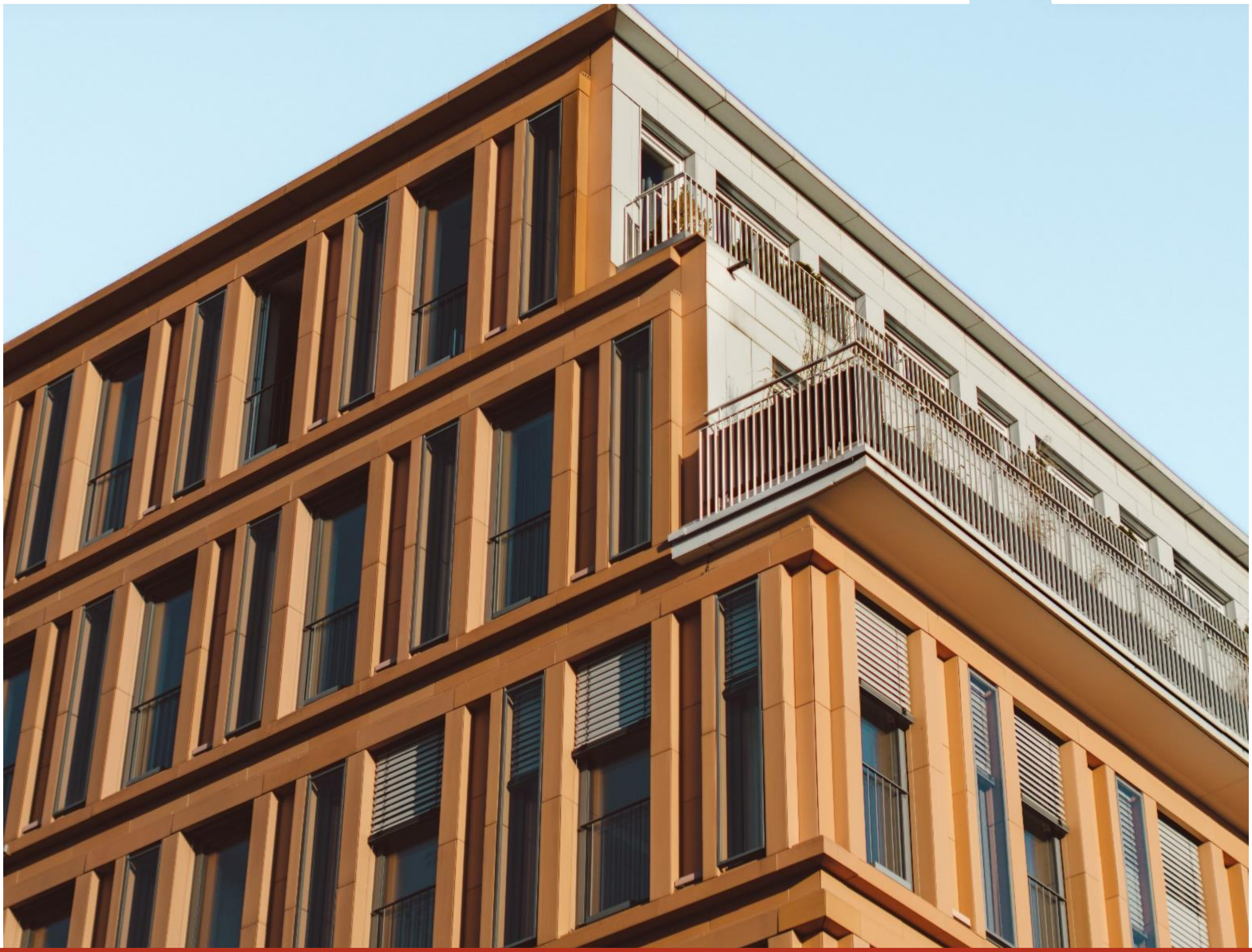
Llinks Legal Alert – Labor & Employment Law

April 2024



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Spotlight on News

1. The Cyberspace Administration of China has issued the *Regulations on Promoting and Standardizing the Cross-border Flow of Data*, exempting the cross-border declaration and certification of personal information in specific human resources management scenarios.

