

Haiwen Labor Law Bi-Monthly Newsletter (2021January--February)

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I Law: The Impact of the Civil Code on Employment Management

The Civil Code of the People's Republic of China (the "Code") was adopted and passed by the 13th National People's Congress on May 28, 2020, and comes into force on January 1, 2021. Although the Code does not have a direct connection with the employment related legislations, it touches upon certain issues with respect to HR management that may be worthy of employers' attention.

1. Greater emphasis shall be placed on the protection of employees' personal information –The protection provided by the Code on personal information is of great significance. On the basis of the Cybersecurity Law and the other existing regulations, the Code stipulates in the general rules section that personal information shall be protected by law; the specific rules part of the Code (Article 1034 to Article 1039) further details the definition of personal information, principles of handling personal information, exemptions, rights and obligations, etc. . Article 1034 of the Code improved the definition of Personal Information to extend the protection to include the email addresses, health status and whereabouts. Article 1035 of the Code explicitly requires that collecting and processing of personal information shall abide by the principles of "legality, propriety and necessity" and other stipulation as required.

Within the labor law context, employers are allowed to collect the personal information of employees, providing that such information is closely related to the employment contract (see Article 8 of the Labor Contract Law). On account of COVID-19 outbreak, the government currently requires businesses to monitor and collect its employees' health status and whereabouts in accordance with the COVID-19 prevention and control policy (see the Circular of Joint Prevention and Control Mechanism of State Council for

Coping with COVID-19 on Issuing the Epidemic Prevention and Control Guidelines for Enterprises and Institutions in Areas of Different Risk Levels to Resume Work and Production (国发明电〔2020〕12号), etc.). The employer shall collect and use employees' personal information with caution in the process of HR management, thus avoiding the risk thereof.

Relevant Provisions - Article 1034 of the Code: The personal information of a natural person shall be protected by the law. Personal information refers to all kinds of information recorded by electronic or otherwise that can be used to independently identify or be combined with other information to identify specific natural persons, including the natural persons' names, dates of birth, ID numbers, biometric information, addresses, telephone numbers, e-mail addresses, health status, whereabouts, etc. For the confidential information included in personal information, the relevant provisions on the right to privacy shall apply; if no provisions are available, the provisions on personal information protection shall apply.

2. Employers to establish and improve sex harassment related internal policy - While local regulations provide definitions of sexual harassment applicable at the local level (e.g. Beijing and Jiangsu), China does not have a uniform definition of sexual harassment at a national level, and previous national legislation (e.g. the Law of the People's Republic of China on the Protection of Women's Rights and Interests and the Special Provisions on Labor Protection of Female Employees) only contains a general principle of sexual harassment being prohibited. Article 1020 of the Code sets out a clear definition of sexual harassment on the one hand and on the other hand requires employers (including government organs, businesses, and schools) to adopt appropriate measures (e.g. preventive measures, complaint mechanism or internal investigation) to prevent and stop workplace harassment that happens because of authority or hierarchy. This provision symbolizes a significant achievement in this area of law in China. It is worth noting for employers that your internal rules shall explicitly prohibit the sexual harassment and a mechanism for preventing, reporting of, and investigating sex harassment shall be established to meet the employer obligations newly proposed by the Code.

Relevant Provisions - Article 1010 of the Code: Where a person conducts sexual harassment of another person in the forms of verbal remarks, written language, images, physical behaviors or otherwise against the will of another person, the victim has the right to request the person to bear civil liability according to the law. Agencies, enterprises, schools, etc. shall adopt reasonable measures on prevention, acceptance and handling of complaints, investigation and disposal, etc. to prevent and curb sexual harassment by making use of official powers and affiliation, etc.

3. Electronic contracts of employment deemed legally effective – During the pandemic, the Ministry of Human Resource and Social Security and Beijing Municipal Human Resources and Social Security Bureau (“Beijing Labor Bureau”) successively issued rules (in March 2020 and October 2020) to encourage employers to conclude

employment contracts by using electronic ways. Article 469 of the Code reconfirmed that an employment contract signed electronically has the same legal effect as a hand-signed one, which is of positive significance to further promote the usage of e-employment documents among enterprises. For more information you can refer to “Haiwen Observation: Interpretation of New Rules and Practical Advice for Conclusion of Written Employment Contract in Electronic Form” ([《海问观察：采用电子形式订立书面劳动合同的新规解读及实务建议》](#)).

Relevant Provisions - Article 469 of the Code: The parties may conclude a contract in writing, orally or in some other form. A writing form refers to any form that renders the content contained therein capable of being represented in a tangible form, such as a written contract, letter, telegram, telex, or facsimile. A data message in any form, such as electronic interexchange and emails that renders the content contained therein capable of being presented in a tangible form and accessible for reference and used at any time shall be regarded as a written form.

4. Employer may seek civil remedies from its employee who caused damages to the third party - The original Tort Liability Law states that when an employee causes damages to a third party during the performance of their work duties, the employer of the employee should be responsible, but it does not clarify whether the employer is permitted to seek compensation from the employee. Article 1191 of the Code expressly addresses this matter, allowing an employer to seek compensation from an employee for damages caused intentionally or by his or her gross negligence. This provision echoes some local previous rules, and is also a confirmation of the current mainstream judicial view.

Relevant Provisions - Article 1191, paragraph 1 of the Code: Where an employee of an employer has caused damage to others as a result of performance of work assignment, the employer shall assume tort liability. The employer may, after assuming the tort liability, seek recourse from the employee who acts intentionally or with gross negligence.

