

Haiwen Labor Law Bi-Monthly Newsletter

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一、新规速递：《促进和规范数据跨境流动规定》发布，员工个人信息出境有机会豁免申报

Quick View of New Regulations: The Provisions on Promoting and Regulating Cross-border Data Flows was Issued, Employees' Personal Information Outbound Can be Exempted from Declaration

2024年3月22日，国家互联网信息办公室正式发布《促进和规范数据跨境流动规定》（“《规定》”），并自公布之日起施行。《规定》第五、七、八条对数据出境合规申报义务（包括安全评估申报、订立个人信息出境标准合同或通过个人信息保护认证）设定了触发门槛和豁免情形，对于企业数据出境的减负信号明显。

On March 22, 2024, the Cyberspace Administration of China issued the Provisions on Promoting and Regulating Cross-border Data Flows ("Provisions"), which comes into effect on the date of publication. Articles 5, 7 and 8 of the Provisions set out trigger thresholds and exemptions from the obligation of data outbound compliance declaration (including applying for the security assessment of outbound data transfer, concluding a standard contract for personal information transfer abroad or passing the certification of personal information protection), which indicates a clear signal of relief for enterprise outbound data transfer.

根据《规定》第5条，就以下情形，可以整体豁免数据出境合规申报义务：（1）履行合同所必需；（2）跨境人力资源管理；（3）保障人身财产安全；（4）非关键信息基础设施运营者少量（当年1月1日起向境外提供不足10万人）非敏感个人信息。

Pursuant to Article 5 of the Provisions, the following cases may be exempted from the obligation of data outbound compliance declaration: (1) necessary for the performance of a contract; (2) for cross-border human resources management; (3) to protect the safety of persons and property; and (4) for a small amount (less than 100,000 persons as of January 1 of the current year) of non-sensitive personal information provided by a data processor other than a critical information infrastructure operator.

其中，关于跨境人力资源管理，豁免前提是“按照依法制定的劳动规章制度和依法签订的集体合同实施跨境人力资源管理，确需向境外提供员工个人信息”。因此，相关企业（特别是外商投资企业）应当根据相关法规要求，制定相关劳动规章制度或签署集体合同，才能符合上述豁免条件。

Regarding cross-border human resources management, the prerequisite for the exemption is that it is necessary to provide employees' personal information abroad for the purpose of conducting cross-border human resources management in accordance with the employment rules and regulations formulated in accordance with the law and collective contracts concluded in accordance with the law. Therefore, enterprises (especially foreign-invested enterprises) should formulate relevant employment rules and regulations or sign collective contracts in accordance with relevant laws and regulations to meet the above exemption conditions.

对于《规定》的详细解读请参见：[《海问·观察 | 数据跨境新规对境内外投资项目的影](#)

For a detailed explanation of the Provisions, you may refer to the ["Haiwen Observation | The Impact of the New Data Cross-Border Provisions on Domestic and Foreign Investment Projects"](#).



二、新规速递：北京市发布《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件解答（一）》

Quick View of New Regulations: Beijing Issued the Official Reply (I) to Trial of Labor and Personnel Disputes of Beijing Higher People's Court and Beijing Labor and Personnel Dispute Arbitration Commission

2024年4月30日，北京市发布了《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件解答（一）》（“《解答（一）》”）。同时，北京市2014年发布的《北京市高级人民法院 北京市劳动争议仲裁委员会关于劳动争议案件法律适用问题研讨会会议纪要（二）》、2017年发布的《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件法律适用问题的解答》等八项文件不再执行。

On April 30, 2024, Beijing Municipality issued the Official Reply (I) to Trial of Labor and Personnel Disputes of Beijing Higher People's Court and Beijing Labor and Personnel Dispute Arbitration Commission ("[Reply \(I\)](#)"). At the same time, eight documents regarding labor disputes handling issued by Beijing previously are no longer enforceable.

