



US-China Business Council Comments on the Draft Provisional Measures on Foreign Workers Participating in Social Insurance in China

The US-China Business Council (USCBC) and its member companies appreciate the opportunity to provide comments on the draft Provisional Measures on Foreign Workers Participating in Social Insurance in China, issued on June 10, 2011. We believe the comment solicitation process reflects a positive effort to provide greater transparency in the formulation of policy and legislation, and will result in better regulatory outcomes that are widely supported by stakeholders in China and that are more enforceable for Chinese regulators. In practice, the most constructive comments and contributions to China's policy-making process come when a period of 30 days is allowed for stakeholders to review the necessary regulations, compare draft provisions with international best practices, draft comments, translate those comments into Chinese, and present final comments to the relevant ministry or ministries.

USCBC represents more than 230 US companies that conduct business in China, including many that have employed or currently employ seconded or locally hired expatriates in China. Our members' experience in participating in the social security programs of other countries, and in managing employees that work in different countries over the course of their careers, has helped USCBC formulate these comments. We hope these comments will prove constructive and useful to the Ministry of Human Resources and Social Security (MOHRSS).

USCBC and its member companies appreciate and support China's efforts to clarify provisions in the PRC Social Insurance Law regarding the participation of foreign nationals in China's social insurance schemes, and we applaud drafters' efforts to secure the health and well-being of all workers by creating the opportunity for everyone working in China to receive basic social insurance coverage. USCBC also recognizes that government authorities must consider the needs of different groups of people. The circumstances regarding the employment of foreigners in China can be complex, and, given the array of foreigners working in China, mandatory participation of foreign nationals in China's social insurance system may create significant operational challenges for companies and regulators alike. Therefore, USCBC respectfully recommends the following clarifications and revisions to some provisions in the draft provisional measures to ensure that the Social Insurance Law and its implementing regulations align with actual social insurance conditions.

Scope of Coverage for Foreign Workers

Duplication with Employer-Offered Social Insurance Programs

Article 3, paragraph 1 of the draft appears to mandate participation in China's social insurance system by all legally employed foreigners. This is an important benefit for those employees whose companies do not provide these benefits. Yet employers in China often provide their foreign employees with commercial insurance and other benefits, which typically cover the five social insurance types identified in the draft provisional measures. In light of this existing employer-sponsored coverage, mandatory participation in China's social insurance scheme is unnecessarily duplicative, and would clearly increase human resource costs for companies and make China a less attractive destination for foreign investment.

Therefore, USCBC respectfully recommends changing "should" to "may" in Article 3, paragraph 1, thus making participation in China's social insurance system optional for foreign employees upon written agreement with their employer.

Duplication with Overseas Social Insurance Programs

Article 3, paragraph 2 also appears to mandate participation in China's social insurance system by all dispatched foreigners. Such foreign employees who are dispatched by an overseas company to work in China typically remain employed by their overseas employer and thus do not share a direct employment relationship with the PRC-based entity to which they are dispatched. Given this lack of an employment relationship, there is no practical basis to require the PRC-based entity to pay social insurance for foreign dispatched employees.

Moreover, foreign employees who are dispatched to work in China generally work for a short period, returning to their home countries after completing their assignment. Such employees are therefore less able to enjoy the social welfare benefits provided by China's social insurance scheme, despite the fact that they must contribute to it. As noted previously, overseas employers generally purchase insurance packages and/or participate in retirement programs in the employees' home countries on behalf of dispatched employees, making participation in China's domestic social insurance scheme duplicative.

Based on the points above, USCBC respectfully recommends changing "should" to "may" in Article 3, paragraph 2, making participation in China's social insurance system optional for dispatched employees upon written agreement with their employer.

Insurance Types

Article 3 lists the five types of social insurance including basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, and maternity insurance. Considering the different circumstances under which foreign nationals are employed in China, USCBC respectfully recommends that the draft provisional measures be revised to reflect different approaches for foreign participation in each type of insurance.

Basic Pension

Dispatched foreign employees typically stay in China for a short period, generally less than five years, and return to their home country upon conclusion of their assigned duties in China. Under most circumstances, expatriates do not retire in China and therefore will not receive social insurance payments in China upon retirement.

