Proposals submitted to amend labor laws

Deputies to the National People’s Congress (NPC) have submitted 18 proposals to amend labor laws according to an NPC subcommittee report released on November 4, 2017. It is expected that some of the proposals will be included in the legislative plan of the NPC for its next session beginning in March 2018.

The proposals aim to amend the Labor Law, Labor Contract Law, and the Social Insurance Law as well as to create specific laws on employment discrimination and collective bargaining. Each legislative proposal requires the support of at least 30 NPC deputies as co-sponsors.

While details of the 18 proposals have not yet been released, it is expected that the proposals may include:

- Eliminating the requirement on an employer to pay statutory severance in certain circumstances, such as for an employee’s lack of performance or for an employee’s failure to return to work after exhausting a medical leave period.

- Setting stricter requirements on the timely payment of wages to migrant workers.

- Introducing collective bargaining legislation to provide a firm legal basis for the development of collective bargaining and to govern the enforcement of obligations to engage in collective bargaining.

Employers face greater liability for commercial bribery

Amendments to the Anti-Unfair Competition Law that take effect on January 1, 2018 impose increased liability on employers for acts of commercial bribery committed by their employees. Under the amended law, commercial bribery committed by employees is presumed conduct of the employer, except where the employer can show that employees’ actions are not related to seeking business opportunities or gaining competitive advantage on behalf of the employer. Previously, employers could escape liability if the administrative authorities were unable to prove that a clear link existed between the employee’s actions and the employer.

The amendments were approved by the Standing Committee of National People’s Congress on November 4, 2017 and represent the first revision of the law since it was issued in 1993. Among the other amendments:
• The maximum fine for employers who commit acts of commercial bribery and infringement of trade secrets increases from RMB 200,000 to RMB 3 million. Profits gained illegally may also be confiscated.

• Employees and former employees are now clearly obligated to protect employers’ trade secrets. However, the amended law does not include a draft proposal released in March 2017 that would have imposed administrative fines of up to RMB 100,000 on employees and former employees for illegally obtaining, divulging or using trade secrets owned by their employers. Under the approved amendment, employers may only bring civil claims for damages against current or former employees.

• The liability of new employers who obtain trade secrets from employees now not only includes use of those trade secrets by the new employer, but also extends to allowing other parties to use the trade secrets.

Industry and commerce authorities will reportedly undertake inspection campaigns to ensure implementation of the amended law across the country in 2018.

**Rewards available for reporting employer violations of union law**

A plan issued by the Beijing Municipal Federation of Trade Unions on October 26, 2017 means that employees in Beijing can now earn up to RMB 200 for reporting employer violations of the Trade Union Law.

Employer violations include:

• obstructing, restricting or retaliating against employees that organize or participate in enterprise-based unions.

• obstructing union authorities that help employees to set up enterprise-based unions.

• obstructing enterprise-based unions from organizing employees to participate in employee representative congresses or all-employee meetings.

• refusing to engage in collective bargaining with employees.

• failing to provide safe, hygienic work conditions.

• violating laws and regulations relating to safe production, operation and construction.
Under the plan, employees can report violations via a telephone hotline for which they are required to provide their real names. Once the infringement has been confirmed, payment will be made by Beijing union authorities. Similar programs to reward employees who report unsafe working conditions are already being implemented by union authorities in Shanghai and Hangzhou.

**CCP: Party branches in 70 percent of foreign-invested enterprises**

There are Communist Party of China (CPC) branches in 70 percent of foreign company subsidiaries operating in China, according to Qi Yu, Vice-Minister of the Organization Department of the CPC Central Committee, who also noted that the presence of these CPC organizations is for the most part welcomed and supported by foreign investors.

Speaking at a news conference at the 19th CPC National Congress on October 19 in Beijing, Vice-Minister Qi reportedly stated that, “Party organizations in foreign-invested enterprises can help companies better understand the Party’s policies and resolve labor disputes” and that, “the establishment of CPC organizations within enterprises reflects the needs of employees and can benefit companies in their day-to-day operation.”

