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好士打

中国动态: 双语版 亚洲雇佣法: 2022年终回顾

第三十六期: 2022年下半年度

Asia Employment Law: 2022 Year-End Review

ISSUE 36: 2022 H2

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引言 Introduction

亚洲法律顾问与人力资源顾问的工作往往涉及多个司法辖区。准确把握雇佣相关法律发展情况既是重中之重又充满挑战。

为协助阁下获取最新法律动态，孖士打(Mayer Brown)发布电子期刊**亚洲雇佣法：年终回顾**，内容涵盖亚洲15个司法辖区，并将每半年更新。

在第三十六期中，我们将回顾并评点2022年下半年度雇佣法发展情况，同时列出一些2023年立法、咨询、政策及判例法方面的预期重大变革。

孖士打与亚洲地区15家律师事务所长期开展跨境合作，与对方律师建立了密切的工作关系，本刊正是这一努力的结果。

我们衷心希望本刊对阁下有所助益。

Asia's legal and human resources advisors are often required to function across multiple jurisdictions. Staying on top of employment-related legal developments is important but can be challenging.

To help keep you up to date, Mayer Brown has produced the **Asia Employment Law: Year-End Review**, an e-publication covering 15 jurisdictions in Asia.

In this thirty-sixth edition, we flag and comment on employment law developments during the second half of 2022 and highlight some of the major legislative, consultative, policy and case law changes to look out for in 2023.

This publication is a result of ongoing cross-border collaboration between 15 law firms across Asia with whose lawyers Mayer Brown has had the pleasure of working with closely for many years.

We hope you find this edition useful.

2022

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《关于在重点工程项目中大力实施以工代赈促进当地群众就业增收工作方案的通知》

2022年7月5日, 国务院办公厅转发国家发展改革委《关于在重点工程项目中大力实施以工代赈促进当地群众就业增收的工作方案》(下称《方案》)。《方案》明确, 推动政府投资的重点工程项目实施以工代赈, 各政府部门要在平衡好建筑行业劳动合同制用工和以工代赈劳务用工之间关系的基础上, 尽可能多地通过实施以工代赈帮助当地群众就近务工实现就业增收。鼓励非政府投资的重点工程项目积极采取以工代赈方式扩大就业容量。相关部门要会同发展改革部门在国家层面列出适用以工代赈的重点工程项目, 分领域形成年度项目清单, 指导地方建立本地区适用以工代赈的项目清单, 实行动态管理。

《方案》同时在项目批复、设计、招投标、施工(实名制管理和劳务报酬发放)、项目竣工验收等环节对相关部门、相关地方人民政府、重点工程项目业主单位、施工单位和监理单位分别提出了相关要求。例如, 相关部门要在批复文件中对项目吸纳当地群众务工就业提出相关要求; 重点工程项目业主单位要在设计、招标投标过程中明确以工代赈用工及劳务报酬发放要求, 在工程服务合同中与施工单位约定相关责任义务; 项目建成后, 项目竣工验收单位会同相关部门、业主单位、施工单位和项目所在地县级人民政府对以工代赈实施情况的评价结果作为项目竣工验收、审计决算的重要参考。

[更多...](#)

Circular on the Work Plan of Vigorously Implementing Work-relief Programmes in Key Construction Projects to Promote the Employment and Increase the Income for Local People

On July 5th, 2022, the General Office of the State Council forwarded the Circular on the Work Plan of Vigorously Implementing Work-relief Programmes in Key Construction Projects to Promote the Employment and Increase the Income for Local People (the "Plan") issued by the National Development and Reform Commission. The Plan specifies that the governmental departments shall promote work-relief programmes in the key construction projects with government investment to help people to obtain local employment and increase their incomes as much as possible, subject to balancing such programmes and the employment contract system in the construction industry. Implementing work-relief programmes in the key construction projects with no government investment is also encouraged to expand employment capacity. Relevant authorities shall work with development and reform departments to list key projects for work-relief programmes at the national level, formulate annual project list by industries, guide the local governments to establish local projects list for work-relief programmes and implement dynamic management.

