

Haiwen Labor Law Bi-Monthly Newsletter (Sep. - Oct.)

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I. Interpretation of Laws and Regulations: Law on the Protection of Women's Rights and Interests Has Been Revised, Putting Forward Higher Requirements for Enterprises to Prevent and Stop Sexual Harassment and Guarantee Women's Equal Employment Rights

In order to protect women's lawful rights and interests, promote the equality between male and female and the all-round development of women, the National People's Congress passed the newly revised Law of the People's Republic of China on the Protection of Women's Rights and Interests (the "**Law on the Protection of Women's Rights and Interests**") on October 30, 2022, which will come into force on January 1, 2023. This revision puts forward new and higher requirements for employers in preventing and stopping sexual harassment and guaranteeing women's equal employment rights, as follows.

1. Employers Shall Refine the Internal Policies on Preventing and Stopping Sexual Harassment

Although the Law on the Protection of Women's Rights and Interests before revision explicitly prohibited sexual harassment, it didn't specify which entities have specific obligations to prevent sexual harassment and to what extent. Article 23 of the new Law on the Protection of Women's Rights and Interests first defines the forms of sexual harassment: "Sexual harassment of women against their will by verbal, written, image, physical behavior, or other means shall be prohibited"; Meanwhile, Article 25 further specifies the preventive and restraining measures that employers should take, including:

1. formulating internal rules and systems prohibiting sexual harassment;
2. specifying a department or person in charge;
3. conducting education and training activities to prevent and stop sexual harassment;
4. taking necessary safety and security measures;
5. publishing complaint telephone numbers and mailboxes, among others, and keeping complaint channels unimpeded;
6. establishing and improving investigation and resolution procedures, resolving disputes in a timely manner, and protecting the privacy and personal information of relevant parties;
7. supporting and assisting women victims in lawful enforcement of rights, and providing them with psychological counseling when necessary; and
8. other reasonable measures to prevent and stop sexual harassment.

According to Article 80, where an employer violates this Law by failure to take necessary measures to prevent and stop sexual harassment, causing women's rights and interests being infringed or creating an execrable social impact, higher authorities or relevant authorities shall order it to take corrective action, and disciplinary measures shall be taken to the directly liable executive in charge and other directly liable persons in accordance with the laws, if they refuse to take corrective action or if the circumstances are serious. And according to Article 77, if relevant entities fail to take reasonable measures to prevent and stop sexual harassment, causing women's rights and interests or the public interest being infringed, the procuratorates may issue a prosecutive recommendation and file a public interest lawsuit according to the laws.

Haiwen Suggestions: This revision requires employers to establish a streamlined and standardized sexual harassment prevention and copying mechanism, and puts forward more specific and clear requirements for the employers. The newly added accountability rules make it possible for the responsible persons within the employing entity to directly face the punishment from the competent authorities, besides the liabilities of the entity. To sum up, the employer's obligation and responsibility to prevent and control sexual harassment is no longer just a mere formality. It is worth noting that Article 8 of the Law on the Protection of Women's Rights and Interests stipulates that the relevant authorities should solicit the opinions of the Women's Federation when formulating or revising laws, regulations, rules and other normative documents concerning women's rights and interests. In 2021, the All-China Women's Federation's Rights and Interests Department issued the Guiding Manual on Prevention and Control of Sexual Harassment in the Workplace, which provides operational guidelines on how to prevent and handle harassment cases for employers. It is worthy of further reference when employers fulfill their legal obligations of sexual harassment prevention and control.

2. Further Guaranteeing Women's Equal Employment Rights

男女平等是我国的基本国策之一，早在2005年已经被纳入《妇女权益保障法》，但原法仅原则性地规定了单位在招聘阶段不得歧视妇女，不得因结婚、怀孕等原因降低妇女的工资待遇。新修订的《妇女权益保障法》不仅细化了招聘录用阶段的妇女平等就业权要求，还进一步明确了妇女在整个用工过程中享有的各项平等权利。

Gender equality is one of China's basic national policies, and it was included in the Law on the Protection of Women's Rights and Interests as early as 2005. However, the law before this revision only stipulated in principle that the employer should not discriminate against women in the recruitment stage, and should not reduce women's salary due to marriage, pregnancy and other reasons of a similar kind. The revised Law on the Protection of Women's Rights and Interests not only specifies women's equal employment rights in the recruitment stage, but also further clarifies the equal rights enjoyed by women in the whole employment process.

