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Dentons Asia Regional Employment Newsletter

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IN THIS ISSUE

Dentons is pleased to present the first issue of the Regional Employment Newsletter, with updates on employment matters in the jurisdictions of China, Singapore and Hong Kong, covering proposed legislation amendments, significant court decisions, and other topical issues.

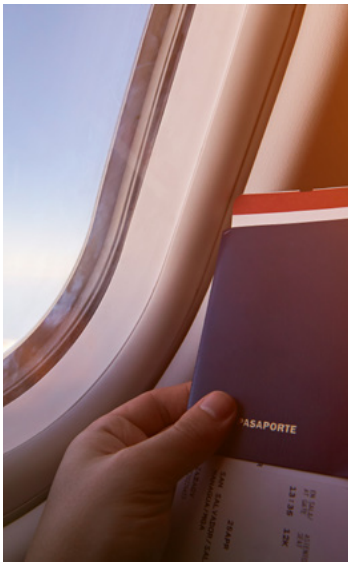
If you wish to understand more about the potential impact of any matters introduced in this newsletter to your organisation, please contact the relevant Dentons lawyers in the relevant region, who will be happy to assist with any queries you might have.

Singapore

Singapore's foreign worker dilemma – recent changes to Singapore's regulatory framework governing the hiring of foreign workers

Singapore's economy has taken a significant hit over the last year, first as a result of the trade disputes between the US and China, and then because of the ongoing COVID-19 pandemic. In the first quarter of 2020, total employment in Singapore saw the biggest decline ever and it is expected that this downward trend will continue as the effects of the pandemic continue to be felt.

During Singapore's recent general elections, the number of foreign workers in Singapore was an issue that was keenly debated by the various political parties, with some arguing that less job opportunities were available for Singaporeans due to the large number of foreigners employed. Separately, the high number of recorded COVID-19 cases among Singapore's large migrant worker population living in workers' dormitories has also shone a spotlight on Singapore's reliance on foreign workers.



OVERVIEW OF THE WORK PASS REGIME IN SINGAPORE

Foreigners who intend to work in Singapore must have a valid work pass before starting work. There are three main types of work passes and permits for foreigners who intend to work in Singapore, namely Employment Passes, S Passes and Work Permits.

Employment Passes are for foreign professionals, managers and executives. S Passes are for mid-skilled technical staff. Work Permits are for unskilled or semi-skilled foreign workers from certain approved source countries, working in the construction, manufacturing, marine shipyard, processing or services sector.

Measures have been put in place to ensure that a strong "Singaporean core" is maintained and locals are considered fairly for job opportunities. Recently, certain of these measures have been tightened.

CUTS TO FOREIGN WORKER QUOTAS

From 1 January 2020, the Dependency Ratio Ceiling (DRC) for the services sector was reduced from 40 per cent to 38 per cent, and will be further reduced to 35 per cent with effect from 1 January 2021. The DRC refers to the maximum permitted ratio of foreign workers to the total workforce that a company in the stipulated sector is allowed to hire. The sub-DRC for S Pass holders in the services sector was also reduced from 15 per cent to 13 per cent with effect from 1 January 2020, and will be further reduced to 10 per cent on 1 January 2021.

In the budget for 2020, it was announced that the sub-DRC for S Pass holders in the construction, marine shipyard and process sectors, some of the hardest hit by the shutdowns due to the COVID-19 pandemic, will be reduced from 20 per cent to 18 per cent with effect from 1 January 2021 and will be cut further to 15 per cent on 1 January 2023.

In delivering the budget for 2020, Finance Minister Heng Swee Keat stated: "These are skilled jobs, many of which can be done by locals, such as polytechnic diploma holders. We created the S Pass category because, despite our best efforts, we are not producing enough of such skilled locals. S Passes enable enterprises to top up their workforce with more skilled workers, and to recruit workers with particular skills that locals may lack. But S Passes should not be a means by which enterprises hire low-cost foreign workers, when qualified locals are available."

INCREASES TO THE LOCAL QUALIFYING SALARY

As mentioned above, the number of foreign workers a company can employ is assessed with reference to the company's total workforce. A company's total workforce is calculated based on the number of S Pass and Work Pass holders the company employs, and the number of its local employees who earn at least the Local Qualifying Salary (LQS). The LQS was raised from S$1,200 to S$1,300 in 2019 and, with effect from 1 July 2020, was increased again to S$1,400.

