

LEGAL BRIEFING

Regulatory Updates

LATEST NEWS

R&P opens Beijing Office

Page 2

**R&P wins Trade Secret
Infringement Case**

Page 2

Introducing Rogier Van Bijnen

Page 8

**Maarten Roos to visit the
Netherlands in late April**

Page 8

**R&P rolls out Compliance
System for Award-Winning
Client**

Page 8

LEGAL DEVELOPMENTS

**Company Law Amends
Registered Capital Rules**

Page 3

**Employment Law:
New Framework for Dispatch
Services**

Page 5

**Lawfully Terminating
Employees**

Page 6



R&P RECOMMENDED IN 2014 BY:

CHAMBERS ASIA PACIFIC

CONTENTS OF THIS BRIEFING

LEGAL DEVELOPMENTS

**Registered Capital Focus on
Amendment to PRC company law**

[p.3]

New Framework for Dispatch Services

[p.5]

Lawful Termination in China

[p.6]

R&P OPENS BEIJING OFFICE

R&P proudly announces the opening of its R&P Beijing office as of 1 March 2014. Despite its strong roots and establishment in Shanghai, R&P has always been engaged by foreign clients for legal assistance throughout all regions in China. In recent years, R&P has been increasingly requested to assist with investment projects and various legal issues in the Beijing area. Therefore, R&P has decided to expand its presence in China, developing Beijing as its second office in China.

R&P Beijing office will work in close cooperation with its Shanghai office and will be led by Mr. Rogier van Bijnen, who joined from Linklaters LLP Beijing to work with multinationals and large SME clients that require legal advice and representation in China.

For an introduction of Rogier Van Bijnen please refer to page 8

R&P WINS TRADE SECRET INFRINGEMENT CASE

In 2011, several employees of a foreign-invested company in Shanghai decided to leave their employer to establish a direct competitor. They collected customer lists and product information from the subsidiary and offered the same products to the company's customers at more attractive terms. We advised to file a claim jointly against the former employees and the competitor, for infringement of our client's trade secrets.

After almost two years, the Putuo District Court finally issued its judgment in late November of 2013. The court did not only confirm the trade secret infringement by the competitor and one of the employees; it also ordered these two parties to pay a substantial amount of damages to compensate our client. We are grateful for the patience and trust that our client has shown in China's judicial system. We also commend the strong showing of the Putuo District Court in recognizing the infringement and protecting the legitimate rights of foreign investors. Last but not least, our congratulations to Mr. Lu Zhiqian, Ms. Teresa Su and Mr. Maarten Roos for bringing this difficult case to a good end!

R&P China Lawyers is a boutique Chinese law firm headquartered in Shanghai, providing high-end legal services to foreign businesses active in China.

R&P Legal Briefing is written to inform clients and friends of the latest developments in Chinese law and practices.

For more on our experience or the services that we have on offer, or to read more articles on Chinese legal topics, please visit our website: www.rplawyers.com

info@rplawyers.com
Tel (+86) 21 6173 8270

The contents of this briefing is for information purposes only, and does not constitute legal advice.

©R&P China Lawyers 2014



Company Law Amends Registered Capital Rules

By Maarten Roos and Kathleen Cao

A legal development announced for 2014 will have a huge impact on how foreign investors plan their investment in China. The amendment of the PRC Company Law, approved by China's top legislative organ on 28 December 2013 which became effective on 1 March 2014, radically changes the way that registered capital is managed under Chinese law.

At present, investors must determine the amount of registered capital in advance, and record this on their business license. They must normally contribute 20% of the registered capital within 3 months, and the full amount two year from issuance of the business license. The amount must reach certain thresholds, and at least 30% must be contributed in cash. Once contributed a CPA must be retained to verify the contribution.

1. Cancellation of Minimum Registered Capital Requirements

The cancellation of the minimum registered capital thresholds should allow more small companies to invest, although it remains to be seen whether this rule-change will open the gates completely. The current legal thresholds for general companies are already quite low (CNY 100,000 for companies with one shareholder, or CNY 30,000 if there is more than

one shareholder), however in practice officials have (and are exercising) the discretion to demand more from foreign investors if the proposed amount is deemed unrealistic to make the project commercially viable. It remains to be seen whether the plans of international companies to start with very small investments will be approved. Moreover, higher registered capital requirements continue to prevail in specific industries, such as banking, insurance, and international freight forwarding.

2. Cancellation of Time-requirements on Capital Contributions

The change from the system based on paid-in registered capital to one based on subscribed registered capital is expected to have the greatest impact. By allowing investors to contribute capital over a much longer period, companies are given much more flexibility in developing their operations.

One consequence may be that shareholders decide on much higher amounts of registered capital than before, as they are now allowed to gradually contribute these over a long time-span as the capital becomes required.

3. Cancellation of Maximum Proportion to In-kind Investments

With the cancellation of the limits on in-kind investment, investors can decide to contribute non-cash investments without restriction. IT companies, for example, could benefit by contributing highly-valued technologies, as long as they can be evaluated and title-transferred.

