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## In this issue



## Government further strengthens enforcement measures against social insurance fraud

The *Measures for the Administration of Social Insurance Fund Supervision and Tip-Offs* ("**Measures**") that were issued by the Ministry of Labor and Social Security will become effective on 1 May 2023. Their purpose is to regulate the administration of social insurance fund supervision and encourage parties to report fraud. Employers should particularly note that companies may be suspected of fraudulently obtaining or misappropriating social insurance pay-outs if they fake social insurance eligibility, or belatedly make missed premium payments in a way that violates regulations, by providing sham supporting documents, or by organizing others to fraudulently enroll in insurance or belatedly make missed premium payments in a way that violates regulations.

This may provide further impetus for local authorities to crack down on cross-city social insurance contribution arrangements for employees. In practice, companies that employ individuals in different localities will often instruct third party local payroll agencies to make social insurance contributions for those employees, because employees often prefer contributions be made in the location of their actual place of work or household registration rather than the employer's place of registration as required by law.

However, the government started a crackdown on this practice in 2020. Further, according to the Measures and the 2022 *Measures for Administrative Supervision of Social Insurance Funds*, it is illegal to pay social insurance payments on behalf of others (nominally employ an individual solely for the purpose of payment of their social insurance premiums) or to falsely report an occupational injury, etc. We have previously summarized the key points of the 2022 M*easures for Administrative Supervision of Social Insurance Funds* in a previous newsletter here.

There are also new provisions encouraging tip-offs on potential fraud. Compared to the 2001 *Measures for the Administration of Social Insurance Fund Supervision and Tip-Offs* ("**2001 Measures**"), the Measures additionally provide that if a tip-off is found to be truthful and leads to the recovery or reduction of serious losses sustained by the social insurance fund, the person wh o

provided it shall be rewarded (provided that they gave their real name at the time). At present, quite a few locations have issued specific rates for tip-off rewards. Places such as Beijing, Guangdong Province and Sichuan Province will give rewards of up to RMB 100,000. As these reward offers are likely to encourage tip-offs, companies should pay more attention to the compliance of their social insurance arrangements.

### Key takeaways

The *Measures for Administrative Supervision of Social Insurance Funds* clarify what social insurance premium payment arrangements are compliant. The Measures, on the other hand, contain specific provisions on the scope of supervision and tip-offs, the tip-off acceptance procedure, the rules for handling tip-offs, protection measures, etc. In view of these provisions, companies should take a closer look at the compliance of their social insurance practices, so as to reduce their risk of becoming the subject of supervision and tip-offs.

## Guangdong province issues detailed implementing rules for parental leave and elder care leave

In January 2023, Guangdong Province issued the *Notice on Better Implementing the Leave Rules in the Regulations of Guangdong Province on Population and Family Planning* ("**Notice**") and an explanation of the policy. These documents provide detailed implementing rules for parental leave and elder care leave and supplement the revised version of the *Regulations of Guangdong Province on Population and Family Planning* that became effective in 2021 ("**Family Planning Regulations**"). The following is a summary of the key points:

1. **Parental leave**

   Employees are entitled to 10 days of paternal leave for each year of their child's age (i.e., not per calendar year) until their child turns three. Parental leave is not cumulative (for employees with two or more eligible children). It is not counted as part of an employee's paid annual leave. The leave can be split up during the same leave year, but in principle it may not be taken in more than two portions. If the youngest child reached the age of three between 1 December 2021 and 11 January 2023, and the employee has not taken parental leave, the employee can take it retroactively upon application.

2. **Elder care leave**

   An employee is entitled to five days of elder care leave per year if the employee is an only child, one or both parents have a Guangdong household registration, and one of the parents is at least 60 years old. If a parent is hospitalized with an illness, the employee will be entitled to a total of no more than 15 days of elder care leave per year. In situations where the household registrations of both parents are outside Guangdong province and their only child is working in Guangdong, the employers of such sons and daughters are encouraged to arrange elder care leave for them.

   Elder care leave is calculated by calendar year and is not cumulative (in cases where both parents are eligible). The leave is not counted as part of an employee's paid annual leave. The leave can be split up during the same leave year, but in principle it may not be taken in more than two portions. If one of the parents of an only child turned 60 between 1 December 2021 and 11 January 2023, and the employee has not taken elder care leave, the employee may take it retroactively upon application.

In addition, the Guangzhou Municipal People's Government issued the Regulations *of Guangzhou Municipality on Population and Family Planning Services*, which expressly state that the number of days of parental leave will not be reset, increased or decreased if the employee changes employers. Spouses may reallocate their leave entitlements among themselves, subject to the consent of their respective employers. For example, if the wife voluntarily reduces her maternity leave and elder care leave, the paternity leave and elder leave of the husband may be increased by the same number of days.

