose children were born before the implementation of the Incentive Regulations but are under three years old, may apply to their employers for parental leave.

Key takeaways

We previously summarized the maternity leave, paternity leave, parental leave and parent care leave rules of various locations (for details, please see the *Summaries of Maternity Leave, Paternity Leave, Parental Leave and Parent Care Leave Rules of Eight Provinces and Municipalities* here). In the course of their leave management, employers should still pay attention to the relevant FAQs and implementing regulations of their localities.

Supreme People's Court rules that employer must compensate ex-employee for occupational invention

Employers have long been required to pay inventor's remuneration to employees who make occupational inventions or creations for which a patent is granted to the employer ("**Occupational Invention Remuneration**"). The Supreme People's Court recently concluded its trial of a two-year case concerning an ex-employee's claim for unpaid Occupational Invention Remuneration. It has practical reference value for employers in terms of the statute of limitations for Occupational Invention Remuneration claims, the determination of the nature of amounts paid and the issue of how to determine the amount of the remuneration.

In the present case, a food company owned a food preparation patent for an invention made by an active employee together with his co-workers. The patent was applied for in 2009 and granted and published in 2010. The employee left the company in 2015 and sued the company in 2020 for more than RMB 800,000 in total.

The company argued that his litigation claim exceeded the two year statute of limitations existing at the time of his departure (the current statute of limitations is three years), that it already had rewarded the employee by paying annual rewards, gratitude payments, etc. since 2011, so it was not required to make further payments, and that the patent concerned had been researched and developed by the company at the instruction of a higher-level parent company. As the employer itself was not the patentee, it should not be obligated to pay any remuneration, and the parent company was also not obligated to pay Occupational Invention Remuneration, because it had had no employment relationship with the employee.

However, the court ruled against the employer, because although the employee had left in 2015, the company continued to use the patent concerned and the patent rights remain valid to this day. Even though the company ceased to use the patent in 2016, the employee had no way of knowing of the company's decision to stop using it, since that decision was made in an internal meeting after he had left. Furthermore, the company offered no evidence to show that the employee knew or should have known that the company stopped using the patent in 2016 (the statute of limitations period starts when an individual knows or should have known that their rights have been infringed). Further, the annual payments made by the company were Chinese New Year gratitude payments and year-end bonuses, and there were far more recipients of those payments than just the inventors of the patent concerned, so such payments could not be deemed as in lieu of the Occupational Invention Remuneration. Finally, the rights in the patent concerned were transferred to the employer's parent company only because they had been under the company's control. The right of the inventor of an occupational invention or creation to claim a reward or remuneration is not prejudiced by the employer's disposal of the patent (application) rights pertaining to the occupational invention or creation.

Determination of the amount of remuneration for an occupational invention requires consideration of several aspects such as the number of persons involved in the research and development of the patent concerned, the employee's role in the research and development, the period of the company's use of the patent concerned, etc. It should not be determined solely on the basis of the provisions of Article 78 of the *Detailed Implementing Rules for the Patent Law* on the "allocation of not less than 2% of the operating profit." In the end, the Supreme People's Court decided that the employer should pay the employee remuneration of RMB 80,000.

Key takeaways

This case shows that the courts in China are willing to hear claims for Occupational Invention Remuneration even many years after an employee's departure from the company. It is important for companies to dismantle such time bombs in advance. We recommend that a company's regulations or employment contracts expressly provide for the ownership of occupational inventions

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and creations, the amount of remuneration for occupational inventions and the period for payment thereof to avoid subsequent disputes over unclear ownership and remuneration issues. Employers should also clearly differentiate any paid Occupational Invention Remuneration from year-end bonuses, performance bonuses, allowances, etc. in their accounting books/payroll records to keep their payments clearly distinguishable.

Supreme People's Court issues guiding case on how employers should handle sexual harassment in the workplace

Recently, the Supreme People's Court published seven employment-related cases to serve as guidance to the lower courts. One of them is an employment dispute regarding termination of a supervising manager for failing to effectively handle a sexual harassment complaint that was decided in 2021 by the Shanghai First Intermediate People's Court.