Article 5 of the draft provisional measures allows individuals to submit to the relevant PRC social security agency a written request to retrieve funds deposited into his or her individual social insurance account and receive a lump-sum payment upon leaving China, after which his or her account will be terminated. Yet managing such a system for foreign employees will be complex for regulators and enterprises and will require additional resources for both sides. In light of the duplicative coverage and extra work, USCBC respectfully suggests that regulators follow the Singapore model in which foreign employees are not required to make payments into the basic pension system, and that MOHRSS revise Article 3, Article 5, and other relevant articles of the draft provisional measures to reflect those changes.

If PRC authorities wish to require foreign employees to contribute to the basic pension system, USCBC respectfully suggests following the existing model found in China's taxation of worldwide income only after five years' continuous residency in China by establishing a threshold after which contributions to the basic pension system would be mandatory. Such a method would eliminate the challenges that would arise from requiring short-term and seconded employees to contribute to the system while meeting regulators' goals of having longer-residing foreigners contribute.

Basic Medical Insurance

Because of language barriers and the potential to seek medical treatment in their home country, many foreign companies provide their foreign employees with medical insurance that they may use at medical facilities of their choosing, either in China or in their home country. Though drafters rightly seek to include those persons who do not have medical insurance, the participation mandate will be duplicative for many foreign employees who already have medical insurance.

Mandating contributions to basic medical insurance becomes even more complex when other questions are considered, such as whether payments made to existing employer-sponsored medical insurance would be regarded as payment into the basic medical insurance scheme, whether international and foreign-invested hospitals and VIP wards of public hospitals in China would be enrolled in the basic medical insurance, and whether foreign nationals who incur medical costs while overseas would be able to reimburse such medical costs. In light of these unresolved complexities for foreign employees that already have medical insurance, USCBC respectfully recommends revising relevant parts of the draft provisional measures, including Article 3, to allow foreign employees to opt out of basic medical insurance upon demonstrating proof of existing coverage.

Unemployment Insurance

Article 51 of the PRC Social Insurance Law stipulates that if an unemployed worker emigrates outside China, his or her unemployment insurance benefits will be terminated. In practice, when

foreign nationals become unemployed in China, it is difficult for them to remain legally in China because their visas are no longer valid. As a consequence, unemployment insurance would have limited effectiveness for foreign nationals. USCBC respectfully recommends that the draft provisional measures be revised so as not to require foreign nationals to participate in the unemployment insurance scheme.

Work-Related Injury and Maternity Insurance

Many foreign employees receive coverage for work-related injuries and benefits for maternity leave as part of their employment package. USCBC respectfully recommends revising the draft provisional measures to allow for foreign employees and employers to mutually agree in writing to participate or to opt-out.

Extension of the Implementation Date

China's Social Insurance Law took effect July 1, 2011. Given the remaining significant uncertainty with respect to the participation of foreign nationals in China's social insurance scheme, an extended deadline for implementation would allow relevant departments to set forth clear implementation details and ensure a smoother implementation process. Extending the implementation deadline would also allow enterprises greater time to make the proper financial preparations that are necessary for compliance. Therefore, USCBC respectfully recommends that Article 12 of the draft provisional measures have an implementation date of at least one year after the date of final promulgation.

Payment Procedures and Standards

Article 3 of the draft provisional measures states that, "Social insurance contributions shall be paid in accordance with the regulations," but neither the measures nor the PRC Social Insurance Law provide details on specific payment procedures and standards. Specifically, the draft does not clearly indicate whether the same standards for calculating social security contributions apply to both expatriate employees and Chinese employees, or whether there is a cap for employee and employer contributions. In addition, Article 12 and Article 35 state that "total employee salary" is an appropriate baseline upon which to calculate basic pension insurance and work-related injury insurance payments. In practice, the standard employers use for making contributions on behalf of employees is based on multiplying their individual base salary by locally set contribution ratios. Changing the standard to use total employee salary would dramatically increase companies' labor costs.

Therefore, USCBC respectfully recommends inserting an additional provision into Article 3 stating that, "The payment procedures and standards that foreign employees use for making social insurance payments shall be the same standards and procedures that domestic employees use. Social insurance contributions should be made based on the employee's average monthly wage, with a cap of three times the average monthly wage of all employees in the relevant locality or jurisdiction."

Conclusion

USCBC would like to thank MOHRSS for providing this opportunity to comment on the draft provisional measures. We hope these comments will prove constructive and useful to the ministry as it continues to develop China's social insurance system. USCBC welcomes any feedback the ministry may have and hopes to have the opportunity to discuss the contents and provisions of the draft more fully.

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