

## **Haiwen Labor Law Bi-Monthly Newsletter(2021 March - April)**

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### **I. Regulation: Regulations on Administration of Online Recruitment Services and Its Accompanying Local Rules Took Effect**

In order to regulate human resources market activities, the State Council issued the Provisional Regulations on Human Resources Market in July 2018. With the popularization of

online recruitment, the Ministry of Human Resources and Social Security issued the Regulations on Administration of Online Recruitment Services (人力资源和社会保障部令第44号) on March 1, 2021 (the “Regulation” ), which came into effect on the same day. The Regulation, as the first departmental regulation regulating online recruitment services in China, provides stipulations regarding the market access of online recruitment services, the obligations of human resources service institutions, employers and individuals, specification of service offered, legal liabilities and other relevant issues.

The Regulation mainly sets out obligations of human resources service institutions which are required to (a) obtain a qualified and valid human resources service permit and present it to the public; (b) improve information management in the course of online recruitment; (c) not charge deposits from individuals, and make clear the service items, fee rates and other matters in respect of online recruitment. The Regulation also emphasizes that service institutions shall observe their legal obligation relating to the network security and personal information protection, and safeguard the integrity, confidentiality and availability of relevant recruitment information.

In accordance with the Regulation, the main obligation of employers is to ensure that the recruitment information provided by them is legitimate and authentic, and contains no discriminatory content in respect of ethnicity, race, gender and religious belief, nor set any unlawful recruitment conditions in terms of household registration, region or identity which may restrict the flow of human resources. The main obligation of individuals is to truthfully provide their personal information

and information about their knowledge, skills and experiences required by the position.

After the Regulation came into effect, the Beijing Municipal Human Resources and Social Security Bureau issued the Notice on Further Strengthening the Management of Online Recruitment Services (京人社市场字〔2021〕12号) on March 29, 2021, which provides detailed provisions to support the implementation of the Regulation locally.

## **II. Regulation: Interim Regulations on Administration of Registration and Record of Directors, Supervisors and Senior Managers of Financial Holding Companies Promulgated**

On March 31, 2021, the People's Bank of China promulgated the Interim Regulations on Administration of Registration and Record of Directors, Supervisors and Senior Managers of Financial Holding Companies (中国人民银行令〔2021〕第2号) (the "Interim Regulations" ), clarifying the qualifications of directors, supervisors and senior managers of Financial Holding Companies and providing detailed rules for the record filling with the People's Bank of China.

"Financial holding company" ( "FHC" ) refers to a company which has a controlling stake in or actually controls two or more financial institutions of different types, solely engages in equity investment management, and does not directly engage in commercial business operations. The "senior managers" defined in the Interim Provisions are those who have decision-making power or significant influence on the operation,

management and risk control of FHC, and the scope of which is slightly different from that under the PRC Corporate Law. The Interim Provisions specifies in detail the qualifications, experiences, eligibility criteria for directors, supervisors and senior managers of FHC.

Previously, the reporting obligation regarding directors, supervisors and senior managers mainly applies to securities companies, futures companies and other financial institutions. After the promulgation of the Interim Provisions, the reporting obligation has been extended to FHCs.

Before the Interim Provisions, the People's Bank of China has already issued, in succession, the Decision of the State Council on Implementing Access Management of Financial Holding Companies (国发〔2020〕12号) and the Tentative Measures for Supervision and Administration of Financial Holding Companies (中国人民银行令〔2020〕第4号) in September, 2020, which have formed a supervision system on FHCs.

### **III. Local Rules: Shenzhen Released the First Local Sexual Harassment Prevention Guide**

The newly effective Article 1010 of the Civil Code stipulates that enterprises should take reasonable measures (such as take the necessary precautions, accept complaints, and conduct investigation and ensure properly disposal of cases) to prevent and stop sexual harassment in workplace. On January 15, 2021, nine departments of Shenzhen including the Women's

Federation, the Public Security Bureau, the Human Resources and Social Security Bureau and the Intermediate People's Court jointly issued the Shenzhen Sexual Harassment Prevention Guide (深妇通〔2021〕1号) (the "Guide"). It is the first guiding document on prevention of sexual harassment of its kind issued by a local government to echo the general requirement of the Civil Code.

The Guide consists of seven chapters, providing detailed and operational provisions in terms of concepts of sexual harassment, prevention and education, consultation and complaint handling, and responsibilities of functional departments. The Guide is accompanied by the Sexual Harassment Prevention and Control System (Sample), which can be used as a reference by employers when establishing relevant systems.

On the basis of the Civil Code, the Guide further refined the definition, constitutive requirements, forms and types of sexual harassment. To clarify what constitutes the sexual harassment, the Guide stipulates that "sexual harassment" is a kind of behavior that "has the nature of sex", "is unwelcome and against the victim's subjective will", and "infringes the personality right of a person by causing bad psychological feeling or creating hostile and unfriendly work or study environment towards him or her". Further, the Guide stipulates that sexual harassment can come in the forms of speech, words, images, physical behaviors. Exceptions for sexual harassment are also listed for reference. The refinement of the definition provides an important reference for employers to introduce relevant rules and might also avoid the liability of employers

resulted from the variation in the judgement of sexual harassment due to blurred definition.

