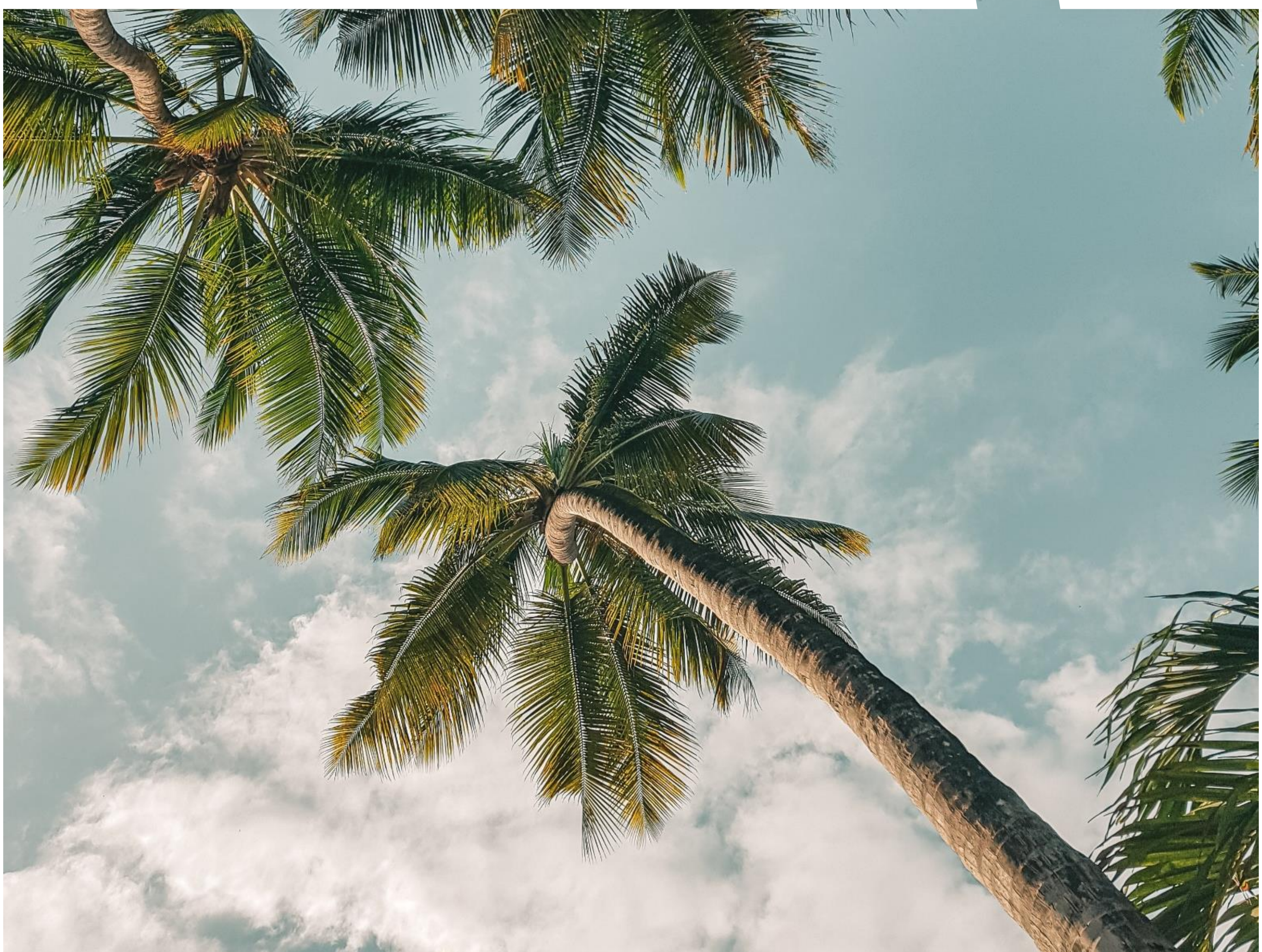
Llinks Legal Alert – Labor & Employment Law

July 2024



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Spotlight on News

1. CPC Central Committee: Orderly implement the gradual postponement of statutory retirement age.

On July 21, 2024, The Central Committee of the Communist Party of China ("**CPC**") issued the *Decision on Further Comprehensive Deepening of Reform and Promoting Chinese Modernization* (the "**Decision**"). Part XI of the Decision emphasizes the need to actively address population aging by steadily and orderly promoting the gradual delay of the statutory retirement age, based on voluntary and flexible principles. The Decision also states that the reform tasks proposed should be completed by the 80th anniversary of the founding of the People's Republic of China in 2029.

According to *the Interim Measures of the State Council on the Resettlement of Old, Infirm, Ill and Disabled Cadres* and the *Interim Measures of the State Council on the Retirement and Retirement of Workers* issued in 1978, the retirement age in China is 60 for men, 55 for female cadres and 50 for female workers. The *Opinions on Deepening the Reform of the Internal Personnel, Labor and Distribution Systems of State-owned Enterprises* issued in 2001 adjusted the retirement age for female employees to 55 for management personnel and 50 for non-management employees.

