

HAIWEN & PARTNERS

**Haiwen Labor Law Bi-Monthly Newsletter (2024  
January - February)**

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## Summary

### 本期摘要



新规速递：《南京市劳动人事争议案件裁审衔接工作指引（一）》发布，涉及南京市劳动人事争议案件的程序和实体问题

Quick View of New Regulations: The Guidelines on the Connection of Labor and Personnel Dispute Cases Arbitration and Litigation of Nanjing (I) was Issued, Involving Procedural and Substantive Issues of Labor and Personnel Dispute Cases in Nanjing



新规速递：全国总工会印发《工会参与劳动争议处理办法》，并与最高人民检察院联合下发《关于协同推进运用“一函两书”制度保障劳动者权益工作的通知》

Quick View of New Regulations: The All-China Federation of Trade Unions Issued the Measures on Trade Unions Participating in Labor Disputes Handling, and Jointly Issued the Notice on Promoting the Protection of Employees' Rights and Interests Through a Collaborative Approach with the Supreme People's Procuratorate



典型案例：人民法院案例库正式上线并向社会开放

Exploration of Typical Cases: The People's Court Case Database was Officially Online and Accessible to the Society



典型案例：北京市人社局发布2023年北京市劳动人事争议仲裁典型案例

Exploration of Typical Cases: Beijing Municipal Human Resources and Social Security Bureau Released Typical Cases of Labor and Personnel Dispute Arbitration in Beijing in 2023



典型案例：苏州两级法院发布《竞业限制纠纷案件审判白皮书》及十大典型案例

Exploration of Typical Cases: The Suzhou Two-level Court Released White Paper on Trial of Non-Compete Dispute Cases and Ten Typical Cases



## 一、新规速递：《南京市劳动人事争议案件裁审衔接工作指引（一）》发布，涉及南京市劳动人事争议案件的程序和实体问题

Quick View of New Regulations: The Guidelines on the Connection of Labor and Personnel Dispute Cases Arbitration and Litigation of Nanjing (I) was Issued, Involving Procedural and Substantive Issues of Labor and Personnel Dispute Cases in Nanjing

2024年1月26日，南京市人力资源和社会保障局与南京市中级人民法院联合发布了《南京市劳动人事争议案件裁审衔接工作指引（一）》（“《工作指引》”）。《工作指引》总结了司法实践中形成的共识，并回应了争议问题。其中，以下要点值得关注：

On January 26, 2024, Nanjing Human Resources and Social Security Bureau and Nanjing Intermediate People's Court jointly issued the Guidelines on the Connection of Labor and Personnel Dispute Cases Arbitration and Litigation of Nanjing (I) (the "Guidelines"). The Guidelines summarized the consensus developed in judicial practice, and responded to controversial issues. Among them, the following points are worthy of attention:

### 1.工资标准。

#### Wage standard.

- 用人单位支付劳动者的医疗补助费的，建议按照劳动者患病或负伤前月平均工资实际应发工资计算。

Where an employer shall pay medical allowances to an employee, it is advisable to calculate the medical allowance based on the actual gross average monthly wage payable before the employee's illness or injury.

- 用人单位支付未签书面劳动合同二倍工资差额的，建议一般按照应发工资计

算。

Where an employer shall pay the difference of double wages for not signing a written labor contract, generally it is advisable to calculate the difference based on the gross wage payable.

- 用人单位支付涉及长期病假职工、企业停产放假的劳动者的经济补偿金的，建议按照正常工作期间的月平均工资计算。

Where an employer shall pay economic compensation to employees who are on long-term sick leave or employees on vacation/suspension due to the company shutdown, it is advisable to calculate the compensation based on the average monthly wage during the normal working period.