In addition, the noteworthy provisions in the Guide mainly include:

The requirement of the Civil Code for establishing a mechanism to prevent sexual harassment is refined by the Guide, which specified that employers shall appoint a department taking charge of sexual harassment prevention work (such as the labor union, the human resources department, etc.); an established sexual harassment prevention regulation shall include public commitments, clear definitions, internal complaint procedures, disciplinary measures, and measures on prohibition of retaliation. Employers are also required to conduct regular training, strengthen propaganda, and create a good workplace environment.

In addition, the Guide expressly states that responsible departments should pay attention to protecting the privacy of the parties concerned when dealing with complaints, to prevent the victims from being harmed again. Suggestions and requirements are also provided in the Guide for the relevant departments of employers to deal with sexual harassment complaints, including the process of interview, investigation, mediation, and disposal.

The Guide also sets out circumstances where an employer may be exempted from liability if relevant measures have been taken. Specifically,

Preventive measure: for example, formulation of sexual harassment prevention system and issuance of anti-sexual harassment reminders, etc.

Disposal measures: for example, quick responding actions to any allegations of sexual harassment and appropriate remedial measures to stop the deterioration of the incident in time.

The Guide may serve as a reference template for enterprises in Shenzhen to establish relevant internal mechanisms and deal with sexual harassment incidents, which provides support for enterprises in actively fulfilling their legal obligations. Sexual harassment has raised more and more attention in recent years. Especially after the promulgation of the Civil Code, it can be expected that local guidance on prevention and control of sexual harassment in different localities will follow. We will provide updates as significant developments arise.

#### **IV. Regional Rules: Liaoning Issued Regulations on Special Protections for Female Employees**

On March 1, 2021, the Measures of Liaoning Province of Labor Protection on Female Employees (辽宁省人民政府令第337号) (the “Measures” ) came into effect, which is the first local regulation specially issued for labor protection of female employees in Liaoning province. Compared with the national level rules such as the Law on the Protection of Rights and Interests of Women and the Special Provisions on Labor Protection for Female Employees, the Measures contains some locally customized provisions including the following, among

others:

The national rules prohibit employers from lowering female employees' wages or terminating their labor contracts simply on grounds of pregnancy, taking maternity leave or under breastfeeding period. With reference to that, the Measures additionally requires the employers not to set restrictions on position promotion, rank promotion and professional evaluation against female employees under the abovementioned situations.

It stipulates that during menstrual period, female employees who are diagnosed with severe dysmenorrhea or excessive menstrual volume shall be given 1 to 2 days off. Apart from Liaoning province, more than 10 provinces also stipulate "dysmenorrhea leave" for female employees, among which Beijing, Zhejiang, Jiangxi and other regions have specified "dysmenorrhea leave" as paid leave.

It adds the provision that pregnant employees who have threatened abortion symptoms or have a history of habitual abortion can take "abortion leave".

Upon application by the female employee and consent by the employer, the female employee may take breastfeeding leave until the infant reaches one-year-old. The salary during the breastfeeding leave shall be determined by the two parties through consultation.

The position and working hours of female employees with postpartum depression or menopausal syndrome may be adjusted, and regular physical check-up for female employees shall be arranged.

## **V. Local Rules: Beijing Formulated Policy on Individual Income Tax Subsidy for Overseas High-end Talents**

On April 27, 2021, Beijing Municipal Finance Bureau and other three departments jointly issued the Interim Measures for Administration of Individual Income Tax Subsidy for Overseas High-end Talents in Beijing (京财税〔2021〕731号) (the “Interim Measures” ), which made specific provisions on the applicable scope, conditions, calculation methods and procedures of applying for individual income tax subsidy for Overseas high-end talents.

The Interim Measure is adopted based on the requirements of the Reply of the State Council on the Work Plan of Deepening Beijing's New Round of Comprehensive Pilot Project for Expanding and Opening up the Service Industry to Build a National Comprehensive Demonstration Zone of Expanding and Opening up the Service Industry (国函〔2020〕123号) and also with reference to the current individual income tax benefit policies of Guangdong-Hong Kong-Macao Greater Bay Area and Shanghai Free Trade Zones Lingang New Area.

According to the Interim Measures, the subsidy shall be granted to the overseas high-end talents working in certain

areas of Beijing for the part of their actual individual income tax burden exceeding 15%, and shall be applied on an annual basis. The “overseas high-end talents” include foreigners, residents of Hong Kong, Macao and Taiwan, returned overseas students and overseas Chinese who have obtained long-term residency abroad who meet the specified qualifications and conditions such as “Class A” work permit holder, senior management or experts of certain qualified enterprises, etc.

