环球律师事务所
GLOBAL LAW OFFICE

关于：环球劳动法律专递

版本：2019 年第 7 期

环球劳动法律专递

GLO Law & Policy Newsletter in Employment

环球劳动团队

GLO Employment Practice Group

2019 年 第 7 期

Volume 7 of 2019

北京市朝阳区建国路81号华贸中心
1号写字楼15层&20层 邮编: 100025
15 & 20/F Tower 1, China Central Place,
No. 81 Jianguo Road Chaoyang District,
Beijing 100025, China
电话/T. (86 10) 6584 6688
传真/F. (86 10) 6584 6666

上海市黄浦区湖滨路150号企业天地
5号楼26层 邮编: 200021
26F, 5 Corporate Avenue,
No. 150 Hubin Road, Huangpu District,
Shanghai 200021, China
电话/T. (86 21) 2310 8288
传真/F. (86 21) 2310 8299

深圳市南山区深南大道9668号
华润置地大厦B座27层 邮编: 518052
27th Floor Tower B, China Resources Land Building,
No. 9668 Shennan Avenue, Nanshan District,
Shenzhen 518052, China
电话/T. (86 755) 8388 5988
传真/F. (86 755) 8388 5987

环球劳动法律专递

目录

2019 年第 7 期

➢ 环球视角

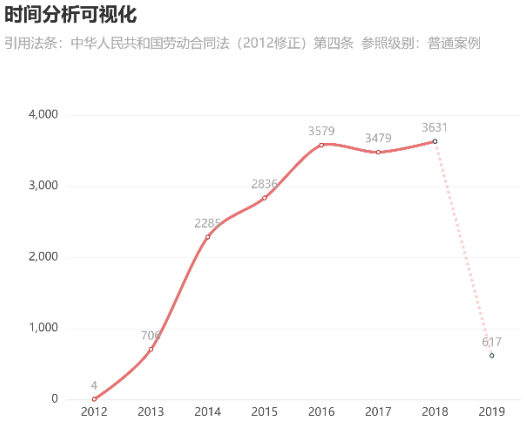
我国劳动法中民主程序的实务问题研究

作者：顾巍巍 | 万发文 | 胡翔

引言

我国《劳动合同法》第四条[1]规定，用人单位在制定、修改或者决定直接决定劳动者切身利益的规章制度或者重大事项时，应当经过职工代表大会或者全体职工讨论，这一条也被称为劳动法领域的“民主程序”。

通过检索与本条相关的劳动法案例可知，自 2012 年以来，实务界越来越重视劳动争议中的民主程序，与民主程序相关的案件近几年来也在持续增长。本文旨在从实务的角度出发，就上海地区实践中常见的几个与民主程序相关的问题进行分析，以期能够对各位同仁有所助益。



图一：2012 年至 2019 年民主程序相关的劳动争议案件的数量分析

[1] 《劳动合同法》第四条 用人单位应当依法建立和完善劳动规章制度，保障劳动者享有劳动权利、履行劳动义务。
用人单位在制定、修改或者决定有关劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利、职工培训、劳动纪律以及劳动定额管理等直接涉及劳动者切身利益的规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定。
在规章制度和重大事项决定实施过程中，工会或者职工认为不适当的，有权向用人单位提出，通过协商予以修改完善。
用人单位应当将直接涉及劳动者切身利益的规章制度和重大事项决定公示，或者告知劳动者。

一、 民主程序的要件

(一) 所涉事项

根据我国《劳动合同法》第四条的规定，用人单位在制定直接涉及劳动者切身利益的制度和重大事项时，应当经过本文讨论的民主程序。而这些重大制度和事项是指与劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利、职工培训、劳动纪律以及劳动定额管理相关的，且直接关系到劳动者的切身利益。

