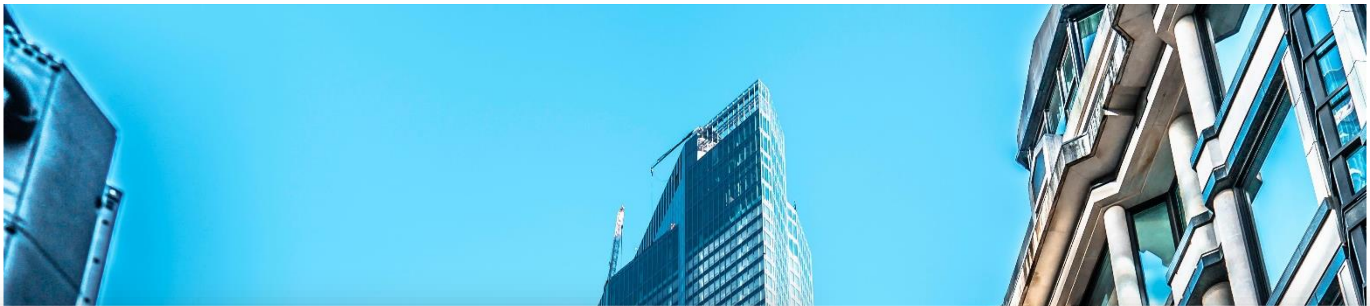

Llinks Legal Alert – Labor & Employment Law

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Shanghai · Beijing · Shenzhen · Hong Kong · London

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Contents

Spotlight on News

1. The New Company Law underscores employees' participation in democratic management and supervision while also reinforcing the responsibilities of directors, supervisors, and senior executives.
2. To standardize judicial practices, the Supreme People's Court introduced a publicly accessible "People's Court Case Database," which published over 40 labor dispute cases in its first batch.
3. The Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security jointly issued "Guiding Opinions on Handling Criminal Cases of Medical Insurance Fraud."

Legislation Updates

1. Shanghai, Beijing, Tianjin and Hebei successively issued new policies to regulate employee management in labor dispatch.
2. The Ministry of Human Resources and Social Security, the Ministry of Finance and the National Health Commission jointly issued "Notice on Launching Pilot Project on Direct Settlement for Cross-Province Medical Treatment Expense within Work-Related Injury Insurance. "

Case Study

1. Beijing: Using social media to communicate with clients outside of working hours while engaging in substantive work constitutes "invisible overtime," for which the employer should pay overtime compensation.
2. The Supreme People's Court ruled that the average salary for the 12 months before termination, used as the calculation base for severance payment, shall include wages earned during abnormal periods such as leave and medical treatment periods.

Spotlight on News

1. **The New Company Law underscores employees' participation in democratic management and supervision while also reinforcing the responsibilities of directors, supervisors, and senior executives.**

The *Company Law* (Revised in 2023), promulgated by the 7th Session of the Standing Committee of the Fourteenth National People's Congress, will come into force on July 1, 2024 (the **"New Company Law"**). This legislation not only underscores the responsibilities of controlling shareholders and management personnel but also enhances the protection of employees' rights. Specifically, the New Company Law aims to optimize and regulate corporate governance and development by ensuring employees' participation in democratic management and supervision. It also strengthens the responsibilities of directors, supervisors, and senior executives.

The New Company Law specifies that companies must establish and enhance a democratic management system, which adopts the employees' representative committee as its fundamental structure and further advances the system of employee representation within the company's board of directors. It stipulates that employees' representatives serving as board members may also become members of the audit committee. In limited liability companies with 300 or more employees, unless the board of supervisors already includes employees' representatives, the board of directors must include such representatives. Furthermore, when making decisions on significant matters such as restructuring, dissolution, bankruptcy application, or other major business operation issues, or when formulating important regulations, the company is required to consult with the company's trade union and employees.

The New Company Law defines the specific contents of the fiduciary duty and requirement of diligence for directors, supervisors and senior executives. It includes articles concerning reporting conflicts of interest, prohibited conducts such as embezzlement of company property, giving bribes, or accepting any other illegal proceeds with influence. Additionally, The New Company Law addresses compensation for damages caused to others due to intentional or gross negligence in the performance of duties. Thus, the New Company Law establishes a higher standard for the performance of duties by directors, supervisors, and senior executives.

