



## **LEHMAN, LEE & XU**

**China Labor Insights:** Bringing You The Latest Developments in Chinese Labor & Employment Law

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### ***Legal and Regulatory Update***

#### **China Labor Law - Bereavement Leave**

China labor law provides that when an employee's parent, spouse, or child dies, the employee is entitled to 1-3 days of bereavement leave, with full pay. It is common practice that employers provide three days of bereavement leave. In addition, cities and localities throughout China (such as Shanghai) may also provide bereavement leave for the death of an employee's parent-in-law.

#### **China Labor Law - Paternity Leave**

Paternity Leave is granted to an employee when his wife gives birth to her first child, provided his wife is aged 24 or older (or got pregnant when aged over 23 - depending on local rules). While the number of paternity days granted varies based on local rules, the number will be between three and ten days.

#### **Shanghai to Require That Employers Must Establish Workers' Representative Congress Which Have the Right to Review Wage Adjustments**

"Regulations of the Shanghai Municipality on Workers' Representative Congress" will be included in the 2010 official legislation project list of the Shanghai Municipal People's Congress. According to the Shanghai branch of the ACFTU, the new regulations will govern public organizations and companies. All employers must

establish a workers' representative congress, which will have the right to review the wage adjustment mechanism, protections of female employees, as well as other labor issues.

### **Beijing to Complete Local Legislation for "Labor Contract Law"**

According to the Beijing Municipal Human Resources and Social Security Bureau, Beijing will complete local legislation for an "Labor Contract Law". All laborers will be covered except civil servants and recruited or appointed civil servants.

### **Shenzhen to Enact Law Requiring Collective Bargaining**

"Regulations of the Shenzhen Special Economic Zone on Collective Negotiation in Labor Relations (draft)" has been submitted to the Standing Committee of the Shenzhen Municipal People's Congress for review. According to the regulations, an employer in Shenzhen that has more than 300 employees will be required to enter into a collective employment contract with the employees. Moreover, these regulations also specify the four circumstances under which a comprehensive collective contract must be concluded. This is the first time that Shenzhen has enacted laws requiring collective bargaining.

### **Sichuan: Work Injury Medical Recovery Period Not to Exceed 24 Months**

The Sichuan Provincial Human Resources and Social Security Bureau has issued the "Tentative Measures of Sichuan Province on Work-Related Injury Recovery Management" which states that the total duration of medical recovery period and work-related injury medical treatment period shall not exceed 24 months.

## ***In the Courts***

### **Dissolving labor contracts: Serious dereliction of duty**

Employers often wish to terminate employees based on "serious dereliction of duty." To do this, an employer must be able to specifically prove the dereliction of duty. If the company fails to provide a specific job description and give a detailed description of the employee's job duties, it is difficult to determine if serious dereliction of duty has occurred, even though the employee has made errors in his job performance that have led to economic loss. It is extremely important that an employer reference the job description and job duties and be able to specifically prove the employees failure to perform those duties. Employers also have the option of defining "serious damage" in its rules or employee handbook, and provide that economic loss that has reached a certain amount shall be deemed as "serious damage." This would help in avoiding dispute on this point during labor arbitration or litigation. If the employer cannot sufficiently and accurately prove and quantify that the employee is derelict of duty, the employer faces a very real risk of losing at labor arbitration or in the People's Courts.

## Material Breach of Discipline versus Material Breach of Rules

The Labour Contract Law includes the grounds of material breach of internal rules and bylaws for termination of employment. Item (2) of Article 39 reads as: "The employer may terminate the employment contract if the employee breach the rules and bylaws of the employer materially." "Material breach" is not a clear concept. Therefore, in anticipation of labor arbitration or litigation, this critical term should not be left to the arbitrator or judge's discretion. It is suggested that employers stipulate in the Employee Handbook or other documented rules and procedures, what specific activities constitute a "material breach" or what exact circumstances will result in immediate termination without payment of severance. As a general rule, employees cannot be terminated for general misbehavior but can be terminated for breaking specific rules.

