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December 16, 2022

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Update

NEA Releases Measures for the Administration of Network Security in the Power Industry

The National Energy Administration (“NEA”) released the *Measures for the Administration of Network Security in the Power Industry* on December 12, 2022.

The Measures stipulated the duties of the NEA as the competent authority clarifying its branches and other local energy authorities have the power on the supervision and administration of network security. It defined the responsibilities and obligations of electricity enterprises, and the supervision and inspection of network security. The Measures is applicable to the construction, operation, maintenance and use of networks (except for nuclear security) by electricity enterprises in China, and the supervision and administration of network security. The document also clarified that the principle officers of electricity enterprises are the first responsible persons of their network security.

Law Firms May be Allowed to Prepare Prospectus Due to a Revised Legal Document

On December 9, 2022, the China Securities Regulatory Commission (“CSRC”) released the revised *Measures for the Provision of Securities-related Legal Services by Law Firms* (Exposure Draft) for public comment until January 8, 2023.

As a critical change, the revised Measures stipulated that law firms are allowed to provide securities-related legal services, including issuing legal opinions on IPOs, depositary receipts and corporate listing, disclosing information of public and private companies, and issuing legal opinions on issuance, trading and transfer of corporate bonds. The legal document also clarified that law firms may organize the preparation of prospectus, and deleted the provisions that link case filing and investigation with business acceptance and review.

GAC Exempts Tariffs on Certain Imported Self-use Equipment

On December 6, 2022, the General Administration of Customs (“GAC”) released the *Announcement of Matters concerning the Implementation of the Catalogue of Encouraged Industries for Foreign Investment (2022 Version)*, to be effective on January 1, 2023.

Imports of qualified self-use equipment and related technologies, accessories and spare parts within the total investment amount of foreign investment projects including the Catalogue will be exempted from the tariffs from January 1, 2023, while the import value-added tax (“VAT”) will be levied on the imported equipment in accordance with applicable rules. The foreign investment projects that are approved, verified or filed prior to January 1, 2023 and fall within the scope of the Catalogue may apply for tax reduction and exemption as long as they have obtained the relevant documents issued by the competent departments before 2024.

CBIRC Urges Commercial Banks to Strengthen Risk Management of OBS Activities

On December 2, 2022, the China Banking and Insurance Regulatory Commission (“CBIRC”) released the revised *Measures for Commercial Banks to Manage Risks of Off-Balance Sheet (“OBS”) Activities*, to be effective on January 1, 2023.

The Measures clarified the definitions and classification of OBS activities of commercial banks, introduced the governance framework of OBS activities, and detailed and defined the requirements for the management of risks in OBS activities, stipulating that commercial banks shall incorporate OBS activities into the comprehensive risk management system to accurately identify different types of risks in OBS activities and impose differentiated management depending on the types of activities and risk characteristics. It also presented the information disclosure requirements and specified the requirements for the supervision and administration.

SMDRC Promotes the Goal of Carbon Peak and Carbon Neutralization on New Infrastructure Fields

On December 13, 2022, Shanghai Municipal Development and Reform Commission (SMDRC) released

the Implementation Plan for Shanghai's Carbon Peak in New Infrastructure Fields.

The Plan introduced a series of measures to promote structural carbon reduction and improve the utilization level of renewable energy, including strictly managing the access of new data centers, promoting the shutdown and conversion of eliminated data centers, and strengthening the green transformation of inefficient data centers.

MEE Releases Measures for the Administration of Key Units Subject to Environmental Supervision

On December 1, 2022, the Ministry of Ecology and Environment (“MEE”) released the *Measures for the Administration of the List of Key Units Subject to the Environmental Supervision*, to be effective on January 1, 2023.

According to the Measures, key units subject to the environmental supervision mainly involve the following aspects including water discharging, prevention and control of groundwater pollution, protection of atmospheric environment, prevention of noises, prevention of soil pollution, and prevention of environment risk. It is clarified that those key units subject to the environmental supervision should conduct self-monitoring and information disclosure to perform their legal obligations for the protection of ecological environment, and take measures to prevent and control environmental pollution and risk.

