JONES DAY

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ASIAN LABOR & EMPLOYMENT NEWS

RECENT LABOR UNREST AND COLLECTIVE WAGE BARGAINING IN CHINA

China is experiencing unusual labor unrest. It all began in early 2010 with a spate of suicidal jumps from the employees' dormitories at Foxconn Technology Group (the main supplier of global IT companies such as Apple, Dell, and Hewlett-Packard), resulting in multiple worker deaths. Labor protests quickly spread to other factories. In May, a strike broke out at a Honda transmission and parts plant in Foshan, Guangdong Province. Shortly afterwards, another strike took place at Honda's exhaust-system plant in Foshan. Honda suffered a third labor action in two weeks when workers of its lock plant at Zhongshan walked off the job. Similar strikes affected Toyota factories in Tianjin and Guangzhou within weeks. These actions were all settled when the employers agreed to substantial pay raises. For example, Foxconn raised monthly wages by 30 percent and promised another 66 percent raise in October. Similarly, Honda Lock agreed to raise monthly wages by 33 percent.

The strikes are, in part, a consequence of the Chinese minimum-wage system, established in 1993. Under this system, different regions in China have different minimum-wage standards, which should be strictly followed by the employers. The current monthly minimum wages for full-time workers in Shenzhen, Shanghai, and Beijing are listed on the following page.

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	MONTHLY MINIMUM WAGE (RMB)
Shenzhen	1,100 (approximately US$162)
Shanghai	1,120 (approximately US$165)
Beijing	960 (approximately US$141)

Some profitable firms pay only the statutory minimum "floor" wages. These wages, which were not set with the most profitable firms in mind, are set at a very low level and are often insufficient to fulfill the workers' daily needs. To earn more, the workers need to work overtime.

The Chinese government is considering a new wage law to promote a wage-bargaining system. Such a collective wage-bargaining arrangement was put forward in 2000 by the Ministry of Labor and Social Security in the Interim Measures for Collective Wage Bargaining. The 2000 Interim Measures provide that either the workers or the enterprise can initiate negotiations with the other side by written request, with the other side obligated to engage in the negotiations. Unfortunately, implementation of the 2000 Interim Measures has faced many difficulties and significant resistance. According to a survey, more than 10 million of the 13 million enterprises existing in China still have not set up a collective wage-bargaining system.

In June, the All-China Federation of Trade Unions ("ACFTU") issued a notice ordering provincial and local branches of the ACFTU to work with employees directly to set up unions. The notice shifts from the employers to the ACFTU branches the burden of taking the lead in setting up unions. Further, the ACFTU branches are also required to implement the collective wage-bargaining system and to set up an employee representative congress in the employer company.

It remains to be seen whether these measures will result in a strong collective bargaining system capable of representing worker interests, but in any event, labor costs are likely to rise. Moreover, as indicated by Foxconn's recently reported plan to build a factory with 300,000 workers in central China's Henan Province, we may see manufacturers move to inner parts of China or other countries where labor costs are lower. On the other hand, we may also see more labor unrest if the government's efforts to protect workers prove to be insufficient or ineffective.

SUMMER JOBS FOR YOUNG PEOPLE IN HONG KONG

With the arrival of summer, many employers have been bombarded with requests from clients and friends for summer-job positions for their youngsters, and in this increasingly competitive world, the applicants seem to be getting younger and younger. Here is a quick review of some of the relevant laws in Hong Kong governing the employment of children and young persons.

Legislation seeking to protect children and young persons in employment are found mainly in the subsidiary regulations to the Employment Ordinance, namely, the Employment of Children Regulations and the Employment of Young Persons (Industry) Regulations.

The Ordinance defines "child" as a person under the age of 15 and a "young person" as a person who has attained the age of 15 but not the age of 18.

The Children's Regulations prohibit the employment of any child who is under the age of 13, as well as the employment in any industrial undertaking of any child under the age of 15, except for the preparation of food for sale and consumption on the premises where it is prepared.

Where a child has attained the age of 13, his parent has consented to his employment, and the child is able to produce evidence that he has completed Form 3 of secondary education, he may be employed, but not:

- Before 7 a.m. or after 7 p.m. on any given day.
- For more than eight hours on any given day.
- For more than five straight hours without an interval of not less than one hour for a meal or rest thereafter.
- To lift or carry any load exceeding 18 kilograms.

