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# China amends women's protection law: businesses need to strengthen the protection of the rights and interests of females

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## Background

On 30 October 2022, the Standing Committee of the National People's Congress approved a new amendment to the Law on the Protection of the Rights and Interests of Females (the "**Amended Law**"), which will come into force from 1 January 2023.

The Amended Law first came into force on 1 October 1992, being later amended in 2005 and 2018[1] and now again in 2022. In this latest round of updates, a number of new requirements have been incorporated into the Amended Law to strengthen the protection of females. We have selected the key articles in the Amended Law related to employment and set out our input below for businesses' reference for the purpose of day-to-day human resources management.

## Further preventing gender-based discrimination in recruitment and hiring

The Amended Law provides better protection of the rights and interests of females, for the purpose of equal employment, by introducing more detailed rules on the prohibition of gender discrimination in recruitment and hiring.

The provisions on gender discrimination in recruitment and hiring in the 2018 Version are generally simple and only prohibit employers from refusing to hire females on the grounds of their genders, raising the hiring standards for females (except for jobs or positions unsuitable for women) or imposing restrictions on marriage, pregnancy or maternity of female employees in labour or employment contracts. Similarly, Article 3 of the Employment Promotion Law[2] also provides that employees have the right to equal employment and free choice of occupation in accordance with the law and that businesses should not discriminate against employees on the basis of gender.

On 18 February 2019, the Ministry of Human Resources and Social Security, together with eight other state-level departments, issued the Circular on Further Regulating Recruitment Practices and Promoting the Employment of

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[1] For the purpose of this Alert, the current version of the Amended Law is referred to as the "**2018 Version**".

[2] The Employment Promotion Law was promulgated on 30 August 2007, came into force on 1 January 2008 and was amended on 24 April 2015.

Females (the "**Circular**") jointly, in which Article 2 expands on the prohibitions of gender discrimination in recruitment and hiring.[3]

The Amended Law was drafted on the basis of the Circular. Article 43 of the Amended Law details the prohibited acts that employers are not allowed to perform in the recruitment and hiring process, including:

- restricting candidates to males only or giving preference to males;
- further inquiring about or investigating the marital or maternity status of female candidates, on top of their basic personal information;
- requiring female candidates to take a pregnancy test in the onboarding physical check-up;
- setting limitations regarding marriage status or pregnancy in the conditions for recruitment and hiring; and
- other practices that prohibit the recruiting or hiring of females on the grounds of gender or which discriminatorily raise the recruitment or hiring standards for females.

From the perspective of personal information protection, both the Circular and the Amended Law prohibit firms from asking female candidates about their marital and maternity status in the recruitment process. It should be noted that the Amended Law also prohibits employers from investigating the marital and maternity status of female candidates in the recruitment process. As a result, an employer who conducts an investigation into the marital or maternity status of a female job applicant will violate that prohibition, whether such investigation is conducted on its own or through a third party (for instance, human resource service providers).

The Employment Contract Law, which came into force in 2008, has clearly prescribed that, when recruiting an employee, the employer "has the right to know the basic information of the employee directly related to the employment contract, and the employee shall provide true information". The information that an employer is entitled to know during the recruitment process is limited to that directly related to the employment contract. A female employee's marital or maternity status is evidently unrelated to the employment contract. As such, the above provisions of the Amended Law and the Circular mirror the provisions of the Employment Contract Law. The Amended Law essentially converts Article 2 of the Circular into a legislative requirement, which is higher in the legislative hierarchy, and provides for corresponding

[3] The Circular provides that "II. Prohibition of Gender Discrimination in the Recruitment Process in accordance with the Law. In making recruitment plans, publishing recruitment information and recruiting personnel, employers and human resource service providers shall not restrict candidates to a certain gender (except that the employer is banned from arranging female employees to do certain jobs) or give preference to a certain gender, create obstacles for female applicants or refuse to recruit females on the grounds of gender, inquire about the marital or maternity status of female candidates, require female candidates to take a pregnancy test in the onboarding physical examination, include limitations on marriage or pregnancy in the conditions for recruitment and hiring, or discriminatorily raise the recruitment or hiring standards for females. State-owned enterprises and public institutions, public employment and job application service providers and human resource service providers affiliated to various authorities shall take the lead in abiding by the law and strictly prohibit gender discrimination in employment."

administrative penalties (see "**Strengthening enforcement supervision and liability for breach**" below), which will undoubtedly help the relevant authorities protect the right of females to equal employment.

