Llinks Legal Alert – Labor & Employment Law

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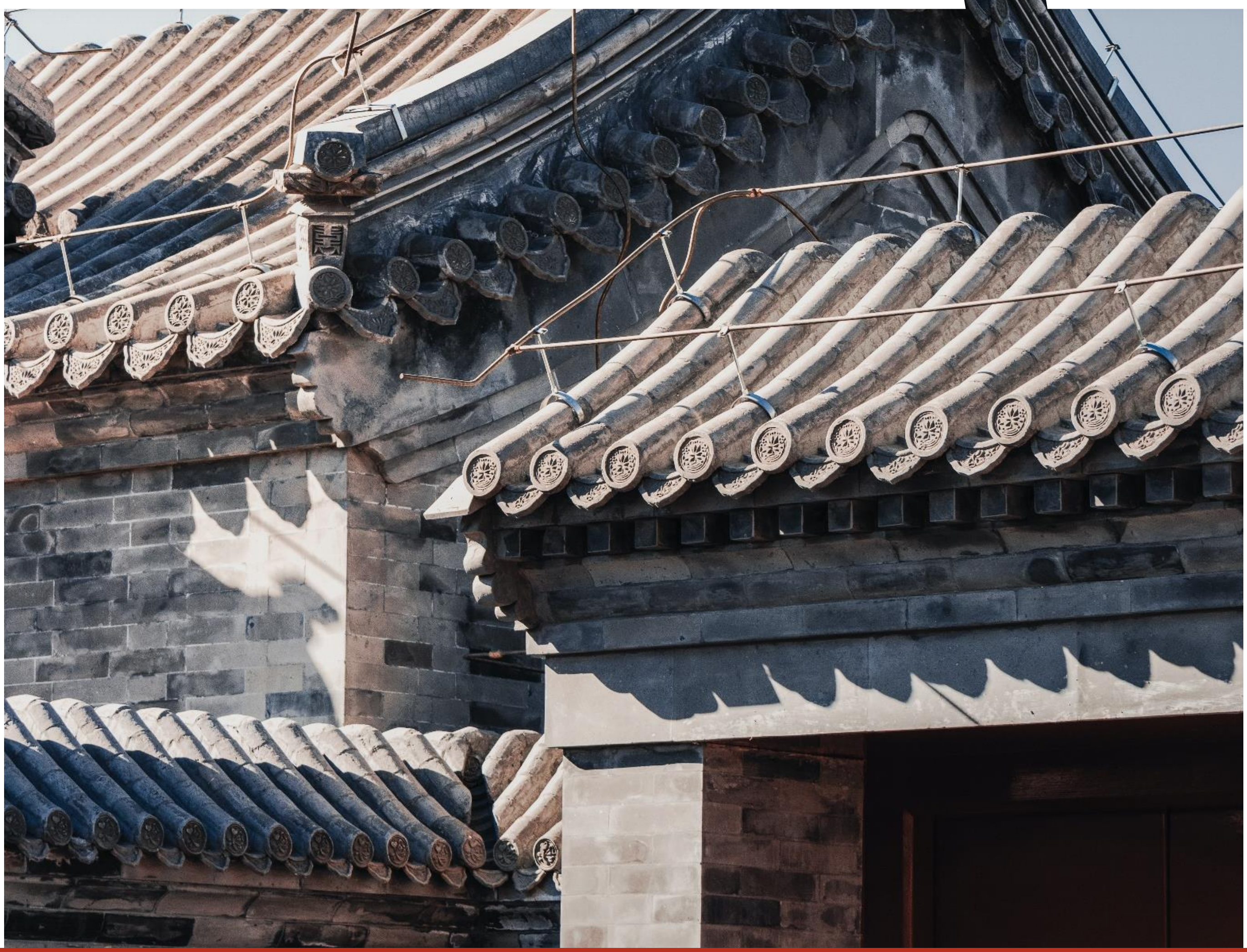

Shanghai · Beijing · Shenzhen · Hong Kong · London

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Spotlight on News

1. **The U.S. Federal Trade Commission issued a final rule on non-compete clause, banning the application of most non-compete agreements.**

On April 23, 2024, the US Federal Trade Commission ("**FTC**") introduced its expansive final rule on non-compete clause ("**Final Rule**"), which will come into effect on September 4, 2024. The Final Rule has retroactive effect, signifying that most non-compete agreements between workers and employers in the U.S. will be no longer enforceable.