In recent years, relevant policies on delaying retirement ages have been continuously promoted. In March 2021, the State Council stated in the *Outline of the 14th Five-Year Plan for National Economic and Social Development and Long-Range Objectives Through 2035* that the postponement of the statutory retirement age would be gradually implemented with "small-step adjustments, flexible implementation, classified advancement, and overall coordination." The *China Pension Development Report 2023,* published by the Social Security Laboratory of the Chinese Academy of Social Sciences, indicated that the policy of postponed retirement is imminent, with 65 years possibly being the finally adjusted statutory retirement age. The adjustment of the statutory retirement age and any corresponding changes to the minimum social security contributions period, currently set at 15 years, will depend on the subsequent implementation rules.

2. Shanghai, Guangzhou and Shenzhen released 2023 average wage, raising the cap for calculating statutory severance pay to RMB 36,921 per month, RMB 39,579.50 per month and RMB 43,660 per month in the locality.

On July 31, 2024, the Shanghai Municipal Human Resources and Social Security Bureau released the the average salary of employees in full coverage urban employers in 2023, which is RMB 12,307 per month. On June 24, 2024 and June 30, 2024, Guangzhou Municipal Bureau of Statistics and Shenzhen Municipal Bureau of Statistics also released the 2023 Annual Average Wage for Employees in Urban Non-private Legal Entities in Guangzhou and Shenzhen respectively. According to the statistics, the average wage for employees in Guangzhou is RMB 158,318 per year, and in Shenzhen, it is RMB 174,640 per year.

According to local rules of Shanghai, Guangzhou and Shenzhen, the average monthly wage data for employees in full coverage urban employers in Shanghai and the average monthly wage for employees in service in urban non-private legal entities in Guangzhou and Shenzhen are used to determine the cap for the monthly salary for calculating statutory severance pay under *Labor Contract Law*. Effective immediately, if an employee's average monthly income prior to termination respectively exceeds RMB 36,921 in Shanghai (calculated as RMB 12,307 multiplied by 3), RMB 39,579.50 in Guangzhou (calculated as RMB 158,318 divided by 12 and multiplied by 3), or RMB 43,660 in Shenzhen (calculated as RMB 174,640 divided by 12 and multiplied by 3), the severance pay should be calculated based on and capped at these respective figures.

Legislation Updates

1. The *Employment Promotion Regulations of Zhejiang Province* Officially Implemented on July 1, 2024.

On May 31, 2024, the Standing Committee of the 14th People's Congress of Zhejiang Province issued the *Employment Promotion Regulations of Zhejiang Province* (the "**Regulations**"), which were formally implemented in July 1, 2024.

Chapter VIII of the Regulations, titled "Employment Rights and Interests and Protection," explicitly prohibits discrimination in employment on the basis of ethnicity, race, gender and any other differences, and emphasizes the protection of the rights and interests of female workers. Additionally, the Regulations have made significant progress in linking vocational education and employment. Article 64 stipulates that graduates of vocational schools shall enjoy equal opportunities with graduates of regular (non-vocational) schools at the same level in terms of recruitment to enterprises and salary grading. Furthermore, intermediate, advanced, and technician classes (including preparatory technician classes) in technical schools shall be treated equivalent to graduates of technical secondary school, colleges for professional training, and bachelor's degree holders, respectively, in terms of recruitment and salary grading, shall be entitled to the same policies.

2. SASAC issued the *Guiding Opinions on the High-Standard Implementation of Social Responsibility by State-Owned Central Enterprises in the New Era*, emphasizing ESG governing capabilities.

On June 4, 2024, the State-owned Assets Supervision and Administration Commission of the State Council ("**SASAC**") issued the *Guiding Opinions on the High-Standard Implementation of Social Responsibility by State-Owned Central Enterprises in the New Era* ("**Opinions**"). The Opinions further clarify the objectives and set out specific requirements for state-owned central enterprises (**"Central Enterprises"**) to fulfill their social responsibilities in the new era. The Opinions require that by 2025, the social responsibility work system of Central Enterprises should be more standardized and mature, with deeper integration of social responsibility concepts into their operation and management. By 2030, the functional value of Central Enterprises is expected to be significantly elevated to better serve the economic and social development and improve people's life.

Notably, the Opinions emphasizes strengthening Environmental, Social, and Governance ("**ESG**") work. The Opinions require integrating ESG efforts into the overall management of social responsibility, with a particular focus on enhancing ESG governance capabilities of listed Central Enterprises and strengthening ESG governance by overseas operating institutions of Central Enterprises. This marks the first time the ESG concept has been included in the scope of social responsibility for Central Enterprises. This inclusion is expected to enhance the value recognition of Central Enterprises in the capital market, facilitate better integration of Chinese enterprises into the international capital market, and continuously improve their competitiveness in the international area.