In the case, a supervisor received a complaint from a subordinate female employee, who alleged that she was being sexually harassed by the supervisor's superior (a married man). Upon receiving the complaint, the supervisor stated that he did not wish to become involved and he refused to answer his subordinate's related questions. The supervisor also tried to minimize the seriousness of his superior's harassment and even tried to act as a matchmaker between the two parties. He subsequently recommended that the company terminate the woman's employment contract on the grounds of her "lack of a sociable disposition." After conducting an investigation, the company unilaterally terminated the supervisor's employment contract. The supervisor then sued for unlawful dismissal.

During the trial, the court held as follows:

- The company had put in place a training mechanism on preventing sexual harassment in the workplace. The supervisor in question had attended the training. Company regulations expressly required supervisors to respect their subordinates' right to submit complaints and instructed them not to permit any form of retaliation. The regulations stated that both the engagement in sexual harassment and the giving of false statements during internal investigations constituted serious disciplinary offenses.
- Although the supervisor had been unable to determine whether the sexual harassment complaint was true or false, he had not only failed to diligently assist his subordinate in resolving the issue, but also attempted to set up an improper relationship between the employee and his own superior. This conduct breached his duty as supervisor and was contrary to good customs. After the subordinate had expressed her opposition to the sexual harassment, her supervisor recommended that the company terminate her contract. This recommendation constituted retaliation against a subordinate. Therefore, the court held that the company's decision to dismiss the supervisor for serious breach of disciplinary rules had been based on ample evidence and was not unlawful.

Key takeaways

Article 1010 of the *Civil Code*, as well as the newly amended *Law on the Protection of the Rights and Interests of Women*, impose on employers the duty to prevent and deal with sexual harassment. This guidance case further shows that employers may dismiss management staff for serious breach of disciplinary rules (based on the company's regulations) if they fail to reasonably follow up on employee complaints of sexual harassment or if they condone sexual harassment or interfere with sexual harassment investigations.

The case also shows the importance of taking the following measures to prevent sexual harassment in the workplace:

- formulating company rules (and adopting them through employee consultations) against sexual harassment in the workplace (e.g., clarifying how sexual harassment complaints should be handled, specifying the responsibility of management, prohibiting retaliation, etc.), to serve as a basis for disciplinary action
- specifying in the company's rules that giving false statements during the company's internal investigations will constitute a serious disciplinary offense, in order to strengthen the policy grounds for unilateral termination
- providing training on prevention of sexual harassment in the workplace, and keeping training records
- investigating and dealing with sexual harassment complaints in a timely manner and duly gathering relevant evidence in the process, including preparing written records of interviews with the person(s) being investigated and having them sign those records

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Employee's unsupported accusation of sexual harassment could constitute infringement of the right to reputation

Shenzhen's Pingshan District People's Court recently concluded the trial of a dispute over the right to one's reputation arising from a sexual harassment allegation. Being dissatisfied with her dismissal, a female ex-employee posted to a work-related WeChat group (which someone else later reposted on WeChat Moments) an accusation that she had been "sexually harassed" by her ex-manager. The manager then sued the ex-employee for infringement of his right to his reputation. He alleged that the employee's rumors and defamation had caused him extreme physical, mental and reputational harm and that his wife had quarreled with him and mentioned her wish for a divorce. The company had issued a severe warning against him and also reduced the performance-based component of his salary (which he claimed was the result of the allegation).

During the trial, the Pingshan court held as follows: (1) The ex-employee had provided no evidence showing that her manager had sexually harassed her. Without any objective basis, the ex-employee had written a text with disparaging expressions such as "wildly arrogant lecher" and posted it to a work-related WeChat group with several hundred members. The content had become known to a considerable number of members of the public. Her conduct had harmed the manager's right to his reputation. (2) The evidence submitted by the manager in support of the alleged reduction of the performance-based component of his salary did not prove that such reduction had already been made or that the reduction was directly caused by the allegation, so the court did not support a monetary award for the alleged damages. The court ultimately ordered the ex-employee to apologize to the manager in writing.

Key takeaways

The recent judgment of the Pingshan District People's Court should serve as a reminder that when a company is faced with a sexual harassment complaint from an employee, it should swiftly conduct an objective and impartial investigation and give the complainant and the accused equal opportunity to make statements and respond. Only then should the company make a specific decision (e.g., bonus cancellation, demotion, warning, dismissal, etc.).

