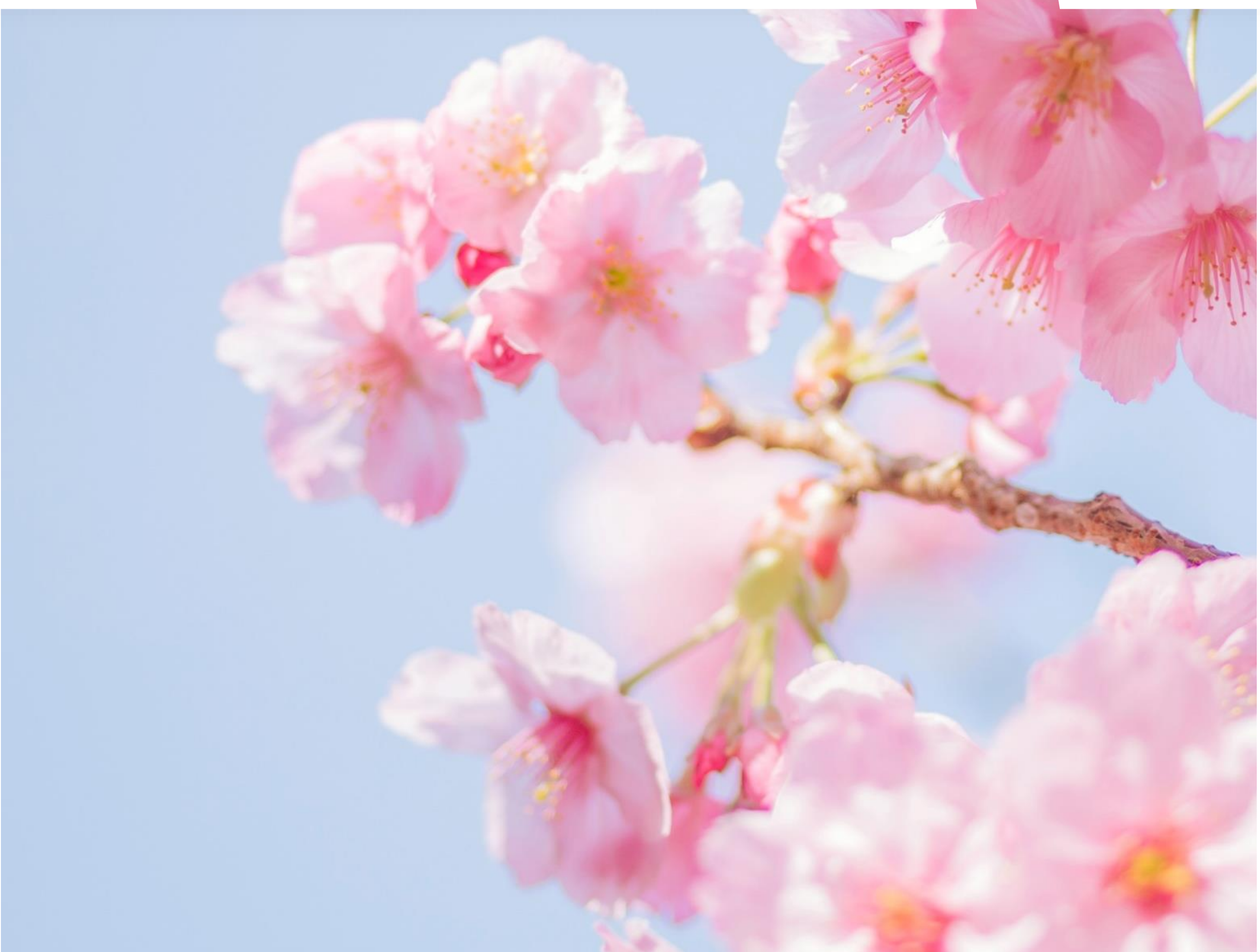
Llinks Legal Alert – Labor & Employment Law

March 2022



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Spotlight on News

1. **The NPC and NCPPCC Sessions Focused on Flexible Employment, Equal Employment, Maternity Protection, and Protection of Female Employees' Rights**

    The two sessions of the NPC and NCPPCC were officially closed recently. Premier Li Keqiang pointed out in Report on the Work of the Government that the government will support the development of new forms of employment and improve the relevant protective measures, and conduct the pilot program of occupational injury insurance for the new business forms.

