

Salans News

Employment Law China

September 2011

Mandatory Social Insurance Contributions for Foreigners Working in China

The Interim Measures for the Participation in Social Insurance of Foreigners Working in China have been released on 6 September 2011 and will be implemented as of 15 October 2011 (“Regulations”). The main contents are as follows:

■ Mandatory Participation

Foreign employees will be included into the Chinese social insurance scheme.

■ Scope of Foreigner Employees

Foreign employees refer to those holding employment certificates such as Work Permit for Foreigners, Foreign Expert Certificate, Permit for Permanent Foreign Journalists and Permanent Residence Permit.

The type of contract and parties are irrelevant to the obligation to contribute: all foreigners must participate, including those working for companies in China, and those holding employment contracts with foreign employers and being dispatched to branches and representative offices registered in China.

■ Timeline for Social Insurance Registration

The employer must conduct social insurance registration within 30 days from the “handling of work permit”; we assume as of application.

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■ Scope of Insurance

Foreigners must contribute to all five social insurance schemes, i.e., pension, medical insurance, work injury insurance, unemployment insurance and maternity insurance.

Short of other regulations, we currently assume that foreigners will contribute at the same rates as Chinese nationals. The following table summarized the current applicable cap of the monthly contributions of employers and employees in some big cities:

City	Max. Monthly Contributions (RMB)	
	Employee	Employer
Beijing	~ 1,515	~ 4,033 – 4,386 *
Shanghai	~ 1,286	~ 4,325
Suzhou	~ 1,158	~ 3,760
Guangzhou	~ 1,499	~ 4,250 – 4,479 *
Shenzhen	~ 1,262	~ 4,016 – 4,142 *

* (depending on rate of the work-related injury, which varies from industry to industry)

■ Maintaining Private Accounts

When the foreigner is leaving China prior to retirement, the private accounts (i.e., pension and medical) will generally be maintained (the amount will be accumulated once the foreigner works in China again and makes contributions). Upon application, the foreigner may withdraw the balance in the individual account.

■ Inheritance

The balance in the foreign employee's private accounts (i.e., pension and medical) can be inherited in case of death.

■ Employers' Liabilities

Liabilities for not making social insurance registration or failure to make contributions according to law are stipulated in the Social Insurance Law, Labour Security Supervision Regulations (i.e., rectification order to register or contribute; or penalties in case of failure of rectification).

■ Bilateral Social Insurance Agreement

Participation in Chinese social insurance scheme 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 expatriates meet the requirements under the bilateral agreement, these expatriates may remain in their home country's scheme and at the same time be exempt from the obligation to contribute in China.

For German expatriates, among other requirements, a suspended home employment contract is favourable for a fixed term assignment to China in order to remain in the German pension and unemployment insurance.

Salans Comments:

- ▶ *The obligation to participate in the Chinese social insurance scheme will be implemented as of 15 October 2011. We do therefore not expect any claims for contribution for the interim period since the effectiveness of the new social security law on 1 July 2011.*
- ▶ *With regard to foreigners already working in China, employers should proceed with registration with the funds immediately.*
- ▶ *Employers should agree with employees on the cost bearing considering that if the employer bears the employee's contributions this constitutes taxable income and also that the employee may claim refund of balance in his individual accounts when leaving China.*

Pilot Plan for Prevention and Mediation of Labour Disputes in Shanghai

As of 1 August 2011, the Opinion on Implementation of Pilot Plan for the Prevention and Mediation of Labour Disputes has been implemented. Shanghai government will select pilot enterprises to establish internal mediation committees to resolve labour disputes. Such pilot plan is taken by Shanghai local government to implement the national policy on encouraging labour disputes to be settled within the companies.



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"European Law Firm of the Year" 2010, *The Lawyer*



"Law Firm of the Year: France" 2010, *The Lawyer*

Salans Comments:

Companies should watch this development, as of 2012, based on the experience gained via the pilot enterprises' practice, mechanism of prevention and mediation via internal mediation committees will be implemented throughout Shanghai enterprises step by step.



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Shanghai Opinion on Labour Dispatch

Recently, several local Shanghai authorities have jointly released the Guiding Opinion on Labour Dispatch ("Labour Dispatch Opinion") for the purpose of regulating labour dispatch. The main task set by the Labour Dispatch Opinion is to control and gradually decrease the number of employees employed via labour dispatch.



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The PRC Labour Contract Law requires that the labour dispatch shall only apply to temporary, auxiliary or substitutable positions. This Labour Dispatch Opinion provides that the scope of temporary, auxiliary or substitutable positions shall be determined through collective negotiation within labour accepting entities (companies). The number of employees dispatched to positions which are not temporary, auxiliary or substitutable shall gradually be decreased.



Top ranked by Independent Legal Directory Chambers Asia, 2009

Salans Comment:

Companies should carefully consider whether to use labour dispatch agencies or rather conclude contracts with their employees directly. HR services such as payroll handling can be outsourced by service agreements only. Labour dispatch in China in general does not serve the purpose of labour flexibility as they do in other countries; mainly because contracts should have a minimum duration of 2 years and dispatching firms mostly transfer their liabilities to the labour accepting. Moreover, companies are generally required by the labour contract law to conclude written labour contracts with their employees directly. A lack of any written agreement between the company and the employee, but also not carefully drafted supplementary agreements may increase costs and risks for the company.



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Today's Q&A: Open-Term Contract after Two Fixed-Term Contracts

Q: We have signed 2 fixed-term contracts in sequence with an employee. The second contract will expire soon. Are we obliged to provide a third contract with an open term to the employee?

A: The exact entitlement may vary in different location. In general, as provided by Article 14 of the Labour Contract Law, if an employment contract is renewed for a third period of time in sequence, the employee is entitled to an open term contract. The question is who may decide on whether the contract is renewed at all.

According to Article 11 of the Implementation Regulations to the Labour Contract Law, if an employee proposes to renew his/her second fixed term labour contract, an open-ended labour contract shall be concluded except otherwise agreed between the employee and the employer through consultation. Labour authorities in different cities/provinces have a different understanding and explanation of this provision.

In Shanghai, only if a third contract is intended by both parties, such contract must be open-term. This means at the expiration of the second contract, the employer may still decide whether or not to continue hiring an employee. Shenzhen and Guangzhou labour authorities have the same opinion as those in Shanghai.

Beijing labour authorities and the local high people's court have a more strict interpretation. An employee holding a second fixed-term contract is entitled to request for a third contract with an open term. Upon the employee's request, the employer is obliged to provide a third contract with open term. Therefore, for Beijing employers, thorough consideration must be given to conclusion of a second fixed-term contract as well as the term of the first fixed term contract.

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