

海问劳动法双月报（2023年5-6月）

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Interpretation of Laws and Regulations: MOHRSS Issues Regulations to Enhance

Compliance Requirements for HR Service Agencies

2023年6月29日，人力资源与社会保障部（“人社部”）发布《人力资源服务机构管理规定》（“《规定》”），就人力资源服务机构的行政许可和备案、服务规范、监督管理、法律责任等方面进行规定，系在《中华人民共和国就业促进法》《人力资源市场暂行条例》（“《条例》”）的基础上，首部全国性的系统规范人力资源服务机构相关活动的部门规章。《规定》主要有下述新关注要点：

On June 29, 2023, the Ministry of Human Resources and Social Security (“MOHRSS”) issued the Regulations on the Administration of Human Resource Service Agencies (the “Regulation”), which provide for the administrative permit and filing, specification of service offered, supervision and administration, and legal liability of HR service agencies. The Regulation is the first national ministerial regulation to systematically regulate the activities of HR Service Agencies on the basis of the Employment Promotion Law of the People’s Republic of China and the Provisional Regulations on Human Resource Market (“Previous Law and Regulation”). The main points of new concern in the Regulation are as follows:

1. 明确不得以欺诈、胁迫、诱导劳动者注册为个体工商户等方式帮助用人单位规避用工主体责任

Clearly providing that no fraud, coercion or inducement of employees to register as Independent Business shall be used to help enterprises evade the employer’s responsibilities

《条例》中规定人力资源服务机构“不得改变用人单位与个人的劳动关系，不得与用人单位串通侵害个人的合法权益”。在平台经济的发展过程中，存在通过引导员工设立个体工商户的方式主张员工和平台之间建立的是合作关系而非劳动关系的实践，本《规定》中进一步明确不得以欺诈、胁迫、诱导劳动者注册为个体工商户等方式改变用人单位与劳动者的劳动关系，帮助用人单位规避用工主体责任。

The Regulation stipulates that HR service agencies “shall not change the labor relations between employers and employees, and shall not collude with employers to infringe upon the legitimate rights and interests of employees”. In the development of platform economy, there is the practice of guiding

employees to set up an independent business to advocate that the relationship between employees and the platform is a cooperative relationship rather than a labor relationship. The Regulation further clarifies that the labor relationship between employers and employees shall not be changed by fraud, coercion or inducement employees to register as an independent business accounts to help employers avoid the employer's responsibilities.

2. 从部门规章层面将“假外包、真派遣”定性为禁止性人力资源服务外包行为

Defining “providing labor dispatch in the name of providing outsourcing services” as a prohibited HR service outsourcing practice from the ministerial regulation

《规定》进一步明确，不得“以人力资源服务外包名义，实际上按劳务派遣，将劳动者派往其他单位工作”。如有违反，将按照《条例》的规定采取责令改正、没收违法所得、处以罚款、吊销人力资源服务许可证等行政处罚。

The Regulation further clarifies that it is prohibited for HR service agencies to dispatch employees to other employers under de facto labor dispatch, in the name of HR service outsourcing. In case of violation, administrative penalties such as ordering correction, confiscation of illegal income, imposition of fines and revocation of HR service permit will be taken in accordance with the provisions of the Regulation.

3. 对人力资源服务机构提出不得介绍未满16岁的未成年人就业等服务规范要求

Putting forward other service specification requirements, such as HR service agencies shall not introduce minors under the age of 16 years old to employment

《规定》在《就业促进法》和《条例》的基础上，提出了下述新服务规范：不得（1）介绍未满16周岁的未成年人就业；（2）为无合法身份证件劳动者提供职业中介服务；（3）介绍劳动者从事法律、法规禁止从事的职业；（4）以欺诈、伪造证明材料等手段骗取社会保险基金支出、社会保险待遇。

The Regulation introduces the following new service specifications on the basis

of Previous Law and Regulation: HR service agencies shall not (1) introduce minors under the age of 16 years old to employment; (2) provide employment intermediary services for employees without legal identity documents; (3) introduce employees to engage in occupations prohibited by law or regulation; (4) fraudulently obtain social insurance fund expenditures, social insurance benefits by means of fraud, falsification of documents, etc.