The vice-minister also restated the Party’s position of supporting the establishment of Party organizations in private enterprises, reportedly stating that, “the presence of CPC organizations is in line with the Constitution of the CPC and the Company Law.”

**Unemployment insurance coverage set to expand**

Proposed revisions to unemployment insurance regulations issued by the Ministry of Human Resources and Social Security (MHRSS) on November 10, 2017 aim to increase the number of employees covered by unemployment insurance, and hence are likely to increase costs for many employers. The MHRSS is collecting public comment on the draft changes until December 10, 2017.

Under the proposed changes, migrant workers—individuals holding household registrations in rural areas but are employed in urban areas—would be included in unemployment insurance. Currently, only a portion of the estimated 280 million migrant workers are required to be enrolled under local unemployment insurance rules.

The draft rules would also expand the types of employers required to participate in unemployment insurance from “urban enterprises” to also include employers in rural areas as well as employers that are foundations, law firms, and accounting firms.

While both employers and employees would continue to make contributions to the insurance fund, a proposed change would lower the combined employer and employee contribution rate from three percent to a maximum of two percent. Local governments would be given the discretion to adopt lower rates, thereby formalizing a practice that is already common.
Significant changes are being proposed to the kinds of benefits that may be paid by the insurance. Current employees would be entitled to apply for funds for occupational skill training, and funds may be available for startup businesses. In order to encourage employers to retain employees during difficult economic times, employers could be entitled to partial refunds of contributions if the percentage of their workforce they lay off is lower than the local unemployment rate. Shenzhen adopted a similar program for employers in 2016.

**Violation of family planning rules may no longer be fireable offense**

Provincial governments of Guangdong, Yunnan, Jiangxi, Hainan and Fujian are expected to eliminate local family planning regulations that currently give employers the right to dismiss employees who violate state family planning requirements.

The Standing Committee of the National People’s Congress in September reportedly exercised its constitutional powers to advise the provincial governments to amend these local regulations. The Standing Committee’s position is essentially that only the central government has the power to determine the legal termination grounds of employees. Because national law did not specify that the violation of family planning rules is grounds for an employee to be fired, lower-level governments could not give employers that right. Moreover, the Standing Committee indicated that the provincial regulations permitting dismissal were at odds with national policy to increase the birthrate.

Under current regulations, state-owned enterprises in Guangdong are required to fire employees who violate family planning requirements, such as having more than two children or giving birth out of wedlock. In other provinces, for example Jiangxi and Yunnan, private-sector employers have the option of dismissing employees who violate local family planning regulations.

**More provinces require paid leave for care of parents**

Heilongjiang on October 13, 2017 became the latest province to issue rules requiring employers to provide paid leave to employees to care for their sick parents. Under the Heilongjiang rules, which come into effect on January 1, 2018, employees will be entitled to take paid leave to care for parents who are over age 60 and who have been admitted to hospitals. The paid leave cannot be used to care for children or for parents-in-law. Employees who are single children are allowed to take up to 20 days paid leave per year, while employees with siblings are allowed 10 days per year. These paid leave days are additional to other paid leave entitlements, such as statutory annual leave.

In the past 18 months, Fujian, Guangxi, Hainan, Henan and Hubei provinces have issued similar paid leave regulations, enabling employees to take off 10-20 days per year to care for sick parents. There are as yet no reports of such type of paid leave being considered at a national level, or in the more developed provinces and cities, such as Beijing, Shanghai, and Guangdong.
Employer concerns block additional paid paternity leave in Jiangsu

Concerns with rising costs to employers have reportedly blocked approval of a proposal to provide an additional 15 days of required paid paternity leave that has been under consideration in Jiangsu province. A June 2017 draft amendment to local regulations implementing the Law on the Protection of Women’s Rights and Interests had called for 15 days of “joint parenting leave.” This leave would have been available only to fathers and would have been additional to the 15 days of paid paternity leave already available under family planning laws. The draft rules were designed to encourage fathers to be more active parents. It was also hoped that increasing the leave that employers were obliged to give men would reduce employment discrimination against women.