On March 22, 2024, the Cyberspace Administration of China announced the *Regulations on Promoting and Regulating the Cross-border Flow of Data* ("**the Regulations**"), which took effect immediately. The Regulations further refine the system and rules for outbound data, including data security assessments, standard contracts for the outbound transfer of personal information, and certification for personal information protection.

Regarding the declaration and certification procedures for providing data and personal information to overseas entities, the Regulations incorporate key exemptions. Specifically, the Regulations outline conditions under which data handlers are exempt from undergoing data security assessments, establishing standard contracts for the outbound of personal information, and obtaining personal information protection certification. These conditions include situations where "cross-border human resources management is implemented in accordance with labor regulations and collective contracts legally established and signed, and it is genuinely necessary to provide employees' personal information to overseas entities." However, further clarification and explanation regarding the criteria for determining the necessity in such cases are still in progress.

2. The State Council announced the abolition of the *Regulations on the Labor Insurance of the People's Republic of China*, effective from May 1, 2024.

On February 2, 2024, during the 25th executive meeting of the State Council, the *Decision of the State Council on Amending and Abolishing Certain Administrative Regulations* was approved. This decision entails the abolition of 13 administrative regulations, effective from May 1, 2024. Notably, among these regulations is the *Regulations on the Labor Insurance of the People's Republic of China* (“**Labor Insurance Regulation**”).

The Labor Insurance Regulation, promulgated in 1951 and classified as administrative regulations has seen its provisions gradually replaced over the past 70 years by laws and regulations such as the *Social Insurance Law* and the *Regulations on Work-related Injury Insurance*. The abolition of the Labor Insurance Regulation not only signifies the continuous enhancement of China's social security system but also clarifies certain crucial concepts in managing employment relations.

For instance, concerning the standard for sick pay for employees, at the national level, there has been inconsistency at the national level between the provisions of the Labor Insurance Regulation and Opinions on Implementing the Labor Law of the People's Republic of China issued by the Ministry of Labor (**“Document No. 309 of 1995”**). Following the abolition of the Labor Insurance Regulation, the provisions outlined in Document No. 309 of 1995 issued by the Ministry of Labor regarding the standard for sick pay will become the only legal basis at the national level. This implies that unless there are different local regulations, during an employee’s sickness or non-work-related injury treatment period, the sick pay or disease relief fee provided by the employer within the specified medical treatment duration may be lower than the local minimum wage standard but it cannot fall below 80% of the minimum wage standard.

3. The Ministry of Human Resources and Social Security announced the minimum wage standards for all 31 provinces and municipalities in China (as of April 1, 2024).

On April 3, 2024, the Ministry of Human Resources and Social Security released the Minimum Wage Standards in Various Provinces, Autonomous Regions, and Municipalities Nationwide, which disclosed the monthly and hourly minimum wage standards in all 31 provinces, autonomous regions, and municipalities in China as of April 1, 2024. The data shows that a total of 20 provinces have minimum wages exceeding CNY 2,000 per month. Regarding the monthly minimum wage standards, Shanghai has the highest at CNY 2,690, while Jiangsu Province and Zhejiang Province share the second position with a first-tier monthly minimum wage standard of CNY 2,490 each. Beijing's monthly minimum wage standard is CNY 2,420. In terms of the hourly minimum wage, Beijing leads with CNY 26.4 per hour. Furthermore, minimum wage standards have been increased in places like Hubei, Jiangxi, and Ningxia.

Legislation Updates

1. The *Opinions on Several Issues Related to Work-related Injury Insurance in Shanghai,* issued by the Shanghai Municipal Bureau of Human Resources and Social Security, will be implemented starting from May 1, 2024.

