

Haiwen Labor Law Bi-Monthly Newsletter

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I. Interpretation of Laws and Regulations: The Ministry of Human Resources and Social Security, the Supreme People's Court and other Departments Successively Issued Documents to Protect the Equal Employment Rights of Laborers Including those Recovering from COVID-19

In order to tackle with the recent employment discrimination against laborers recovering from COVID-19 in some regions and employing entities, and to protect the equal employment rights and interests of employees recovering from COVID-19 in accordance with laws and regulations, the Ministry of Human Resources and Social Security (the "**MOHRSS**") and the National Health Commission jointly issued the Emergency Notice on Resolutely Solving Employment Discrimination against Laborers Recovering from COVID-19 (the "**Emergency Notice**") on 29 July 2022; the MOHRSS and the Supreme People's Court jointly issued the Notice on Strengthening Administrative and Judicial Coordination to Protect the Equal Employment Rights for Laborers

The two notices strictly prohibit discrimination against laborers including those recovering from COVID-19, and the following behaviors of employers are forbidden: (1) refuse to recruit laborers recovering from COVID-19 on the ground that they have ever tested positive in nucleic acid testing; (2) release recruitment notice with discriminatory content including the past positive result in nucleic acid testing for COVID-19; (3) discriminate employees recovering from COVID-19 during recruitment and employment; (4) query the result of nucleic acid testing for COVID-19 without authorization unless for epidemic prevention and control needs; (5) dismiss employees recovering from COVID-19 arbitrarily and illegally.

The MOHRSS and other departments will strengthen the investigation and inspection, and take strong measures such as administrative admonition, notification and exposure, administrative treatment and administrative punishment to employers, human resource service agencies or other entities and individuals who violate the foregoing requirements. In addition to lodging labor arbitration and litigation, employees whose rights have been infringed can also file civil lawsuits on the ground of infringement of equal employment right or personal information right.

Haiwen Suggestions: Employers need to pay attention to identifying and assessing risks of violating laws and regulations, to avoid the aforementioned behaviors of discriminating against laborers including those recovering from COVID-19 in the process of releasing recruitment notice, employee onboarding and employment management, and terminating labor relations. Employers also need to standardize query of the result of nucleic acid testing for COVID-19, to avoid unauthorized and illegal query of relevant test results, except for the need for epidemic prevention and control and scientific and reasonable setting of query for information in nucleic acid testing for COVID-19.



II. Interpretation of Laws and Regulations: Shenzhen Revised Wage Payment Regulation to Adjust Bonus Payment and Other Rules.

On 4 August 2022, the Standing Committee of the People’s Congress of Shenzhen issued a decision on revising the Regulation of Shenzhen on the Wage Payment to Employees (the “**Original Regulations**”). The revision (the “**New Regulations**”) involves 16 items, focusing on the following aspects:

1. Adjust bonus payment rules.

According to Article 14 of the New Regulations, where an employee’s monthly bonus, quarterly bonus and year-end bonus have not become due, the calculation and distribution rules shall be determined in accordance with the following sequence: (1) labor contract; (2) collective contract; (3) internal rules and regulations of employer; (4) If no agreement or stipulation, calculation and payment shall be based on the actual working hours of the employee. Compared with the Original Regulation requiring this part of bonus to be paid according to the actual working hours of employees, this revision fully reflects the recognition of the incentive role of the bonus, and the respect for the autonomy of employee and employer, and the autonomy in management of the employer. In Shenzhen, the employer may negotiate with the employee to modify the rules on bonus payment in the labor contract, collective contract and/or rules and regulations of employer according to the actual situation, or reach supplementary agreement in this regard, so that the calculation and payment rules can be clarified and interests of both the employer and the employee can be protected.

2. Adjust rules on retention period of payroll sheet, the form of payroll and the requirement of signing receipt.

Article 15 of the New Regulations extend the employer's obligation of keeping the payroll sheet of employees from two years to three years, stipulates that individual payroll can be presented to employees electronically and employees' signature for receipt is no longer required.

