

Haiwen Labor Law Bi-Monthly Newsletter(2021 September – October)

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I. Interpretation of Laws and Regulations: Local Regulations on Population and Family Planning Amended in Multiple Regions to Adjust Marriage and Childbirth related Leaves

To implement the Decision on Optimizing the Family Planning Policy to Promote Long-term and Balanced Population Development, the Standing Committee of the National People' s Congress adopted a decision to amend the Population and Family Planning Law of the People' s Republic of China (the "Population and Family Planning Law") on August 20, 2021, which reflects the major adjustment of optimizing the birth policy. The amended Population and Family Planning Law adds a second paragraph to Article 25 to support the establishment of "parental leave" in regions where conditions permit.

To implement the new amendments to the Population and Family Planning Law, Jiangsu, Guizhou, Jilin, Sichuan, Shanxi, and Heilongjiang have successively revised their existing Population and Family Planning Regulations in light of local conditions. Due to the different basic conditions in each place, there are differences in their population and family planning policies. Among them, those with strong relevance to the employment management of employers are mainly for the adjustment of leave types and length of holidays. After this revision and adjustment, the leave settings related to marriage and childbirth in various regions are mainly as follows.

Employers shall reasonably ensure the rights of employees to rest and leave in accordance with local population and family planning policies. Besides, some regions also emphasize that women's employment rights and interests, such as bonuses, benefits and promotions, shall not be affected because of the childbirth.

II. Interpretation of Laws and Regulations: New Regulations Issued in Various Regions to Implement the Protection of Rights and Interests of Workers in New Employment Type

On July 16, 2021, the Ministry of Human Resources and Social Security ("MOHRSS"), the State Administration of Market Regulation, the All-China Federation of Trade Unions and other departments 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 Bi-Monthly Newsletter" (2021 July – August)). Since September, Beijing, Zhejiang, Shandong, Chongqing, Guizhou and Hunan have issued implementation opinions based on the principle policies specified in the Opinions to regulate the new types of employment and safeguard workers' rights and interests.

On 5 September 2021, Beijing took the lead in issuing "Several Measures on Promoting the Healthy Development of New Work Forms" . Since then, Zhejiang promulgated the "Implementation Measures for Safeguarding Labor Security Rights and Interests of Workers in New Work Forms in Zhejiang Province" ; Shandong and Chongqing issued the "Implementation Opinions on Safeguarding Labor Security Rights and Interests of Workers in New Work Forms" ; Guizhou issued the "Notice of Guizhou Human Resources and Social Security Department on Special Actions for Safeguarding Labor Security Rights and Interests of Workers in New Work Forms" ; Hunan issued the notice of soliciting opinions on "Service Specification for Flexible Employment Platforms in the Sharing Economy" and "Management Specification for Flexible Employment Platforms in the Sharing Economy" . The new regulations issued by various regions contain different degrees of refinement to the guiding policies put forward in the Opinions. The following specific provisions in the aforementioned regions are worth noting.

1. The implementation measures jointly issued by eight departments in Zhejiang Province set out more specific rules for the protection of workers in new work forms. For example:
 - a. Distinguish the relationship between workers in new work forms and the employing units into three categories: employment relationships, situations that do not fully satisfy employment relationship, and civil relationship, and specify respectively the legal responsibilities for employment, and protect the bottom line of workers' labor rights and interests in situations that do not fully satisfy employment relationship.
 - b. Platform enterprises shall converge labor contracts or agreements signed with workers to the online platform of electronic labor contracts (agreements) in real time in accordance with the regulations, and bring them into unified management and

supervision.

c. The production quotas determined by the enterprise shall enable more than 90% of the workers in the same position in the enterprise to complete their work within the statutory working hours.

d. Encourage enterprises to turn to positive incentives that reflect merit pay instead of cutting payment.

e. Require the platform to optimize rules, and arrange breaks for those who have worked continuously for more than 4 hours.

f. Emphasize the establishment of the single-type work injury insurance system for workers in the new work forms.

