Locals or Expats? Impact of Latest Reforms on Hong Kong, Macao and Taiwan Residents Working in Mainland China

Employment Alert

27 SEP 2018
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On 3 August 2018, the State Council made an announcement (Announcement) to cancel several administrative permits, including the work permits for Hong Kong, Macao and Taiwan residents (HMT Residents). This was closely followed by a series of developments that changes how HMT Residents obtain employment, education and medical benefits in mainland China (China). However, various questions remain unresolved and employers should be alert about the heightened risks associated with having these individuals work in China in the meantime.

Definition of HMT Residents

HMT Residents are individuals with Chinese descent who have at least permanent residency in Hong Kong, Macao or Taiwan, which the Chinese government recognizes are part of China and not foreign territories. Rather than needing any visas, these individuals may enter into the mainland using travel permits for Hong Kong, Macao or Taiwan residents, respectively, or more commonly known as Hui Xiang Zheng in Hong Kong and Macau, or Tai Bao Zheng in Taiwan. In the past, they are required to have a work permit in order to obtain employment in mainland China, and are treated in many respects as similar to foreign nationals under employment regulations.

Residence Permits for HMT Residents

Following the Announcement, on 19 August 2018, the General Office of the State Council issued the Measures on the Application for and Issuance of Residence Permits for Hong Kong, Macao and Taiwan Residents (Measures) which are effective as of 1 September 2018. The Measures allow HMT Residents to apply for residence permits in mainland China (Residence Permits) if they reside for more than 6 months and have in mainland China:

- a stable job;
- a legitimate and stable residence; or
- an education course they are attending continuously.

Residence Permits will be valid for up to 5 years and will need to be renewed at the end of its term. According to the Measures, a holder of the Residence Permit has the right to work legally in China, participate in social insurance scheme, and contribute, collect and use housing funds. Moreover, local governments should provide basic public services to HMT Residents, including public education for children, legal pro bono service, issuance of driver's license, and childbirth services.
Notably, while the Measures emphasize on the benefits, they are silent on whether any corresponding obligations that apply to local nationals also apply to HMT Residents in China, such as whether it is mandatory to have certain percentage of the individual’s salary paid to all five types of social insurance and housing funds and whether there is any restriction on the number of children eligible for education and other public services due to birth planning regulations mainland China (currently local nationals are allowed to have two children). In the past, HMT residents in mainland China are generally treated as similar to foreigners and are only required to participate in some types of social insurance.

Employment of HMT Residents

On 23 August 2018, the Ministry of Human Resources and Social Security (MHRSS) issued the Notice on Employment Matters of Hong Kong, Macao and Taiwan Residents in Mainland China (Notice).

The Notice confirms that there is no need for HMT Residents to apply for work permits starting from 28 July 2018. In the absence of work permits, HMT Residents could use either the above Residence Permits or the regular travel permits they use to enter into mainland China (i.e. Hui Xiang Zheng or Tai Bao Zheng) to enroll in social insurance and other services. Further, they could use their labor contracts (hiring contracts), payroll receipts or social insurance contribution records to prove their employment in mainland China.

The Notice left unaddressed the issue of whether corresponding employer obligations that apply to local nationals also apply to HMT residents, or whether they would be treated as foreign nationals as in the past. This is exacerbated by the fact that, at the same time as it issued the Notice, the MHRSS abolished the key piece of regulation that governed employment of HMT Residents, the Regulations on Administration of Employment of Hong Kong, Macao and Taiwan Residents in Mainland China.

What This Means for Employers

While the cancellation of work permits for HMT Residents may result in some convenience for companies that want to employ them to work in mainland China, the lack of clarity in the legislation has so far heightened risks associated with having these individuals work there. In particular, employers should be aware of and try to seek clarification on the following issues.

- Whether the employer needs to enroll HMT Residents in all types of social insurance and housing fund and whether this is a mandatory requirement like local nationals. (In the past, for HMT Residents and foreign nationals this is only mandatory with respect to a few types of social insurance, some cities even do not enforce the requirement for them.)
- Whether mandatory terms and conditions under labor laws and regulations can be varied in the employment contracts for HMT Residents. (Chinese labor laws are known for the protection of employees such as the difficulty for employers to terminate employment. In the past, some cities expressly permit these requirements to be varied in the employment contracts for HMT Residents and foreign nationals but not for local nationals.)
- Whether the requirement for Representative Offices of foreign companies to employ local nationals via local staffing agencies apply to HMT Residents. Local staffing agencies should in theory be able to process their employment and payroll if they are treated the same as local nationals, whereas they are unable to do so for foreign nationals.
- In the past, a HMT resident (or a foreign national) who does not have a work permit is expressly excluded from the protection of Chinese labor laws. Now the Notice states that HMT Residents may use their “labor contract (hiring contract), salary payment slip or social insurance payment record as evidence of their employment in China.” Therefore, the new rules seem to make it much easier for HMT Residents to assert protection under Chinese labor laws. This will have most impact on companies that hire or assign HMT Residents to work in China on a temporary or part-time basis (e.g. Hong Kong residents working across the border in Shenzhen temporarily), and thus were not required to obtain a work permit and excluded from Chinese labor law protection in the past. In addition, HMT Residents that are seconded to China by an overseas employer through an expat secondment arrangement may also rely on Chinese labor laws more easily using their “hiring contract” as evidence of their employment in China, as “hiring contract” is undefined in the Notice.
Many HMT Residents also hold foreign passports. In the past, the rules that apply to the employment of HMT Residents and foreign nationals are more or less the same. Under the new rules, it is not clear whether the rules with respect to foreign nationals or HMT Residents will apply to them.

Impact of Latest Income Tax Law Changes

The changes to the rules bringing HMT Residents' status in China more in line with local nationals also understandably trigger questions with respect to their tax exposure. On that front, the Chinese government recently passed the amendments to the Individual Income Tax Law (see link to our article on this topic), making it easier for expats to be subject to local taxes in China. On that question, a spokesman of the Taiwan Affair's Office of the State Council said on 1 September 2018 that the HMT Residents may not necessarily be subject to tax on their worldwide income even though they have obtained Residence Permits in China. This is however not clarified in the latest legislative changes around the rules for HMT Residents.

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