The extension of the retention period of payroll sheet may also means the corresponding extension of the period of the employer's burden of proof for wage information in judicial practice. In Shenzhen, employers shall pay attention to the extended retention period of payroll sheet and avoid the legal consequence of inability to bear the burden of proof as required.

3. Remove the economic punishment for violating rules and regulations of employer, add the obligation of informing employee in writing.

Article 34 of the New Regulations deletes the rule that employer can impose economic punishment on employee violating rules and regulations of employer by deducting the employee's salary, and adds the obligation of employer to notify employee in writing before making any permitted wage deduction.

Regarding the economic punishment clause, Article 50 of the Regulations on Labor Security Supervision of Guangdong Province clarifies that the rules and regulations of employer shall not entitle the employer to discipline an employee by levying a fine. Although the provision in the New Regulations is in line with the regulations of Guangdong Province, Article 16 of the Regulations on Promoting Harmonious Labor Relations of Shenzhen Special Economic Zone that the employer may "impose economic punishment on laborers in accordance with the rules and regulations of employer" is still valid. Considering that the Legislation Law authorizes the Shenzhen Special Economic Zone has the right to modify laws, administrative regulations and local laws and regulations according to its actual situation, and clearly stipulates that the laws and regulations of special economic zone shall prevail in the event of conflict. We suppose the Regulations on Promoting Harmonious Labor Relations of Shenzhen Special Economic Zone shall preempt the Regulations on Labor Security Supervision of Guangdong Province. However, it is foreseeable that due to the different positions on the right to economic punishment of employer in the New Regulations and the Regulations on Promoting Harmonious Labor Relations of Shenzhen Special Economic Zone, it would be a highly controversial issue in the judicial practice of Shenzhen in handling further disputes.

Other revisions in the New Regulations relate to the payout time of wage payment for the first month, the starting time of a wage period in the case of stop work and production, as well as revisions of several wordings and adjustments of fine amount, and other details.

Haiwen Suggestions: Employers in Shenzhen shall implement the above requirements promptly, and review the compliance of the relevant internal rules and regulations. If rules and regulations need to be revised, employer shall also ensure the compliance of democratic discussion procedure and proclamation procedure, in order to avoid the validity of relevant rules and regulations being denied due to procedural flaws.



III. Interpretation of Laws and Regulations: The Human Resources and Social Security Departments of Shanghai, Jiangsu, Zhejiang and Anhui Jointly Issued the "Guidelines on Labor Dispatching Compliance in the Yangtze River Delta Region" to Indicate the Identification Standards of Labor Dispatching and the Difference between Labor Dispatching and Labor Outsourcing

In order to further regulate the practices of labor dispatch, guide employers to use the dispatched workers according to laws and regulations and labor dispatch entities to carry out labor dispatch service activities according to laws and regulations, the human resources and social security departments of Jiangsu, Shanghai, Zhejiang and Anhui jointly issued the Guidelines for Compliance of Employment by way of Labor Dispatch in Yangtze River Delta (the “**Guidelines**”).

The Guidelines proposes 22 normative points that the employer and the labor dispatch entities shall notice, including but not limited to:

1. Further clarify the procedural requirements for defining “auxiliary positions”

The requirements of the democratic proclamation procedure for defining “auxiliary” in the Guidelines are consistent with the 2nd sub-paragraph of Article 3 in the Interim Provisions on Labor Dispatch. The steps of such procedure are further clarified as follows: “the first step is to determine the auxiliary positions for which dispatched workers will be used, compile a directory of auxiliary positions, and submit the directory of auxiliary positions to employees’ congress or all employees for discussion and to put forward plans and opinions; the second step is to determine the auxiliary positions through equal consultation with labor union or employees’ representatives; the third step is to announce the auxiliary positions within the entity.”

