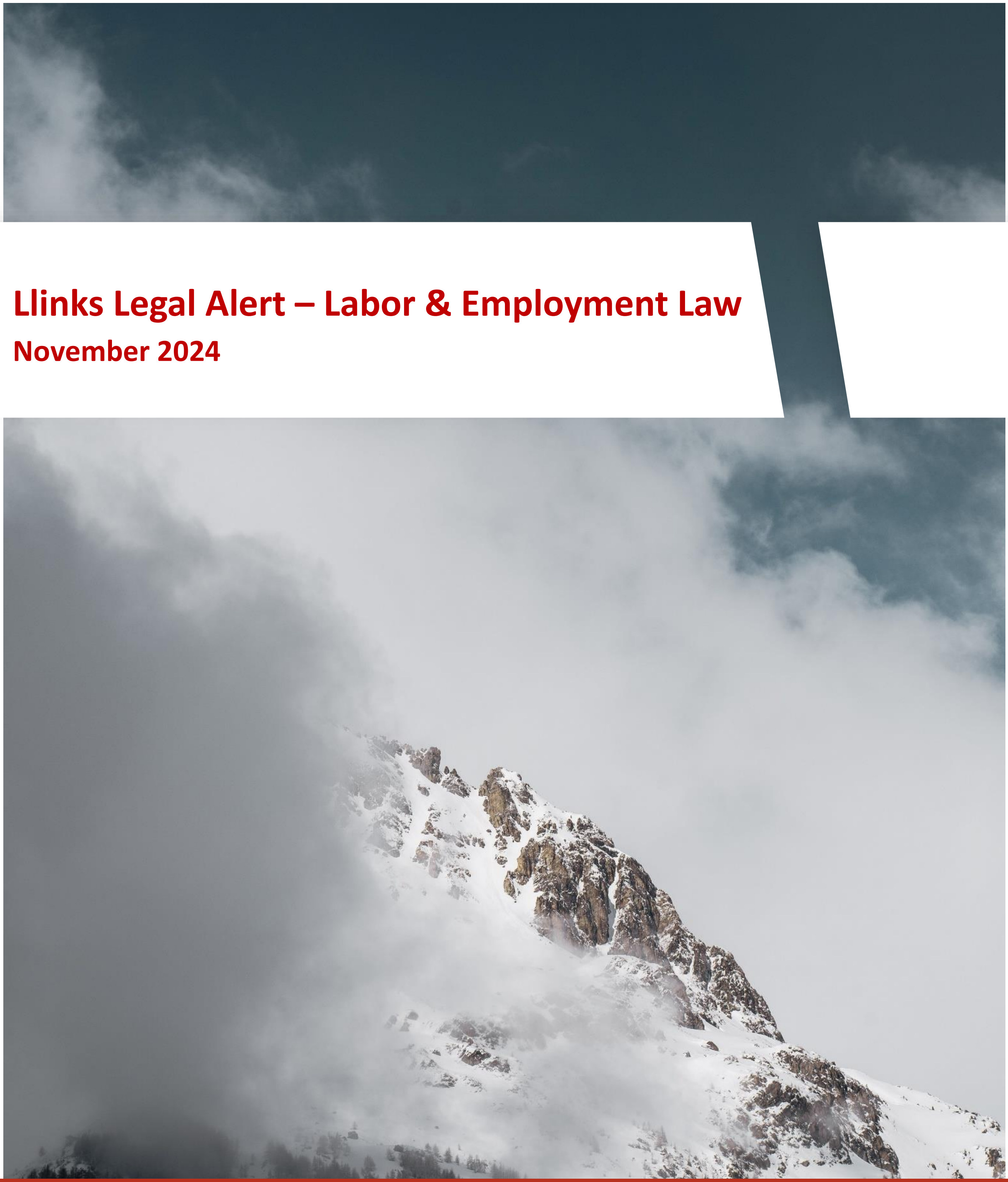
Llinks Legal Alert – Labor & Employment Law

November 2024



Shanghai · Beijing · Shenzhen · Hong Kong · London

LLINKS Law Offices
通力律师事务所

Contents

Spotlight on News

1. State Council: *Decision on Amending the Measures for National Annual Holidays and Commemorative Days.*

On November 10, 2024, the State Council issued the *Decision on Amending the Measures for National Annual Holidays and Commemorative Days* ("**Decision**"), which was approved at the 45th executive meeting of the State Council on November 8, 2024, and will come into effect on January 1, 2025.

