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China: Trends & Developments
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Introduction
In the context of the ongoing and gradually normalised COVID-19 pandemic, China’s labour market has been continuously changing and developing for the past year, including the changes in response to the pandemic as well as other dynamics. The following developments are particularly noteworthy:

- dynamics of new forms of employment for platform economy workers;
- trends in social insurance enrolment and contribution by third-party agencies; and
- the newly enacted Personal Information Protection Law of the PRC and its implications on employees’ personal information management.

Dynamics of New Forms of Employment
With the development of the platform economy and the need for more flexible employment forms amidst the COVID-19 pandemic, new forms of employment have developed further and infiltrated more and more industries in the past year. While creating new job opportunities and promoting the economy, the new forms of employment also bring about new problems and challenges. Amongst these problems, the identification of the relationship between platform enterprises and the individuals engaged and the protection of such individuals’ rights and interests are of most concern.

Regulations and policies
The national and local governments have been issuing regulations and policies concerning new forms of employment in recent years. On 16 July 2021, the Ministry of Human Resources and Social Security, together with seven other departments, issued the Guiding Opinions on Protecting the Employment Rights and Interests of Workers under New Forms of Employment (“Opinions”). The Opinions have, for the first time, introduced a new concept called the “less-than-complete employment relationship” as opposed to an ordinary employment relationship or a civil law relationship. It has also set out comprehensive provisions to ensure platform workers’ rights and interests, including reasonable pay, accident insurance participation and vocational training, etc. Generally speaking, however, the legislation in relation to new forms of employment in China is still being explored at a relatively early stage and is awaiting specific implementing rules from the government.

Judicial practices
Employment-related disputes arising from new forms of employment are increasing year by year and the focus of such disputes usually lies in whether there is an employment relationship between the platform enterprise and the worker.

Based on the judicial cases in recent years, though the prevailing opinion is that the employment relationship does not exist between the platform enterprise and the worker, there has been a significant increase in the number of cases where the court ruled that a de-facto employment relationship was formed between the two parties. When making decisions on whether there is an employment relationship, the factors that the courts may consider usually include:

- which employment method the platform enterprise has adopted (eg, direct hire, labour dispatch or outsourcing);
• whether the workers are under the supervision of the platform enterprises; and
• whether the parties have reached a clear agreement not to form an employment relationship between them.

In a nutshell, when platform enterprises adopt the outsourcing method, the possibility that workers are found to have formed de-facto employment relationships with the platform enterprises will be greatly reduced. In addition, if the platform enterprise and the worker reach a written agreement confirming the non-existence of any employment relationship between them, courts would be inclined to recognise the validity of such agreements.

Suggestions
Laws and regulations on protecting the rights and interests of workers in new forms of employment are being gradually improved, and the respective rights and obligations of the platform enterprises and workers will also be made clearer. The platform enterprises need to pay attention to the upcoming laws and regulations as well as the latest trends in judicial practice in this area to strictly abide by such mandatory requirements and bear the responsibilities in accordance with the law while enjoying the benefits brought by the rapid development of the digital economy.

Trends in Social Insurance Enrolment and Contribution

Although the Social Security Law of the PRC requires an employer to enrol and pay social insurance contributions for its employees in the locality where it is registered and located, enrolment through a third-party agency such as a human resources service provider at a place other than the employer’s location is commonly adopted by many companies in China, especially in larger cities like Beijing and Shanghai. However, since the Measures for Administrative Supervision of Social Insurance Funds (“Measures”) were implemented on 18 March 2022, this “common practice” needs to be revised to come into compliance.

