Changes in China's Labor Law Environment

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2007 has seen major changes in Chinese labor legislation. Two statutes have been enacted--the Labor Contract Law (中华人民共和国劳动合同法) and the Employment Promotion Law (中华人民共和国就业促进法), each with effect from January 1, 2008--and attendant implementing regulations are in process. These two statutes promise major changes in labor-management relations and equal employment opportunity. The Shanghai Municipal Rules on Collective Contracts (上海市集体合同条例), promulgated on August 16 by the Standing Committee of the Shanghai Municipal People's Congress, is a harbinger of how collective bargaining is expected to work.

The upsurge in legislative activity is a product of several factors: the determination of the current Chinese leadership to temper rising social inequality and build a harmonious society; the drive to increase political control over the workforce and society at large by bringing the bulk of the workforce within Party-controlled labor unions; and the efforts of the All-China Federation of Trade Unions to expand its influence and revenue.

Employers should review their HR policies to adjust to the new, more-regulated employment regime with collective bargaining obligations.

Labor Contract Law

The Labor Contract Law was enacted on June 29 following an unusually open process which saw nearly 200,000 public comments submitted to the National People's Congress (NPC) after publication of an early draft aroused controversy from businesses and workers alike. Multiple revisions were made to refine and temper some of the statute's provisions.

The purposes of the Labor Contract Law are to perfect the labor contract system, clarify the rights and obligations of the parties, protect employees' lawful interests and establish or strengthen stable labor relations (Article 1). Written labor contracts are the mechanism for doing so (Article 10). Written contracts had long since been required under Article 19 of the Labor Law (1994), but this requirement was often disregarded, particularly in casual employment industries like construction, where migrant workers have often been mistreated and deprived of promised compensation.

Other provisions will, however, place more burdens on employers in general, including pressure to engage in collective bargaining over many issues and to allow the formation of unions, albeit

company unions. Employers are obligated to present proposals and discuss with the company union--or, in the absence of a union, the employee representative congress--rules and major matters that affect employees' fundamental interests, including compensation, work hours, leave, occupational safety and health, insurance and fringe benefits, training, discipline and performance norms (Article 4). The union or employee representative congress may also demand that the company address any irregularities in company rules or the implementation of major matters (Article 4).

The basic rules of employment relationships are also changed in several important respects. Probationary periods for new employees are shortened to a maximum of two months (one month for employment terms of less than a year) from the current six months, unless the term is at least three years or without a fixed term, in which case six months is permissible (Article 19)--and the minimum salary during the probationary period is 80% of the starting salary for regular employees in the same position (Article 20). Non-compete provisions remain lawful, but the maximum term is two years--one year shorter than the three years now generally allowed in China--and they are restricted to senior managers, senior technical personnel and other personnel with confidentiality obligations (Article 24). The controversial provision in an early draft that would have essentially allowed employees to buy their way out of a non-compete obligation was dropped, however.

Employers contemplating a reduction in force of 20 or more employees or 10% or more of the workforce are allowed to do so in the context of a bankruptcy restructuring, severe production difficulties or change of production, technology or business form, but must give the union or all employees at least 30 days advance notice (Article 41). Mass firings because of labor problems are therefore impermissible.

Among the biggest changes are protections for senior employees. The existing labor law has heretofore allowed employees to be hired in a series of fixed-term contracts, thereby allowing either party to terminate an employment relationship without penalty or severance by simply letting the contract expire. Only employees with at least 10 years of service were allowed to elect non-fixed term contracts (Labor Law, Article 20), which meant that termination required the payment of severance (one month of base salary per year of employment up to a maximum of 12 months for 12 years). Under the Labor Contract Law, the maximum number of fixed-term contracts is two (Article 14). Employees who have at least 15 consecutive years of service and who are within five years of retirement age (60 for men, 55 for women in general; five years younger in physical occupations) are protected from termination because of a deterioration in capability or a reduction in force by the employer (Article 42). The severance provision is improved from the employer's perspective, however, as severance is capped at three times the base local standard salary (Article 47) rather than the employee's own salary. Temporary employees paid on an hourly basis will be treated as regular employees if they work more than 24 hours a week (Article 68).

While the Labor Contract Law allows, but does not formally require, employees and the company to negotiate a collective labor contract in addition to written individual contracts (Article 51), collective contracts are distinctly favored. The employee representative congress will negotiate the collective contract if a union has not been formed, but government policy now strongly supports the formation

of unions in all companies with at least 25 employees, regardless of ownership. Thus, while the employee representative congress may function in the absence of a union, there is public pressure on employers--notably McDonald's and Wal-Mart--to allow and actually foster the formation of workplace unions.

