

Salans News

Employment Law China

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Drafts to Implement New Social Insurance Law

The PRC Social Insurance Law ("Social Insurance Law") will become effective on 1 July 2011. Recently, China's government has published several drafts of rules clarifying the implementation of the new Social Insurance Law for public comment, including:

- Draft on Several Rules on the Implementation of the Social Insurance Law of the PRC ("Draft of Implementation Rules") on 12 May 2011; and
- Draft on Interim Measures for the Participation in Social Insurance of Foreigners Employed in China ("Draft of Foreigners Participation Measures") on 10 June 2011

Draft of Several Rules on the Implementation of the Social Insurance Law of the PRC

The Draft of the Implementation Rules increases an employer's risk of liability. It does this by creating a clear basis for employees to claim damages from employers who fail to meet their obligations under the New Social Insurance Law, such as to:

- Disclose contribution information: The New Social Insurance Law requires an employer to notify each employee about social insurance contributions details on a monthly basis. If it does not, it faces a fine of up to RMB 20,000 and the liability to compensate the employee for loss.
- Issue documents certifying the termination of a labour relationship: The Draft of Implementation Rules entitles an employee to claim

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compensation from a former employer if they are unable to enjoy social insurance benefits (e.g., unemployment subsidies, pension) due to the employer's refusal to issue the certifying document.

The Draft of the Implementation Rules also clarifies the liability of an employer that fails to withhold employee contributions. In addition to contributing the due amount, a fine calculated at the daily rate of 0.05% will be imposed and the employer may not shift that burden to the employee.

Draft on Interim Measures for the Participation in Social Insurance of Foreigners Employed in China

The Draft of Foreigners' Participation is supposed to clarify the general inclusion of foreigners in the Chinese statutory social insurance scheme as stated in the New Social Insurance Law, published last year (see Salans Employment Newsletter December 2010). In its current version the Draft provides:

- Foreign employees must participate in the Chinese social insurance scheme.
- Foreign employees are defined as non-Chinese nationals who legally work in China, and hold work permits, foreign expert certificates, and permits for foreign journalists. Employees from Hong Kong, Macao, and Taiwan are regarded as foreign nationals.
- The kind of contract and parties are irrelevant to the obligation to contribute: all foreigners must participate, including those working for companies in China, and those who conclude employment contracts with foreign employers and are dispatched to branches and representative offices registered in China.
- Foreigners must contribute to all five social insurance schemes, i.e., pension, medical insurance, work injury insurance, unemployment insurance and maternity insurance. However, the Draft does not specify the contributions standards. It is currently assumed that foreigners must contribute at the same rates as Chinese nationals. Consequently, the maximum employer's contribution per employee would amount to approx. RMB 4,325 monthly in Shanghai or RMB 4,096 monthly in Beijing. The maximum employee's contribution would amount to approx. RMB 1,286 monthly in Shanghai and RMB 1,326 monthly in Beijing.

- When the foreigner is leaving China, the pension accounts will generally be maintained. Upon application, the foreigner may withdraw the balance in the individual account. However, the Draft does not clarify how this process will work.
- Beyond this, there is no clarification on how foreigners can enjoy benefits of the other social insurance schemes, such as maternity or unemployment.
- Participation in Chinese social insurance schemes of foreign employees from a country which has signed a bilateral social insurance agreement with China is subject to that agreement. Currently, only Germany and South Korea have signed bilateral social insurance agreements with China. If they meet the requirements under the bilateral agreement, these expatriates may remain in their home country's scheme and be exempt from the obligation to contribute in China.

During our inquiries, officials of the social insurance authorities in Shanghai, Suzhou, Hangzhou, Tianjin, and Nanjing stated that they are preparing for the implementation of the New Social Insurance Law and the inclusion of foreigners. However, contributions of foreigners are currently voluntary in most cities:

City / Area	Mandatory/ Voluntary/ Not possible	Type of Insurance				
		Pension	Medical	Work-related injury	Maternity	Unemployment
Beijing	m	GER/Korean: m Others: n	n	m	n	GER: m Others: n
Shanghai	v	v	v	v	n	n
Suzhou	GER/Korean: n v	GER/Korean: n v	GER/Korean: n v	GER/Korean: n v	n	n
Suzhou SIP	GER/Korean:n Others:v	GER/Korean:n Others:v	GER/Korean:n Others:v	GER/Korean:n Others:v	GER/Korean:n Others:v	GER/Korean:n Others:v
Kunshan	v	v	v	v	n	n
Hangzhou	v	v	v	v	v	n
Guangzhou	v	GER/Korean: m Others: v	v	v	n	GER: m Others: v
Shenzhen	m	GER/Korean: v m	m	m	n	GER: v m
Tianjin	v	v	v	v	v	v
Nanjing	v	v	v	v	v	v