Prohibited Acts of Employer in Recruitment Stage (unless Otherwise Required by Law)

1. recruiting only males or specifying preference for males;
2. in addition to basic personal information, inquiring about or investigating the marital and parenting status of a female candidate;
3. including a pregnancy test as a pre-employment medical examination item;
4. conditioning employment on marital or parenting restrictions or status;
5. otherwise refusing to employ women on the grounds of gender or applying higher standards for recruiting women in a differentiated manner.

Prohibited Acts of Employer during the Process of Employment

1. decreasing a female employee's wage and perks, by reason of matrimony, pregnancy, maternity leave or breastfeeding, among others;
2. restricting the female employee from promotion in post, rank, professional qualification certification or appointments by the above reasons.

For the gender discrimination by an employer, labor authorities shall order it to take corrective action, and impose a fine from RMB 10,000 to RMB 50,000 if it refuses to take corrective action or if the circumstances are serious. And according to Article 77, if relevant entities violate women's equal employment rights and causes the public interest being infringed, the procuratorates may issue a prosecutive recommendation and file a public interest lawsuit according to the laws.

Haiwen Suggestions: Employers should review and make improvement to their whole employment process to control the employment discrimination risks, including the recruitment posting, information collection, onboarding, physical examination, promotion, and termination of employment, and should make sure all the internal policies and employment documents are in compliance with the latest legal requirements.

3. Strengthening Special Protection on Women's Health and the Right to Rest, etc.

Employers should also pay attention to the following special protection requirements for female employees:

1. According to Article 44, the employment contract or service agreement with female employees shall contain special protection clauses.
2. Article 31 stipulates that an employer shall regularly arrange health screening for female employees related to gynecological diseases, breast diseases and other health examinations specially needed by women.

3. According to Article 47 and Article 51, an employer shall protect women's right of rest and observe the relevant rules regarding maternity leave and benefits during pregnancy according to the law.

Where an employer violates women's labor and social security rights and interests, in accordance with Article 74, the labor authorities may, together with trade unions and women's federations, interview the employer, exercise supervision in accordance with the law, and require the employer to take corrective action within a specified period. According to Article 85, where a violation of this law infringes the lawful rights and interests of a woman, if any other law or regulation provides any administrative punishment against it, such law or regulation shall be followed. If such violation causes any property losses or personal damages, the violator shall bear civil liabilities. If any crime is constituted, criminal liabilities shall be imposed.

Haiwen Suggestions: Employers should review and make improvement to their whole employment process, as well as all the internal policies and employment documents, to make sure they are in compliance with the latest legal requirements.



II. Quick View of New Regulations: Measures for Compliance Management of Centrally Administered Enterprises Came into Force to Provide Significant Regulatory basis for the Compliance Management of Centrally Administered Enterprises and State-Owned Enterprises

Measures for Compliance Management of Centrally Administered Enterprises (the **Measures**) issued on August 23, 2022 by the State-owned Assets Supervision and Administration Commission of the State Council (the **SASAC**) came into force on October 1, 2022. The Measures applies to centrally administered enterprise for which the SASAC performs the duties of capital contributor as authorized by the State Council, and the centrally administered enterprises shall promote their affiliated entities to establish safe compliance management systems in accordance with the Measures. The local state-owned assets supervision and administration authorities shall guide the enterprises which they invested to strengthen the compliance management according to the Measures. Thus it appears that the Measures may become one of the core documents for the compliance construction of centrally administered enterprises, their affiliated entities and other state-owned enterprises.

According to the Measures, the centrally administered enterprises shall formulate specific systems or special guidelines for compliance management in key areas such as work safety, employment, tax management and so forth. Regarding management of employees, the Measures clarifies that the centrally administered enterprises shall improve its accountability mechanism for violations, clarify the scope of responsibilities, refine the standards for accountability, establish systems for recording the violations of its affiliated entities' operation management and employees' performance of duty, and take the nature, frequency of occurrence and degree of harm of violations as an important basis for performance assessment, position rating, etc..