《解答（一）》系北京市各级法院及劳动仲裁委员会就劳动争议案件审理中的裁判尺度的综合总结，回应了实践中的诸多疑难问题，就劳动争议案件受理范围与案件管辖、劳动争议案件裁审衔接、劳动关系及责任主体的认定、劳动合同的订立、劳动合同的履行和变更、劳动合同的解除和终止、其他等七个方面的问题进行了解答，对于北京地区用人单位的日常劳动管理及劳动争议处理具有重要的指导意义。

The Reply (I) is a comprehensive summary of the rulings in relation to the adjudication of labor dispute cases of Beijing courts and labor arbitration committees at all levels, and responds to many difficult issues in practice, providing guidance on seven aspects including the scope of acceptance and jurisdiction of labor dispute cases, the interface between the trail of arbitration and litigation of labor dispute cases, the identification of the labor relationship and the responsible subject, the formation of a labor contract, the performance and modification of a labor contract, and the end and termination of a labor contract, etc., which is of great significance in guiding the daily HR management and labor disputes handling by employers in Beijing.



三、新规速递：《京津冀劳务派遣合规用工指引》发布，引导劳务派遣单位和用工单位依法依规开展劳务派遣活动

[Quick View of New Regulations: The Guidelines for the Compliance of Labor Dispatch in the Beijing-Tianjin-Hebei Region was Issued, Guiding Labor Dispatch Service Providers and Accepting Entities to Conduct Labor Dispatch Activities in Compliance with Laws and Regulations](#)

为促进京津冀地区劳务派遣市场协同有序健康发展，规范劳务派遣用工行为，北京市、天津市、河北省三地的人力资源和社会保障部门于2024年2月3日联合印发了《京津冀劳务派遣合规用工指引》（“[《用工指引》](#)”）。

In order to promote the synergistic, orderly and healthy development of the labor dispatch market in the Beijing-Tianjin-Hebei region and to regulate the employment of labor dispatch, the human resources and social security departments of Beijing, Tianjin and Hebei Province jointly issued the Guidelines for the Compliance of Labor Dispatch in the Beijing-Tianjin-Hebei Region (the "[Guidelines](#)") on February 3, 2024.

《用工指引》包含劳务派遣单位、用工单位、劳动纠纷处理、违反劳动保障法律法规的处理四个部分，重点对劳务派遣单位与用工单位的资质、行为予以引导和提示，进一步明确和强调了劳务派遣单位、用工单位的相关义务和责任。

The Guidelines covers labor dispatching service providers, accepting entities, handling of labor disputes, and handling of violations of labor security laws and regulations, focusing on guiding and prompting the qualification and behaviors of labor dispatching service providers and accepting entities, and further clarifies and emphasizes the relevant obligations and responsibilities of labor dispatching service providers and accepting entities.

值得关注的是，《用工指引》还从主体、岗位要求、法律关系、支配与管理、工作成果衡量标准、法律适用六个方面具体阐述了劳务派遣与劳务外包的主要区别，重点提示用工单位避免出现名为劳务外包实为劳务派遣的情形。

It is noteworthy that the Guidelines also elaborate the main differences between labor dispatch and labor outsourcing in subject, job requirements, legal relationship, control and management, measurement standards of work output, and application of laws, and suggests that employers avoid situation that labor outsourcing is de facto labor dispatch.



四、新规速递：湖北省人社厅印发《湖北省审理劳动人事争议仲裁案件若干问题规范指引（一）》，聚焦常见劳动争议问题

[Quick View of New Regulations: Hubei Province Human Resources and Social Security Department Issued Hubei Provincial Normative](#)

Guidelines for Hearing Arbitration Cases of Labor-Management Disputes on Several Issues (I), Focusing on Common Labor Dispute Issues

2024年3月22日，湖北省人力资源和社会保障厅印发了《湖北省审理劳动人事争议仲裁案件若干问题规范指引（一）》，聚焦常见劳动争议问题，供湖北省内处理劳动争议仲裁案件时作为参考。

On March 22, 2024, Hubei Province Human Resources and Social Security Department Issued Hubei Provincial Normative Guidelines for Hearing Arbitration Cases of Labor-Management Disputes on Several Issues (I), focusing on common labor dispute issues for reference when handling labor dispute arbitration cases in Hubei Province.