**2.继续履行劳动合同。**针对用人单位违法解除劳动合同，劳动者要求继续履行并支付该期间工资的，双方争议较大丧失继续履行劳动合同的基础，建议原则上不支持恢复劳动关系。

**Continuing to perform the labor contract.**Where the employer illegally terminates the labor contract, and the employee claims to continue to perform the labor contract and pay back the wages for the wrongful termination period, in the event that the parties has lost the foundation for continuation of the labor contract due to significant dispute, in principle, it is advisable that the reinstatement of the employment relationship shall not be supported.

**3.末位淘汰。**用人单位根据绩效考核制度对员工进行绩效考核排名，对排名“末位”员工扣减绩效工资，用人单位的绩效考核制度的合法性应当看单位是否有明确考核制度，是否对员工进行考核量化打分，考核是否客观合理等，区分情形，个案判断。

**Last-position Eliminating.** If the employer ranks the employees according to the performance appraisal rules, and deducts the performance salary of the employee who is ranked at the last-position, the legality of the employer's performance appraisal rule shall depend

on whether there is a clear rule regarding the performance appraisal, whether the employee's is evaluated quantitatively, whether the appraisal is objective and reasonable, etc., and shall be judged case by case according to different situations.

**海问建议：**南京地区的用人单位在日常劳动管理、劳动争议处理等实践中，应重视本《工作指引》，以满足劳动用工合规要求。

**Haiwen suggestions:** Employers in Nanjing shall pay attention to this Guidelines in daily HR management, labor dispute handling and other practical operations to meet the HR compliance requirements.



## 二、新规速递：全国总工会印发《工会参与劳动争议处理办法》，并与最高人民检察院联合下发《关于协同推进运用“一函两书”制度保障劳动者权益工作的通知》

[Quick View of New Regulations: The All-China Federation of Trade Unions Issued the Measures on Trade Unions Participating in Labor Disputes Handling, and Jointly Issued the Notice on Promoting the Protection of Employees' Rights and Interests Through a Collaborative Approach with the Supreme People's Procuratorate](#)

2023年12月28日，中华全国总工会（“[全国总工会](#)”）印发《工会参与劳动争议处理办法》（“[《办法》](#)”）。《办法》对工会参与劳动争议协商、调解、仲裁、诉讼，以及处理集体劳动争议等作出规定，进一步规范和加强工会参与劳动争议处理工作。

On December 28, 2023, the All-China Federation of Trade Unions issued the Measures on Trade Unions Participating in Labor Disputes Handling (the “[Measures](#)”). The Measures covers participation of trade unions in consultation, mediation, arbitration and litigation of labor disputes, as well as handling of collective labor disputes, etc., and further regulates and strengthens the participation of trade unions in the labor disputes handling.

2024年2月7日，最高人民检察院、全国总工会联合下发《关于协同推进运用“一函两书”制度保障劳动者权益工作的通知》，适用于用人单位的规章制度制定、修改、执行，以及劳动合同订立、履行、变更、解除、终止等范围。其中，“一函”指《工会劳动法律监督提示函》，“两书”指《工会劳动法律监督意见书》和《工会劳动法律监督建议书》。

On February 7, 2024, the Supreme People's Procuratorate and the All-China Federation of Trade Unions jointly issued the Notice on Promoting the Protection of Employees' Rights and Interests Through a Collaborative Approach, which covers the formulation, modification and implementation of the rules and regulations of employers, as well as the conclusion, fulfillment, amendment and termination of labor contracts. The supervision approaches include the A Labor Law Supervision Reminder Letter of Trade Unions, the Labor Law Supervision Opinion of Trade Unions and the Labor Law Supervision Proposal of Trade Unions.

1. 工会劳动法律监督委员会认为用人单位可能违反或者出现违反有关劳动法律法规情况时向用人单位发出《工会劳动法律监督提示函》，也可在重要时间节点聚焦重点问题公开发布《工会劳动法律监督提示函》。

A Labor Law Supervision Reminder Letter of Trade Unions can be sent to the employer when the Labor Union Labor Law Supervision Committee observes that the employer may violate or violates labor laws and regulations. It can also be publicly issued at important time points focusing on key issues.

