

Haiwen Labor Law Bi-Monthly Newsletter

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I. Interpretation of Laws and Regulations: The Official Reply to Several Issues Concerning the Trial of Labor Dispute Cases of the Third Court of Shandong Higher People's Court was Released, Focusing on Common Controversial Issues

On March 31, 2023, the Official Reply to Several Issues Concerning the Trial of Labor Dispute Cases of the Third Court of Shandong Higher People's Court (the "**Reply**") was released, and clearly stated the rules of adjudication on 31 issues including the scope of acceptance of labor dispute cases, confirmation of employment relationship, and application of the time limitation of arbitration, involving both procedural and substantive aspects, responding to common controversial issues in the labor field. Some parts of the rules are interpreted as follows.

1. When shall the employment relationship of persons who reach the statutory retirement age be terminated?

According to Article 44.2 of the Labor Contract Law, the labor contract shall be terminated when "the worker started exercising his/her basic pension insurance entitlements in accordance with the law", while Article 21 of the Regulations for the Implementation of the Labor Contract Law provides that the labor contract shall be terminated "when the worker reaches the statutory retirement age". In practice, it is no longer a controversial issue that the labor dispute raised by those who have reached the statutory retirement age and have started exercising pension insurance entitlements in accordance with the law shall be handled on basis of service relationship, not employment relationship. However, the issue regarding whether the employment contract of those who have reached the statutory retirement age but have not yet started exercising the basic pension insurance entitlements shall be terminated is still controversial, and the caliber of adjudication varies by different area.

The Reply clearly states that "if a worker reaches the statutory retirement age but cannot exercise the basic pension insurance entitlements for reasons not related to the employer, the employment relationship shall be terminated, and it shall be deemed as a service relationship when the worker is rehired. If a worker reaches the statutory retirement age but cannot exercise the basic pension insurance entitlements for reasons of the employer, the employment relationship shall not be deemed terminated".

2. When shall the time limitation of arbitration start for employees requesting employers to pay wages for untaken annual leave?

The Reply holds that "according to Article 10 of the Regulations on the Composition of Gross Wages, the compensation for untaken annual leave belong to the wages paid under special circumstances, and the regulation does not delineate the different components of the compensation of untaken annual leave", and accordingly identifies the compensation for untaken annual leave as labor remuneration, and states that "if the employee requests the employer to pay the salary remuneration for untaken annual leave, the time limitation of arbitration stipulated by the Article 27.4 of the Law on Mediation and Arbitration of Labor Disputes regarding the special time limitation of arbitration shall apply", i.e. starts from the date of termination of employment relationship.

3. Whether the employee shall be paid overtime fees for on-call duty arranged by the employer?

Given both on call duty and overtime work are performed beyond the standard working hours, and labor laws or regulations do not state whether overtime wages shall be paid for on-call duty, relevant disputes often occur in practice. The Reply holds that the two are essentially different, and "If the employer arranges employees to perform on-call tasks unrelated to their own work due to safety, fire control, holidays, etc., or if the employer arranges employees to perform on-call tasks related to their own work while employees can rest during the on-call period, such circumstances shall not be considered as overtime work. The employee may request the payment of the corresponding on-call work remuneration or other remuneration according to the rules and regulations of the employer, but the request for the employer to pay overtime wages shall not be supported".

4. Can an employee who has voluntarily waived social insurance contributions still has the right to terminate the employment contract on the grounds of non-payment of social insurance contributions and claim economic compensation?

In practice, for reasons such as reducing the company's costs or the employee's personal will, there are cases where

the employer and the employee agree not to pay social insurance contributions. However, in such cases, it is likely that the employee may claim termination of the labor contract and demand economic compensation on the grounds of non-payment of social insurance contributions. For such claims of employees, the Reply holds that it violates the principle of honesty and should not be supported.

Haiwen Suggestions: Employers in Shandong should keep an eye on the above-mentioned local judicial rules and refer to them in the daily labor management, disposal of labor relations and payment of compensation in order to avoid the risk of non-compliance



II. Quick View of New Regulations: Six Departments Issued Two Reference Templates, Focusing on Protection for Female Employees and Elimination of Sexual Harassment in the Workplace

According to the Law on the Protection of Women's Rights and Interests, when hiring female employees, employers shall sign labor contracts or service agreements with them in accordance with the law, and the labor contracts or service agreements shall contain provisions for the special protection of female employees, and employers shall formulate rules and regulations prohibiting sexual harassment to prevent and stop sexual harassment against women. On March 8, 2023, six departments including the Ministry of Human Resources and Social Security issued two reference templates, the Special Labor Protection Policy for Female Employees in the Workplace (Reference Template) and the Policy to Eliminate Sexual Harassment in the Workplace (Reference Template) (the "**Reference Templates**"), as references for employers to formulate relevant rules.