Following a period of public comment, a revised draft of the regulations was released by the Jiangsu Provincial People’s Congress on November 28, 2017. The revised draft deleted fathers’ rights to an additional 15 days of paid paternity leave, and now states that employers are only just “encouraged” to grant an additional five days of leave.

Hangzhou minimum monthly salary increases to RMB 2,010

Hangzhou increased minimum wages for the first time in more than two years with minimum monthly salaries set to hit RMB 2,010 on December 1, 2017. The minimum wage for part-time workers will increase to RMB 18.4 per hour on that date. The previous minimums were RMB 1,860 per month and RMB 17 per hour, which were set on November 1, 2015.

Minimum wages in Wuhan also increased on November 1, 2017. The minimum monthly salary increased from RMB 1,550 to RMB 1,750 while minimum hourly pay rose from RMB 16 to RMB 18.

China and Luxembourg sign social insurance agreement

China and Luxembourg signed a social insurance agreement on November 27, 2017, which will exempt Chinese and Luxembourg nationals assigned to work in the other country from participation in statutory pension insurance. The effective date of the agreement awaits domestic implementing legislation of China and Luxembourg.

The PRC Social Insurance Law requires that foreign nationals working in China to participate in statutory social insurance programs unless there is an applicable treaty exempting participation. China now has entered into treaties with ten countries, including Germany, South Korea, Denmark, Finland, Canada, Switzerland, Netherlands, and Spain.

Preferential policies announced for business immigration

The Ministry of Public Security announced on October 23, 2017 that various preferential visa and exit-entry policies will be implemented in certain trade zones in Fujian, Guangdong, Jiangsu, Hangzhou, and Changchun, thereby expanding the reach of similar policies implemented over the
past two years in other key economic areas. The policies include expedited green card application processing for certain foreign employees and their dependents, work visas for high tech experts available upon arrival in China, and five-year residence permits for certain foreign nationals.

In a related development, Shanghai authorities on October 10, 2017 announced preferential immigration policies for foreign-invested research and development centers, including offering five to ten year talent visas for foreign national employees who are highly-skilled or hold senior management positions.

**Case: damages awarded against employee who competed on the job**

The Shanghai Second Intermediate People's Court released a decision in October upholding a lower court ruling ordering a former employee to pay liquidated damages to his former employer for competing on the job. While liquidated damage clauses are generally used for post-employment obligations, the case clarifies that liquidated damage clauses may also be enforceable when used for non-compete and confidentiality obligations owed during employment.

The employee, Yu Ting, joined Zongtang Electronics in January 2010 as a sales manager. Zongtang and Mr. Yu signed a side agreement stating that Zongtang would pay Mr. Yu RMB 2,000 per month in exchange for Mr. Yu keeping company information confidential and not competing while employed. The agreement included a liquidated damages clause requiring Mr. Yu to pay Zongtang twice the total fees he received should he breach his obligations.

Mr. Yu left Zongtang when his contract expired in February 2013. In November 2015, Zongtang discovered that in 2011 Mr. Yu had registered and invested in a company to directly compete with Zongtang.

Zongtang's claim for RMB 152,000 in liquidated damages was originally rejected in labor arbitration because the claim was not filed within the necessary time limit. However, the Shanghai Jiading District People's Court later accepted the case, basing the filing period on the November 2015 date when Zongtang became aware of the company registration.

Mr. Yu argued that he was not competing because he did not actually engage in business activities while employed. The court ruled that the registration and capitalization of the company were evidence of business activities, thereby shifting the burden to Mr. Yu to prove that he did not engage in competitive activities. Because Mr. Yu could not show his company had not engaged in business, the court ruled in favor of Zongtang, awarding a reduced amount of the liquidated damages of RMB 108,000. The court based its decision on the terms of the side agreement and on the duty of loyalty employees owe their employers not to compete.

The judgment was upheld by the Shanghai Second Intermediate People's Court, which also cited provisions in the Labor Contract Law relating to the enforceability of non-compete and confidentiality obligations.