海问建议：人力资源服务机构自身，以及企业在和人力资源服务机构合作的过程中，应当避免出现恶意要求员工注册个体工商户、以外包名义提供派遣服务、虚构材料骗取社会保险待遇等法律禁止的行为。

Haiwen Suggestions: HR service agency itself and enterprises in the process of cooperation with HR service agencies, should avoid malicious requiring employees to register an independent business, providing labor dispatch in the name of providing outsourcing services, using fictitious materials to fraudulently obtain social insurance benefits and other acts prohibited by law.

二、新规速递：浙江省人社厅发布新办法，关注不符合确立劳动关系情形的特定人员单险种参加工伤保险

Quick View of New Regulations: Zhejiang Province Human Resources and Social Security Department Issued a New Measure, Focusing on the Specific Personnel Who Do Not Have Labor Relations to Participate in Single-type Work Injury Insurance

2021年7月16日，人社部等部门联合发布《关于维护新就业形态劳动者劳动保障权益的指导意见》（“《意见》”）（参见 [《海问·研究 / 海问劳动法双月报》（7-8月）](#)）。2021年12月1日，浙江省八个部门联合发布《浙江省维护新就业形态劳动者劳动保障权益实施办法》（“《实施办法》”）（参见 [《海问·研究 / 海问劳动法双月报》（11-12月）](#)）。2023年5月26日，浙江省人社厅等三个部门联合发布了《浙江省用人单位招用不符合确立劳动关系情形的特定人员参加工伤保险办法（试行）》（“《工伤保险办法》”），提出了针对不符合确立劳动关系情形的特定人员单险种参加工伤保险更为具体的规则：

On July 16, 2021, MOHRSS and other ministries jointly issued the Guiding Opinions on Protecting the Labor Security Rights and Interests of Workers in New Work Forms (the “**Opinions**”) (for more information you may refer to [*“Haiwen Research: Haiwen Labor Law Bimonthly Newsletter” \(2021 July August\)*](#)). On December 1, 2021, eight departments in Zhejiang Province jointly issued the Several Measures on Promoting the Healthy Development of New Work Forms (the “**Measures**”) (for more information you may refer to [*“Haiwen Research: Haiwen Labor Law Bimonthly Newsletter” \(2021 November December\)*](#)). On May 26, 2023, Zhejiang Province Human Resources and Social Security Department and three other departments jointly issued the Measures on Participation in Single-type Work Injury Insurance for Specific Personnel Who Do Not Have Labor Relations (Trial) (the “**Work Injury Insurance Measures**”), which proposed more specific rules for single-type work injury insurance participation for specific personnel:

1. 扩大单险种缴纳工伤保险的适用人员范围

Expanding the scope of personnel covered by single-type work injury insurance

2. 将参保人员年龄限制在16-65周岁

Limiting the age of insured personnel to 16-65 years old

3. 明确工伤保险申报基数

Clarifying the basis of declaration of work injury insurance

4. 允许多重参保并明确工伤保险责任主体

Allowing multiple single-type work injury insurances and clarifying the subject of responsibility for work injury insurance

5. 同时享受养老保险和伤残津贴的，以就高补差原则确定待遇

Determining the treatment of those who enjoy both pension allowance and disability allowance, i.e. applying the higher one and making up the difference as the principle

海问建议：如企业在用工过程中涉及达到法定退休年龄且不超过65岁的大龄劳动者、实习学生、新就业形态劳动者人员等非劳动关系人员的，可以根据当地政策参加单险种工伤保险，降低企业用工风险。

Haiwen Suggestions: if the employer in the process of employment engages non-labor relations personnel such as older workers who have reached statutory retirement age and are not older than 65 years of age, internship students, new work form workers, it can participate in a single-type work injury insurance for these personnel according to the local policy to reduce the risk of employment.

