

Haiwen Labor Law Bi-Monthly Newsletter (2021 May – June)

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I.Law: Standing Committee of the National People' s Congress Amended the Production Safety Law

On June 10, 2021, the 29th meeting of the Standing Committee of the 13th National People' s Congress decided to amend the Production Safety Law of the People' s Republic of China (the "Revised Law"), and the Revised Law will come into force on September 1, 2021. There are 42 pieces of amended provisions, touching upon matters such as new issues arising from new business models and strengthening the punishment for illegal acts. The key points are as follows:

1. The Revised Law adds provisions concerning the new situation of workplace safety in emerging industries such as platform economy. The new risks arising from the new business models are one of the focuses of this amendment. The Revised Law stresses that entities in emerging industries such as platform economy should establish, improve and implement the responsibility system for production safety for all workers, and strengthen the work safety education and training for workers. Meanwhile, if the

responsible authority in charge of the supervision and administration of the production safety of the emerging industries has not been specified, it shall be determined by the local government on the county level or above by referring to the businesses which have a similar nature.

2. Enterprises are required to pay attention to the psychological conditions and behavioral habits of employees. The Revised Law requires enterprises to pay close attention to the physical and psychological conditions and behavioral habits of workers and offer workers with psychological counseling and access to spiritual comfort, and to prevent accidents caused by abnormal behaviors of the employees.
3. Increasing the penalty for workplace safety violations. The Revised Law significantly increased the amount of administrative fines, up to RMB 100 million. In the meanwhile, more stringent forms of punishment were introduced. Particularly, once an illegal act is found, the violator shall be ordered to rectify the act (even in suspension of production and operation) and a fine will be imposed at the same time. If the violator refuses to rectify the illegal act, the fines may be accumulated day-by-day on a continuous basis. Besides, relevant government authorities shall take joint disciplinary measures against the violators, such as suspending examination and approval of projects and prohibiting the responsible personnel from accessing the industry or profession, etc.
4. The Revised Law improves the hidden hazard investigation and management mechanism. The Revised Law requires that, after truthfully recording the investigation and management of hidden hazards of accidents, the enterprise shall publish such information to the workers through the all-staff meeting, the employee representative congress or the bulletin board. It also requires that the investigation and management of hidden hazards of major accidents shall be reported to the responsible authorities and staff meeting or employee representative congresses in a timely manner.

The Revised Law will bring significant consequences to the workplace safety management practice of the enterprises in China. It is worthy of special attention from enterprises in both traditional industries and emerging industries such as platform economy.

II. Local Rule: Shenzhen Issued the Rules for Handling Electronic Labor Contracts

On May 13, 2021, Shenzhen Municipal Human Resources and Social Security Bureau and Shenzhen Labor and Personnel Dispute Arbitration Commission issued the Shenzhen Electronic Labor Contract Disputes Handling Rules (Trial) (深发〔2021〕20号) ("Rules"). The Rules include provisions on contract conclusion, identity authentication, service platform requirements, responsibility, dispute resolution and other aspects of electronic labor contracts.

Besides Shenzhen, there have also been similar rules issued nationwide and in other

regions on matters concerning the electronic labor contracts. On March 4, 2020, the General Office of the Ministry of Human Resources and Social Security issued the Letter on Issues concerning the Conclusion of Electronic Labor Contract (人社厅函〔2020〕33号) (for more information you may refer to “Haiwen Observation: Interpretation of New Rules and Practical Advice for Conclusion of Written Employment Contract in Electronic Form”). On October 27, 2020, Beijing Municipal Human Resources and Social Security Bureau issued the Implementation Opinions on Promoting the Application of Electronic Labor Contract (京人社劳发〔2020〕28号). Enterprises that have adopted or intend to adopt electronic labor contracts should pay attention to the relevant rules at the national and local levels.

III. Local Rule: Guangzhou Formulated Preferential Individual Income Tax Policy for the Guangdong-Hong Kong-Macao Greater Bay Area

On June 7, 2021 Guangzhou Municipal Finance Bureau, Guangzhou Municipal Human Resources and Social Security Bureau and other two relevant departments issued the Administrative Measures of Guangzhou on Financial Subsidies under Preferential Individual Income Tax Policies for Guangdong-Hong Kong-Macao Greater Bay Area (穗财规字〔2021〕1号) (“Measures”). According to the Measures, financial subsidies shall be granted to overseas high-end talents and overseas urgently needed talents working within the administrative region of Guangzhou with respect to the portion of their individual income tax paid in Guangzhou which exceeds 15% of their taxable income amount. The subsidies shall be exempted from individual income tax.