According to the Final Rule, the scope of worker is expanded to natural persons such as an employee, independent contractor, extern, volunteer, apprentice, or a sole proprietor who provides a service to a person, regardless of whether they are compensated for their services. But "worker" does not include a franchisee in the context of a franchisee-franchisor relationship. The non-compete clause, on the other hand, is defined as an employment term or condition that prohibits a worker from (1) seeking or accepting work in the United States with a different employer or (2) operating a business in the United States, after the conclusion of the worker's employment.

After the Final Rule takes effect, employers will be responsible for issuing clear notice to workers that any non-compete clauses previously agreed upon will no longer hold legal enforceability, and that employers will be unable to enforce such clauses. However, non-compete clauses entered into with "senior executives" before the effective date of the Final Rule will remain enforceable. A "senior executive" is defined as a worker who holds a "policy-making position" and earned at least $151,164 in annual compensation in the preceding year.

The FTC believes that non-compete clauses inhibit effective matchings between employers and employees, adversely affect competitive conditions in labor markets, and restrict individuals' economic freedom. The issuance of Final Rule not only demonstrates the determination of the United States federal government to reduce the employment restrictions imposed by enterprises on workers, but also highlights its fundamental stance on fostering market competition and advancing economic freedom.

2. Beijing and Shanghai have issued opinions on the adjudication and trial of labor disputes, unifying the standards for the application of the law in labor dispute cases.

On April 30, 2024, the Beijing High People's Court and the Beijing Labor and Personnel Dispute Arbitration Commission jointly issued a notice on the publication of the *Answers of the Beijing High People's Court and the Beijing Labor and Personnel Dispute Arbitration Commission to Questions on the Adjudication of Labor Dispute Cases (I)* ("**Notice**"), which takes effect on the date of publication. Simultaneously, the *Minutes of the Seminar of the Beijing High People's Court and the Beijing Labor Dispute Arbitration Commission on the Application of Laws in Labor Dispute Cases* and other documents were abolished. The Notice addresses many common and challenging issues encountered in practice, clarifying the adjudication standards and providing guidance. For instance, Article 23 of the Notice clarifies determination of labor relationship for foreigners and residents from Hong Kong, Macau, and Taiwan who have not obtained a Foreigner's Employment Permit or an Employment Permit for Taiwan, Hong Kong, and Macau Residents. Article 41 specifies in detail the starting and ending times for the payment of the double wages, the method of calculation, and the statute of limitations for arbitration. Additionally, Article 75 clarifies the approach for reviewing whether the arbitration commission or the court should uphold the continuation of the employment contract when the employer unlawfully terminates the employment contract.

To optimize source of complaints governance, standardize legal application standards for labor dispute adjudication and trial, and regulate adjudication discretion, on April 26, 2024, the Shanghai Second Intermediate People's Court and the Shanghai Bureau of Human Resources and Social Security co-signed the *Several Opinions on Strengthening the Governance of the Source of Complaints and the Convergence of the Adjudication and the Trial* ("**the Opinions**"), Concurrently, they released ten typical cases of labor disputes. Among these, Case No.2 particularly pointed out that the "fragmented" weekend work qualifies as overtime, mandating employers to pay overtime wages if such work meets the criteria of completing specific tasks outside legal working hours.

Legislation Updates

1. The State Council officially announced the *Regulations on Disciplinary Measures for Managerial Personnel in State-owned Enterprises*, which will take effect on September 1, 2024.