#### **VI. Cases: Several Different Regions Unveiled Typical Labor Dispute Cases Addressing the Issues on Identification of Employment Relationship in the Context of Civil Contract being Signed**

In April, 2021, Jiangsu, Chongqing, Guangdong, Shandong, Chengdu and other localities published typical labor dispute cases in succession. The typical cases released recently covers a wide range of contents, including traditional labor disputes, determination of employment relationship under new business forms and protection of employees' rights and interests during COVID-19 pandemic. The identification of employment relations under the new business forms is still a hot topic. Jiangsu, Guangdong, Chongqing and Chengdu respectively discussed the issue of how to determine the employment relations under a situation where the individuals and employers have reached a civil law contract to govern their respective rights and obligations.

Jiangsu: Registering the natural person rendering services as an independent business does not necessarily exclude the

## identification of employment relationship

The defendant company is a takeout delivery service provider, and the plaintiff is an individual engaged in delivery work at the company without signing an employment contract. On October 4, 2018, the plaintiff suffered a traffic accident while delivering the takeout. The major dispute of the case is whether or not a de facto employment relationship exists between the parties. The defendant provided a Project Subcontracting Agreement to prove that the plaintiff was an independent business. The court found that the agreement was not actually signed by the parties and the date when the plaintiff was issued with the business license to be officially approved as an independent business was October 10, 2018, later than the accident, which therefore, according to the court, shall not be taken into account in determining whether a de facto employment relationship is established. Consequently, in view of the level of control exercised by the company over the riders, such as attendance management and orders distribution, the court determined that the employment relationship had been established between the parties.

In this case, albeit that the company lost the case partly because no valid civil law agreement was found to be concluded and the individual had not been admitted as an independent business when the accident happened, the court also considered the control exercised by the company over the riders and details of assignment and fulfillment of work. Therefore, it is not safe to conclude that the de facto employment relationship can be ruled out solely by two parties entering into a civil law contract or registering the individual

as an independent business.

Guangdong: The conclusion of a civil law contract between the individual and the company does not necessarily exclude the identification of employment relationship

In April 2016, the individual joined an aluminum company as a boiler worker without signing an employment contract or contributing social insurance. In April 2018, the company signed a contracting agreement with the individual, stipulating that no employment relationship existed between the two parties. Later, the individual fell down at work and caused an injury. Because of the impediment to be identified as work injury (due to lack of employment contract), dispute arose between parties on whether there was an employment relationship between them. Guangdong Higher People's Court heard the case and held that: the employment relationship between the two parties shall be deemed established if the worker was engaged in paid work arranged by the employer, the work was done in the workplace of the employer and the individual was subject to the labor management of the employer. The de facto employment relationship shall not be automatically excluded only based on a civil law contract whereby it is agreed that no employment relationship would be established.

Chengdu: Identification of employment relationship should be based on the substantive review of the factual elements

The individual concerned entered into both a written

employment contract and a civil law contract for garbage clearance service with a garbage clearance company on the same day. The company argued that on account of the existence of the contract for garbage clearance, civil law relationship rather than employment relationship shall prevail. On review of the two agreements and on the facts found regarding the labor management posed by the company on the individual, payment of salary, contribution of social security and so on, the court decided that the employment relationship, instead of civil law relationship was established between the parties. In addition to the forgoing, the court went beyond and concluded that even if no written employment contract was in place, evaluation of the factual circumstance as mentioned above will also be conducted and considered in a substantive way such that the same conclusion will be reached nevertheless.

Chongqing: The calculating method of remuneration does not necessarily impact the identification of employment relationship

The individual engaged in express delivery for an express delivery company, and he will receive 1 yuan for each delivery to be settled monthly. During the process of work-related injuries identification, dispute on whether they have established employment relationship arose. The court held that although the company did not sign a written labor contract with the individual, the individual went to the company on time every day to collect the couriers and was responsible for the delivery of the courier in a specific area as assigned by the company. The worker followed the employer' s instructions in

respect of working hours, place of work, work content etc. and the company has conducted effective management over the individual. Therefore, it should be recognized that the employment relationship has been established.

With the vigorous development of various new business and staffing models, in practice, it is not rare for enterprises and individuals to conclude civil agreements instead of employment contract, defining the legal nature of the relationship as independent service relationship, contracting relationship, subcontracting relationship, cooperative relationship, etc. However, when there is a dispute between the two parties on whether there is an employment relationship, the court will not only consider the terms of the mutual agreement between the two parties, but also will make a judgment case-by-case according to the specific service model of the two parties, usually examining the degree of management the employer posed upon the individual, the structure of compensation, whether the services provided by the individual constitute a part of the company's business and other factors.

However, due to the variety and flexibility of the new business models today, the determining elements of employment relationship mentioned above are being challenged constantly, which leads to varying subjective discretion in judicial practice. The balance of social interests and the influence on the industry supervision policy may be taken into account by the courts and the labor arbitration committees. Therefore, enterprises with strong dependence on flexible employment models should pay special attention to the fact that a mutual

agreement between parties to rule out the employment relationship apparently cannot save the company from bearing employer liabilities and a comprehensive evaluation taking into consideration the specific features in business model and industrial background should be conducted.

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