On March 28, 2024, the Shanghai Municipal Bureau of Human Resources and Social Security issued the *Opinions on Several Issues Related to Work-related Injury Insurance in Shanghai* ("**the Opinions**"), which will be implemented from May 1, 2024, and will remain valid until April 30, 2029. Simultaneously, the *Opinions of Shanghai Municipal Bureau of Human Resources and Social Security on Several Issues Regarding the Implementation of the Shanghai Work-related Injury Insurance Measures* are abolished.

The Opinions provide detailed provisions on several key issues related to work-related injury insurance. These include the selection of the jurisdiction for work-related injury identification, the starting point for the application period for work-related injury identification when multiple diagnoses confirm the same occupational disease, and the responsibility of employers to make up the shortfall in work-related injury insurance benefits when the insurance premiums are not paid in full. Additionally, the Opinions clarify matters such as salary and benefits during the furlough period, time limits and extension procedures, death benefits due to work-related causes, etc. It is stipulated that if a worker is still in the period of leave for work-related injury with pay or if the conclusion of the assessment of working capacity has not been made, the employer is not allowed to terminate the labor relationship with the employee.

2. The *Regulations on the Protection of Women's Rights and Interests in Fujian Province* emphasize the protection of women's rights and interests in terms of labor and property.

On March 27, 2024, the Ninth Meeting of the Standing Committee of the Fourteenth Fujian Provincial People's Congress enacted the Regulations on the Protection of *Women's Rights and Interests of Fujian Province* ("**the Regulations**"), which will come into effect on June 1, 2024. The Regulations cover the protection of women's political rights, personal and personality rights and interests, cultural and educational rights and interests, labor and social security rights and interests, property rights, as well as marriage and family rights.

In terms of labor and social security rights and interests, the Regulations specify that employers must guarantee female employees their legal rights to marriage leave, maternity leave, childcare leave, as well as time for prenatal check-ups and breastfeeding. The Regulations mandate that employers should organize a health examination that includes gynecological checks for female employees at least once every two years. Female employees over the age of thirty-five should be provided with additional screenings for breast cancer and cervical cancer, with the costs borne by the employer and the time spent for the screenings to be considered as working hours.

Regarding property rights, the Regulations stipulate that women, with their ID card, household registration book, marriage certificate, and other valid documents proving the marital relationship, may apply to real estate administration, vehicle management, and other departments to inquire about the property ownership status of their spouses. These departments are obligated to accept these inquiries and provide corresponding written materials.

3. Shandong Province has initiated the implementation of direct settlement of work-related injury insurance for medical treatment across various locations within the province.

The Human Resources and Social Security Department of Shandong Province, along with two other departments, have jointly issued the *Notice on Promoting the Direct Settlement of Work-related Injury Insurance for Off-site Medical Treatment* ("**the Notice**"), which clarifies that starting from April 1, 2024, the implementation of direct settlement for off-site medical treatment within the province under work-related injury insurance will be initiated. Additionally, pilot projects for direct settlement of cross-provincial off-site medical treatment will be carried out to conveniently serve all employees in the province who have suffered work-related injuries.

The Notice stipulates that employees who have participated in work-related injury insurance and have completed the work-related injury identification, recurrence confirmation, rehabilitation confirmation, or assistive device configuration confirmation, and are referred to off-site (outside the districted city) hospitals, or who live off-site long-term or are permanently working off-site, can apply for the direct settlement of off-site medical treatment costs.

Regarding treatment standards, employees with work-related injuries receiving off-site medical treatment within the province will have their work-related medical expenses and rehabilitation costs executed in accordance with the regulations of the place of treatment. The list of rehabilitation service items, assistive devices configuration, and the cost cap standards will be implemented according to the unified policy of Shandong Province. For cross-provincial off-site medical treatment, the costs for inpatient work-related medical and rehabilitation expenses will be executed in accordance with the regulations of the place of treatment; the list of assistive devices configuration and the cost cap standards will be implemented according to the policy regulations of Shandong Province.