While, theoretically, this increase should mean a reduction in the number of local employees that would count towards the assessment of a company's total workforce, Minister of Manpower Josephine Teo has stated that most employers of foreign workers are unlikely to be affected by these changes as the majority do not have workers earning less than S$1,400.

INCREASE IN S PASS QUALIFYING SALARY

In addition to the quotas imposed, applicants for S Passes must also have a minimum qualifying salary of S$2,400 a month. This was progressively increased from S$2,300 a month before 1 January 2020 and from S$2,200 a month before 1 January 2019. The Ministry of Manpower has announced that the S Pass qualifying salary will be raised further to S$2,500 a month. This higher qualifying salary will take effect from 1 October 2020 for new applications, and from 1 May 2021 for renewals.

HIGHER QUALIFYING SALARY FOR EMPLOYMENT PASS APPLICATIONS

Unlike S Pass and Work Pass holders, no quota restrictions are placed on Employment Pass holders. However, similar to applicants for S Passes, applicants for Employment Passes must meet the minimum qualifying salary requirement. The current minimum qualifying salary for new Employment Pass applicants is S$4,500 a month, with higher qualifying salaries for older and more experienced applicants. This follows the recent increase in May to S$3,900 from the previous minimum qualifying salary of S$3,600, and a further increase that took effect from 1 September 2020. The minimum qualifying salary for Employment Passes was previously raised in 2017 from S$3,300 to S$3,600. For renewal applications, the minimum qualifying salary remains at S$3,900 a month, but this will be raised to S$4,500 a month from 1 May 2021. Additionally, to account for the fact that salaries in the Financial Services sector are generally higher than those in other sectors, from 1 December 2020, new applications for Employment Passes in the Financial Services sector will be subject to a minimum qualifying salary of S$5,000 a month, which will also apply to renewal applications with effect from 1 May 2021.

CHANGES TO THE FAIR CONSIDERATION FRAMEWORK

To ensure that local employees are considered fairly for job opportunities, companies are required to comply with the Fair Consideration Framework (FCF). Currently, under the FCF, employers who wish to apply for Employment Passes to hire foreign employees must first advertise the job vacancies on the government jobs portal for at least 14 days and must consider all candidates fairly before submitting an application. From 1 October 2020, the FCF will be revised to extend to S Pass Application as well. Additionally, the minimum advertising duration will be doubled from 14 days to 28 days.

An employer does not need to comply with the abovementioned advertising requirements if certain conditions are met. For example, if the fixed monthly salary for the vacancy is S$20,000 and above, the vacancy will not have to be advertised. The current threshold of S$20,000 represents a significant increase from the previous threshold of S$15,000. This increase was announced in March 2020 and took effect from 1 May 2020.

CHANGES TO THE LICENSING CONDITIONS FOR EMPLOYMENT AGENCIES

Most recently, on 22 June 2020, the Ministry of Manpower announced that, with effect from 1 October 2020, employment agencies will have to comply with additional licensing conditions. Among the new conditions is a requirement that all employment agencies must now comply with the fair recruitment requirement set out in the Tripartite Guidelines on Fair Employment Practices and must, among other things, make reasonable efforts to attract Singaporeans for job vacancies. Employment agencies must ensure that discriminatory hiring practices are not adopted (including discrimination based on nationality) and may face sanctions if they are found to have breached the licensing conditions.

CONCLUSION

It is clear that the Singapore government is progressively taking steps to tighten the regulations governing the employment of foreign workers in Singapore, at least in part, to reduce the number of foreign employees and strengthen the "Singaporean core".

It is possible that companies affected by the foreign worker quota cuts and higher qualifying salaries may turn to hiring local employees (as an alternative to foreign employees, or to build up their quotas so that they are able to maintain the number of foreign workers they currently employ). However, certain industries, such as the construction industry which is heavily reliant on foreign construction workers, may also have to rethink their processes and invest in more efficient methods of production to reduce their dependence on foreign workers.

While in the long run it may be possible for Singapore to reduce its dependence on foreign workers, Singapore cannot completely eliminate its need for them. Foreign workers fill the gap in certain industries, such as construction, by taking on jobs that Singaporeans may not be so keen to do. Furthermore, being a small and open economy with almost no natural resources, Singapore's ability to attract diverse talent from the region and beyond is important in its push to be a regional and global hub.

That being said, travel restrictions imposed across the globe in response to the COVID-19 pandemic have also made it more difficult for companies to source for talent overseas. Although some of these

restrictions are slowly being lifted, it is likely that it will be some time before people are willing to travel and relocate abroad again.