## Jiangsu Labor Arbitration: Employee Termination Now Requires Letter to the Labor Union or Local Supervising Labor Union

Labor arbitration committees in Jiangsu Province are becoming much more strict in requiring that companies strictly follow procedures when terminating employees. Labor arbitration committees have always held a preference for finding some level of fault with employers in order to require some payment of severance. The continuing economic crisis, deteriorating employment conditions, and a severe lack of labor arbitrators in the face of rising claims with local labor tribunals is making labor arbitration more difficult for employers. Arbitrators have less time to hear claims and are now pushing employers to settle claims, even when employers have sufficient grounds to terminate employees for no severance.

Two areas that employers must now be aware of:

Letters to labor unions: in the past, this has rarely been an issue in labor arbitration. Recently, some labor arbitrators in Jiangsu have now required that notices be sent to the labor union simultaneously with the termination notice to the employee. This is true, even if a company does not have a labor union. Various labor arbitration tribunals have different rules in force. Some arbitrators are now requiring that if a company does not have a labor union, the company should send a notice to the "local supervising labor union" or the local labor bureau. As local labor arbitration committees follow different rules, it is critically important that employers contact their local labor bureaus to find out the local rule in place.

Re-training: re-training of employees has always been a requirement for terminating employees for no severance. However, labor arbitrators are now becoming more strict in demanding sufficient, documented proof that the company did in fact attempt to re-train the employee. It is now critically important that employer do the following:

- Document in detail the employees deficiencies
- Create an action plan showing the improvements and deliverables that will be expected from the employee
- Have the employee sign the action plan outlining his deficiencies and expected improvement
- Create a detailed plan for re-training
- Collect documents or other evidence that shows that the employee was in fact re-trained and coached. Included should be the person who re-trained the employee, what task or tasks were coached, the time and

date of the retraining.

## Employee Fired for Always Being Late...Still Wins at Labor Arbitration

In January 2008, Ms. Cheng was employed as Marketing Manager by a company located in Shanghai. The two parties signed a labor contract running from January 17, 2008 to January 16 2009 and with a monthly salary of RMB 7000. The two parties further agreed in the labor contract that "the company had the right to terminate the labor contract without payment of any economic compensation provided that: 1) the employee was absent from work without cause for three days in one year or 2) the employee was late or left work early three times in one month".

On February 12, 2008, the company sent a written "terminate notice" to Ms. Cheng, in which the company stated that Ms. Cheng had arrived late for work seven times during her probation period and during that time, had arrived late for work three days in a row. Based on this, the company stated that Ms. Cheng had materially breached the employer's rules and regulations, and according to the articles agreed to in the labor contract, the company terminated labor contract with Ms. Cheng.

Ms. Cheng was found to be pregnant on January 26, 2008 and gave birth to a baby on October 10, 2008.

In March 2008, Ms. Cheng filed a claim with the Labor Arbitration Commission in Shanghai, asking that the company be required to re-hire her and continue performing the labor contract. The arbitration committee supported her position and the company appealed to the local People's Court in Shanghai..

During the court hearing, the company stated that according to the electronic attendance records', Ms. Cheng was absent 9 days and was late on 8 days. The company provided Ms. Cheng's electronic attendance record, which had been legally notarized on May 29, 2009.

Ms. Cheng argued that the notarized attendance record had been altered by the company. Ms. Cheng submitted evidence to prove that the content in the electronic attendance record could be amended by the system administrator at any time.

The court confirmed from that software developer that the company did have the ability to alter the employee's attendance record and that the software provider could determine whether the records had been altered if the employer would pay a RMB 20,000 fee to do so. The court requested the company to pay the RMB 20,000 appraisal fee to determine whether the records had been altered, however the company refused to pay the fee.

### Decision of Court

The court stated that the focus of this case was whether the company's termination of the labor contract with Ms. Cheng was legally supported. As the employer, the burden was on the company to provide sufficient evidence to prove the termination was in accordance with the law. Although the company provided Ms. Cheng's attendance records, Ms. Cheng did show that the records could have been altered by the company. Therefore, because the company failed to prove that it did not alter the time records, the court found that the time records

were not sufficient to prove that Ms. Cheng had materially breached the rules and regulations of the company and the company was required to re-hire her.