It is worth noting that the risks that an employer may face when subjecting females to discrimination are not limited to administrative penalties. Article 995 of the Civil Code[4] provides: "where the personality rights are infringed upon, the victim shall have the right to request the perpetrator to assume civil liability in accordance with this Code and other laws. The provisions on the statutes of limitation shall not apply to any request of a victim for cessation of infringement, removal of obstacles, elimination of danger, elimination of adverse effects, restoration of reputation, or making an apology". On 12 December 2018, the Supreme People's Court (the "**SPC**") issued a circular which adds "dispute over the right to equal employment" as one of the causes of action under "disputes over personality rights". According to such provisions, a female candidate or employee may pursue relevant civil liabilities of her employer on the basis of employment discrimination in recruitment or during employment, including requiring the employer to make an apology and pay compensation for mental distress. Additionally, our case searches also indicate that, where the employment of a female employee is unilaterally terminated by the employer for knowingly concealing her marital or maternity status, the court inclines to hold the unilateral termination unlawful. If the employee requests reinstatement of her employment, the request may be upheld by the court.[5]

On 4 July 2022, the SPC released seven guiding cases (the "**Guiding Cases**"). In one of the Guiding Cases, which is related to an individual's right to equal employment, the SPC points out that, where an employer imposes differential treatment based on factors which are not necessarily associated with the "inherent requirements of the job" in recruitment and hiring (for instance, gender), it constitutes a discrimination in employment. The job applicant may claim an infringement of the right to equal employment and seek liabilities from the employer.

## Strengthening the special protection for female employees during their employment

In addition to the recruitment process, new provisions on special treatment and protection for female employees during their employment have also been added into the Amended Law. These mainly include the following:

> **To incorporate provisions concerning the protection of the rights and interests of female employees into employment contracts:** The Amended Law requires that there must be provisions concerning the special protection of female employees in the employment contract between an employer and its female employees. As such, all companies must be wary that, when they sign or renew an employment contract with a female employee, such contract must include clauses regarding the protection of female rights and interests.

  In addition, the Amended Law requires that the collective contract between an employer and its employees should include provisions concerning the equality between males and females and the protection of the rights and interests of female employees. Alternatively, a special chapter or appendix concerning the provisions mentioned above should be formulated or a special collective contract for the protection of the rights and interests of female employees should be separately signed.

[4] The Civil Code was promulgated on 28 May 2020 and came into force on 1 January 2021.

[5] (2019) Hu 0106, Civil First No. 58260.

- **To protect the health of female employees:** An employer must, for its female employees, regularly arrange gynaecological and breast disease examinations and other health examinations for the special needs of women. This is one of the new requirements imposed on employers by the Amended Law. The Amended Law also emphasises that an employer must, in light of the specific characteristics of females, protect the rights and interests of females to safety, health and rest during their work.
- **To protect females during special physiological periods**: The 2018 Version provides for special protection for females during special physiological periods. For example, employers are not allowed to reduce the salary of female employees or dismiss them just because they are married, pregnant, on maternity leave, breastfeeding etc. The Amended Law further extends this special protection provision, including:
  - requiring that employers are not allowed to reduce the benefits and entitlements of female employees or restrict them from getting promoted or obtaining professional and technical titles and positions as a result of the above circumstances; and
  - explicitly providing that, if a female employee's employment contract or service agreement expires when she is pregnant or taking maternity leave in accordance with the law, her employment contract or service agreement will be automatically extended until the end of the maternity leave (unless such contract has been terminated by the employer or the employee according to the law, or it ends due to other statutory circumstances).

We highlight that the Employment Contract Law stipulates that, if the employment contract of a female employee expires during her pregnancy, maternity leave or breastfeeding period, such contract must be extended until the lapse of the relevant circumstances. However, the Amended Law does not mention the breastfeeding period when it requires an "automatic extension" of a female employee's employment contract. It is not clear whether the purpose of the legislator is not to mention the breastfeeding period because such breastfeeding period is already provided for in the Employment Contract Law, or whether it might be a signal of a potential trend towards further amendments in the future. We recommend that employers should pay close attention to this issue. However, at this stage, the provisions of the Employment Contract Law concerning the protection of female employees during their pregnancy, maternity or breastfeeding period remain in force, and the employer must comply with such provisions. Failure to do so may result in the legal risks of wrongful termination of employment.[6]

[6] According to the Employment Contract Law, an may be liable to pay double the amount of statutory severance (i.e. one month's pay for one year of service) or ordered to reinstate the employment contract, depending on the option the employee opts for, due to its wrongful termination of employment

## Strengthening the prevention and handling of sexual harassment in the workplace

The Civil Code states that enterprises must put in place reasonable measures in relation to the prevention, receipt and handling of complaints and the investigation of, and disciplinary measures regarding, sexual harassment, in order to prevent and stop sexual harassment through the taking advantage of power and authority, a subordinated relationship etc., without laying down specific requirements. On the basis of the Civil Code, the Amended Law has added a number of specific provisions related to the prevention and handling of sexual harassment, mainly covering the following areas:

> **Clarifying the forms of sexual harassment:** Article 23 of the Amended Law specifies that sexual harassment of a woman against her will by means of spoken words, written texts, images, physical conduct etc. is prohibited. This is in line with the provisions of the Civil Code.

