

Stay Current.

May 2004

China's Wage and Hour Laws: New Rules Governing Minimum Wages

By Lin Huawei, Michael Downey and Stephen Sonnenberg

In March 2004, the *Rules for Minimum Wages* ("2004 Rules") took effect in The Peoples' Republic of China ("China").¹ More than a decade after China first imposed minimum wage requirements, the 2004 Rules significantly expand protection for workers. The Rules now afford protection to migrant and part-time workers, and identify with greater specificity the classes of employers and types of work subject to minimum wage regulations.

Although the extent to which the authorized authorities will alter China's minimum wages is unclear, employers with current or anticipated operations in China are well advised to familiarize themselves with the legal framework and implications of the 2004 Rules.

Regional and Local Minimum Wages

Minimum wage regulations have been in place in China since 1993, when China enacted the *Regulations Concerning Minimum Wages in Enterprises* ("1993 Regulations").² The 1993 Regulations arose from the international minimum wage-fixing obligations that China assumed upon ratifying International Labour Organization ("ILO") Convention No. 26.³ Convention No. 26 obligated China to create a minimum wage-fixing mechanism for its workforce.

The minimum wage requirement imposed by the 1993 Regulations was far from universal. The requirement also varied based on geography. As of January 1, 2004, for example, the monthly minimum wage for full-time workers in Beijing was RMB 495 (approximately \$60) and in Shanghai was RMB 570 (approximately \$69).

On March 1 of this year, the 2004 Rules replaced the 1993 Regulations.⁴ The 2004

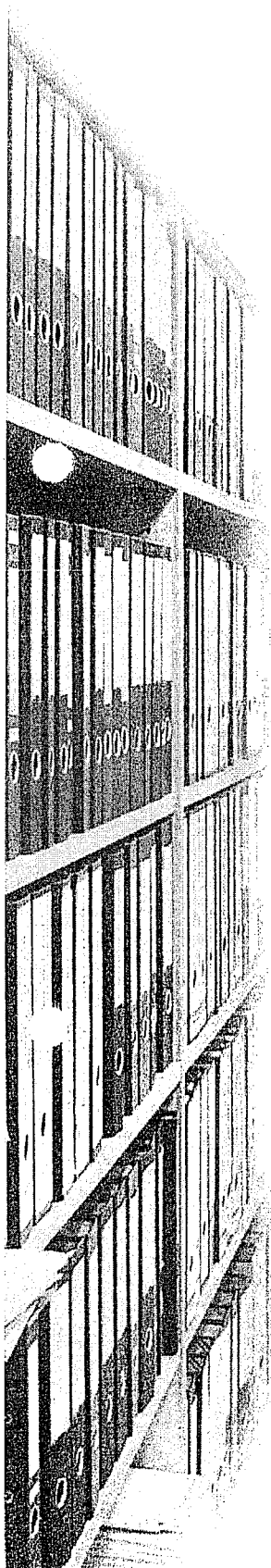
Rules, like the 1993 Regulations, do not create a uniform nationwide minimum wage. Rather, they recognize the right of Provinces, Municipalities and Autonomous Regions⁵ to set their own minimum standards according to local conditions.⁶ Provinces, Municipalities and Autonomous Regions also have discretion to set different minimum wages in different locations within a region.⁷

The 2004 Rules afford Provinces, Municipalities and Autonomous Regions less wage-setting discretion in one important respect. Under the 1993 Regulations, the governmental entities responsible for setting minimum wages could do so based on the industrial sector involved. For example, Guangdong Province (with widespread and varying manufacturing industries) set 2002 minimum wages ranging from RMB 510 to RMB 280, depending on whether employees worked in industries ranging from "Type 1" to "Type 7," respectively. The 2004 Rules retain differential rates according to locality, but no longer explicitly allow minimum rates to be set by reference to particular industries.⁸

Several additional changes in China's wage and hour laws arise from the 2004 Rules.

Expanded Classes of Covered Employers

Under the 1993 Regulations all enterprises were required to pay employees a minimum wage. Because the term "enterprises" was not defined within the 1993 Regulations, employers and employees were left to speculate as to which employers or entities were required to pay a minimum wage. Moreover, the 1993 Regulations afforded Provinces, Municipalities and Autonomous Regions an overriding power to exempt employers selected by counties and towns from paying a minimum wage.⁹ Consequently,



numerous employers throughout China at a county and township level were not subject to minimum wage rules.

The 2004 Rules explicitly provide that all enterprises, private non-enterprise units, sole proprietors, including state agencies, public institutions and community organizations, are required to pay minimum wages.¹⁰ Provinces, Municipalities and Autonomous Regions are no longer authorized to exempt employers from paying a minimum wage. The extent to which local authorities will refrain from such exemptions remains to be seen.¹¹

Minimum Wage During Leave

The 1993 Regulations required covered employers to pay a minimum wage for "normal work performed by the worker within the prescribed working time."¹² "Normal work" is defined as no more than eight hours a day and 40 hours per week.¹³ The 1993 Regulations did not specify whether employees were entitled to a minimum wage during legally protected absences such as maternity or annual leave.

