

## Tort liabilities relating to employment-take domestic workers as illustration

### Description

In Shanghai, there are basically two ways of hiring an Ayi from market. (1) you find the Ayi by yourself or through a friend and you pay her directly and thus establish an employment relationship with the Ayi; (2) you hire the housekeeping/babysitting service from a company or firm in the market and the company sends their staff to your house but you pay the company instead of the Ayi directly.

The legal risks associated therewith are quite different in the two cases.

#### 1. Ayi getting injured during work

(1) in the first case, you are almost always to pay the compensation (including medical care, loss of income, nutrition fee, disability damages etc., could be a stunning amount). The law in this regard has relaxed a little bit on the part of employer after China Tort Liability Law (hereinafter, the "Tort Law") takes effect on July 1, 2010. Previously, in accordance with the Interpretation on Application of Law in Personal Injury Disputes (hereinafter the "Interpretation"), the employer shall have to pay any and all damages suffered by the employee arising from personal injury without regard to whose fault giving rise to the injury. However in the Tort Law, it makes it clear that, in the employment relationship between individuals, if the employee is injured because of her work, the court will look into the faults of the parties when allocating liabilities.

If the injury is caused by a third party, under the Interpretation, the Ayi or the domestic employee may choose to sue the third party or the employer for damages. The employer assuming compensation shall have recourse to the third party. However in the Tort Law, if the employer can show to court that the injury is completely attributed to a third party misconducts, then employer will be free from any liability to the employee.

(2) in the second case, you are much safer. Although the Ayi is working for you, the court will not see an employment relationship between you and the Ayi but between the company and the Ayi. You are simply purchasing service rather than employing someone. However, please note, you will be likely to bear responsibility for compensation, if the court finds that you have issued improper instructions to the Ayi which may contribute to the injury.

#### 2. Ayi injuring others during work

If the Ayi or your employee inflicts injury to others during performing her or his duties, in both cases, you or the company, as the employer, is always in the first place to pay damages. Previously in the Interpretation, if such injury arises out of intention or gross negligence on the part of the employee, the employer and employee shall be jointly and severally liable for the third party, and afterwards, the employer may have recourse to the employee.

But in the Tort Law, while it repeats that the employer shall be responsible for the injury to the third party caused by the employee, it is however silent on whether the employer will be able to pursue recourse to the employee for his or her intention or gross negligence. People are divided on whether an employer should have such recourse to employee. I personally think such right of recourse shall be granted to employers in order to discipline unruly employees.

IMPORTANT NOTE: the above analysis is made in accordance with Chinese laws. The word “employment”, “employer” and “employee” used here denote a legal relationship that shall be distinguished from the labor relationship defined and regulated by China Labor Law and China Labor Contract Law. While the two similar relationships share some common legal features, generally speaking, a labor relationship is more heavily regulated than the employment relationship discussed here.

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