2. List the specific positions where labor dispatch is not allowed

For the specific positions that are not allowed to use labor dispatch, it was previously scattered in laws and regulations such as Measures for Safety Management of Overall Custody of Coal Mines (Trial) and Guiding Opinions on Strengthening Safety Production of Non-coal Mines. The Guidelines summarized and enumerated these positions, and made it clear that “for the key industries, confidential and core technical positions that are related to the life and property of the state and people, employers should adopt direct employment methods and sign labor contracts directly with employees as required, and labor dispatch is not allowed, such as full-time firefighters and other safety production positions, underground positions in coal mines and non-coal mines, and chemical production positions.”

3. Refine the calculation method of total headcount

The Guidelines clearly stated that “each affiliate of a group company should calculate the its headcount separately, and it is not allowed to compute the headcount based on group companies in the context of determining the permitted rate of dispatching employees.” It reemphasized that calculating 10% of the total employment of labor dispatch is an employer that can conclude labor contracts with workers, and closed the loophole of package calculation of the employment ratio of group companies. However, there is no clear provision in the Guidelines for the package calculation between head offices and branches.

4. Elaborate the difference between labor dispatching and labor outsourcing

The Guidelines elaborates the differences between labor dispatching and labor outsourcing from the aspects of subject qualification, job requirements, legal relationship, control and management, measurement standards of work results, etc. and further suggests that employers shall pay attention to the above differences when outsourcing labor, so as to avoid the situation that labor outsourcing is actually labor dispatch.

Haiwen Suggestions: The promulgation of the Guidelines suggests that employers need to strictly abide by the nature and proportion of using labor dispatch positions, and sort out and evaluate the compliance of their own labor dispatch employment. If labor outsourcing arrangements are involved, the compliance risks should be

carefully assessed in advance, and the legal risks identified as “fake outsourcing and real dispatch” should be fully prevented and controlled from the contents of service agreements and the actual service management methods.



IV . Quick View of New Regulations: Four Departments and Multiple Regions Successively Issued Notice on Phased Deferred Payment of Basic Medical Insurance for Employees by Employer; Beijing Adjusted the Rules for the Use of Funds in Individual Medical Insurance Accounts; Shandong Revised the Regulations on Population and Family Planning

1. Four Departments and Multiple Regions Successively Issued Notice on Phased Deferred Payment of Basic Medical Insurance for Employees by Employer

To help enterprises overcome difficulties, the National Health Insurance Bureau, the National Development and Reform Commission, the Ministry of Finance and the National Taxation Administration jointly issued the Notice on Phased Deferred Payment of Basic Medical Insurance for Employees by Employer (the “**Notice**”) on 30 June, 2022. Beijing, Tianjin, Shenzhen, Jiangsu, Hebei, Anhui and other places have successively issued local documents to implement the relevant requirements of the Notice.

The Notice makes it clear that the policy of phased deferred payment of basic medical insurance for employees will be implemented for micro, small and medium-sized enterprises. The co-ordination areas where the accumulated balance of the co-ordination fund can be paid for more than 6 months defer the payment medical insurance by micro, small and medium-sized enterprises and individual businesses participating in the insurance by means of employer for 3 months since July 2022, and no overdue fine shall be charged during the moratorium period.

2. Beijing Adjusted the Rules for the Use of Funds in Individual Medical Insurance Accounts

On 12 August, 2022, Beijing Medical Security Bureau issued the Notice on Adjusting the Relevant Policies of Basic Medical Insurance for Urban Employees in the City (the “**Notice**”), which involved eight amendments to Beijing’s medical insurance policies. Among them, the Notice particularly clarifies that since 1 September, 2022, personal account funds are earmarked for special purposes, and insured persons cannot withdraw them; Since 1 December, 2022, the personal account of the insured person can be used to pay the related expenses incurred by immediate family members; Since next year, if the outpatient (emergency) consultation expenses of the insured meet the requirements, and the maximum payment limit is more than 20,000 yuan, 60% of it will be paid by the mutual fund of large medical expenses, which will not be capped.

3. Shandong Revised the Local Regulations on Population and Family Planning

In order to implement the relevant provisions of the newly revised Population and Family Planning Law on 20 August, 2021, the Standing Committee of Shandong Provincial People’s Congress issued the revised Population and Family Planning Regulations of Shandong Province (the “**Regulations**”) on 28 July, 2022.