Haiwen Suggestions: The centrally administered enterprises, their affiliated entities and other state-owned enterprises shall attach great importance to and timely implement the relevant requirements of the Measures, including constantly improving their compliance management system and policies, optimizing the framework and organization of compliance, e.g. setting up the role of Chief Compliance Officer and clarifying his/her rights and responsibilities, etc.. During the formulation of compliance system, the enterprises shall establish an identification, evaluation and early warning mechanism for compliance risks and corresponding assessment and evaluation mechanism, and strengthen the mechanism of supervision and accountability. In addition, if the compliance policies directly affect interests of employees, the democratic consultation and notification procedure shall be completed during the formulation and modification process to ensure the effectiveness of the relevant policies.



III. Quick View of New Regulations: Tianjin Issued the Revised Regulation on the Protection of Minors to Establish the Rule that Employers Who Have Close Contact with Minors Shall Establish the Employment Inquiry System

On September 27, 2022, the Standing Committee of the Tianjin Municipal People's Congress adopted the revision of Regulations of Tianjin Municipality on the Protection of Minors (the "**Regulations**") which came into force on November 1, 2022. The Regulations added the following provisions: no organization or individual may recruit minors in violation of regulations; employers who have close contact with minors shall establish the employment inquiry system and inquire with the public security organs or the people's procuratorates about whether the candidate has any record of illegal or criminal act such as sexual assault, abuse, abduction and human trafficking, act of force, etc. when recruiting employees, and shall not employ personnel who is found to have any record of the aforesaid acts. This is consistent with the following provisions in Law of People's Republic of China on the Protection of Minors (revised in 2020)(the "**Law on the Protection of Minors**"): *"When recruiting employees, employers that are in close contact with minors shall inquire with the public security organs and people's procuratorates about whether the candidate has any record of illegal or criminal act such as sexual assault, abuse, abduction and human trafficking, act of force, etc. and shall not employ personnel who is found to have any record of the aforesaid acts. Employers that are in close contact with minors shall regularly check whether the employees have the above-mentioned records of illegal or criminal act every year. If the employees are found to have the above behaviors through inquiry or other means, they shall be dismissed in time."*

Haiwen Suggestions: Regarding employment inquiry, on the one hand, according to the Rules for Public Security Organs in Handling of Criminal Record Inquiry Work issued by the Ministry of Public Security on December 3, 2021, when an employer inquires about the criminal record of its in-service staff or personnel to be recruited, it should be based on the provisions of laws and administrative regulations on prohibition of employment, and the relevant provisions of the Law on the Protection of Minors (revised in 2020) mentioned above belong to such "provisions on prohibition of employment". On the other hand, according to Article 100 of Criminal Law of the People's Republic of China, anyone who has been subjected to criminal penalties shall, when being employed, report to the employer faithfully about the fact, without concealment, therefore employers can ask whether candidates have been subjected to criminal penalties during recruitment and relevant personnel are obliged to report criminal record.



IV. Quick View of New Regulations: The State Council Issued Regulation for Promoting the Development of Individually Owned Businesses; Hebei Province and Henan Province Successively Released Regulations on Human Resources Market; Hebei Province Issued the 2021 Guidance Wage Level of Certain Occupations

1. The State Council Issued Regulation for Promoting the Development of Individually Owned Businesses

In order to encourage, support and guide healthy development of the individually owned economy, the State Council issued Regulations for Promoting the Development of Individually Owned Businesses on October 1, 2022, specifying that employees shall not may be induced or forced to register as individually owned businesses, and local government shall not take the number growth rate and annual reporting rate of individually owned businesses as the performance appraisal indicators.

2. Hebei Province and Henan Province Successively Released Regulations on Human Resources Market

The Standing Committee of the People's Congress of Hebei Province released the Regulations on Human Resource Market of Hebei Province (the "**Regulations**") on September 28, 2022. According to the Regulations, human resource service agencies shall conduct self-check on the information protection status of online recruitment service users at least once a year, verify the unreal and illegal information timely, take measures such as deleting according to law, and keep relevant records. The Regulations encourages human resource service agencies to provide professional services for personnel under flexible employment mode such as job hunting and recruitment, and outsourcing of human resource services. Human resource service agencies who have introduced high-level talents, high-skilled talents or talents in urgent need, may receive subsidies according to the level and quantity of the introduced talents in accordance with the Regulations.

