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Social Insurance in Shanghai, To Pay Or Not To Pay?

Under the *PRC Social Security Law*[1], China adopted its own social insurance system, including the following 5 items: pension insurance, medical insurance, work-related injury insurance, unemployment insurance and the maternity insurance. For the first time, it is mentioned at a national level that foreigners working in China shall participate in the social insurance.

Specifically, foreigners legally working in China and holding a work and a residence permit, or the permanent residence permit, shall subscribe to the social insurance. Chinese employers shall carry out the social insurance registration for their foreign employees within 30 days after obtaining the work permit. If they fail to do so, they will be punished accordingly.

Afterwards, many cities and provinces, such as Beijing, Wuhan and Shenzhen, released their local provisions to regulate the procedure for the foreigners' participation in the social insurance.

Social Insurance in Shanghai: the exception

Back in 2009, the local rules of Shanghai were providing the participation in the social insurance system for foreign employees as an option, which ended up creating a conflict with national laws and regulations.

However, nothing changed after 2011. In practice, as Shanghai Human Resources and Social Security Bureau keeps following the local rules, foreign employees in Shanghai can opt to participate in the Chinese social insurance. Therefore, unless it is clearly agreed in the labor contract, foreign employees are not obliged to subscribe to the Chinese social insurance. And it has been proved to be the choice of the majority of companies in Shanghai, together with the agreement of their foreign employees.

Before 2020, the replies of Shanghai Human Resources and Social Security Bureau were in the same line, being unable to provide further explanation regarding the contradiction between the national and local provisions.

New trend in Shanghai

Further to the social insurance reform happened in China in 2020 in terms of contribution collection, according to which the Tax Bureau replaces the Human Resources and Social Security Bureau as the collection authority; Shanghai Human Resources and Social Security Bureau has emphasized that national laws and regulations apply over the local rules and that their implementation will become stricter.

As a matter of fact, we can see this new trend in the official answers that are recently given by Shanghai Social Security bureau when consulted about this matter.

[1] Promulgated by the Standing Committee of the National People's Congress and effective since July 1, 2011, last amendment effective since December 29, 2018.

Tips for DS Clients

The Social Security Law clearly provides that the companies failing to pay the social insurance for their employees will be ordered to make up the payment and also a daily fine equivalent to 0.05% of the overdue payment will be imposed. If no rectifications are made by the companies within a prescribed time, a fine from 1 to 3 times the amount of the overdue payment could be imposed to the companies.

Although we have not found any judicial cases whereby there is a decision imposing this kind of punishment to companies, taking into consideration the new trend, we suggest to consider the following options:

1. Upon agreement between the parties, the company withholds from the salary of the foreign employees a specific amount for a certain period, in case the company is ordered to make up the social security payment in the future.

2. Upon agreement between the parties, the company subscribes to the social insurance for the new foreign employees hired. If they refuse to participate in the social insurance, the company can enter into a side agreement with the foreign employee specifying that any legal consequences arising from the non-subscription to the social insurance shall be assumed by the employee himself, and the company reserves the right for full recovery the amounts claimed in this regard. Please note that Shanghai Human Resources and Social Security Bureau is not bind by this kind of side agreement.

3. The company may check the existence of a bilateral social security treaty between China and the country of the foreign employee concerned. Currently, China has concluded bilateral social security treaties with 12 countries, including German, South Korea, Denmark, Canada, Finland, Switzerland, the Netherlands, Spain, Luxembourg, Japan, Serbia and France. Except the bilateral treaty with France, which has not been ratified yet, the rest have been officially implemented.

   As an example, according to the bilateral treaty with Spain, foreign employees can exempt from the subscription to pension insurance and unemployment insurance in China if they reach the below conditions:

   (i) being dispatched by the employer in Spain to work in China;
   (ii) being employed on seagoing vessel flying the flag of Spain, or the seagoing vessel flying the flag of China but generally living in the territory of Spain;
   (iii) being employed on the aircraft, referring to the management personnel on the aircraft or the aircrews, whose headquarter is in Spain;
   (iv) being diplomatic and consular institution personnel, and the Spanish public servants engaging in official activities in China.

   These foreign employees shall subscribe to the social insurance in Spain and provide the original participation proof issued by the General Office of the Social Security of Spain.

   It shall be noted that the longest exemption period for these employees first time applying the exemption of the subscription to the social insurance is 6 years, and it could be extended based on the agreement of the Chinese and Spanish authorities. Nevertheless, the foreign employees enjoying the benefits under such treaty shall still participate in the medical insurance, the maternity insurance and the work-related injury insurance in China. The participation to these items will be made through the Chinese subsidiary of the foreign employer.

   As per our analysis, other bilateral treaties also provide similar applicable scope, exemption items and exemption period.

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