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# China Labor Insights
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## Cancer Survivor's Request for Permanent Labor Contract Refused

Mr. Tan began working for a fashion company in Shanghai in 1998. He was unfortunately found to have nasopharyngeal cancer in February 2006 at which time he began to take long term medical leave. On January 2, 2007, the company renewed the employment contract with Mr. Tan for another two years. Mr. Tan was still on medical leave after the contract renewal and the company continued to pay him salary and social insurance every month.

In November 2008, the company notified Mr. Tan that it would not renew his employment contract at the expiration of the existing contract, citing his health conditions. The company then sent Mr. Tan a termination letter. Mr. Tan filed a complaint against the company with the People's Court in Songjiang District, claiming that the company could not revoke his labor contract and additionally, that the contact had been become a "permanent contract" because Mr. Tan had served with the company for more than ten consecutive years.

In court, the company argued that it had given Mr. Tan over 24 months of paid medical leave and had fulfilled its obligations under the labor laws and regulations. The company further argued that Mr. Tan had lost his work capacity and was therefore no longer suited to his original position.

According to Article 14 of the Labor Contract Law, employees who have worked for an employer for a period of ten consecutive years are entitled to a permanent contract in which there is no contract termination date. In the absence of a termination date, an employer may simply decline to renew a labor contract at the expiration of the contract, with no consequences to itself. If an employee is found to have a permanent contract, the contract will never naturally expire and the employer would be required to pay severance payments to the employee under the Labor Contract Law if that employee is terminated.

In this case, the plaintiff lost his capacity to work in February 2006 even though he did not receive his termination notice until November 2008. Therefore, Mr. Tan's actual service years were only eight years, from 1998 to 2006. The court found that after 2006, Mr. Tan was still in medical therapy, had lost his ability to work, and there was no justification for the company to continue the employment relationship. For these reasons, the court rejected Mr. Tan's claim.



### Employees Beware! The 'Soft Layoff'

A depressing term is now spreading in job market, the so-called 'soft layoff'. This is a catch-all phrase referring to the various ways in which businesses in mainland China force employees to 'voluntarily' resign, allowing them to get rid of workers without the need for severance payouts, which would otherwise be required under Chinese law.

The top three methods are: salary reduction; changing work duties; and changing work location. Other means include compulsory long unpaid vacations; demotions; arbitrarily raising performance targets; and cancelling company transportation services.

According to a survey of 2173 recently laid-off employees conducted by *51job.com*, employees with between three and seven years of work experience were most vulnerable to soft layoffs. Almost half of interviewees claimed they were laid off primarily through a soft layoff.

### Dongguan Cuts Social Insurance Rates

The Dongguan government will cut social insurance rates for enterprises in a phased approach during March 1-December 31 of 2009. Specifically, the employer contribution for work injury insurance will decrease 20%; the employer contribution for basic medical insurance will shed 5%.

It is estimated that enterprises in Dongguan will save RMB 475 million as a result of these measures. Meanwhile, enterprises in difficulty may apply for subsidies on social insurance or the approval of suspensions of the payment of social insurance premiums.

June Labor Briefing:

# *New Supreme Court Judicial Interpretation On Hearing Employment Disputes*

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The Supreme People's Court is currently drafting the judicial interpretation concerning the applicability of laws in employment dispute cases and how lower courts should apply recent legislation to resolve employment disputes.

According to the draft, where an employer fails to sign a written employment contract with an employee one year after the commencement of the employment or where an employment contract does not express the terms of the contract, the employer and employee in question shall be deemed to have entered into an indefinite employment contract. Where an employer fails to enter into a written employment contract with an employee after one month but within one year or where an employer fails to enter into an indefinite employment contract with an employee as it is legally required, the employer in question shall pay double monthly salary to the affected employee starting from the commencement date or from the date the indefinite employment contract should have been concluded. However, such double monthly salary shall not be paid for more than 13 months. The draft also reaffirms that the same employer and employee shall only agree upon one probation period in the existing employment relationship.

Regarding company rules and policies, rules that were issued before January 1 2008 (when the Employment Contract Law came into force) that were not adopted in accordance with employee consultation procedures remain valid, provided they do not violate applicable law and were publicized to employees. Courts may also consider the validity of company rules issued from January 1 2008 if the rules meet these criteria and are not clearly unreasonable.

Regarding the calculation of overtime compensation, the draft interpretation provides that employers and employees may agree that the calculation base for overtime compensation can exclude bonuses, allowances and subsidies. The resulting amount however, cannot be lower than the local minimum wage.

The Supreme Court's decision to draft the judicial interpretation was deemed as highly necessary and urgent given the fact that labor issues have become a focal point in China, especially in the background of the current global financial crisis where many employers are terminating employees in order to stay afloat. The new judicial interpretation is seen as addressing many perceived loopholes in the 2007 Labor Contract Law, and helps to clarify previously ambiguous parts of the Labor Law and Labor Contract Law for fairer, more effective, and more uniform real-world application.

**Page 2 of each month's edition of *China Labor Insights* is dedicated to a particular aspect of Chinese labor and employment law, focusing on the main issues affecting companies doing business in China.**

## *Company Liable for Expensive Medical Treatment in Work-Related Injury Case*

Ms. Li, employee of Shanghai Aifa, seriously injured her leg in a work-related injury and was hospitalized, requiring an emergency bone implant. However only imported (and more costly) implants were available, giving Ms. Li no choice but to accept the more expensive device. However her employer refused to reimburse her for the extra cost, so Ms. Li sued them in the Xuhui People's Court, claiming that the company should reimburse all medical expenses for work-related injuries.

The defendant, Shanghai Aifa, admitted Ms. Li's injury was work related, but denied that it was liable for the full cost of her treatment, arguing that her imported implant was not included in the *Work Related Injury Insurance Medicine List* issued by the Ministry of Labor and Social Insurance.

The court agreed that generally only medicines and medical materials listed in the *Work Related Injury Insurance Medicine List* are reimbursable. However, the court found for Ms. Li, stating that because using the more expensive materials was the only feasible choice under the circumstances, their extra cost was necessary and it would therefore be unfair for Ms. Li to have to bear the expense.