The Plan also imposes respective requirements on the competent authorities, the competent local governments, the owners of key construction projects, the contractors and the supervisors at various project phases relating to preliminary governmental approval, design, tendering, construction (real-name management and remuneration payment) and inspection upon completion. For example, the competent authorities should include the relevant requirements for absorbing local employment in the approval documents for a construction project; the owner of a key construction project should clarify requirements on work-relief programmes and remuneration payment at the design and tendering stages of such project and specify the relevant obligations and liabilities in the construction service contracts with contractors. Upon the completion of such project, the inspection institution should conduct evaluation on the situation of work-relief programmes with the relevant authorities, the project owner, the contractor and the government at the county level where the project is located, the result of which is an important consideration in the project completion acceptance and the final accounts audit.

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《关于加快落实一次性扩岗补助政策有关工作的通知》

2022年7月25日, 人力资源和社会保障部办公厅、教育部办公厅、财政部办公厅联合发布《关于加快落实一次性扩岗补助政策有关工作的通知》(下称《通知》)。《通知》规定对招用毕业时间为2022年1-12月且取得普通高等学校毕业证书的普通高校毕业生, 签订劳动合同, 并为其缴纳失业保险费1个月以上的企业, 可以按每招用1人不超过1500元的标准发放一次性扩岗补助。政策执行至2022年12月底。《通知》还明确, 1名毕业年度普通高校毕业生的就业参保信息和身份只能由一户企业用于享受一次性扩岗补助, 不能重复使用。一次性扩岗补助和一次性吸纳就业补贴政策不能重复享受。

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中国
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Circular on Accelerating the Implementation of the One-off Job Increase Subsidy Policy

On July 25th, 2022, the General Office of the Ministry of Human Resources and Social Security, the General Office of the Ministry of Education, and the General Office of the Ministry of Finance jointly issued the Circular on Accelerating the Implementation of the One-off Job Increase Subsidy Policy (the "Circular"). The Circular stipulates that with respect to enterprises that recruit, conclude employment contract with and pay the unemployment insurance premiums for at least one month for the graduates of regular higher education institutes who graduated during January 2022 to December 2022, they are entitled to the one-off job increase subsidy with no more than RMB1,500 for each graduate recruited. This policy shall be implemented until the end of December 2022. The Circular also specifies that the employment insurance information relating to and the identification of each graduate can be used by only one enterprise for the one-off job increase subsidy and cannot be re-used. Enterprises cannot benefit from both the one-off job increase subsidy and the one-off employment absorption subsidy.

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《关于加强行政司法联动保障新冠肺炎康复者等劳动者平等就业权利的通知》

2022年8月10日, 人力资源和社会保障部、最高人民法院联合发布了《关于加强行政司法联动保障新冠肺炎康复者等劳动者平等就业权利的通知》(下称《通知》)。《通知》要求依据《劳动法》《就业促进法》《传染病防治法》《人力资源市场暂行条例》等规定, 用人单位、人力资源服务机构不得歧视新冠肺炎康复者等劳动者, 不得以曾经新冠肺炎病毒核酸检测阳性等为由, 拒绝招(聘)用新冠肺炎康复者等劳动者, 不得发布含有歧视性内容的招聘信息, 除因疫情防控需要外不得违反个人信息保护法等有关规定擅自非法查询新冠病毒核酸检测结果。用人单位对新冠肺炎康复者等劳动者实施就业歧视、擅自非法查询新冠病毒核酸检测结果的, 劳动者可以侵害平等就业权、个人信息权益等为由, 依法向人民法院提起诉讼。人力资源服务机构对于用人单位发布含有歧视新冠肺炎康复者等劳动者招聘信息未履行合法性审查义务的, 要依据《人力资源市场暂行条例》严肃查处。人民法院在审理就业歧视案件过程中, 发现用人单位招聘信息含有歧视性内容的, 可以将违法行为线索通报给人力资源社会保障部门, 人力资源社会保障部门要及时予以核查, 并将查处相关违法行为情况反馈给人民法院。

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中国
8月10日
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Circular on Strengthening Administrative and Judicial Linkage to Protect Equal Employment Rights of Workers Recovered from COVID-19 and Other Workers

