



Llinks Legal Alert – Labor & Employment Law

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Spotlight on News

1. The Ministry of Human Resources and Social Security and the Supreme Court jointly released the *Opinions on Issues concerning the Connection between Arbitration and Litigation of Labor Disputes (I)*

The Ministry of Human Resources and Social Security (the "**MOHRSS**") and the Supreme Court of the People's Republic of China (the "**Supreme Court**") jointly released the *Opinions on Issues concerning the Connection between Arbitration and Litigation of Labor Disputes (I)* (the "**Opinions**"). The Opinions implement and regulate the connection between labor arbitration and court and unify the application of legal standards for two proceedings. The Opinions clarify some important issues, such as settlement agreements follow-up procedures, the scope of final awards, connection between arbitration and litigation, application of some legal standards. During the press conference, the spokespersons of two departments stated that MOHRSS and the Supreme Court will further unify the application of legal standards for two proceedings by jointly publishing typical case references and establishing an information comparison system.

2. The Supreme Court released the typical civil cases of promoting core socialist values

Recently, the Supreme Court released the second batch of typical civil cases of promoting the core socialist values. The court opined that an enterprise discriminated against the candidate in the recruitment process based on his household, which impaired the candidate's right to equal employment opportunities. The enterprise has infringed the candidate's right to equal employment and the candidate shall be compensated in accordance with the law. It is worth noting that over the past five years, the concept of core socialist values has been applied in courts' legal reasoning for more than 1 million first instance civil cases nationwide. Therefore, employers should be aware of the concept of core socialist values, such as integrity, harmony, equality, etc., which has become a significant factor when the judges make the awards.

3. Eight Departments jointly released the *Implementing Opinions on the Protection of the Labor Security Rights and Interests of Workers under New Employment Modes*

Recently, eight departments including the Shanghai Municipal Human Resources and Social Security Bureau and the Shanghai Federation of Trade Unions jointly released the *Implementing Opinions on the Protection of the Labor Security Rights and Interests of Workers under New Employment Modes* (the "**Opinions**"). The Opinions make it clear that where an enterprise does not completely satisfy the conditions for establishing employment relationship, but exerts employment management over the workers, including using algorithm to manage the workers performance, such enterprises shall sign a written agreement with the worker with the terms of remuneration, working hours, occupational protection, etc. The legal relationship between the platforms and individuals who rely on the platforms to carry out business independently or engage in freelance work should



be governed by the civil laws rather than the labor contract law. In addition, occupational injury insurance for these workers will be piloted in Shanghai in 2022. For more analysis and interpretation, please refer to our [*Brief Review of Shanghai Implementing Opinions on the Protection of the Labor Security Rights and Interests of workers under New Employment Modes \(Chinese Version\)*](#).

4. Tianjin Municipal Human Resources and Social Security Bureau released the typical cases of labor disputes in 2021

Tianjin Municipal Human Resources and Social Security Bureau released five typical cases of labor disputes in 2021. A case that received the most attention is whether it constitutes illegal termination when the employer terminates the employment contract upon its expiry without knowing the employee's pregnancy. According to the case analysis, if the employer is not informed that the employee is pregnant prior to the expiration of the employment contract, and the employee does not raise any objection before the last working day, the termination should be not deemed as the illegal termination and the employer is not required to pay the wrongful termination compensation. However, in accordance with the Labor Contract Law, the date of expiration shall be extended to the end of "special circumstances", including an employee's condition of "three periods (of pregnancy, lactation and delivery)". Therefore, the employer shall continue to perform the employment contract until the special circumstances end.