According to the Measures, social insurance enrolment and contribution through entities other than the employer risks being deemed as fraudulently obtaining social insurance by fabricating personal information and employment relationships. In addition, many local government authorities have started to strengthen the enforcement relating to social insurance enrolment and contribution and have begun to exercise greater scrutiny over the enrolment. For example, on 30 June 2020, the Beijing Social Security Fund Management Centre issued a notice requiring employers to submit basic employment information including the type of employment, position, salary, contract term and the social credit number of the employer when enroling the social insurances for new hires in the official online system. This is to determine whether there is an actual employment relationship between the individual being enrolled and the party enrolling the individual. In addition, the local Human Resources and Social Security Department of Guangdong Province also implemented a notice on 25 April 2022 to carry out special inspections and audits of companies and third-party agencies on their unlawful enrolment of social insurance.

With the introduction of more stringent regulation by the government at both national and local levels, it is anticipated that the enrolment and contribution of employees’ social insurance by a third-party agency at a place where the employer is not registered is becoming less feasible in practice.
Risks faced by employers by entrusting third-party agencies to contribute social insurance at places other than the employers’ location

Regulatory risks arising from the supervision of social security administration

Social insurance contribution by a third party will bring many risks to the employer and the agency in the current context. One significant risk comes from the supervision of the social security administration. If the employee’s social insurance is contributed in another city by an entity other than the employer, the local social security administration of the employee’s registered city may order the employer to make up the contribution in its registered city within a stipulated period and pay the late payment fines. If the payment is not made within the stipulated period, the relevant administrative authorities may also impose a fine on the employer ranging from one to three times the amount in arrears.

Through this firm’s consultation, the social security administrations of many districts in Beijing even hold the opinion that non-compliance also occurs if the employer enrolls and contributes social insurance in another district of Beijing. In this situation, the employer has to request the refund of the contribution from the district involved in the wrongful enrolment and then transfer the enrolment to its registered district and pay the social insurance contributions and the late payment fine there.

Risks of constructive termination by employees

According to the Employment Contract Law of the PRC, an employer’s failure to contribute social insurance for an employee pursuant to the law is one of the statutory grounds on which the employee would be entitled to unilaterally terminate the employment relationship and request statutory severance. The Guangzhou Labour Dispute Arbitration Commission and the Guangzhou Intermediate People’s Court have even taken a step further by jointly issuing an opinion specifying that where the employer has entrusted a third party to contribute social insurance for the employee, such employee is entitled to terminate their employment contract and receive the statutory severance from the employer.

However, in cities other than Guangzhou, it is uncertain in practice whether the employee can successfully claim such statutory severance. In Beijing for example, some judges tend to view that severance should not be granted if the employer can prove that the employee has acknowledged or consented to such arrangement, while some other judges hold a contrary opinion that the employee’s consent and acknowledgement cannot exempt the employer from paying the severance to the employee.

Risks of paying employees’ social insurance benefits

Another risk of paying social insurance by a third-party agency is that the social security administration may refuse to pay the insurance benefits. One typical situation is in work-related injury cases, where the employer wants to collect benefits in the occurrence of a work-related injury but the social security administration holds the opinion that the third-party agency is not the employee’s actual employer and thus refuses to pay the benefits. In this case, the insurance benefits to which the employee would otherwise be entitled should be recovered by the actual employer according to the Social Security Law of the PRC.

Although in some cases the employer and the entrusted agency may have entered into an agreement stipulating that the third-party agency shall pay the benefits if the employee fails to collect them from the social security administration, the validity of such agreement is highly controversial in practice as such an enrolment and contribution arrangement is not in line with the mandatory regulations. Although the courts
have, in a few cases, recognised the validity of such provisions, the common understanding is that the employer cannot shift its obligation to pay the benefits to the third-party agency via written agreements.

**Criminal liability**

In addition to the above-mentioned administrative and civil liability, third-party contribution arrangements may also expose the third-party agency as well as the employer to potential criminal liability for fraudulently obtaining social insurance by fabricating personal information and employment relationships, according to the Measures. This could be a signal that the authorities will take more severe measures to crack down on third-party contribution arrangements in the near future.

