



# China Regulatory Updates

October 2011

## Connotation of "Han Yi"

- › Standardization
- › Unique player in the PRC legal service market
- › Simplicity, but always with a focus on key points and attention to details

## Our Values

- › Professionalism
- › Cost Efficiency and Effectiveness
- › Constant Self-Improvement Towards Perfection



## ■ LABOR LAW / 劳动法

### Foreign Employees in China Now Required to Participate in PRC Social Insurance

在境内工作的外国人需参加中国社会保险

## ■ INTELLECTUAL PROPERTY / 知识产权

### SAIC Plans to Revise *Trademark Law* Again

工商总局拟对《商标法》进行第三次修订

## ■ BANKRUPTCY / 破产法

### Supreme Court Releases Its First Interpretation of *Enterprise Bankruptcy Law*

最高法出台《破产法》司法解释

#### Shanghai Office

Suite 1801, Tower I, Huayi Plaza  
2020 West Zhongshan Road  
Shanghai 200235, China  
Tel: (86-21) 6083-9800  
Fax: (86-21) 6083-9811

#### Beijing Office

Suite C203-5A  
Lufthansa Centre Office Building  
Beijing 100125, China  
Tel: (86-10) 6410-5322  
Fax: (86-10) 6410-5322

## LABOR LAW / 劳动法

## Foreign Employees in China Now Required to Participate in PRC Social Insurance

## 在境内工作的外国人需参加中国社会保险

The PRC Ministry of Human Resources and Social Security (“MHRSS”) has formally issued the *Interim Measures for Foreigners Working in China to Participate in Social Insurance* (the “Interim Measures”) recently, which will become effective as of October 15, 2011. After the Interim Measures come into force, foreigners employed by enterprises, public institutions and other organizations registered in China (the “Employers”) as well as those concluding employment contracts with foreign employers and then dispatched to their employers’ PRC branches and representative offices (the “Domestic Offices”) should also participate in the social insurance applicable to Chinese employees, i.e., basic pension insurance, basic medical insurance, work injury insurance, unemployment insurance and maternity insurance.

The Interim Measures have generally kept the contents of the relevant draft for comments issued by MHRSS in June this year (please refer to our July 2011 issue of *China Regulatory Updates* for details). It should be noted however that the Interim Measures do not require any Hong Kong, Macao or Taiwan resident working in mainland China to participate in the PRC social insurance scheme for the time being. Detailed rules thereof will need to be further clarified by MHRSS. Additionally, in order to facilitate the Employers and the Domestic Offices to comply with the Interim Measures, the Interim Measures expressly provide that if any Employer or Domestic Office violates the Interim Measures, relevant punishments under the PRC Social Insurance Law will apply (the Employer or Domestic Office will be subject to a penalty of up to three times the unpaid social insurance premium).

Participation in social insurance is a mandatory requirement under the Interim Measures, which will significantly increase the labor costs of Employers and Domestic Offices that have heavy reliance on foreign employees and may thus negatively impact the overall investment environment of China to some extent. Currently many local governments are formulating relevant supporting rules on specific procedures and certain details (such as specific insurance rate applicable to foreign employees) with respect to foreigners’ participation in the PRC social insurance.

人力资源和社会保障部(“人保部”)于近日正式出台了《在中国境内就业的外国人参加社会保险暂行办法》(“《暂行办法》”),自2011年10月15日起实施。届时,在中国境内注册或者登记的企业、事业等单位(“用人单位”)依法招用的外国人,以及与境外雇主订立雇用合同后,被派遣到中国境内的分支机构、代表机构(“境内工作单位”)从事相关工作的外国人均需与中国雇员一样参加相关职工基本养老保险、职工基本医疗保险、工伤保险、失业保险和生育保险等中国社会保险。

《暂行办法》基本保留了人保部于今年6月份出台的相关征求意见稿的主要内容(详情请参见本所2011年7月期的《中国法律更新》)。但值得注意的是,《暂行办法》删除了原征求意见稿中关于在内地就业的港、澳、台人员参照上述办法参加内地社会保险的规定,因此上述人员将暂时无需按照《暂行办法》参加内地社会保险,港、澳、台人员参加内地社保的具体规则还尚待人保部进一步明确。此外,为敦促用人单位和境内工作单位遵守《暂行办法》的相关规定,《暂行办法》明确用人单位或境内工作单位违反该办法的,将适用《社会保险法》中的相应罚则(用人单位和境内工作单位最高可处应缴而未缴的保险费数额三倍的罚款)。

《暂行办法》中社会保险参保义务是一项强制性义务,其正式实施将显著提高那些高度依赖外国员工的用人单位和境内工作单位的用工成本,并可能会对投资环境带来一定的负面影响。目前各地正在制定与此相关的配套规定,对具体的实施程序和一些细节内容(比如适用于外国员工的缴费比例等)进行明确。

## INTELLECTUAL PROPERTY / 知识产权

## SAIC Plans to Revise Trademark Law Again

## 工商总局拟对《商标法》进行第三次修订

SAIC recently issued a draft of the revised PRC Trademark Law to solicit public opinions (the "Draft"), launching the third amendments to the *Trademark Law* since its effectiveness (*the previous two were in 1993 and 2001 respectively*). Compared with the existing *Trademark Law*, the Draft has noticeably provided that "sound" may also be registered as a trademark. Other revisions thereunder mainly focus on recognition of well-known trademarks, restriction on malicious registration, and qualifications required for one to challenge against any preliminarily approved trademark:

1. The Draft adopts the international principle of passive protection for well-known trademarks, which means that well-known trademarks will only be recognized by competent authorities (i.e., the Trademark Office, the Trademark Review Committee or a people's court) during the trademark registration, review or other administrative procedures, or trademark civil dispute proceedings at the request of relevant parties when such trademarks are subject to certain infringement by a third party. Previously, SAIC used to recognize well-known trademarks simply based on application of trademark holders without any trademark infringement dispute.
2. Under the existing Trademark Law, except for a trademark with certain influence (e.g., a well-known trademark), generally speaking, no trademark will be protected by the *Trademark Law* if it is not registered. In order to better crack down upon malicious trademark registration in practice such as free-rider phenomena, the Draft expressly provides that if an applicant knows that another person is using a trademark (even if such trademark is not registered and does not have considerable influence) in China due to its contractual or business relationship with such person or geographical or other similar relationships, its application for the registration of any trademark the same as or similar to such person's trademark on the same or similar commodities should be denied.
3. According to the existing Trademark Law, anyone may raise an objection against a preliminary approved trademark within three months from the date of public announcement of such trademark, and a trademark may only be registered if no objection is raised during the public announcement period. In the Draft however, only "a prior right holder or an interested party" may raise the objection as mentioned above, which is intended to control malicious objections.

日前, 国家工商行政总局发布了《商标法》修订草案征求意见稿(“征求意见稿”)。这是继 1993 年、2001 年修改后, 工商总局对《商标法》的第三次修改。与现行商标法相比, 此次征求意见稿将“声音”纳入了商标申请注册范围, 并重点从规范驰名商标的认定、限制恶意抢注行为以及限定商标异议主体等方面进行了修改, 具体为:

1. 征求意见稿采纳了驰名商标被动认定的这一项国际惯例, 即驰名商标应当根据相关当事人的请求, 在其受到他人的侵害时, 由商标局、商标评审委员会或人民法院在商标注册、评审、管理等行政处理程序和商标民事纠纷诉讼程序中进行认定。此前, 国家工商总局曾一度可以根据商标权利人的申请主动、批量地认定驰名商标。
2. 现行商标法下, 除非是有一定影响力的商标(如驰名商标), 一般的商标未经注册并不受商标法保护。为更好地遏制实践中“傍名牌”等恶意抢注行为, 征求意见稿中明确, 如果申请人因与该他人具有合同、业务往来、地域关系或其他关系而明知该他人在中国在先使用相关商标(即使未经注册、该等商标也没有较大的影响力)的, 其拟申请的相同或者类似商品上与他人商标相同或者近似的, 不予注册。
3. 现行商标法规定, 经初步审定的商标, 自公告之日起三个月内, 任何人都可以提出异议, 公告期满无异议的方可注册。此次征求意见稿将前述主体限定为“在先权利人或者利害关系人”, 旨在抑制屡屡出现的恶意异议行为。

## BANKRUPTCY / 破产法

### Supreme Court Releases Its First Interpretation of Enterprise Bankruptcy Law

#### 最高法出台《破产法》司法解释

The PRC Supreme People's Court has lately issued the *Provisions on Several Issues Concerning the Application of the*

近日, 最高人民法院公布了《最高人民法院关于适用〈中华人民共和国企业破

*PRC Enterprise Bankruptcy Law (I)* (the “Judicial Interpretation”), effective as of September 26, 2011. The Judicial Interpretation mainly deals with certain common issues the people’s courts may face when they accept and hear bankruptcy cases, with an aim to facilitate the relevant judicial proceedings and enhance the enforceability of the *Bankruptcy Law*. Currently many judicial authorities appear quite passive or reluctant to take active measures when accepting and hearing bankruptcy cases due to lack of sufficient interpretations of the *Bankruptcy Law*.

Specifically, the Judicial Interpretation sets out in detail certain issues that should be noted when the people’s courts review the bankruptcy application of an enterprise, allocation of the rights and obligations of relevant parties during bankruptcy liquidation and etc., and further clarifies the burden of proof in relevant bankruptcy cases. For example, the Judicial Interpretation specifies the detailed standards for certain key concepts (including “being unable to repay debts that are due”, “becoming insolvent to settle all debts” and “obviously lacking solvency” among others) under the *Bankruptcy Law*. Clarification of such concepts provides express legal basis for acceptance of bankruptcy applications in judicial practice.

The promulgation of the Judicial Interpretation is expected to help ensure the fair and orderly realization of creditors’ rights, create a better competition environment and optimize the allocation of social resources.

产法》若干问题的规定（一）》（“司法解释”），对人民法院受理和审理破产案件时一些常见的问题作出统一规范，意在推动破产案件的司法处理程序，改变目前破产法司法实践中操作依据不足、司法部门怠于作为等情况，从而更好地保护债权人权益。司法解释已于 2011 年 9 月 26 日起施行。

具体而言，司法解释详细规定了人民法院审查企业破产申请时应注意的事项，破产清算时各方的权利义务等，并对破产案件中的举证责任分派进行了进一步明确。比如，此次司法解释对“不能清偿到期债务”、“资产不足以清偿全部债务”及“明显缺乏清偿能力”等构成破产原因的核心概念分别做出详细规定，为司法实践接受破产申请案件提供了明确的法律依据。

本次司法解释的出台应有助于进一步保障债权公平有序地受偿、完善社会的优胜劣汰竞争机制和优化社会资源配置。

*For further information, please write us at [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com).*

*These updates are intended for information purpose only and are not a legal advice or a substitute for legal consultation for any particular case or circumstance. © Han Yi Law Offices All rights reserved.*