The Special Labor Protection Policy for Female Employees in the Workplace (Reference Template) mainly specifies employee protections in terms of labor and employment, salary and benefit, maternity, occupational safety and health, etc. The Policy to Eliminate Sexual Harassment in the Workplace (Reference Template) mainly specifies the public commitment of the employer to eliminate sexual harassment in the workplace, publicity and training, employee reporting and complaint, investigation and disposal, and participation of labor unions in supervision.

Therefore, the above-mentioned Reference Templates can be used by employers for reference when implementing the requirements of the laws and regulations related to the protection of women's rights and interests.

Haiwen Suggestions: the employer can be guided by the above-mentioned Reference Templates to develop and improve the relevant internal policies, labor contracts and collective contracts with female employees. In addition, according to the local regulations, combined with specific practices on the Reference Templates to further refine the content.



III. Exploration of Typical Cases: Beijing and Henan Published the First Batch of Major Labor Security Violations in 2023 to Strengthen the Supervision of Wage Arrears

The Ministry of Human Resources and Social Security issued the Measures for Social Announcement of Major Labor Security Violations (the "**Measures**") in 2017, requiring the Human Resources and Social Security Administrative Departments to announce to the public significant violations of labor protection laws that have been investigated and dealt with according to the law, such as an employee failing to pay large amount of wage arrears.

As a specific implementation of the above requirements, the Beijing Municipal Human Resources and Social Security Bureau ("**Beijing Labor Bureau**") issued the First Batch of Major Labor Security Violations in Beijing in 2023 on March 30, 2023, publishing four cases in which the employers defaulted on employees' salary and were ordered by Beijing Labor Bureau to make corrections and refused to fulfill after the administrative disposal and penalty decisions were made. Beijing Labor Bureau will apply to the People's Court for compulsory enforcement of the salaries, compensation and fines payable by the employer to the employees after the expiration of the statutory period for reconsideration and litigation of administrative processing decisions and administrative penalty decisions.

Henan Province on April 19, 2023 issued the Henan Province Human Resources and Social Security Department on the Release of the First Batch of Major Labor Security Violations in 2023, announced 22 cases of employers defaulting on employees' salary and refusing to perform. The Labor Administrative Departments will transfer the employers involved

on suspicion of refusing to pay employees' salary to the public security organs for investigation and punishment or include such employers in the list of objects of joint punishment for defaulting on migrant employees' salaries in breach of trust.

The content of the above cases published in Beijing and Henan are in accordance with the Measures, listing the full name, unified social credit code (or registration number) and address of the illegal entity, the name of the legal representative or person in charge, the main facts of the breach and the relevant results.

Haiwen Suggestions: It is recommended that employers keep abreast of labor laws and regulations, strengthen compliance management, and avoid being included in the published cases of labor administration departments due to default employees' salary and other labor security violations which affect the reputation and image of enterprises.



IV. Exploration of Typical Cases: Shanghai Municipal Administration for Market Regulation Announced the First Batch of Trade Secret Infringement Cases in 2023

On April 11, 2023, Shanghai Municipal Administration for Market Regulation announced the first batch of trade secret infringement cases in 2023. All 3 cases involved employees infringing on company's trade secrets and administrative penalties were imposed by the Administration for Market Regulation, and the specific infringement acts are as follows:

1. Case I is the first case in the field of architectural engineering. The employee, as Cost Management Director, violated the confidentiality obligation by disclosing to three bidding companies the commercial information of the base bid price, engineering list, price list and related drawings of the project bidding of his company (the tendering company). Then the Administration for Market Regulation made a total fine of more than RMB 1.3 million yuan of administrative penalties on the employee and three bidding companies.
2. Case II is a case where an employee quitted his job and took away the numerical model with him. The employee served as technical director in Company A, and then left company A and joined Company B. When he left Company A, he violated the confidentiality agreement and took away the numerical model developed by Company A without permission and used it for the business of Company B. Then the Administration for Market Regulation imposed an administrative penalty of RMB 100,000 yuan on the employee.
3. Case III is a case where the employee disclosed the company's product quotation. The employee, a regional sales representative of his company based in Chongqing, provided the price list of similar products of his company to the competing company upon the competing company's request, and the competing company adjusted the pricing strategy of its own products with reference to the price list to gain a competitive advantage. Then the Administration for Market Regulation imposed administrative fines of RMB 400,000 yuan on the competing company and RMB 150,000 yuan on the employee.