2. 当用人单位存在违反劳动法律法规、侵害职工合法权益行为，与用人单位经提示、协商无效的，由该用人单位所在地县级以上总工会向用人单位发出《工会劳动法律监督意见书》，提出改正意见。涉及新业态员工等特殊情况的可同时抄送同级检察机关。

If an employer violates labor laws and regulations and infringes employees' lawful rights and interests, and reminder and negotiation with the employer is ineffective, the federation of trade unions at or above the county level where the employer is located can issue a Labor Law Supervision Opinion of Trade Unions to the employer, and put forward opinions on corrections. In case of employees in new business

form or other special circumstances, the Opinion can be copied to the procuratorate at the same level.

3. 用人单位无正当理由未在规定期限内答复，或者无正当理由拒不改正的，地方总工会向同级政府执法部门发出《工会劳动法律监督建议书》，并可同时抄送同级检察机关。

If the employer fails to respond in the prescribed period without a justifiable reason, or refuses to make corrections without a justifiable reason, the local federation of trade unions can send a Labor Law Supervision Proposal of Trade Unions to the law-enforcement departments at the same level, which can also be copied to the procuratorate at the same level.



### 三、典型案例：人民法院案例库正式上线并向社会开放

[Exploration of Typical Cases: The People's Court Case Database was Officially Online and Accessible to the Society](#)

2024年2月27日，最高人民法院举行人民法院案例库（“[案例库](#)”）建设工作新闻发布会。案例库收录了经最高人民法院审核认为对类案具有参考示范价值的权威案例，包括指导性案例和参考案例，服务司法审判、公众学法、学者科研、律师办案。

On February 27, 2024, the Supreme People's Court held a press conference on the construction of the People's Court Case Database (“[Case Database](#)”). The Case Database contains authoritative cases, including guiding cases and reference cases, which have been reviewed and evaluated by the Supreme People's Court as having reference and demonstration value for similar cases, and which can provide guidance to the judicial trial, the public in learning the law, scholars in scientific research, and lawyers in handling cases.

案例库目前共收录了劳动争议共42件（其中8件为指导性案例，部分指导性案例分析参见[《海问·观察 / 基于最高院第32批指导性案例的分析及用工实务建议》](#)），人事争议共1件，涉及确认劳动关系、经济补偿金和赔偿金、工资、奖金、竞业限制等多个方面。就其中包含的裁审典型观点，我们梳理如下：

The Case Database currently contains a total of 42 labor disputes (of which 8 are guiding cases, for part of the guiding case analysis please refer to [Haiwen Observation: Analysis and Practical Suggestions on Employment Based on the 32nd Batch of Guiding Cases of the Supreme People's Court](#)), and 1 personnel dispute, involving confirmation of labor relation, economic compensation and indemnity, salary, bonus, non-compete and other aspects. We have summarized the typical opinions of courts and the labor arbitration committees contained therein as follows:

1. 确认劳动关系案件中，认定的核心为劳动者人格及经济从属性。

In the confirmation of labor relation cases, the core factors are the personal and economic subordination of the employee.

- 在挂靠情形下，陈某诉广州某某船务公司船员劳动争议案、滦县某物流公司诉王某劳动争议案中，均认定被挂靠公司和员工之间不具有从属性。

In the situation of affiliation, in both *Mr. Chen v. Guangzhou Company Crew Labor Dispute* and *Luanxian Company v. Mr. Wang Labor Dispute*, it has been concluded that there was no subordination between affiliated company and the individual.

- 在平台等新业态用工情形下，李某诉某文化传播公司劳动争议案等案件中，认定员工与公司之间不具有从属性。但在某服务外包有限公司诉徐某确认劳动关系纠纷案等案件中，认定平台合作的外包公司和员工之间满足从属性的要求。

In the situation of the platform and other new forms of employment, it was found that the employees and the company does not have subordination in *Mr. Li v. Company* labor dispute case. However, in the case of *Outsourcing Company v. Mr. Xu* with respect of confirmation of the labor relation, it was found that there is subordination between the outsourcing company and the employees.