三、典型案例：北京市一中院发布涉股权激励劳动争议案件的裁判规则和典型案例

Quick View of New Regulations: Beijing First Middle People's Court Issue Opinions and Typical Cases of Labor Disputes Involving ESOP Issues

北京市一中院于2023年5月5日发布了《北京市第一中级人民法院涉股权激励劳动争议典型案例通报》，后又于2023年5月29日在《人民司法》（2023年第13期）发布了《涉股权激励民事案件常见争议裁判规则研究——以劳动争议为视角》文章。

On May 5, 2023, the Beijing First Intermediate People's Court issued the *Notice of Typical Cases of Involving Equity Incentive Labor Disputes*, and then on May 29, 2023, it published the article *Research on the Judgment Rules of Common Disputes in Civil Cases Involving Equity Incentives - From the Perspective of Labor Disputes* in People's Justice Magazine (No.13, 2023).

该等案例和文章围绕股权激励纠纷中的常见问题（例如约定域外管辖条款的效力、涉第三方案件当事人的确定、股权激励标的物能否作为竞业限制经济补偿、行权相关争议、劳动者违约责任条款的效力等），总结和分析了司法实践当中的不同观点，并提出了倾向性的意见。

The cases and the article summarized and analyzed the different views in the judicial practice and put forward the tendency judicial opinions around the common problems in the equity incentive disputes (such as the validity of the agreed extraterritorial jurisdiction clause, the determination of the litigants in cases involving third-party, whether the equity incentive can be used as the non-competition compensation, the disputes related to the exercise of rights, the validity of the clauses of the employees' liability for breach of contract, etc.).

该等意见在一定程度上回应了实践中诸多长期引发争议的疑难问题，对于企业实施股权激励具有重要的指导意义。

To a certain extent, these opinions have responded to many controversial and difficult issues in practice, and are of great significance to the implementation of equity incentive plan by employers.

四、典型案例：人社部、最高院联合发布新就业形态相关劳动争议典型案例

Exploration of Typical Cases: MOHRSS and the Supreme People's Court Jointly Released Typical Cases Involving New Work Models

2023年4月24日，人社部和最高院联合发布第三批劳动人事争议典型案例。（第二批典型案例参见[《海问·研究 / 海问劳动法双月报》（7-8月）](#)）本轮共发布六个关于新就业形态下的劳动者权益保障的典型案例，聚焦为劳动者与平台企业之间劳动关系的认定。其中以下裁判要点值得注意：

On April 24, 2023, MOHRSS and the Supreme People's Court jointly release the third batch of typical cases on labor and personnel disputes. (For the second batch of typical cases, you may refer to [“Haiwen Research: Haiwen Labor Law Bi-Monthly Newsletter” \(2021 July - August\)](#)). A total of six typical cases on the protection of rights and interests of workers in new work models were released in this round, focusing on the identification of employment relationship between workers and platform enterprises. Among them, the following judicial opinions are worth noting:

1. 认定新就业形态下劳动者与平台企业之间是否存在劳动关系，应当对照劳动管理的相关要素，综合考量人格从属性、经济从属性、组织从属性的有无及强弱。

To identify whether there is an employment relationship between workers and the platform enterprises in new work models, whether there are certain elements, including personal subordination, economic subordination and organizational subordination, and the degree of subordination shall be comprehensively

considered.

2. 不同平台之间用工模式存在差异，在裁审实践中，应注意审查平台运营方式、算法规则等，充分考虑行业特点，明确企业运营模式，查明平台企业是否对劳动者存在劳动管理行为，据实认定法律关系性质。

Since the model of work varies from different platforms, in judicial practice, the nature of legal relationship shall be identified based on the ascertainment of the way of operation and algorithm rules of the platform, the characteristics of the industry, the mode of operation of the enterprise, and whether the platform enterprise conducts labor management on the workers.

