NEWS LETTER ASIA

JANUARY 2010

CHINA

INFLUENZA H1N1 AND ITS LEGAL CONSEQUENCES

The World Health Organization stated that the alert level of Influenza H1N1 had reached the phase 6, which corresponds to a risk of pandemic. Already completed after the 2003 experience of the Severe Acute Respiratory Syndrome (SARS) epidemic with the measures taken at that moment by Chinese government, the Chinese legal arsenal counts now a few specific regulations about Influenza H1N1 including regulations of the Ministry of Health (<Notice of the Ministry of Health on the stepped-up measures of prevention and treatment for the Influenza H1N1>, entered into force on 13th Nov. 2009 etc.)

I- Protection of the individuals in public places and at their working place

Laws enable the Chinese government to impose some exceptional obligations in case of Influenza H1N1 epidemic.

I.1 Preventive measures imposed by the regulations

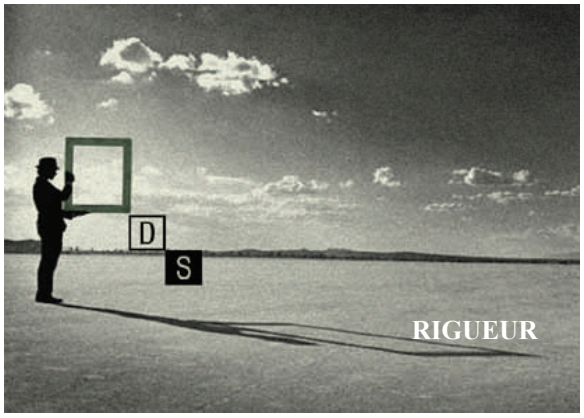
The entity or the person in charge of public places (subway, exhibition centers etc.) and generally any entity where people gather together (Companies, representative offices etc.) has the obligation to draw up a procedure to follow in case of Influenza H1N1 epidemic and to have, within their premises, the rescue equipments (thermometers, medicine, masks) and the basic hygiene products (hydro-alcoholic solution, etc.). The incurred fines for the non application of those measures consist in the payment of a 50 000 to 200 000 RMB fine and in the suspension or the withdrawal of the business license. (<Law of the People's Republic of China on Prevention and Treatment of Infectious Diseases>, entered into force on 21st feb.1989, amended on 1st Jan. 2004).

These preventive measures have already been applied during the Guangdong international Exhibition in May 2009, in which were set up 60 areas where the temperatures of the visitors could be controlled; as well, all the public places, inside and outside, were disinfected everyday during the exhibition.

I.2 Measures imposed by the regulations in case of an Influenza A/ H1N1 epidemic

A temporary measure to limit the access or even to prohibit the access to public places or to working places can be imposed by the competent authority (not defined by the regulations)…

In addition, in case of contagion, any entity or individual has the obligation to inform the nearest medical establishment (Law of 21st Feb. 1989), under penalty of an administrative or criminal sanction (<Regulation on the Urgent Handling of Public Health Emergencies>, came into force on 1st nov.2007).



II- Protection of the employee under his labor contract

So far, there is no regulation governing the protection of an employee under his labor contract in case of the influenza H1N1. The measures to be applied are likely to be those applied in 2003, for the SARS epidemic (<Notice for Prevention Measures and Treatment of SARS>, entered into force on May 14th, 2003).

II.1 Salary

When for a preventive purpose an employee is obliged to stay at home (this employee presents several symptoms, has just travelled back from a country severely touched by the influenza H1N1, etc.) and that he can't work, his employer shall pay the employee's salary during this isolation period.

During the medical treatment, the salary shall be paid by the employer according to the local provisions on sick leaves.

II.2 Medical expenses

The Ministry of Health should promulgate soon a new regulation on the medical expenses due to the influenza H1N1. For now, the Shanghai Health Bureau has precised, not officially though, that all the medical examinations (even those for prevention) and medical treatment of the influenza H1N1 are free in Shanghai.

II.3 Labor contract

If the term of the labor contract occurs during the isolation period, then the labor contract will be extended until the end of the isolation.

Moreover, according to the regulation in force in Shanghai, it is forbidden for an employer to dismiss an employee during the isolation period or during the medical treatment period (<Regulation on the Urgent Handling of Public Health Emergencies>, entered into force on May 7th, 2003).