On April 26, 2024, the State Council held an executive meeting to review and approve the *Draft of Regulations on Disciplinary Measures for Managerial Personnel in State-owned Enterprises*. On May 28, 2024, the *Regulations on Disciplinary Measures for Managerial Personnel in State-owned Enterprises* (the **"Regulations"**) were officially released and will take effect on September 1, 2024.

The Regulations adopt the definition of managerial personnel in state-owned enterprises as stipulated in the *Implementation Regulations of the Supervision Law*, clarifying that personnel performing organizational, leadership, management or supervisory duties in wholly state-owned enterprises, wholly owned subsidiaries by state-owned enterprises, or companies in which the state has a stake, whether controlling or non-controlling, and their subsidiaries, are considered managerial personnel as set out in the regulations.

Regarding the application of disciplinary measures, the Regulations align with the *Law on Administrative Disciplinary Measures for Public Officials* and further specify the types and durations of disciplinary measures for managerial personnel. The most severe disciplinary measures include removal of position or dismissal. Additionally, the Regulations stipulate that in cases where the circumstances are complex, involve a wide range of people, or have significant negative effects, the supervisory agencies with management authorities may be consulted to handle the disciplinary cases, providing a legal basis for procedural coordination with the supervisory authorities at the statutory level.

2. The Ministry of Finance and the State Taxation Administration issued the *Announcement on the Individual Income Tax Policies Related to Equity Incentives of Listed Companies*.

On April 17, 2024, the Ministry of Finance and the State Taxation Administration issued the *Announcement on the Individual Income Tax Policies Related to Equity Incentives of Listed Companies* ("**Announcement**"). Effective from January 1, 2024, to December 31, 2027. The Announcement concurrently abolishes Concurrently, Article 2, Paragraph 1 of the *Notice of the Ministry of Finance and the State Taxation Administration on Improving the Income Tax Policies for Equity Incentives and Technology Investments* (Cai Shui [2016] No. 101), and the *Notice of the Ministry of Finance* and the *State Taxation Administration on the Equity Incentive Deferred Tax Payment Policy in the Core Area (Haidian Park) of the Zhongguancun National Independent Innovation Demonstration Zone* (Cai Shui [2022] No. 16).

The Announcement elaborates on individual income tax policies related to equity incentives for listed companies. According to the Announcement, individuals receiving stock options, restricted stocks, and equity reward from domestic listed companies must pay personal income tax within 36 months from the date of exercising the options. If the taxpayer leaves his or her job during this period, all the tax must be paid before departing.

3. Beijing issued the ***Notice on Launching the Pilot Program of Direct Settlement for Cross-Provincial Medical Treatment for Work-Related Injury Insurance in Beijing*****.**

On March 29, 2024, the Beijing Municipal Bureau of Human Resources and Social Security, the Beijing Municipal Bureau of Finance and the Beijing Municipal Commission of Health jointly issued the *Notice on Launching the Pilot Program of Direct Settlement for Cross-Provincial Medical Treatment for Work-Related Injury Insurance in Beijing* ("**Notice**"), effective from April 1, 2024. Beijing officially launched the pilot activity of direct settlement for cross-provincial medical treatment for work-related injuries insurance, with the pilot period set at one year.

According to the "Notice," three categories of insured workers with work-related injuries, including those who reside long-term in a different location, those who work regularly in a different location, and those who are referred or transferred to a different location for medical treatment, can apply for direct settlement of cross-province medical treatment after completing the work injury identification, confirmation of work-related injury recurrence, approval of work-related injury rehabilitation application, or confirmation of assistive device allocation. Before settlement, register for the record of cross-province medical treatment is necessary. The registration validity period for direct settlement of medical treatment for those residing long-term or working regularly in a different location is one year, while for those filing for referral to a hospital in a different place, it is six months. Currently, several work-related injury agreement institutions are already conducting pilot programs.

Case Study

1. The Supreme People's Court issued a typical case, concluding that if an employee's spouse invests in or operates a company competing with the employee's employer, it constitutes violation of non-compete clauses.

