



## PRC Labor and Employment Law Newsflash

August, 2013

### Participation in the Social Insurance System by Foreigners

With the soar of China's economy, more and more foreigners including Taiwan, Hong Kong and Macau residents have come to work in mainland China and these foreign employees have enjoyed different treatment from the domestic ones in the terms of remuneration and benefits, etc., especially in the way of insurance, which is often commercially purchased by the employer. Although on October 10<sup>th</sup>, 2009, Shanghai Municipal Human Resources and Social Security Bureau issued *the Notice of Several Questions about Participation in the Social Insurance System by Foreigners, People Who Are Granted the Overseas Right of Permanent (Long-term) Residence, Taiwan, Hong Kong and Macau residents* (Herein after referred to as Notice No.38), it only mentions that the foreign employees may participate in the social insurance systems including basic pension insurance, basic medical insurance, work-related injury insurance, which is not compulsory. On July 1<sup>st</sup>, 2011, the state implemented *the Social Insurance Law of the People's Republic of China*, regulating that foreigners shall participate in the social security system in compliance with the law. Shortly after that, on October 15<sup>th</sup>, *the Interim Measures for the Participation in the Social Insurance System by Foreigners Working within the Territory of China* became effective, which further requires foreign employees to participate in the social insurance systems including basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance. This new regulation has now been implemented for over a year, and there has been more and more arbitration cases regarding foreign employees pleading for social security with judicial practices leaning towards tightening the law enforcement. Considering this, this newsflash intends to give a brief introduction about the present foreign social security system consisting of three aspects including the scope of foreign employees to participate, treatments when reaching the statutory retiring age and the security account handling when leaving China.

#### 1. The scope of foreign employees to participate in the social security system

In accordance with the Interim Measures and Notice No. 38, foreign employees to participate in the social security system are divided into the following groups:

- A. Foreigners, people who are granted the overseas right of permanent (long-term) residence, Taiwan, Hong Kong and Macau residents, employed by employers that belong to the scope of basic pension insurance, have obtained the Certificate of Foreign Expert, Shanghai Residency Certificate (Type B), the Employment Certificate for Foreigner, the Employment Certificate for Taiwan, Hong Kong and Macau residents and the Employment Approval Certificate for Overseas Employees, etc. in accordance with the law; and
- B. Any foreigner who, after signing an employment contract with a foreign employer, is

sent to work in any branch or representative office of the foreign employer incorporated or registered in China.

## 2. Treatments of foreign employees when reaching the statutory retiring age

Pursuant to the regulation of Notice No. 38, after foreign employees, participating in the social security system, reach 60 years old for male employees, 55 years old for female ones, and meet the payment years required by the state and municipal laws and regulations, these foreign employees may conduct the formalities of applying for the basic pension and enjoy the pension benefits according to *the Notice of Adjusting the Basic Pension Calculation Method for Enterprises in the Municipality*. People who do not meet the regulation and have the employment relationship may continue to pay the premiums and people who do not have the employment relationship may terminate the basic pension relationship and get back the deposit in a lump sum at his or her pension account through handling agency of the social security.

## 3. The security account handling when leaving China before reaching the required age at which pension is granted.

In accordance with the regulation of the Interim Measures, when foreign employees leave China before the required age at which pension is granted, his or her individual social insurance account shall be kept and if he or she is employed in China again, the number of years in which social insurance premiums are paid shall be calculated on an accumulative basis. If the social insurance relationship is terminated upon the written application of the foreigner, the deposit amount of his or her individual social insurance account may also be paid to the foreigner in a lump sum.

## **Case Study: Employment Contract Termination of A Foreign Employee**

Patrick entered into Xinyi Company to work on September 17<sup>th</sup>, 2009, serving as the general manager of Xinyi Company, Shanghai Branch. Both parties signed an employment contract effective since September 17<sup>th</sup>, 2009 with a term of three years. On May 21<sup>st</sup>, 2012, Xinyi Company sent a written notice to Patrick informing him that the employment relationship had been terminated on May 21<sup>st</sup>, 2012 in accordance with the regulation of article 9 of the employment contract. On the same day, Xinyi Company issued the notice of change of personnel, deciding that Fang would hold a concurrent post of the general manager of Shanghai Branch.