III- Consequences of the influenza H1N1 epidemic on the performance of a commercial contract

The key point is to know whether the influenza H1N1 can be considered as an event of force majeure which would thus justify the impossibility for a party to perform its obligation under a commercial contract.

According to article 117 of the Contract Law of the People's Republic of China, an event of force majeure is an event which is unforeseeable, unavoidable and insurmountable.

Until today, Chinese law has not defined whether the influenza H1N1 should systematically be considered as an event of force majeure.

In the light of the decisions made on 2003 during the SARS epidemic, the qualification of the influenza H1N1 should be made case by case. This will depend on several criterions and especially on the unpredictability of the influenza H1N1 when the contract was concluded, and on the reality of the consequences of the flu on the performance of the contract.

It is now strongly advised to insert among the provisions of the contract the consequences of the influenza H1N1 on the performance of the contract.

INDIA

Proposed extension of the social security net in India

In a recent proposal sent to the Labour Ministry, the Employee Provident Fund Organisation (EPFO) recommended to extend the coverage of the social security legislation applicable to employees in India, the Employees Provident Fund and Miscellaneous Provisions Act (EPF Act), 1952.

The proposal includes, *inter alia*:

(i) Increase of the salary-limit for compulsory contribution to the EPFO: monthly salary up to INR 10,000 instead of INR 6,500 per month.

(ii) Application of the EPF Act to companies with a minimum of 10 employees, against the present norm of a minimum of 20 employees.

1- Context of the proposition

Because of the limited scope of the current EPF Act and of a deficient implementation by Labour authorities, millions of Indian workers are left out of the EPFO regulations. Thus, the organised labour sector comprises 300 million workers, of which only 40 million are covered under EPFO regulations.

The reform aims at bringing an additional 100 million of workers into the social security net. This will benefit mostly contractual workers and small firms, working as contractors to bigger firms, which are not obliged to honour the EPF Act.

2- Implication

Under the current version of the EPF Act, which applies to all factories and specified establishments having a minimum of 20 employees, employers have to contribute a minimum of 12 per cent towards EPF on less than or up to Rs 6,500 (basic + dearness allowance). The employee is also required to contribute a matching amount.

Employees earning more than INR 6,500 who do not have existing provident fund membership, may on a voluntary basis, be made eligible for benefits under the EPF Act and the Schemes.

This reform, if implemented, is likely to increase the costs of labour in India and to place on companies the responsibility to raise the standard of social compliance and to complete additional formalities with the Labour authorities (registration of new employees covered, periodic filings etc.).

JAPAN

AMENDMENT TO THE LABOR STANDARDS ACT

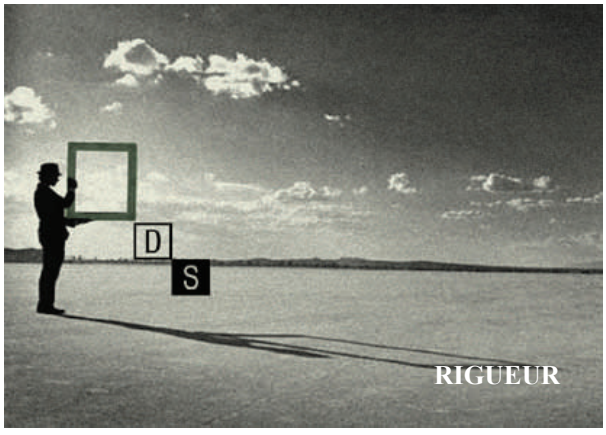
The amendment to the Labor Standards Act that aims at controlling the use of overtime work and achieving a balance between the employees' private and personal lives takes effect from April 1, 2010. You will find below a general outline of this reform.

I- Increase in the overtime work compensation rate

1.1 Increase in the overtime work compensation rate for overtime work exceeding 60 hours in a month

Under the current system, overtime work must be paid at a compensation rate of 25%, regardless of the number of hours of overtime work.
Under the amendment, overtime work exceeding 60 hours in a calendar month will have to be paid at a rate that will be at least equal to 50%.

This will mean that overtime work exceeding 60 hours in a calendar month made during late-night hours (between 10 p.m. and 5 a.m.) will have to be paid at a compensation rate equal to 75% comprising the 50% compensation rate mentioned above and the regular 25 % compensation rate for overtime night work.