Consistent with Article 81 of the Labor Law, the Labor Contract Law also provides for a tripartite structure for resolution of major problems in labor relations. This structure--which has tended to favor employees--is to be composed of members of the local government's labor and social security bureau, trade union federation and representatives of employers (Article 5).

Shanghai Municipal Collective Contract Rules

The Rules fundamentally seek to establish the procedures for the negotiation of collective labor contracts in Shanghai (Article 2) which, as China's most important commercial center, may then serve as a model for the rest of the country. Employers and employees will each be represented by a team of at least three members, provided that the employer's team is not larger than the employees' team (Article 6). The union will negotiate the contract on behalf of employees. If there is no union, the chief of the employee representative congress will handle the negotiations under the guidance of the union federation at the next higher level (Articles 7 and 14). Moreover, the Rules specify that the employer will be represented by its legal representative or his or her proxy (Article 7). Each side can be represented by outside negotiators, provided that such outsiders may not exceed one-third of the team membership (Article 7). The union federation has the right to be represented by an observer (Article 17).

Pressure is brought to bear on negotiators by requiring their replacement if an agreement is not reached within six months (Article 8). Collective contracts are subject to approval by a majority of the workers or their representatives (Article 20). The local labor and social security bureau has the power to require modification of contracts, presumably to be exercised if the parties stray from the minimum local standard.

Although the Rules include China's standard prohibition on disruption of production, work order and social stability in labor relations, employees have the right to be informed of mergers and acquisitions, divisions and restructurings, and to demand a renewal of the collective contract (Article 18), presumably under different terms. Thus, approval by employees may be required for foreign-related M&A transactions, in addition to government approval, anti-monopoly review and national security review.

The Rules (Article 31) mirror the tripartite procedure for resolution of disputes found in the Labor Law and Labor Contract Law, but add that either side may submit the dispute directly to the labor and social security bureau for resolution, which can mandate negotiations. The bureau can also consult on its own initiative with the labor union federation at the same level or with the employer to resolve the dispute (Article 32). The union has the right to litigate if the contract is breached and employees' rights are infringed (Article 34). By implication, the employee representative congress does not have a right to litigate.

Employment Promotion Law

The purposes of the Employment Promotion Law, adopted August 30, are to promote employment in the private sector through preferential policies, ease the burden on the unemployed and promote equal employment in the workplace. The State Council will establish a coordinating mechanism for employment promotion with the Ministry of Labor and Social Security responsible for policy formulation and implementation (Article 6). The government will implement policies to promote employment through a variety of channels, including labor-intensive businesses, the service sector, small and medium-sized enterprises, construction projects, micro-finance and, depending on the locality, a new or strengthened unemployment insurance system (Articles 12-16). Except for the possibility of an additional unemployment insurance burden, these policies seem unlikely to affect foreign investors unless their activities fall within the scope of labor-intensive industry and can qualify for any preferences made available to such businesses.

Non-discrimination is the second major component of the Employment Promotion Law. The law expressly provides that workers have equal rights to employment and to establish businesses in accordance with law without respect to ethnicity (nationality in Chinese), race, gender, religious belief or other characteristics (Article 3), and may not be discriminated against in hiring or in the conditions of their employment (Article 26). Similar prohibitions on discrimination were included in the 1994 Labor Law (Articles 12-14), but they were less comprehensive and widely disregarded. The Employment Promotion Law includes an entire chapter on equal opportunity and specifies other protected characteristics--notably, communicable disease (Article 30) and rural residence (Article 31). The specification of disease as a protected characteristic (excluding disease that is readily communicable), should benefit persons with hepatitis, who currently suffer from widespread discrimination. Although it is unclear how effectively these provisions will be implemented, the absence of specific penalties may limit the force of the equal employment provisions for some time to come even though the statute applies to both employees and recruiters. However, private litigation by workers is authorized (Article 62). It should also be noted that age is not listed, which indicates that age discrimination in the workplace will remain permissible.

Conclusion

The new legislation promises substantial changes in labor relations in China. Employers should review their HR policies and adjust them as needed in light of the new regulatory requirements. Employers should also prepare themselves to operate in a broadened collective bargaining environment with their employee representative congress or unions. Although these bodies are not independent unions, the trade union federations are likely to play a role, which may make collective bargaining more complicated and contentious.

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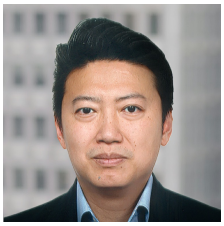

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