该指引对于劳动争议的受案范围、确认劳动关系争议的仲裁时效、二倍工资的计算标准、用人单位可以单方调岗的情形、劳动者被迫辞职的限定情形、劳动者承诺不需要缴纳社保后主张经济补偿金的处理、不符合录用条件的认定、客观情况发生重大变化的认定、加班工资的计算标准等问题作出了明确和细化，对于湖北地区用人单位的劳动用工合规管理具有重要的参考价值。

The guideline made clear and detailed provisions on the scope of labor disputes, the limitation of arbitration of confirmation of employment relationship, the standard for calculation of double wages, the circumstances under which an employer can unilaterally transfer employment posts, the limited circumstances under which a worker is forced to resign, the handling of claims for economic compensation after the worker promises not to pay social security contributions, the determination of non-satisfaction of the employment conditions, the determination of significant changes in the objective circumstances, the calculation standard of overtime wages, and other issues, providing an important reference value for Hubei employers in labor and employment compliance management.

五、典型案例：最高人民法院发布六起劳动争议典型案例

Exploration of Typical Cases: The Supreme People's Court Released Six Typical Labor Contract Disputes Cases

2024年4月30日，最高人民法院发布六起劳动争议典型案例。典型案例裁审观点如下：

On April 30, 2024, the Supreme People's Court released six typical cases of labor disputes. The opinions of the typical cases are summarized as below:

1. 用人单位不能通过订立承包合同规避劳动关系。某公司和车间工作人员签订车间承包协议，法院认定员工从事的工作是公司业务的组成部分，并按月领取劳动报酬，员工接受了公司的管理，双方存在劳动关系。

An employer cannot circumvent establishing a labor relationship by entering into a contracting agreement. An employer entered into a workshop contracting agreement with a workshop employee, and the court found that the work performed by the employee was an integral part of the employer's business, the employee received monthly remuneration for his work, and the employee accepted the employer's management, due to which there was an employment relationship between the two parties.

2. 劳动者对于是否订立无固定期限劳动合同具有单方选择权。某公司已与员工连续订立二次固定期限劳动合同，法院认定员工提出订立无固定期限劳动合同，且没有《劳动合同法》第三十九条和第四十条第一项、第二项的情形的，公司无权拒绝续订。就此问题，各地司法实践存在差异，最高院发布的该典型案例对于此前采用不同裁审口径的地区（例如上海）的影响有待观察。

Employees have the unilateral right to choose whether or not to enter into an open-ended employment contract. An employer had entered into two consecutive fixed-term employment contracts with its employees, and the court found that the employer had no right to refuse to renew the contract if the employee proposed to enter into an open-ended employment contract and there were no circumstances as stipulated in Article 39 and Article 40 (1) and (2) of the Labor Contract Law. On this issue, there are differences in judicial practices in different localities, and the impact of the Supreme Court's release of this typical case on regions that have previously adopted a different caliber of adjudication (such as Shanghai) remains to be seen.

3. 竞业限制协议不能限制非负有保密义务的劳动者的自主择业权。某公司主张其推拿师和培训师违反竞业限制义务，法院认定公司仅证明员工接触到一般经营信息，而非核心经营信息，不属于负有保密义务的人员，无需支付违约金。

A non-competition agreement cannot restrict the right to independent career choice of a worker who is not under an obligation of confidentiality. An employer claimed that its massage therapist and trainer had breached their non-competition obligations, and the court found that the employer had only proved that the employees had access to general business information, not core business information, and that they were not persons subject to a duty of confidentiality, and were not required to pay liquidated damages.

