

China TIPs

泰乐信律师事务所

Also in this edition:

Page 2

Overtime Compensation
Labor Dispute Settlement

Page 3

Intellectual Property Rights
Auto Finance Companies

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Labor Law Update

In connection with the promulgation of the extensively debated *Labor Contract Law of the People's Republic of China* (LCL) on June 29, 2007, which took effect on January 1, 2008, several new regulations and notices have been promulgated in recent months aiming at a better implementation of the LCL. Since these new regulations cover various aspects of the HR management of an enterprise, employers should continue to review their existing labor related policies and documentation to ensure compliance.

Annual Leave and Public Holidays

On December 14, 2007, the State Council issued the revised *Measures of Holidays for National Festivals and Memorial Days* which took effect on the date of promulgation. The main amendment to these measures is the re-arrangement of the existing public holidays: it shortens the May Day holidays (now 1 day) and introduces new holidays for traditional festivals such as Tomb-sweeping Day, Dragon Boat Festival and Mid-Autumn Festival. The overall number of national public holidays has been increased from 10 to 11 days.

On the same date the *Regulations on Paid Annual Leave for Employees* (Leave Regulations) were promulgated, which apply to all enterprises and took effect as of January 1, 2008. According to the Leave Regulations, employees "working continuously" for over one year are entitled to paid annual leave. The number of minimum annual leave days depends on the continuous employment term of the employee, namely (exclusive of public holidays):

Minimum Annual Paid Leave	Continuous Employment
5 days	<10 years
10 days	10 years - 20 years
15 days	> 20 years

The Leave Regulations contain certain exceptions for cases in which an employee is not entitled to paid leave. e.g. when the employee has already had more summer or winter holidays than statutory paid leave days.

Also when he/she already has over 20 days' paid leave for private matters and in certain cases of longer sick leave, an entitlement to paid leave may not be given.

If an employer is not able to arrange annual leaves for an employee with the employee's consent, he shall pay to the employee a compensation equivalent to three times the average daily salary per untaken leave day.

The general wording of the Leave Regulations leaves some uncertainties on important practical issues, e.g.

- whether an employer is obliged to grant the compensation if the employee has not even applied for annual leave
- whether an employee's previous employment record should be counted as "continuous employment"
- how paid annual leave granted by an employer in excess of the minimum national requirements should be treated.

More clarity on these issues may be expected under implementing measures which are allegedly under preparation by the Ministry of Labor and Social Security (MLSS).

Overtime Compensation

MLSS issued the *Notice on Issues regarding Monthly Average Working Hours and Salary Conversion within A Year* on January 3, 2008 (Notice No. 3) aiming at clarifying how overtime payment shall be calculated following the prolongation of the public holidays. According to Notice No. 3, an average number of monthly working days subject to compensation (月计薪天数) is used which is stipulated to be 21.75 days. Inquiries with the MLSS and some local labor authorities indicate that this new concept has been created to determine the daily salary earned by an employee which may further be used for calculating overtime compensation payable to her/him.

Notice No. 3 will probably lead to slightly reduced overtime compensation.

Labor Dispute Settlement

The *Labor Dispute Mediation and Arbitration Law of the People's Republic of China* (LDMA Law) was promulgated on December 29, 2007 and will take effect on May 1, 2008. Compared with older regulations, the new law generally extends the deadline to file a claim for labor arbitration to one year (sixty days under the older regulations) starting from the date when a party knew or should have known that her/his rights were violated.

The deadline for the arbitration tribunals to render an award has been shortened to 45 days upon acceptance of the case (with 15

days' extension permitted in complicated cases). The deadline used to be 60 days (with 30 days extension permissible) under the Old Regulations. Except in cases of misconduct of the arbitration tribunal, a labor arbitration award becomes final if the dispute relates to unpaid wages, work-related injury medical costs, damages, severance, work hours, rest, leave time, and social insurance. This new rule will significantly strengthen the role of labor arbitration in China. By expressly eliminating arbitration fees, the LDMA Law makes labor arbitration proceedings more easily accessible for settling labor related disputes.

