

# CHINA LEGAL REPORT\*

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**subject** Adoption of Social Insurance Law of the People's Republic of China

## **Adoption of Social Insurance Law of the People's Republic of China**

On October 28, 2010, the National People's Congress Standing Committee of the People's Republic of China (the "PRC") (the "NPC Standing Committee") voted to adopt the Social Insurance Law of PRC (the "SIL"), which will take effect on July 1, 2011. A social insurance law was first proposed sixteen years ago by the top legislature, and its current form has been debated and deliberated on for three years. In comparison with three-time's review for general laws, the SIL is eventually adopted after reading four times, which shows the concern of the whole society, in addition to the significance and complexity of legislation in the field of social insurance.

This issue of China Legal Report aims to provide you with a introduction of the new social insurance law, especially the remarkable progresses reflected by it, like broadening coverage of social insurance, breaking the stiff fifteen-year contribution period requirement for basic pension, transferring basic pension insurance account and medical insurance account cross-regionally, strengthening the collection of premiums, and setting up national pooling for basic pension.

### **I. Introduction**

Social insurance, the core of social security system in China, as clearly defined in the new law, is a program for which the government is legally required to establish a competent system, including without limitation, the basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, and maternity insurance, for the purpose of ensuring provisions of benefits to PRC nationals in old age, sickness, work-related injury, unemployment, maternity period, and any other conditions alike in need of assistance.

Before the introduction of the SIL, despite the execution of social insurance programs in China for more than ten years, this country still had no specific comprehensive law to follow in this field. Under the current valid legislation, except unemployment insurance and work-related injury insurance, which are regulated by regulations issued by the State Council, the remaining three forms of insurance are simply governed by decisions or orders issued by the State Council, department rules issued by certain department affiliated to the State Council, or local rules or regulations issued by provincial or municipal governments, all of which even have weaker effectiveness and enforcement than the former.<sup>1</sup>

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<sup>1</sup> In accordance with *Legislation Law of PRC* (2000).

The SIL as a general principle, for the first time, supplies a unified law to regulate various forms of social insurance, and covers PRC nationals entirely as well as foreign workers.<sup>2</sup> Consisting of twelve chapters and ninety-eight articles, the new law stipulates vital issues involving basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, maternity insurance, collection of social insurance premiums, social insurance funds, organization of social insurance agency, and supervision to social insurance operation.

## **II. Main Points of SIL**

### **i Expansion of Coverage by Social Insurance**

As the first feature worthy of mention, the SIL specifies a common right for all Chinese citizens to access and enjoy five forms of insurance. It is provided in Article 3 that wide coverage shall be one of the guiding policies to be adhered to. Based on this principle as well as the explicit provision in Article 95 that the SIL shall also apply to migrant rural workers working in cities, the new law provides a basis for an equal treatment of migrant rural workers and urban workers with regards to social insurance.

Under the existing legal structure, those migrant rural workers are normally offered low-level social insurance and benefits. Taking the situation in Shanghai as an example, basic pension insurance has been divided into four types: insurance for workers holding non-agricultural Hukou, insurance for workers holding non-agricultural Hukou but employed by enterprises registered in suburb, like Chongming, Jinshan, Fengxian, and Minhang, insurance for agricultural Hukou holders, and comprehensive insurance for migrant workers (mainly targeting at migrant rural workers since its revisions on July 1, 2009), among which the premiums of the latter two are lower than the former, leading to the lower benefits consequently. By this new law, an equal treatment will probably be accessible to all PRC citizens.

However, pursuant to the SIL, basic pension insurance and basic medical insurance are only mandatory to full-time workers. As stipulated in Article 10 and Article 23, individual industrial and commercial households without employees, part-time workers without payment of basic pension insurance premiums by their employers, and other freelance workers are allowed to enjoy the basic pension insurance in the way of paying the premiums themselves, which means employers of part-time workers are free to choose whether to pay premiums for them or not.