- 在已达退休年龄但未享受养老保险待遇的情形下，乌鲁木齐某物业服务有限公司诉马某某劳动合同纠纷案等案件中，因员工和用人单位之间不具有从属性，且员工未能领取养老保险待遇非因用人单位原因，认定不属于劳动关系。

In the situation of an employee who had reached retirement age but not yet started to receive the basic pension insurance entitlements, due to the lack of subordination between the employee and the employer and the employee's failure to receive pension insurance

entitlements cannot be attributed to the employer, it was found that there was not a labor relation in *Urumqi Company v. Mr. Ma* labor contract dispute case, etc.,.

2. 认定用人单位违法解除劳动合同的案件中，裁审机构对于《劳动合同法》中解除路径适用的具体标准审查较为严格。在42起劳动争议中，9起和违法解除劳动合同的赔偿金直接且紧密相关，仅1起案件（即指导性案例181号）认定用人单位无需支付违法解除劳动合同的赔偿金。

In cases where the employer terminated the labor contract wrongfully, the courts and the labor arbitration committees were more rigorous in their assessment of the specific criteria applicable to the termination approach under the Labor Contract Law. Among the 42 labor disputes, 9 cases were connected directly and closely with the compensation for wrongful termination of labor contracts, and only 1 case (Guiding Case No. 181) found that the employer was not required to pay compensation for wrongful termination of labor contracts.

3. 关于奖金支付认定的案件中：

Among the cases on the payment of bonuses:

- 3起案件认定不支付奖金不当：指导性案例182号释明用人单位不得以奖金未经审批认为员工无权领取；指导性案例183号释明用人单位单方解除劳动关系且不予发放年终奖的规定缺乏合理性；刘某诉北京某公司劳动争议纠纷案释明因用人单位违法解除劳动合同而导致员工离职的不能成为拒付年终奖的理由。

Three cases found that the non-payment of bonuses was improper: Guiding Case No. 182 explained that an employer shall not claim that an employee is not entitled to receive a bonus because the bonus had not been approved by the employer; Guiding Case No. 183 explained that the provision of non-payment of a year-end bonus after the employer unilaterally terminated the labor relation was unreasonable. *Mr. Liu v. A Beijing Company* Labor Dispute case explained that the employee's termination of his/her job due to illegal termination of the labor contract by the employer couldn't be the ground for the refusal of payment of a year-end bonus.

- 1起案件支持了用人单位不予支付奖金的主张：曾某诉某网络科技有限公司劳动争议案中用人单位的薪酬制度规定绩效考核与年终绩效奖金挂钩，考核结果规范合理的可以作为不予发放年终绩效奖金的依据。

One case supported that the employer shall not pay the bonus: in *Mr. Zeng v. Company* Labor Dispute, the employer's salary policy stipulated that the performance appraisal was linked to the year-end performance bonus, and the standardized and justified appraisal results could be a basis for not paying the year-end performance bonus.

4. 关于竞业限制的案件中：指导性案例184号释明诉讼期限不计入竞业限制期限的约定无效；指导性案例190号指出竞争关系应当根据实际经营情况综合判断，不应仅依据经营范围确认；上海某实业股份有限公司诉韩某某劳动合同纠纷案中，员工的配偶持股竞争对手竞业公司，裁审机构结合行为发生时间、财产独立状况等认定属于隐蔽竞业的违约行为。

Among the non-compete cases: Guiding Case No. 184 explained that the clause which provided that period of litigation shall not counted as the period of non-compete was invalid; Guiding Case No. 190 pointed out that the competitive relation should be determined comprehensively according to the actual operation situation, and should not be confirmed only based on the business scope in business licenses; in *Shanghai Company v. Mr. Han* Labor Contract Dispute case, the spouse of the employee held shares in the rival competitor, and the court and the labor arbitration committee determined that it was a breach of contract in the form of hidden competition in combination with the time of the behavior and the independent status of the property.