3. 不能仅以业务承包协议等外观认定员工属于第三方劳务公司的员工或个体工商户，并作为认定员工和该公司之间不存在劳动关系的依据，而应根据劳动管理事实和从属性特征等实质要件进行审查。

The workers shall not be identified as employees of a third-party labor company or as individual entrepreneurs by the outsourcing agreement or other appearance, and the labor relationship between the worker and the company shall not be denied based on the appearance either, but rather to examine the material elements such as the fact of labor management and the characteristics of subordination.

五、典型案例：北京三中院发布服务保障“就业优先战略”劳动争议审判白皮书

Exploration of Typical Cases: Beijing Third Intermediate People's Court Released the White Paper on Labor Disputes Trial Regarding Protection of Employment Promotion Strategy

2023年5月16日，北京市第三中级人民法院（“北京三中院”）召开服务保障“就业优先战略”劳动争议审判白皮书（“白皮书”）新闻通报会。《白皮书》对2020-2022年间北京三中院受理的劳动争议案件进行了大数据分析。数据显示：劳动争议收案数量持续高位运行，案件审理呈现劳动关系

解除纠纷占比高、劳动争议主体多元化、涉诉年龄趋于年轻化、新业态模式用工规范待加强等新特点。

On May 16, 2023, Beijing Third Intermediate People's Court held a press briefing to release the White Paper on Labor Disputes Trial Regarding Protection of Employment Promotion Strategy (the **'White Paper'**). The White Paper provides a big data analysis of the labor dispute cases accepted by the Beijing Third Intermediate People's Court during the period of 2020-2022. The data shows that the number of labor dispute cases remains at a high level, and the case trial reveals several new features such as disputes of termination of employment contracts takes a high proportion, labor dispute litigants diverse, the parties involved in cases tends to be younger, and employment of new work models needs to be further regulated.

另外，《白皮书》还发布了十大典型案例，其中，我们认为可以重点提示的案例有：

Additionally, the White Paper released ten typical cases, among which we highlight below cases for reference:

1. 案例一中，用人单位在招聘面试及薪资待遇洽谈过程中承诺了较高的薪水，在劳动者从原单位离职准备入职时发放的《入职邀请函》中方才告知劳动者真实工资待遇，二者存在明显差异。法院认为，用人单位的上述行为违背诚信原则，给劳动者造成了信赖利益损失，应依法承担缔约过失责任。

In the first case, the employer promised a higher salary during the recruitment interview and salary negotiation process, but informed the employee of the real salary in the offer letter when the employee left the former employer and prepared to join, and the real salary was significantly lower than the salary promised. The court held that the above behaviors of the employer violated the legal principle of good faith and caused loss of reliance interests to the employee, so the employer shall bear the fault liability to contract according to law.

2. 案例八中，用人单位为劳动者办理进京落户指标并约定服务期，劳动者因自身原因未服务期离职的，违反了诚实信用原则并给用人单位造成办理落户、招录新人等成本损失，应承担损害赔偿责任，由法院综合其工作

年限、离职原因、京户指标的稀缺性等因素酌定公司的损失数额。

In the eighth case, the employer applied for Beijing Hukou quota for the employee and agreed on a service period, later the employee left early for his own reasons. As the employee violated the legal principle of good faith and caused losses to the employer for applying for Beijing Hukou quota and recruiting newcomers, the employee shall bear the liability for damages, and the losses of the employer shall be decided by the court based on actual service years, reasons for leaving, the scarcity degree of Beijing Hukou, etc.