4. Cancellation of Verification Procedures

Companies will gain much flexibility with the cancellation of the need to engage a CPA and go through verification procedures, and amend the business license, each time that a capital contribution is made. Costs and the time needed to complete these procedures have made it unattractive for companies to split contributions in many installments. Under the new regime, investors will not be inhibited by such costs, and so can make decisions on contributions purely based on commercial considerations and the provisions in the company's Articles of Association.

Implementing Rules to Provide More Details

The amendments to the PRC Company Law have been promulgated at the highest level. However, detailed implementation rules will have to be issued in order for registration authorities to apply them. These regulations determine how much flexibility shareholders will really be given in determining their capital arrangement. These new rules will apply to domestic as well as foreign-invested companies alike.

Another issue to watch for is how the rules will deal with companies that have already been established. Presumably they will fall under the new regime

immediately; those companies that immediately want more flexibility will have to prepare for a change of their Articles of Association, which will become the binding document to determine the registered capital contribution arrangements that a company has in place. But will companies also be allowed to decrease the registered capital, where it is considered too high? Time will tell.

Other Rules to Come?

The amendments to the PRC Company Law were initially agreed at an executive meeting of the State Council chaired by Premier Li Keqiang, on 25 October 2013. Two other changes discussed at this meeting could also have a revolutionary impact on foreign companies doing business in China:

Information on companies registered in China should become completely transparent, easily accessed and checked by both entities and individuals. At present, the level of transparency varies from location to location, and in many districts only lawyers can check a company's registered information.

At present, every company must have a registered address; only certain buildings can serve as registered addresses (with even stricter requirements for foreign-invested companies); and one address can only register one company. This bars the "post office model" whereby one address (such as an accountant, law firm or service provider) serves as registered address of many companies at one time. Presumably, the new rules will change some of this – though to which extent remains uncertain.

With the amendments to the PRC Company Law already promulgated, and further rules expected soon to relax other requirements, the Chinese government is giving a strong signal that it wants to boost the economy by giving more flexibility to businesses – including foreign investors. More detail is expected in the weeks and months to come.



Employment Law: New Framework for Dispatch Services

By Maarten Roos & Victoria Lei

The recent amendments to the PRC Labor contract law put severe restrictions on using dispatched workers which has been common in China for many years.

The business of employing people and then dispatching them to another company for work has in recent times come under severe scrutiny, with a huge impact on two kinds of companies:

1. Subsidiaries of international companies who for one reason or another hire at least part of their workforce through dispatch services providers (incl. FESCO and CIIC).
2. Foreign-invested companies that specialize in providing dispatch services, i.e. hiring employees and then dispatching them to their customers for a fee;

Using dispatched workers has been very common in China for many years. However the recent amendments to the *PRC Labor Contract Law* have put severe restrictions on the practice of using dispatched workers, and these restrictions have been further detailed in the *Interim Provisions on Labour Dispatch Rules* that came effective on 1 March 2014. For example, dispatched workers can only be used for temporary, substitute or auxiliary positions, with the law defining these positions in great detail to avoid potential abuse. Also, the number of dispatched employees may not exceed 10% of the total workforce, and social insurance

contributions must be made in the place where the hiring entity is registered. Breach will trigger severe penalties, and so foreign-invested companies that use many dispatched workers must immediately review their practices, take legal advice, and make arrangements to ensure compliance with the law.

“The recent amendments to the *PRC Labor Contract Law* have put severe restrictions on the practice of using dispatched workers”

Companies that provide the dispatched workers are subject to more regulation as well. Proper licensing has become a major challenge, especially to foreign-invested companies. Companies that provide dispatch services without the proper license risk severe penalties of 1-5 times all income obtained from those services. This initiative is clearly designed to favor those companies that are willing to take the extra steps to be compliant.

For the full article on how the new legal framework for dispatch services in China will impact foreign-invested companies, visit:

<http://www.rplawyers.com/articles/employment-law-update-new-framework-for-dispatch-services-in-china/> or email info@rplawyers.com



Lawfully Terminating Employees: Severance pay calculations and conditions

By Robin Tabbers and Yang Limeng

Employers are obliged to provide severance pay and other contractual arrangements when an employee is lawfully terminated. Situations that require severance pay include termination due to restructuring, termination as a result of a mutual agreement or termination as a result of the expiration of a fixed-term labor contract.

The Labor Contract Law provides an exhaustive list of situations under which an employer may lawfully dismiss its employee. It depends on the situation whether severance pay is required; severance pay (or termination pay) is the amount an employer has to pay to an employee that is lawfully terminated. Any unlawful termination by the employer will result in reinstatement of employment or a punitive compensation equal to the doubled severance pay.

Calculations

Severance pay is calculated at one-month salary for each year. Any working period of six months or above but less than one year must be counted as one year and for working periods less than six months, half a month's salary must be paid as severance. For example, in case an employee worked for 13 months for the same company, he will receive severance pay that amounts to 1.5 month

salary. The one-month salary is calculated – with certain limitations – at the employee's average monthly salary during the last twelve months.

