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Corporate Employers Beware: (1) Potential Liabilities arising from Joint Employment; (2) Employment updates under COVID-19, for Mainland China and Hong Kong

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1. JOINT EMPLOYMENT

Joint employment relationship may arise when there is a use of services provided by an employee between parent and subsidiary companies, affiliated companies, or other forms of connected companies. Companies using such services may be jointly liable for the salary and benefits of the employee.

While the concept of "joint employment" is not prohibited in mainland China, this has been recognized in Hong Kong. Corporate employers should take note of the potential liability arising therefrom.

In general, apart from the employment contract, the courts in both mainland China and Hong Kong take into consideration the surrounding circumstances of the employment such as the nature of the services provided by the employee, salary and benefits arrangement, and recruitment process in its determination of the establishment of a joint employment relationship. These are further discussed below.

MAINLAND CHINA

In determining whether there is joint employment relationship, the Chinese courts will consider the facts and circumstances of each case and if there is a "confusion of legal entity" (主体混同), which can be reflected by a mixed use of financial resources, operation sites and mixed operation of business. It should be noted that local regulations may exist which vary in different provinces or municipalities.

- **Beijing**: The "Minutes of the Seminar of the Beijing Municipal High People's Court and the Beijing Municipal Labour Dispute Arbitration Commission on the Application of Law in Labour Dispute Cases (II)" (《北京市高级人民法院、北京市劳动争议仲裁委员会关于劳动争议案件法律适用问题研讨会会议纪要(二)》) provides that, where there is a mixed use of labour by connected companies and where it is difficult to ascertain the actual work of the employee, the employment relationship will be determined according to the provision in the employment contract. In the absence of an employment contract, considerations based on the entity paying the wages and social security, the place of work and job duties will be used in the determination.
- **Shanghai**: If the party who entered into the employment contract as an employer is inconsistent with the party

who actually uses the employee's services, the identity of the employer may be changed upon consultation between the parties involved, and the original employment contract shall continue to be performed after such change. If the employer that actually uses the employee's services is unable to perform the obligations stipulated in the employment contract, the employer who signed the contract shall bear such obligations. (Notice of the Shanghai Municipal Bureau of Labour and Social Security on Several Issues Concerning the Implementation of the "Shanghai Labour Contract Regulations" (上海市劳动和社会保障局关于实施《上海市劳动合同条例》若干问题的通知)

- **Shenzhen**: Under the Guidelines of Shenzhen Intermediate People's Court on the Adjudication of Labour Dispute Cases (《深圳市中级人民法院关于审理劳动争议案件的裁判指引》), an employee who was assigned to work for a joint venture or shareholder company by the original employer shall maintain the employment relationship with the original employer, who shall have an express agreement on the wages, welfare, etc. of the employee with the joint venture and/or shareholder company. In the absence of such an agreement, the relevant payments shall be borne jointly by the original employer and the joint venture and/or shareholding company.
- **Anhui:** According to the Notice on Matters Related to the Establishment of Labour Relations (《关于确立劳动关系有关事项的通知》) [2005] No. 12, where connected companies use the same labour, the court shall comprehensively evaluate the employment relationship, considering the job nature of the employee, management, employment contract, payment of social insurance premiums, etc., and it may be held that either or both employers bear responsibilities upon the employee's request and the actual situation.

HONG KONG

The employees of a subsidiary company (as secretary and vice-CEO of the subsidiary) who also perform work for the parent company were held to be the employees of the parent company under the High Court cases *Yung Wai Tak Abraham William v Natural Daily (NZ) Holdings Ltd* [2020] HKCFI 2067 and *Shiu Ming v Natural Daily (NZ) Holdings Ltd* [2021] HKCFI 361. Both companies were thus held jointly liable for the wages in arrears, payment in lieu of notice, and other unpaid benefits to the employees.

