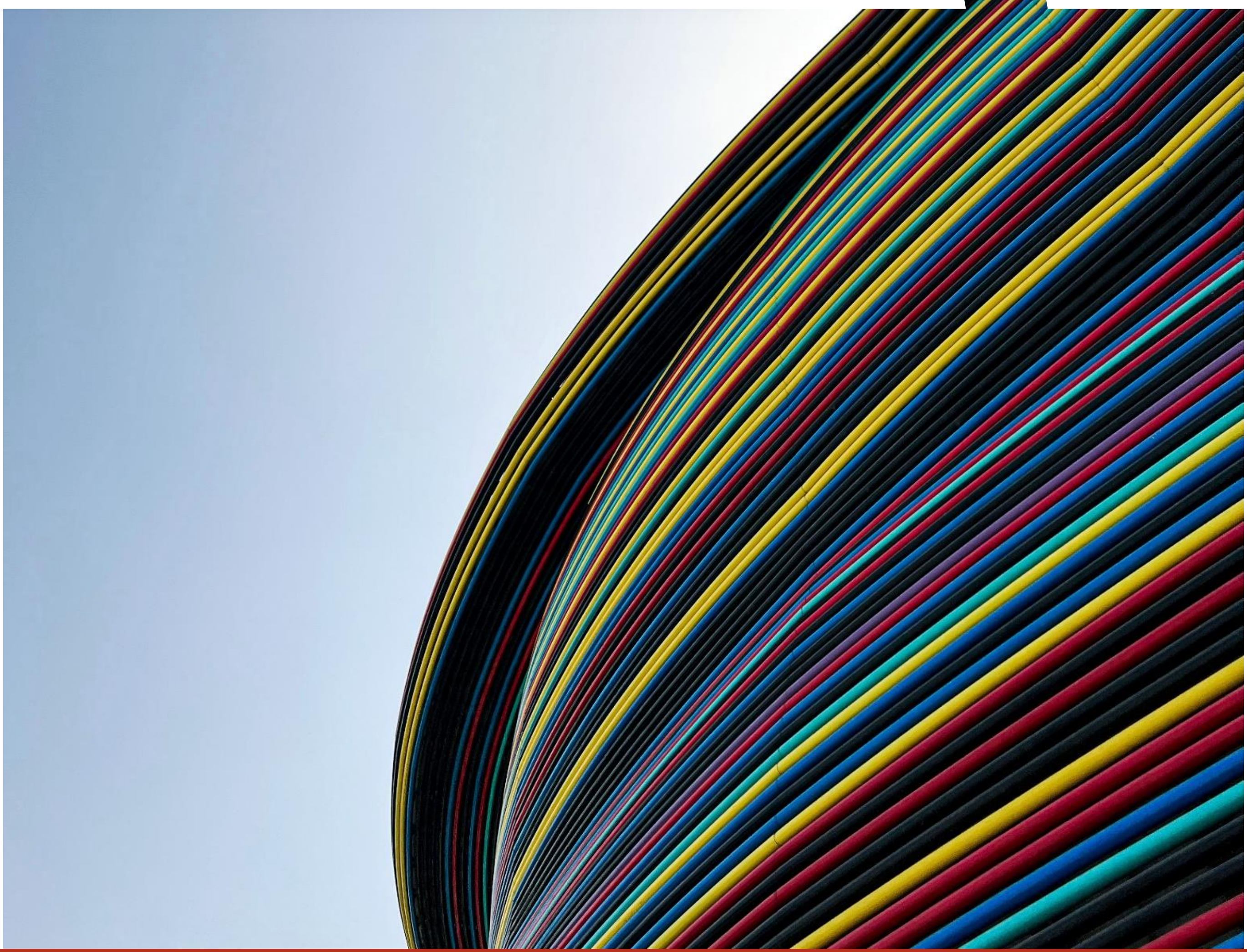
Llinks Legal Alert – Labor & Employment Law

September 2023



Shanghai · Beijing · Shenzhen · Hong Kong · London

LLINKS Law Offices

通力律师事务所

Contents

Legislation Updates

Spotlight on News

Case Study

Legislation Updates

1. The State Council, the Ministry of Finance and the State Taxation Administration extended multiple preferential policies for individual income tax