Patrick's Employment Certificate for Foreigner was cancelled in June, 2012. The article 9 of the employment contract signed by both parties agrees that if parties to this contract consent, each party may terminate the contact by six months' prior written notice, unless it is otherwise stipulated in the contract. The company may choose to pay the salaries to replace the period of notice, thus, terminating the contract immediately.

During the first instance, Patrick requested the court to rule that: 1. Xinyi Company continues to perform the employment contract and handles the formalities of his Employment Certificate for Foreigner, which was unilaterally canceled by Xinyi, being a breach of the contract. The company shall also reinstate Patrick's position. 2. Xinyi Company shall pay him salaries in arrears from June 2012 to December 2012, including the regular salary, house allowance and education allowance. 3. Xinyi Company shall pay him bonus from January to June in the year of 2012.

The court of the first instance held that in accordance with the article 9 of the employment contract between the two parties, under the precondition that both parties agree, each party can terminate the employment contract by six months' prior written notice or can choose to pay the salaries to replace the period of notice. The condition is mutual agreement. Patrick never expressed his consent to the decision of terminating the employment contract and Xinyi Company cannot produce evidence to show that Patrick agreed to terminate. Hence, the decision of Xinyi Company should be revoked. However, the position has been taken by Fang and Patrick's Employment Certificate for Foreigner was canceled in June 2012. The employment contract was, in fact, unperformable and the company was willing to pay Patrick six months' salaries as damages. The court believed it was not inappropriate and ruled in favor of the company:

1. Xinyi Company shall pay Patrick damages 49,053.60 Euros within 10 days since the day of effect.
2. The other pleadings of Patrick are not supported by the court.

Patrick was not satisfied with the judgment of the first instance and appealed. The court of second instance affirmed the original judgment after trial.

*This newsflash is prepared by the Labor Law Team of Dacheng Law Offices. Members of the Labor Law Team: Maggie Kong, Shane Luo, Novel Sun, Susan Shan, Kent Xu, Grace Yang, Anderson Zhang and John Zhou. If you have any inquiries regarding the PRC employment law matters, please contact us at [laborlaw@dachenglaw.com](mailto:laborlaw@dachenglaw.com).*

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## 中国劳动法资讯速递 二零一三年八月刊

### 外籍员工缴纳社保

随着中国经济的腾飞，越来越多的外国人包括台港澳人员来中国大陆就业。但一直以来，外籍员工在薪酬、福利待遇等方面享受的是与中国员工不同的差别待遇，特别是保险方面，公司一般给外籍员工购买商业保险。尽管上海市人力资源和社会保障局在2009年10月10日出台了《上海市人力资源和社会保障局关于在沪工作的外籍人员、获得境外永久（长期）居留权人员和台湾香港澳门居民参加城镇职工社会保险若干问题的通知》【沪人社养发（2009）38号】（下称“38号通知”），但只提及外籍员工可以按照相关规定参加本市城镇职工基本养老保险、基本医疗保险和工伤保险，而不是强制缴纳。2011年7月1日实施的《社会保险法》明确提出，外国人在中国境内就业的，参照本法规定参加社会保险。紧接着，2011年10月15日起执行的《在中国境内就业的外国人参加社会保险暂行办法》（下称“暂行办法”）进一步规定，外籍员工应当依法参加职工基本养老保险、职工基本医疗保险、工伤保险、失业保险和生育保险。新规出台至今已一年多，陆续出现了外籍员工社保仲裁案件，执法口径也从原来的宽松趋于收紧。鉴于此，本文从缴纳社保的外籍员工范围、达到法定退休年龄时可享受的待遇、退休前离境时社保账户内资金的处理这三方面对现行外国人社保制度进行介绍。