If the child has not completed Form 3 of secondary education, then his parent will need to produce a valid school attendance certificate, and in addition to the conditions applicable to someone who has completed Form 3, he may not be employed:

- During school hours on any school day.
- During the school term for more than two hours on any school day or four hours on other days.
- During summer holidays for more than eight hours on any given day.
- In any of the prohibited occupations specified in the Schedule; these include work at places where intoxicating liquor is sold and consumed; public places where refuse is handled; places involving work with any dangerous machines; dance halls, billiard rooms, and gambling establishments; places of public entertainment (except stage performances); kitchens or, for outside window cleaning, places where the windows are higher than three meters above the ground; and abattoirs, hairdressers, and massage parlors.

An employer has no right to substitute rest days for pay or for another day of rest as it would be entitled to do with an adult employee.

The Young Persons' Regulations prohibit employment of a young person in various dangerous trades as defined in the Factories and Industrial Undertakings Ordinance, such as underground work in any mine or quarry, or in any other industrial undertaking or dangerous trade. The Regulations make no application to those employed in a clerical or managerial capacity or any health or welfare service connected with an industrial undertaking. A young person employed in an industrial undertaking is not permitted to carry any load that is unreasonably heavy for a person of his age and physical development; for a person under 16, the load must not exceed 18 kilograms.

There are also regulations requiring the provision of facilities for rest and stipulating the hours of work. Generally, the hours of work may not exceed eight per day or 48 per week. A young person may not be required to work continuously for five hours without an interval of not less than half an hour for rest or a meal.

On a separate point, the common-law position still holds in determining the binding effects of a contract of employment entered into with a minor. Such contract will be binding if it is on the whole beneficial to the minor at the time it is entered into.

HOLIDAYS AND OVERTIME PAY IN CHINA

The 2010 World Expo opened in Shanghai on May 1 (China's Labor Day), following an opening ceremony the night before. To mark the occasion, the government allowed Shanghai enterprises to extend the Labor Day holiday by two days to include April 30 and May 4 (the "Expo holidays").

Some Shanghai employers, however, required their employees to work these two days without overtime pay. Was doing so within the employers' legal right? To answer this question, we can look to China's policies on holidays and overtime compensation.

TYPES OF HOLIDAYS IN CHINA

Statutory Holidays

All employees in China are entitled to 11 days of statutory public holidays. If employees are required to work on these days, they must receive overtime compensation. These holidays are as follows:

HOLIDAY	NUMBER OF DAYS
New Year's Day	1 day
Spring Festival	3 days
Tomb-Sweeping Day	1 day
Labor Day	1 day
Dragon Boat Festival	1 day
Mid-Autumn Festival	1 day
National Day	3 days

If any of the statutory public holidays falls on a Saturday or Sunday, the holiday will be observed on that day, and the next scheduled working day will be a holiday. For example,

because Labor Day (May 1) fell on a Saturday this year, employees had the following Monday off.

"Soft" Holidays

There is a second class of holidays in China, sometimes referred to as "soft" holidays, *e.g.*, Women's Day (March 8), on which female employees may take a half day of leave.

There are two important differences between "soft" holidays and statutory public holidays. First, employers have the discretion to cancel a "soft" holiday for those employees who would otherwise be eligible. When they do so, they are not required to pay overtime compensation. Second, if the "soft" holiday falls on a Saturday or Sunday, it will not be recognized on a working day.

COMPENSATION FOR OVERTIME WORK ON HOLIDAYS

Overtime Pay for Rest Days

When an employer requires an employee to work on a rest day (*i.e.*, Saturday or Sunday), the employer must offer the employee either (1) a compensatory day off, or (2) overtime pay at no less than 200 percent of the employee's normal wage.

Overtime Pay for Statutory Holidays

When an employer requires an employee to work on a statutory holiday, the employer must pay the employee no less than 300 percent of the employee's normal wage.

The two Expo holidays were in the nature of "soft" holidays, allowing Shanghai employers to require employees to work without overtime compensation. If the Expo holidays had been of the same statutory character as Labor Day itself, the employers would have been required to pay overtime compensation to any employee who was required to work on those days.

AUSTRALIA IMPLEMENTS NATIONAL EMPLOYMENT STANDARDS

On the first day of 2010, the final parts of the employment reforms introduced under the Fair Work Act 2009 (Cth) came into force, including the National Employment Standards ("NES"), which set out 10 minimum entitlements applicable to all Australian employees. The NES replaced and enhanced the previous statutory entitlements provided to employees under the Australian Fair Pay and Conditions Standard ("AFPCS").

