

Haiwen Labor Law Bi-Monthly Newsletter (2021 July – August)

Author: LIU, Yuxiang WU, Qiong

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I. Interpretation of Laws and Regulations: Personal Information Protection Law and Related Regulations Promulgated, Legal System of Personal Information Protection Improved Progressively

The Personal Information Protection Law of the People's Republic of China ("Personal Information Protection Law"), adopted at the 30th Session of the Standing Committee of the 13th National People's Congress on August 20, 2021, will take effect on November 1, 2021. The Personal Information Protection Law, together with the previously issued Cybersecurity Law and Data Security Law, has built a legal shield for the protection of personal information.

The Personal Information Protection Law, consisting of eight chapters, specifies the principles to be abided by in processing personal information, including the principles of legality, legitimacy, necessity and good faith, explicit purpose and minimum necessity, openness and transparency, and quality and security assurance. The Personal Information Protection Law sets up personal information processing rules around the principle of "inform-agree" , strengthens the obligations of personal information processors, and imposes strict legal liabilities on them.

Article 4 of the Personal Information Protection stipulates that, the processing of personal information includes the collection, storage, use, processing, transmission, provision, disclosure and deletion, etc. of personal information. As it is inevitable that the employer will need to process the personal information of the employees in the course of the employment management, it will be an important part of HR compliance for the employer (as a personal information processor) to protect the personal information of employees.

According to the Personal Information Protection Law, typical scenarios and legal requirements relating to the protection of personal information of employees mainly include the following:

1. Collecting and processing employees' personal information based on recruitment and management principle, an individual's consent is required before his or her personal information can be processed. Article 13 of the Personal Information Protection Law provides a series of situations in which an individual's consent is not required, of which item (2) is "where it is necessary for the conclusion or performance of a contract to which the individual concerned is a party, or for the implementation of human resources management in accordance with the labor rules and regulations formulated in accordance with the law and the collective contract concluded in accordance with the law".

On the one hand, this provision reflects the principle of necessity in substance, which is consistent with Article 8 of the Labor Contract Law which states that "the employer shall have the right to ask about the basic information of the employee in direct relation to the labor contract"; on the other hand, this provision emphasizes that the provisions of the legally formed rules and regulations of the employer and the collective contract are the precondition. In practice, it is necessary to analyze and evaluate specific situations and purposes to determine whether certain information (such as the information on health status, marital status and family status of employees) is necessary for the implementation of HR management.

Chapter 2 of the Personal Information Protection Law further states that as for the sensitive personal information of an individual, the personal information processor shall, inform the individual of the name and contact information of the personal information processor, the necessity of processing such sensitive personal information, and the impact on his/her personal rights and interests. The logical relation between the abovementioned provisions of Article 13 is to be further clarified. In employment management scenarios, such as checking work attendance, collecting fingerprints and faces, monitoring employees' whereabouts, requiring employees to provide health status information, etc., employers may need to pay special attention to whether the employees' sensitive information is involved.

2. Transferring employees' information to a third party: For the convenience of employee management and improvement of employee welfare, the employer may need to entrust third parties (such as suppliers) to provide some HR services, purchase commercial insurance for employees, or need to let the parent company participate in or guide the labor management of member entities, which may involve the transfer of personal information of employees to a third party. If the third party is identified as a "personal information processor", the employer shall perform its duty to inform the concerned employees and obtain their separate consent. If the supplier is identified as "being entrusted to process personal information", the employer shall supervise the information processing activities of the trustee.
3. Transferring employees' information to overseas entities: Some transnational corporation may intend to transfer employees' information to overseas entities based on the consideration of global employment management. According to the Personal Information Protection Law, where personal information is to be provided to overseas parties, the statutory conditions and procedures such as the passing security assessment, going through information protection authentication or entering into a contract with the recipient shall be completed by the employer. Besides, the notification obligations shall be fully performed, and it is necessary to obtain individual's consent.
4. Processing remaining personal information of separated employees: The employer shall properly keep the personal information of the separated employees, and shall not disclose or use it without due reason. After the personal information becomes unnecessary, the employer shall delete the personal information of the employee.

With the implementation of the Personal Information Protection Law, other laws and regulations related to personal information protection have been issued in succession. For example, the Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Cases Relating to the Use of Facial Recognition Technologies to Process Personal Information, promulgated by the Supreme People's Court, came into effect on August 1, 2021. It strengthens the judicial protection of face information in three aspects: reasonably distributing the burden of proof, reasonably defining the scope of property losses and advocating civil public interest litigation. If the employer intends to adopt the face recognition system,

it should pay attention to protecting the safety of face information of employees and preventing the related technologies from infringing on employees' personality rights and interests.

In addition, on July 6, 2021, Shenzhen promulgated the Data Regulations of Shenzhen Special Economic Zone, which, on the basis of the following principles and rules stated by the Personal Information Protection Law, refined the processing requirements for different kinds of personal data, and detailed the regulations on the sharing, opening and utilization of public data, as well as data security management, etc. It also put forward higher requirements on employers with respect to processing employees' personal data.