Salans Comments:

It is unclear how and when local funds will implement the new Social Insurance Law with regard to foreigners' mandatory participation after 1 July 2011. To avoid penalties, it is recommended that companies contact their fund to confirm the local implementation process. Nevertheless, agreements with foreign employees must be concluded or amended and budgets should be allocated to include social insurance liabilities; although the implementation of the Interim Measures for the Participation in Social Insurance of Foreigners Employed in China is not expected to meet the 1 July deadline, a retroactive application cannot be excluded.

Guangdong Regulations on Expats

On 1 May 2011, Guangdong Interim Regulations on the Management and Service of Foreigners came into effect. They concern the residence, business, and employment of foreigners and impose additional obligations and requirements on their employers. In particular, the following issues are worth special attention:

- Special requirements on positions for foreigners: Positions provided to foreigners must have specific requirements and there may be no appropriate domestic candidates available. The Guangdong Government will publish catalogues for foreign employment, which will categorize positions as “restricted” and “encouraged”.
- Registration and deregistration of employment: Similar to employing Chinese nationals, an employer must register and deregister the employment of foreigners, including renewal or termination, within 15 days with the local human resource and social insurance competent authorities.
- Reporting obligation: A Guangdong employer must compile a separate list of its foreign employees and report to the human resource and social security administration on a regular basis.
- Visa and passport checking: Guangdong employers are required to check foreign employees' passports and visas on a regular basis to ascertain the relevant validity period.

If a foreigner refuses to leave China on the expiry of a visa, the employer must report to public security authority and the labour authority, terminate the employment and require the foreigner to leave China. In the case of non-compliance, the employer will be ordered to rectify its omission and receive a fine from the public security authorities. In severe cases, the foreign affairs authority may revoke the employer's certificate of foreign employment and the employer may be required to bear the expatriation expenses.

Salans Comments:

We have observed that China is tightening foreign employment. These Guangdong regulations are regarded as the pilot local implementation of a national policy of "Introducing high-end, Restricting ordinary and Prohibiting low-end (引进高端、限制一般、禁止低端)".

In general, when companies that recruit foreign employees obtain work permits, the candidates experience and diploma must be checked to confirm whether they are suitable for the job profile. Guangdong employers will also have to check the (not yet promulgated) catalogues for foreign employment.

Guangzhou White Paper on Labour Disputes

Recently, the Guangzhou Intermediate People's Court announced the White Paper on Labour Disputes ("White Paper"), analyzing cases concerning labour disputes from 2008 to 2010.

According the White Paper, labour disputes sharply increased in Guangzhou after the implementation of the PRC Labour Contract Law and the PRC Mediation and Arbitration Law on Labour Disputes. Labour disputes became the majority of cases adjudicated by Guangzhou People's Courts, prevailing over traditional disputes of marriage and inheritance. In 2010, 11,630 cases were adjudicated by Guangzhou People's Courts of first instance. Over the past years, more and more cases were settled by mediation. In 2010, around 52.7% of the cases were settled by agreement reached during mediation.

According to the cases adjusted, the most common problems in companies' HR management addressed by Guangzhou Intermediate People's Court were the:

- implementation of illegal or unreasonable internal regulations;
- failure to strictly implement the provisions concerning conclusion of written labour contracts (e.g., timeline for conclusion, entitlement to open term contract);
- failure to pay salary and overtime payment on time or in full; and
- failure to keep records on work attendance and payment of salary which result in a lack of evidence during a law suit.

Salans Comments:

The PRC Mediation and Arbitration Law on Labour Disputes provides the basis for employees to enforce their rights provided by the PRC Labour Contract Law. Two characteristics of the law make it easy for employees to start disputes, namely that there are no costs for starting an arbitration and that the time limit for filing a claim is one year from entitlement, or even after the termination of the period for financial claims. To avoid the risks of arbitrary claims, compliance with the legal requirements and implementation of a profound HR management are essential.

Draft Regulations on Methods to Mediate Labor Disputes in Enterprises

On 3 June 2011, the Ministry of Human Resource and Social Security published the Draft on Methods to Mediate Labor Disputes in Enterprises and called for public comment. These Measures on the Consultation and Mediation on the Labour Disputes in Enterprises focus on friendly consultation between employee and employer, and mediation by a third party.