The five entitlements provided by the AFPCS included enforcement of a minimum wage, the requirement that employees work a maximum of 38 hours a week plus reasonable additional hours, and leave entitlements. Under the AFPCS, employees were entitled to paid annual leave, paid personal/carer's leave, and unpaid parental leave of 12 months to be shared between both parents. The current NES entitlements

ASIA OVERVIEW

In Asia our lawyers have experience across a broad range of employment matters encountered by companies doing business throughout the region.

We regularly advise both Western- and Asia-based companies on employment-related merger, acquisition, disposition, and joint venture issues; employment contracts (including noncompete, intellectual property protection, and confidentiality); occupational safety and health matters; restructuring and retrenchment issues; and employee benefits (including stock-option schemes for local listed companies and subsidiaries of U.S. listed companies). In addition, we represent clients with respect to a variety of employment-related disputes, primarily those engaged in by employers with regard to disciplinary dismissals, regular dismissals, and unfair labor practice at labor unions and courts.

From our offices in Beijing, Hong Kong, Shanghai, Singapore, Taipei, and Tokyo, our lawyers are well positioned to provide practical and cost-efficient advice on employment-law matters throughout the region, working as needed with experienced local counsel, including in the People's Republic of China and in Singapore.

largely reflect those of the AFPCS, except in the following areas.

Employers with more than 15 full-time, part-time, and regular casual employees (when combined with associated entities) are now obliged to make redundancy payments to all employees with more than 12 months' service, in addition to any notice period to which they are entitled. Previously, employers were obliged to make redundancy payments only to employees covered by an award or who had an entitlement under a company severance policy. The amount of the payment is calculated by reference to the level of continuous service completed by the employee; however, for employees who did not previously have an entitlement to redundancy pay, service prior to January 1, 2010, is not counted.

The NES provide notable concessions for working parents, including enhancement of the parental leave previously provided by the AFPCS. Parents now have the right to take separate periods of up to 12 months' unpaid parental leave after the birth or adoption of a child, including a period of three weeks that may be taken concurrently. If both parents do not wish to use their entitlement, one parent may request an additional 12 months of leave, which an employer may refuse only on "reasonable business grounds," a term not defined in the Fair Work Act.

Additionally, employees who have caring responsibilities for children under school age or disabled children under 18 and who have completed 12 months' continuous service can request flexible working arrangements. These arrangements may include reduced hours, different start or finish times, or authorization to work from home. Again, employers may, within 21 days, refuse such requests on "reasonable business grounds." Companies should introduce workplace policies and procedures in order to efficiently respond to such requests.

In our experience, employment contracts consistent with the AFPCS have required minimal changes, if any, to reflect the entitlements now provided to employees by the NES. However, while most employers can avoid updating their contracts, all employers should be aware of the additional obligations now in place and ensure that they comply with them in practice.

JAPANESE SUPREME COURT WEIGHS IN ON IMPLIED EMPLOYMENT CONTRACTS

Under Japanese law, an employment contract is effective between an employee and an employer when the employee promises the employer that the employee will work for the employer and the employer promises the employee that the employer will remunerate the employee for his or her work. Theoretically, such contract can be implied and does not need to be in writing. Thus, if an individual works for a company that remunerates him or her without an express agreement, then the individual and the company may be regarded as having entered into an employment contract.

According to this reasoning, it has been argued that an implied employment contract can be effective between an individual who is ostensibly employed by one company but actually works for and under the direction of another company, termed the "de facto employer" under this implied employment relationship. This argument, if sustained, would be advantageous to an employee whose "ostensible employer" has gone bankrupt or who for any reason wishes to remain with the de facto employer.

On December 18, 2009, the Japanese Supreme Court rendered an important decision on this issue, referring for the first time to specific factors in assessing whether there can be a valid employment contract between an individual who is ostensibly employed by one company but actually working for and under the direction of another company, and such other company. (Supreme Court, 2nd Petty Bench, Dec. 18, 2009, *Hanrei Times*, Vol. 1316 , p. 121.)

In the lawsuit, the plaintiff was an employee of Pusco K.K. ("Pusco"), which dispatched the plaintiff to a factory of the defendant, Matsushita Plasma Display K.K. ("Matsushita"), to have him work for Matsushita in accordance with an arrangement between Pusco and Matsushita. The plaintiff worked under the direction of Matsushita, and his salary was paid by Pusco for a year and a half. After Pusco decided to withdraw its employees from Matsushita, the plaintiff requested Matsushita to employ him directly. Matsushita refused the request, and the plaintiff filed a lawsuit to declare that he was an employee of Matsushita, asserting that an implied

employment contract had been in effect between the plaintiff and Matsushita.