On August 10th, 2022, the Ministry of Human Resources and Social Security and the Supreme People's Court jointly issued the Circular on Strengthening Administrative and Judicial Linkage to Protect Equal Employment Rights of Workers Recovered from COVID-19 and Other Workers (the "Circular"). The

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Circular requires, in accordance with the Labor Law, the Employment Promotion Law, the Law on the Prevention and Treatment of Infectious Disease and the Interim Regulations for the Human Resources Market, employers and human resources service agencies to not discriminate against workers such as those recovered from COVID-19, or refuse to recruit or employ workers such as those recovered from COVID-19 on the grounds such as they have tested positive for COVID-19 nucleic acid, or publish recruitment information containing discriminatory content. Except for the purpose of epidemic prevention and control, employers shall not illegally inquire the COVID-19 nucleic acid test results in violation of the Personal Information Protection Law and other relevant provisions. Where employers discriminate against workers such as those recovered from COVID-19 in employment or illegally inquire the COVID-19 nucleic acid test result without authorization, employees may file a lawsuit to the People's Court in accordance with the law on the ground of infringement of rights of equal employment and personal information. Where human resources service agencies fail to fulfil their obligation to review the legality of the recruitment information posted by employers which contains discriminatory content against workers such as those recovered from COVID-19, they shall be seriously investigated and punished in accordance with the Interim Regulations for the Human Resources Market. In the process of hearing an employment discrimination case, if the People's Court finds that the recruitment information of the employer contains discriminatory content, it may notify the Human Resources and Social Security department of the potential unlawful act, the Human Resources and Social Security department shall promptly verify and report the investigation outcome of the relevant unlawful act to the People's Court.

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《关于进一步做好阶段性缓缴社会保险费政策实施工作有关问题的通知》

2022年9月19日, 人力资源和社会保障部办公厅等四个部门发布了《关于进一步做好阶段性缓缴社会保险费政策实施工作有关问题的通知》(下称《通知》)。《通知》规定为了进一步落实好《关于扩大阶段性缓缴社会保险费政策实施范围等问题的通知》, 自2022年9月起, 各省级地区及新疆生产建设兵团可根据本地区受疫情影响情况和社会保险基金状况, 进一步扩大缓缴政策实施范围, 覆盖本地区所有受疫情影响较大、生产经营困难的中小微企业、以单位方式参保的个体工商户、参加企业职工基本养老保险的事业单位及各类社会组织。企业缓缴期间, 要依法履行代扣代缴职工个人缴费义务。阶段性缓缴社会保险费政策到期后, 可允许企业在2023年底前采取分期或逐月等方式补缴缓缴的社会保险费。补缴期间免收滞纳金。

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Circular on Further Implementation of the Policy for Provisional Postponement of Social Security Payments

On September 19th, 2022, the General Office of the Ministry of Human Resources and Social Security and three other authorities issued the Circular on Further Implementation of the Policy for Provisional Postponement of Social Security Payments (the "Circular"). The Circular specifies that starting from September 2022, in order to further implement the Circular on Expanding the Implementation Scope of the Policy for Provisional Postponement of Social Security Payments, each provincial-level region and the Xinjiang Production and Construction Corps may, in accordance with the pandemic situation in the region and the status of the social insurance fund, further expand the implementation scope of the policy for provisional postponement of social security payments to include all micro, small, and medium-sized enterprises, individual businesses participating in the social insurance scheme in the form of an entity as well as institutions and various social organizations that

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participate in the basic old-age insurance for enterprise employees which are severely affected by the pandemic and have difficulties in production and operation in the region. During the period of postponement, enterprises shall continue to fulfil the obligations to withhold and pay individual contributions on behalf of employees in accordance with the law. When the policy for provisional postponement of social security payments expires, enterprises are allowed to make up the deferred social insurance payments by the end of 2023 in a phased or monthly manner with no overdue fine imposed.

