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ASIAN LABOR & EMPLOYMENT NEWS

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CHINA HIGH COURT ISSUES NEW INTERPRETATION REGARDING LABOR DISPUTES

The PRC Supreme People's Court ("Supreme Court") recently issued the Third Interpretation of Several Issues Concerning the Application of Law in the Trial of Labor Disputes ("Third Interpretation"), which became effective on September 14, 2010. Compared to the Supreme Court's previous two interpretations, issued in 2001 and 2006, the Third Interpretation is significant because it is the first interpretation since the promulgation of the PRC Labor Contract Law and the PRC Labor Dispute Mediation and Arbitration Law, both of which came into effect in 2008.

While the 2008 PRC labor laws referenced above were avowedly focused on expanding employee rights and protections, the global economic recession has required the Chinese judiciary to try to balance the need for social stability with the need to maintain companies' viability by minimizing company layoffs. High courts in some provinces, such as Guangzhou, Shanghai, Beijing, and Jiangsu, had issued guiding opinions and related standards for handling labor disputes that were aimed at finding the right balance. Those standards, however, varied significantly among jurisdictions. For example, the claim that an employer failed to pay an employee's social security in full as required by law might be accepted by Guangzhou courts but not necessarily by courts in Beijing. Consequently, there was confusion among employers and legal practitioners and perhaps even within the judiciary itself regarding which cases were likely to be heard by the courts.

In light of this growing confusion, the Supreme Court spent more than two years studying the problem, out of which came the Third Interpretation, which was issued in part to unify the relevant judicial standards and procedures. (A Fourth Interpretation, which will focus on substantive legal issues in labor disputes, is in the process of being drafted.)

Among the 18 articles in the Third Interpretation that are of particular interest to many foreign-invested companies are the following:

- Disputes arising out of corporate restructurings: Article 2 provides that "[t]he people's courts shall accept disputes arising from the restructuring by the enterprise."

- Burden of proof for disputes involving overtime payment: Article 9 provides that "[w]here an employee makes a claim for unpaid overtime compensation, he or she shall bear the burden of proof that such employee in fact worked overtime. However, when an employee can demonstrate that the employer possesses relevant evidence that could prove the overtime the employee in fact worked, and the employer refuses to produce the same, the employer shall bear the adverse consequence."

- Contract validity: Paragraph 1 of Article 10 provides that "[a]n agreement between an employee and employer on termination or dissolution of an employment contract and its relevant administrative matters, or payment of wages and remuneration, overtime payment, economic compensation or damages, shall be valid and effective, provided that there is no violation of mandatory provisions of law or regulations and no fraud, coercion or exploitation of an employee's hardship."

In addition, China is presently drafting a new national regulation on salaries, with the aim of guaranteeing payment of wages and possibly increasing employees' salaries. The proposed regulation, among other things, would clarify that the components of the local legally required minimum wage do not include any overtime payment or social security fees, that salary security funds will be set up to prevent late payment of salaries, and that employers shall take into account hikes in the cost of living in determining wages. Doubtless, this new national regulation on salaries, once fully implemented, will further raise labor costs for companies.

AUSTRALIA ENACTS PAID PARENTAL LEAVE

On June 17, 2010, Australia passed the Paid Parental Leave Act 2010 (Cth) ("PPLA"), the country's first statutory paid parental leave. The PPLA, commencing in 2011, will provide the primary caregiver of a newborn or newly adopted child with government-funded parental-leave payments for a maximum period of 18 weeks. Beginning July 1, 2012, fathers and partners also become entitled to two weeks' paid leave at the time of the birth or adoption of a child.

To be eligible for the payments, the employee must be an Australian resident or a special class of visa holder, not earn more than AUD$150,000 (to be indexed annually from June 30, 2012), have worked continuously for at least 10 of the 13 months prior to the birth of the child, and have worked for at least 330 hours in that 10-month period. The parental-leave pay will be paid in installments at the level of the national minimum wage, which is currently set at AUD$569.90 per week.