### Key takeaways

The Family Planning Regulations spell out the basic conditions and numbers of days of parental leave and elder care leave. The Notice supplements this with regulations on how parental leave and elder care leave are calculated and how wages are affected during the leave period. In addition, the Notice encourages employers to simplify the documentation requirement for leave applications by asking their employees to submit a written undertaking to the effect that they satisfy the conditions for taking the leave.

## National authorities publish guideline cases dealing with protection of women's rights

Recently, the Supreme People's Procuratorate (equivalent to a prosecutor's office) and the All-China Women's Federation jointly published 10 typical cases of public interest litigation for the protection of women's rights and interests. Some of the cases involve women's employment rights and privacy protection.

Some of the companies involved in the cases failed to pay social insurance premiums for female employees according to law, some arranged overtime or night shifts for female employees during their pregnancy and nursing periods, some failed to pay 300% wages to female employees who worked on statutory holidays and some posted recruitment information with gender discriminatory content on recruitment service platforms, thus infringing women's employment rights and interests. In one case, a company used storage rooms as changing rooms for female employees and installed monitoring equipment without their consent, thereby seriously violating women's privacy by taking advantage of regulatory blind spots.

The procuratorial authorities instituted administrative public interest litigation after receiving information through tip-offs from the public, social media posts, and other means. The issuance of these guidance cases follows the latest amendments to the *Law on the Protection of Women's Rights and Interests*, which now includes provisions making clear that the procuratorial organs should make good use of their ability to institute public interest actions against employers that fail to protect women's employment and social security rights in accordance with the law.

The newly amended law clearly provides that the procuratorial authorities may issue procuratorial recommendations if the infringement of women's legitimate rights and interests results in damage to the public interest. Furthermore, the procuratorial authorities may institute a public interest action in accordance with the law if women's equal employment rights are infringed or if the relevant entity fails to take reasonable measures to prevent and stop sexual harassment.

## Guangdong High People's Court publishes guideline case on ex-employee theft of trade secrets

On 2 January 2023, the Guangdong High People's Court published six typical criminal cases concerning intellectual property rights, including the case of an ex-employee's infringement of a technical secret of his former employer. The final judgment in the case was handed down by the Guangzhou Intermediate People's Court, which held the defendant criminally liable.

The defendant in the case worked in a motor factory for 10 years. During his tenure as manager of the manufacturing and quality departments, he used his position to obtain information about the production technology used by the motor factory and its affiliates for a certain product. The defendant set up his own company after leaving his job in 2015, using the production technology to produce and sell similar products. This earned him a total profit of more than RMB 70 million from 2017 to 2019, leading to police investigation in 2020.

The court of first instance held that the production technology of the motor factory was technical information that was not known to the public and had commercial value. The court found that the motor factory had taken the necessary measures to maintain confidentiality. Despite being obligated to keep the technical information secret, the defendant applied it in the production and sale of similar products by his own company. As the level of illegal income was very high, his conduct amounted to a crime of infringement of trade secrets. In the end, the court sentenced him to six years in prison and a fine of RMB 5 million. The court of second instance upheld the original sentence.

### Key takeaways

Trade secret infringement cases often place a heavy burden of proof on the employer. This case shows that the court focused on evidence from three aspects, namely whether the information involved was "non-public knowledge," whether it had commercial value to the rights owner and whether the rights owner took reasonable steps to keep the information confidential. Accordingly, the employer's implementation of measures to maintain the confidentiality of its trade secrets is an important basis on which to seek protection of its rights in a trade secret infringement case.

Employers therefore should include confidentiality obligations and data security provisions in their employment contracts, confidentiality agreements and policy documents (such as employee handbooks). The definition of confidential information in such documents should be as specific and comprehensive as possible, so as to give the employer a stronger basis for claiming that the particular information concerned is a trade secret of the company. In terms of technical means, companies can encrypt the carriers

of confidential information, spell out access rights to confidential information, ensure the traceability of confidential information access and processing, strictly manage electronic devices on which trade secrets are stored, etc.

## Shanghai non-compete case shows courts may look at circumstantial evidence to prove breach by employees engaged in covert competition

Recently, the Shanghai Baoshan District People's Court heard a non-compete dispute that will have significant reference value for employers that need to prove ex-employees are covertly competing against them through indirect employment arrangements.