On August 18, 2023, the Ministry of Finance and the State Taxation Administration released the *Announcement on Continued Implementation of Individual Income Tax Policies for Annual One-off Bonus* specifying that annual one-off bonus obtained by a resident individual may be taxed separately rather than from the individual's comprehensive income for the year, the *Announcement on Continued Implementation of Individual Income Tax Policies for Subsidies and Allowances for Foreign Individuals* specifying that foreign individuals who satisfy the criteria for resident individuals may opt to claim special additional itemized deductions, or opt to enjoy nontaxable benefits in kind such as housing rental, language training, children education etc., and the *Announcement on Continued Implementation of Individual Income Tax Policies Relating to Equity Incentives of Listed Companies* specifying that income from equity incentives of listed companies obtained by a resident individual shall not be taxed from the individual's comprehensive income for the current year but taxed separately on the full amount by applying the comprehensive income tax rate table. The aforesaid policies would have expired on 31 December 2023, but were all extended through December 31, 2027.

Also, on August 28, 2023, the State Council released the *Notice on Raising the Criteria for Special Additional Deductions for Individual Income Tax*; on August 30, 2023, the State Taxation Administration released the *Announcement on Implementation of Policies for Raising the Criteria for Special Additional Deductions for Individual Income Tax*. The two policies together raised the deductible amount of the additional itemized deductions of nursing expenses for infants below three years of age, children's education expenses, and elderly parent(s) support expenses. The two policies apply retroactively as from January 1, 2023.

2. Beijing, Shanghai and Shenzhen released their municipal average salary standards for 2022

Beijing Municipal Bureau of Statistics released that the average annual salary of employees of corporate entities in Beijing in 2022 is CNY178,476, which is CNY14,873 per month. Shanghai Municipal Bureau of Human Resource and Social Security released that the average salary of employees in full coverage urban employers in Shanghai in 2022 is CNY12,183 per month. Shenzhen Municipal Bureau of Statistics released that the 2022 annual average salary of in-service employees in non-private entities in Shenzhen is CNY164,754, which is CNY13,730 per month.

Spotlight on News

1. ***Regulation on the Provision of Social Insurance Services* imposes serious punishment on obtaining payment from the social insurance fund through fraudulent means like fraud, fabricating supporting materials, etc.**

   Regulation on the Provision of Social Insurance Services released by the State Council will be implemented starting December 1, 2023, which includes administrative guidelines for social insurance registration and transfer of social insurance relations, assessment and payment of social insurance benefits, service and administration of social insurance, supervision of the provision of social insurance services and the related legal liabilities. Among the legal liabilities specified in the regulation, regarding the conduct of obtaining payment from the social insurance fund through fraudulent means (such as contributing social insurance through agents rather than actual employers) like fraud, fabricating supporting materials, etc., the violator will face legal liabilities such as returning the fraudulently obtained payment, a fine of two to five times the fraudulently obtained amount, and revocation of the qualification or license of the persons in charge or directly liable in accordance with the law.

2. **Anti-corruption crackdown in the pharmaceutical industry urges the internal anti-corruption compliance transformation of pharmaceutical enterprises**

   Since July 2023, the National Health Commission, joined by a number of state departments, carried out a series of anti-corruption actions in the pharmaceutical industry nationwide, which covered the whole chain of production, circulation, sales, use and reimbursement in the pharmaceutical industry, as well as the whole sector including pharmaceutical administrative departments, medical and health institutions, pharmaceutical production and operation enterprises, and medical insurance funds. In this unprecedented anti-corruption storm in the pharmaceutical industry, bribery continued to be a key focus of crackdown, some public hospitals have issued letters to pharmaceutical enterprises demanding the dismissal of a number of pharmaceutical representatives, leading to an increasing revelation of commercial bribery conducted by employees of pharmaceutical enterprises.

   Should the commercial bribery between employees and the third parties be identified as the conduct by the enterprise, such enterprise and the relevant person in charge will face criminal liabilities. Furthermore, once added to the bribery "blacklist", the enterprise may face additional consequences such as damage to the reputation, restrictions on market access as well as qualification and certification, etc. This nationwide anti-corruption campaign raised the requirement on the management in the workplace and anti-corruption compliance for the pharmaceutical enterprises. To minimize the exposure to criminal liabilities, such enterprises would need to put in place in advance both a sound internal management system and an anti-corruption compliance system. As such measures could not only help enterprises shield themselves from assuming liabilities for the conduct by other natural persons or companies, but also are conducive to their long-term healthy development.