The Decision specifies the addition of two days of statutory public holidays for all citizens: Lunar New Year's Eve and May 2nd. With this adjustment, the statutory public holidays during the Spring Festival will increase to four days (Lunar New Year's Eve, and the first to third days of the Lunar New Year), while Labor Day holidays will increase to two days (May 1 and May 2). This marks the first adjustment to the holiday schedule and arrangements in 11 years since 2013. Furthermore, the Decision clarifies that public holidays for all citizens can be arranged in conjunction with compensatory leave and paid annual leave to form extended holiday periods. Generally, excluding special circumstances, consecutive workdays before or after statutory public holidays will not exceed six days.

The increase in statutory public holidays reduces the annual total workdays from 250 to 248. However, as the calculation of monthly salary days excludes only rest days and is unrelated to statutory public holidays, the monthly salary days remain unchanged at 21.75 days. Consequently, there are no significant changes to the bases for calculating daily/hourly wages, overtime pay under standard working hours, or compensation for unused annual leave.

It is important to note that the increased number of statutory public holidays directly affects matters such as the total workdays within a cycle under comprehensive working hour system and the conversion of medical leave days. With the annual standard working days reduced from 250 to 248, the monthly working days decrease from 20.83 to 20.67, potentially increasing employers' overtime pay costs under comprehensive working hour systems. Furthermore, in Shanghai, as medical treatment period is calculated based on prescribed monthly working hours, after the implementation of the Decision, 20.67 consecutive or cumulative working days of sick leave will be equivalent to one month of medical treatment period, excluding statutory public holidays and rest days.

Legislation Updates

1. **General Office of the All-China Federation of Trade Unions: *Guidelines for Trade Union Work in Platform Enterprises.***

On October 11, 2024, the General Office of the All-China Federation of Trade Unions issued the *Guidelines for Trade Union Work in Platform Enterprises* ("**Guidelines**"). The Guidelines provide regulations on trade union organization, key tasks for platform enterprise trade unions, and the responsibilities of higher-level trade unions, aiming to enhance the institutional framework for trade unions in platform enterprises.

According to the Guidelines, platform enterprises refer to companies that provide services such as delivery, transportation, ride-hailing, and household services through internet platforms. Trade unions in such platform enterprises are required to establish committees, including a trade union committee, a finance review committee, a women's committee, and a labor law supervision committee, in accordance with the law. The platform enterprise trade unions shall also apply for a trade union legal entity certificate, open a dedicated bank account for union funds, allocate sufficient funds to the union in a timely manner, and provide necessary facilities and venues for union activities.

The Guidelines outline ten key tasks for platform enterprise trade unions, including strengthening ideological and political guidance, encouraging workers to join unions, providing rights protection services, conducting diverse training programs, organizing labor competitions and grassroots innovation activities, promoting the spirit of model workers and craftsmanship, and fostering exemplary workers and craftsmen. The release and implementation of the Guidelines signify a step toward institutionalizing and standardizing trade union work in platform enterprises, contributing to the protection of worker' rights and the sustainable development of the platform economy.

2. **General Office of the All-China Federation of Trade Unions, the Ministry of Human Resources and Social Security, the China Enterprise Confederation/China Entrepreneurs Association, and the All-China Federation of Industry and Commerce: *Guidelines for Consultation on the Rights of Workers in New Employment Forms.***

On November 6, 2024, the General Office of the All-China Federation of Trade Unions, the Ministry of Human Resources and Social Security, the China Enterprise Confederation/China Entrepreneurs Association, and the All-China Federation of Industry and Commerce jointly issued the *Guidelines for Consultation on the Rights of Workers in New Employment Form*s ("**Guidelines**"). The Guidelines aim to guide platform enterprises to consider opinions from trade unions and worker representatives when formulating rules and algorithms affecting workers' rights, standardize consultation procedures, enhance negotiation effectiveness, and promote lawful labor practices and rights protection.

The Guidelines consist of 13 articles, including encouraging active consultations between enterprises, trade unions, and worker representatives. Consultations shall be conducted by representatives from both parties in the form of consultative meetings, such as collective bargaining, coordination meetings and informal discussions. The Guidelines specify limit on the number of representatives from both parties, the compositional structure, and selection methods.

The Guidelines further emphasize that representatives from both parties shall widely solicit the concerns of all parties before consultative meetings, determine the topics for consultation in a focused manner based on industry-specific conditions and provide relevant information materials, and include common topics such as dispatching rules, insurance protection, remuneration rules and skills training involved in the consultations between distribution enterprises, travel and transportation enterprises and domestic service enterprises. The outcomes by consultative meetings such as draft collective agreements, meeting minutes, or memorandums must be signed by the chief representatives from both parties and disclosed to all affected workers within ten days.