The defendant in this case, worked for Company A (the plaintiff), which was mainly engaged in the development of electric vehicle drive systems. When the employee left Company A, the two parties agreed on a 12-month non-compete period. The following month, the employee joined software Company B and provided Company A with a document from Company B certifying that he was working there. Company A paid non-compete compensation to the employee as agreed. Company A subsequently learned that Company B was actually engaged in the provision of IT personnel outsourcing services and that it was highly likely that the employee was actually working for Company C, which was in the same line of business as Company A.

As the defendant was employed by Company B, Company B was responsible for signing his employment contract, paying his salary and making his social security contributions. Being a software company, Company B was not a competitor of Party A. Therefore, it was difficult for Company A to provide direct evidence of the employee's breach of the non-compete agreement. Based on the preliminary evidence provided by Company A, the court approved its application for an investigation order and obtained information on the defendant's parking space rental, hotel accommodation invoices, etc. for in-depth investigation. The court found that the following evidence could confirm that Mr. Zhang worked for Company C:

1. According to the information obtained under the investigation order, the employee was renting a monthly parking space in the parking lot in which Company C was located, and that parking space belonged to Company C. Video records showed that the employee had been to the parking lot on multiple occasions during the dispute period.
2. An invoice relating to the employee was obtained from a hotel pursuant to the investigation order. The invoice showed that the hotel had accommodated the employee and invoiced Company C.
3. The employee did not admit to the above facts but failed to provide a reasonable explanation. Furthermore, during the dispute he had made contradictory statements as to his place of work. His actions were hard to justify and his arguments were implausible.

The court found that the above circumstantial evidence could form a chain of evidence and that the evidence provided met the high standard of proof of probability required in civil actions. The court supported Company A's allegations.

### Key takeaways

In practice, the signing of non-compete agreements is one of the more common precautions taken to protect trade secrets. Competition by ex-employees can take various forms, including not only direct employment and investment in an organization in the same industry but also covert forms such as labor dispatch, nominee shareholding, nominal employment by an entity other than the entity worked for, working through a personnel agency, etc. Since it is often difficult for enterprises to obtain direct evidence of covert competition, it can be hard for them to defend their rights. In the present case, the court issued an investigation order for Company A after it provided preliminary evidence. This shows that when a court assess such cases, it may take into account the employer's difficulty in collecting evidence and allocate the burden of proof more reasonably. The court's approach enables a rethink of the ways to identify and prove covert competition by former employees.

## Henan court case shows importance of using correct terminology in an employment termination notice

In a case ruled on by the Henan Xinxiang Intermediate People's Court, a company wished to terminate the employment contract of an employee who had been absent without leave, but it sent her a "Notice of Ending of Employment Contract". A small language error, using the word "end" instead of "terminate", resulted in the termination being found invalid by the court.

The employee was hospitalized with an illness on 23 March 2017 and took leave until 1 May 2017. After the leave ended, she neither showed up for work nor applied for leave. The company reminded her in October that she should come to work. The

employee then reported for duty but requested that the company give her another job because the hours of her current job were too long. The company refused her request and the employee stopped going to work. On 6 November 2017, the company sent her a "Notice of Ending of Employment Contract", arguing that the employee was deemed absent without leave, since she had not reported for work for such a long period. The company terminated her employment contract and terminated the employment relationship on the basis of Article 39 of the Law on Employment Contracts.

During the trial, the court found that the employee had not submitted any sick note to the company after 2 May 2017 and that there was no evidence of her having applied for leave following that date. She had not reported for work and fulfilled her job duties as requested in the company's notice. Considering the attendance records submitted by the company, her conduct constituted absence without leave. However, the company had erroneously sent her a "notice of ending of employment contract" instead of a "notice of termination of employment contract." The terms "ending of employment" and "termination of employment" are two different concepts under PRC law addressed in two different provisions of the Employment Contract Law. "Ending of employment" generally refers to automatic ending of employment upon the occurrence of certain events, such as expiration of a fixed-term contract, whereas "termination" generally refers to when either the employer or employee actively notifies the other party to terminate the employment early.

The court of first instance ruled that the employment contract between the company and the employee had not been effectively terminated and therefore should continue to be performed. The court of second instance upheld the original judgment.

## Key takeaways

The judgment in this case reflects the legislative intent to favor protection of the workers, and the small mistake in terminology by the employer eventually led to the invalidation of the termination of the employment relationship. From a legal point of view, the termination of an employment contract and the ending of an employment contract are two different legal concepts and should not be confused by the employer. When providing an employee with notice of the termination/ending of their employment contract, the employer should pay attention to the nature of the notice and review the wording or seek professional advice, so as to avoid procedural defects.

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