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## China Employment Law Update - August 2017

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## China Employment Law Update - August 2017

### Abstract

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### Comments

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## Newsletter

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For further information, please contact:

Jonathan Isaacs  
+852 2846 1968 (Hong Kong)  
jonathan.isaacs@bakermckenzie.com

Zheng Lu  
+86 21 6105 5922 (Shanghai)  
zheng.lu@bakermckenzie.com

Bofu An  
+86 10 6535 3852 (Beijing)  
bofu.an@bakermckenzie.com

## Guangdong Province High Court Provides Guidance on Labor Disputes

On July 19, 2017, the Guangdong Province High People's Court issued a *Reply to Controversial Issues Concerning Ruling on Labor Dispute Cases* to guide lower courts when ruling on labor disputes. The high court's reply should significantly influence how local judges handle labor disputes in Guangdong Province.

Key highlights from the guidance include:

- **Relocation:** Relocation due to the business development or planning is a major change in the objective circumstances upon which an employment contract was originally agreed. Thus, an employee may terminate the employment contract and demand compensation if the employee does not agree to the workplace relocation unless the relocation does not excessively inconvenience the employee and the employer takes reasonable steps to eliminate the inconvenience (for example, providing a shuttle bus for the employee).
- **Liquidated damages:** An employee can request both liquidated damages and severance pay if the employer breaches the contract or wrongfully terminates the employee. The employee can claim liquidated damages according to the employment contract (if the contract has such a liquidated damages clause) and can additionally claim severance compensation according to the Labor Contract Law.
- **Termination:** An employer can terminate an employee who violates family planning regulations if such termination cause is stipulated in the labor contract, the collective contract or company policy.
- **Personal injury compensation:** An employee suffering a work safety accident or an occupational disease can claim personal injury compensation from the employer if such amount is not covered by the work injury insurance system.

### Key take-away points:

Employers in Guangdong Province should take note of the above points when facing potential labor disputes. In particular, potential employer exposure in relation to occupational injuries or illnesses may drastically increase in light of the above guiding opinion.

## Shanghai Second Intermediate Court Issues Employment Dispute White Paper for 2013 – 2016

On June 26, 2017, the Shanghai Second Intermediate Court issued the *White Paper on Employment Dispute Judgments for 2013 to 2016*. In addition to discussing traditional employment dispute matters, such as unlawful termination, wage arrears, and labor dispatch issues, the White Paper also calls attention to other emerging trends. For example, the White Paper

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addresses employee dishonesty, electronic evidence, and evidentiary difficulties due to paperless offices and extensive use of social media.

Certain model court decisions were also included in the White Paper.

In one case, the court ruled that a board resolution to remove a senior manager from the manager's current position should be deemed as a change in that position rather than as an automatic termination of employment. Dismissal based on this board resolution was therefore wrongful termination. Furthermore, under these circumstances, the employee was entitled to reinstatement even though the original position had been filled by another employee. The employer was therefore required to arrange a "reasonable position" for the reinstated employee.

In another case, the court held that a mutual termination contract could not become effective until an employee with potential exposure to occupational hazards conducted an exit occupational health examination. The court reasoned that an employee unaware of whether he suffered an occupational disease or injury could not form the requisite intent to terminate an employment contract. Therefore, the court ruled that the employee could claim employment reinstatement until the exit occupational health examination and the labor incapacity assessment were completed and the statutory compensation for any occupational disease could be determined. The court did note, however, that this right to the exit occupational health examination could be waived by the employee voluntarily in the mutual termination contract if reasonable consideration were paid for the waiver.

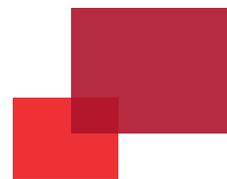
#### Key take-away points:

Employers should carefully handle unilateral termination of senior managers and should always consider potential reinstatement risks and costs. Employers should conduct exit occupational health examinations for employees with potential occupational hazard exposure or ask for a waiver of the examination in the mutual termination contract and provide reasonable compensation for the waiver.

