

Salans News

Employment Law China

March 2011



Minimum Salaries Are Increased

Several big Chinese cities have recently announced an increase – averaging 20% - to their minimum salary for 2011. While Shanghai has a relatively low increase of 14%, Tianjin's is sharply higher at 26%. The detailed figures of the local minimum salary are as follows:

City	Minimum Salary			% of increase
	2010	2011		
Beijing	960	1,160	1 Jan.	approx. 21%
Shanghai	1,120	1,280	1 Apr.	approx. 14%
Suzhou Area	960	1,140	1 Feb.	approx. 19%
Nanjing	960*	1,140*	1 Feb.	approx. 19%
Hangzhou	1,100	1,310	1 Apr.	approx. 19%
Guangzhou	1,100**	1,300**	1 Mar.	approx. 18%
Shenzhen	1,100	1,320	1 Apr.	20%
Tianjin	920	1,160	1 Apr.	approx. 26%

* (regions of 1st level)

** (except for 5 suburban districts/county-level cities)

New Work-Related Injury Insurance Regulations

As of 1 January 2011, the new Regulations on Work-Related Injury Insurance came into effect. There are certain changes to the scope and compensation which may impact the employers' liabilities.

Scope

Previously the scope of commuting accident covered only motor vehicle accidents. Now, the scope of commuting accidents includes:

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- i) traffic accidents (non-motor vehicle accident are included); and
- ii) accidents of city rail, passenger ferry, and train.

But, as precondition, an employee may not be primarily liable for the respective accidents.

Compensation

Compensation obligations for work related injury that were previously borne by employers have shifted to the work-related injury fund. These include

- boarding subsidies during hospitalization,
- medical subsidies and transport expenses,
- boarding and accommodation for clinics outside the region covered by the local work-related injury fund.

Employers must still provide 100% of the monthly salary to an injured employee for a medical treatment period of up to 12 months (or up to 24 months subject to approval of local work capability verification authority). After the medical treatment, the employer’s liability depends on the disability and injury grade (“Grade”) as evaluated by the local work capability verification authority:

Grades 1 to 4	<ul style="list-style-type: none"> ▪ Employer: No specific compensation. ▪ Work-related injury fund: lump sum payment of disability and injury subsidy, and monthly disability and injury allowances.
Grades 5 and 6	<ul style="list-style-type: none"> ▪ Employer: arrange appropriate work for the injured employees; otherwise, payment of monthly disability and injury allowances; and unemployment subsidy - upon termination of labour contracts - for the disability and injury according to local government standards in lump sum payments ▪ Work-related injury fund: lump sum payment of disability and injury subsidy and lump sum payment - upon termination of labour contracts - of injury medical subsidy according to local government standards

Grades 7 to 10	<ul style="list-style-type: none"> ▪ Employer: unemployment subsidy - upon termination of labour contracts - for disability and injury according to local government standards ▪ Work-related injury fund: on termination of labour contract, disability and injury subsidy, and disability and injury medical subsidy in lump sum payments according to local government standards
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Salans Comments:

Although the new regulations shift certain compensation liabilities from employers to the fund, an employer’s financial burden might not ease as the fund may increase the contributions to cover its increased liabilities. In most cities, the work-related injury insurance rate varies between industries. Therefore, it is likely that the contribution rate for an industry with high injury potential might be increased by the local fund.

Shanghai issues Regulations on Employee Representative Councils

On May 1 2011, the Shanghai Employee Representative Council Regulations (“ERC Regulations”) will take effect. They are the first local regulations which provide clear guidelines on the matter of establishing employee representative councils (“ERC”). Enterprises in Shanghai must follow the ERC Regulations when establishing and dealing with their employee representative councils.

Establishment Requirement

All the enterprises and institutions in Shanghai should establish a system of employee participation. The exact form depends on the scale of the enterprise: those with 100 or more employees must establish an ERC consisting of representatives elected by the employees; those with less than 100 employees must hold employee meetings.

Constitution and Term

The ERC set out clear guidelines on a democratic election process for the representatives. Middle or upper management cannot count for more than 20% of the representatives. The term of the representatives is from 3 years to 5 years.

Responsibility and Powers

According to the ERC Regulations a company is required to solicit the ERC's opinion, particularly on the following matters:

- business development plans, annual management and operation status, and important decisions;
- the formulation of, or amendment to, internal rules and regulations or significant matters which have a direct impact on employees' interests;
- the status of collective bargaining conducted by the trade union over matters of salary adjustment, lay-off, collective labour disputes, high accident potential or occupational hazards detected during production process, etc.