From July 1, 2011, the parental-leave payments will be channeled from the Family Assistance Office ("FAO") through employers to those employees with 12 months or more of service. The fact that employers are not required to make payments before receiving the relevant payment from the FAO avoids any cash-flow issues for employers. The PPLA also provides that FAO payments must be made to employees on their regular paydays, that employers must withhold tax from the payments in accordance with the usual arrangements, and that employers are required to keep records of the funds received from the FAO and must provide each employee with a record of each parental-leave payment made to him or her.

The PPLA specifically provides that the obligation of an employer to provide parental-leave pay under the PPLA is in addition to any other obligation the employer may have in relation to the employee, however that other obligation

may arise. As a result, although it is not expressly prohibited under the PPLA, the Australian Industry Group, a prominent Australian employer association, has taken the view that the government parental-leave payments should not be set off against any company parental-leave payments currently made available to employees under their employers' paid parental-leave policies.

Accordingly, employers should update their parental-leave policies to reflect their new obligations under the PPLA and should introduce appropriate procedures and payroll systems to ensure that these obligations are met. Additionally, in order to attract and retain employees, employers should continue to refine the form and implementation of their own parental-leave policies, including through the provision of superannuation payments to employees on parental leave and flexible working arrangements for when they return.

CHINA CONTINUES EXPERIMENT WITH DIRECT ELECTION OF UNION REPRESENTATIVES

In an attempt to shore up the integrity of the All-China Federation of Trade Unions ("ACFTU"), the sole lawful labor union in the PRC, the government is presently considering paying union staff at the factory level and experimenting with worker selection of union officials at that level. Though independent labor unions seem highly unlikely in light of the ACFTU's history, the Chinese government has been experimenting with direct election of local union officials. Under the direct-election approach, employees who are members of the ACFTU recommend themselves or others, and after an initial presentation, the ACFTU determines the official candidates. An election is then conducted among all members of the local union. For more than 10 years, the Shanghai government has promoted the idea that the chairman of a company's labor union should be directly elected by its employees. As of April 2010, official statistics state that union chairmen are directly elected by employees in 5,961 of 51,952 local labor unions in Shanghai. The percentages of union chairmen directly elected by employees in Shanghai's Xuhui and Huangpu Districts are reportedly as high as 80 percent.

IMPLIED NONCOMPETE COVENANT REJECTED BY JAPANESE SUPREME COURT

In its ruling of March 25, 2010, the Japanese Supreme Court highlighted the limited scope of implied noncompete covenants and the importance of including specific, express clauses in employment agreements.

In the case in question, former employees ("Ex-Employees") of a company that engages in the manufacturing of industrial robots and machine components ("Company") started the same kind of business by themselves shortly after their retirement. Half a year later, the Company learned of these competitive activities by the Ex-Employees and filed a suit against them for breach of an implied noncompete obligation derived from the employment agreement and continuing after retirement. It should be noted that in this case, there was no specific written noncompete agreement between the Company and the Ex-Employees.

Under prior law, even if there is no specific provision in an employment agreement or in work rules that prohibits employees from performing any activities that are competitive with the employer's business, employees are under an implied duty to refrain from engaging in such activities while working for the employer, because employees have the obligation to keep good faith with their employer for the term of the employment contract. On the other hand, once the term of an employment agreement expires or terminates for any reason, the noncompete obligation continues only if there is a specific noncompete provision that applies after expiration or termination of the employment agreement. And even if there is such an agreement, it is valid only if the covenant has a reasonable scope, taking various factors into consideration. Such factors typically considered by the courts are the duration and geographic scope of the noncompete obligation, the necessity to have such obligation in view of the need to protect trade secrets or the know-how of an employee, the scope of the prohibited activities, and the compensation provided to the employee in exchange for such obligation. The rationale for such judicial oversight is that an employee has the constitutional right to freely choose his/her occupation,

which cannot be unreasonably restricted by noncompete obligations. Also, such prohibition may possibly threaten the employee's right to life, which is also protected under the Constitution.

