

Public Comments Sought on PRC Enterprise Mass Layoff Provisions

The Ministry of Human Resources and Social Security (MOHRSS) issued on 31 December 2014 a draft regulation on enterprise mass layoff, viz. the *Provisions on Enterprise Mass Layoff (Draft for Comments)* (the “Draft Provisions”). The Draft Provisions represent an effort by the central government to safeguard employment amidst China’s economic slowdown. Public comments are invited to be submitted by 31 January 2015.

The Draft Provisions re-state the legitimate reasons for mass layoff, the employees who have priority to be retained and the employees to be re-hired within 6 months, all as already provided in Article 41 of PRC Labour Contract Law (LCL) and the protected employees as provided in Article 42 of LCL.

The Draft Provisions also provide the detailed procedures and requirements to implement a layoff plan as well as the employer’s obligations if the number of the employees who are terminated by mutual consent exceeds 20, and these requirements render mass layoffs in China more difficult.

Employers are urged to adopt certain measures to avoid mass layoff before implementing a layoff plan

The Draft Provisions suggest that employers, after consultation with the unions or the employee representatives, adopt certain measures to avoid mass layoff or to reduce the number of employees to be laid off on the ground of Article 41 of LCL.

The measures recommended by the Draft Provisions include providing training to the employees to facilitate their relocation to their new positions or to improve their professional skills, reduction of working hours, salary cut, job rotation, etc. If the recommended measures are adopted, the government will provide financial subsidy to the employers to cover the expenses incurred, such as the

employee’s living subsidy, the employee’s social insurance contribution, and the training expenses, etc.

While these are called “recommended measures” in the Draft Provisions, in reality they become a requirement on the employers, because the employers have to evidence their efforts in avoiding the mass layoff in the prescribed follow-up procedures (see below) of implementing a layoff plan.

It remains to be seen if any suggestion by the public in response to this Draft Provisions that the recommended measures should remain an option for the employers in name and in reality would be favourably received by MOHRSS.

Procedures and requirements to implement a layoff plan

Following the efforts and measures to avoid mass layoff, employers are required to follow the procedures and requirements if a mass layoff has to be implemented anyway:

Step 1: Explain the circumstances 30 days in advance to the union or all of the employees, including: (i) the specific circumstance listed in Article 41 of LCL and the reasons resulting in that specific circumstance with certain supporting documents on the business operation; (ii) how the specific circumstance impacts the business operation and the employees; and (iii) the measures having been adopted to avoid mass layoff or to reduce the number of employees to be laid off.

The Draft Provisions do not provide any detailed or specific guidance under Article 41 of LCL as to what amounts to “serious difficulties in production or business operation”, “switching production, introducing material new technological innovation or revising business methodologies” or “major change in the objective economic circumstances”, and such

generality has caused intensive disputes since its taking effect on 1 January 2008. It would be helpful if these terms could be elaborated.

Step 2: Propose a preliminary layoff plan which includes: (i) the statutory ground for mass layoff; (ii) the scope, number and percentage of mass layoff; (iii) the standards for selecting the employees to be laid off; (iv) the timeline and steps to implement the layoff plan; and (v) the severance package.

Step 3: Solicit the opinion of the union or the employees, and make appropriate revisions and announce the finalised layoff plan and the name list.

Step 4: Report to the local labour bureau in writing which should include: (i) the finalised layoff plan; (ii) the name list determined according to the layoff plan; (iii) the supporting documents evidencing that the employee has gone through Step 1 & 3; (iv) the employer's statement on its ability to pay salary, severance and social insurance contributions in due course to the employees to be laid off; (v) the measures adopted to avoid mass layoff or to reduce the number of employees to be laid off; (vi) other documents required by the local labour bureau. The local labour bureau will issue a written acknowledgement if the documents are complete and satisfactory.

Step 5: Implement the layoff plan within 10 days after receiving the written acknowledgement from the local labour bureau.

In addition to the employees who have priority to be retained according to Article 41 of LCL, the Draft Provisions provide that the employees who are "survivors of martyrs" or "retired soldiers employed by the employer" also have priority to be retained.

If an employer fails to follow Step 1 or Step 3, the union or the employees may require the employer to undergo the layoff procedures again. However, it is not clear how any failure to the procedure would impact the termination with the employees, i.e., would the termination be considered as an illegal termination or the employment shall resume as if it has never been terminated.

Also, the employer may be ordered to make correction and be fined an amount between RMB2,000 to RMB20,000 if there is any misrepresentation in the documents submitted to the local labour bureau in Step 4.

Employer's obligations where 20 or more employees are mutually terminated instead of unilaterally terminated on the ground of Article 41 of LCL

If an employer intends to implement a layoff plan by mutual termination with 20 or more of the employees, instead of termination on the ground of Article 41 of LCL, the employer is required to (i) notify the union or all of the employees of the mutual termination 30 days in advance, and (ii) report to the local labour bureau the number of the employees to be mutually terminated.

The employer may be ordered to make correction and be fined an amount between RMB2,000 to RMB20,000 if such employer fails to satisfy either of the obligations.

The Draft Provisions are also unclear on how the 20 or more of the terminated employees should be counted. For instance, do we only count those who are mutually terminated on the same day or also those mutually terminated within a certain period of time? This may lead to uncertainty and inconsistent enforcement in practice.

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