

CHINA

BEITEN BURKHARDT

百达律师事务所

PRC Labour Contract Law implementing regulations issued



By Ada Lee

On 18 September 2008, the State Council promulgated implementing regulations (Implementing Regulations) for the PRC Labour Contract Law, which has been in effect since 1 January 2008. These regulations address the following key aspects:

Consolidation of employment period

An employee's service with a previous employer counts towards the employment period with a new employer if the job transfer is based on a reason 'not attributable' to the employee. Examples of such reasons include a transfer due to business reorganization or group restructuring.

The effect of such service recognition provision is that it could lead to higher financial implications for employers since higher severance payment will accrue as the calculation is based on the period of employment. On the other hand, prior employment does not count if the employee already received a severance payment.

Signing a labour contract

The PRC Labour Contract Law requires an employer and employee to sign a labour contract after the end of the first month and before the end of the first year of employment. If they do not, the employer must pay twice the employee's normal salary. The Implementing Regulations clarify that an employer will not be liable if failure to sign is the employee's fault and it has notified the employee in writing. An employer can also dismiss an employee who refuses to sign a contract within the first year of employment if it has notified that employee in writing. Such employees are only entitled to their regular salary.

Implied terms

The PRC Labour Contract Law introduced the concept of deemed open-term employment. The Implementing Regulations allow the contents of an open-term contract to be implied where the employee and employer have not agreed on them.

Termination

The Implementing Regulations provide that an employee may unilaterally terminate a limited-term labour contract if an employer is in breach under Article 38 of the PRC Labour Contract Law, so no liquidated damages will be due from the employee. On the other hand, an employer may seek liquidated damages from an employee if an employer's unilateral termination of the contract is due to the employee's own fault.

The Implementing Regulations clarify that the right of termination applies not only to open-term labour contracts, but also to fixed-term contracts and contracts that expire upon completion of a specified task. Given that they also allow an employee to terminate by giving the employer 30 days' notice, the parties may not agree to a longer notice period.

Although the Implementing Regulations provide useful elaboration of several areas covered by the PRC Labour Contract Law, concerned parties will continue to look for clarification of remaining open issues, such as the definition of 'temporary', 'auxiliary' or 'substitute' jobs placed through labour dispatch agencies and the meaning of 'major matters' that trigger an employer's obligation to consult with an employee.

BEITEN BURKHARDT

3rd Floor,

8 Queen's Road Central

Hong Kong

Tel: (852) 2524 6468

Fax: (852) 2524 7028

Email: Ada.Lee@bblaw.comwww.beitenburkhardt.com