The Supreme Court ruled against the plaintiff, finding that (i) the plaintiff had worked for Matsushita under its direction; (ii) the plaintiff initially became an employee of Pusco without the involvement of Matsushita; (iii) the plaintiff's salary was determined and paid by Pusco; and (iv) the plaintiff's primary working conditions were determined by Pusco although details thereof were determined by Matsushita. Considering the above, the Supreme Court concluded that an implied employment contract had not been formed between the plaintiff and Matsushita.

Although the Supreme Court decision did not lay down a rule, it is considered to be substantively in line with prior decisions, such as the Fukuoka High Court ruling in 1983 (Fukuoka High Court, June 7, 1983, *Hanrei Times*, Vol. 497, p. 197), which call for inquiry into nearly the same factors. Under this body of law, an implied employment contract between an employee and the de facto employer would be recognized where (a) the employee works exclusively for and under the direction of the de facto employer; (b) the employee's salary is substantially decided and paid by the de facto employer; and (c) the employee's adoption, dismissal, and working conditions, including salary, disposition, and disciplinary measures, are determined by the de facto employer, not by the ostensible employer. Thus, in order to avoid recognition of such implied employment contract, an employer that dispatches employee(s) shall determine the fundamental working conditions of the dispatched employee, pay his or her salary, and provide the employee with appropriate direction.

OFFICE INFORMATION

SHANGHAI

Jones Day's first location in Mainland China, the Shanghai Office opened in 1999 and has long been one of the pre-eminent foreign law firms in Shanghai. The team includes a mix of Western-trained lawyers who have practiced in Greater China for most of their careers and China-trained lawyers with significant experience in Chinese and Western legal environments. As a group, Jones Day's Shanghai lawyers are fluent in English, Mandarin, French, Shanghainese, and a number of other Chinese dialects.

BEIJING

Jones Day's Beijing Office opened in 2003 and has since expanded to become one of the largest foreign law firms in Beijing. Team members (the vast majority of whom are Chinese nationals) include legal professionals who are qualified in the jurisdictions of Hong Kong, the U.S., the U.K., Canada, Singapore, and New Zealand.

HONG KONG

Jones Day's Hong Kong Office opened in 1986, and in 1996 it became the first branch of a U.S. law firm permitted to practice Hong Kong law. The office comprises more than 50 lawyers admitted to practice in jurisdictions covering Hong Kong, the U.S., the U.K., Australia, Singapore, and Canada. Clients include multinational and local corporations, financial institutions, and government organizations.

TAIPEI

Jones Day's Taipei Office opened in 1990 to serve the legal needs of international and Taiwanese clients. Lawyers in the Taipei Office are fully qualified to practice both Taiwanese and U.S. law. Most attorneys are multilingual and are experienced in both Taiwanese and foreign transactions. The Taipei Office regularly advises clients on a wide range of Taiwanese legal issues, as well as on U.S. and other international legal matters.

TOKYO

Since 1989, the Tokyo Office has offered comprehensive and cost-effective counsel. In 2002, the Tokyo Office of Jones Day entered into a joint-venture arrangement (*Tokutei-kyodo Jigyo*) with Showa Law Office. The two firms fully integrated their operations in 2005. The Tokyo Office serves as the local window to the resources of the Jones Day worldwide network, giving our clients access to a broad range of legal experience in the various markets in which they operate.

SINGAPORE

Jones Day's Singapore Office opened in 2001, but our lawyers have been advising clients in Southeast Asia for more than 20 years. These lawyers represent a diverse list of clients, with particular focus on corporate/M&A, financing, and dispute resolution work throughout the Asia-Pacific region. Lawyers in the Singapore Office are fluent in Mandarin, Cantonese, Hakka, Bahasa Malaysia, Bahasa Indonesia, Thai, Hindi, French, and Arabic.

SYDNEY

The Firm's Sydney Office opened in 1998. It has a core team dedicated to the provision of high-quality transactional and advisory support across Australian, Asian, U.S., and European jurisdictions. Consistent with the Firm's commitment to providing high-quality client service, the Sydney Office delivers technically accurate, creative, and efficient legal services that help further our clients' business objectives.

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