## Transgender Employee Wins Compensation For Unlawful Termination and Infringement of Personality Rights in Guizhou

In two separate trials, the Yunyang District People's Court in Guiyang City, Guizhou Province awarded a transgender employee statutory damages for unlawful termination and emotional damages for infringement of personality rights.

In April 2015, the employee was terminated after just one week at a new job with a health check company. The employer instructed a co-worker to inform the employee of the termination. While informing the employee of her termination, the co-worker also told the employee that the company's HR manager thought the employee's wardrobe choices were "incompatible" with the company's image. The employee felt this statement demonstrated discrimination against her transgender identity and was the real reason for the termination. The employee filed a labor dispute case with the local court claiming unlawful termination.



In the labor dispute case, the employer denied responsibility for the discriminatory comments and insisted the reason for the termination was the employee failed to meet the conditions of employment during the probationary period. The court ruled that the employer lacked evidence to prove dismissal on these grounds; thus, the court ruled the termination unlawful and ordered statutory damages. However, in its ruling, the court rejected the employee's allegation that the termination constituted transgender discrimination because the co-worker's comments were insufficient to prove the discrimination.

In December 2016, the employee filed a tort claim with the same court claiming the health check company infringed her personality rights by violating her equal employment opportunity rights. During the case, the court shifted the burden of proof to the employer by reasoning that only the employer could know the genuine reason for the termination. The court considered its previous ruling of unlawful termination when ruling that the employer failed to prove reasonable termination grounds in the current tort claim. Therefore, the court ruled that the company had infringed the employee's personality rights by violating her equal employment opportunity rights and awarded CNY 2,000 to the employee for emotional damages.

**Key take-away points:**

Currently, courts sidestep discrimination issues in labor disputes and instead only review whether termination is based on permitted grounds under the PRC Employment Contract Law. However, the second case shows that courts may be more receptive to discrimination issues under a tort claim for infringement of equal opportunity rights. By shifting the burden of proof to the employer in the tort claim and using the previous ruling of unlawful termination to conclude the employer had not met that burden, the courts could be making employers more vulnerable to tort claims for infringement of equal opportunity rights.

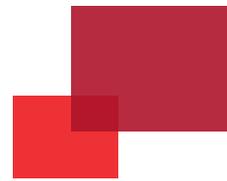
## Master Chef's *De Facto* Employment Claim Upheld

In July 2017, the Beijing Chaoyang District People's Court upheld the *de facto* employment claim raised by an individual hired through an online cooking-service app, and ordered the company operating the app to pay CNY 10,000 for wrongful termination of the individual.

The individual claimed to have worked for the company from 10 am to 6 pm every day and to have received CNY 5,000 as monthly salary. On this basis, the individual argued that an employment relationship had been established with the company.

The company argued that the individual worked as a freelancer because: (a) the business cooperation contract signed by the parties specified that the relationship was a service relationship; (b) the individual could decide whether to accept cooking orders, could set working hours without company approval, and was not subject to the company's management; and (c) the individual was paid based on the cooking orders accepted through the online app.

The court ruled that a *de facto* employment relationship had been established based on the following facts:



- the company required the individual to complete work assigned by a store manager at the outset of the relationship;
- the company required the individual to report to work at a company store every day and work on a full-time basis;
- the company required the individual to wear the company's uniforms and to use the company's tools when providing services;
- the company required the individual to undertake some business development responsibilities; and
- only at later stages of the relationship did the company gradually change its business model, close stores, and allow the individual to choose which orders to fulfill.

#### **Key take-away points:**

With the boom in online service apps in China, many individuals are providing services to customers by accepting orders through these online platforms. PRC law is silent on whether these individuals should be considered freelancers or employees of the app operators. This case shows that the Beijing courts will assess the relationship by using a balancing test that weighs all factors deemed relevant by the court, including the documents signed between the parties and the app operator's business model and daily operations.