Case Study

1. **Shanghai: if an employee joins a third-party company during the non-compete period and indirectly serves a competing entity, the employee is in violation of the non-compete obligation.**

- **Facts**

An internet company had a non-compete agreement with its former Chief Technology Officer, Mr. Liu. After leaving the internet company, it was discovered that Mr. Liu had frequented the office of a certain technology company multiple times. Believing Mr. Liu had violated his non-compete obligations, the internet company applied for labor arbitration, seeking to refund his non-compete compensation and impose a penalty.

After leaving, Mr. Liu joined a management consulting firm that had a consulting services agreement with the technology company. The firm provided services related to human resource management systems and management structures for the technology company.

Both the labor arbitration and the first-instance court ruled against Mr. Liu, requiring him to refund the non-compete compensation and pay a penalty. Mr. Liu disagreed, arguing that the technology company's platform differed fundamentally from the internet company's and that they were not direct competitors. He appealed the decision to the Second Intermediate People's Court of Shanghai.

- **Judge's Viewpoint**

The Labor Contract Law permits employers to include a non-compete clause in agreements with employees, prohibiting them from working for other employers engaging in similar businesses, or producing similar products that compete with the current employer. However, the law does not provide a clear guideline for determining a "competitive relationship," nor does it specify whether breaching the non-compete obligation should be limited to establishing labor relations with competitive enterprises.

In this case, after deliberation, the Second Intermediate People's Court of Shanghai deliberated on whether a competitive relationship existed between the internet company and the technology company. Both companies were registered with the Administration for Industry and Commerce and included logistics services, food sales, and computer software development in their business scopes. They operated as e-commerce enterprises serving local urban life through Internet platforms, targeting surrounding residents as their main consumer group. Furthermore, both platforms offered local life application software, selling similar products and promising efficient delivery, indicating a direct competitive relationship in terms of geographical scope, business type, and customer base.

Therefore, the court concluded that both companies essentially operated as online ordering and offline delivery service platforms for local life internet transactions, with similar business scopes and service content, establishing a competitive relationship.

Regarding Mr. Liu's violation of the non-compete obligation, evidence such as his card-swiping records at the technology company, timing, and frequency of visits, the labor contract he concluded with the consulting firm suggested his involvement with the technology company. As Mr. Liu had access to detailed data regarding the internet company's logistics and delivery operations, his association with the technology company could potentially lead to the disclosure of trade secrets, thus violating the non-compete agreement. Therefore, Mr. Liu was deemed liable to refund the economic compensation for the non-compete restriction and pay the penalty for breaching the non-compete obligation.

2. Shanghai: if a company sets an unreasonably low compensation standard for non-compete restrictions, it is deemed an invalid clause, and should be made up in accordance with the statutory minimum standard.

- **Facts**

The confidentiality agreement between employee Su and a certain technology company stipulated that upon leaving the company, Su would be bound by a 24-month non-compete obligation. During this period, the technology company was obligated to provide economic compensation for the non-compete, based on Shanghai's minimum wage standard in Shanghai (CNY 2,590 per month). However, the technology company failed to pay the non-compete economic compensation for over three months. Consequently, Su filed for arbitration, seeking the technology company to cover the shortfall in economic compensation based on 30% of his normal salary prior to leaving the company (CNY 45,000 per month), terminate the non-compete agreement, and provide an additional three months of economic compensation for its termination.

- **Judge's Viewpoint**

In judicial practice, there are differing viewpoints on whether non-compete compensation, agreed upon between an employer and an employee, should be at least 30% of the employee's average monthly salary prior to leaving the company. One perspective argues that the statutory compensation standard - either the local minimum wage standard or 30% of the employee's average monthly salary before separation (or a special standard set by local regulations), whichever is higher, should only be applied if the parties have not agreed on the non-compete economic compensation. Conversely, if they have agreed, the statutory minimum should not apply. The opposing view suggests that if the non-compete economic compensation agreed upon by the parties is lower than the statutory standard, the statutory standard should be enforced to bridge the gap.