2. The circular released by the Beijing Leading Group for Employment classifies “workers in new work forms” into three categories: platform online workers, platform individual flexible workers and platform enterprises’ employees, and sets out different protection measures for different categories of workers in new work forms in a hierarchical manner. It also clarifies the allocation of management responsibilities for “platform enterprises’ employees”, and requires platform enterprises to bear corresponding liabilities in accordance with the law in the event that the labor rights and interests of “platform enterprises’ employees” are damaged.
3. Administration for Market Regulation of Hunan Province issued the draft of Hunan’ s local standard for public consultation with a view to standardizing the services and management of flexible employment platforms for sharing economy. The two standards focus on solving the uneven problems of service quality, management level, security, etc., of flexible employment platforms, and enhancing the standardization of the platform.
4. Guizhou Province specifies in the notice that the Human Resources and Social Security Department should formulate general model texts such as the labor contracts and written agreements of take-away workers and drivers of online car before February 2022; Promote the establishment of the employment reporting system of platform enterprises and the incentive and punishment mechanism for the labor security rights and interests of workers in new work forms; It is also required to regularly publish a list of enterprises whose employment complies with laws and regulations on the website of the provincial human resources and social security department.
5. The circulars released by Beijing, Shandong, Chongqing and other regions, on the basis of the Opinions, determine the departments taking the lead and participating departments for each guiding policy, which, while clearly dividing the responsibilities, also has the function of supervising the implementation of policies.
6. In the settlement of labor disputes, overtime work and arrears of labor remuneration have received particular attention. The circular of Guizhou Province emphasized the importance of carefully organizing the study of labor disputes involving overtime work and typical cases of labor disputes over new work forms; The circular of Beijing also

specified that the labor inspection department and other competent authorities should “step up efforts to tackle outstanding problems such as delayed payment of labor remuneration and illegal overtime work” .

Platform enterprises should pay close attention to the key issues of labor protection in new work forms in the process of platform service and management construction, as well as employment, and regulate workforce management in conjunction with local implementation rules.

III. Quick View of New Regulations: Administrative Measures on Practitioners of Extracurricular Training Institutions Took Effect; Shanghai Released Revisions to the Production Safety Regulations; Jiangsu Province Revised Wage Payment Regulations

1. Administrative Measures on Practitioners of Extracurricular Training Institutions Took Effect

Following the promulgation of the Opinions on Further Reducing the Burden of Homework and Off-campus Training of Students in Compulsory Education Stage (the “Double Burden Reduction Policy”), the Ministry of Education and the MOHRSS jointly issued Administrative Measures on Employees of Extracurricular Training Institutions (Trial) (the “Administrative Measures”) on September 9, 2021 to further strengthen the management of employees of extracurricular training institutions.

The Administrative Measures apply to the teaching and research personnel, teaching assistants, class teacher and other supporting staff of extracurricular training institutions. It provides that the full-time teaching and research personnel of an extracurricular training institution shall, in principle, not be less than 50% of the total number of employees of such institution. The Administrative Measures also specifies the management standards of employees for extracurricular training institutions, such as checking their information on crimes before employment, carrying out on-the-job training, and publishing employees’ information.

In addition, the Administrative Measures requires the establishment of a “blacklist of employees of extracurricular training institutions” on the national unified regulatory platform for employees that violate relevant regulations, and those who are included in the “blacklist” shall no longer be allowed to be employed as an employee of an extracurricular training institution.

2. Shanghai Released Revised Production Safety Regulations

The Production Safety Regulations of Shanghai revised by the Standing Committee of Shanghai Municipal People’ s Congress on October 28, 2021 will take effect on December 1, 2021. The revision of the Production Safety Regulations of Shanghai relies on the newly amended Production Safety Law, and the ideas for the revision of the specific provisions are also consistent with those of the Production Safety Law (for the

main amendments of the Production Safety Law, please refer to “Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter” (2021 May – June)).

In addition to being consistent with the Production Safety Law, the Production Safety Regulations of Shanghai also specified that producers and business operators with high risks shall strengthen the information management of production safety, use digitalized technologies to carry out safety risk management and control, accident potential check and solution, major hazard sources monitoring and other duty, and submit the relevant data to the relevant departments in a real-time, accurate and complete manner as required.