4. 员工配偶投资、经营存在竞争关系的企业可能构成员工违反竞业限制义务。某公司主张其总经理离职后，该员工妻子设立了具有竞争关系的新公司的行为违反竞业限制义务。法院认为因员工和妻子具有紧密的人身和财产关系，经济利益具有一致性，故认定员工违反了竞业限制约定。

If the spouse of an employee invests in or operates a competing enterprise, the employee may violate the non-competition obligation. An employer claimed that after the departure of its general manager, the wife of the employee violated the non-compete obligation by setting up a competing new company. The court held that the employee and his wife had close personal and property relationships and identical economic interests, so the employee was found to have violated the non-compete agreement.

5. 研发人员辞职后拒不交接工作造成公司损失的，应承担赔偿责任。某公司研发人员未提前三十日通知即自行离职，且拒绝办理交接手续，某公司通过启动备用方案、招聘人员、委托设计等产生了损失，法院酌定员工赔偿损失5万元。

The R&D Personnel who refuse to handover his/her work after resignation shall be liable for indemnification if he/she causes losses to the employer. The R&D personnel of the employer left his job without giving 30 days' prior notice and refused to handover. The employer suffered losses due to starting its backup plan, recruiting replacement, commissioning design, etc., and the court decided that the employee shall compensate the employer for losses of RMB 50,000.

6. 男职工应依法享受护理假。某公司摄影工作人员因妻子待产回家陪产，法院认定男方享受护理假不少于十五天，假期内公司需照发工资。

Male employees are entitled to paternity leave. Where an employee who was engaged in photography went home to company childbirth as his wife was due to give birth, the court ruled that the employee shall be entitled to a paternity leave of no less than 15 days and the employer shall pay salary to the employee during such leave as usual.



六、典型案例：上海市通报商业秘密案件审判情况并发布典型案例

Exploration of Typical Cases: Shanghai Announced the Summary of the Trial of Trade Secret Cases and Released Typical Cases

2024年4月17日，上海市三中院、上海知识产权法院共同召开新闻发布会，发布2015-2023年商业秘密案件审判情况和12起典型案例。

On April 17, 2024, Shanghai Third Intermediate Court and Shanghai Intellectual Property Court jointly held a press conference to announce the summary of the trial trade secret cases from 2015 to 2023 and released 12 typical cases.

商业秘密案件具有当事人多为高新技术领域经营者、从业者、案件起因多为人才流动引发纠纷、诉讼标的或者犯罪金额较高等特点。本次典型案例中体现出裁判机构的下述裁判观点值得关注：

Trade secret cases have the characteristics that the parties are mostly entrepreneurs and employees in the high-tech field, the reasons for the cases are mostly disputes triggered by the flow of talents, and the subject matter of the litigation or the amount of the crime is relatively high. The following judgement views of the courts and the labor arbitration committees are worthy of attention:

1. 从多份不同文件总结提炼的技术信息、产品配方、单一潜在客户的采购意向以及销售代理商在为供货商开发客户时形成的客户信息可作为商业秘密获得保护。

Technical information summarized and extracted from a number of different documents, product formulas, the purchase intention of a single potential customer and customer information formed by a sales representative while developing customers for a supplier can be protected as trade secrets.

2. 员工从公司系统中下载涉案商业秘密的技术图纸并转存至外接存储设备，相关商业秘密已被非法获取，此时举证责任将转移至员工。

The employee downloaded the technical documents involves the trade secrets from the employer's system and transferred them to the external storage device, the relevant trade secrets have been illegally obtained, and the burden of proof will be shifted to the employee at this point.

3. 员工擅自将技术信息转存至未经公司授权的USB存储设备中，在签署承认事实并承诺配合删除文件的《确认函》后又拒绝配合，法院判令员工停止侵权，赔偿公司经济损失26万元及合理开支24万元。

The employee transferred the technical information to the USB storage device without authorization from employer and refused to cooperate after signing the Confirmation Letter acknowledging the fact and promising to cooperate in deleting the files, the court ruled that the employee should stop infringing the trade secrets, and compensated the employer for 260,000 RMB of economic loss and 240,000 RMB of reasonable expenses.