### **Employee Fails to File for Arbitration Within the Statute of Limitations...Case Dismissed**

Mr. Li was hired by a company located in Jiangxi Province on April 2, 2007. He did not enter into a written labor contract with the company but was told that he had an initial probation period of 2 months. After the probation period was completed, the company did not conclude a labor contract with Mr. Li and he was informed by the president of the company that he was terminated.

On July 23, 2008, Mr. Li sent a written letter to the company demanding compensation but received no response for more than one year. Finally, on Oct 13 2009, Mr. Li filed a claim with the local labor arbitration committee.

The arbitration committee rejected Mr. Li's claim for exceeding the statute of limitations. Not satisfied with the arbitration result, Mr. Li appealed to the local people's court. The court upheld the decision of the arbitration committee.

According to Article 27 of the PRC Mediation and Arbitration Law for Labor Disputes, the statute of limitations for filing for labor arbitration shall be one year, beginning from the time the party becomes aware of or should have been aware of the damages. If the employee made a demand to the company for compensation, the limitations period would be interrupted and start over from that day.

Mr. Li knew that he was terminated at the end of March 2008 and he demanded compensation from the company on July 23 2008. Therefore, the one-year statute of limitation period began on July 23, 2008 and expired on July 22, 2009. Mr. Li filed his claim for arbitration on Oct 13, 2009 which was outside the statute of limitations period. Therefore, the court dismissed Mr. Li's claim.

### **Social Insurance Payments Mandatory, May Not be Negotiated Between Employers and Employees**

On June 2008, Mr. Zhao was employed as a Manager by an American company located in Shanghai. The company offered Mr. Zhao a monthly salary of RMB 12,000 per month. However, the company notified Mr. Zhao that it would not pay Mr. Zhao's social insurance. Although Mr. Zhao was worried about the social insurance, he was very satisfied with his salary. Mr. Zhao entered into a labor contract with the company on the basis of the offer.

Several months later, Mr. Zhao and the company had disagreements on how to manage the company and Mr. Zhao was terminated. Mr. Zhao filed a claim for labor arbitration requesting payment of his social insurance. The company insisted that they had informed Mr. Zhao in advance that they would not pay the social insurance for him which Mr. Zhao's agreed to when he signed the labor contract.

The arbitration committee ruled in favor of Mr. Zhao and required that the company pay the social insurance for Mr. Zhao in accordance with the law. Article 72 of the PRC Labor Law states that the employer shall pay social insurance for its employees. It is a mandatory provision which is not allowed to be changed through bargaining

or negotiation between the employer and employee.

### **University Diploma a Fake, Labor Contract Voided**

On Nov 28 2008, Mrs. Yang entered into a one year term labor contract with a Beijing company as the company's training manager for a monthly salary of RMB 4,000 for per month. During her recruitment and prior to signing the labor contract, Mrs. Yang submitted a Bachelor Degree of English Education, issued by a famous university. Later, the company confirmed with the university that the university had never issued a Bachelor Degree certificate to Mrs. Yang and that the certificate submitted by Mrs. Yang was a counterfeit.

The company filed a lawsuit with the Beijing Xicheng People's Court, asking that the labor contract be declared null and void for fraud. Mrs. Yang argued that during her recruitment, the company did not require any specific education background and therefore, whether the degree was fake or not should not affect the validity of the contract.

The court ruled for the company and declared the labor contract void. According to the China Labor Contract Law, a labor contract shall be invalid if based on fraud.

In this case, Mrs. Yang was fully aware that the degree she submitted to the company was counterfeit, however she intentionally submitted it and the degree misled the company, causing it to enter into the labor contract.

### **Employee Fined and Fired for Quality Control Problems and Refusing to Work. Court Rejects His Claim for Compensation.**

On Jan. 20, Mr. Yu, who lives in the Zhenhai Economic Development Zone of Zhejiang Province, was fired by his company for violating the company's rules and regulations. He then filed a lawsuit with the people's court seeking economic compensation from the company. His claim was rejected.