    The government will resolutely prevent and correct the employment discrimination in terms of sex, age and educational background and make great efforts to create a fair employment environment. The government will also allow tax deductions for expenses incurred in caring for children under 3 to facilitate implementation of its third-child policy.

    In addition, the Standing Committee of the NPC introduced in its work report that it will revise the *Law on the Protection of Women's Rights and Interests* this year, and modify related rules governing the protection of women's rights and interests.

2. **The Labor Authorities of Beijing, Anhui, Shandong Provinces Carry out Intensive Crackdown against Violation on Working Hours and Rights of Rest and Leaves**

    The HRSS Departments of Beijing, Anhui, Shandong, Henan, and Jiangxi etc. issued notices, deciding to carry out intensive inspections against violation on working hours and rights of rest and leaves from March 15 to May 15.

    The Beijing HRSS Bureau pointed out that the inspection will focus on internet (platform) enterprises and their affiliates, technology-intensive enterprises with high proportion of R&D positions, labor-intensive processing and manufacturing enterprises and service enterprises.

    The contents of the inspection mainly include:
    (1) employers' formulation of internal rules and regulations on working hours, rest and holidays;
    (2) employers' implementation of special working hours system;
    (3) employers' arrangement of overtime work;
    (4) employers' implementation of the employee rest and holidays and
    (5) employer's payment of overtime pay and compensation for unused annual leave, etc.

3. The Human Resources and Social Security Bureau ("HRSS")and Trade Union of Beijing Promoted the Collective Bargaining between the Top-tier Enterprises of New Business Forms such as JD.com and its Employees

Recently, under the guidance of the labor authorities, JD.com and JD Logistics have signed a collective employment contract with employees upon negotiation with employee representatives including couriers, warehousing sorters and freight drivers.

The provisions of the contract has covered remuneration, labor safety, insurance benefits and occupational skill training in accordance with the occupational characteristics of employees of the new employment forms.

The contract also provided a certain amount of supplementary accident insurance for employees in relevant positions besides the mandatory social insurances, and provided vocational skills training and training subsidies according to job skills requirements.

Legislation Updates

1. National: The Amended *Measures for the Administrative Supervision of the Social Insurance Fund* Has Come into Effect

On March 18, 2022, the amended *Measures for the Administrative Supervision of Social Insurance Fund* (the "***Measures***") became effective. This is the first amendment to the Measures since its promulgation in 2001. The Measures focus on the supervision over the income and expenditure as well as the management of the social security fund, improve the working mechanism for the administrative supervision of the social security fund, and clarify the legal liability for violations of the social security fund. The Measures provide that the labor authorities shall establish the reporting system for key information on the social security fund (i.e. embezzlement, fraud and other infringements on the social security fund).

The amended Measures further elaborate the specific circumstances of "employers or individuals defraud social insurance benefits by fraud, forging evidentiary materials or other means" provided in Article 88 of the *Social Insurance Law*, including but not limited to "participating in social insurance by fabricating personal information or labor relationship, using forged, altered or embezzled documents of others that can be used to prove identity, providing false evidentiary materials, or other means" and "conducting work-related injury identification or labor ability appraisal by falsely reporting work-related injury accidents, forging or altering evidentiary materials".

2. National: The SAMR Issued the *Work Plan for National Trade Secret Protection and Innovation Pilot Program*

On March 2, 2022, the State Administration for Market Regulation issued the *Work Plan for National Trade Secret Protection and Innovation Pilot Program* (the "***Work Plan***"), proposing to select 15 to 20 pilot areas to carry out a three-year pilot program for trade secret protection and innovation. The list of pilot areas will be released by the end of June 2022, and the pilot program will be fully launched in July 2022.

The Work Plan puts forward main tasks in six aspects, namely, strengthening innovation of trade secret protection systems, improving work mechanisms for trade secret protection, strengthening supervision and law enforcement in trade secret protection, improving service assurance system for trade secret protection, targeting the high-standard international economic and trade rules, and creating a good environment for trade secret protection.

With regard to enterprises' trade secret protection, the Work Plan emphasizes that enterprises shall be instructed to establish an internal management system that is in line with the characteristics of the industry and their own technical requirements and improve their organizational structure for the protection and management of trade secrets; the management of the whole process of enterprises' production and operation shall be strengthened through the network to intensify the protection of their own secrets; and the education and management of employees shall be strengthened to intensify employees' confidentiality responsibilities and obligations.