而且，根据该条的规定，用人单位不仅在新制定规章制度、作出新事项时需要经过民主程序，在后续修改规章或事项时也必须经过民主程序。

在（2014）沪一中民三（民）终字第 329 号案中，用人单位主张其已经将修改销售佣金的决定邮件告知劳动者，因此应当依据变更后的佣金管理制度计算销售佣金。而上海一中院认为，《劳动合同法》第四条第二款规定："用人单位在制定、修改或者决定有关劳动报酬等直接涉及劳动者切身利益的规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定。"本案中，用人单位主张应当按照用人单位修改后的销售佣金管理制度计算销售佣金，但由于用人单位提供的电子邮件及公证书上均未显示电子邮箱地址，故尚不足以证实劳动者已经明知用人单位就销售佣金的计算方式进行过变更。即使如用人单位所称，其已将修改后的销售佣金管理制度送达给劳动者，鉴于该销售佣金管理制度涉及劳动者切身利益，用人单位还应就其曾在修改时经过了平等协商程序进行举证，但用人单位并未举证，因此上海一中院并未支持用人单位的主张。

(二) 程序要求

根据《劳动合同法》第四条的规定，用人单位在针对上述重要事项时，应当经过三个程序，其一是讨论，即将劳动规章制度和重大事项提交职工代表大会或者全体职工讨论，且用人单位应当与工会或者职工代表平等协商确定；其二是修改，即在规章制度和重大事项决定实施时，工会和职工可以向用人单位提出修改意见，而用人单位应当与职工进行协商；其三

是公示，即用人单位应当将规章制度和重大事项决定公示，或者告知劳动者。

从司法实践来看，提交职工代表大会或者全体职工讨论，以及最后的公示和告知是缺一不可的。从上文（2014）沪一中民三（民）终字第 329 号案的判决结果可以看出，在上海地区，即便最后已经告知了劳动者，但如果未经职工代表大会或者全体职工的讨论，依然不会被认为完成了民主程序。

上海二中院作出的（2016）沪 02 民终 10482 号案对于民主程序的审查的方法与观点值得关注，该案中用人单位在 2013 年 3 月 26 日就《奖惩条例细则》、《考勤管理规定》等议题召开职工大会，在参会职工人数超过职工总数三分之二的情况下，讨论通过了前述规章制度，并于同月 29 日发文公告。上述公告内容以及工会委员会在发文公告上加盖印章的事实，表明上述规章制度系在职工参与下讨论通过的，体现了法律强调职工民主参与制定用人单位规章制度的程序性要求。劳动者在《确认表》上签名承诺遵守各项规章制度，且对《确认表》上的签名并无异议，表明其认可用人单位的发文有效，且该文已进行过公示。因此，二中院认为该案系争规章制度制定主体合法，且在职工民主参与下制定的，制定后亦告知了劳动者，其亦未对规章制度内容的合法性提出异议，因而认可了该案中公司作出的规章制度的效力。

二、 未经民主程序制定的规章制度的效力问题

根据上文的分析，如果被认定为未经民主程序，则涉案的规章制度或决定可能不会被法院采纳。在上海一中院审理的（2017）沪 01 民终 9599 号案中，用人单位没有提供涉案员工手册已经经过民主程序的证据，因此法院认为，用人单位并未提供证据证明涉及劳动报酬变更事项的员工手册已经法定程序，也没有提供证据证明已向劳动者送达。因此用人单位主张按照员工手册支付工资的主张，法院不予支持。

但即便用人单位提交了召开职工大会或员工大会的证据，也存在风险，法院不会当然认定为用人单位已经完成了民主程序，而是会对这些证据的实质性内容进行审查。在上海一中院审理的（2017）沪 01 民终 11631 号案中，用人单位提供了《关于召开首届一次职工代表

大会暨二次员工大会的通知》以及《关于同意和美（上海）房地产开发有限公司首届工会委员会选举结果的批复》，证明用人单位的《绩效考核管理制度》经过了公示和签收。但劳动者对该组证据的真实性不予认可。法院审理后认为，即便假设该组证据为真，从内容上看，也不足以证明该制度已经经过法定的民主程序并送达劳动者，最终没有采信该组证据，用人单位提供的《绩效考核管理制度》的效力最终也未被法院认可。对比上文中我们反复讨论的（2016）沪 02 民终 10482 号案，劳动者提交了用人单位作出的有工会委员会加盖公章的公告和收到公告的确认表。由于我们无法查阅具体的案件资料，因此这两个案例中公告的内容有何差别我们不能妄下论断，但（2016）沪 02 民终 10482 号案中公告和确认表是由劳动者提供的，劳动者虽然对公告的证明内容存在异议，但并未否认公告的效力。而本案中，用人单位提交的召开员工大会的通知真实性没有被劳动者认可，且从文件名称上来看，用人单位提交的只是召开员工大会的通知，而不是最终的决议，无法体现用人单位的规章制度经过员工大会的讨论，同时用人单位也没有提供任何可以证明劳动者签收的证据材料，因此法院在审查证据的实质性内容后不予采纳。