SSE Regulate the Distribution of Income from Publicly Offered Infrastructure REITs

On November 18, 2022, the Shanghai Stock Exchange (“SSE”) released the *Circular on Regulating the Income Distribution in Publicly-offered Infrastructure Real Estate Investment Trusts (REITs)*.

Infrastructure REITs should distribute income in accordance with Article 37 of the *Measures for the Administration of Public-offered Real Estate Investment Trusts* and Article 2 of the *Guidelines for the Public-offered Real Estate Investment Trusts* (for Trial Implementation). The Circular also clarified that, if an infrastructure REIT fails to distribute income in accordance with the laws and regulations for two consecutive years, the manager should apply for termination of the listing of the REIT. In addition, the manager should stipulate the above-mentioned matters in the relevant legal documents of the infrastructure REITs to be listed, and inform investors of the risk that the REITs may be terminated from listing if the income distribution is not carried out as required, and make the relevant information disclosure.

Shanghai Introducing New Policies to Promote Biomedical R&D Industry

On October 25, 2022, Shanghai Municipal Government released the Measures to Accelerate the Establish of a Global Biomedical R&D hub in Shanghai (“Measures”). The Measures came into force on October 31 and will be valid until October 30, 2027, aiming to drive expansion of biomedical R&D and industrialization activity by a 5-year plan. The core content of the Measures includes 16 specific policy measures in 6 aspects, which expect that the development pattern of Shanghai's global biomedical R&D economy and industrialization hub will be initially formed by 2025 when the R&D economy is expected to be generating over RMB 100 billion, and over 100 innovative drugs or medical devices are expected to

be under development locally. In addition, the Measures also supports the establish of innovative companies with biomedical R&D and the flow of research projects from universities and research institutes to industry.

Article(s)

Difference among Labor Relationship, Labor Outsourcing and Labor Dispatch

by Sophie Chen

Labor compliance means that enterprises shall comply with applicable laws and regulations on labor. It is aimed at preventing and addressing the risks related with a possible non-compliance with labor regulations. This article introduces labor compliance in China.

1. Labor Relationship

(1) Labor Contract

An employer shall enter into labor contracts with all employees. Otherwise, once there is a de facto labor relationship, an employer will be liable for compensation of double wages during the period when they do not sign a labor contract. Besides, the employer may be subject to administrative penalties.

When a labor contract expires, the employer shall promptly renew the contract with the employee.

Termination of labor contracts shall also be in accordance with the statutory and agreed procedural requirements.

(2) Internal Regulation

When an employer formulates internal rules or regulations which directly involves the interests of employees, it shall go through procedures including negotiation with labor union (if any) or discussion by the employees' representatives congress and publicizing the rules and regulations on the internal website of company or in other ways to make sure that every single employee is aware of such rules and regulations. In addition, the content of rules or regulations shall comply with laws and the provisions of the labor security system. Otherwise, the employees can terminate the labor contract at any time.

(3) Social Security

Employer shall undertake endowment insurance, medical insurance, unemployment insurance, work-related injury insurance and maternity insurance of employees. Employer shall pay the above social security for employee timely and employer is not allowed to negotiate with employee to release from the above obligation.

2. Labor Outsourcing

Labor Outsourcing refers to contract-issuer entrusts part of its business or auxiliary work to a third-party specialist institution, i.e., a contractor of labor outsourcing who arranges its own workers to complete the business or work as required by the contract-issuer.

There is no specific law or regulation on labor outsourcing in China. The contractor-issuer and the contractor can enter into a labor outsourcing agreement and stipulate their rights and obligations depending on the specific circumstances, which shall be subject to the Civil Code promulgated in 2020.

