

HAIWEN & PARTNERS

Haiwen Labor Law Bi-Monthly Newsletter

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I. Interpretation of Laws and Regulations: MOHRSS Issues Regulations to Enhance Compliance Requirements for HR Service Agencies

On June 29, 2023, the Ministry of Human Resources and Social Security (“MOHRSS”) issued the Regulations on the Administration of Human Resources Service Agencies (the “Regulation”), which provide for the administrative permit and filing, specification of service offered, supervision and administration, and legal liability of HR service agencies. The Regulation is the first national ministerial regulation to systematically regulate the activities of HR Service Agencies on the basis of the Employment Promotion Law of the People's Republic of China and the Provisional Regulations on Human Resources Market (“Previous Law and Regulation”). The main points of new concern in the Regulation are as follows:

1. Clearly providing that no fraud, coercion or inducement of employees to register as Independent Business shall be used to help enterprises evade the employer’s responsibilities

The Regulation stipulates that HR service agencies “shall not change the labor relations between employers and employees, and shall not collude with employers to infringe upon the legitimate rights and interests of employees”. In the development of platform economy, there is the practice of guiding employees to set up an independent business to advocate that the relationship between employees and the platform is a cooperative relationship rather than a labor relationship. The Regulation further clarifies that the labor relationship between employers and employees shall not be changed by fraud, coercion or inducement employees to register as an independent business accounts to help employers avoid the employer's responsibilities.

2. Defining “providing labor dispatch in the name of providing outsourcing services” as a prohibited HR service outsourcing practice from the ministerial regulation

The Regulation further clarifies that it is prohibited for HR service agencies to dispatch employees to other employers under de facto labor dispatch, in the name of HR service outsourcing. In case of violation, administrative penalties such as ordering correction, confiscation of illegal income, imposition of fines and revocation of HR service permit will be taken in accordance with the provisions of the Regulation.

3. Putting forward other service specification requirements, such as HR service agencies shall not introduce minors under the age of 16 years old to employment

The Regulation introduces the following new service specifications on the basis of Previous Law and Regulation: HR service agencies shall not (1) introduce minors under the age of 16 years old to employment; (2) provide employment intermediary services for employees without legal identity documents; (3) introduce employees to engage in occupations prohibited by law or regulation; (4) fraudulently obtain social insurance fund expenditures, social insurance benefits by means of fraud, falsification of documents, etc.

Haiwen Suggestions: HR service agency itself and enterprises in the process of cooperation with HR service agencies, should avoid malicious requiring employees to register an independent business, providing labor dispatch in the name of providing outsourcing services, using fictitious materials to fraudulently obtain social insurance benefits and other acts prohibited by law.



II. Quick View of New Regulations: Zhejiang Province Human Resources and Social Security Department Issued a New Measure, Focusing on the Specific Personnel Who Do Not Have Labor Relations to Participate in Single-type Work Injury Insurance

On July 16, 2021, MOHRSS and other ministries jointly issued the Guiding Opinions on Protecting the Labor Security Rights and Interests of Workers in New Work Forms (the “**Opinions**”) (for more information you may refer to [*“Haiwen Research: Haiwen Labor Law Bimonthly Newsletter” \(2021 July-August\)*](#)). On December 1, 2021, eight departments in Zhejiang Province jointly issued the Several Measures on Promoting the Healthy Development of New Work Forms (the “**Measures**”) (for more information you may refer to [*“Haiwen Research: Haiwen Labor Law Bimonthly Newsletter” \(2021 November-December\)*](#)). On May 26, 2023, Zhejiang Province Human Resources and Social Security Department and three other departments jointly issued the Measures on Participation in Single-type Work Injury Insurance for Specific Personnel Who Do Not Have Labor Relations (Trial) (the “**Work Injury Insurance Measures**”), which proposed more specific rules for single-type work injury insurance participation for specific personnel:

1. Expanding the scope of personnel covered by single-type work injury insurance

2. Limiting the age of insured personnel to 16-65 years old
3. Clarifying the basis of declaration of work injury insurance
4. Allowing multiple single-type work injury insurances and clarifying the subject of responsibility for work injury insurance
5. Determining the treatment of those who enjoy both pension allowance and disability allowance, i.e. applying the higher one and making up the difference as the principle

Haiwen Suggestions: if the employer in the process of employment engages non-labor relations personnel such as older workers who have reached statutory retirement age and are not older than 65 years of age, internship students, new work form workers, it can participate in a single-type work injury insurance for these personnel according to the local policy to reduce the risk of employment.



III. Quick View of New Regulations: Beijing First Middle People's Court Issued Opinions and Typical Cases of Labor Disputes Involving ESOP Issues

On May 5, 2023, the Beijing First Intermediate People's Court issued the *Notice of Typical Cases of Involving Equity Incentive Labor Disputes*, and then on May 29, 2023, it published the article *Research on the Judgment Rules of Common Disputes in Civil Cases Involving Equity Incentives - From the Perspective of Labor Disputes* in People's Justice Magazine (No.13, 2023).

The cases and the article summarized and analyzed the different views in the judicial practice and put forward the tendency judicial opinions around the common problems in the equity incentive disputes (such as the validity of the agreed extraterritorial jurisdiction clause, the determination of the litigants in cases involving third-party, whether the equity incentive can be used as the non-competition compensation, the disputes related to the exercise of rights, the validity of the clauses of the employees' liability for breach of contract, etc.).