Cases of sexual harassment in the workplace often attract a great deal of public attention and affect a company's public image and reputation. Therefore, in addition to putting in place a mechanism to prevent and deal with sexual harassment, companies should formulate a comprehensive social media policy to prevent and stop employees from using social media to disparage, vilify or defame the company or other employees.

First equal opportunity case judgment in Guangdong Province issued

The first equal opportunity employment case in Guangdong Province was concluded in 2022 with a judgment ordering the employer to pay compensation and apologize in writing to the employee.

On January 5, 2019, a female employee joined a real estate management company in Zhuhai. Soon thereafter, she discovered she was pregnant and informed the company's manager of the news. To her surprise, she received a notice from the company on the same day which said "you don't have to come in anymore". The company refused to let her into the office.

The employee subsequently applied for employment dispute arbitration, claiming amounts such as double salary for failing to sign a written employment contract and compensation for illegal termination of her employment contract. In July of the same year, the parties reached a mediated agreement concerning their employment dispute. The agreement required the company to pay the employee RMB 6,000.

Meanwhile, the employee also instituted a *civil* action, the cause of action being an equal employment rights dispute. She alleged that the company had dismissed her due to her pregnancy, thereby infringing her equal employment rights and causing her to suffer losses from being unable to go to work, as well as from mental distress. She demanded that the company compensate for her losses and apologize.

In its defense, the company stated that the case concerned an employment dispute rather than an equal employment rights dispute. Her contract had not been terminated because of her pregnancy, but because she had frequently arrived late and left early during her probation period, thus seriously violating company's regulations and failing to comply with the conditions for employment.

The court ruled that the employee was dismissed during the performance of the employment contract by reason of her pregnancy, which constituted discrimination against her during the performance of the employment contract. It also ruled that violation of her

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equal employment rights was a separate cause of action from the employment claims she had previously brought, which were covered by the settlement agreement.

The court ordered the company to apologize to the employee in writing and to pay her RMB 2,064 for lost salary during her pregnancy, RMB 1,875 for lost maternity leave salary and RMB 10,000 as damages for mental distress.

Key takeaways

An equal employment rights dispute is a cause of action independent from an employment dispute. Employees who suffer discrimination may institute a civil action for an equal employment rights dispute simultaneously with filing an application for employment-related arbitration. Therefore, if an employer reaches a settlement agreement with an employee who is protected under anti-discrimination legislation (female employees who are pregnant, confined or nursing, disabled persons, etc.), the waiver and release clause of the settlement agreement should not only cover all employment claims, but also any civil claims under anti-discrimination legislation, so as to avoid being subject to another claim for damages after reaching the settlement agreement.

Guangzhou court rules that company's internal disclosure of employee's personal information violates their privacy rights

In this Guangzhou case, which was ruled on in May 2021 but only recently reported in the press, after an employee had suddenly stopped coming to work, HR staff posted a notice to the management staff's WeChat group. The notice contained private information of the employee, including his cell phone number, his mother's and wife's cell phone numbers, his I.D. card number, the residential address shown on his I.D. card, his home address, etc. so that management could reach out to relevant persons to try to locate the employee. A reminder with the same private information was posted to the WeChat group the next day. The group had 18 members, all of whom were middle and senior managers in the company.

The employee then sued the company for violation of his right to privacy, demanding that it make a public apology and pay damages for mental distress. The court held that according to the definitions of "privacy" and "personal information" in the *Civil Code*, all information in the documents that the company had posted to the WeChat group, including the employee's cell phone number, I.D. card number, residential address and family information, constituted private, personal information, and the employee had privacy rights therein. By publishing the employee's private information without his consent, the company had violated his right to privacy. The court ultimately ordered the company to apologize to the employee in the WeChat group.

Key takeaways

An employee's submission of private information upon request does not mean that the employer can internally disclose it at will to other employees (including management staff). While this case was ruled on prior to the effective date of the *Law of the People's Republic of China on the Protection of Personal Information* on November 1, 2021, the implementation of the new law makes it even more important for employers to have well-drafted, comprehensive personal information consent forms for the processing/use of employee personal information and procedures in place for the processing of employees' personal information. In addition, employers should provide training to members of their management and administrative staff who handle employees' personal information, so as to reduce or prevent disputes arising from improper processing of such information.

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