3. Labor Dispatch

Labor dispatch is a supplementary form of labor and can be applied to temporary, auxiliary or alternative work only. Temporary refers to a position that has a duration of no more than six months; auxiliary refers to a non-main business position; alternative refers to a position that can be replaced by other workers during a period when the worker is unable to work due to vacation, etc.

Enterprises shall enter into labor dispatch contracts with qualified labor dispatch companies. In addition, enterprises shall restrict the proportion of dispatched workers to 10% of the total workforce. Furthermore, there is no significant difference in wages between dispatched workers and employees who have signed labor contract with the employer.

4. Differences between Labor Outsourcing and Labor Dispatch

Matters	Labor Outsourcing	Labor Dispatch
Applicable Laws	<i>Civil Code</i> issued in 2020	<i>Labor Contract Law</i> issued in 2012, <i>Implementation Measures for Administrative Licensing for Labor Secondment</i> issued by Ministry of Human Resources & Social Security in 2013 and <i>Interim Provisions on Labor Dispatch</i> issued by Ministry of Human Resources & Social Security in 2014
Contract	An enterprise, i.e., contract-issuer, enters into a contract with a labor outsourcing company, i.e., contractor.	An employer enters into a labor dispatch contract with a labor dispatch company.
Qualification	Only when the work covers licensed activities, the contractor shall obtain the corresponding business qualification.	Labor dispatch companies shall obtain labor dispatching business license.
Personnel Management	The contract-issuer does not directly manage contractor's workers, the contractor is solely responsible for personnel management.	The employer directly manages the dispatched workers.

Fee Calculation	The contract-issuer pays the contractor in accordance with the content and the result of the work, which is not associated with the number of the workers and the working hours.	The employer calculates the fee based on the number of dispatched workers and their working hours.
Payment	The contractor pays the worker's wages and bear their social security cost.	The employer pays the labor dispatch company for the dispatching fee and the employer can pay social security cost for the workers if the labor dispatch is off-site.
Risk	The contractor bears the risk.	In the event that a worker's labor contract is illegally terminated by the labor dispatch company due to the employer's illegal withdrawal, the employer and the labor dispatch company shall be jointly liable for damages suffered by the worker.

5. How to Avoid Labor Outsourcing Being Deemed as Labor Dispatch?

Once a labor outsourcing relationship is deemed as a labor dispatch relationship, laws and regulations on labor dispatch will be applicable, which are quite unfavorable to contract-issuers.

Chinese courts tend to determine a labor dispatch relationship under the following circumstances: (i) the worker is required to comply with employer's rules or regulations; (ii) the employer directly manages the workers; (iii) the contractor is not qualified to operate the contracting business but obtains labor dispatching business license; (iv) the contract-issuer bills the contractor depending on the number of workers and working hours rather than the completion of work order.

Therefore, enterprise shall conduct a self-assessment from the above perspectives to avoid the labor outsourcing relationship being identified as labor dispatch relationship.

6. How to Avoid the Labor Outsourcing Relationship Being Deemed as a Labor Relationship?

As labor outsourcing can effectively reduce the management cost of enterprises and the risk of employment, labor outsourcing is preferred by lots of enterprises. However, there is a risk that labor outsourcing may be identified as a labor relationship by courts.

In the case where no labor contract has been signed by and between the contract-issuer and the contractor's worker, Chinese courts tend to determine that the worker and the contract-issuer are in a labor

relationship, if the following conditions are satisfied: (i) the worker is required to comply with the employer's internal rules and regulation; (ii) the worker is engaged in contract-issuer's main business; (iii) the contract-issuer directly pays the worker's wages or any other benefits through its bank account.

While a labor outsourcing relationship could be identified under the following conditions: (i) the contractor and its worker have signed a labor contract; (ii) the contractor undertakes the social security cost of the worker; (iii) the contractor pays the worker wages through the contractor's bank account.

Hence, enterprises shall verify the above conditions to reduce the labor risk.

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