In this case, the Second Intermediate People's Court of Shanghai held that the confidentiality agreement between Su and the technology company contained a pre-set standard clause for non-compete economic compensation of CNY 2,590 per month. This amount, constituting only 5.8% of Su's normal salary standard of CNY 45,000, is significantly lower than Su's regular pay level. Moreover, the confidentiality agreement imposed a hefty CNY 1 million penalty on Su for breaching the non-compete obligation, resulting in an unfair imbalance of rights and obligations between the parties. The court deemed this as the company unfairly lightening its responsibilities through standard clauses, contrary to the principle of fairness in the formation of labor contracts. Consequently, the court invalidated the non-compete compensation agreement in the confidentiality contract and upheld the use of 30% of Su's average salary over the twelve months before separation - equivalent to CNY 13,500 per month - as the standard for non-compete compensation.

3. Nanjing: if an employee fulfills the substantive requirements for receiving performance bonuses, the employer cannot withhold payment of the bonus citing internal procedural approval issues.

- **Facts**

City Development Company has established a "Reward Scheme," outlining the eligibility criteria and application procedures for employees to receive rewards. The Meeting Minutes explicitly stated that within the department, the internal reward distribution follows a 75% allocation for managers and 25% for other project participants. Throughout his tenure, Mr. Peng submitted six reward applications, yet City Development Company declined to grant any rewards. Mr. Peng subsequently filed a lawsuit against City Development Company, seeking payment of a reward totaling CNY1,689,083. During the trial, while City Development Company acknowledged that the six projects met the initial reward criteria outlined in the "Reward Scheme," they contended that these applications had not been approved and therefore refused to initiate the approval procedures, leading to the denial of rewards.

- **Judge’s Viewpoint**

Employers commonly establish procedural requirements for disbursement of bonuses, often mandating that employees must actively apply and obtain approval from department heads and the board of directors. Disputes may arise if employees fail to adhere to these procedures, leading the company to withhold bonus payments, citing non-compliance with the approval process, such situations can be contentious and prone to disagreement.

In this instance, the Intermediate People's Court of Nanjing, Jiangsu Province, held that an employer cannot justify withholding bonus payments due to an employee's reward application not undergoing review or an incomplete approval process. The court emphasized that the bonus assessment process is procedural, not substantive in determining an employee's eligibility for bonuses. Fulfilling the procedural approval process and reviewing the employee's application are both rights and duties of the employer. Upholding the principles of good faith and fair compensation for work, when an employee submits a bonus request, the employer is obligated to initiate the review process, and if the request is rejected, valid reasons must be provided. In this case, Mr. Peng not only meets the qualifications for the reward but also, considering Mr. Peng's contributions to the six projects involved, satisfies the criteria for receiving the rewards set forth in the "Reward Scheme". Therefore, City Development Company should pay Mr. Peng the bonus as per the terms of the "Reward Scheme".

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:

- In 2024, Patrick Gu was recommended as a Ranked Partner in Chambers and Partners Greater China Region Guide 2024
- In 2021, 2020 and 2019, Patrick Gu was consecutively recommended as the leading labor lawyer by China Law & Practice
- In 2023, 2022, 2021, 2020 and 2019, Patrick Gu was consecutively recommended as the top-tier labor lawyer by LEGALBAND
- In 2023, Patrick Gu was recommended in Regulatory/Compliance, Labor and Employment in the 2023 edition of The Legal 500
- In 2023, Patrick Gu was recommended as the leading lawyer by The Legal 500
- Llinks Law Offices were awarded Labor & Employment PRC Firms China 2023 by The Legal 500
- Llinks Law Offices were awarded Most Innovative Firm of the Year of China Law & Practice Awards 2021
- Llinks Law Offices were awarded Best Law Firm for Client Service of Chambers China Awards 2020

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