As Singapore positions itself for the post-COVID-19 world, companies here need to critically evaluate the composition of their workforce and their methods of production. Companies, especially those heavily dependent on foreign workers, need to adapt to the current economic and geopolitical realities and cannot assume that their current ways of operating and conducting business will continue to be sustainable moving forward.

In this regard, companies should also consider conducting a review of their existing employment contracts, handbooks and policies to ensure that these key employment documents are up to date with current legislation and practices, and that they adequately account for and address the various new challenges that companies have and will continue to face. Companies that are planning to restructure or implement manpower changes will also need to assess whether the provisions of their existing employment contracts, handbooks and policies allow for or can accommodate such plans.

Hong Kong

Hong Kong improves anti-discrimination legislation

Anti-discrimination legislation in Hong Kong has recently taken a leap forward.

On 19 June 2020, following the passage of the Discrimination Legislation (Miscellaneous Amendments) Bill 2018 by the Legislative Council, the Discrimination Legislation (Miscellaneous Amendments) Ordinance 2020[1] ("**Ordinance**") was gazetted. This long-awaited Ordinance takes into account recommendations made by the Equal Opportunities Commission four years ago in its Discrimination Law Review, and implements enhanced protection from discrimination and harassment, particularly for breastfeeding women, ethnic minorities and non-employee workers, under the existing four anti-discrimination ordinances, namely, the Sex Discrimination Ordinance ("**SDO**"), Disability Discrimination Ordinance ("**DDO**"), Family Status Discrimination Ordinance ("**FSDO**") and Race Discrimination Ordinance ("**RDO**").

The key amendments brought about by the new Ordinance are as follows:

1. Outlawing discrimination against breastfeeding women

New provisions are added to the SDO to introduce a prohibition of direct and indirect discrimination, as well as victimisation, on the ground of "breastfeeding", which is broadly defined to cover the act of breastfeeding, the expression of milk and the status of being a breastfeeding woman. This protection will apply to all fields specified in the SDO, such as education, employment and the provision of goods, services and facilities, and disposal or management of premises. Although there is no express requirement in the Ordinance or any existing law for work places to make suitable accommodation for breastfeeding women, for example, by allowing them suitable breaks or providing a hygienic space for expressing milk, employers should turn their minds to these concerns and see how they can accommodate breastfeeding women so as to comply with the Ordinance.

Unlike the other provisions of the Ordinance, which take effect immediately, these provisions will come into force one year later, i.e. on 19 June 2021. Thereafter, any person can be held liable for unlawful discrimination on the ground of breastfeeding if he/she (1) treats a breastfeeding woman less favourably than he/she would treat another woman who is not breastfeeding; or (2) applies a blanket requirement to all persons but fewer breastfeeding women, to their detriment, would be able to comply with it compared to other women, and such requirement cannot be shown to be justifiable.

2. Introducing protection from racial discrimination and racial harassment to cover "associates" and prohibiting racial discrimination and racial harassment by imputation under the RDO

References to "near relative"[2] in the RDO are replaced by references to "associate"[3] such that, not only will a person be protected from direct racial discrimination and harassment on the basis of his/her immediate family, the person will further be shielded from racial discrimination by association in relation to, for example, his/her partners, friends, carers, and work colleagues.

1 For full text of the Ordinance, please click the link here: https://www.gld.gov.hk/egazette/pdf/20202425/es1202024258.pdf

2 "Near relative" is defined as including the person's spouse, a parent of the person or the spouse, a child of the person or the spouse of such a child, a brother or sister of the person or of the spouse or of the spouse of such a brother or sister, a grandparent of the person or spouse, a grandchild of the person or the spouse of such a grandchild.

3 "Associate" is defined as including, a spouse of the person, another person who is living with the person on a genuine domestic basis, a relative of the person, a carer of the person; and another person who is in a business, sporting or recreational relationship with the person.

The Ordinance also widens the scope of protection from racial discrimination and racial harassment to cover situations where these prohibited behaviours are targeted at a person who is perceived, assumed or imputed to be of a particular race, even if he/she is not. Hence, it will now be possible for a person to be held liable for racial discrimination or racial harassment (as the case may be) if he/she discriminates against or harasses another person on the basis of a mistaken perception that the other person is of a particular racial group.