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《中华人民共和国妇女权益保障法 (2022年修订) 》

2022年10月30日, 全国人民代表大会常务委员会会议修订通过新《中华人民共和国妇女权益保障法》(下称“《妇女权益保障法》(2022年修订)”), 自2023年1月1日起施行。

《妇女权益保障法》(2022年修订) 进一步明确了在妇女平等就业、防止对妇女性骚扰、保护妇女劳动健康三方面对用人单位的要求, 特别是:

- (1) 除国家另有规定外, 禁止用人单位在招录 (聘用) 中限定为男性或者男性优先, 将限制结婚、生育或者婚姻、生育状况作为录用条件, 在个人基本信息之外询问或调查女性求职者的婚育情况, 将妊娠测试作为入职体检项目, 或实施其他以性别为由拒绝录 (聘) 用妇女或者差别化地提高对妇女录 (聘) 用标准的行为; 如用人单位违反情节严重或拒不改正, 可实施最高五万元人民币罚款。
- (2) 明确用人单位就预防和制止对妇女的性骚扰应当采取的措施, 例如规章制度、负责机构或人员、教育培训、安保措施、投诉渠道、支持协助维权和心理疏导等; 如用人单位违反情节严重, 造成妇女权益受到侵害或者社会影响恶劣, 情节严重或拒不改正的, 直接负责的主管人员和其他直接责任人员可能遭受处分。
- (3) 要求用人单位定期为女职工安排妇科疾病、乳腺疾病检查以及妇女特殊需要的其他检查。
- (4) 要求劳动合同/服务协议包含女职工特殊保护条款, 集体合同包含男女平等和女职工权益保护相关内容。

此外, 《妇女权益保障法》(2022年修订) 规定检察机关可以对严重侵害妇女权益的情形 (例如侵害妇女平等就业权益、用人单位未采取合理措施预防和制止性骚扰) 提起公益诉讼。

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Law of the People's Republic of China on the Protection of the Rights and Interests of Women (Revised in 2022)

On October 30th, 2022, the Standing Committee of the National People's Congress adopted the revised Law of the People's Republic of China on the Protection of the Rights and Interests of Women (the "Law on the Protection of the Rights and Interests of Women (Revised in 2022)"), which came into effect on January 1st, 2023.

The Law on the Protection of the Rights and Interests of Women (Revised in 2022) further specifies the requirements upon the employers in three areas: equal employment for women, prevention of sexual harassment against women, and protection of women's health at work, in particular:

- (1) in the process of recruitment and employment, unless otherwise stipulated by the state, employers shall not limit job candidates to males or stipulate that males are preferred, or set any restriction on marriage or childbirth or make the marital or childbirth status as a condition for recruitment or employment. Employers shall also not further inquire about or investigate the marital or childbirth status of a female job applicant in addition to her basic personal information, or include pregnancy test in the entry physical examination, or conduct other acts of refusing to recruit or employ women on the grounds of gender or raise the standards for recruiting or

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employing women in a differentiated manner. A fine of up to RMB50,000 may be imposed where the employers severely violate the aforementioned provisions or refuse to make corrections;

(2) it specifies that employers shall adopt measures to prevent and stop any sexual harassment against women, for instance, formulating rules and regulations, clarifying the organization or person in charge, conducting education and training programmes, adopting necessary safeguard measures, setting up complaint channels, supporting and assisting the victimized female employees in safeguarding rights, and providing psychological counselling. In case where employers fail to take necessary measures to prevent and stop sexual harassment, resulting in infringement of women's rights and interests or adverse social impacts, the directly responsible officers and other persons directly liable may be punished where they refuse to make corrections or the violations are serious;

(3) employers shall regularly arrange examinations for gynaecological diseases and breast diseases, and arrange other health examinations for women's special needs for female employees; and

(4) employment contracts or service agreements shall contain special protection clauses for female employees, and collective contracts shall contain content related to gender equality, and the protection of the rights and interests of female employees.

Furthermore, the Law on the Protection of the Rights and Interests of Women (Revised in 2022) stipulates that the prosecutorial authorities may file public interest litigations where the legitimate rights and interests of women are severely infringed upon (for instance, infringements of women's rights and interests in equal employment, employers' failure to take reasonable measures to prevent and stop sexual harassment).

