

New Development of Legal Requirements in China on Maternity Allowance

By Yue Shi and Ron Cai

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1. New Development of National Law and Shanghai Local Regulation

The *PRC Social Insurance Law* (the “Social Insurance Law”), which was issued by the Standing Committee of the National People's Congress and became effective July 1, 2011, establishes national standardized social insurance systems in China, including basic pension, basic medical insurance, work-related injury insurance, unemployment insurance, and maternity insurance. Under Article 56 of the Social Insurance Law, the maternity allowance for a female employee's maternity leave is no longer based on her own average monthly salary during the previous year. Instead, as of July 1, 2011, it must be calculated according to the average monthly salaries for all employees of the same employer during the previous year (the “employer's average monthly salary”). This is good news for low-paid employees but bad news for highly compensated employees, and may add new costs and uncertainty for employers.

Different local governments in China may have different approaches in implementation. Following the Social Insurance Law, Shanghai Municipal Government issued the *Circular on Implementing the Social Insurance Law and Adjusting the Current Maternity Insurance Policies in Shanghai* (the “Shanghai Circular”), which became effective on July 1, 2011 as well. The Shanghai Circular restates that the monthly maternity allowance granted to a female employee during her maternity leave shall be the employer's average monthly salary. If the employer's average monthly salary is higher than three times the average salary of all employees in Shanghai Municipality, such allowance payable from the social insurance fund will be capped at three times the average salary of Shanghai Municipality, and the employer must make up the difference between the allowance paid from the fund and the employer's average monthly salary.

In addition, if the female employee has changed her job during the previous year before her maternity leave, according to the Shanghai Circular, the maternity allowance for her should be equal to the weighted average of the employer's average monthly salaries of her previous and current employers.

The Shanghai Circular also increases the maternity insurance premium rates. Under the previous regulations, employers needed to pay maternity insurance premiums at 0.5% of the payment base every month. This has been changed to 0.8% of the payment base.

2. Related Issues

Impact on Maternity Allowance Entitlement

The new benchmark established by the Social Insurance Law and the Shanghai Circular (collectively, the “New Rules”), i.e. the employer’s average monthly salary, may generate a significant difference in maternity allowance entitlement, especially within an employer with dramatic salary discrepancy. A lower-paid female employee can receive a windfall if the employer’s average monthly salary is high, while a high-salary employee’s maternity allowance will be substantially decreased by the New Rules.

The rationality behind the new benchmark, as indicated in the [Q&A about adjustment to social insurance policies in Shanghai Municipality](#) as published on the official website of Shanghai Municipal Human Resources and Social Security Bureau, is that “in general, female employees giving birth to a baby are comparatively young with shorter terms of service in the employers; therefore, the new benchmark would benefit most of female employees as well as better reflect the principle of fairness.” However, we are not sure whether the legislator ever carefully thought through the formula that would create a situation whereby a lower-paid employee can receive more compensation while she is on leave than when she is actually working.

Seconded Employees

As defined in Article 58 of the *PRC Labor Contract Law* (the “Labor Contract Law”), the employer under a secondment arrangement should be the entity seconding the employee. The Social Insurance Law and the Shanghai Circular do not provide any specific rules on secondment arrangement. Accordingly, it implies that the said employer’s average monthly salary should be the average salary of the entity seconding the employee, such as the Foreign Enterprise Human Resources Service Company (“FESCO”) and China International Intellectech Corporation (“CIIC”), instead of the company to which the employee is seconded. Our inquiries with FESCO and CIIC have confirmed this understanding.

According to the Labor Contract Law, the entity seconding the employee must enter into a fixed-term employment agreement with the employee for not less than two years. When the employee has no work to do during the effective term of the employment, such entity must continue to pay the employee the salary at the minimum wage rate prescribed by the local government until the employee has been seconded to another company. As a result, the average salary of the entity seconding the employee will probably be reduced by those receiving minimum salaries. It may follow that high-paid female employees under secondment arrangements will receive even lower maternity allowance if the average salary of the company they actually work for is higher than that of the seconding entity. This creates a big potential problem for those female employees and their FIE or foreign representative office employers if the nominal employment relationship is with FESCO, CIIC, or other seconding agencies.

Gap Between the Maternity Allowance and the Actual Monthly Salary

As discussed above, the maternity allowance received by a high-paid employee may be far less than her regular salary. Before the effectiveness of the Social Insurance Law, where a female employee is entitled to receive maternity allowance from the social insurance fund which is normally capped at three times the local employees' average monthly salary during the previous year, the employer was required to make up the difference between the maternity allowance and the employee's regular salary before her maternity leave.

Unfortunately, both the Social Insurance Law and the Shanghai Circular are silent on whether the employer is still obligated to make up the difference if such female employee's actual monthly salary is higher than the employer's average monthly salary. From a literal reading of the New Rules, the maternity allowance entitlement of a female employee is no longer linked to her personal salary, and the employer is not required by the New Rules to pay the employee other than the gap between the employer's average monthly salary and three times the average salary of Shanghai Municipality (if applicable) as required by the Shanghai Circular.

However, on the other hand, some other laws and regulations that require employees to make up the difference are still effective. In particular, the *PRC Law on Protection of Women's Interests* (the "Women Protection Law"), which was issued by the National People's Congress and amended by the Standing Committee of the National People's Congress, and has the same level of legal effect as the Social Insurance Law, provides that a female employee's salary may not be decreased during her maternity leave. Legally speaking, for two laws formulated by the same authority with equal legal effect, if there is any conflict between the new provision and the old one, the new provision shall prevail. However, in this case, as the Social Insurance Law provides rules on maternity allowance, while the Women Protection Law deals with the salary entitlement during maternity leave, the provisions are apparently not in conflict with each other. Accordingly, if an employer does not make up the difference based on the employee's regular salary, it may have a potential risk under the Women Protection Law and other existing laws and regulations related to salary for maternity leave.

Therefore, this issue is still unclear now, and we will continue to follow up with additional interpretation or implementing rules (if any). Once this issue is clarified, we would suggest that employers revise their employee handbooks to accommodate the new change in maternity allowance as well as employers' obligation to make up the difference.

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