**Solutions**

With the increased enforcement by the national and local social security administrations in the area of social insurance enrolment and contribution, the employer, the employee and the third-party agency are facing more risks for non-compliance than before. When it comes to administrative supervision, employment relationship disputes, benefits collection and other related issues, the employer usually bears most of the risks, compared to the employee and the third-party agency.

Therefore, an employer using an unrelated third party to enrol employees and pay their social insurance in a city other than the company’s location should rethink this arrangement to ensure that it complies with the regulations. Here are a few options for the employer to consider:

• commence contributing the social insurance in its own name and in the city in which it is registered;
• set up a branch or subsidiary in the city in which the employees are located and transfer their employment to the branch or subsidiary, then arrange for the branch or subsidiary to enrol the employee into the local social insurance scheme;
• use labour dispatched workers from the local labour dispatch company for those temporary, auxiliary or alternative positions, and the local dispatch company will enrol the dispatched workers into the local social insurance scheme;
• outsource part of the service to a local service company, and that company will enrol the insurance for its own employees.

**Personal Information Protection Law of the PRC and its Implications on Employees’ Personal Information Management**

Data protection has been given more and more importance in China in recent years and there have been several legislative developments in this area since 2017, including the promulgation of the Cyber Security Law of the PRC (which came into effect on 1 June 2017), the Data Security Law of the PRC (which came into effect on 1 September 2021) and, most importantly, the Personal Information Protection Law of the PRC (PIPL) (which came into effect on 1 November 2021).

The newly enacted PIPL sets out comprehensive rules concerning personal information protection, including the principle of processing personal information (PI), specific PI processing requirements for different circumstances, possible legal liabilities, etc. As employers deal with the PI of employees during daily operations, the PIPL also has great implications on employment-related scenarios, and the key implications are summarised as follows:
Legal grounds for processing the PI of employees: obtaining employees’ consent is recommended
According to the PIPL, statutory grounds are needed for PI processing. The below two grounds are most relevant in employment-related scenarios:

• the individual’s consent has been obtained; or
• the processing is necessary for the conclusion or performance of a contract to which the individual concerned is a party, or for the implementation of human resource management based on the employment rules and regulations formulated in accordance with the law or the collective contracts concluded in accordance with the law.

Legally speaking, as “necessary for implementing human resource management” alone is a legal ground for processing PI, employees’ consent is not required once this condition is met. However, given that the absence of a specific standard in practice for determining what can be construed as “necessary” for implementing HR management under the PIPL, employers are still advised to try to obtain consent from the employees even when they think the processing of information is necessary for HR management.

Specific requirements for consent
According to the PIPL, consent must be voluntarily and explicitly given by the individual on a fully informed basis. To this end, the employer should truthfully, accurately and completely inform the employee of the following matters (“Requisite Matters”) in a conspicuous manner and in clear language that is easy to understand:

• the name and contact information of the PI processor;
• purposes and methods of processing the PI, categories of PI to be processed, and the retention periods;
• methods and procedures for the individual to exercise the rights provided by the PIPL; and
• other matters that should be notified to the individual as provided by laws and administrative regulations.

Separate consent
According to the PIPL, separate consent is needed on various occasions. The specific requirements of separate consent are not specified in the PIPL; they are based on the general understanding and current practice. This means the consent should be specifically related to the relevant PI processing purpose instead of being related to a package of processing purposes covering multiple processing activities.

The circumstances where separate consent is required are as follows:

• providing PI to third parties;
• disclosing PI to the public;
• processing sensitive PI;
• installing devices for the collection of personal images and identification information in public places for purposes other than public security; and
• cross-border transferring of PI.

Specific PI processing rules for certain circumstances
In addition to the requirement of separate consent, the PIPL also sets out stricter requirements when it comes to certain PI processing circumstances. The circumstances most commonly seen in employment-related scenarios are as follows.

