

Salans News

Employment Law China

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Update: Social Insurance for Foreigners

The Ministry of Human Resources and Social Security (MOHRSS) has recently issued Decree No. 113, the Notification on Guidance of Measures for Foreigners Working in China to Participate in Social Insurance ("Notification"). This Notification requires the strict implementation of the Social Insurance Law and the Interim Measures on Participation in Social Insurance of Foreigners Employed in China.

If foreigners meet the requirements, they must be enrolled in the social insurance scheme before 31 December 2011. Foreigners who were employed in China before 15 October 2011 and who qualify for social insurance must participate in the social insurance and pay premiums from 15 October 2011. There are no fines for overdue payment for those who register for social insurance and pay premiums between 15 October and 31 December 2011. For those who register and pay premiums after 1 January 2012, the fine for overdue payment will be calculated from 15 October 2011. Social insurance payments for foreigners who started working in China after 15 October 2011 will be collected from the month they start working in China.

The Notification clarifies that foreigners may draw pension insurance benefits when they reach retirement age (60 for males; 55 for females) as provided under the current rules. No regulation is provided for unemployment insurance. The maternity expenses incurred in China within the coverage of maternity insurance will be paid from the local maternity insurance fund. Specific rules will be issued separately by provinces, autonomous regions, and municipalities.

Salans Comment: *Until now, implementation varies by location though as of 15 October 2011 all foreign nationals holding a work permit and*

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legally working in China are included in its statutory social insurance scheme. Employers should immediately enquire with their respective local insurance funds about actual handling and implementation. They should register their foreign employees before 31 December 2011 to avoid fines for overdue payment.

Chengdu: Social insurance contributions also for Hong Kong, Macau and Taiwan employees

The labour authority in Chengdu issued a circular ("Circular") to implement the Interim Measures on Participation in Social Insurance of Foreigners Employed in China, effective from 15 October 2011. It clarifies that in addition to foreigners, Hong Kong, Macau, and Taiwan residents who are legally employed in Chengdu are included in the social insurance scheme and obliged to contribute. An additional mandatory 'catastrophic medical insurance' has been added to the five categories of statutory insurance (i.e. pension, medical, work-related injury, unemployment and maternity insurance).

Salans Comment: *In Chengdu, employers must register their employees from Hong Kong, Macau, and Taiwan at the social insurance fund after they obtain their work permits. In other cities, information about the local practice must be requested from the local funds until a national regulation on this matter is implemented.*

Dalian: Temporary Removal of Caps for Social Insurance Contributions

Many employers are not aware of the policy implemented in Dalian from 1 September 2011 ("Policy"). According to this Policy, the previous cap for calculating employer's contributions amounting to RMB 11,154 has been temporarily removed. The basis for calculation of the employer's contribution is the total previous month's salary paid to employees. The company must include in the contribution basis the salaries paid to foreign employees, including those from Hong Kong, Macau, and Taiwan. The contribution rate remains at approximately 32 %. The cap still applies to employees' individual contributions.

Salans Comment: *This new policy will increase personnel costs for companies in Dalian and has to be considered in the overall hiring*

strategy. Companies should closely follow the development of this “temporary” removal.

Draft of the Administrative Regulations on Social Insurance Premium Filing and Contribution

To specify the employers’ obligations and liabilities under the new Social Insurance Law, MOHRSS has released a draft of the Administrative Regulations on Social Insurance Premium Filing and Contribution (“Draft”). The Draft emphasizes timeline for registration and contribution of new employees, i.e., 30 days from starting work. It specifies liabilities for noncompliance on contributions (e.g., underpayment, wrong filling of total payroll or number of employees, etc.). Sanctions include fines for delayed contributions at a daily rate of 0.05% (without any cap), penalties of 100% - 300% of the due amount, enforcement by authorities, etc.

Salans Comment: *Liabilities are increased under the Draft. Companies should ensure that social insurance filing and contributions are handled correctly.*

Rules on Consultation and Mediation of Labour Disputes in Enterprises

MOHRSS released on 30 November 2011 Rules on the Consultation and Mediation of Labour Disputes in Enterprises (“Rules”), which take effect from 1 January 2012. The Rules expressly detail the principles that parties in the labour relationships must observe when settling a dispute through consultation, the method of consultation, participants and time limit, and the effectiveness of the settlement agreement. The Rules also require large and medium-sized enterprises to establish a labour dispute mediation committee. Different from the draft published in June (please refer to our Salans Employment Newsletter June 2011), the Rules do not provide for a fixed threshold of 300 employees any longer.

Salans Comment: *Companies should follow the local development and interpretations on when they are required to implement a mediation*

committee. Companies with several hundreds employees must prepare for establishment of a mediation committee in line with the Rules.

Maternity Subsidies Provided by the Social Insurance Fund

Under Article 56 of the PRC Social Insurance Law effective since 1 July 2011 (“Social Insurance Law”), the calculation of benefits payable to female employees during their maternity leave has been changed. Previously, maternity subsidies were based on the individual’s salary before maternity. Now, the calculation is based on the average monthly salaries of all employees of the same employer during the previous year.

Some companies now reduce payments to employees during maternity by not making up the difference between maternity subsidies and higher individual salaries. This may expose them to certain risks.

Salans Comment: *General principles from laws protecting rights of female employees prohibit employers from discriminating against female employees, and reducing their salary during pregnancy and maternity. The new regulation in the Social Insurance Law rather deals with maternity subsidies as social insurance coverage only, not with employer payments. We assume that female employees will claim for – and will probably also be entitled to – the difference between maternity subsidies and higher individual salaries. Companies should decide on a general handling policy and include a regulation in the employee handbook to explicitly illustrate the amount to be paid.*

Today’s Q&A: Annual Leave Entitlement

Q: We have hired a new employee as of 1 January 2012. He has not been employed during the previous month. Is he entitled to annual leave during 2012?

A: Yes, the employee is entitled to statutory leave in 2012. To determine his entitlement, the employment years with previous employers must be considered.

According to the Regulations on Employees’ Annual Leave and its implementation regulations, employees become entitled to annual leave

once they work for 12 consecutive months either with the current employer or previous employer(s). Also, a break in between employment, breaks from work, or changing employers does not impact this entitlement. This has recently been confirmed by the Shunyi District People's Court of Beijing.

However, if the company provides other annual leave days, the company's internal rules may provide different additional entitlements depending on the employment years with the company.

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