Case Study

1. **If a labor contract is renewed with the employer’s affiliated company for reasons other than the employee’s personal reasons, the employee’s years of service and contract signing shall be continuously calculated.**

- **Facts**

On April 18, 2016, Mr. Tian joined a technical company (“**Company**”) as a Java development supervisor, with a labor contract term from April 18, 2016 to April 17, 2018. After this contract, Mr. Tian signed a second labor contract with the Beijing branch of the Company (“**Beijing Branch**”) as a deputy director, with a term from April 18, 2018 to April 17, 2020. On April 14, 2020, the Beijing Branch sent Mr. Tian a Notice of Termination of Labor Contract, unilaterally deciding not to renew the contract upon its expiration on April 17, 2020. Mr. Tian applied for labor arbitration, claiming compensation for illegal termination of the labor contract and other payments. The arbitration award denied his claim leading Mr. Tian to file a lawsuit. The case was finalized after the first instance and second instance procedures.

- **Judge’s Viewpoint**

At the first instance, Beijing Chaoyang District People’s Court held that although the Company and its Beijing Branch separately signed labor contracts with Mr. Tian, both companies had the same legal representative. Evidence, such as the DingTalk records submitted by Mr. Tian, indicated that the Beijing branch recognized the continuity of Mr. Tian's years of service with the Company, and the two companies were affiliated. During Mr. Tian’s tenure, he signed a labor contract with the Beijing branch not due to his personal reasons, meeting the conditions for consecutively signing two fixed-term labor contracts. According to *Labor Contract Law*, Mr. Tian qualified for an open-ended labor contract. The Beijing Branch’s email notification to Mr. Tian to terminate the labor contract constituted an unlawful termination. At the second instance, Beijing No. 3 Intermediate People’s Court affirmed the first instance court’s determination that the Company and Beijing Branch were affiliated. It held that Mr. Tian met the conditions for consecutively signing two fixed-term labor contracts, thus requiring an open-ended labor contract from the employer.

The Beijing Chaoyang District People’s Court highlighted that the case’s typical significance lies in the employer’s practice of alternately changing the signing party of labor contracts through its affiliates, which constitutes a circumvention of Article 14 of *Labor Contract Law*, which stipulates that under such situation employers shall sign open-ended labor contracts with employees. Therefore, the years of service and the number of fixed-term labor contracts shall be counted consecutively.

2. Even after signing a "no dispute between the two parties" separation certificate, the employee can still claim the unpaid performance wages from the employer.

- **Facts**

Mr. Min had a labor relationship with Company A from February 24, 2017, to May 13, 2021. On April 27, 2021, Company A issued a certificate of termination of the labor contract for Mr. Min, which stated: "The departure was due to the employee's personal reasons and after mutual consultation, the labor contract has been terminated on May 13, 2021. All matters concerning wages and compensation, remaining leaves, various benefits, and other issues (including but not limited to the above-mentioned issues) have been fully settled, and there are no further disputes between the parties."

After the labor relationship with Company A was ended on May 13, 2021, Mr. Min received wages from Company A on May 26, 2021. Mr. Min believed that his wages were not fully paid and, based on WeChat chat records with relevant personnel from Company A, his attendance records, and the Employee Compensation Management Measures of Company A, claimed that Company A still owed him performance wages, overtime wages, and unpaid annual leave wages. Mr. Min applied for labor arbitration with the Beijing Shunyi District Labor and Personnel Dispute Arbitration Committee, requesting payment of these wages. The arbitration committee rejected all of Mr. Min's claims, prompting Mr. Min to file a lawsuit.

- **Judge's Viewpoint**

Beijing Shunyi District People's Court held that, although Company A argued that the certificate of termination of labor contract indicated that all monetary debts were settled, the evidence showed that Mr. Min's wages and other monetary were not settled at the time of the signing of the certificate. Given the actual situation, it was difficult for the court to conclude that there was no dispute between the parties regarding wages. The court then ordered Company A to pay Mr. Min's performance wage and annual leave wage.

Beijing Shunyi District People's Court emphasized that, typically, a separation certificate should only contain basic information about the performance of the labor contract. However, in practice, these certificates often include clauses such as "no further disputes between the parties," or other unfavorable content for the employee, which can pressure the employee into relinquishing their rights. These certificates are usually unilaterally formatted by the employer, who often requires the employee to sign them. If the employee does not sign, they may not promptly obtain the separation certificate, hindering their ability to start new employment.

Weighing the circumstances, signing the separation certificate does not indicate employees' intention to relinquish or waive civil rights. This differs from documents like the Mutual Agreement to Terminate the Labor Contract, which are signed and confirmed by both parties, and directly prove an agreement. An employee's signature on a separation certificate cannot be automatically considered consent to all its content. If wages or other payments are unsettled and no consensus has been reached, the employer should fulfill its obligation to pay, rather than evade responsibility unilaterally formatted documents.

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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