#### 一、须缴纳社保的外籍员工范围

按照暂行办法以及上海市人力资源和社会保障局38号通知的规定，须缴纳社保的外籍员工包括如下几类：

- (1) 与属于参加本市城镇基本养老保险范围的用人单位建立劳动（聘用）关系，并按规定分别办理了《外国专家证》、《上海市居住证》B证、《外国人就业证》、《台港澳人员就业证》、《定居国外人员在沪就业核准证》等证件的外籍、获得境外永久（长期）居留权、台、港、澳来沪工作人员；以及
- (2) 与境外雇主订立雇用合同后，被派遣到在中国境内注册或者登记的分支机构、代表机构工作的外国人。

#### 二、外籍员工达到法定退休年龄时可享受的待遇

根据上海市人力资源和社会保障局38号通知的规定，外籍员工参保后，男年满60周岁、女年满55周岁时，符合国家和本市规定缴费年限的，可以办理申领基本养老金手续，并按照《关于调整本市城镇企业基本养老金计发办法的通知》（沪府发[2007]27号）的规定计发基本养老金；不符合规定的人员，仍具有劳动（聘用）关系的可以继续缴费，不再具有劳动（聘用）关系的人员可由社会保险经办机构将其养老保险个人账户储存额（不含“虚账实记”的金额及利息），一次性支付给本人，终止基本养老保险关系。

#### 三、外籍员工退休前离境时社保账户内资金的处理

根据暂行办法的规定，外籍员工在达到规定的领取养老金年龄前离境的，其社会保险个人账户予以保留，再次来中国就业的，缴费年限累计计算；经本人书面申请终止社会保险关系的，也可以将其社会保险个人账户储存额一次性支付给本人。

## 案例分析：外籍员工劳动合同解除

Patrick 于 2009 年 9 月 17 日进入信宜公司工作，担任信宜公司上海分公司总经理，双方签订自 2009 年 9 月 17 日起生效、有效期三年的劳动合同。2012 年 5 月 21 日，信宜公司向 Patrick 发出书面通知，告知根据劳动合同第九条的规定，双方的劳动合同关系于 2012 年 5 月 21 日解除。同日，信宜公司发出《人事变动通知》，决定由房某某兼任信宜公司上海分公司总经理。Patrick 的《外国人就业证》于 2012 年 6 月注销。双方签订的劳动合同第九条约定，合同双方同意下，任何一方可以提前 6 个月书面通知对方的方式解除本合同，但另有约定的情况除外。公司也可选择以支付工资的方式代替通知期，从而立即解除本合同。

在本案一审中，Patrick 请求判令：1、信宜公司继续履行劳动合同，并为其办理由信宜公司单方面违约注销的工作许可证，恢复原职；2、信宜公司向其支付 2012 年 6 月至 2012 年 12 月欠付工资，包括基本工资、住房津贴和教育津贴；3、信宜公司向其支付 2012 年 1 月-6 月的奖金。

一审法院认为，根据双方签订的劳动合同第九条的规定，在双方同意的前提下，合同任何一方可以提前六个月书面通知对方的方式解除劳动合同或选择以支付工资的方式代替通知期，前提条件应为双方同意。Patrick 表示从未同意信宜公司解除劳动关系的决定，信宜公司也无证据表明 Patrick 同意解约，故信宜公司作出的解除决定应予撤销，但因原职位已由房某某担任，且 Patrick 的《外国人就业证》已于 2012 年 6 月注销，劳动合同已无法实际履行，现信宜公司愿意按合同支付 Patrick 六个月替代通知期工资作为赔偿，并无不妥，予以采纳。

据此判决：一、信宜公司于判决生效之日起十日内支付 Patrick 赔偿金共计 49,053.60 欧元；二、Patrick 其余诉讼请求不予支持。

Patrick 对一审判决不服，提起上诉，二审法院经审理，维持原判。

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