

HAIWEN & PARTNERS

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Quick View of New Regulations: The State Cyberspace Administration Issued Measures for the Standard Contract for Outbound Transfer of Personal Information

On February 22, 2023, the State Cyberspace Administration issued the Measures for the Standard Contract for Outbound Transfer of Personal Information (the “**Measures**”) and its annex “Standard Contract for Outbound Transfer of Personal Information”. The Measures will come into effect on June 1, 2023, and enterprises which have carried out outbound transfer of personal information activities before the implementation shall make rectification within a period of six months from the date of implementation of the Measures.

The Measures is applicable to the situation where a personal information processor provides personal information abroad by entering into a standard contract for the outbound transfer of personal information (the “**Standard Contract**”) with a foreign recipient, as stipulated in Article 38 of the Personal Information Protection Law. It is worth noting that enterprises may only choose to enter into a Standard Contract as a way of transferring of personal information outside China if they have not met the threshold for security assessment declaration.

The Measures clarifies that any personal information processor transferring personal information abroad by entering into the Standard Contract must meet all of the following conditions:

1. It is not a critical information infrastructure operator.
2. It processes the personal information of less than 1 million individuals.
3. It has cumulatively transferred abroad the personal information of less than 100,000 individuals since January 1 of the previous year.
4. It has cumulatively transferred abroad the sensitive personal information of less than 10,000 individuals since January 1 of the previous year.

According to the provisions of the Measures, the personal information processor shall not use the method such as quantity splitting to meet the conditions of providing personal information

abroad by entering into a Standard Contract, while in fact it should go through the outbound security assessment. And the processor shall conduct a personal information protection impact assessment prior to the outbound transfer of personal information. The Standard Contract shall be concluded in strict accordance with the template of the Standard Contract in the Annex, while the processor of personal information may agree other terms with the foreign recipient, provided the terms do not conflict with the standard contract. The personal information processor shall file the signed Standard Contract and the personal information impact assessment report with the cyberspace administration authorities at the provincial level within 10 working days after the Standard Contract enters into effect.

Haiwen Suggestions: Enterprises that carry out outbound transfer of personal information such as employee information should sort out the details of the data to be transferred abroad as early as possible, and determine the proper methods for outbound transfer of data in accordance with the law. For those enterprises that are required to enter into a Standard Contract to transfer the personal information abroad, they should complete the rectification in a timely manner before the end of the rectification period on December 1, 2023, in accordance with the requirements of the Measures.



Quick View of New Regulations: Guangdong Further Clarified the Detailed Rules of the Parental Leave, Elderly Care Leave and Other Leave

The Human Resources and Social Security Department of Guangdong Province and Health Commission of Guangdong Province issued the Notice on Further Improving the Implementation of the Leave Stipulated in the Regulation on Population and Family Planning of Guangdong Province (the “**Notice**”) on January 11, 2023. The Notice clarifies the details of the leave application and taking on the basis of the new parental leave and elderly care leave added to the Regulation on Population and Family Planning of Guangdong Province (for details of the relevant provisions on parental leave and elderly care leave, please refer to the [*Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter \(November-December 2021\)*](#)).

The Notice clarifies that parental leave is taken on an annual basis, i.e. according to the child's age, and parental leave is not stackable even if the parents have multiple children under the age of 3. Elderly care leave is taken on a natural year basis and also not stackable. Parental leave and elderly care leave can be split to several times within the same calculation year, in principle no more than two times for each leave. If it is necessary for an employer to arrange an employee to carry parental leave and elderly care leave over the next calculation year, a consensus should be reached with the employee.

The Notice requires employers to specify in their internal policies the salaries and benefits during parental and elderly care leave, and advocates employers to clarify with employees the salaries during parental and elderly care leave through collective negotiation and to sign

collective contracts. However, the Notice does not clarify the standard for paying employees' salaries during parental and elderly care leave in cases where the employer's internal policies do not specify the salaries during such leave. Salaries during parental and elderly care leave shall not be lower than the local minimum wage standard.

In addition, if the youngest child of an employee reaches the age of three, or one of the parents of the employee (who is an only child) reaches the age of 60 during the period from the date of implementation of the Regulation on Population and Family Planning of Guangdong Province (December 1, 2021) to the date of publication of the Notice (January 11, 2023), and the employer has not arranged for the employee to take parental leave or elderly care leave for reasons of work needs, the employer shall arrange for the employee to take additional leave.

Haiwen Suggestions: Employers in Guangdong province should be fully aware of the local rules in force and on this basis update and improve their internal policies in a timely manner to protect the rights and interests of employees on rest and leave. If an employer fails to arrange for employees to take extended maternity leave, paternity leave, parental leave and elderly care leave in accordance with the rules, the labor authorities have the right to order rectification within a certain period of time. If the employer refuses to rectify, it may also be subject to a fine.