Certain small and medium sized companies will, however, be exempt from paying the increased overtime rate for overtime work exceeding 60 hours in a month, at least for the time being.

1.2 Grant of special leave

Under the amendment, full days or half-days of paid special leave (this leave is different from the legal annual paid leave) may, subject to the applicable collective bargaining agreement, be granted to an employee, whose overtime work exceeds 60 hours in a calendar month.

However, such special leave will only concern the part of the overtime work exceeding 60 hours in a calendar month.

Subject to this limitation and on the basis of an equivalence of 4 hours of overtime work for 1 hour of special leave, any employee who will have 16 hours of overtime work exceeding 60 hours in a calendar month may be granted half a day (4 hours) of special leave.

The granting of such paid leave does not release the employer from its obligation to pay a compensation rate of 25% for such overtime work exceeding 60 hours per calendar month.

II- <u>Taking annual paid leave by the hour</u>

Under the current system, annual paid leave must be taken in full days. It was allowed, however, that this paid leave could be taken by half-days where the employer and the employee so agreed.

Under the amended Labor Standards Act and subject to the prior execution of a collective bargaining agreement, an employee will be allowed to take annual paid leave by the hour in the limit of 5 days per year. Accordingly, an employee will, for instance, be allowed to take annual paid leave of 2 or 3 hours.

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Before the amended Labor Standards Act becomes effective, companies are invited to take all necessary measures to limit the use of overtime work, and to negotiate collective bargaining agreements laying down the conditions under which special leave may be granted.

SINGAPORE

Singapore joins OECD white list

Christine Lagarde, French Minister of Economy, Industry and Employment, and Singapore's Minister of Finance, Mr Tharman Shanmugaratnam, signed on Friday, November 13th, 2009 an amendment to the tax treaty of Franco-Singaporean double taxation. This ensures compliance of the City-State to OECD standards allowing tax information exchange between the two countries and gets Singapore out of the OECD grey list.
The agreement on exchange of information on tax matters, elaborated by OECD in 2002, seeks to address harmful tax practices. One of the key criteria to qualify the existence of such a practice consists of "the lack of effective exchange of information" (OECD – *Hamful Tax Competition: An Emerging Global Issue* – 1998). This agreement is not a binding instrument but represents the standard required by OECD in terms of effective exchange of information.

This is the 12th agreement that Singapore has signed in accordance with the OECD standard since the G20 in April. By providing international guarantees of transparency, Singapore strengthens its image and its attractiveness for financial investments.

Review of the Companies Act

Earlier this year, Tharman Shanmugaratnam, Singapore's Minister of Finance, announced the setting up of a Steering Committee to review the Companies Act in line with the Government's efforts to keep

pace with economic changes and to improve regulatory and governance framework. Some specific areas have been targeted for amendment.

I- <u>Exempt Private Company definition review</u>

The concept of exempt private company (one in which no corporation holds a beneficial interest and which has no more than 20 members), may be replaced with a "small company" concept. Indeed, based on the current definition of an exempt private company, large private companies are exempted from publishing their financial information. The proponents for legislative change consider the current system as inconsistent with market expectations such as large companies' financial information disclosed to the larger pool of stakeholders (creditors, customers…) and not just limited to their shareholders.

<u>II- Improve minority shareholders protection</u>

Currently, the Companies Act allows minority shareholders to apply to court for relief against abuse of the majority's voting rights power. This route is onerous which makes it unattractive. As in Canada or New Zealand, amendments are proposed to allow a minority shareholder who had opposed fundamental changes to the company structure or alteration of shareholder rights, to require the company to buy his shares at a fair value.
The proposed amendments demonstrate Singapore's commitment to improving corporate governance but raise many comments including the definition of this fair value.