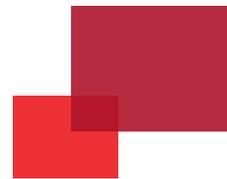
To reduce the risk of creating *de facto* employment relationships, app operators should sign service contracts with freelancers and manage them differently from regular employees. For example, app operators should not control the freelancers daily work, should not pay them a fixed monthly salary, and should not label them as employees in internal or external records.

## **Beijing Labor Arbitration Committee Considers Foreign National Working Outside Approved Location as Illegal Employment**

On July 19, 2017, the Beijing Municipal Social Security and Human Resources Bureau released a summary of 10 model Beijing labor arbitration cases. One notable case involved a labor dispute between a foreign national working in Beijing after being hired by a Shanghai entity. The Beijing labor arbitration committee rejected the foreign national's claim for severance on the basis that the employee was illegally employed by working outside of Shanghai.

In the case, the foreign national signed an employment contract with a Shanghai company to work as a tennis coach in Beijing under the daily management of the Shanghai company's Beijing branch. The Shanghai company sponsored the employee's work permit, residence permit and other immigration documents in Shanghai. Later, the employee resigned when the Beijing branch refused to pay salary and filed a labor arbitration claim in Beijing against the Shanghai hiring company.

The Beijing labor arbitration committee decided that the foreign employee's work permit clearly provided that the employee's approved work location was Shanghai; therefore, by working in Beijing, the employee was illegally



working and thus should not be entitled to the labor protections in China. The labor arbitration authority rejected the employee's claim for severance.

**Key take-away points:**

An employer will often hire all employees through its headquarters in one city while sending the employees to work in another city. When foreign nationals (including Hong Kong, Macao and Taiwan residents) are hired, both the employer and the employee should be particularly careful about following the immigration requirements on where the foreign national is permitted to work. All work permits and other immigration documents should be obtained in the city where employee will actually work to avoid potential liabilities in relation to illegal employment.

Although the denial of PRC labor protections to the employee in this case worked in the company's favor, both the employer and the foreign national employee could face potential legal liabilities as a result of such an employment arrangement. The employer could be fined CNY 10,000 per illegal hire up to a total maximum of CNY 100,000 for all the illegal hires, with all illegal gains from the illegal employment confiscated. The foreign national could be fined up to CNY 20,000 and be subject to administrative detention in the severe situations. The foreign national could also be deported for illegally working in the PRC.

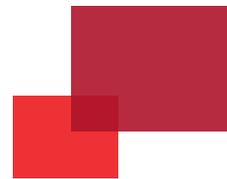
## **Strong Company Policies Shield Employer From Criminal Liability for Employee Criminal Conduct**

The Lanzhou Intermediate People's Court recently found six sales employees at a milk powder company and two employees at a hospital guilty of illegally collecting personal data. Despite employee allegations that they were instructed by the milk powder company to collect the personal data, the company was not held criminally liable for the employees' criminal conduct because the milk powder company had implemented policies prohibiting employees from illegally collecting personal information.

The sales employees paid the hospital employees to distribute free milk powder samples to new parents and to collect their personal information. With the help of the hospital employees, each sales employee illegally collected information on between 963 to 40,507 people. The court held that this behavior violated the employer's company policies prohibiting the collection of personal information without company approval. Thus, while the employees were criminally liable for illegally collecting personal data, the milk powder company was not criminally liable for the employee behavior.

**Key take-away points:**

An employer can potentially avoid criminal liability for an employee's criminal conduct by formulating and properly implementing appropriate company policies. Employers should formulate company policies that establish a business code of conduct and specifically address proper behavior in high risk areas associated with the employer's business, e.g., how to properly collect personal information. The company should also provide and properly document compliance trainings to its employees, especially marketing and sales employees. These company policies and practices can help the company avoid being held criminally liable for employee criminal conduct.



## Unilateral Termination for Non-disclosure of Sealed Juvenile Criminal Record Ruled Unlawful

The Shanghai Putuo District People's Court recently ruled that a termination for failure to disclose a sealed juvenile criminal record was unlawful.

