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China's Social Security Implementing Rules Are In Force – What's Next?

Shortly before China's *Social Insurance Law* ("SIL") came into effect on July 1, 2011, the Ministry of Human Resources and Social Security ("MOHRSS") issued draft regulations on the enrollment of foreigners in China's social security system. The draft regulations are controversial because they purport to make enrollment by foreign workers mandatory, a state of affairs which is almost unprecedented in PRC law.

After a brief public consultation period, the draft regulations were then made effective, with few amendments, as *Interim Measures on Participation in Social Insurance by Foreigners Working in China* 在中国境内就业的外国人参加社会保险暂行办法 (the "Measures") on October 15. Unfortunately, the Measures leave a number of key questions unanswered and employers across China are now left wondering how they are expected to comply.

Which Employees are Affected?

The Measures require all foreigners employed in China to be enrolled in China's social security system. The definition of "foreigners" includes persons who are: a) not Chinese citizens; and b) hold a relevant Chinese work permit (eg: PRC employment visa, foreign expert certificate, foreign journalist card and/or permanent residence card). It includes foreigners employed by PRC subsidiaries or representative offices as well as those employed overseas and seconded to work in these entities.

For now, the definition excludes Chinese permanent residents of Hong Kong, Macau and Taiwan, who are subject to separate regulations.

What Coverage is Provided?

China's social security system consists of five basic social security programs: basic pension, basic medical insurance, unemployment insurance, work-related injury insurance and maternity insurance. The Measures make participation in all five programs compulsory.

The Measures are silent on the entitlements that foreigners are entitled to so the inference is that these will be the same for local citizens and foreigners. This raises concern because the benefits currently offered under China's social security system are quite meager and are administered in accordance with local regulations and standards.

Employers in China are required to participate in the PRC Housing Fund for the benefit of local employees but this is not part of the PRC social security system and is therefore not covered by the Measures. Foreign employees are not required to participate in the Housing Fund.

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The contents are intended for general information purposes only and are based on our understanding of the relevant Chinese law and practice and our experience representing foreign companies in China. Law and practice concerning foreign related business in China are subject to change and may require confirmation from the relevant authorities. You are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

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How Much Will This Cost?

The cost of participation is likely to be a significant concern for most employers and employees. The total amount of social security contributions and the employer/employee cost-sharing ratio varies from place to place. In most cities, employers are responsible for contributing between 32-37% of their employees' average monthly remuneration over the past calendar year, subject to a cap of 300% of the local average monthly wage ("LAMW"). Employees will contribute approximately 10-15%.

The chart below illustrates the current monthly contribution rates for employers and employees in each of Beijing, Shanghai and Guangzhou.

	Beijing		Shanghai		Guangzhou	
	Employer	Employee	Employer	Employee	Employer	Employee
Pension	20%	8%	22%	8%	12%	8%
Medical Insurance	10%	2%	12%	2%	8%	2%
Work-related injury	0.2%	0%	0.5%	0%	0.5%	0%
Maternity Insurance	0.8%	0%	0.8%	0%	0.85%	0%
Unemployment	1%	0.2%	1.7%	1%	2%	1%
Total	32%	10.2%	37%	11%	33.35%	11%
Max. amount (Rmb)	4,033	1,289	4,325	1,286	2,487	1,096

Taking Shanghai as an example, the Rmb5,611 cap on employer monthly contributions will be satisfied for employees in Shanghai earning U.S.\$21,915 a year or more. Even so, the combined contributions for these employees represent an additional U.S.\$10,519 per year per foreign employee, a cost which many employers will have to incur alone if they provide their foreign staff with tax equalization.

What Comes Next?

What disturbs employers most about the new regulations is that key questions about the arrangements remain unanswered. Although the SIL and the Measures clearly require all foreign staff to be enrolled, the actual enrollment procedures, arrangements for paying contributions and enforcement have all been left to local authorities. This is usual in China but there are as yet few cities, including Shanghai, to issue any notices or rules about how the Measures will apply to foreigners.

Consequently, cities such as Shanghai, which previously established voluntary participation for foreigners in some or all of the social security schemes, appear to have opted simply to continue these indefinitely. This means that employers in those cities will be under no legal obligation to make contributions for their foreign staff or withhold employee contributions to the social security schemes. However in other cities, like Tianjin, which have already established compulsory arrangements or are in the process of doing so, employers will certainly need to ensure foreign staff are enrolled and contributions are paid. Eventually, all cities in China may move toward a universal standard set of policies and procedures but that may be several years in the making.

For now, since the Measures require employers to comply with local social security rules, they need to investigate the local enrollment policies and procedures in each community where they employ foreign staff and take whatever steps are necessary to comply. In Shanghai and Suzhou, local arrangements provide for voluntary participation in only the basic pension, basic medical and basic work-related injury insurance. Inquiries should be made at the local bureau for administration and settlement center for social security funds (社会保险事业管理中心) or, in some cities, the tax bureau.

Since the Measures are now in effect, employers should make these inquiries now for all current foreign personnel and seek to enroll new staff within 30 days of them obtaining their PRC work permit or equivalent.

Penalties

It is important that employers do comply with the local arrangements once they are in place. The financial penalties for non-compliance under the SIL are severe and the Measures empower authorities in China's social insurance administration to share information with authorities handling work permits for foreigners as a means of verifying compliance. Failing to comply could potentially result in delayed or rejected work permit applications.

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