3- <u>Other targeted areas</u>

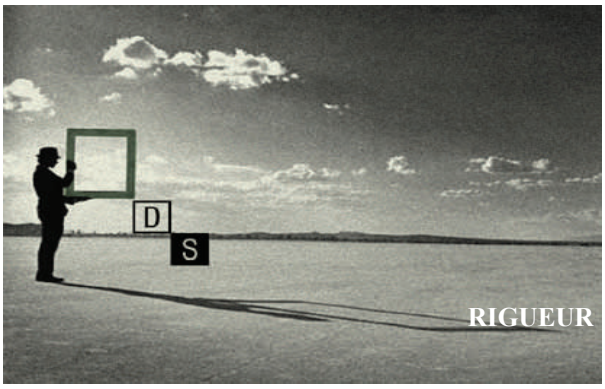
* Codification of directors' duties;
* Appointment of multiple proxies in shareholders' meetings;
* Removing restrictions from section 76 of the Company Act under which a company may not, in principle, give financial assistance to any person for the purpose of the acquisition of shares in the company or its holding company.

THAILAND

"Patent Application under the PCT"

After 2 years of negotiation and legislative hurdle, both the Paris Convention on Industrial Property protection and the Patent Cooperation Treaty (PCT) will come into force in Thailand on December 24, 2009.

In this edition, we review the general framework of the PCT (I), and focus on the very specific consequences of this adherence for both Thai and Foreign Companies intending to file a patent application under the Treaty (II).



I- General Framework of the Patent Cooperation Treaty

A) The Paris Convention for the Protection of Industrial Property.

This ratification was a compulsory step, as the adherence to the PCT is solely reserved to the Contracting States to the Paris Convention.

This Convention, signed by 7 countries in **1883,** but 172 currently, provides the "Priority Right": an applicant from one contracting State can use its first filing date in one of the Contracting State as the effective filing date in another contracting State, provided that he meets the deadlines for filing, i.e. 12 months for patents and utility models from the first filing date (6 months for industrial designs and trademarks).

B) The Patent Cooperation Treaty

From 24th September 2009, Thailand ratified the Patent Cooperation Treaty (PCT), which was originally signed in Washington on **June 19, 1970**. This International Patent Law Treaty came into force with 18 Contracting States on January 21, 1978. Today, 141 States have ratified the PCT. The Treaty was modified several times since its adoption, the last substantial revision being made in 2001.

Each and every inventor willing to protect his invention has to get a **patent**, which is a set of exclusive rights granted by a State for a fixed period of time. These exclusive rights are granted in exchange for a disclosure of the invention.

On a global scale, issues may arise when the inventor intends to get protection in several countries. In such case, the inventor has to get his patent granted in every single country that he wants the protection in.

Getting a patent in several countries is costly and obviously inefficient. Under the PCT, the applicant can file one patent application. This unique application may give the applicant the right to designate his application to all the PCT Member States.

However, applicants shall keep in mind that a national phase for each chosen country remains compulsory.

II- Consequences of the PCT on Thai & Foreign Companies

For an inventor, one of the main risks during the patent application process is to destroy the **novelty** for his own patent application. But on the other hand, protecting an invention in many countries is costly. An inventor obviously needs as much time as possible to find out whether his invention might bring a return on his investment.

In Thailand, under the current system, patent applicants have to designate all countries where they intend to get protection, before expiration of a 12 months period called **"priority year"**. Under this system, applicants have to face major costs at an early point in the patenting procedure, which can easily be a huge drawback.

From December 24, 2009 under the PCT system, applicants will have the possibility to file one patent application at any of the PCT Receiving Offices. But they will have 30 months instead of 12, to decide in which PCT Member States they intend to extend the protection. This is a great advantage of the PCT.
Consequently, the important costs related to the process only occur later in the patenting procedure.

Thai companies will have up to 30 months to extend their protection to any of the other 141 PCT Member States, but also, Foreign companies intending to be protected on Thai market will have up to 30 months to extend to Thailand their patent application previously filed in any other PCT Member State.

From a practical point of view, companies will be entitled to file an international application at the new ad hoc section opened within the Department of Intellectual Property. This filing will, however, be cost effective. According to draft regulations, fees and filing languages are to be as follows:

The international fees amount is planned to be equivalent to 133 Swiss Francs (90% discount from the WIPO reference). The international search fees might be included in a 280 – 2,400 USD bracket (75% discount). Finally, applicants might expect transmittal fees around 3,000 THB.

When filing an application with the Department of Intellectual Property, a patent text in Thai can be submitted, provided that an English translation is also added to the application.