3. Expanding the scope of protection from sexual, disability and racial harassment to benefit all "workplace participants"

The scope of unlawful sexual, racial and disability harassment under SDO, RDO and DDO is expanded to cover situations where the perpetrator and the victim are working in a common workplace, but there is no employment or employment-like relationship between them. In order words, so long as the victim of harassment is a "workplace participant"[4], he or she may potentially bring claims of unlawful harassment against the perpetrator in the common workplace, regardless of whether there exists a relevant employment relationship.

It should be noted that provisions are specifically introduced to SDO, RDO and DDO to the effect that, not only will an intern/a volunteer answer for any unlawful act of harassment committed at the workplace in the course of an internship/performing the volunteer work, the principal who engages them can be held vicariously liable for such act, even if the act was done without his/her knowledge or approval. As with vicarious liability in other contexts of harassment, the principal can establish a defence by demonstrating that reasonably practicable steps have been taken to prevent the intern/volunteer from doing the act, or from doing acts of that description, for example, by having in place clearly communicated policies and providing regular training to staff.

4. Providing protection from racial and disability harassment between service providers and customers under the DDO and RDO, including where such acts occur overseas but on Hong Kong registered aircraft or ships

Previously, unlike the SDO, which expressly prohibits sexual harassment between service providers and customers, the DDO and RDO did not protect a person providing goods, facilities or services from disability and racial harassment by a customer. To align the anti-harassment provisions in the DDO and RDO with those in the SDO, the Ordinance amends the DDO and RDO to make it unlawful for a person to harass another person on grounds of disability and race in the above scenario. The harassment provisions in DDO and RDO are further amended to cover situations where the harassment takes place outside Hong Kong but on Hong Kong registered aircraft or ships.

5. Providing protection from sexual and disability harassment for members and prospective members of clubs, by the management of the clubs

Provisions are added in the SDO and DDO to render it unlawful for a club, the committee of management of a club or a member of the committee of management of a club to sexually harass a woman or harass a person with a disability who is, or has applied to be, a member of the club.

6. Repealing requirements of intention to discriminate as a pre-condition to awarding damages for indirect discrimination under the SDO, FSDO and RDO

Under the DDO, a victim of unlawful indirect discrimination may apply for an award of damages even though the wrongdoer can prove that there was no intention to treat the victim unfavourably. The SDO, FSDO and RDO have been amended to similarly allow damages to be awarded to victims of indirect discrimination on grounds of sex, family status and race, without proof of the wrongdoer's intention to discriminate.

The passing of the Ordinance is very much a welcome development in Hong Kong. Apart from offering a wider and more direct pathway for victims of discrimination to seek justice, it is hoped that the Ordinance can serve to advance public and private organisations' attitudes towards the promotion of equality. As a starting point, all organisations should, in light of the new law in place, review their anti-discrimination policies and provide updated training to their staff and members (including interns and volunteers).

4 "Workplace participant" is defined to mean an employee, an employer, a contract worker, the principal of a contract worker, a commission agent, the principal of a commission agent, a partner in a firm, an intern or a volunteer.

Hong Kong passed bill to extend statutory maternity leave

On 9 July, the Hong Kong Legislative Council passed the Employment (Amendment) Bill 2019, approving changes in relation to statutory maternity benefits.

Under the current regime, a female employee employed under a continuous contract is entitled to a continuous period of 10 weeks' maternity leave, and is entitled to maternity leave pay at the rate of four-fifths (80%) of her average daily wages. Further, if a female employee suffers a miscarriage before 28 weeks of pregnancy, she is entitled to sick leave in respect of any day on which she is absent from work by reason of the miscarriage, but not maternity leave.