The Work Plan also points out that efforts will be made to actively respond to enterprises' rights protection demands, stepping up administrative law enforcement and case handling in respect of trade secret infringement, and to strengthen the linkage with judicial authorities, establishing the work mechanisms for case transfer and joint law enforcement and other related work mechanisms.

3. National: The *Administrative Provisions on Algorithm Recommendation for Internet Information Services* Has Come into Effect

On March 1, 2022, the *Administrative Provisions on Algorithm Recommendation for Internet Information Services* (the "***Administrative Provisions***") entered into force. As the first regulation in China regulating the algorithmic recommendation services, the Administrative Provisions stipulate all-round aspects of algorithmic specification, protection of users' rights and interests, supervision and administration, and legal liability.

For those enterprises (especially internet platform enterprises) widely using algorithm technology for scheduling and decisions in labor management, Article 20 of the Administrative Provisions explicitly provides that "where an algorithmic recommendation service provider provides work scheduling services to employees, such provider shall protect the employees' legitimate rights and interests in obtaining labor remuneration, rest and holidays, etc., and shall establish and improve relevant algorithms for platform order allocation, remuneration composition and payment, working hours, rewards and penalties." If relevant enterprises fail to comply with the requirements of the aforesaid provisions, any organization or individual has the right to report to cybersecurity administration and other relevant authorities, and the employer shall be subject to the relevant punishment.

Case Study

A female employee, who had signed a mutual termination agreement of labor contract, found out she was pregnant after signing the agreement and claimed for revocation of the agreement. The Court overruled her claim.

Facts

Ms. Wan was employed as an administrative assistant in Cloud Company on May 8, 2018. On February 19, 2020, the Company negotiated with Ms. Wan to terminate the labor relationship, and two parties signed the written Labor Contract Mutual Termination Agreement in next morning, agreeing that the labor relationship would be terminated on March 20, 2020. However, on March 10, 2020, Ms. Wan informed the Company by email that she was pregnant and provided the diagnosis certificate. On March 23, 2020, the company sent an Employment Separation Certificate to Ms. Wan, but she refused to accept it.

Wan claimed that the labor contract between two parties had not expired when she was pregnant, and she had clearly informed the Company of the fact of her pregnancy. According to the provisions of the *Labor Contract Law*, the labor relationship should be terminated only after the end of the breastfeeding period. Ms. Wan also claimed that she had signed the Mutual Termination Agreement based on substantial misunderstanding, so the Agreement should be revoked and the Company should reinstate the employment relationship with her from March 21, 2020.

Judge's Opinions

The court of first instance held that, in accordance with the law, the employer and the employee may terminate the labor contract if they reach a consensus through negotiation. In this case, the Mutual Termination Agreement signed between the plaintiff and the defendant based on the true intention of the parties, which did not violate the mandatory provisions of laws and regulations, and is lawful and valid. In this case, the labor contract was terminated on March 20, 2020 as agreed upon both parties' consensus, thus the pregnancy cannot invalidate the mutual termination agreement signed by two parties. Therefore, the Ms. Wan's claim has no sufficient legal basis and therefore was dismissed.

The court of second instance held that Ms. Wan's claim that her pregnancy after signing the Mutual Termination Agreement cannot be deemed as the substantial misunderstanding when they entered into the contract, and rejected Ms. Wan's appeal.

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Introduction of Llinks Labor and Employment Law Practice

Llinks provides clients with efficient solutions and pragmatic labor law compliance advice based on clients' business needs. Our services include: providing daily labor law compliance advice and training; designing strategies and plans for mass layoffs and participating in on-site negotiations; assisting in solving personnel replacement in mergers and acquisitions, and providing on-site support and crisis management for strikes and other collective action; representing clients in labor arbitrations and litigations involving terminations of employment contracts, bonus payments, etc.; advising on issues of white-collar crime, anti-corruption and anti-bribery, anti-discrimination, personal information protection, protection of trade secrets and non-competition obligation, equity incentives, and senior-level employee dismissals, etc.

Awards and Honors:

- Llinks Law Offices were awarded Best Law Firm for Client Service of Chambers China Awards 2020
- Llinks Law Offices were awarded Labor & Employment Firm of the Year of China Law & Practice Awards 2021
- Llinks Law Offices were awarded Most Innovative Firm of the Year of China Law & Practice Awards 2021
- In 2021, 2020 and 2019, Patrick Gu was consecutively recommended as the top-tier labor lawyer by LEGALBAND
- In 2020 and 2019, Patrick Gu was consecutively recommended as the leading labor lawyer by China Law & Practice

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