For any period after 1 January 2008 – the date of the enactment of the Labor Contract Law – where the employee's average monthly salary is more than three times the average monthly salary in the location of employment, the latter will be used to calculate severance pay. For example, in Shanghai, the average local monthly salary of 2012 is RMB 4,692, and three times this amounts to RMB 14,076. Thus, an employee whose employment is lawfully terminated in Shanghai can only receive up to RMB 14,076 as severance for each year of employment after 1 January 2008; this rule does not apply to the period prior to the enactment of the PRC Labor Contract Law.

In addition to this “three-times” restriction, the PRC Labor Contract Law also limits the total amount of

severance to a maximum of twelve months average salary. In other words, a lawfully terminated employee can only receive 12 months average salary in maximum even if he or she works for a company for over 12 years.

Severance Pay Agreements

Although employers in China are obliged to provide severance pay to their ex-employees, many employers choose to close severance pay agreements with their employees. Under such an agreement, both parties offer each other additional conditions that are not required by law. For example, an employer can agree to pay a higher amount of severance – this can also be a lump sum – in exchange for the employee's agreement not to file a claim against the employer. However in case the agreed amount of severance pay is lower than the amount the employee is entitled to anyway by law or by other legal documents such as the employment handbook, the agreement will be deemed invalid.

A severance pay agreement can be an efficient measure for an employer with insufficient termination reason to prevent a potential dispute in case the employee would have had a wrongful termination claim, but accepted the severance pay agreement in advance.

Besides negotiating about the amount of severance pay, the employee can also ask for non-monetary benefits, such as a reference letter or keeping certain company properties, e.g. a company laptop. The employer will try to persuade the employee to agree upon waiving as many employment law claims the employee has against the employer as possible. However, certain claims related to minimum wage, overtime, unemployment benefits, compensation benefits and other mandatory legal rights cannot be waived; otherwise such a severance pay agreement would not be valid.

Severance pay agreements usually contain certain other clauses as well. Provisions such as the date of termination, confidentiality clauses and non-

competition clauses are common for severance pay agreements. Also, an employer may insert a 'no rehire' provision or a 'return of company property' provision, depending on the specific situation.

Final Remark for Foreign Employees

Foreign employees need to fulfill a specific requirement upon receiving severance pay. As their employment depends on their work permit, foreign employees are only entitled to severance pay for the period they have a work permit. The duration of foreign employee's work permit is normally shorter than the term of the labor contract. Therefore it is critical for foreign employees to ensure the local employers timely apply for and renew their work permits in order to get full protection of local labor laws



R&P China Lawyers
38/F ICC Tower,
No. 3000 Zhongshan North Road,
Shanghai, 200063, P.R. China
Tel: +86 21 61738270
Email: info@rplawyers.com
Emergencies (24/7):
+86 13641605259 (Mob)

Introducing Rogier van Bijnen

The R&P Beijing office will be led by Rogier van Bijnen, who joins from Linklaters Beijing and also spent six years at the Dutch leading firm De Brauw Blackstone Westbroek (Amsterdam and Beijing). Rogier has been in Beijing since 2009, and focuses on supporting multinational companies, private equity firms and large SMEs on foreign direct investment, mergers and acquisitions, as well as general corporate and commercial work.

Contact Info:

beijing@rplawyers.com



Maarten Roos to visit the Netherlands in late April

Maarten Roos, managing director of R&P China Lawyers, will be visiting the Netherlands in late April to attend a seminar and visit Dutch clients. He will be available during this period to arrange meetings with current and prospective clients that want to enquire about R&P's legal services in China.

For more information please contact Maarten at:

roos@rplawyers.com

R&P rolls out Compliance System for Award-Winning Client

We are proud to announce that one of our clients was recently named one of the winners of the Law-abiding Award by the People's Government of Wuzhong District, Suzhou. R&P is proud to have contributed to its success, with the development and roll-out of a comprehensive compliance system. Through interviews, the establishment of new rules and training programs, and a close follow-up, we are meeting the group's objective of ensuring that managers and employees fully understand the company's culture and requirements, and how to tackle the practical challenges of successfully operating a company in a compliant way.

R&P is increasingly engaged by clients with WFOE's or JV's in China to implement Risk Management, Safety & Compliance Systems. For more information please contact your regular contact person or email info@rplawyers.com



INDIVIDUAL RECOGNITIONS ASIALAW LEADING LAWYERS 2014



WE CONGRATULATE OUR FELLOW R&P MEMBERS WHO WERE MENTIONED BY ASIALAW IN THE 2014 SURVEY RESULTS FOR CHINA:

MAARTEN ROOS

CORPORATE AND M&A; DISPUTE RESOLUTION; INTELLECTUAL PROPERTY

ROBIN TABBERS

CORPORATE AND M&A

CHEN YUN

CORPORATE AND M&A; DISPUTE RESOLUTION

VICTORIA LEI

CORPORATE AND M&A

KATHLEEN CAO

CORPORATE AND M&A

TONY LU

DISPUTE RESOLUTION