VIETNAM

NEW MINIMUM SALARY TO BE PAID TO EMPLOYEES

On 30th of October, 2009, the Government has approved the Decision No.97/2009/ND-CP (the « **Decree 97** ») issuing the minimum salary applicable to employees working in domestic enterprises and the Decree 98/2009/ND-CP (the "**Decree 98**") issuing the minimum salary to be paid to employees working in foreign owned enterprises. These two decrees shall enter into force as from 1st of January, 2010 and shall replace the Decree 110/2008/ND-CP regarding the minimum salary applicable to domestic enterprises and the Decree 111/2008/ND-CP regarding the minimum salary applicable to foreign owned enterprises.

As usual, the Government continues to stipulate **two different levels of minimum salary depending on the employer's status: domestic enterprises vs. foreign owned enterprises.**

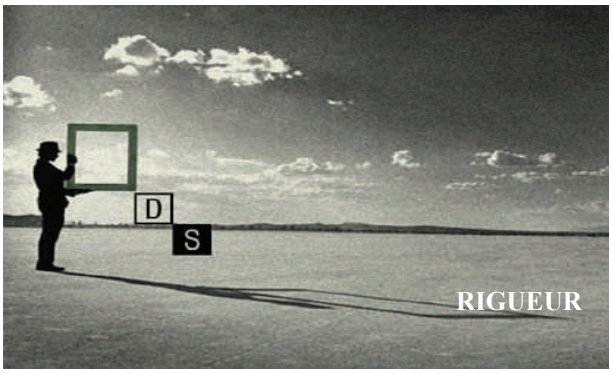
- Employees working for domestic enterprises shall be paid with a monthly salary equal to or higher than:
  - ◊ 980,000 VND applicable to employees working for domestic enterprises located in Zone I;
  - ◊ 880,000 VND applicable to employees working for domestic enterprises located in Zone II;
  - ◊ 810,000 VND applicable to employees working for domestic

enterprises located in Zone III;
◊ 730,000 VND applicable to employees working for domestic enterprises located in Zone IV.

- Those working for foreign owned enterprises shall be paid with a monthly salary equal to or higher than:

◊ 1,340,000 VND applicable to employees working for foreign owned enterprises located in Zone I;
◊ 1,190,000 VND applicable to employees working for foreign owned enterprises located in Zone II;
◊ 1,040,000 VND applicable to employees working for foreign owned enterprises located in Zone III;
◊ 1,000,000 VND applicable to employees working for foreign owned enterprises located in Zone IV.

The Decree 97 and Decree 98 also publishes the list of such Zones I, II, III and IV.
The remainence of two different regimes of minimum salary appears unreasonable as the minimum salary is defined on the basis of cost of living so that an employee performing the most elementary work in normal working conditions recuperates his/her basic work capacity and partly accumulates reserves for regenerating enhanced capacity.
The minimum salary varies depending on *the areas* and *the various branches of trades*. Since two different employees living in the same zone will face similar cost of living and will thus have similar needs, there is no justification for imposing two different regimes of minimum salary depending furthermore on the employer's form of investment.
Moreover, the coexistence of two different levels of minimum salary leads to discrimination amongst companies, which is contrary to WTO's equal treatment condition. Higher minimum salary leads to higher expenses for company's budget, although foreign owned enterprises do not enjoy the same rights as domestic enterprises.



GUIDELINES ON HEALTH INSURANCE

Since the 1st of July, 2009, the new regime on health insurance according to the Health Insurance Law of 25th August, 2009 has entered into force. For the implementation of this Law, the Government has issued the Decree 62/2009/ND-CP on 27th of July, 2009 guiding a certain number of articles of the Health Insurance Law ("Decree 62"). After that, the Ministries of Health and Finance have also issued the Joint Circular 09/2009/TTLT-BYT-BTC regarding the implementation of health insurance ("Joint Circular 09"). The Decree 62 and the Joint Circular 09 are both effective as from 1st of October, 2009.
With the purpose of developing the public medical cares, the State intends to **extend the number of persons subject to the health insurance in order that everyone residing in Vietnam is entitled to medical cares**. The Decree 62 and Joint Circular 09 have to implement this policy. However, it seems that the concretisation of this policy through these both legal texts remain impracticable and subject to discussions and debates within the community of foreigners working in Vietnam.
One of the important changes provided by the Joint Circular is that

foreign employees working in Vietnam under a contract of 3 months or more shall now take part in the health insurance regime in Vietnam. As a consequence, the employer and foreign employee will have to deduct from their monthly salary and remuneration a contribution to the health insurance funds. The question to be raised is that whether this health insurance applicable to foreign employees is realistic.