> **Specifying the approaches for females to defend their rights when facing sexual harassment:** The Amended Law stipulates that a female victim may lodge a complaint with the relevant organisations and state institutions. This amended provision does not, in essence, provide for new means but merely summarises the existing ways available to a female to defend her rights. It does not specify the scope of the "organisations and state institutions" that may receive complaints of sexual harassment, either. In practice, we believe that female employees could generally lodge their complaints with labour unions, women's federations and their employers.

  It is particularly important to note that the Amended Law requires that relevant organisations and state institutions, when receiving complaints, must handle the complaints in a timely manner and inform the complainant of the results in writing. When receiving complaints about the sexual harassment of female employees, employers are not allowed to "turn a deaf ear" and must handle the complaints in a timely manner and inform the female employees of the outcome in writing.

  The Amended Law specifically provides that a female victim may report the case to the public security authority or file a civil lawsuit before the people's court to hold the perpetrator accountable for civil liability in accordance with the law. Again, this amended provision does not provide for new approaches for female victims to defend their rights.

  We highlight that the Amended Law expressly stipulates that an employer bears the obligation to support and assist female victims in defending their rights in accordance with the law (detailed below). As such, in practice, if a female employee files her case before the public security authority or the people's court and requests assistance from her employer (for example, to request the use of the surveillance video in the workplace), her employer must support and assist.

> **Specifying the employer's obligation to prevent and handle sexual harassment in the workplace:** Compared with the general requirements in the Civil Code, Article 25 of the Amended Law outlines the employer's

Generally speaking, sexual harassment refers to undesirable and sexually motivated acts of infringement, usually carried out in the form of spoken words, written texts, images and physical conduct. Common sexual harassment acts mainly include physical contact, inappropriate language and behaviour, or even the use of sex as a bribe or threat.

In the workplace, sexual harassment occurs in a variety of ways, including sexual harassment of a subordinate by a superior by taking advantage of certain powers (such as promotion, salary increase, performance assessment etc.), as well as words or acts of a sexual nature and flirting that occur between employees with no superior-subordinate relationship.

obligations in preventing and stopping sexual harassment in the workplace in detail, including:

- formulating rules and policies against sexual harassment;
- designating the responsible department or personnel;
- carrying out education and training on the prevention and stopping of sexual harassment;
- putting in place necessary security and safeguard measures;
- setting up complaint hotlines, mailboxes, etc. to ensure smooth complaint channels;
- establishing and improving investigation and discipline procedures in order to address disputes in a timely manner and to protect the privacy and personal information of the parties concerned;
- supporting and assisting the female victim to defend her rights in accordance with the law and providing psychological counselling when necessary; and
- other reasonable measures to prevent and stop sexual harassment.

> **Specifying relevant legal liabilities:** The legal liabilities related to sexual harassment under the Amended Law mainly include the following:

- In respect of the perpetrators, the Amended Law stipulates that the person who commits sexual harassment against a woman shall be reprimanded or issued with a warning letter by the public security authority, with disciplinary actions imposed by the employer in accordance with the law. Therefore, in addition to the measures mentioned above, businesses are advised to clearly stipulate in their internal rules the relevant disciplinary actions for sexual harassment, including termination of the employment contract of the perpetrators; and
- As regards the employers, the Amended Law for the first time provides legal liabilities for employers who fail to fulfil the obligations mentioned above to prevent and take action against sexual harassment. Article 80 of the Amended Law stipulates that, if the employer breaches its requirements and fails to take necessary measures to prevent and stop sexual harassment, thus resulting in infringement of the rights and interests of a woman or the causing of adverse social impact, the employer's superior or supervising authority must order the employer to rectify matters. If the employer refuses to rectify matters or the violation is severe, the directly responsible person in charge and other directly responsible personnel must be disciplined in accordance with the law. In addition, the Amended Law also stipulates that, if the relevant organisation fails to take reasonable measures to prevent and stop sexual harassment, the procuratorate may bring public interest litigation in accordance with the law. Although the Amended Law does not provide for specific administrative penalties for employers,

For foreign-invested enterprises and private enterprises, laws and regulations do not stipulate the direct "superior or supervising authority". Therefore, how this provision will be applied to foreign-invested enterprises and private enterprises in the future will be subject to further explanation by relevant authorities or depend on the practice of relevant administrative authorities.

we imagine that, if an incident of sexual harassment occurs as a result of the employer's failure to adopt preventative measures, it will undoubtedly have a serious impact on the reputation of the employer and the employer might also need to assume liability for damages.