Enterprises with more than 300 employees must set up a mediation committee, which consists of elected employee representatives and nominated corporate representatives. Other enterprises may set up a mediation committee or have employees and employers elect mediators. Enterprises that do not set up a mediation committee, and face frequent labour disputes or collective incidents and adverse social

impacts, may be criticized in a circulated notice and ordered to rectify the problem (i.e., establish mediation committee).

Under the draft, a mediation committee can proactively initiate mediation with the consent of the concerned parties even when no application is received. If there is no agreement or settlement is not achieved, labour arbitration may still be initiated.

Salans Comments:

In addition to trade unions and employee representative council, this Draft suggests a new organization for the maintenance of a harmonious labour relationship. As the draft is formulated to supplement the Law on Mediation and Arbitration of Labour Disputes, mediation by a company's internal mediation committee is not intended to be mandatory before labour arbitration – as it is already encouraged in practice. But the final version, and more important the practical implementation, are awaited.

Criminal Liability for Failure to Pay Remuneration

As of 1 May 2011, Amendment Eight of the PRC Criminal Law makes an employer's intentional failure to pay remuneration a criminal offence. The employer will face a fine and the directly responsible officer faces up to 7 years' imprisonment depending on the severity of the case.

Under Amendment Eight, an employer commits a criminal offence if:

- it evades paying remuneration by means of transferring assets or hiding, going into hiding, or simply not paying despite of having the capability to do so;
- the amount concerned is substantial; and
- it still refuses to pay remuneration after being ordered to pay by the competent authority.

Shanxi: Model Text on Enterprise Wages & Collective Contracts

The Office of Human Resources and Social Security of Shanxi Province has released the "Notice on Announcing the Model Text of Enterprises' Wage and Collective Contract in Shanxi Province". It summarises the general legal HR principles:



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- an employee’s wage during their probation period may not be less than 80% of the wage agreed in the employment contract;
- original welfare and treatment must remain unchanged during the period of medical treatment for work-related injury;
- unused days of annual leave must be paid at three times the daily wage (when – upon termination?);
- the days of statutory holiday not taken must be paid additionally no less than three times the daily or hourly wage.



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Focus on Austria: Change to Tax Privilege for overseas construction and installation

In 2010, the Austrian Constitutional Court had caused an industry outcry by annulling the regulations on preferential tax treatment of salaries for service technicians for construction and installation abroad (“Auslandsmontage”) as they violated European laws. The decision of the Council of Ministers on a subsequent regulation in June 2011 came as a relief. After its ratification by parliament, the new regulation is planned to be effective from 2012. It will be a “secondment privilege” rather than an “installation privilege”. This means that it exempts 60% of the remuneration (to a maximum of EUR 4,200) from taxation. But there are qualifications that must be met: The (i) Austrian tax resident must be seconded (ii) by an Austrian or European employer to (iii) perform a typical fixed-term job (iv) under hardship conditions (v) for a fixed term of at least one month (vi) at a location at least 400 km away (vii) which is not an operation or a permanent establishment of the employer.

Salans Comments:

The regulation helps to avoid severely increasing labour costs. But its legal application is limited. In many cases, the treaty on the avoidance of double taxation between China and Austria may require the taxation of employment remuneration in China.



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Today's Q&A: Term of a labour contract

Q: We are planning to hire a new employee. How long is the contract term we should provide?

A: There is no statutory minimum. However, when deciding on the contract term to provide to a new employee, you should consider the following.

Firstly, the contract term has an impact on the length of the probation period. Under PRC Labour Contract Law, the maximum probation period allowed depends on the contract term:

Term of Contract (n)	Probation Period
$n < 3$ months	no probation is allowed
$3 \text{ months} \leq n < 1$ year	≤ 1 month
$1 \text{ year} \leq n < 3$ years	≤ 2 months
$n \geq 3$ years; open term	≤ 6 months

A second feature worth considering is the employee's potential entitlement to an open term contract at the end of the second fixed-term contract according to Article 14 of the Labour Contract Law. The second fixed-term labour contract may restrict the employer's right to decide on the renewal of an employment contract. For example labour authorities in Beijing hold that an Employee is entitled to demand continuance of the employment based on an open-term contract at the end of a second fixed-term contract. In such a case, the length of the contract term offered to a new employee should be carefully considered.

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