Case Study

1. Shenzhen Intermediate People's Court: Former employee used company's research formula to start a business, court added client company as a third party, and judicial expertise confirmed infringement of trade secrets.

- **Facts**

Employee Huang, a former technical director at Company A, had access to Company A's optical adhesive formula developed for a specific client. After resigning in 2016, Huang established Company B. Starting in 2018, the client abruptly ceased purchasing optical adhesive from Company A and began sourcing a similar product from Company B at a significantly lower price. Company A subsequently filed a lawsuit against Huang and Company B for misappropriating trade secrets, seeking an injunction and compensation for damages.

- **Judge’s Viewpoint**

The Shenzhen Intermediate People's Court ruled that the case involved optical adhesives, which are highly customized chemical product tailored to client requirements, and not commercially available. Thus, Company A could not directly obtain Company B's product as evidence for evaluation. To address this challenge, the court allowed the addition of the client company as a third party to the case and ordered evidence preservation of the optical adhesives stored at the client's facility. Samples from the client's warehouse were collected under judicial supervision, and a comparative analysis by an expert agency confirmed that the optical adhesive formulas used by Company A and Company B were substantially identical. Further, Company A obtained access to Huang's work computer via a password provided during trial, revealing evidence that Huang had indeed accessed the optical adhesive formula, contrary to Huang's earlier denial.

After review, the Supreme People's Court upheld the findings, concluding that Huang and Company B had infringed on Company A's trade secrets. The appeal by Huang and Company B was dismissed, and the original judgment was affirmed.

2. Shanghai No. 2 Intermediate People's Court: Employer cannot refuse overtime pay solely due to lack of approval if employee proves overtime was arranged or necessary for work.

- **Facts**

Employee Wang joined a company as a senior engineer in December 2021. The labor contract stipulated that overtime required prior approval under company policies, and any unapproved overtime would be considered a personal act, exempting the company from paying overtime wages. Between March and October 2022, email exchanges between Wang's supervisor and the company's legal representative Huang confirmed that Wang had worked 30 overtime days during this period. However, in May 2023, the company decided to reduce Wang's workload and salary by half, and in July 2023, Wang was notified to cease working and await further instructions.

On August 8, 2023, Wang terminated the labor contract, citing wage arrears, malicious wage deductions, and forced suspension. Wang then filed for labor arbitration, seeking compensation for wage differences, overtime pay, and severance. The arbitration tribunal rejected Wang's overtime claim, prompting Wang to sue in court, submitting the October 26, 2022, email as evidence of Wang's overtime.

- **Judge's Viewpoint**

The first-instance court ruled against Wang's overtime claim, citing lack of company approval or acknowledgment. However, the Shanghai No. 2 Intermediate People's Court overturned this, emphasizing that overtime pay is compensation for labor provided beyond statutory working hours. In order to avoid unnecessary prolongation of working hours and undue increase in the cost of employment of the enterprise, the employer, through contracts or policies, explicitly stipulates that the overtime work of the employees shall be subject to the approval and consent of the supervisors, and that the policies which are determined through the discussion of the democratic procedures and have been notified to the employees, shall serve as the basis of the handling of the disputes on this type of overtime work. The management of overtime matters by the employer is a manifestation of the exercise of the enterprise's right of independent management, but the employer shall not take advantage of its dominant position to deliberately reject normal overtime applications, deny the existence of overtime work, nor shall it formulate excessively harsh and unenforceable provisions on overtime work and rest, and circumvent the obligation to pay overtime wages by nominally granting rest.

If there is sufficient evidence to prove that the employee has actually been arranged by the employer to work overtime, or has to extend the working hours due to work needs, the employer's denial of the existence of overtime work on the basis of lack of approval and consent is generally not accepted. In addition, the employer's rule that compensative leave for overtime must be used in the same month or they expire is also too harsh. In this case, the supervisor of Wang's department made statistics on Wang's overtime work and reported it to the company's legal representative, which should be regarded as a confirmation of the fact of overtime work by the management. Combined with the chat records with company's HR personnel which confirmed that Wang still had 31 days of compensative leave for overtime, it can be confirmed that Wang's overtime did exist. In the end, the Shanghai No. 2 Intermediate People's Court ordered the company to pay Wang over 60,000 yuan for overtime on statutory holidays and rest days.

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 2025, Patrick Gu was recommended in Regulatory/Compliance, Labor and employment in the 2025 edition of The Legal 500
- 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

Contact us

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