**海问建议：**因案例库筛选的案例具有代表性，在法律适用、裁判规则等方面具有参考意义和示范价值，企业在日常劳动人事管理实践中可加以参考。

**Haiwen suggests:** Since the cases selected by the Case Database are typical, which shall have reference and demonstrative value from the perspective of applying laws and adjudication rules, and can be referred to in the daily practice of HR management of enterprises.



#### 四、典型案例：北京市人社局发布2023年北京市劳动人事争议仲裁典型案例

[Exploration of Typical Cases: Beijing Municipal Human Resources and Social Security Bureau Released Typical Cases of Labor and Personnel Dispute Arbitration in Beijing in 2023](#)

2023年12月29日，北京市人力资源和社会保障局发布《2023年北京市劳动人

事争议仲裁典型案例》。典型案例共十起，裁判要点如下：

On December 29, 2023, the Beijing Municipal Human Resources and Social Security Bureau released the 2023 Typical Cases of Labor and Personnel Dispute Arbitration in Beijing. There are ten typical cases, and the main opinions are as follows:

1. 某保安公司和员工签订《服务项目承包经营合同书》规避《劳动合同法》，裁审机构根据双方主体资格、用工管理情况等认定双方存在劳动关系。

A security company and its employee signed the Service Project Agreement to evade the application of Labor Contract Law, and the labor arbitration committee and the court determined that the two parties had a labor relation based on their qualifications of both parties as subjects of an employment and the labor management situation, etc.

2. 承包互联网平台企业外卖服务的加盟商通过第三方公司招用派遣员工的，裁审机构根据加盟商未向员工告知派遣协议内容、接受其管理、工资明细和来源为该加盟商，以及提供的服务为加盟商的业务组成部分等认定双方存在劳动关系。

In the case of a franchisee who contracted a takeaway service from an internet platform company and recruited dispatched employees through another third-party company, the court and the labor arbitration committee found that a labor relation existed between the two parties based on the fact that the franchisee did not notify the employee of the content of the dispatched agreement, the employee was under its management, the payroll and its details were from the franchisee, and that the service provided was an integral part of the franchisee's business.

3. 员工劳动合同约定为标准工时制，用人单位主张员工为高管应当执行不定时工时制度，裁审机构因员工岗位不属于高管且用人单位曾就员工旷工扣除工资，认定应当支付加班工资。

The employee's labor contract agreed on a standard working system, and the employer claimed that the employee was an executive and should be subject to a flexible working system, but the court and the labor arbitration committee determined that overtime wages should be paid because the employee's position was not an executive and the employer had deducted the employee's wages for absenteeism.

4. 用人单位主张以员工迟到、早退时间抵扣年休假的，不属于员工不享受年休假的法定情形。

The employer's claimed that the employee's annual leave had been deducted from the employee's late arrivals and early departures shall not be considered as the reason that the employee was not entitled to annual leave provided by law.

5. 法律并未对劳动者履行保密义务需要支付保密费用作出强制性规定，对员工要求用人单位支付保密费用的主张不予支持。

The law did not impose the payment of confidentiality fee for the employee's fulfillment of confidentiality obligations on the employer, and the employee's request for the employer to pay the confidentiality fee shall not be supported.

6. 工作交接期间劳动者因工负伤应享受工伤待遇，用人单位不得在劳动能力鉴定前解除劳动合同。

During the period of work handover, employees who were injured at work shall be entitled to work injury treatment, and the employer shall not terminate the labor contract before the evaluation of work capacity.

7. 用人单位不得以任何理由限制女职工的生育权，不得因新入职女员工未按照规章制度规定提交申请后怀孕而扣除绩效奖金。

The employer shall not restrict the maternity rights of female employees for any reason, and shall not deduct the performance bonus of a new female employee due to her failure to submit an application for pregnancy in accordance with the employer's rules and regulations.