To a certain extent, these opinions have responded to many controversial and difficult issues in practice, and are of great significance to the implementation of equity incentive plan by employers.



IV. Exploration of Typical Cases: MOHRSS and the Supreme People's Court Jointly Released Typical Cases Involving New Work Models

On April 24, 2023, MOHRSS and the Supreme People's Court jointly released the third batch of typical cases on labor and personnel disputes. (For the second batch of typical cases, you may refer to [*"Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter" \(2021 July - August\)*](#)). A total of six typical cases on the protection of rights and interests of workers in new work models were released in this round, focusing on the identification of employment relationship between workers and platform enterprises. Among them, the following judicial opinions are worth noting:

1. To identify whether there is an employment relationship between workers and the platform enterprises in new work models, whether there are certain elements, including personal subordination, economic subordination and organizational subordination, and the degree of subordination shall be comprehensively considered.
2. Since the model of work varies from different platforms, in judicial practice, the nature of legal relationship shall be identified based on the ascertainment of the way of operation and algorithm rules of the platform, the characteristics of the industry, the mode of operation of the enterprise, and whether the platform enterprise conducts labor management on the workers.
3. The workers shall not be identified as employees of a third-party labor company or as individual entrepreneurs by the outsourcing agreement or other appearance, and the labor relationship between the worker and the company shall not be denied based on the appearance either, but rather to examine the material elements such as the fact of labor management and the characteristics of subordination.



V. Exploration of Typical Cases: Beijing Third Intermediate People's Court Released the White Paper on Labor Disputes Trial Regarding Protection of Employment Promotion Strategy

On May 16, 2023, Beijing Third Intermediate People's Court held a press briefing to release the White Paper on Labor Disputes Trial Regarding Protection of Employment Promotion Strategy (the **"White Paper"**). The White Paper provides a big data analysis of the labor dispute cases accepted by the Beijing Third Intermediate People's Court during the period of 2020-2022. The data shows that the number of labor dispute cases remains at a high level, and the case trial reveals several new features such as disputes of termination of employment contracts takes a high proportion, labor dispute litigants diverse, the parties involved in cases tends to be younger, and employment of new work models needs to be further regulated.

Additionally, the White Paper released ten typical cases, among which we highlight below cases for

reference:

1. In the first case, the employer promised a higher salary during the recruitment interview and salary negotiation process, but informed the employee of the real salary in the offer letter when the employee left the former employer and prepared to join, and the real salary was significantly lower than the salary promised. The court held that the above behaviors of the employer violated the legal principle of good faith and caused loss of reliance interests to the employee, so the employer shall bear the fault liability to contract according to law.

2. In the eighth case, the employer applied for Beijing Hukou quota for the employee and agreed on a service period, later the employee left early for his own reasons. As the employee violated the legal principle of good faith and caused losses to the employer for applying for Beijing Hukou quota and recruiting newcomers, the employee shall bear the liability for damages, and the losses of the employer shall be decided by the court based on actual service years, reasons for leaving, the scarcity degree of Beijing Hukou, etc.

3. In the ninth case, it is stated in the separation certificate issued by the employer that the employment contract was terminated due to the employee's serious violation of the employer's policies. The court clarified that the content of the separation certificate shall be limited to statutory items, and the employer should reissue the separation certificate for the employee to protect the employee's rights to choose the employment from being affected by the employer's subjective intent.

4. In the tenth case, the employee claimed that the liquidated damages agreed in the non-competition agreement were too high and requested a reduction. The court determined that the employee shall bear the burden of proof that the liquidated damages were excessively higher than the damages caused to the employer by his breach of contract, and that it was not appropriate to merely compare the amount of non-competition compensation paid by the employer with the amount of liquidated damages directly, but the damages caused to the employer shall also be considered comprehensively.



VI .Exploration of Typical Cases: Jiangsu Higher People's Court Released Ten Typical Cases of Labor and Personnel Disputes in 2022

Recently, Jiangsu Higher People's Court released ten typical cases of labor and personnel disputes in 2022, involving various types of disputes, focusing on the protection of the rights and interests of special groups of employees and the proper exercise of enterprises' employment autonomy. Among them, the following cases are worthy of attention:

1. In the fourth case, a former employee of the employer incorporated a solely-invested human resources company and signed a labor outsourcing agreement with the employer, agreeing that other employees who continued to work in their original positions were employees assigned to the employer by the human resources company. The court held that the main purpose of the establishment of the human resources company was to avoid paying social insurance contributions to the employees and to transfer the risk of employment to the human resources company through labor outsourcing, and the employees were still under the actual management of the employer. Accordingly, the court ruled that the labor relationship existed between the employees and the employer rather than the human resources company.

2. In the sixth case, the employee was complained by two female interns that he verbally harassed them, asked them to squeeze his shoulders and forcefully hugged them, etc. during the work period. When being investigated, the employee admitted he asked the interns to squeeze his shoulders. Therefore, the employer terminated the employee's labor contract on the grounds of serious disciplinary violations. Later the employee applied for arbitration claiming illegal termination. The court held that since the employee used the convenience of his position in managing female interns to implement harassment, which is a serious violation of labor discipline and professional ethics, the termination of the labor contract by the employer is legal.

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