2. To standardize judicial practices, the Supreme People's Court introduced a publicly accessible "People's Court Case Database," which published over 40 labor dispute cases in its first batch.

To standardize judicial practices and ensure consistent application of the law, on February 27, 2024, the Supreme People's Court introduced a publicly accessible "People's Court Case Database." This database disseminates authoritative cases that have undergone review by the Supreme People's Court and are deemed to possess precedential and exemplary value for similar cases. The "People's Court Case Database" not only regularly publishes reference cases but also updates and replaces outdated ones to maintain relevance and accuracy.

As of today, the "People's Court Case Database" has published over 3,800 cases, comprising more than 1,400 criminal cases, over 1,600 civil cases, and over 400 administrative cases. Notably, the first batch includes over 40 labor dispute cases, focusing on common issues such as termination of employment, employment contracts, non-competition agreements, severance payments, and overtime compensation.

3. The Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security jointly issued "Guiding Opinions on Handling Criminal Cases of Medical Insurance Fraud."

On February 28, 2024, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security jointly issued the "Guiding Opinions on Handling Criminal Cases of Medical Insurance Fraud." These opinions provide further clarification on matters pertaining to the conviction and punishment for medical insurance fraud crimes, legal interpretation, policy understanding, case handling requirements, and relevant work systems and mechanisms. Additionally, the Supreme People's Court and the Supreme People's Procuratorate released eight typical cases of prosecuting medical insurance fraud crimes in accordance with the law. These cases cover common charges such as fraud, concealment of criminal proceeds, and embezzlement, offering insights into the methods and societal impact of medical insurance fraud crimes from various perspectives.

This initiative serves as a reminder to relevant individuals, including designated medical institutions, medical insurance review and handling agencies, and insured persons, to handle medical insurance matters in accordance with laws and regulations. It also urges medical insurance administrative departments to enhance supervision and inspection of medical insurance funds, while medical insurance handling agencies are encouraged to strengthen the review and verification of medical insurance reimbursement materials to effectively safeguard the security of medical insurance funds.

Legislation Updates

1. Shanghai, Beijing, Tianjin and Hebei successively issued new policies to regulate employee management in labor dispatch.

On December 6, 2023, the Shanghai Municipal Human Resources and Social Security Bureau issued the "Opinions on Regulating Several Issues of Labor Dispatch and Employment in this City" (Hu Ren She Gui [2023] No. 32), which came into effect on January 1, 2024. These opinions address significant aspects of employee management in labor dispatch, including equal pay for equal work, determination of auxiliary positions, and the transition from dispatch to outsourcing. Notably, concerning the "Issue of Recruitment and Employment Registration and Social Insurance for Cross-Regional Labor Dispatch," a notable change from previous regulations in Shanghai is the omission of the statement "If labor dispatch units from other provinces and cities dispatch non-local employees to work at positions located in other provinces and cities where the labor dispatch units are located, this provision does not apply." This deletion reflects a continued trend of tightening social insurance payments for labor dispatch across regions.

On February 3, 2024, the Beijing Municipal Human Resources and Social Security Bureau, the Tianjin Municipal Human Resources and Social Security Bureau, and the Hebei Province Human Resources and Social Security Department jointly issued the "Guidelines for Compliance in Labor Dispatch and Employment in the Beijing-Tianjin-Hebei Region." These guidelines aim to provide comprehensive guidance for entities engaging in labor dispatch operations, ensuring compliance with relevant laws and regulations. Additionally, they offer specific normative guidance on key issues such as applicable positions for labor dispatch, distinguishing between labor dispatch and outsourcing, and determining the proportion of labor-dispatched employees within a company.

2. The Ministry of Human Resources and Social Security, the Ministry of Finance and the National Health Commission jointly issued "Notice on Launching Pilot Project on Direct Settlement for Cross-Province Medical Treatment Expense within Work-Related Injury Insurance."