4. 侵犯经营秘密的案件中，公司员工亲属关系人员持股新公司和原告公司既有客户发生了交易，客户出具了主动交易的说明但无法明确“经由业内朋友介绍”中的“业内朋友”为何人，或者新公司先辩称客户系基于个人信赖后辩称自行开发的，但均无证据佐证或证明，因此法院认定上述抗辩不能成立。

In the case of infringement of trade secrets, the new company was owned by a relative of an employee of the employer, which had transactions with the employer's customers, and the customers provided a description of the initiative of the transaction, but it was not possible to clarify "introduced to the new company by friends in the industry", or the new company first argued that the customer was based on personal trust and then argued that it was developed on its own, but there was no evidence to corroborate or prove any of these, so the court found that the above defenses could not be sustained.

5. 此外，侵犯商业秘密罪的刑事案件中还体现出下述观点：非法获取并持有商业秘密类型的侵犯商业秘密案件可引入“虚拟许可+类比参照”标准；提出反向工程辩解需结合主客观证据证实反向工程的研究过程；利用商业秘密对软件源代码进行保护需要明确秘点；认罪认罚并积极赔偿取得权利人谅解可获宽缓处理。

In addition, the following opinions of the courts have been reflected in criminal cases of trade secret infringement: The "virtual license + analogous reference" standard can be introduced in cases of trade secret infringement of the type of illegally acquired and possessed trade secrets, reverse engineering defense needs to be combined with subjective and objective evidence to confirm the research and development process, utilizing trade secrets to protect software source code must to clarify the key secret point, and pleading guilty and actively compensation and obtaining the understanding of the right holder can be given lenient treatment.



七、典型案例：最高检、上海市、广东省等多地陆续发布劳动人事争议典型案例

Exploration of Typical Cases: The Supreme People's Procuratorate, Shanghai, Guangdong Province and Many Other Places Have Successively Released Typical Cases of Labor and Personnel Disputes

自2021年中央全面深化改革委员会第十八次会议审议通过《关于加强诉源治理推动矛盾纠纷源头化解的意见》以来，各地司法机关积极推进和完善诉源治理的系列措施。

Since the 18th meeting of the Central Committee for Comprehensively Deepening Reform in 2021 approved the Opinions on Strengthening the

Governance of Sources of Complaints and Promoting the Resolution of Conflicts and Disputes at the Source, judicial institutions have been vigorously promoting and enhancing a series of measures for the governance of sources of complaints.

2024年4月26日，上海第二中级人民法院与上海市人力资源和社会保障局共同签署《关于加强诉源治理和裁审衔接若干意见》，并发布十个劳动争议纠纷典型案例。其中，以下案例值得关注：

On April 26, 2024, the Shanghai Second Intermediate People's Court and the Shanghai Municipal Bureau of Human Resources and Social Security jointly signed the Opinions on Strengthening the Governance of Sources of Complaints and Connecting Adjudication and Trial, and released ten typical cases of labor disputes. Among them, the following cases are worthy of attention:

1. 案例1中，员工（注册估价师）接受卖方私下宴请，因买方举报后公司被行业协会通报批评，裁决认为公司以严重违反职业道德为由解雇员工合法。

In case 1, an employee (a registered appraiser) accepted a private banquet from the seller, and his employer was criticized by the industry association due to the buyer's report, and the award found that the employer's dismissal of the employee for serious violation of professional ethics was lawful.

2. 案例2中，员工任职期间需要利用休息日和法定节假日在家完成信息撰写和后台推送工作，裁决依据查明的加班事实，结合双方认可的工作量，酌情认定员工每个休息日和法定节假日加班时间为1小时。

In case 2, the employee was required to perform information writing and online publishing work at home on rest days and statutory holidays during his employment. On the basis of the established facts of overtime work and the workload recognized by both parties, the award found that the employee's overtime work was one hour for each rest day and statutory holiday.