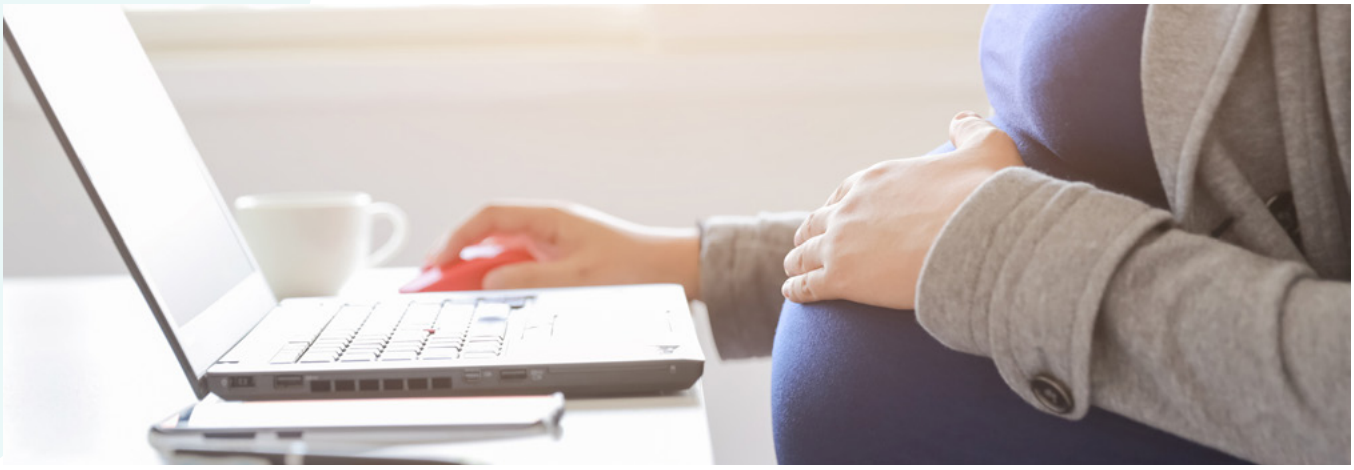
The bill has made several improvements on maternity benefits, including:

1. extending the period of statutory maternity leave from 10 weeks to 14 weeks.
2. providing that additional maternity leave pay will need to be made for the maternity leave extension at the current statutory rate for maternity leave pay, subject to a cap of HKD 80,000 per employee for those four weeks.
3. reducing the period of pregnancy for the definition of "miscarriage" from 28 weeks to 24 weeks, so that a female employee whose child is incapable of survival after being born at or after 24 weeks of pregnancy may be entitled to maternity leave if other conditions are met.
4. allowing a certificate of attendance issued by a medical professional, as an alternative to a medical certificate, to be presented as a proof for sickness allowance for a female employee's attendance at a medical examination for her pregnancy.

The bill has now become the Employment (Amendment) Ordinance 2020 following the latter's publication in the Gazette on 17 July. It will come into force on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

The Hong Kong Government has committed to introduce an administrative reimbursement scheme in the first half of 2021, following the expected implementation of the bill by the end of this year, to provide reimbursement to employers for the additional maternity leave pay required for the four weeks' extension of maternity leave.

These long-awaited changes, which were first announced in the Hong Kong Government's policy address in 2018, are a welcome change for working mothers in Hong Kong.



China

Data compliance in human resource management

The Standing Committee of the National People's Congress in China published the Draft Data Security Law on 2 July 2020 to solicit public opinion. Once finalised and passed, this new law, together with the Cybersecurity Law and the Personal Information Protection Law being formulated, will form a more complete legal system in the information field.

According to Paragraph 2, Article 3 of the Draft Data Security Law: "Data Activities shall mean such acts as data collection, storage, processing, use, provision, transaction and disclosure." Employers have been intensively collecting employees' personal information, so as to improve their management of them. This article summarises the main issues that employers should pay attention to, and aims to help enterprises clarify their relevant legal responsibilities.

1. Can employers collect employees' personal information?

Based on Article 8 of the Labour Contract Law[5], employers are entitled to learn about their employees' basic information which is directly related to the labour contract, such as name, gender, ethnicity, native place, identification number, address, personal e-mail address, health status, academic degree, work experience, emergency contact (or main family members) etc.

As for marriage and fertility status information, it remains controversial whether they belong to the basic information directly related to the labour contract. For example, the employer Beijing Fujia Huixiang Engineering Co., Ltd. terminated the labour contract with its employee Li Yang on the grounds that he concealed his marriage status information when he joined the company. The court held the view that marriage information was not necessarily related to the performance of the labour contract and, therefore, the employer shall not terminate the contract due to employees not providing such information.

2. How should employers collect employees' personal information?

Obtaining employees' consent is the initial principle when collecting their personal information. Generally speaking, there are three ways to collect employees' personal information, and our specific suggestions for each scenario are as follows:

- By providing their personal information voluntarily, employees are already giving their consent.
- When requiring employees to provide their personal information, employers should obtain their consent, and should explicitly bring the intended purposes and uses to their attention. For instance, employers should set forth the purposes of collection, and include a statement of consent.
- When entrusting a third party to collect employees' information, employers should obtain their consent. The third party should guarantee that it will adopt safe and reliable means to protect information from any leakage, damage or loss.