从以上的分析可知，未经民主程序的规章制度和决定是不会被法院采纳的，但是否只要未经民主程序就一定无效呢？

对此我们进行了相关检索，发现江苏省高级人民法院、江苏省劳动争议仲裁委员会在 2009 年颁布的《关于审理劳动争议案件的指导意见》中第十八条规定，用人单位在《劳动合同法》实施（2008 年 1 月 1 日）前制定的规章制度，虽未经过《劳动合同法))第四条规定的民主程序，但其内容不违反法律、行政法规及政策规定，且不存在明显不合理的情形，并已向劳动者公示或者告知的，可以作为处理劳动争议的依据。北京市高级人民法院、北京市劳动争议仲裁委员会颁布的《北京市高级人民法院、北京市劳动争议仲裁委员会关于劳动争议案件法律适用问题研讨会会议纪要》第 36 点也有相同的观点。

三、 用人单位解除劳动合同时的民主程序

除了《劳动合同法》第四条规定的民主程序外，第四十三条[2]和《最高人民法院关于审

[2] 《劳动合同法》第四十三条 用人单位单方解除劳动合同，应当事先将理由通知工会。用人单位违反法

理劳动争议案件适用法律若干问题的解释（四）》（“《解释四》”）对用人单位解除单方解除劳动合同的民主程序也进行了规定。《解释四》第十二条规定，建立了工会组织的用人单位解除劳动合同符合劳动合同法第三十九条[3]、第四十条规定[4]，但未按照劳动合同法第四十三条规定事先通知工会，劳动者以用人单位违法解除劳动合同为由请求用人单位支付赔偿金的，人民法院应予支持，但起诉前用人单位已经补正有关程序的除外。

也就是说，当符合《劳动合同法》第三十九条和四十条的情形下，用人单位行使解除权时应当通知工会。根据《劳动合同法》第四十三条的规定，用人单位在解除劳动合同前应当通知工会，而工会有纠正的权力，从该条的规定来看，通知工会是一个前置程序。但根据《解释四》第十二条的规定，用人单位可以在起诉前补正程序，而此时用人单位显然已经行使了单方解除权，通知工会并不需要得到工会的事先许可。

在（2018）沪 01 民终 720 号案中，用人单位解除劳动合同的时间是 2017 年 5 月 16 日，通知工会的时间是 2017 年 7 月 4 日，而劳动仲裁庭开庭的时间是 7 月 5 日，上海一中院并未否认这一补正程序的效力。（2014）沪二中民三（民）终字第 356 号案中，用人单位在劳动者向劳动仲裁员申请劳动仲裁前通知了工会，工会也同意了用人单位的决定，上海二中院最终也认可了补正的效力。

如果用人单位在起诉后补正程序，按照《解释四》的规定，这一补正程序不能被法院认可。在（2013）沪二中民三（民）终字第 900 号案中，用人单位通知工会的时间是 2013 年

律、行政法规规定或者劳动合同约定的，工会有权要求用人单位纠正。用人单位应当研究工会的意见，并将处理结果书面通知工会。

[3] 《劳动合同法》第三十九条 劳动者有下列情形之一的，用人单位可以解除劳动合同：
（一）在试用期间被证明不符合录用条件的；
（二）严重违反用人单位的规章制度的；
（三）严重失职，营私舞弊，给用人单位造成重大损害的；
（四）劳动者同时与其他用人单位建立劳动关系，对完成本单位的工作任务造成严重影响，或者经用人单位提出，拒不改正的；
（五）因本法第二十六条第一款第一项规定的情形致使劳动合同无效的；
（六）被依法追究刑事责任的。