The Measures is a refinement and localization of the national level policy, Notice on Individual Income Tax Incentives for Guangdong-Hong Kong-Macau Greater Bay Area (财税〔2019〕31号), and the [provincial level](#) policy, Notice on Continuing to Implement Individual Income Tax Incentives for Guangdong-Hong Kong-Macau Greater Bay Area (粤财税〔2020〕29号). Besides, the relevant government departments in Guangzhou also published the corresponding “Fifty Questions on Financial Subsidies for Implementing the Preferential Individual Income Tax Policies in Guangzhou for Guangdong-Hong Kong-Macao Greater Bay Area (2021 Edition)” aiming to provide specific guidance in practice.

In addition, Beijing also introduced similar policies for individual income tax subsidies for overseas high-end talents in April, 2021 (for more information you may refer to “Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter” (2021 March – April)).

IV. Local Rule: Qingdao Released Trial Measures Dealing with Work-Related Injury of Non-Employee Staff

On June 17, 2021, Qingdao Municipal Human Resources and Social Security Bureau, together with Qingdao Municipal Finance Bureau and Qingdao Tax Service under the State Taxation Administration, jointly issued the Measures of Qingdao concerning the Work-related Injury Protection of Nonemployee (Trial) (青人社规〔2021〕4号) (“Protection

Measures”). The promulgation of the Protection Measures is to put in place the requirement of “supporting Internet platform enterprises to voluntarily pay work-related injury insurance premiums for non-employee staff” proposed by the Implementation Opinions of the General Office of Qingdao Municipal Government on Supporting Multi-Channel Flexible Employment.

The Protection Measures stipulates that the employer may, on a voluntary basis, pay work-related injury insurance separately for the specific workers engaged by the employer under the non-employment relations. “Specific workers under non-employment relations” also known as non-employee staff, mainly include: (1) internship and trainee students, including college students, technical college students and unemployed college graduates who have signed the internship/trainee agreement with the employing entity; (2) domestic service personnel and other non-employment workers who are engaged through domestic service agencies to deliver housekeeping services within Qingdao; and (3) the staff of the villagers committees and neighborhood committees and staff of the primary Party organizations formed within those committees.

In addition to Qingdao, Guangdong Province has also promulgated and implemented the similar policy in January 2021, the Measures for the Engagement of Workers over the Legal Retirement Age and Other Specific Personnel Participating in Work-related Injury Insurance (Trial).

V. Local Rules: Citywide Social Average Wage of 2020 Released Successively and the Minimum Monthly Wage Standard Adjusted

Since May 2021, the statistical data of social average wage of numerous cities of the year of 2020 have been released in succession, and many cities also adjusted the local minimum wage of the year of 2021. (It should be noted that when publishing the wage data, some cities may adopt different approaches which should be applicable to different legal scenarios. Please follow the specific local rules.)

1. Summary of the recently released social average wage in 2020 in various cities is as follows:

2. Summary of the recently released minimum wage standard for 2021 in various cities is as follows:

VI. Cases: Suzhou Intermediate People’s Court Released Typical Cases of Labor Disputes Concerning Non-Compete Obligation

2021年4月30日，苏州中级人民法院发布了涉竞业限制劳动争议十大典型案例，其中体现了当地司法实践中就相关问题的一部分倾向性观点，总结如下：

On April 30, 2021, Suzhou Intermediate People's Court released 10 typical cases of labor disputes concerning non-competition obligation of employees. The cases reflect some tendentious judicial views on relevant topics, which are summarized as follows:

1. The scope of the applicable subjects of the non-competition obligation should be accurately defined, and it is invalid to extend the non-competition obligation to the non-applicable subject who does not have access to the trade secret. In practice, some employers require all employees to execute non-competition obligation clauses, leaving such clauses to the risks of being held invalid.
2. Regarding the employee's non-competition obligation during the employment period, it is confirmed by the court that (1) the agreement regarding the non-compete obligation during employment is valid; (2) the agreement to provide compensation for the performance of non-competition obligation during the employment is valid.
3. The employer may agree with the employee to pay the post-employment non-compete compensation during the employment period, but the payment must be clearly reflected in the remuneration structure, and the employer is not allowed to break down the original wages payable to the employee and name a part as "non-competition compensation" to avoid the payment obligation of non-compete compensation in disguise.
4. If the agreed compensation is lower than the local minimum legal standard, it does not necessarily affect the effectiveness of non-competition obligation. If the compensation paid by the employer is lower than the statutory standard, the court may reduce the liquidated damages of the employee for breach of contract as appropriate, or the employee may claim for making up the difference.

VII. Cases: Shanghai Released the "White Paper on the Trial of Labor Disputes Concerning Senior Executives"

Recently, the First Intermediate People's Court of Shanghai held a press conference and released the White Paper on the Trial of Labor Disputes Concerning Executives, circulating typical cases of labor dispute cases involving senior executives from January 1, 2019 to March 31, 2021.

Compared with cases involving ordinary employees, labor disputes involving senior executives have some special factors such as diversified dispute types, high income and complex income composition, flexible working arrangement, strong ability of adducing evidence, difficulty in reinstatement of employment, etc. Therefore, the judgment and opinions of the court in the cases involving senior executives may be different from those involving ordinary employees. Among them, we highlight below cases for

reference:

1. If an employer does not conduct regular attendance management on a senior executive, the senior executive's failure to abide by the attendance management system may not be used as the legal ground for taking unilateral termination on the senior executive. Li was a shareholder of a company, and concurrently served as the head of business development of this company. Li did not report to work at the company for several consecutive days, but communicated and arranged work in the WeChat work group of the company. Later, the company terminated Li's labor contract according to the attendance management rules in the employee handbook on the ground of absence from work. The court held that the factual basis for the company to terminate the labor contract was insufficient because (a) the company didn't actually check on Li's attendance in practice, (b) no clear leave approval process is provided in the internal rules, as well as (c) in fact Li had been working through WeChat during the so-called absent days.

However, it is worth noting that one of the typical cases of senior executives released by the First Intermediate Court of Beijing in 2020 reflects a different view on this issue, which is that the executives, even those under the approved flexible working system, should comply with the company attendance management system nevertheless. As the trial rational of different localities can be different, enterprises shall bear in mind the difference among regions during the formulation of internal policies, the daily HR management as well as the risk assessment of termination of senior executives.

2. Equity disputes are generally not classified and handled as labor disputes. Zheng served as director of human resources of a company. Zheng was granted the stock options of the company, and it was provided in the Employee Stock Option Plan that if the stock option cannot be exercised when the vesting conditions had been met, the company would pay Zheng 1 million RMB as compensation. Later, the company terminated his labor contract and refused to pay the 1 million compensation as he requested. Zheng filed a labor lawsuit to the court requesting the company to resume the labor relationship with him and pay the compensation for stock option. The court held that the dispute was relating to and arising from a stock option agreement, which shall not be handled as a labor law dispute.

The view as to whether the stock option related dispute shall fall into the scope of "labor dispute" differ in judicial practice. When designing the legal document structure or analyzing the litigation strategy, the parties should comprehensively evaluate the feasibility of different litigation paths, taking into account the regional judicial practices.

3. If the senior executives claim to resume the employment relation, the court should strictly examine if the objective conditions on reinstatement can be met. Chen was the general manager of the company's asset management department. The company terminated the labor contract with Chen on the grounds that Chen had been "proved

to be unqualified for employment during the probation period” . Chen sued the company and claimed for continuing the performance of the labor contract. The court rejected Chen’ s claim of reinstatement based on the following reasons: (1) entering the labor dispute was a symbol that the trust foundation between the two parties had been broken; and (2) as Chen was originally on a senior management position which has been replaced by others, while the company could not create a new position for such a senior executive from a practical perspective, the court held that the company did not have the objective conditions to continue to perform the labor contract.

In practice, courts in different localities have different degrees of stringency in examining whether labor relationship can be reinstated after wrongful termination of a labor contract. For example, courts in Beijing are more likely to support the claim of reinstatement and strictly limit the situations of “unable to continue to perform the labor contract” , while Shanghai is the opposite.

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