The employee was convicted of a crime while a juvenile. As an adult seeking employment with the employer, the employee did not disclose the sealed juvenile criminal record to the employer and marked "no criminal record" on recruitment documents. After hiring the employee, the company discovered the existence of the sealed juvenile criminal record during a background check. The employer deemed this non-disclosure as providing false and deceitful information during recruitment and summarily dismissed the employee.

According to PRC law, criminal records should be sealed if the person committing the crime is a minor (under 18 years old) and is sentenced to less than 5-years fixed-term imprisonment. According to the Shanghai court, sealed juvenile criminal records should be treated as if no criminal record exists. Thus, the court ruled that the employee was entitled to mark "no criminal record" on the recruitment documents and that the unilateral termination was unlawful.

### **Key take-away points:**

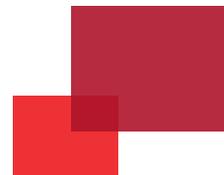
The PRC seals criminal records for minors who commit low level criminal offenses in order to protect the person's privacy as a minor and to safeguard the person's equal employment rights as an adult. This case deems the person to have no criminal record when the juvenile criminal record has been sealed. Employers need to be aware that an employee's statement of "no criminal record" under these circumstances may be treated as accurate by PRC courts.

## Employer Recovers *Hukou*-related Costs for Employee Breach of Service Years Agreement

Recently, the Beijing No. 1 Intermediate Court upheld a lower court order for an employee to pay CNY 24,000 to compensate the employer's costs related to handling the application for an employee's Beijing household permit (i.e., *hukou*) when the employee resigned before finishing the agreed upon number of service years.

Under the agreement, the employer agreed to handle the employee's Beijing *hukou* and bear all associated costs. In exchange, the employee agreed to work for the company for five years. If the employee terminated employment earlier, the employee would compensate the employer's loss for handling the employee's *hukou* up to a maximum of CNY 150,000. One year after receiving the Beijing *hukou*, the employee resigned. The employer sued for compensation.

The employee argued that the clause was invalid since the compensation clause amounted to a liquidated damages clause prohibited under PRC Employment Contract Law (liquidated damages clauses are only allowed for non-compete and training bond agreements). The employer argued that the



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compensation clause was not a prohibited liquidated damages clause but was instead an enforceable loss compensation clause.

The Beijing No. 1 Intermediate Court upheld the lower court's judgment that the clause was an enforceable loss compensation clause and not a liquidated damages clause. Since the employee's early termination of the employment contract violated the service years agreement causing a loss to the employer, the employee was liable to pay compensation under the loss compensation clause. In its opinion, the lower court referred to a 2009 guiding opinion jointly issued by the Beijing Labor and Social Security Bureau and the Beijing High Court. The 2009 guiding opinion stated that *hukou*-related liquidated damages clauses are unenforceable but an employee may still have to pay compensation for an employer's losses caused by the employee if the employee acts in bad faith.

#### **Key take-away points:**

Every employer in Beijing should ensure its service years agreements related to *hukou* applications do not include liquidated damages clauses. Instead, such an agreement should expressly state that the employee must pay compensation for losses suffered by the company (such as costs related to applying for the *hukou*) rather than stipulating a fixed liquidated damages amount. If the compensation clause is properly constructed, Beijing courts may uphold an employer's claim for compensation for losses suffered.

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Beijing  
Suite 3401, China World Office 2  
China World Trade Centre  
1 Jianguomenwai Dajie  
Beijing 100004, PRC  
Tel: +86 10 6535 3800  
Fax: +86 10 6505 2309

Hong Kong  
14th Floor, Hutchison House  
10 Harcourt Road  
Central, Hong Kong  
Tel: +852 2846 1888  
Fax: +852 2845 0476

Shanghai  
Unit 1601, Jin Mao Tower  
88 Century Avenue, Pudong  
Shanghai 200121, PRC  
Tel: +86 21 6105 8558  
Fax: +86 21 5047 0020

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