II Regulation: Guiding Opinions on Claw-back Mechanism of Performance-based Remuneration for Banks and Insurance Institutions Issued

On January 28, 2021, the General Office of China Banking and Insurance Regulatory Commission issued the Guiding Opinions on Claw-back Mechanism of Performance-based Remuneration for Banks and Insurance Institutions (银保监办发〔2021〕17号) (“Opinions”). On the basis of the existing regulations of Guidelines for the Supervision of Sound Remuneration of Commercial Banks and Guidelines for Remuneration Management Standards of Insurance Companies (Trial), the Opinions put forward specific requirements for banks and insurance institutions to establish and improve a performance-based remuneration claw-back mechanism, which involves the scope of application of the mechanism, methods, applicable circumstances, subject of responsibility, etc., and is of strong guidance significance.

For the purpose of the Opinions, the banks and insurance institutions include banking institutions, insurance institutions, and the following organizations legally established in China: financial asset management companies, trust companies, finance companies of enterprise group, financial leasing companies, auto finance companies, consumer finance companies, and currency brokerage companies. This Opinions is applicable as reference to other financial institutions approved by the China Banking and Insurance Regulatory Commission. For the specific content of this part, please refer to “Haiwen Observation | Interpretation of New Regulations: Performance-based Remuneration Recovery and Deduction System for Banks and Insurance Institutions - Regulatory Perspective and Labor Law Perspective” ([《海问观察·新规解读：银保机构绩效薪酬追索扣回机制—监管视角与劳动法视角》](#)).

III Local Rules: Beijing and Shanghai Issue New Guides to Promote Shared Employee Model

Employee sharing is a new form of work emerged because of the COVID-19 pandemic. In order to allocate human resources wisely, companies with surplus labor (the “Home Company”) are allowed to arrange their full-time employees to work at companies without sufficient workforce (the “Host Company”). On 9 December 2020, the Beijing Labor Bureau issued a Guide to Employee Sharing of Beijing, delineating the rights and obligations of each involved parties (Host companies, Home companies and “shared” employees) and the duties of the labor authorities.

On 5 February 2021, Shanghai Municipal Human Resources and Social Security Bureau issued a similar paper, the Guide to Shared Employee of Shanghai, regulating the legal relationship among the companies and the shared employees, the conclusion of the employee-sharing agreement, protections on the legal rights and interests of shared employees, improvement of training service for such employees, dispute resolution, etc.

Two Guides have reach a consensus on a lot of key issues of employee-sharing arrangement, for example, prior consent of the employees is the pre-condition of the arrangement; the current employment relationship must not be changed or altered by the shared employee arrangement; the original employer is not allowed to charge any other fees; dispatch workers are not allowed to be engaged in the employee-sharing arrangements; the Home Company and the Host Company must conclude an employee-sharing agreement. It is worth noting that Beijing requires the Home Company to amend the current employment contract with the shared employees to reflect such arrangement, while it is not mandatory in Shanghai.

It is advisable for the employers to do the following preparation before starting an employee-sharing arrangement: analyze the local supervision requirements, conduct legal risk assessment, obtain employee’ s consent beforehand and have a cooperation agreement to delineate respective rights and obligations of parties. The job-sharing arrangement shall be conducted with caution and within the scope permitted by law.

IV Local Rules: Jiangsu Province Issues Measures on Making up Payment of Pension Insurance Premiums

On January 22, 2021, Department of Human Resources and Social Security of Jiangsu Province, Department of Finance of Jiangsu Province, and Jiangsu Provincial Tax Service, State taxation Administration jointly issued the Measures of Jiangsu Province on Regulating and Improving the Compensating of Basic Pension Insurance Premiums for Enterprise Employees ("Measures" , 苏人社规〔2021〕1号), which has come into effect since March 1st. The Measures lists 11 situations in which unpaid pension insurance premiums can be compensated retroactively, and clarifies the base and proportion of the deficiency and how to calculate the payment period.

The Measures is not a newly promulgated policy in a sense, but a collation and compilation of previous rules for making up pension insurance issued by the three departments in accordance with national laws in different periods, which greatly improves the integrity and transparency of the policies and may provide a clearer guide to employers when they make up the insurance premiums in reality.

V The Supreme People' s Court Organizes Discussion on Nine Typical Labor Dispute Cases

On January 15, 2021, the Judicial Case Research Institute of the Supreme People' s Court and the Case Law Research Institute of the China Law Society held a case seminar, with the participation of judges from all over the country. In the seminar, nine typical employment law cases related to the emerging economy business model were selected and discussed in depth. Judges who heard the cases and made the decisions shared the theory of the judicial decisions, legal rules and their experiences.

Types of disputes and issues of the nine cases mainly include:

1. Disputes related to the new types of work arrangement: (1) under the gig economy business model, whether take-away riders, network anchors, or platform network contractors can be deemed as employees; (2) in the process of employee-sharing arrangement, if the Home Company goes bankrupt, how to deal with the employment relationship of the shared employees.
2. Disputes related to the COVID-19 pandemic: the employer cannot invoke the COVID-19 pandemic as a force majeure event to escape the employer's obligation to pay salary.
3. Disputes related to non-compete restrictions: (1) the overlaps of business scope in business licenses (of previous and current employers) is not a sufficient condition to determine that the employee has violated non-competition obligations; (2) in the case that the employer does not release the employee from non-compete obligation, the employee is not allowed to stop performing the non-compete agreement on the

grounds that the employer fails to pay the non-competition compensation; (3) the employer may, through the non-competition agreement, restrict employees from engaging in competing activities via stakeholders indirectly.

4. Disputes related to liquidated damages for Hukou: The clauses on service period and liquidated damages agreed based on the application of Hukou are invalid, but the employee who leaves early shall bear the liability of compensation as a result of the breach of the legal principle of good faith.

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