II. Interpretation of Laws and Regulations: Multiple Departments and Regions Successively Issued Opinions on the Protection of Workforce on New Forms of Work and Employment

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 two guiding opinions on the protection of workers' rights and interests in new work forms, being the "Guiding Opinions on Implementing the Responsibility of Online Catering Platform and Effectively Protecting the Rights and Interests of Takeaway Food Delivery Workers" ("Opinions on Protecting the Rights and Interests of Takeaway Food Delivery Workers") and "Guiding Opinions on Protecting the Labor Security Rights and Interests of Workers in New Work Forms" ("Opinions on Protecting Workers in New Work Forms"). The two opinions aim to providing guidance for the formation of subsequent rules and the disputes resolution in practice.

The abovementioned two opinions put forward measures and requirements to safeguard the rights and interests of workers in the new work forms, among which the following aspects are worth noting:

1. Regulating the signing of written agreements: Opinions on Protecting Workers in New Work Forms advc given different circumstances, different forms of written agreement shall be adopted and concluded by an the employers and the workforce. If the conditions for forming an employment relationship are met, the shall enter into an employment contract with workers; otherwise, the employer shall enter into other types agreements with workers.
2. Improving the payment system of the salary and performance-based pay: Enterprises are required to pay s lower than the local minimum salary to workers in new work forms. Reasonable remuneration rate higher of normal work hours shall be adopted for their holiday work. The Opinions on Protecting the Rights an of Takeaway Food Delivery Workers requires the online catering platforms and third-party cooperative ent design the performance appraisal system for takeaway food delivery workers in a reasonable way.
3. Encouraging and requiring enterprises to participate in the social insurance schemes: As participatio insurance programs are considered important measures for safeguarding workers' rights and interest opinions clarified the relevant issues concerning the participation of social insurance of the workers in forms. The Opinions on Protecting Workers in New Work Forms requires enterprises to support workers in forms with non-labor relations to participate in endowment insurance and medical insurance as appropri encourages platform enterprises including those managing rides, meals, freight deliveries to purchase c insurance. Opinions on Protecting the Rights and Interests of Takeaway Food Delivery Workers encourage riders who have not formed labor relations with platforms to participate in social insurance.

The Opinions on Protecting Workers in New Work Forms also requires all localities to create conditions f workers to participate in social insurance. At present, some cities have issued relevant regulations to

enterprises to pay social insurance separately for the flexible workers who are engaged in non-labor related work. For example, in June, 2021, Qingdao issued the regulation of paying work-related injury insurance premiums for flexible workers (for more information you may refer to “Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter” (2021 May – June)). In January, 2021, Guangdong Province promulgated the “Measures for the Engagement of Flexible Workers over the Statutory Retirement Age and Other Specific Personnel Participating in Work-related Injury Insurance (Trial)” ; On this basis, Guangzhou Municipal Human Resources and Social Security Bureau issued the Guidelines on the Participation of Specific Laborers of Enterprises in Work-related Injury Insurance in Guangzhou, which clarified the operational details of participation in the work-related injury insurance. Ningbo is also exploring methods to expand the coverage of work-related injury insurance to flexible workers, and to bring flexible workers into the current system of the endowment insurance and medical insurance system (For details, please refer to the Notice of the General Office of the National Development and Reform Commission on Promulgation of Typical Experiences of Ningbo in Promoting Employment Support Policy issued by the National Development and Reform Commission on July 2, 2021.).

4. Protecting workers’ labor rights: Both opinions emphasize the need to optimize the working environment to protect workers’ rights such as the right to rest and safety. The Opinions on Protecting Workers in New Work Forms provides that enterprises shall implement reasonable rest system, scientifically determine workers’ working hours, reduce labor intensity, and develop rules and write algorithms that directly relate to the protection of workers’ interests. The Opinions on Protecting the Rights and Interests of Takeaway Food Delivery Workers provide that the order distributing mechanism of the platform should be optimized to ensure labor safety.
5. Promoting the establishment of trade unions that adapt to new forms of work: The Opinions on Protecting the Rights and Interests of Takeaway Food Delivery Workers explicitly provides that efforts should be made to promote the establishment of trade unions, to guide and help takeaway riders to participate in trade union affairs. With the development of new forms of work, the number of flexible workforce has increased substantially, and the establishment of trade unions under new forms of work has become a trend across the country.

Besides the guidance for employers, the two opinions also make requests for other stakeholders, including labor organizations and government authorities. In the future, different departments and regions will release detailed implementing rules and regulations based on the opinions. We will also continue to keep a close eye on the legislative progress.

III. Quick View of New Regulations: New Regulations for Electronic Labor Contract Issued; Citywide Social Insurance Rules Released Successively and the Minimum Monthly Wage Standard Adjusted in Multiple Regions

1. The MOHRSS and Tianjin Released Guidelines for Concluding Electronic Labor Contracts

Following the issuance of the Notification of the General Office of the Ministry of Human Resources and Social Security on Issues Concerning the Conclusion of Electronic Labor Contract on March 4, 2020, the MOHRSS has further issued the Guidelines for the Conclusion of Electronic Labor Contracts (the “Guidelines”) on July 1, 2021 to provide specific and practical guidance on the conclusion of electronic labor contracts. The Guidelines specifies the standards for the conclusion, retrieval, storage and application of electronic labor contracts in order to ensure that the contracts are true, complete, accurate and non-tampered. Employers and employees entering into electronic labor contracts may conclude electronic labor contracts by reference to the Guidelines upon mutual consent.