The newly revised regulations has made significant adjustments to the leaves related to marriage and childbirth, and the leave settings before and after the revision are as follows (for more information about revisions and adjustments to marriage and childbirth related leaves in other regions, please refer to the “[*Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter*](#)” (November-December 2021), [*Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter*](#)” (January-February 2022), [*Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter*](#)” (March-April 2022), [*Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter*](#)” (May-June 2022))

地区 Regions	条例的修订情况 Effective Date	假期种类 Types of Leave	适用主体 Applicable Body	修改前 Before Revision	修改后 After Revision
山东省 Shandong	2022.7.28 发布, 2022.11.1 生效 Promulgated on 2022.7.28 and effective on 2022.11.1	婚假 marriage leave	夫妻双方 couple	3 日 3 days	3 日 3 days
		延长产假 extended maternity leave	女方 female	60 日 60 days	60 日 60 days
		陪产假 paternity leave	男方 male	7 日 7 days	15 日 15 days
		育儿假 parental leave	夫妻双方 couple	/	三周岁以下婴幼儿父母各享受每年累计不少于十日育儿假 Each parent of infants under the age of three is entitled to no less than 10 days' parental leave each year

Employers in Shandong should fully understand the local rules in force, and on this basis, update and improve the internal rules and regulations in a timely manner to protect the rights and interests of employees on rest and leave.



V. Exploration of Typical Cases: The Supreme People's Court Released the 32nd Batch of Guiding Cases; Chongqing Fifth Intermediate People's Court Released Typical Cases of Labor Disputes from 2019 to 2021; Huai'an Intermediate People's Court of Jiangsu Province Released 10 Typical Cases of Labor Disputes; Hangzhou Internet Court Released "10 Typical Cases of Personal Information Protection"

1. The Supreme People's Court Released the 32nd Batch of Guiding Cases

The Supreme People's Court released the 32nd batch of seven guiding cases in early July, 2022, mainly for the protection of employees' legitimate rights and interests. For a detailed analysis of these guiding cases and practical suggestions on employment, please refer to [*Haiwen Observation: Analysis and Practical Suggestions on Employment Based on the 32nd Batch of Guiding Cases of the Supreme People's Court*](#).

2. Chongqing Fifth Intermediate People's Court Released Typical Cases of Labor Disputes from 2019 to 2021

Chongqing Fifth Intermediate People's Court released six typical cases of labor disputes in August, 2022, involving the invalidation of voluntary waiver of social insurance contributions, using employees' salary under normal circumstances to calculate severance where the company has ceased production, and the coincidence of compensation for work-related injuries and infringement damages.

Among them, the second case is noteworthy. In that case the employee constructively terminated the employment contract because he was identified as level eight disability due to work-related injury. The court held that this situation shall be deemed as one of the circumstances stipulated in Article 38 of the Labor Contract Law where the employee was forced to terminate the employment contract, and therefore the employer shall pay economic compensation to the employee. At present, there are different opinions among local judges on this issue.

In addition, according to the fourth Case, the court held that the average wage of employees in normal production

in the 12 months before the termination of the labor contract should be taken as the wage standard for calculating economic compensation. At present, there are different standards for the calculation of economic compensation in this situation, and this standard in Chongqing is more favorable to employees.

3. Hangzhou Internet Court Released “10 Typical Cases of Personal Information Protection”

On the occasion of the fifth anniversary of its establishment, Hangzhou Internet Court released “Ten Typical Cases of Personal Information Protection”. Those cases relate to bank credit reporting, public travel service, online shopping platforms providing user information to embedded payment institutions, APP automatic recommendation applications, etc.

Since the introduction of the Civil Code and the Personal Information Protection Law in 2021, the protection of personal information at the practical level has been increasing. In addition to a continued increase in administrative supervision and penalty cases, civil litigation and criminal cases have also gradually entered the judicial procedure. For enterprises in all industries, in addition to completing the data compliance system under the external business scenarios, it is also necessary to attach importance to the evaluation, improvement and implementation of the management mode of the personal information of internal employees.

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