[4] 《劳动合同法》第四十条 有下列情形之一的，用人单位提前三十日以书面形式通知劳动者本人或者额外支付劳动者一个月工资后，可以解除劳动合同：
（一）劳动者患病或者非因工负伤，在规定的医疗期满后不能从事原工作，也不能从事由用人单位另行安排的工作的；
（二）劳动者不能胜任工作，经过培训或者调整工作岗位，仍不能胜任工作的；
（三）劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容达成协议的。

2 月 22 日，而劳动者起诉的时间为 2013 年 2 月 8 日，通知工会的时间晚于起诉的时间，上海二中院最终没有认可用人单位的补正。

另外，我们在对上海地区关于用人单位解除劳动合同的民主程序进行案例检索时发现，上海法院在用人单位没有工会时是否还需要通知工会这一问题的观点存在一定的分歧。

（一）用人单位有工会

如果用人单位本身有工会，或者用人单位加入了地区工会，上海市的审判口径均为用人单位行使单方解除权时应当通知工会，这类的案例有很多[5]，此处不加赘述。

（二）用人单位没有工会

在用人单位没有工会的情况下，我们查到了上海市的两种口径，一种认为即便用人单位没有工会，也应当听取职工代表的意见，或者向当地的总工会征求意见等方式履行民主程序。另一种认为，在没有工会的情况下，用人单位无需履行告知工会这一程序。

上海市二中院在（2013）沪二中民三（民）终字第 1015 号案中认为，《劳动合同法》及司法解释的相关规定的目的在于避免用人单位随意解除劳动合同。用人单位单方解除劳动合同，应当依法告知并听取工会或职工代表的意见，这不仅是单位解除劳动合同时应当履行的法定程序，亦是对职工劳动权利、生存权利的保障。即使用人单位未建立基层工会，也应当通过告知并听取职工代表的意见的方式或者向当地总工会征求意见的变通方式来履行告知义务这一法定程序。

同样地，上海二中院在（2014）沪二中民三（民）终字第 462 号案中认为，用人单位虽主张其公司未建立工会，但是作为专业的劳务派遣公司，其名下管理着大量的劳动者，相较之其他用人单位更应切实维护劳动者的相关权益。用人单位虽坚称其没有建立工会，但仍

[5] 如（2017）沪 02 民终 3174 号案，（2016）沪 01 民终 11268 号案，（2015）沪二中民三（民）终字第 227 号案、（2016）沪 01 民终 10852 号案等。

应采取通知同级或上级工会的方式履行告知义务以避免用人单位利用强势地位滥用解除权。

但同时我们也检索到很多持相反观点的案例。

在二中院作出的（2016）沪 02 民终 2234 号案中，法院认为工会是职工自愿结合的工人阶级的群众组织。最高人民法院《解释四》规定，建立了工会组织的用人单位依照劳动合同法第三十九条、第四十条规定单方解除劳动合同，未按照劳动合同法第四十三条规定征求工会意见，劳动者以用人单位违法解除劳动合同为由，请求用人单位按照劳动合同法第四十七条规定的经济补偿标准的两倍向劳动者支付赔偿金的，人民法院应予支持。根据双方陈述，用人单位尚未成立工会，劳动者以该公司做出解雇决定未通知工会为由主张解雇程序违法，本院难以支持。

同样地，在（2017）沪 01 民终 6419 号案中，上海一中院认为用人单位未成立工会，故用人单位在与劳动者解除劳动合同时未通知工会，并无不当。上海二中院在（2013）沪二中民三（民）终字第 416 号案中也认为，因用人单位未成立工会，劳动者认为解除劳动关系须经有关工会部门报备的主张，依据不足。用人单位按照《员工手册》的规定，解除与劳动者的劳动合同，并无不妥。