3. Jiangsu Province Revised Wage Payment Regulations

The Standing Committee of Jiangsu Municipal People’s Congress revised the Wage Payment Regulations of Jiangsu Province on September 29, 2019. There are a few provisions revised this time, mainly focusing on the adjustments to certain provisions on administrative penalties, which mainly include revising the scope of the amount of fines and adjusting the types of administrative penalties.

IV. Exploration of Typical Cases: Xicheng District People’s Court of Beijing and Haikou Intermediate People’s Court Released Typical Cases of Labor Disputes

On September 16, 2021, Xicheng District People’s Court of Beijing held a press conference on Typical Cases of Disputes over Paid Annual Leave of Employees, releasing five typical cases of disputes over paid annual leave of employees. The five typical cases respectively dealt with common issues, such as remuneration of employees’ unused annual leave, annual leave standards, statutory circumstances under which employees are no longer entitled to annual leave and annual leave arrangement during the pandemic.

On September 23, 2021, Haikou Intermediate People’s Court and Haikou Municipal Human Resources and Social Security Bureau jointly released ten typical cases about labor disputes, involving a wide range of issues, including the identification of employment relationship, overtime work, conclusion of employment contracts, payment of salary, and transfer of employment posts.

Among the typical cases released by both regions, the following issues concerning remuneration for employees’ unused annual leave are worthy of attention:

1. Limitation of Arbitration on Remuneration for Employees’ Unused Annual Leave

With regard to this issue, cases from different regions show different opinions held by the courts.

In the first case released by Xicheng District People’s Court of Beijing, an employee

proposed to terminate his employment contract on the ground of long delay in payment of wage. And the next day the employee applied for labor arbitration, claiming that the company should pay his remuneration for the unused annual leave from 2017 to 2020 totaling over RMB 40,000. The court held that the statute of limitations for arbitration of claims for unused annual leave remuneration should be applied to Article 27 Paragraph 1 of the Law on Mediation and Arbitration of Labor Disputes, which provides that the limitation period for application for arbitration of a labor dispute is one year and shall be calculated from the date a party comes to know or should know the infringement of its rights. Therefore, the limitation of arbitration on the claim of employee for unused annual leave from 2017 had expired. Therefore, only the remuneration for unused annual leave from 2018 to 2020 would be supported.

In a typical case released by Haikou Intermediate People's Court, from 2008 to 2011, and in 2017, the employer neither arranged for the employee to take annual leave nor paid the employee any remuneration for unused annual leave. On August 31, 2017, the employer terminated its employment contract with the employee. The court held that the payment for unused annual leave shall be classified into remuneration for the duration of employment, and the limitation of arbitration shall be calculated since the termination date of the employment relationship. Therefore, the employee's claim for remuneration for unused annual leave is still within the limitation of action. This opinion is just opposite to that of Xicheng District People's Court of Beijing.

2. The impact of termination methods of employment contract on the remuneration for unused annual leave

As for the impact of termination methods of employment contract on the remuneration for unused annual leave, the courts of different regions also hold different opinions.

For example, in the second case released by Xicheng District People's Court of Beijing, an employee submitted his resignation to his employer due to family reason. After the resignation, the employee filed a lawsuit to the court citing that the employer failed to pay the unused annual leave remuneration of 2019. The court held that, according to Article 12 of the Implementation Measures on Paid Annual Leave for Employees of Enterprises, no matter which party requests to terminate the employment contract, the employer shall pay the employee remuneration calculated in accordance with the number of days of unused annual leave in the current year.

However, in Shanghai, the courts generally agree that in a case where the employer legally terminates the employment contract due to the employee's serious violation of employer's rules and regulations, the employer need not pay the employee the remuneration for unused annual leave for that year. For example, in the case of (2021)沪01民终2329号, the court held that the employment contract was terminated due to the employee's serious violation of the company's rules and regulations, the employee shall bear the liabilities for the unused annual leave himself. Therefore, the company need not pay him the remuneration for the unused annual leave.

In the course of labor management, the enterprise may, on the basis of the local rules, determine whether and how to pay the remuneration for unused annual leave.

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