The 2004 Rules clarify that an employee will be regarded as undertaking "normal work" (and thus be entitled to a minimum wage) even if absent from the workplace because of approved

- annual leave
- family leave
- marriage leave
- bereavement leave
- maternity leave
- leave necessitated to undergo birth-control surgery, or
- leave taken to participate in community activities.

Protection for Part-time Employees

The 1993 Regulations did not expressly require employers to pay part-time workers a minimum wage. Consequently, employers and employees alike were uncertain as to whether, and to what extent, part-time employees were protected.

The 2004 Rules expressly provide that employers must pay a minimum hourly rate to all part-time employees, in contrast to a minimum monthly rate for full-time workers.¹⁴ The hourly rate for part-time workers is determined based on the

monthly minimum salary and other factors as discussed below.

The Minimum Wage Formulas

The 2004 Rules expressly provide that the appropriate authorities are required to determine and adjust the monthly minimum wage for full-time workers by reference to the following factors:¹⁵

- minimum living costs of local employees and their dependents
- consumer price index for urban residents
- social security and housing fund contributions paid by individual employees
- average wage of workers in the locality
- level of economic development (*e.g.*, the status of the local economy),¹⁶ and
- employment situation.¹⁷

As a guideline, the 2004 Rules provide that the minimum wage for full-time employees should fall within a range of 40-60% of the monthly average local wage.¹⁸

Hourly minimum wage standards for part-time workers are to be determined and adjusted with reference to the factors set forth above and the following additional factors:¹⁹

- the published monthly minimum wages²⁰
- basic pension insurance contributions payable by employers
- basic medical insurance contributions payable by employers
- differences between full-time and part-time workers in terms of job stability, working conditions, and intensity of labor and welfare.²¹

The 2004 Rules also specify that an employee's minimum wage must not include any payments that are payable to an employee as:

- overtime pay²²
- special allowances paid by reason of a particular work environment or condition (*e.g.*, shift duties, working in mines, at high altitudes, etc.), or
- statutory employee welfare benefits.

Bi-annual Adjustments

The 2004 Rules, like the 1993 Regulations, provide for adjustments to minimum rates to reflect changes in the cost of living. Under the new rules, the time-frame for undertaking an adjustment review has been extended from one year to at least once every two years.²³

Violations and Penalties

Under the 2004 Rules, the labor and social security authorities at or above the county level are responsible for implementing and supervising the minimum wage program. In addition, trade unions at all levels have the right to supervise and report violations to local labor authorities.²⁴ Disputes regarding minimum wage violations are subject to mediation or arbitration in accordance with the relevant rules governing labor disputes.²⁵

In the event a violation is established, the authorities may order an employer to pay the difference owed to employees within a specified period, and may order the payment of damages of up to five times the difference outstanding.²⁶ While the civil penalties under the 2004 Rules are more stringent than those that could be imposed under the 1993 Regulations, the new rules stop short of imposing any criminal liability on defaulting employers.

Additional Implications

- The 2004 Rules are significant for the vast number of migrant workers²⁷ in China who now are afforded minimum wage protection – including those migrant workers engaged as part-time employees. When the national authorities formulated the 1993 Regulations, they focused on protecting the interests of workers in traditional employment, *e.g.*, those workers employed with fixed hours and in static locations. The authorities focused less on the interests of increasing numbers of migrant workers who were moving from the rural sector to take up ad-hoc industrial-type employment, primarily in China's cities. While estimates vary considerably, it is generally acknowledged that between 100 and 150 million migrant workers are currently employed throughout China.
- The introduction of an across the board minimum wage standard that applies to both full-time and part-time workers may allay concerns in China about the burden that mandatory social security contributions impose on low-wage workers. During the last decade, China's social security program expanded to include a variety of retirement, housing, health insurance and unemployment schemes. The Chinese authorities have made clear their ultimate

goal of universal social security coverage for China's workforce. For some workers, the mandatory social security deductions jeopardized their ability to maintain basic living standards. Fortunately, the 2004 Rules directly involve social security agencies throughout China in the process of determining and adjusting minimum wage standards.²⁸ Greater confidence in Chinese workers' ability to contribute to the social security system should lead to greater confidence in the system as a whole.

- The rules are noteworthy for their relative brevity and clarity. The 1993 Regulations comprised some 32 clauses and made copious references to "developing the socialist market economy" and "democratic consultation between the trade unions and the enterprises." The 2004 Rules consist of 15 articles that no longer look backwards to a not so distant socialist planned economy.

With the advent of the 2004 Rules, employers are well advised to keep apprised of local and regional announcements regarding revised minimum wage requirements. While the 2004 Rules do not require local governments to change minimum wages by a date certain, employers should expect the authorities to phase in new minimum wage rates over the coming year.