. Quick View of New Regulations: Beijing and Sichuan Issued Notices to date the Human Resources and Social Security Administrative Penalty Discretion Standards

On January 13, 2023, the Beijing Municipal Human Resources and Social Security Bureau ("Beijing Labor Authority") issued the Benchmark Sheet for Human Resources and Social Security Administrative Penalty Discretion (Concerning the Law on the Protection of Women's Rights and Interests) (the "**Discretion Benchmark Sheet**"), further clarifying the benchmark of administrative penalty for violations involving the protection of women's rights and interests stipulated in the Law on the Protection of Women's Rights and Interests (for the specific protection of female workers in the Law on the Protection of Women's Rights and Interests, please refer to the Haiwen Research: [*Haiwen Labor Law Bi-monthly Newsletter \(September-October 2022\)*](#)). Previously, the Beijing Labor Authority issued the Benchmark Sheet of Beijing Municipal Human Resources and Social Security for Administrative Penalty Discretion on March 22, 2022, and on June 24, 2022, the purpose of this release is to specifically regulate administrative penalty for the protection of female worker's rights and interests.

The Discretion Benchmark Sheet released this time includes the legal basis of punishment, the circumstances of the violation, the benchmark of discretion, the period of public notice of punishment and the period of public notice that can be shortened on application, for four violations of the Law on the Protection of Women's Rights and Interests and one violation of the Regulations on the Administration of the Talent Market. All five violations will be punishable by

finer. The five violations are as follows:

1. The employer refuses to employ women on the grounds of gender or applies higher standards for recruiting women in a differentiated manner.
2. The employer decreases a female employee's wage and benefits, restricts the female employee from promotion in post, rank, professional qualification certification or appointments, fires the female employee, or terminates the labor (employment)/service contract with female employee, by reason of matrimony, pregnancy, maternity leave or breastfeeding, among others.
3. The employer terminates the labor (employment) /service contract of a female employee during her pregnancy and maternity leave in accordance with the law.
4. The employer discriminates against women on the basis of gender when implementing the national retirement policies.
5. The employer refuses to hire or raises the employment standard on the grounds of ethnicity or religious beliefs in serious cases.

In the same month, on January 31, 2023, the Department of Human Resources and Social Security of Sichuan Province issued the Discretion Standards for Human Resources and Social Security Administrative Penalties in Sichuan Province (2023 Version) ("**Discretion Standards**"), and the Discretion Standards revised in 2018 were simultaneously repealed.

The Discretion Standards contains fifty-nine violations, involving intermediary activities of human resources service agencies, social security contributions, working hours, labor remuneration and protection of women's rights and interests. The Discretion Standards specifies the legal basis for penalties, applicable circumstances and discretion standards.

Haiwen Suggestions: Along with the revision of the Law on the Protection of Women's Rights and Interests, the local labor authorities will strengthen the supervision and enforcement of employers' compliance with the requirements regarding female employee protection. Employers should pay more attention to implement the legal requirements on the protection of rights and interests of female employees in a timely manner.



Quick View of New Regulations: Employment Promotion Ordinance of Shanghai Was Issued to Strengthen the Policies of Employment Promotion

On 25 February 2023, the Standing Committee of People's Congress of Shanghai issued Employment Promotion Ordinance of Shanghai (the "**Ordinance**"). On the basis of Provisions of Shanghai Municipality on the Promotion of Employment issued on 29 December 2005, and combining the experience gained since the implementation of the relevant provisions, the Ordinance responded to the new situations and issues in the employment situation and

employment field as well as put forward new requirements.

The Ordinance covers employment policies, supports for start-up, fair employment, employment services and management, vocational education and training, employment assistance, employment of key groups, and flexible employment, etc., and stipulates the following issues in the new situation:

1. [\[Women's Equal Labor Rights\]](#) Ensures women's legitimate rights and interests in employment, start-up, career development, vocational training, labor remuneration, welfare benefits, occupational health and safety and other aspects according to law, and build a childbearing-friendly employment environment.
2. [\[Anti-discrimination Requirements in the Post-Pandemic Era\]](#) Prohibits employers from refusing to employ a worker on the ground that he/she is a pathogen carrier of an infectious disease or has ever suffered from an infectious disease, and dissolving the labor relationship with a worker on the ground that he/she suffers from an infectious disease (unless otherwise required by law), to timely response to possible employment discrimination in the "post-pandemic era".
3. [\[Personal Information Protection\]](#) Prohibits employers and human resources service agencies from accessing information such as diagnosis and treatment records, medical test reports, criminal records, etc., of the employees or requiring the employees to provide information unrelated to the performance of the labor contract at the time of recruitment or the provision of human resources service (unless otherwise required by law).
4. [\[Protection for Flexible Employment Personnel\]](#) Includes the persons who are employed in a flexible manner into the scope of public employment services, as well as the training and evaluation system for vocational skills; clarifies that they may participate in the social insurance scheme in accordance with relevant provisions, enjoy social insurance benefits according to law, and apply for social insurance subsidy and job subsidy if qualified; includes them into the scope of corresponding social reliefs if qualified; and establishes and improves the occupational injury security system for workers of new forms of employment.