In spite of this drawback, the positive side still outweighs the negative one on expanding the coverage of beneficiaries.

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<sup>2</sup> There still exist differences in its application to different people in spite of the general principle. Please find detailed discussion below.

## **ii Flexibility on Contribution Period for Basic Pension**

The amount of standard pension provided monthly to retired workers is ordinarily comprised of two parts: a variable sum from social pooling account and a fixed sum from individual account. Prior to the SIL, for the purpose of receiving such monthly paid standard pension, a worker is required to contribute for fifteen years cumulatively, when the statutory retirement age arrives, otherwise this worker will only be available to a lump sum in the value of this person's contribution deposited in the individual account at retirement.<sup>3</sup> Apparently, such lump sum will be much lower than the standard pension, since it will not contain money from social pooling account. Furthermore, current valid rules and regulations do not provide any alternatives else.

Article 16 of the new law offers a mechanism to solve the aforesaid troubles faced by those workers. If a worker's cumulative contribution period is less than fifteen years at retirement, then this person who previously enjoyed basic pension insurance will have two options: 1) to continue contributing until satisfying the fifteen-year requirement, so that this worker will be able to receive standard pension monthly; or 2) to transfer to New-pattern Rural Social Pension Insurance<sup>4</sup>, or social pension insurance for residence with non-agricultural Hukou<sup>5</sup>, and receive corresponding benefits according to regulations issued by the State Council (not yet issued). Besides, workers failing to meet the fifteen-year contribution period are also free to choose the old way, the lump sum. Such flexibility demonstrates fairness and offers every contributor more opportunities to take.

## **iii Off-site "Roaming" of Basic Pension Insurance and Basic Medical Insurance**

The SIL allows workers to transfer their basic pension insurance accounts and basic medical insurance account from one residence to another with their contribution period calculated cumulatively, thus off-site "roaming" of those two forms of insurance becomes possible. Actually, this is not a system completely new, since on January 01, 2010 Ministry of Human Resources and Social Security of PRC and Ministry of Fiscal jointly issued the Provisional Measures on Taking over Primary Pension Insurance for Workers of Enterprises in Urban Area by which the system of cross-regional transfer of basic pension account was set up. The SIL confirms and emphasizes this system, so that it is not provisional any more. The allowance of account transfer overcomes the adverse impact brought by the

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<sup>3</sup> In accordance with *Decision by the State Council on Improving the Basic Workers' Pension System* (2005)

<sup>4</sup> In accordance with "Guiding Opinions of the State Council on the Trial New-pattern Rural Social Pension Insurance" (2010) (the "Guiding Opinion"), this "New-pattern Rural Social Pension Insurance" consists of contributions by individuals, grants by rural group, and subsidies by competent government organizations. The State Council has not issued formal regulation in respect of this form of insurance, but this new system has been executed in several cities under relevant local rules enacted in compliance with the Guiding Opinion.

<sup>5</sup> The State Council has not issued regulation or any kind of documents in respect of this social pension insurance, but this system has been executed in trial in several cities under local rules. Referring to the provisions of those local rules, social pension insurance is applicable to those non-agricultural holders excluded from any type of existed basic pension insurance before the introduction of such system.

inconsistencies among local rules to migrant workers<sup>6</sup> previously and lifts restrictions on movement of China's increasing migrant population.

Moreover, the SIL also intends to tackle the problem of cross-regional medical insurance refund by requiring relevant social insurance administration and health administration to establish cross-regional medical insurance payment system that allows medical insurance in one place to be repaid in another.

Although timetable for the issuance of detailed measures for both is unknown, such provisions are still seemed to be a positive signal of the central government's intent to bring more conveniences and interests to Chinese citizens.

#### **iv Enhancement of the Collection of Social Insurance Premium**

In the old regulation, Provisional Regulations on Collection and Payment of Social Insurance Premiums dated January 22, 1999, in the event an enterprise fails to pay social insurance premiums, the major punishment is to impose a fine on it, despite the provision of application to people's court for taking enforcement action against enterprises having unpaid overdue premiums, because it does not specify detailed steps and what kind of action is available if the amount in that enterprise's account is short of the required premiums.