Paul Hastings has offices in Beijing, Shanghai and Hong Kong, in addition to Japan, the United States and Europe. If you would like more information about the issues discussed in this alert, please contact any of the following attorneys:

In Beijing

Lin Huawei 8610 6505-3443
huaweilin@paulhastings.com

David Livdahl 8610 6505-3393
davidlivdahl@paulhastings.com

In Shanghai

Mitchell Dudek 8621 6335-3345
mitchelldudek@paulhastings.com

Tom Shoesmith 8621 6335-3920
tomshoesmith@paulhastings.com

In Hong Kong

Michael Downey 852 2867-1283
michaeldowney@paulhastings.com

In New York

Erika Collins 212 318-6789
erikacollins@paulhastings.com

In Los Angeles

Stephen Sonnenberg 213 683-6104
stephensonnenberg@paulhastings.com

Notes

1. In accord with the principle of "one country, two systems," the laws affecting employment in China do not apply to the Special Administrative Regions of Hong Kong or Macau, which have their own legal systems based on the laws of England and Portugal, respectively.
2. The 1993 Regulations were effective on November 24, 1993.
3. China ratified the Convention Concerning the Creation of Minimum Wage-Fixing Machinery on May 5, 1930 and again on June 11, 1984, after China rejoined the International Labour Organization.
4. The Ministry of Labour and Social Security ("MOLSS") promulgated the 2004 Rules on February 20, 2004, as MOLSS Decree No. 21.
5. There are 22 Provinces and four Municipalities in China (Beijing, Shanghai, Tianjin and Chongqing). There are five Autonomous Regions in China (Tibet, Inner Mongolia, Xinjiang, Ningxia and Guangxi).
6. The decision-making process is as follows: the local labor and social security administrative departments (at the Provincial, Autonomous Region and Municipality level), acting in consultation with the trade unions, enterprise and entrepreneurs at an equivalent level, draft a plan for adjusting minimum wage standards. The draft is submitted to the MOLSS for approval. MOLSS is required to solicit – but not follow – opinions of the All China Federation of Trade Unions, the China Enterprise Confederation and the China Enterprise Directors Association prior to giving its approval. The MOLSS may amend the draft prior to approval.
7. See 2004 Rules, Article 7. The minimum wages set within a Province are typically higher in urban than rural areas, where the cost of living is lower. For example, in 2003 the minimum monthly wage in Shenzhen (an urbanized area in China directly across the border from Hong Kong) was RMB 600, but the minimum wage in two neighboring counties more distant from Hong Kong was RMB 465.
8. See 2004 Rules, Article 4.
9. See Section 2 of the 1993 Regulations.
10. See Article 2 of the 2004 Rules.
11. Although the 2004 Rules do not recognize any exceptions, in the past it was common practice for regions such as Mongolia and Tibet not to set minimum wage standards.
12. See Section 3 of the 1993 Regulations.
13. See Article 36 of the Labor Law of the People's Republic of China 1994.
14. See Article 5 of the 2004 Rules.
15. See Article 6 of the 2004 Rules.
16. For example, the minimum wage that is set for rural localities in which the cost of living is lower (e.g., Yunnan in the far South of China) will be lower than the minimum wage set for urban areas (e.g., Beijing) where the living costs are much higher.
17. For example, under the 1993 Regulations, Shanghai had just one standard minimum wage that applied to all types of employment; by contrast, the Province of Guangdong had seven different minimum wages that were set to reflect the diverse range of manufacturing and other types of employment undertaken in that Province.
18. See Appendix to the 2004 Rules.
19. See 2004 Rules, Article 6. The Appendix attached to the 2004 Rules provides detailed technical calculations relating to minimum average incomes. The Appendix also provides alternate methods for calculating minimum wage standards.
20. Under the 2004 Rules, the minimum wages standards must be published by Provincial, Municipal and Autonomous Region Governments after a minimum wage plan has been approved.
21. See Appendix to 2004 Rules which provides technical guidance for the purposes of taking such differences into account in determining the hourly minimum wage.
22. See Article 44 of the Labor Law of the People's Republic of China 1994, which provides:

The employer shall pay laborers more wage remuneration than those for normal work according to the following standards in any one of the following cases:

 - (1) Wage payments to laborers no less than 150 per cent of their wages if the laborers are asked to work longer hours;
 - (2) Wage payments to laborers no less than 200 per cent of their wages if no rest can be arranged afterwards for the laborers asked to work on days of rest;
 - (3) Wage payments to laborers no less than 300 per cent of their wages if the laborers are asked to work on legal holidays.
23. See 2004 Rules, Article 10.
24. See 2004 Rules, Article 4.
25. See 2004 Rules, Article 14. For settling labor disputes, see Regulations Governing the Settlement of Labor Disputes in Enterprise in the People's Republic of China, 1993. Under Article 31 of those Regulations, once an arbitration award is made, the party in whose favor the award is made may apply to a court to have it enforced.
26. See 2004 Rules, Article 13.
27. The term "migrant worker" refers to workers who leave rural localities throughout China to take up either seasonal employment (e.g., fruit gathering/harvesting) or industrial-type work in one or more localities. It is estimated that some 60% of China's population of 1.3 billion remains rurally based. The gradual movement of the rural population to urban centers has created a significant sized migrant workforce.
28. See 2004 Rules, Article 9.

Stay *Current* is published solely for the interests of friends and clients of Paul, Hastings, Janofsky & Walker LLP and should in no way be relied upon or construed as legal advice.

For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. Paul Hastings is a limited liability partnership.

www.paulhastings.com