3. 案例6中，公司因员工一年内多次上班迟到依据内部制度扣除工资约21万元，判决认为公司仅可通过规章制度扣除未提供劳动时间对应的工资，不得为了惩罚而扣除多倍工资，需补发约20万元工资差额。

In case 6, the employer deducted about 210,000 RMB from the employee's salary due to the employee's late for work multiple times in a year based on the internal rules and regulations, and the judgment held that the employer could only deduct the salary corresponding to the time of absence of work according to the rules and regulations, but could not deduct extra salary for the purpose of punishment, and ruled the employer to make up for the difference in salary of approximately 200,000 RMB.

2024年3月至4月，各地裁审机构陆续发布与妇女权益保障以及劳动人事相关争议的典型案例，主要包括：

Between March and April 2024, the Supreme People's Procuratorate, the courts and the labor arbitration committees in Guangdong, Jiangsu, Zhejiang, Sichuan, Chongqing, and Hebei released typical cases regarding disputes related to women's rights and interests and labor and personnel.

最高检	“ 检察机关依法维护劳动者合法权益典型案例 ”；
	“ 保障妇女儿童权益典型案例 ”，其中案例10涉及保护“三期”女职工特殊权益；
	“ 首批检察机关依法能动履职推动社会主义核心价值观融入法治建设典型案例 ”，其中案例4涉及保护孕期女职工劳动权益；
广东省	广东高院发布“ 维护妇女合法权益典型案例 ”；
	广东高院等联合发布“ 劳动争议典型案例 ”；
	深圳中院发布“ 六个劳动争议典型案例 ”；
	珠海中院发布“ 劳动争议典型案例 ”；
	佛山中院发布“ 八个劳动争议典型案例 ”；
江苏省	东莞市人社局发布“ 东莞市劳动权益保障十大典型案例 ”；
	江苏高院发布“ 2023年度江苏法院劳动人事争议十大典型案例 ”；
	南京中院发布“ 南京法院2023年度劳动人事争议十大典型案例 ”；
	苏州中院发布“ 2018-2023年涉女职工劳动争议审判工作报告及十大典型案例 ”；
	苏州中院等联合发布“ 2023年度苏州市劳动人事争议裁审衔接十大典型案例 ”；
	无锡中院等联合发布“ 2023年度无锡地区劳动人事争议十大典型案例 ”；
	南通中院等联合发布“ 12个劳动争议典型案例 ”；

浙江省	浙江高院、浙江省人社厅联合发布“ 劳动人事争议典型案例 ”；
	宁波中院发布“ 2023年宁波法院涉外涉港澳台商事审判十大典型案例 ”，其中案例2与劳动用工相关；
四川省、重庆市	四川高院、重庆高院等联合发布“ 12件劳动人事争议典型案例 ”；
	重庆高院发布“ 重庆法院2023年度民事审判十大典型案例 ”；
	成都中院发布“ 劳动争议典型案例 ”；
	重庆一中院发布“ 6起维护妇女权益典型案例 ”，案例5涉及职场言语性骚扰的侵权行为；
	重庆一中院发布“ 涉关联企业劳动争议典型案例 ”；
	重庆二中院发布“ 劳动争议典型案例 ”；
	重庆三中院发布“ 劳动争议典型案例 ”；
	重庆四中院发布“ 劳动争议典型案例 ”；
	河北高院发布“ 涉劳动争议纠纷多元化解典型案例 ”；
	河北高院发布“ 新就业形态劳动争议典型案例 ”；
河北省	山东高院发布“ 山东法院劳动者权益司法保护十大典型案例 ”；
	山西高院等联合发布“ 劳动者权益保护典型案例 ”；
其他地区	安徽高院等联合发布“ 劳动争议典型案例 ”；
	云南高院等联合发布“ 12个劳动人事争议典型案例 ”；
	青海高院发布“ 4起劳动争议典型案例 ”；
	新疆高院发布“ 5起劳动争议典型案例 ”。

2024-05-16