Haiwen Suggestions: Enterprises shall avoid behavior that may be identified as employment discrimination, violations of women's equal employment rights, or violations of employees' personal information in their whole process of employment management.



Exploration of Typical Cases: The Supreme People's Court Released the 3rd Batch of Typical Civil Cases of People's Courts Vigorously Carrying Forward Socialist Core Values

On 1 March 2023, the Supreme People's Court released the 3rd batch of typical civil cases of People's Courts vigorously carrying forward socialist core values. Among them, the ninth case and the tenth case are labor disputes, which reflect the following judicial views of the courts:

1. Employers have the right to refuse to be paid in virtual currency by the employer, and wages shall be paid in legal tender.
2. The employer shall exercise its right to manage the employment in a good faith, tolerant and reasonable manner when an employee applies for leave to look after his dying father. In such situation, it is not reasonable for the employer to refuse to approve the employee's leave application on the grounds that the application documents are incomplete. Accordingly, if the employer terminates the employment contract on the grounds that the employee has been absent from work, it shall be deemed illegal.



Exploration of Typical Cases: Shanghai High People's Court Released Typical Cases of Shanghai Courts Carrying Forward Socialist Core Values

On 5 January 2023, Shanghai High People's Court released typical cases of Shanghai courts carrying forward socialist core values. Among them, the first case and the third case are labor disputes, involving verification of work injury and workplace sexual harassment. The relevant cases reflect the following judicial views of Shanghai courts:

1. Regarding the issue of how to identify "commuting to or from work" in the recognition of work injury for takeaway riders, considering their industry characteristics, it shall be comprehensively determined based on the actual circumstances such as the time they logged into the system, the time of the accident and the location of the accident, in order to effectively protect the legitimate rights and interests of both the riders and the companies.
2. The employee's sexual harassment in the workplace violates the public order and good morals, as well as the basic professional ethics of workers. Therefore, it shall be deemed as a legal termination if the employer terminates the employment contract on this ground. According to this case, even in the absence of specified internal policies against sexual harassment by the employer, it still leaves some space for the employer to terminate the employment contract on the grounds of serious breach of labor discipline.



Exploration of Typical Cases: Suzhou Intermediate People's Court Released Ten Typical Cases Regarding Employment Promotion

Recently, Suzhou Intermediate People's Court systematically sorted out ten typical cases of Suzhou Courts serving to provide judicial services and protection for stable employment,

involving non-competition, bonus payment, payment of wages during working from home, and work injury insurance, etc. Among them, the cases related to the identification of labor relationship and the recognition of work injury reflect the following judicial views of Suzhou courts:

1. The third case and the fourth case are both related to the identification of labor relationship. In the third case, the employee was engaged in delivery work at the site of a takeaway delivery service provider, and the employer claimed that the two parties were not in a labor relationship on the grounds that the worker had registered as an individual business owner. The court did not deny the labor relationship between the two parties based on the appearance, and ultimately confirmed that the two parties constituted a labor relationship.

In the fourth case, the worker voluntarily undertook labor work and settlement by registering in the app. The enterprise did not restrict whether and when the worker participated in the labor work, and did not prohibit the worker from being employed by other platforms. The court held that there was no subordination of personality between the parties since the enterprise did not manage or control the worker, and therefore did not support the worker's claim to confirm the labor relationship between the two parties.

Accordingly, regarding whether there is a labor relationship between workers on online platforms such as takeaway riders or delivery workers and the platform enterprises or service outsourcing enterprises, the courts judged based on whether the legal relationship between the two parties conformed to the essential characteristics of a labor relationship, rather than the appearance of the legal relationship such as the type of agreement concluded, whether the worker is registered as an individual business owner.

2. The eighth case is related to the recognition of work injury. The court held that since the employee was out for personal reasons during his lunch break and was involved in a traffic accident which he was not primarily responsible on his way back to the workplace, it shall not be deemed as the circumstance in which the employee is injured in a traffic accident which was not caused by him/her "while commuting to or from work" as stipulated in Article 14(6) of the Regulations on Work Injury Insurance, and therefore shall not be determined as a work injury.

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