V. Exploration of Typical Cases: Shanghai Changning District People's Court Released Ten Typical Cases of Labor Disputes over the Termination of Labor Contracts on the Grounds of Disciplinary Violations in 2020-2022

On April 23, 2023, Shanghai Changning District People's Court released the ten typical cases of labor disputes over the termination of labor contracts on the grounds of disciplinary violations in 2020-2022. These typical cases focus on the two main themes of protecting the legitimate rights and interests of employees and supporting employers in the proper exercise of employment management rights. The details of the relevant cases are as follows:

- 1. There are 5 cases in which the employer's termination of labor contract on the grounds of serious disciplinary violations was upheld by the court.**

It is worth noting that in Case II, the employee joined the same company twice, and only signed to acknowledge the receipt of the company's internal policies on the first occasion. The court found that the employee knew or should have known the employer's internal policies where the company's internal policies have not changed, and therefore held that it was lawful for the company to terminate the employee's labor contract on the grounds of serious disciplinary violations.

In the remaining four cases, the employees' violations of discipline were: (1) the flight attendant smoked electronic cigarettes during the flight, which did not cause serious consequences, but was abominable and endangered public safety; (2) the executive transferred a large amount of funds from the employer without authorization, causing damage to the company's property; and (3) the employee did not report the conflict of interest in accordance with the contract, which violated the company's internal policies; (4) the employee used false fapiao to obtain the company's property, showed malicious intent and violated the principle of honesty. Therefore, the court held that the employer's termination was lawful.

2. There are also five cases in which the employer's termination of labor contract on the grounds of serious disciplinary violations was found to be unlawful by the court.

It is worth noting that case XI is a case concerning the issue of burden of proof. The court held that the employer shall bear the burden of proof to show that the employee constituted a serious breach of discipline. Therefore, the court judged that the employer's termination was unlawful as the employer failed to prove that the employee's resale of the company's products was in breach of internal policies. Case XII is a case concerning the issue of the scope of effectiveness of the internal policies. The court held that the employer's internal policies were not universally applicable to the behavior of employers during non-working hours and non-working occasions. Therefore, the court found that the company's internal policies did not apply when employees clashed with each other during the evening meal.

In the remaining three cases, the court found that the reasons for not constituting serious disciplinary violations were mainly as follows:

- a. The company's internal policies provide that refusal of orders is an absenteeism, while the online car-hailing driver did not intentionally refuse orders and should not be considered absent from work.
- b. As the person in charge of the Key Account Department, the employee's approval behavior was reasonable in terms of management and decision, and he does not have the final decision making power. The losses incurred by the employer due to the relevant approval cannot be attributed to the employee, thus the employee does not violate the discipline.
- c. The company's internal policies stipulate that the company's financial status, financial information and remuneration system shall not be disclosed. The employee's provision of his salary details to the third party for litigation was a reasonable disclosure and did not seriously violate the company's policies.



VI. Exploration of Typical Cases: Suzhou Intermediate People's Court Released Ten Typical Cases of Labor and Personnel Disputes Heard in Suzhou Courts in 2022

On April 24, 2023, Suzhou Intermediate People's Court released the Ten Typical Cases of Labor and Personnel Disputes in Suzhou Courts in 2022, which included a variety of common labor disputes. Among them, Cases II, III and IX dealt with the issue of compensation for loss of equity incentive in case of unlawful termination of labor contract, the obligation of necessary assistance to be performed by the employee after the dismissal or termination of labor contract, and the compensation liabilities for cancellation of employment without justifiable reasons, reflecting the following judicial views of Suzhou courts:

1. The employer shall compensate the employee for the loss of the option/stock incentive during the corresponding assessment period if all the following three conditions are satisfied: (1) the employer terminates the labor contract of the employee and cancels the option/stock incentive that has not been exercised or released from the restricted sale period, and the termination is not caused by the employee's fault or resignation, (2) the employee has completed the

work tasks of the corresponding assessment year, and (3) the employer cannot prove that the employee does not meet the other conditions of exercising or releasing the restricted sale.

2. If a party breaches post-contractual obligations causing damages to the other party, he or she shall be liable for compensation. In terms of the employment contract, the employer shall fulfill the obligation to issue the separation certificate and complete the file and social insurance transfer procedures after the employment contract is terminated or ended, and the employee shall also fulfill the necessary assistance obligations. The employee canceled the Tiktok account, instead of providing necessary cooperation to unbundle the account in a timely manner, resulting in the employer being unable to use the account for marketing during Christmas and incurring losses, so he/she should bear the corresponding liability for compensation.
3. If the candidate proposes to leave the employment with the former employer based on the reasonable reliance on the offer letter of the new company, it is a preparation for the fulfillment of the employment contract with the new company. If the new company cancels the offer without justifiable reasons and causes damages to the candidate, the candidate shall be compensated for the damages. The amount shall be determined by taking into account the wage rate stated in the offer letter, the degree of fault of the former employer and the candidate's work situation.