Case Study

1. Private hospital doctor who job-hopped to a competitor was claimed by the former employer for breach of non-competition agreement, which was found by the Court to be void

- **Facts**

The Non-Competition Agreement signed between a private hospital and a doctor stipulated that within six months after separation, the doctor shall not work for other medical institutions listed in the agreement that compete with the private hospital, and that the customer information, operation methods, processes and programs were part of the private hospital's confidential information. Yet after resigning from the private hospital, the doctor immediately joined one of the medical institutions listed in the Non-Competition Agreement. Later, the private hospital initiated labor arbitration demanding the doctor to assume liability for breach of the non-competition obligation. The arbitration awarded the doctor to pay the private hospital the damage over CNY200,000 for the breach. The doctor refused to accept the arbitration award and brought the case to the Court.

- **Judge's Viewpoint**

The Court opined that the issue of the case was whether the doctor was an eligible party to a non-competition agreement which the doctor shall be bound by. As the original intention and purpose of the legislation system of non-competition is to protect the trade secrets of the employer, therefore only when the employer has the trade secrets or intellectual property rights worth protecting, may the employer require the employee to sign a non-competition agreement, yet it can only be applied to "senior management personnel, senior technical personnel and other personnel who bear confidentiality obligations". As an ordinary emergency room doctor, the employee in this case obviously belonged to neither the senior management personnel, nor senior technical personnel. Although the Non-Competition Agreement clearly specified that the customer information, operation methods and processes are part of the private hospital's confidential information, nonetheless, it is inevitable for a doctor to learn about the customer information in the process of diagnosis and treatment, which is a matter of the protection of privacy and hardly falls into trade secret. A doctor's diagnosis and routine treatment of diseases are in public domain and are not trade secret. Meanwhile, the private hospital failed to prove that their so-called emergency training and medical programs maintain specific technology or business secrets that can be regarded as trade secrets. Besides, the doctor's job in the new medical institution was to make use of his own basic vocational skills to practice medicine. Finally, the Court found that the doctor did not belong to other personnel who may bear confidentiality obligations as well, and was therefore not an eligible party to the Non-Competition Agreement, as a result, the doctor shall not be obliged to pay the damage for breach of non-competition obligation.

2. The Court ruled that the extension of the probationary period shall be invalid, even if it was agreed by both the company and the employee and did not exceed the maximum period allowed by law

- **Facts**

In this case, the employment contract signed by the employee and the company included a contract term of 3 years and a probationary period of 3 months. During the probationary period, the company and the employee negotiated and agreed to extend the probationary period to 6 months. Later, the company terminated the employment relationship with the employee on the ground that the employee did not pass the probation. The employee then initiated labor arbitration and further brought the case to the Court, contesting the validity of the extension of probationary period, and claiming from the company the damage for wrongful termination of the employment contract.

- **Judge's Viewpoint**

It has been debated in judicial practice regarding whether the agreement on extension of probationary period is valid when the extended probationary period does not exceed the maximum period allowed by *Labor Contract Law*. Some held that since the parties have reached a mutual agreement on the extension of probationary period and if the extended period does not exceed the limit set by law, the mutual agreement shall be respected and recognized as lawful and effective, while others held that the agreement between the employer and employee on extension of probationary period should be found invalid as it is a violation of the mandatory provisions of the law, regardless of whether or not it exceeds the statutory maximum period.

In this particular case, the term of the employee's employment contract was 3 years, the preliminary agreed probationary period was 3 months, and the probation period was extended into 6 months agreed by both parties. The total probation period was within the maximum period set by *Labor Contract Law*, but the People's Court of Baoshan District in Shanghai reasoned that, Article 19 of the *Labor Contract Law* stipulates that the same employer and the same employee may only agree on probationary period for one time, and the reason why the law puts strict limits on the agreement of the probationary period is not only because the length and existence of the probationary period are important factors for employees to consider for employment, but also because along with the establishment of the employment relationship, there is a personal affiliation relationship between the employee and the employer, as such if the employer is granted the right to negotiate with the employee on the probationary period for a second time, it is very likely that the interests of the employee could be harmed. In this case, even if the extended period did not exceed the maximum period allowed by law, the extension of probationary period to 6 months is deemed to establish the second probationary period and shall therefore be invalid.

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 Labor & Employment PRC Firms in China and Patrick Gu was recommended as the leading lawyer 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 Labor & Employment 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
- In 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 China section of the 2023 edition of The Legal 500

Contact us

Patrick Gu
Tel: +86 21 3135 8722
patrick.gu@llinkslaw.com

If you do not wish to receive this kind of publication sent by Llinks, please contact us.
E-mail: Publication@llinkslaw.com
www.llinkslaw.com