The Standing Committee of the People's Congress of Henan Province released the Regulations on Human Resource Market of Henan Province (the "**Regulations**") on September 30, 2022. According to the Regulations, job hunters have the right to request the deletion of their personal information if human resource service agencies or network operators handled their personal information unlawfully or in breach of contract, and have the right to request the correction or deletion of their personal information if the handled personal information is wrong. Regarding workers under new forms of employment, the platform enterprises shall conclude **labor contracts** with the workers if they meet the conditions of establishing labor relations. If the platform enterprises conduct labor management on the workers who do not fully meet the conditions of establishing labor relations, the platform enterprises shall conclude **written agreements** with the workers.

3. Hebei Province Issued the 2021 Wage Level Guidance of Certain Occupations

In order to implement the relevant requirements of the Notice on the Establishment of Enterprise Salary Survey and Information Release System (Ministry of Human Resources and Social Security Issue No. 29, 2018), Hebei Provincial Department of Human Resources and Social Security issued the Hebei Province 2021 Wage Level Guidance of Certain Occupations (the "**Wage Level Guidance**") on October 25, 2022. The Wage Level Guidance covers 265 occupations, and it can be used for reference combining their own individual situation for employers' recruiting, employees' job hunting, and enterprises' collective negotiations of wage. Before this, Zhuhai, Qingdao and other regions also issued documents on the local wage level guidance.



V. Exploration of Typical Cases: The Intermediate People's Court of Hefei Municipality Issued a Typical Case of Labor Dispute, and the Primary People's Court of Wanzhou District of Chongqing Municipality Issued Eight Typical Cases of Labor Dispute

1. The Intermediate People's Court of Hefei Municipality Issued a Typical Case of Labor Dispute

Recently, the Intermediate People's Court of Hefei Municipality released a labor dispute case tried by the Primary People's Court of Baohe District of Hefei Municipality. People's Court Newspaper made a large-scale report of this case on October 13, 2022. The main facts of the case are that Nian who served as an office clerk held a concurrent post as accountant in the company, and he was deceived to transfer the funds in the company's account to fraudsters, resulting in a loss of RMB 1.943 million. Then the company sued Nian for compensation.

This case mainly involves issues that the employees cause loss to the employers when performing duties or tasks. The court held that the loss caused by the employee's normal performance of duties belongs to the objective business risk of the employer, and the employee generally does not bear the liability for compensation. However, if an employee intentionally or negligently fails to fulfill his duty of loyalty and prudence, he / she shall be liable for compensation to a certain extent. The scope and proportion of compensation should be comprehensively determined by factors such as the fault degree, damage degree and labor remuneration level of employees. In this case, the court ruled that Nian should be liable for damages of 80,000 yuan.

2. The Primary People's Court of Wanzhou District of Chongqing Municipality Issued Eight Typical Cases of Labor Dispute

The Primary People's Court of Wanzhou District of Chongqing Municipality issued eight typical cases of labor dispute, involving that network anchors and brokerage companies don't constitute employment relations when they don't have personal or economic subordination, the pre-condition for setting up a service period on employees is that the employer actually provides special business skills training for employees and the training expenses have been paid at the employer's cost and the employer's purchase of commercial insurance for employees doesn't exempt their payment obligation of mandatory work related injury insurance benefits.

The eighth case among them is noteworthy. This case involves that the employer illegally terminated the labor contract with the employee, and the employee requested to continue performing the labor contract in arbitration.

However, in the lawsuit, the term of the labor contract expired, and there was no condition for continuous performance. When the employee appealed to the court, he changed his request to pay compensation. The Primary People's Court of Wanzhou District of Chongqing Municipality held that it didn't violate the rule that a labor claim is short of justifiability before the courts if not completing prior arbitration proceedings , and the people's court can hear it directly. At present, the opinions of local judges are not consistent on this issue. When facing disputes, it is necessary to evaluate this issue according to the local rules and judicial practice. The court's opinion reflected in the above case is more favorable to employees.



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