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《最高人民法院关于为稳定就业提供司法服务和保障的意见》

2022年12月26日, 最高人民法院发布了《关于为稳定就业提供司法服务和保障的意见》(下称《意见》)。(1) 在稳市场主体保就业方面,《意见》明确了可以考虑企业复工复产实际情况,通过延展补缴期限等方式妥善处理责令补缴社保的行政案件;对于享受阶段性缓缴社保政策的单位,审慎处理劳动者主张缓缴期间未缴社保而解除劳动合同的社会保险纠纷案件;对于在试用期内受疫情影响不能返岗且无法采用灵活考察方式的高校毕业生,无法实施考察期间经协商可不计入约定试用期,但用人单位不得变相突破法定试用期上限。(2) 在规范网约配送、移动出行、网络直播等平台经济的新形态用工方面,《意见》规定了对于未订立书面劳动合同的劳动者,根据用工事实和劳动管理程度,综合考虑各种因素审慎认定其与平台企业或用工合作单位之间的劳动关系(例如劳动者对工作时间及工作量的自主决定程度、劳动过程受管理控制程度、劳动者是否需要遵守有关工作规则、劳动纪律和奖惩办法、劳动者工作的持续性、劳动者能否决定或者改变交易价格);劳动者因不可抗力、见义勇为、紧急救助以及工作量或者劳动强度明显不合理等非主观因素,超时完成工作任务或者受到消费者差评,主张不能因此扣减应得报酬的,应当依法支持;推动完善劳动者因执行工作任务遭受损害的责任分担机制;与用工管理相关的算法规则存在不符合日常生活经验法则、未考虑遵守交通规则等客观因素或其他违背公序良俗情形,劳动者主张其不具有法律约束力或请求赔偿损害,应当依法支持。(3)《意见》还规定了除依法按协商程序降低劳动报酬外,用人单位安排劳动者通过居家办公或灵活办公等方式提供正常劳动,劳动者请求按正常工资标准支付其工资的,应当依法支持。

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Opinions of the Supreme People's Court on Providing Judicial Services and Support for Employment Stabilization

On December 26th, 2022, the Supreme People's Court issued the Opinions of the Supreme People's Court on Providing Judicial Services and Support for

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Employment Stabilization (the "Opinions"). (1) In terms of stabilizing market entities and supporting employment, the Opinions specifies that administrative cases ordering enterprises of supplementary payment of social security can be properly handled by extending the period for supplementary payment and taking into account the actual situation of resumption of work and production of enterprises. For employers entitled to provisional postponement of social security payments, the People's Courts shall prudently handle cases where workers claim to terminate employment contracts due to employers' failure to pay social security during the postponement period. For college graduates who could not return to work due to the epidemic and could not be reviewed in a flexible manner during the probation period, the period during which the review is not available, may be excluded in the agreed probation period after negotiation, but employer shall not stipulate a probation period exceeding the statutory maximum in any method. (2) In terms of standardizing the new forms of employment of platform economy such as online delivery, mobile travel and network broadcast, the Opinions stipulates that for employees who have not concluded written employment contracts, the existence of labor relationship between them and the platform enterprises or the labor cooperation entities shall be prudently determined according to the facts surrounding the employment and the degree of labor management. The People's Courts shall take various factors into consideration, such as the degree of autonomy that workers are entitled over their working hours and workload, the degree to which the working process is subject to management or control, whether workers shall comply with relevant work regulations, disciplines, reward and punishment policies, as well as the persistence of the work, and whether workers are able to determine or change the price of the transaction. The People's Court shall support workers' claim that their agreed remuneration cannot be deducted due to delayed work or negative evaluation from consumers as a result of non-subjective factors such as force majeure, acts of courage or emergency assistance by the workers, and obvious unreasonable workload or work intensity. The People's Court shall promote the improvement of the liability sharing mechanism for workers who suffer damages due to the performance of work. Where the algorithmic rules related to employment management do not conform to the rules of daily life experience, or do not consider the observance of traffic rules and other objective factors or fall within other situations contrary to public order and good morals, the People's Court shall support the workers' claims that the aforesaid algorithmic rules are not legally binding or for their claim for compensation, in accordance with applicable laws. (3) The Opinions also stipulates that in addition to reducing remuneration by negotiation in accordance with the law, the People's Court shall support workers' claims for remuneration payment on the normal standard for normal work provided through working from home or other flexible working approaches arranged by employers.

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