



# China Regulatory Updates

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## LABOR & EMPLOYMENT

### Supreme People's Court Issues New Rules to Clarify Labor Disputes

Since the *PRC Labor Contract Law* and the *PRC Labor Mediation and Arbitration Law* being issued in 2008, the number of labor and employment disputes has increased dramatically and many disputes were failed to be efficiently resolved due to the lack of specific rules clarifying labor disputes in details. In order to provide some detailed guidance for PRC people's courts in their hearing and judgment practices with respect to labor and employment disputes, the PRC Supreme People's Court (the "SPC") recently has promulgated the *Interpretations of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trial of Labor Dispute Cases (III)* (FA SHI [2010] 12 HAO) (the "Interpretations"). Here are some of the highlights of the Interpretations:

- (a) Cases Related to Social Insurance Disputes. According to the Interpretations, people's courts should accept cases concerning damage claims made against employers by employees alleging that they are unable to enjoy social insurance benefits due to their employers' failure to go through the social insurance procedures and the social insurance agencies' refusing to help rectify such failure for them.
- (b) Parties to Litigations of Certain Labor Disputes. According to the Interpretations, where a dispute arises between an employee

and his/her employer without a lawful operation qualification, the employer or its shareholder(s) should be the parties to the litigation; where an employer "borrows" a business license from others by means of being subordinated to the owner of the business license, both such employer and the owner of the business license should be the parties to the litigation.

- (c) Employment Relationship for Specific Persons. Persons who (i) retained jobs with their respective former employer without salary, (ii) have early retired from previous jobs, or (iii) were laid off by former employer(s), may establish formal labor relationship with new employers. In addition, relationship between an employer and a person who has already enjoyed the pension insurance benefits or has started to draw their pension shall be deemed as a labor service relationship rather than a typical labor relationship.
- (d) Burden of Proof for Overtime Working. Where an employee could prove that the employer controls the evidences of his/her overtime works but refuses to provide such evidences, the employer should bear the adverse legal consequence thereof.

## FOREIGN INVESTMENT

### MOFCOM Further Delegates Its Approval Authority Over Certain Foreign-Invested Commercial Enterprises

The PRC Ministry of Commerce (the "MOFCOM") has recently issued a circular (the "MOFCOM Circular") to specify and further delegate its approval authority over foreign-invested commercial enterprises (the "FICEs") engaged in online sales and/or sales via vending machines to its local counterparts at provincial level. According to the MOFCOM Circular,

- (a) In respect of FICEs engaged in online sales:

- (i) All duly approved and legally established FICEs and foreign-invested manufacturing enterprises may be engaged in online sales without the need to obtain any additional approval from MOFCOM central office or its local counterparts;
- (ii) The approval authority over the establishment of FICEs dedicatedly engaged in online sales has been

delegated to provincial MOFCOM offices; and

- (b) Engagement in sales via vending machines by FICEs (including FICEs to be established to use vending machines as their sales channel and currently existing enterprises which intend to adding sales via vending machines into their business scope) should be subject to approvals by the competent

provincial MOFCOM offices. Previously, such approval authority was vested in central MOFCOM office.

It is noteworthy that the MOFCOM Circular does not apply to FICEs without physical shops and making sales through means such as television, telephone, mail order and etc. Theoretically speaking, establishment of such FICEs are still subject to central MOFCOM office's approval.

## M&A

### Opinions issued by State Council to Promote Enterprise Mergers and Restructurings

On September 6, 2010, the State Council issued the *Opinions on Promotion of the Enterprise Mergers and Restructurings* (GUO FA [2010] 27 HAO) (the "Opinions"), with an aim to boost the development of enterprise mergers and restructurings and to optimize the allocation of resources. According to the Opinions, merger and restructuring projects in such industries as automobile, iron, steel, cement, machinery, electrolytic aluminum and rare earth will be specifically promoted. Highlights of the Opinions are as follows:

- (a) Elimination of Barriers to Mergers and Restructurings: According to the Opinions, local governments are required to revoke local rules and regulations which may restrict cross-region mergers and restructurings. Further, local governments are allowed to make post-transaction fiscal and tax revenue sharing arrangement with respect to cross-region merger and restructuring projects based on the scale and profitability of the enterprises involved and etc. The Opinions also emphasize that local governments should encourage private investment in non-prohibited industries, relax restrictions on shareholding ratio of private capital in the target companies and promote the investment by private capital into the competitive areas of monopolistic industries.
- (b) Financial and Tax Incentives: The Opinions have put forward various policies in a bid to solve certain typical problems that may be encountered in the process of merger or restructuring projects, including tax, land

utilization, debt restructuring and employee placement, among others. According to the Opinions, preferential tax treatment will be tendered for asset appraisal and appreciation, debt restructuring gains, real estate transfer and etc. involved in the process of mergers and restructurings. Moreover, government subsidies may be provided for employee settlement. In addition, where allocated land use rights are involved in mergers or restructurings, such land use rights may continue to be allocated to the relevant enterprises or to be invested by local governments as capital contributions to such enterprises.

- (c) Widen Financial Channels for Enterprise Mergers and Restructurings: The Opinions encourage commercial banks to extend comprehensive credit lines to enterprises after mergers or restructurings and also encourage securities companies, asset management companies, equity investment funds and industry investment funds to participate in the process of enterprise mergers and restructurings and provide financial supports.

The Opinions have provided practical instructions to eliminate obstacles to enterprise mergers and restructurings which we believe, will to some extent accelerate enterprise mergers and restructurings in a more rational and efficient way. Pursuant to the Opinions, the Ministry of Industry and Information Technology will together with the National Development and Reform Commission, MOFCOM, the State Administration for Industry and Commerce

and etc. to formulate more detailed rules and regulations to effectuate the various policies

provided under the Opinions.

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### REAL ESTATE

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#### PRC Government Further Tightens Up Land Supply

Recently, the PRC Ministry of Land and Resources and the PRC Ministry of Housing and Urban-Rural Development have jointly issued the *Circular on Further Strengthening the Administration of Use of Land and Construction of Real Estate Projects* (GUO TU ZI FA [2010] 151 HAO) (the “Real Estate Circular”) in order to further implement the *Circular of the State Council on Determined Suppression of the Exceedingly Rapid Rise of Certain Urban Housing Prices* issued in early this year.

In addition to encouraging the construction of government-subsidized housing, the Real Estate Circular also emphasizes that (i) once a parcel of land has been kept idle by a developer for more

than one year on the account of the developer, neither such developer nor its controlling shareholder may participate in any bidding for any other land in the future; (ii) when participating in a public bidding, auction or quotation process, a bidder should provide a commitment letter indicating that the bid deposit is not composed of any bank loans, shareholders’ loans, sub-loans or raised funds and a credibility certificate issued by a commercial financing institution; and (iii) local governments are prohibited from tying in 2 or more parcels of land, or granting land with areas exceeding the permitted scale, undeveloped land or land with more than 3 development years.

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