In considering the employment relationships of the parties concerned, the court in both cases adopted the "**overall impression**" test, that is, considering all the features of the relationship, including the surrounding circumstances and the special facts of the case, to see if an employment relationship indeed exists. The court in both cases considered the following factors:

- *The proper interpretation of the contract*: the court concluded that the employees in both cases only had obligations to provide services to the subsidiary, but not its parent. As such, the fact that the employees provided services to the parent company implied the existence of another employment relationship;
- *The process of recruitment; and*
- *Contemporaneous evidence* (e.g., notice regarding salary adjustment signed by the board of directors of the parent company).

The court concluded that the parent company deemed the employees in both cases as its own employees on an overall impression. Therefore, the employees in both cases obtained judgments against the parent company for unpaid wages and other employee benefits.

The cases shed some light on the recognition of joint employment in Hong Kong – even when there is no written employment contract, a joint employment relationship may be inferred from the background and context of the employment, in which case joint employers can be held liable for wages and other benefits of an employee who serves two or more employers during the course of employment.

IMPLICATIONS FOR CORPORATE EMPLOYERS

To conclude, joint employment relationship is recognized in Hong Kong and can exist in mainland China, albeit arguably being more difficult to establish. Whilst issues relating to joint employment may not affect the employment in itself when employers and employees are on good terms, corporate employers ought to be aware of the potential consequences when using the services provided by an employee by two companies in these jurisdictions.

In light of this, companies may note the following points:

- For any secondment arrangement between connected companies, it should be duly documented to prevent such works to be deemed as creating a joint employment relationship.
- Group companies sharing labour resources for convenience should be careful of the use of services of employees of an associated entity within the same group. Further, employment relationships ought to be regulated carefully.
- Update and track employees' duties regularly. Since the job duties of employees may change from time to time, it is advisable to document any such changes in writing.

EMPLOYMENT UPDATES UNDER COVID-19

Since COVID-19 continues to affect every aspect of employment, companies strive to adapt to the rapid-changing working environment. The law on employment in Hong Kong and mainland China has also been updated or interpreted in light of the ongoing pandemic. The following are some tips regarding the proper arrangement for employers.

1. ***If an employee does not comply with anti-epidemic measures, can the employer terminate the employment?***

   Mainland China: If an employee knowingly places his/her colleagues at risk by entering the workplace after infecting with COVID-19 and refusing to leave, the employer is entitled to terminate the employment contract.
   Hong Kong: An employee's failure to comply with a legitimate vaccination request is a valid reason for dismissal, subject to exemptions for certain employees, e.g., pregnant and breastfeeding employees.

2. ***Is an employer allowed to terminate an employment contract if an employee failed to attend work because of compliance with anti-epidemic measures?***

   Mainland China: No. Under Chinese law, an employer shall not terminate the employment relationship because of the employee's inability to work in such situations.
   Hong Kong: No. Failure to attend work due to compliance with the requirements under the Prevention and Control of Disease Ordinance (Cap. 599) is considered unreasonable dismissal of the employment contract. In such situations, the employee may sue the employer for (1) reinstatement or re-engagement of the employee; or (2) an award of termination payments against the employer.

3. ***What is the payment arrangement when an employee is absent from work due to compliance with a quarantine order?***

Mainland China: Where an employee is unable to provide normal labour because of compliance with quarantine arrangements mandated by the Government, the employer must not stop paying remuneration during such period and shall make salary payments as usual.

The amount of salary to be paid would depend on the circumstances. Where an employer requires employees to work from home, they should be paid according to their usual salary entitlement (The Law on the Prevention and Control of Infectious Disease of the PRC).

Hong Kong: Where an employee is absent from work by reason of compliance with the requirements under Cap.599, an employer is required to grant statutory sickness allowance to eligible employees.

- Note: Eligible employees are employees employed under a continuous contract, sick leave taken is not less than 4 consecutive days, accumulated sufficient paid sickness days and the sick leave is supported by the required proof.

CONCLUSION

The employment law of mainland China and Hong Kong has been updated and/or clarified to adapt to the rapid-changing employment arrangement due to COVID-19. As such, employers should keep abreast of such changes or new rules and understand their obligations and potential liabilities in employment.