Mr. Yu, aged 30 and originally from Anhui Province, began working for the Ningbo Haotian Machinery Co. Ltd. in 2006 as a machine operator under the piecework system. He signed a Labor Contract with the company in 2009 with an agreed contract term of Jan. 01 - Dec. 31, 2009.

From July, 2008 to March, 2009, Mr. Yu's work was to operate one milling machine. In April, 2009, the amount of work was reduced due to the effects of the economic crisis. Ningbo Haotian Machinery Co. Ltd. then arranged for Mr. Yu to operate two milling machines simultaneously. Later, Mr. Yu was twice fined by the company for product quality problems resulting from operating the machines too fast. Mr. Yu found it difficult to accept a reduction in income and refused to continue operating the two milling machines. The company then gave Mr. Yu three demerits in accordance with the company staff code of conduct, and then ultimately rescinded the Labor Contract with Mr. Yu on May 21, 2009.

Mr. Yu then applied for an arbitration hearing with the Arbitration Committee for Labor Disputes of Zhenhai Economic and Development Zone. However, he was not satisfied with the arbitration award and filed an appeal with the People's Court of Zhenhai Economic and Development Zone, claiming economic compensation of RMB 12,444.

The People's Court, after trying the case, held that Ningbo Haotian Machinery Co. Ltd. had the right to administer and punish its employees according to its Staff Code of Conduct. The court found that the quality problems did not arise from Mr. Yu's simultaneous operation of two milling machines but rather from the speed he operated the machines. The court further found that Mr. Yu's refusal to operate the two milling machines because of his dissatisfaction with the company's fine on him was an obvious violation of the company's rules and regulations. Finding that the company's rescission of the Labor Contract was based on the Staff Code of Conduct and did violate the law, the court rejected Mr. Yu's claim.

## *In the News*

### **Shanghai Employers Searching for More Migrant Workers**

With businesses expanding in an improved economy, Shanghai is in need of more migrant workers, especially in suburban areas heavy in manufacturing, such Jiading and Minhang districts, local authorities said recently.

To meet the labor demand, a group of 25 companies organized by the Jiading District government will go to Baoji City in northwestern China's Shaanxi Province to recruit about 5,000 workers, said Zhou Wenliang, an official with the district's migrant workers' service center.

Zhou said most companies registered in the center are planning to employ more workers than last year because of the recovering economy. He stated the shortage will be relieved after the Lantern Festival on Sunday - the 15th day of the first month in the lunar calendar which marks the end of the series of celebrations starting from the Chinese New Year. Starting next month, the job market in China will enter its high period which will last until July.

According to Zhao Jiande, Director of the city's migrant workers office, the labor shortage began in December of last year. With business on the rise, it will be a challenge for local employers to recruit enough people in the short term, Zhao said.

### **85% of IT Staff Intend to Change Jobs**

In a recent survey conducted by [www.51job.com](http://www.51job.com), 85% of IT workers surveyed stated their intention to job-hop in 2010. 50% of those surveyed feel they are "facing career development bottlenecks" and 40% say they are "not happy with their pay".

### **Beijing to Raise Minimum Wages by 10%**

The Beijing Municipal Government Work Report for 2010 stated that the minimum wage rate this year is expected to grow approximately 10% to RMB 880. The wage increase proposal has been submitted for review and approval. The increase in minimum wage rates is expected to begin in April at the earliest, or July at the latest.

## Shanghai to Raise Minimum Wages by 15% starting from April 1

According to Han Zheng, Mayor of Shanghai, the Shanghai Municipal Party Committee and the Shanghai Municipal Government have decided to raise the Shanghai minimum wage rate by 15% starting from April 1. Pension amount will grow by slightly more than 10%, or roughly RMB 170 more per person.

## Nanjing to Raise Minimum Wages Starting February 1st

According to the Nanjing Municipal Labor and Social Security Bureau, the minimum wage rate in Nanjing will go up starting from February 1. Specifically, the minimum wage rate in tier one districts will be raised from RMB 850 to RMB 960 per month, and in tier two districts from RMB 700 to RMB 790 per month. In the meantime, minimum hourly wage rates will also be increased accordingly.

## Newsbites

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