Civil Litigation

The *Provisions on the Cause of Action of Civil Cases* (Provisions) have been promulgated by the Supreme People's Court (SPC) and took effect as of April 1, 2008.

The definition of "cause of action" in a particular case is of practical significance in terms of e.g. case-acceptance and jurisdiction / court competency in civil proceedings. The new Provisions amend the *Trial Provisions on Cause of Action of Civil Cases* in order to assure their compatibility with the new or newly revised laws such as the *Real Property Law of the People's Republic of China*, the *Labor Contract Law of the People's Republic of China*, the *Company Law of the People's Republic of China* and the *Securities Law of the People's Republic of China*. 361 possible causes of action are covered.

Intellectual Property Rights (IPR)

On March 1, 2008, the *Provisions on the Trial of Civil Cases Involving the Conflicts of Registered Trademarks, Enterprise Names and Prior Rights* (Provisions) issued by the SPC have come into force.

The new Provisions are composed of only four Articles but solve various issues connected with conflicts of different IPR. If someone's trademark violates another person's prior rights including copyright, patent for exterior design or an enterprise name, a respective claim may be raised. Using a name identical to or similar to another one's existing enterprise name which misleads the public, can lead to litigation based on the *Unfair Competition Law of the People's Republic of China*.

The Provisions also pave way to sue if an enterprise name is very similar to a registered trademark of another party or leads to unfair competition.

Auto Finance Companies

The new *Administrative Measures on Automobile Finance Companies* (Measures) were promulgated by the China Banking Regulatory Commission on January 24, 2008.

The new Measures replace the 2003 version of the *Administrative Measures on Automobile Finance Companies* and their implementing rules and brought adjustments regarding market access conditions, business scope and risk management of automobile fi-

nance companies. Under the Measures, the business scope of an automobile finance company has been further expanded, which includes accepting loan deposits of automobile dealers and leasing deposits from lessees, to undertake automobile financial leasing (excluding sale-leaseback), to handle salvage value disposal, to issue financial bonds and to carry out inter-bank lending. The Measures also permit equity investment in financial institutions which carry out automobile finance business.

Individual Income Tax

Revisions of the *Implementing Rules of the Individual Income Tax Law of the People's Republic of China* have been promulgated by the State Council which took effect on March 1, 2008.

One revision is the increase of the monthly deductible tax allowance for Chinese employees from RMB 1.600 to RMB 2.000.

EUCCC

Ralph Koppitz (Shanghai) has been elected as board member of the European Chamber of Commerce in Shanghai.

He already served as board member from 2004 to 2006, and headed the IPR Working Group of the Chamber previously.

Questions or comments? - Contact us:

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Tips & Dates

M. Florian Ranft, Dr. Oliver Kirschner and Dr. Sven-Michael Werner - **Investments in China - Tax and Legal Update**, together with tax advisers WTS

16 April 2008 - Düsseldorf

22 April 2008 - Munich

23 April 2008 in Hamburg

Dr. Sven-Michael Werner - **A way to Chinese Subsidiaries**, organized by Global Competence Forum

25 April 2008 - Munich

Roland Falder - **Labor Contract Law** organized by the German-Chinese Economic Association and the Chamber of Commerce of Frankfurt a.M.

6 May 2008 - Frankfurt a.M.

Dr. Sven-Michael Werner - **Legal Issues during Sourcing in China**, organized by Management Forum Starnberg

7 May 2008 - Frankfurt a.M.

Dr. Sven-Michael Werner and Dr. Martin Rothermel - **Legal and Liability Issues with Chinese Suppliers** organized by Management Circle

25 and 26 June 2008 - Munich

Disclaimer

The contents of this newsletter are a general information on the respective subject matter only and cannot be treated as a complete description or a substitute specific advice.

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