## Employers have an obligation to prevent and stop domestic violence

Domestic violence is a social issue that cannot be ignored. Prior to the Amended Law, domestic violence against women has been expressly prohibited under the 2018 Version. In order to further prevent domestic violence, the Amended Law now clearly provides that employers have an obligation to "prevent and stop domestic violence within the scope of their responsibilities, and provide assistance to female victims in accordance with the law".

In accordance with the Anti-Domestic Violence Law, domestic violence refers to acts of physical or mental torture committed by family members against each other by means of beating, binding, harming, restriction of personal freedom and frequent verbal abuse or intimidation.

It is worth noting that the Anti-Domestic Violence Law,[7] which came into force on 1 March 2016, has clearly provided for the obligations of employers in the prevention and handling of domestic violence, including:

- Where an employer discovers that any of its employees has committed domestic violence, it must discipline and educate such employee, and mediate in and resolve family conflicts;
- Victims of domestic violence and their legal representatives and close relatives may lodge a complaint or report to, or seek help from, the employer of the perpetrator or the victim. After receiving such a complaint, report or request for help regarding domestic violence, the employer should provide assistance and handle the case; and
- Where an employer discovers any ongoing domestic violence, the employer has the right to take dissuasive action immediately.

In view of the above provisions of the Anti-Domestic Violence Law, it appears that the Amended Law mirrors the existing provisions of the Anti-Domestic Violence Law and does not increase the burden on employers. However, the provisions in the Amended Law are yet to be further clarified by the legislative body or the SPC, such as how the employer prevents domestic violence and how to define the boundary of the "scope of responsibility".

At this stage, we believe that employers could refer to the provisions of the Anti-Domestic Violence Law to provide reasonable and necessary assistance when receiving a complaint, or to report on or request help dealing with domestic violence. This includes supporting or assisting female victims to defend their rights in accordance with the law and taking dissuasive action against any ongoing domestic violence on a timely basis.

## Strengthening enforcement supervision and liability for breach

To ensure employers fully comply with the relevant provisions of the Amended Law in all aspects of employment, and to eliminate gender discrimination in the workplace, the Amended Law has added new provisions on the

[7] The Anti-Domestic Violence Law was issued on 27 December 2015.

administrative supervision and the liabilities and consequences for violations. In particular, it covers the following aspects:

- **Strengthening third-party supervision:** In accordance with Article 74 of the Amended Law, where an employer infringes the labour and social security rights and interests of a female, the human resources and social security authorities may, jointly with the labour union and the women's federation, summon such employer for a regulatory talk, carry out supervision in accordance with the law and require such employer to rectify matters within a specified period of time.
- **Extension of labour security supervision:** Article 49 of the Amended Law provides that the human resources and social security authorities must include within labour security supervision gender discrimination in the course of recruitment, enrolment, promotion in titles or ranks, evaluation and appointment of professional and technical titles and positions, training and dismissal. This means that the protection of the rights and interests of female employees will become an integral part of labour security supervision in the future.
- **Adding liability for administrative fines:** A new liability has been added in Article 83 of the Amended Law, which clearly stipulates that, where an employer violates Article 43 (i.e. the gender discrimination at the recruitment and enrolment stage mentioned above) and Article 48 (i.e. special protection for female employees in the case of marriage, pregnancy, maternity leave, breastfeeding etc.) of the Amended Law, the human resources and social security authorities will order it to rectify matters. If the employer refuses to rectify matters, or if the violation is serious, a fine of not less than RMB10,000, but not more than RMB50,000, will be imposed.
- **Additional provisions on public interest litigation:** Article 77 of the Amended Law provides that, where the infringement of the rights and interests of females results in damage to the social public interest, the procuratorate may issue written suggestions and, under some circumstances, they may institute public interest lawsuits in accordance with the law. These circumstances include “infringement upon the equal employment rights of females” and “failure of relevant organisations to take reasonable measures to prevent and stop sexual harassment”. Therefore, if an employer fails to fulfil these two obligations, in addition to the administrative penalties, it may also be investigated by the procuratorate for civil tort liability.