- **Facts**

On July 31, 2018, Mr. Zhang joined a sports company as the general manager of the teaching research and development center, where he was responsible for teaching and researching management. Upon his employment, Mr. Zhang and the sports company signed a non-compete agreement, stipulating that he would refrain from engaging in activities that violate non-compete obligations during both his employment period and a two-year non-compete period after leaving the company. The agreement also mandated economic compensation from the sports company to Mr. Zhang during the non-compete period, with Mr. Zhang liable to pay liquidated damages for any breach. The liquidated damages were set at 10 times Mr. Zhang's income received from the sports company and its related entities in the 12 months preceding termination of their employment relationship.

Mr. Zhang resigned from his position on July 31, 2021, and received five months' economic compensation for non-compete from the sports company. In December 2021, Mr. Zhang's wife became an investor (holding 95% of the shares) in a company that competes with the sports company. An affiliate of this company, established by Mr. Zhang's wife, paid social insurance for Mr. Zhang.

The sports company alleged that Mr. Zhang breached the non-compete agreement by his wife's involvement in the competing business and demanded the return of the economic compensation and sought liquidated damages. The sports company initiated arbitration proceedings with a Labor and Personnel Dispute Arbitration Committee. The committee ruled in favor of the sports company, ordering Mr. Zhang to return the economic compensation and pay liquidated damages. Mr. Zhang brought the case to the People's Court, seeking exemption from refunding the economic compensation and paying liquidated damages.

- **Judge's Viewpoint**

The court determined that the violation of the non-compete agreement was particularly insidious, given that the employee, in his capacity as a senior manager, orchestrated the breach through his spouse's involvement in a competing enterprise. In this instance, Mr. Zhang held the position of the general manager of the teaching and research center, where he wielded significant management authority and decision-making power over the sports company's operations. Thus, he was obligated to adhere to the terms of the non-compete agreement. Furthermore, Mr. Zhang's wife's investment in a competing company subjected her to the same non-compete restrictions, considering her relationship with Mr. Zhang and their shared economic interests. The court noted that the majority of his spouse's investment occurred after Mr. Zhang's departure from the sports company. Consequently, the court concluded that Mr. Zhang breached the non-compete agreement. As a result, he was ordered to pay liquidated damages for the breach and return the economic compensation received during the non-compete period to the sports company.

2. The Shenzhen Intermediate People's Court released a typical case stating that even if an employee agrees with the company beforehand that the company has the right not to pay year-end bonuses, if the termination is unlawful, the company cannot refuse to pay based on the employee's signed confirmation only.

- **Facts**

Mr. Zhang joined A company in September 2019 as the product manager. In April 2022, A company notified Mr. Zhang of the termination of the employment on the grounds that Mr. Zhang was incompetent to perform his job. Mr. Zhang contested the termination, alleging that it was unlawful. He subsequently pursued arbitration and legal action, seeking compensation for the illegal termination of his employment, as well as the year-end bonus during his employment. A company argued that the Salary Confirmation Letter signed by Mr. Zhang explicitly stipulated that if an employee terminates the employment contract with the company for any reason, the company reserves the right to withhold the payment of the year-end bonus, and therefore refused to pay Mr. Zhang his year-end bonus.

- **Judge's Viewpoint**

The court ruled that employers have the prerogative to negotiate conditions and criteria for year-end bonus payments with their employees. Whether a departing employee is entitled to a year-end bonus should be determined in accordance with the principles of objectivity, truthfulness, reasonableness and lawfulness, with due consideration given to the reasons for the worker's departure, his or her work performance and other relevant factors. If the termination of the employment contract is not due to the fault of the employee or voluntary resignation, the employer is obligated to pay the year-end bonus unless they can prove the employee does not meet the conditions for the year-end bonus. In this case, although both parties agreed that A company could withhold the year-end bonus if an employee terminates the employment contract with the company for any reason, the termination here resulted from the company's unlawful actions, not the fault of the employee or their voluntary resignation. Since there was no evidence that Mr. Zhang's performance failed to meet bonus criteria, A company should have paid him the year-end bonus.

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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