The decision of the Nagoya High Court on March 5, 2009, stated that the Ex-Employees did not automatically assume a noncompete obligation to the Company after their retirement, but the competitive activities of the Ex-Employees may constitute a tort if such activities are practiced in a manner that deviates from the normal social convention regarding the scope of free competition. In this case, orders from clients of the Company, which one of the Ex-Employees had overseen while he was at the Company, accounted for about 80 to 90 percent of the total sales of the Ex-Employees' new business, while sales of the Company to these clients declined commensurately. Because of these and several other facts approved by the Nagoya High Court, the court decided that the competitive activities of the Ex-Employees were illegal, as they deviated from the socially accepted scope of free competition.

In contrast with the High Court, however, the Supreme Court rendered a decision upholding the allegations of the Ex-Employees. In the Supreme Court's view, the Company did not prove it was so actively engaged in a transaction with one of those clients that substantial sales were lost to the Ex-Employees, that the Ex-Employees exploited their position as employees of the Company, or that they hindered the transaction between the Company and its clients. In conclusion, the Supreme Court judged that the competitive activity engaged in by the Ex-Employees did not illegally deviate from social standards and therefore did not constitute a tort. The Supreme Court also rejected the Company's claim that the Ex-Employees undertook a post-noncompete obligation based on the principle of good faith on the facts.

This Supreme Court decision suggests that employers should consider including specific, express noncompete provisions in employment agreements if they wish to prevent competition from former employees.

THE INTRODUCTION OF MODERN AWARDS UNDER AUSTRALIA'S FAIR WORK ACT 2009 (CTH)

On January 1, 2010, the final components of Australia's Fair Work Act 2009 (Cth) ("Act") went into effect, completing the government's comprehensive reform of labor and employment legislation in Australia. Although the transition to the new regime has generally been a smooth one, employers in Australia now face a number of fresh challenges as a result of the Act's introduction.

Prior to the Act, employees working in Australia could be covered by one or more of approximately 1,560 existing federal

OVERVIEW

Throughout the Asia-Pacific region, our lawyers have experience across a broad range of employment matters encountered by companies doing business there.

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 locally 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, Sydney, 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 lawyers in the People's Republic of China and Singapore.

and state awards. These awards were industrial instruments that set binding minimum terms and conditions of employment for the employees and employers they covered, primarily blue-collar workers in relatively low-paying industries. The Act introduced an award-modernization process, which consolidated the former state and federal awards into 122 modern awards; these came into effect at the beginning of 2010.

Despite government assurances to the contrary, the award-modernization process has in practice increased the number of employees covered by awards, particularly in the previously largely unregulated, nonunion information technology and finance sectors. For example, the Professional Employees Award 2010 now applies to all employees working in the information-technology industry throughout Australia, where previously only employees in that industry in the State of Victoria were covered. The information-technology industry is defined broadly to include the design, manufacture, installation, and repair of computers and computer software, as well as the provision of computer consultancy and programming services.

The new system has also brought complications for those employers and their employees who were previously covered by the old awards. Inevitably, in some instances the process of consolidating the old awards into the modern awards has resulted in significant changes in an employee's entitlements, requiring broad reassessment and adjustment of the conditions applicable to each workplace. Further, the transitional provisions incorporated in every modern award, which permit the phasing-in of changes to wages, loadings, and penalties over a five-year period, are complex.

We recommend that all employers assess the award coverage of their staff and thoroughly review the employment conditions they provide, to ensure compliance with all minimum entitlements under applicable modern awards and the Act. To avoid extension of award coverage to their workplaces, employers may wish to consider using "high-income guarantees." Section 47 of the Act provides that the terms and conditions in a modern award will not apply to an employee who has been provided with a guarantee of annual earnings exceeding the high-income threshold (currently set at AUD$113,800), provided the guarantee complies with the requirements of the Act.

Another option for employers is to make an individual flexibility arrangement ("IFA") with any of their employees covered by modern awards. Subject to a number of requirements, an IFA may vary the application of the terms of a modern award, including in relation to when work is performed, overtime and penalty rates, allowances, and leave loading.

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 40 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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