## What must businesses do?

The Amended Law has stressed the protection of the rights and interests of female employees in a great number of ways. It will undoubtedly have an impact on the operation of businesses in the future.

As the Amended Law will take effect from 1 January 2023, we recommend that businesses should make full use of the “window period” before the Amended Law takes effect. Enterprises must focus on the following measures to ensure compliance with the requirements of the Amended Law:

- **Compliance review of the recruitment process:** Employers should review the entire process and relevant documents of recruitment (including recruitment through third parties) and hiring (including job advertisements, job descriptions, candidate information registration forms etc.), to ensure they do not contain any elements that could discriminate and to prevent unlawful collection of personal information in the process of recruitment.
- **Reviewing and updating employment contract templates:** To comply with compulsory requirements set out in the Amended Law, companies should incorporate provisions on the protection of the rights and interests of female employees in their employment contract templates and ensure they use such templates when entering into or renewing employment contracts with employees. Where the collective contract (if any) between an employer and its employees does not contain provisions on the protection of the rights and interests of female employees, the employer should consider amending the collective contract or entering into a separate collective contract for the protection of the rights and interests of female employees.
- **Formulating rules and policies on the prevention and handling of sexual harassment:** In order to comply with the requirements of the Amended Law, employers shall:
  - promptly formulate internal policies or by-laws on the prevention and handling of sexual harassment in the workplace providing for clear disciplinary actions or punishment measures, which should be taken not only against sexual harassment itself, but also against the misconduct and omission of the relevant management personnel in handling complaints of sexual harassment in the workplace;
  - revise and improve rules and policies on the prevention and handling of sexual harassment from time to time or periodically in light of legislation and local rules which may develop now and then;
  - ensure that the procedures for formulating such rules and policies are lawful (including through a collective consultation process, disclosure to all employees or requiring all employees to sign and accept such rules and policies)[8] so that they may serve as a basis for the recognition of the rights and obligations of both the employer and the employees;

In one of the Guiding Cases, the SPC points out that, if an executive fails to take reasonable measures against sexual harassment in the workplace or commits acts of sexual harassment or interferes with the investigation of sexual harassment, and the employer terminates the employment contract on the ground that such executive fails to perform his/her duties and materially violates rules and policies of the employer, the court will not side with such executive for his/her claim of wrongful termination of employment.

[8] Article 4 of the Employment Contract Law stipulates: "…Where an employer formulates, modifies or determines any rules, policies or significant matters concerning the remuneration, working hours, break, vacation, work safety and sanitation, insurance and welfare, training of employees, labour discipline, or management of production quota, which are directly related to the vital interests of the employees, the employer is required to discuss with the employee representative congress or all the employees, put forward proposals and opinions and finalise the decisions through consultation with the trade union or employee representatives…". Article 50 of the Interpretation of the Supreme Court on the Application of Law in the Hearing of Labour Dispute Cases (I) (which was released on 29 December 2020, and took effect on 1 January 2021): "the rules and policies formulated by employers in accordance with Article 4 of the Employment Contract Law which are not in violation of applicable national laws, administrative regulations and policies and have been announced to the employees may serve as the basis for determining the rights and obligations of the parties…".

- in accordance with the procedural requirements of laws and regulations, democratically consult with the employees, labour union or the employee representative congress and make the rules and policies mentioned above public so that they may serve as a basis for the recognition of the rights and obligations of both the employer and the employees;
- establish a hotline, email and other channels for complaints or reports of sexual harassment in accordance with the requirements of the Amended Law to ensure that such complaints or reports are received in a timely manner; and
- while formulating anti-sexual harassment rules and policies, consider how to prevent perpetrators of sexual harassment from retaliating against female victims or whistle-blowers with reference to the best market practice.

> **Conducting anti-sexual harassment training:** Employers should actively conduct training on the prevention and stopping of sexual harassment in the workplace, and retain relevant evidence (including retaining attendance registration forms filled out during training). As the Amended Law has no specific requirements on the form of the training, we believe that companies could adopt various means for the training in a flexible manner, such as offline face-to-face training, online webinars or e-learning.

> **Seeking help from professionals:** If an employer receives a complaint or a report of the infringement of the rights and interests of female employees (for example, a sexual harassment complaint or report), it could proactively seek the assistance of professionals (including lawyers) to ensure the procedures for receiving complaints (or reports), and their investigation and handling, are in compliance with the law. If the violation is severe and may involve an administrative penalty or criminal offence, the employer may help the female victims report the case to the public security authorities and actively co-operate with the police investigation.

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