On January 12, 2024, the Ministry of Human Resources and Social Security, the Ministry of Finance, and the National Health Commission jointly issued the "Notice on Launching Pilot Project on Direct Settlement for Cross-Province Medical Treatment Expense within Work-Related Injury Insurance." This notice specifies that starting from April 1, 2024, human resources and social security departments in various provinces and the Xinjiang Production and Construction Corps will select certain cities to initiate a pilot project on direct settlement for cross-province medical treatment expenses within work-related injury insurance. Utilizing the national system for cross-province medical treatment settlement for work-related injuries, the pilot cities will allow individuals to directly settle inpatient medical expenses for work-related injuries, inpatient rehabilitation expenses for work-related injuries, and expenses for assistive devices using their social security cards. The pilot period will last for one year.

Case Study

1. **Beijing: Using social media to communicate with clients outside of working hours while engaging in substantive work constitutes "invisible overtime," for which the employer should pay overtime compensation.**

- **Facts**

Employee Li claimed that during her tenure as a product operation staff member at a certain technology company, the company arranged for her to communicate with clients and employees using WeChat, DingTalk, and other social media platforms outside of normal working hours, which constituted overtime work. Therefore, Li filed for labor arbitration, demanding that the company pay her overtime compensation. The company argued that as the head of the operations department, it should not be considered overtime when other employees simply made a small call to her after work hours. Additionally, when clients asked questions in WeChat groups, it only took Li a few minutes to reply, which should not constitute overtime work, thus Li is not entitled to overtime compensation. Both the labor arbitration and the first-instance court ruling did not support Li's claim for overtime compensation, citing her failure to prove the existence of overtime work. Li then appealed to the Beijing Municipal Third Intermediate People's Court.

- **Judge's Viewpoint**

After reviewing the case, the court concluded that with economic development and technological advancements, employees' modes of work have become increasingly flexible. Employees can provide labor anytime and anywhere using computers and mobile phones, no longer confined to the workplace provided by the employer. It's not uncommon for employees to use social media platforms like WeChat for work outside of regular working hours. In cases of invisible overtime like this, the court should consider whether the employee provided substantive work content to determine if overtime occurred. Regarding the use of social media platforms like WeChat for work, if employees engage in substantive work beyond simple communication during non-working hours or if using social media for work is a regular and recurring task that significantly encroaches on the employee's rest time, it should be considered as overtime.

In this case, based on the chat records and Li's job responsibilities, it was evident that Li's use of social media for work outside of regular working hours went beyond simple communication. Her utilization of social media for work was not just occasional or incidental but rather reflected the company's management of its employees. Therefore, it should be considered as overtime, and the technology company should pay Li overtime compensation.

2. The Supreme People's Court ruled that the average salary for the 12 months before termination, used as the calculation base for severance payment, shall include wages earned during abnormal periods such as leave and medical treatment periods.

- **Facts**

Since the company issued a "Leave Notice" to the employee on April 26, 2019, the employee has not returned to work. The company paid the employee leave wages lower than the local minimum wage standard each month. The employee terminated the labor contract with the company on July 1, 2020. The employee argued that the company deliberately arranged for them to take leave so that they could pay only the minimum wage, thereby lowering the calculation base for severance payment. The employee contended that only wages under normal working conditions should be used as the calculation base for severance payment.

- **Judge's Viewpoint**

When an employee is in an abnormal work state (such as taking leave or being on a medical treatment period) before the termination of the labor contract, there has been a debate in different regions regarding the calculation base for severance payment. Some argue that the calculation should only be based on wages under normal working conditions, while others suggest that it should be strictly based on the actual wages earned during the 12 months before termination.

In this case, the Supreme People's Court ruled that according to Article 47, Paragraph 3 of the *Labor Contract Law*, which stipulates that the monthly average salary is used as the calculation base for severance payment, it is intended to tie severance payment to the employee's contribution. The employee's claim that "the average wage for the 12 months should only include wages under normal working conditions, excluding wages during abnormal work periods such as leave and medical treatment period" lacks a legal basis. Therefore, the employee's request to use the monthly wage under normal working conditions as the calculation base for severance payment was not supported.

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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