3. How should employers store and use employees' personal information?

Employers shall safeguard personal information in each step, take high-standard management and technical measures to ensure the security of the personal information collected, and prevent

5 Article 8 of Labour Contract Law: "The employer has the right to learn from the employee basic information which directly relates to the labour contract, and the employee shall truthfully provide the same."

divulgence, loss or abuse of such information. The specific measures that can be taken are as follows:

- Adopt safe and reliable means for the storage of collected personal information.
- The use of collected personal information must not exceed the scope of consent.
- Arrange for specific personnel to concentrate on handling employees' personal information, and limit the scope of the specific personnel involved.
- Employers shall preserve the personal information of former employees for at least two years for reference purposes. Thereafter, employers should delete or anonymise the relevant personal information that no longer needs to be kept, unless otherwise required by laws and regulations.

4. What are the adverse consequences for improper processing of employees' personal information?

While it is permissible for employers to collect and use employees' personal information, employers shall process such information properly. Failure to do so may bring adverse impacts on the employees, and legal liability to the employers.

- *Civil liability*: The leakage, unlawful provision or abuse of employees' personal information is likely to have adverse effects on the employees. Once found to have infringed on personal information, the organisation or individual shall bear tort liabilities based on their fault, including but not limited to ceasing infringement, paying damages, eliminating impacts, restoring reputation and apologising.
- *Administrative liability*: Employers who illegally provide employees' personal information to others, or sell employees' information for profit without their consent, will be subject to administrative punishment such as a warning, fine, confiscating illegal income, revoking the licence, cancelling the record, closing the website and prohibiting the relevant responsible personnel from engaging in network service business.
- *Criminal liability*: In the event of constituting unlawfully providing personal information to others severely, the employer or individual may be charged with the crime of infringing on personal information. Article 253 of the Criminal Law[6]

6 Article 253 of the Criminal Law: "Those who, in violation of the relevant regulations of the State, sell or provide personal information of citizens to others, in the case of serious circumstances, shall be imposed fine, and/or sentenced to imprisonment of no more than three years or detention, in case of particularly serious circumstances, shall be fined alone or at the same time, sentenced to imprisonment of more than three years and less than seven years. Those who, in violation of relevant regulations of State, sell or provide to others the personal information of citizens obtained in the course of performing duties or providing services shall be punished in accordance with the provisions of the preceding paragraph with heavier punishment. Those who steal or illegally obtain personal information of citizens by other methods shall be punished in accordance with the provisions of the first paragraph. If the unit commits the crimes stipulated in the preceding three paragraphs, the unit shall be fined, and the directly responsible person in charge and other directly responsible person shall be punished in accordance with each preceding paragraph."

prescribes the crime of infringing on a citizen's personal information, for which the sentence can be up to seven years' imprisonment in addition to a fine. In particular, it emphasises the circumstances where a person who illegally sells or provides a citizen's personal information obtained in the course of performing duties or providing services receives a heavier sentence. Nevertheless, to convict the person, "serious circumstance" is of a perquisite.

In addition, employers shall also properly collect, store and use other personal information involved in the operation of a business, such as clients' personal information. Employees shall be educated and trained not to disclose or misuse such information. If an employee illegally discloses or uses such information, thereby infringing another's privacy, the employer shall be jointly and severally liable for the employee's behaviour.

For example, Beijing Lianjia Real Estate Agency Co., Ltd. (Lianjia) is an intermediary service provider for real estate sales and leases, and Song Yinghua is an employee of Lianjia. In order to apply for residence permit in Beijing, Song illegally used the personal information of Zhao Peng, one of Lianjia's clients, who intended to sell his house via Lianjia. Song's behaviour obviously infringed Zhao's personal information. As for the employer's responsibility, the court held the view that the information security system of Lianjia was not sound, and the company failed to educate its employees to use clients' personal information prudently and legally. Thus, Lianjia's employees can easily use clients' information for illegal purposes. In the end, the court decided that Lianjia and Song Yinghua should jointly and severally compensate the client Zhao Peng with RMB 100,000 for his loss.

To conclude, on the one hand, data-related compliance has become crucial for companies that collect, process and use personal data during their business operations. Companies are required to deal with the collection and use of personal data prudently and to ensure the security of the data collected.

On the other hand, in recent years China has been endeavouring to set up the legal regime for personal data protection. It is expected that more rules and regulations will be formulated in the near future to put personal data protection fully into play in China. Let's keep a close eye in this regard.

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