Moreover, the following matters are subject to ERC's review and approval:

- drafts of collective agreements concerning remuneration, working time, rest and vacation, insurance and benefits, etc.;
- drafts of special collective agreements on salary adjustment mechanisms, protection of female employees rights and interests, and work safety, etc.

Further, the ERC Regulations grant the ERC the supervision right over the performance of collective agreements, execution of standards on labour safety and hygiene, and allocation of capital to employee education and training expenses, etc.

Salans Comments:

As the ERC Regulations only set the overall structure for the ERC, companies must observe how these regulations are implemented in practice; in particular, if the trade unions use of their supervision right. However, the ERC can effectively support communication between workers and management and therefore may provide positive opportunities for the company management.

Regulations on Democratic Management of Enterprises in Guangdong

Different from Shanghai's ERC Regulations, the Guangdong government's 4th draft of the Regulations on Democratic Management of Enterprises ("Draft") does not require private enterprises (including foreign invested companies) to establish employee representative councils or employees' meetings. State-owned enterprises and collective enterprises must.

However, it provides clear guidelines on the democratic election and powers and duties of ERCs. This 4th draft has also revised provisions on collective bargaining, such as listing prohibited activities of employees during ongoing collective bargaining, e.g., inciting work stoppages or slowdowns, etc. Instead of calling for public comments, this 4th draft has only been circulated to selected institutions and entities for comment.

Shenzhen Launched New Housing Fund Policy

As of December 2010, Shenzhen implemented its new Interim Regulations on Management of Housing Fund (“Regulations”), which open the fund to non-Shenzhen hukou holders. Now, employers are required to register and make contributions to the housing fund for all their employees regardless of the *hukou’s* registration locality. In case of non-compliance, fines of RMB 10,000 to 50,000 may be imposed.

In Shenzhen, the calculation basis for monthly contributions to the housing fund is capped at five times the local monthly average salary of the previous year. In comparison, other big cities, such as Shanghai and Beijing set the cap at triple the local monthly average salary of the previous year. The current maximum calculation basis in Shenzhen is RMB 19,470. The applicable rates range from 5% to 20%, subject to the employer’s decision. Within each company, only one rate may be applied. An employer may adjust this rate once every year. Differently, in some other big cities, the rates are fixed by the fund and cannot be chosen.

Salans Comments:

As contributions for non-Shenzhen hukou holders are now feasible and mandatory in Shenzhen, employers must consider these contributions in their salary budgeting.

Focus on Hong Kong: Update on the Minimum Wage Legislation

(by Darren Fitzgerald and Roberta Chan)

The setting of the statutory minimum comes after months of consultation with labour and business groups about how much workers should be paid. Labour groups in the city pushed for a minimum hourly rate of HK\$33 yet were strongly resisted by the business sector which complained it was too high and would lead to massive layoffs.

After prolonged debate, Hong Kong lawmakers finally set out the details of



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the minimum wage law in November 2010. In particular:

- the hourly minimum wage will be HK\$28.
- the threshold above which an employer is not required to keep records of "hours worked" by an employee is HK\$11,500 per month (which equates to about 15 hours per day at HK\$28).
- the date on which the major terms of the minimum wage legislation will come into force is 1 May 2011.

Today's Q&A: Bonus Payment

Q: Must a company still pay a bonus to an employee who resigns before it is paid?

A: It depends on the contractual agreement.

A common bonus is the annual performance bonus, i.e. a bonus awarding the achievement of targets – either agreed with the employee or decided at the company's discretion. When stipulating this bonus, pay special attention as entitlement may be created by careless wording. Once a general entitlement is provided ("the employee is entitled to a bonus"), only the amount is at the discretion of the company (if agreed so "at the sole discretion of the company"); the employee is entitled to a fair evaluation. Also, if clear targets or evaluation criteria are defined, it would be contradictory to agree that the company has full discretion at the same time. If an employee "may be provided a performance bonus at the employer's sole discretion", the company is generally not obliged to make the bonus payment if the employee resigns before the bonus decision is made. Once the bonus is announced, the resignation does not cancel out the entitlement.

The agreement of a 13th month's salary does not actually constitute a real annual bonus. However, it is often treated as bonus for tax purposes. If the wording does not make it clear that there are certain requirements for the entitlement to such payment, e.g. the employment relationship must not terminate at a specific time, the employee is probably entitled to a full or pro-rated payment. Again, the wording of the clause is of great importance!

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