The ambiguousness as aforesaid can be avoided by the new law. As to enterprises with unpaid overdue social insurance premiums, social insurance premiums collection organization is entitled to apply to banks or any other financial agencies to inspect their deposit accounts. Furthermore, the organization is also allowed to apply to competent administration above county-level to make decisions on social insurance premiums transferring, by which decisions banks or other financial agencies will be obliged to directly remit certain sum of money to instructed social insurance account upon receipt of written notice. If the amount in the deposit account is insufficient to pay the premiums, the collection organization and certain owner of the deposit account are allowed to enter deferred payment agreement on the ground of providing securities by the owner. In case an enterprise neither fully pays the premiums nor provides any security, the collection organization is entitled to apply to people's court to distrain, seal up, or sell by auction properties possessed by such enterprise valued in the same amount as the unpaid premiums.

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<sup>6</sup> For instance, the "Jiang Naiqun (蒋乃群)" case which has been deemed as the trigger of enactment of the *Provisional Measures on Taking over Primary Pension Insurance for Workers of Enterprises in Urban Area*: Jiang Naiqun (蒋乃群), a worker with Nanjing Hukou, worked in Nanjing for thirty years from 1962 to 1992, and then he left the former enterprise and migrated to and worked in Shenzhen for a WFOE for seven years. When he was at the statutory retirement age, he returned to Nanjing, but was told that physically he could not enjoy pension in Nanjing, since the social insurance system was not executed at the time he left Nanjing, and therefore he had no social insurance account in Nanjing. Then he went to Shenzhen Social Security Department for resort, but was told that he simply worked in Shenzhen for seven years, failing to meet the requirement of fifteen-year's contribution period, so he was only accessible to the contribution in his personal account (only seven-year's contribution). Therefore, after thirty-seven years' work, Jiang eventually was provided with relatively low pension.

#### **v Establishment of National Pooling of Basic Pension**

At present, the basic pension insurance fund is provincial or municipal pooling, materially restricting the transfer of basic pension account cross-regionally.

In accordance with the SIL, the government is required to establish national pooling for basic pension insurance fund, and provincial pooling for fund of other forms of insurance stage by stage, though detailed timing and stages of such establishment has not been disclosed. The national pooling of basic pension has also been included into the proposal of the Twelfth Five-year Program on National Economic and Social Development drafted by the Communist Party of China Central Committee.

#### **vi Coverage of Foreign Workers**

Currently, most foreign workers in China can enjoy worker injury insurance and basic medical insurance in big cities such as Beijing and Shanghai, or even access to the same social insurance as local citizens when satisfying certain conditions, while all of which are optional. Therefore, most enterprises incline not to pay any kind of insurance for their foreign employees, instead to reimburse employees for such things as medical bills, because that costs less every year.

For the adoption of the SIL, foreign workers in China will be entitled to social insurance benefits as Chinese citizens and this is being seen as a major sign of the country's wider economic and social openness, except that the SIL does not reveal details like how many insurance forms will be available to foreign workers, so that we have to wait for the issuance of relevant measures of implementation or local regulations to elaborate on which insurance is compulsory and which is not. Still, it is the first step taken by Chinese government toward foreign workers being included in the national social insurance system.

### **III. Conclusion**

The adoption of the SIL is essential for improving and perfecting the legislation of this country's social security system notwithstanding the shortcoming demonstrated by SIL that there exist too many authorizations to the State Council, ministries, and local governments in enacting specified measures of implementation, as the new law itself bears general and ambiguous wording. It is also helpful unifying the standard of various forms of social insurance nation wide. Moreover, the introduction of the new social insurance law manifests the central government's determined mind to narrow polarization of wealth by methods like lifting the stiff restrict of fifteen-year limitation, expanding coverage of beneficiaries and establishing national pooling of basic pension.

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