Before the MOHRSS issued the Guidelines, Beijing, Shenzhen and other regions also issued specific regulations for the conclusion of electronic labor contracts (for more information you may refer to “Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter” (2021 May – June)). Subsequently, on July 27, 2021, Tianjin Municipal Bureau of Human Resources and Social Security also issued the Guidelines for the Conclusion of Electronic Labor Contracts in Tianjin.

2. Shenzhen, Guangdong, Sichuan and Other Regions Have Successively Released Social Insurance Rules

On July 6, 2021, the Standing Committee of Shenzhen Municipal People's Congress released the revised Regulations on Social Endowment Insurance of Shenzhen Special Economic Zone, which has come into effect since August 1, 2021. The revisions are few, which mainly confirm the base of endowment insurance payment.

On July 29, 2021, the People's Government of Guangdong Province released the revised Provisions of Guangdong Province on Employee Maternity Insurance, which will come into force on October 1, 2021. This revision mainly regulates the payment methods and insurance benefits of the employee maternity insurance after the combination of the employee maternity insurance and employee basic medical insurance.

On July 2, 2020, People's Government of Sichuan Province released the Measures for the Implementation of Regulations on Work-related Injury Insurance in Sichuan Province, which has taken effect since August 6, 2021. The Implementation Measures provide specific interpretations on three issues including the identification of work-related injury, the assessment of work capability and the obtainment of work-related injury insurance benefits in the Regulations on Work-related Injury Insurance in Sichuan Province, which came into effect on September 1, 2020.

3. Local Minimum Wage Standards Continue to Be Adjusted in Multiple Regions

In July 2021, Jiangsu (including Nanjing, Suzhou and other places), Zhejiang, Hubei, Ningxia and other places successively issued notices to adjust the minimum wage standard.



(For the previously adjusted minimum wage standards in other regions in this year, please refer to "Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter" (2021 May – June))

IV. Exploration of Typical Cases: The MOHRSS and the Supreme People's Court Jointly Released Typical Cases of Overtime-related Labor Disputes

The MOHRSS and the Supreme People's Court jointly released the Notice on the Second Batch of Typical Cases about Labor Disputes on 30 June 2021. The Notice mainly involves labor disputes between employers and employees in connection with overtime work. It not only regulates employers' performance of obligations, but also leads employees to defend their rights rationally according to the laws and regulations.

Among the ten typical cases, the following legal issues and judicial opinions are worth noting:

1. Issues concerning workers refusing to work overtime:

(1) If the employer terminates the labor contract because the employee refuses to perform the overtime work arranged by the employer, it may be deemed as illegal termination of the labor contract.

(2) If the employer fails to reach a consensus with the employee on the significant increase of his/her work if the increase will result in the total working time exceeding the statutory upper limit, the employee has to refuse the arrangement in question.

2. Issues concerning claims of overtime pay:

(1) If the employee concludes an agreement with the employer to give up overtime pay, or signs the document to confirm that the overtime pay has been settled, the validity of the agreement shall be examined case by case.

(2) Even if the employer and the employee agree to pay "Package Wages" (a fixed amount of wages to be paid every month to cover all amount of work regardless of working hours), the agreement is possible to be held invalid and the employer may still need to pay overtime pay according to laws and regulations.

3. Issues concerning identification of overtime facts:

(1) The failure of employees to perform overtime examination and approval procedures according to the rules and regulations of employers may not necessarily deny the fact that employees work overtime.

(2) If the employer denies that the employee's overtime work based on the internal rules and regulations, the effectiveness and actual enforceability of the rules and regulations shall be reviewed by the court, and the employee's overtime work shall be comprehensively considered based on the evidence of the whole case.

4. Other issues:

(1) If the dispatched employee suffers from health damage or work-related injury due to long-term overtime work, accepting enterprises and the labor dispatching enterprises shall bear joint and several liabilities for compensation.

(2) If a labor dispute arises during the existence of the employment relationship due to the arrears of remuneration (including overtime pay), a special rule concerning the limitation of arbitration shall be applied. That is, the limitations of arbitration for arrears of labor remuneration during the existence of the employment relationship shall not be restricted by "one year from the date of knowing or should know that the rights are infringed"; but if the employment relationship is terminated, the claim shall be raised within one year from the date of termination of the employment relationship.

(3) Employees who advocate overtime pay have the responsibility to provide evidence of the existence of overtime work, or to prove that the relevant evidence is in the possession of the employer (therefore, individuals should give evidence). Where the employer should but does not provide relevant evidence, it can be presumed that the employee works overtime.

*Disclaimer: This newsletter is for general information only and does not constitute our legal advice or legal opinions. For further discussions, please consult your regular contact at our firm, or any of the following Haiwen Labor Law Team members.

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