实践中持这类观点的案例还有很多[6]，在此我们不一一列举，从谨慎的角度来看，我们建议如果用人单位有工会，那务必履行事先通知工会的义务，并留存相关的书面证据，如果用人单位尚未设立工会，那么也应当向上级工会，或者注册地的总工会履行通知工会这一程序，以免在诉讼中因程序问题产生不必要的损失。

[6] 如（2017）沪 01 民终 4559 号案，（2015）沪二中民三（民）终字第 264 号案，（2014）沪一中民三（民）终字第 1929 号、（2017）沪 01 民终 7956 号等。

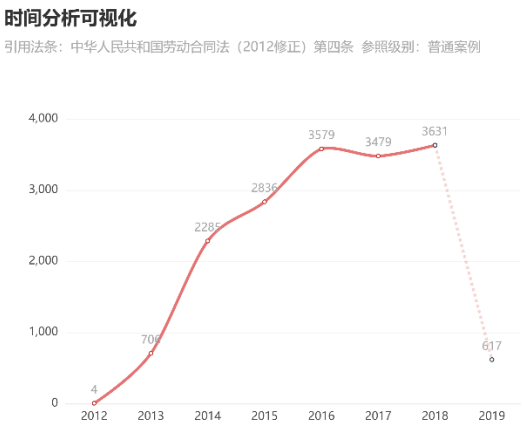
Practical Issues of Democratic Procedure in Chinese Labor Law

Weiwei Gu | Fawen Wan | Suri Hu

Introduction

Article 4 of the *Labor Contract Law*[7] stipulates that when an employer formulates, revises or decides on rules or major matters which directly involve the vital interests of employees, such matters shall be discussed by the employee representatives congress or all staff. This article is deemed as “Democratic Procedures” in the field of labor law.

Through the research of labor dispute cases relating to the article, it shows that practitioners have paid more and more attention to the Democratic Procedures in labor disputes since 2012. Therefore, the number of cases concerning Democratic Procedures has continued to increase in recent years. This article aims to analyze several common issues with regards to Democratic Procedures in Shanghai from a practical perspective, which is expected to be helpful to the fellows in the legal industry.



Picture 1: Number of Labor Dispute Cases Concerning Democratic Procedures from 2012 to 2019

[7] Article 4 of the *Labor Contract Law* provides that employers shall establish and improve upon labor rules and system pursuant to the law to ensure employees' entitlement to labor rights and performance of labor obligations.

When an employer formulates, revises or decides on rules or major matters pertaining to labor remuneration, working hours, rest periods and off days, labor safety and health, insurance and welfare, staff training, labor discipline and labor quota administration etc which directly involves the vital interests of employees, such matters shall be discussed by the employee representatives congress or all staff who shall make proposal and give their opinion and the employer shall carry out equal negotiation with the labor union or employee representatives before making a decision.

During the decision and implementation of rules and major matters, the labor union or staff shall have the right to raise their concern with the employer on any inappropriate issues and such issues shall be corrected and refined through negotiation.

Employers shall announce decisions on rules and major matters which directly involve the vital interests of employees or notify the employees.

1. Constitutive Requirements of Democratic Procedures

1.1 Matters Involved

In accordance with Article 4 of the *Labor Contract Law*, the employer shall go through the Democratic Procedures discussed in this paper when formulating rules or major matters which directly involve the vital interests of employees. These rules and major matters shall pertain to labor remuneration, working hours, rest periods and vocations, labor safety and health, insurance and welfare, staff training, labor discipline and labor quota administration etc., and shall be directly related to the vital interests of employees.

Moreover, pursuant to the Article, the employer shall go through the Democratic Procedures not only in the process of formulating new rules and matters but also in subsequent revisions of such rules or matters.