This news is not welcome by foreigners working in Vietnam. Actually, they usually are covered by insurance companies according to the policies of local companies which are normally more advantageous than the State health insurance policies. Additionally, several employees may be medically insured according to the laws of their countries of origin (i.e French employees are entitled to subscribe to the regime of *Caisse des Français de l'Etranger CFE* or even remain insured by the *French social security*). Therefore, it seems that they do not need to enjoy the Vietnamese health insurance policies, but would nonetheless have to deduct a part from their monthly wages for contribution to health insurance funds, without ever enjoying this medical cares. This contribution to health insurance is thus considered as an "additional tax" supported by foreigners working in Vietnam.
Regarding Vietnamese employees, the health insurance should be regarded as a guaranty. However, nowadays, several employers - especially foreign owned enterprises - offer their Vietnamese employees a care policy as benefit, which is more advantageous than the State health insurance. Therefore, for these Vietnamese employees, the State medical cares and treatments become useless, even if they continue to contribute.

Up to date, the monthly contribution to health insurance is 3% of employees' monthly salary, of which the employer shall pay 2% and the employee is charged 1%. From the 1st of January 2010, this payment shall be increased to 4,5%, in which 3% to be contributed by the employer and 1,5% by the employee.

The employees covered by health insurance will be paid 100% of medical cost at commune level hospitals if the medical cost for 01 time of treatment or examination is lower than 15% of the minimum monthly salary. Otherwise, the employees shall enjoy the payment of 80% of medical cost covered by the health insurance funds and will have to pay the remaining 20%.
If the employees covered by health insurance use the examination or treatment in hospitals with high service or abroad, the employees must pay medical cost firstly and then ask the health insurance funds to reimburse, but the reimbursement shall not exceed the amount fixed in the Joint Circular 09 which is quite low Additionally, there are only a few of Vietnamese hospitals.

Lobbying has been activated to try and get this regulations amended.

PAYMENT FOR UNUSED ANNUAL LEAVES

Recently, the Ministry of Labour, Invalides and Social Affaires ("**MoLISA**") has issued instructions regarding the payment for unused annual leaves through the Official Letter No.3917/LDTBXH-LDTL ("**Letter 3917"**) on 15th of October 2009.

Pursuant to the articles 74, 75 and 76 of the Labour Code, **the employer must facilitate the employee to use the latter's annual leaves for the applied year and not forward to the next year.** The employee may agree with his/her employer to split his/her annual leaves into several periods of leave. If the employees work in remote areas, he/she is allowed to add up the number of annual leaves of two years to take leave once if he/ she requests so. If he/she wants to add up the number of annual leaves of three years to take leave once, he/ she must agree with his/her employer and the latter approves so.

Based on the instructions mentioned in the Letter 3917, **the employer is responsible to come up with an annual leave scheme and notifies its employees for implementation**.

* In case where the employer has arranged the annual leave sheme and notified its employees but requested an employee to work on these planned annual leaves, the annual shall be paid at least 300% of salary unit price or actual salary of his/ her current job for the days worked;
* In case where the employer has arranged the annual leave scheme and notified its employees but the employee requested and worked voluntarily on these planned annual leaves, the employee shall be paid 100% of salary unit price or actual salary of his/her current job for the days worked;
* In case where the employer has failed to arrange the annual leave scheme or has arranged the annual leave scheme but failed to notify its employees, the employee shall be paid with at least 300% of salary unit price or actual salary of his/her current job for the days worked.

It was previously admitted that the non taken annual leave were not paid and therefore lost. Under the Letter 3917, the enterprises should pay attention to the annual leave days of their employees and should fix annual leave scheme and notify their employees.

In case where any employee requests and works voluntarily on the planned annual leaves, it is necessary not to forget to arrange another annual leave plan for him/her. If not, the concerned enterprise shall be risked to pay to the employee 300% of salary unit or his/her actual salary for working on annual leave days. Furthermore, the payment for unused annual leaves may create a bad practice in the management of human resources.