Legislation Updates

1. Nationwide: CSRC released *the Measures for the Supervision and Administration of Directors, Supervisors, Senior Executives and Practitioners of Securities Fund Trading Institutions*

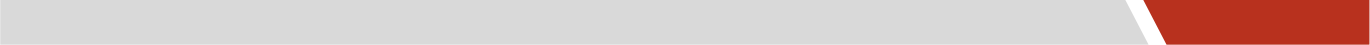
Recently, the China Securities Regulatory Commission (the "CSRC") released the *Measures for the Supervision and Administration of Directors, Supervisors, Senior Executives and Practitioners of Securities Fund Trading Institutions* (the "**Measures**"), effective from April 1, 2022. The Measures put forward new requirements such as remuneration deferral, accountability mechanism, silent period and the prohibition of part-time jobs. One of the highlights is that the Measures clarify that an enterprise should establish and improve its internal accountability mechanism and specify in employment contracts with its senior executives and employees as well as in its internal policies that an employee shall be liable for the enterprise's violations of laws and regulations or business risks, if he/she fails to perform duties diligently. Under such circumstances, the enterprise can require the employee to refund the payable bonus for the year when the negligence behaviors happen, or stop paying the long-term incentive to the employee.

2. Zhejiang: Soliciting Public Opinion on *the Draft of Regulations on Data Management in Electronic Employment Contracts*

Zhejiang Province Human Resources and Social Security Department is soliciting public opinion on the *Draft of Regulations on Data Management in Electronic Employment Contracts* (the "**Regulations**"). The Regulations provide a standard for unified coding of employment contracts, data procedures, data metadata and information expansion in electronic employment contracts, etc. The Regulations not only aim to deepen the implementation of relevant laws and regulations on employment contracts, but also intend to guide the standardization of electronic employment contract service platforms, so as to realize the standardized administration of electronic employment contracts and accelerate the process of digitalization of employment contracts.

3. Jiangsu: *The Implementing Measures of Jiangsu Province on Basic Pension Insurance for Enterprise Employees* was released

Department of Human Resources and Social Security of Jiangsu Province released the *Implementing Measures of Jiangsu Province on Basic Pension Insurance for Enterprise Employees* (the "**Measures**"), effective from March 1, 2022. As the supporting document of the *Provisions on the Basic Pension Insurance for Enterprise Employees in Jiangsu Province*, the highlights of the Measures are as follows: residents from Hong Kong, Macao and Taiwan and foreigners legally employed by Chinese entities shall contribute the pension insurance; flexible employees (local household is unnecessary) can contribute the pension insurance; employers shall formulate their position catalogues, which will be one of grounds for determining the retirement age of female employees and handling the retirement application.



Case Study

An employee was sued by his former employer for breaching non-competition restriction and the employer claimed liquidated damages for RMB 2 million. The appeal court opined that the actual content of business, clients and other factors of companies should be considered comprehensively to determine whether two enterprises were competitors.

Facts

Mr. Wang, a technician, joined Shanghai Bilibili Technology Co., Ltd. ("**Bilibili**") after leaving Wind Information Technology Co. ("**Wind**"). Wind initiated a labor arbitration against Mr. Wang to alleged that he had breached the non-competition agreement signed by the parties, and Wind claimed liquidated damages with the amount of RMB 2 million.

Judge's Opinion

The court of the first instance thought that Wind and Bilibili have overlapping scopes of business based on their business licenses, hence, they are competitors. Mr. Wang worked on the computer-related posts in both employers. Therefore, Mr. Wang has breached the non-compete agreement. However, the appeal court opined that whether the non-compete obligation was violated shall not be determined by the scope of business registered on the business license solely, instead, it should be determined by the clients of both companies and the work activities of the employees comprehensively. There are obvious differences between two companies in terms of business mode, corresponding market and clients. The appeal court therefore overruled the decision made by the court of the first instance.

Our Observation

The legislative purpose of the non-competition related clauses under the Labor Contract Law is to protect the trade secrets of companies from improper infringement, rather than to restrict the talent move freely. In past judicial practice, whether there is a competitive relationship between the former employer and the employee's self-employed enterprise or the new employer is the crucial factor when the judge decided whether the employee has breached the non-compete agreement. And whether two enterprises' business scopes are the same or similar under the business licenses is normally the determining factor. In this case, Shanghai No. 1 Intermediate People's Court reasoned that factors such as the companies' business models and the clients should be taken into consideration as well. It is a useful guideline for the employers to decide how to prepare enforceable non-competition agreements with the employees.

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 2020, Llinks Law Offices were awarded Best Law Firm for Client Service of Chambers China Awards
- 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
- In 2021, Llinks Law Offices were awarded as the leading labor law firm by China Law & Practice

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