8. 员工请人代替其参加年度体检的虚假体检行为造成负面影响，用人单位解除劳动合同合法。

If the employee had asked someone to take his/her place in the annual medical examination for a false medical examination, which had caused a negative impact, it shall be lawful for the employer to terminate the labor contract.

9. 离职证明中载明的内容应当符合法律法规规定，不得载明对员工再就业产生不利影响的评价性表述。

The contents contained in the separation certificate shall be in line with the laws and regulations and shall not contain evaluative expressions that adversely affect the re-employment of the employee.

10. 事业单位工作人员连续订立两次聘用合同，第二次聘用合同到期事业单位可终止不再续订，且无需支付经济补偿金。

Where a public institution's employee entered into two consecutive employment contracts, the public institution could terminate the contract without renewal and did not have to pay economic compensation when the second contract expired.



## 五、典型案例：苏州两级法院发布《竞业限制纠纷案件审判白皮书》及十大典型案例

[Exploration of Typical Cases: The Suzhou Two-level Court Released White Paper on Trial of Non-Compete Dispute Cases and Ten Typical Cases](#)

2024年2月23日，苏州市中级人民法院发布《竞业限制纠纷案件审判白皮书（2018-2023年）》，苏州法院发布竞业限制纠纷十大典型案例。其中，我们认为可以重点提示的案例有：

On February 23, 2024, The Suzhou Intermediate People's Court released the White Paper on

the Trial of Non-Compete Dispute Cases (2018-2023) and Suzhou Court released ten typical cases of Non-Compete disputes. Among them, we think the cases that can be highlighted are:

1. 某总经理年薪最高增长至270万元，用人单位共支付该员工100万元竞业限制补偿金。裁审机构认为高级管理人员竞业限制违约金可体现适度的惩罚性，判令员工需返还已收到的竞业限制经济补偿金，并承担736万元的违约金。该案为近年来苏州地区最高的竞业限制违约金判赔额。

A general manager's annual salary increased to a maximum of 2.7 million RMB, and the employer paid the employee a total of 1 million RMB in non-compete compensation. The court and the labor arbitration committee considered that the non-compete liquidated damages for senior managers could manifest a moderate punitive nature, and ordered the general manager to return the received non-compete economic compensation and bear the liquidated damages of 7.36 million RMB. This case is the highest amount of liquidated damages for non-competition in Suzhou in recent years.

2. 如竞争企业之间实际经营业务范围、对应市场、劳动者实际工作职责的实质审查后不一致的，可认定两家企业不具有竞争关系。

If the actual business scope, corresponding market, and the actual role of an employee are not the same between rival competitors, it could be determined that the two companies do not have a competitive relation.

3. 用人单位不得仅以劳动者未按约定履行报告义务为由主张不支付竞业限制经济补偿。

The employer shall not claim non-payment of economic compensation for breach of non-compete on the sole ground that the employee had not fulfilled his/her reporting obligations as agreed.

4. 用人单位提供劳动者违反竞业限制义务的初步证据后，应由劳动者就其实际入职单位、工作内容等提供反驳证据。

After the employer had provided preliminary evidence of the violation of the non-compete obligation by the employee, the employee shall provide rebuttal evidence regarding his/her actual joining organization, job details, and so on.

5. 员工和用人单位约定违反竞业限制义务的违约金为100万元，竞业限制经济补偿为1220元/月。裁审机构认为竞业限制违约金与经济补偿明显不对等的应

予调低，最终判决员工支付竞业限制违约金4万元。

The employee and the employer agreed that the liquidated damages for breach of non-compete obligation would be 1 million RMB and the non-compete economic compensation would be 1,220 RMB/month. The court and the labor arbitration committee held that the liquidated damages for non-compete and economic compensation should be adjusted downward if they were clearly unequal, and ultimately ruled that the employee should pay RMB 40,000 as liquidated damages for breach of non-compete obligation.

2024-03-19