3. 案例九中，用人单位出具的《离职证明》中写明解除劳动合同的理由系劳动者严重违反公司规章制度。法院明确，离职证明的内容应仅限于法定事项，单位应当重新为员工开具离职证明，避免因用人单位的主观意图影响劳动者的就业择业权。

In the ninth case, it is stated in the separation certificate issued by the employer that the employment contract was terminated due to the employee's serious violation of the employer's policies. The court clarified that the content of the separation certificate shall be limited to statutory items, and the employer should reissue the separation certificate for the employee to protect the employee's rights to choose the employment from being affected by the employer's subjective intent.

4. 案例十中，劳动者主张竞业限制协议中约定的违约金过高要求酌减的，法院认定劳动者应承担对违约金过分高于其违约行为给用人单位造成的损失举证责任，不宜简单将用人单位支付的竞业限制补偿金数额与违约金数额相比较，应综合考虑用人单位因此产生的损失程度。

In the tenth case, the employee claimed that the liquidated damages agreed in the non-competition agreement were too high and requested a reduction. The court determined that the employee shall bear the burden of proof that the liquidated damages were excessively higher than the damages caused to the employer by his breach of contract, and that it was not appropriate to merely compare the amount of non-competition compensation paid by the employer with the amount of liquidated damages directly, but the damages caused to the employer shall also be considered comprehensively.

六、典型案例：江苏高院发布2022年度江苏法院劳动人事争议十大典型案例

Exploration of Typical Cases: Jiangsu Higher People's Court Released Ten Typical Cases of Labor and Personnel Disputes in 2022

日前，江苏省高级人民法院发布了2022年度江苏法院劳动人事争议十大典型案例，涉及多种劳动人事争议类型，关注特殊群体劳动者的权益保护、企业用工自主权的正确行使等方面。其中，以下案例值得关注：

Recently, Jiangsu Higher People's Court released ten typical cases of labor and personnel disputes in 2022, involving various types of disputes, focusing on the protection of the rights and interests of special groups of employees and the proper exercise of enterprises' employment autonomy. Among them, the following cases are worthy of attention:

1. 案例四中，用人单位的前员工注册成立独资的人力公司，与用人单位签订劳务外包协议，将其他仍在原岗位继续工作的员工约定为属于人力公司安排至用人单位作业的员工。法院认为，某人力公司成立的主要目的是为了逃避给员工缴纳社会保险，通过劳务外包将用工风险转嫁给人力公司，员工实际仍然接受用人单位的管理，故判决劳动者与用人单位而非人力公司之间存在劳动关系。

In the fourth case, a former employee of the employer incorporated a solely-invested human resources company and signed a labor outsourcing agreement with the employer, agreeing that other employees who continued to work in their original positions were employees assigned to the employer by the human resources company. The court held that the main purpose of the establishment of the human resources company was to avoid paying social insurance contributions to the employees and to transfer the risk of employment to the human resources company through labor outsourcing, and the employees were still under the actual management of the employer. Accordingly, the court ruled that the labor relationship existed between the employees and the employer rather than the human resources company.

2. 案例六中，员工被两名女实习生投诉称工作期间言语轻薄、被要求为该员工捏肩、强行搂抱等，用人单位调查时员工承认存在要求实习生捏肩的行为，故以严重违纪解除劳动合同，员工后申请仲裁主张违法解除。法院认为，该员工利用其管理女实习生的职务便利实施骚扰行为，严重违反了劳动纪律和职业道德，用人单位解除劳动合同合法。

In the sixth case, the employee was complained by two female interns that he verbally harassed them, asked them to squeeze his shoulders and forcefully hugged them, etc. during the work period. When being investigated, the employee admitted he asked the interns to squeeze his shoulders. Therefore, the employer terminated the employee's labor contract on the grounds of serious disciplinary violations. Later the employee applied for arbitration claiming illegal termination. The court held that since the employee used the convenience of his position in managing female interns to implement harassment, which is a serious violation of labor discipline and professional ethics, the termination of the labor contract by the employer is legal.

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