Providing PI to third parties
The scenarios most related to employment include employers engaging third parties in background checks, pre-employment medical checks, payroll services and labour dispatch, etc.
The PIPL differentiates third parties into “entrusted agent” and “PI processor” based on whether the third-party PI processor independently determines the processing purpose and processing method.

When entrusting a third-party agent to process PI on behalf of the employer, an agreement should be entered into between the employer and the entrusted agent to specify the purposes, duration and means of processing, the categories of PI and protection measures, as well as the rights and obligations of both parties, etc.

When sharing an employee’s PI with a third-party PI processor, the employer shall inform the employee of the recipient’s name, contact information, purposes and methods of processing, and the categories of PI being shared. The employer must also obtain the employee’s separate consent.

Moreover, the employer is required to conduct a personal information protection impact assessment (PIPIA) beforehand and keep a record of the handling.

**Processing sensitive PI**

Employers may need to process employees’ sensitive PI during employment, for example when employers use fingerprints or facial identity information for daily check-in or collect employees’ health-related information for insurance purposes.

According to the PIPL, when processing sensitive PI, the employer should also explicitly inform its employees of the above-mentioned Requisite Matters, as well as the necessity of the processing and the impacts on their rights and interests, and obtain the employee’s separate consent. Also, the employer should complete a PIPIA beforehand.

**Cross-border transferring of PI**

For multinational companies, employees’ PI is likely to be shared with the global management team outside the territory of China. The PIPL thus sets out detailed requirements for such cross-border transfer of PI, including the following.

- It must satisfy any of the following conditions:
  1. passing the security evaluation organised by the Cyberspace Administration of China (CAC);
  2. having been certified by a specialised agency for protection of PI in accordance with the provisions of the CAC; or
  3. entering into a contract with the overseas recipient with the standard contractual clauses formulated by the CAC.

- Necessary measures must be taken to ensure that the activities involving the processing of PI by the overseas recipient meet the standards for protection of PI as prescribed under the PIPL.

- The employee must be informed of the name of the overseas recipient, the recipient’s contact information, the purpose and method of processing, the type of PI and the method and procedure by which the individual can exercise the rights stipulated in the PIPL against the overseas recipient, and the employee’s separate consent must be obtained.

- A PIPIA must be conducted.

In addition to the above, the overseas recipient who processes the employees’ PI outside China should establish a special agency or designate a representative within China to be responsible for handling matters relating to PI protection, and submit the name and contact information of such agency or representative to the governmental authorities.
Legal liability
PI processors who violate the PIPL may be subject to civil liability, administrative liability and/or criminal liability.

• Civil liability - Individuals can file PI infringement lawsuits against PI processors in accordance with the Civil Code of the PRC. Where the individual's claims are supported by the courts, the PI processor should bear the liability of breach, such as cessation of infringement, elimination of adverse effects, rehabilitation of reputation and compensation for damages.

• Administrative liability - Competent PI protection authorities can issue orders for rectification and warnings, and can confiscate unlawful income from a PI processor for its violation of the PIPL. In the case of failure to rectify, fines can also be imposed on the PI processor as well as on the person who is directly responsible for the violation of the PIPL.

• Criminal liability - According to Criminal Law of the PRC, fines and/or up to seven years of imprisonment can be imposed for illegally acquiring PI, or for selling or providing PI to third parties.

Summary
The concepts and requirements under the PIPL are high-level and general and it can be expected that some further details will be provided in regulations and practical guidance in the near future. That said, it is still important for employers to prepare to amend their existing personal data-related policies and practices to ensure that their processing of employees’ PI is compliant with the PIPL requirements. In the meanwhile, employers are also advised to pay close attention to the upcoming implementation rules and guidance for possible further adjustments.

Conclusion
The above trends and developments concerning the dynamics of new forms of employment, trends in social insurance enrolment and contribution, and the PIPL are a few of the noteworthy developments in the area of employment law in the PRC over the past year. Both employers and employees are advised to pay attention to the summarised points above and also to keep track of relevant developments.
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