In the case of (2014) Hu 01 Zhong Min III (Min) Zhong No. 329, the employer claimed that it had notified the employee of the decision to modify the sales commission management rules. Therefore, the sales commission shall be calculated on the basis of the modified commission management rules. The Shanghai No. 1 Intermediate People's Court held that "in accordance with the second paragraph of Article 4 of the *Labor Contract Law*, when an employer formulates, revises or decides on rules or major matters pertaining to labor remuneration, etc., which directly involve the vital interests of employees, such matters shall be discussed by the employee representatives congress or all staff who shall make proposal and give their opinion and the employer shall carry out equal negotiation with the labor union or employee representatives before making a decision." In this case, the employer claimed that the sales commission shall be calculated according to the modified sales commission management rules. However, since the e-mail address was not displayed on the e-mail or the notarial certificate provided by the employer, the evidence was insufficient to prove that the employee knew the employer had changed the way the

sales commission was calculated. Since such rules involved the vital interests of the employee, the employer shall provide evidence to prove that modification of the rules had gone through an equal negotiation procedure. For the employer failed to provide such evidence, as a result, the revised commission management rules shall not apply, even if the employer delivered such rules to the employee. Therefore, Shanghai No. 1 Intermediate People's Court rejected the employer's claim.

1.2 Procedural Requirements

According to Article 4 of the *Labor Contract Law*, the employer shall go through three procedures when the above-mentioned major matters are involved. The first procedure is discussion, which means labor rules and major matters shall be submitted to the employee representatives congress or all staffs for discussion, and the employer shall carry out equal negotiation with the labor union or employee representatives before making a decision. The second procedure is revision, meaning that during the implementation of the rules and major matters, the labor union or staff may raise their suggestions on revision, which shall be negotiated between the employer and the staff. The third procedure is publicity, meaning that the employer shall announce decisions on rules and major matters or notify the employees.

From the perspective of judicial practice, submission to the employee representatives congress or all staff for discussion and the final announcement and notification are both indispensable. The judgment of (2014) Hu 01 Zhong Min III (Min) Zhong No. 329 case demonstrates courts in Shanghai hold the view that if the Democratic Procedures lacks employee representatives congress or all staff discussion, it will still be deemed as uncompleted, no matter the employer notifies the employees or not.

The method and view of (2016) Hu 02 (Min) Zhong No.10482 case on the review method of Democratic Procedures made by Shanghai No. 2 Intermediate People's Court

is worthy to note. In the case, the employer held a staff meeting on March 26, 2013 on the *Regulation on Reward and Punishment of Employees*, *Regulation on Attendance Management* and other relevant issues. With the number of participants exceeding two-thirds of the total number of employees, the above-mentioned regulations were passed after discussion and announced on the 29th of the same month. Furthermore, the content of the announcement with the labor union committee's stamp on such announcement indicated that the above rules were approved after employees' discussion, which reflects the procedural requirements of the law emphasizing democratic participation of the employees in the formulation of the employer's rules. In addition, the employees signed the "Confirmation Form" to promise to abide by the rules and raised no objection to the signature on the "Confirmation Form", indicating that the employees acknowledged that the employer's rules were valid, and such rules had been announced. Hence, Shanghai No. 2 Intermediate People's Court recognized the validity of the rules formulated by the company for the following reasons: 1) the rule-marker was legal; 2) the rules were made with the democratic participation of the employees; 3) the employees were also informed after the formulation of the rules; and 4) they did not object to the legality of the content of the rules.

2. The Validity of the Rules Formulated Without Democratic Procedures

According to the above analysis, the rules involved may not be adopted by the court if they were determined as being passed without Democratic Procedures. In the case of (2017) Hu 01 (Min) Zhong No. 9599 tried by Shanghai No. 1 Intermediate People's Court, the employer failed to provide evidence that the employee manual had gone through Democratic Procedures. Therefore, the Court ruled that the employer did not produce evidence to prove that the employee manual involving labor remuneration had gone through legal procedures or it had been delivered to the employees. As a result, the employer's claim of paying wages according to the employee manual was not upheld by the Court.

Moreover, the employer still bears some risks even if it submits evidence to prove an employee representatives conference or staff meeting. The reason is that the court will not presume that the employer has completed the Democratic Procedures, meanwhile it will review the substantive content of the evidence. In the case of (2017) Hu 01 (Min) Zhong No. 11631 tried by Shanghai No. 1 Intermediate People's Court, the employer provided the "*Notice on Convening the First Employee Representatives Conference and the Second Staff Meeting"* and the "*Consent to the Results of the Election of the First Labor Union Committee of Hemei (Shanghai) Real Estate Development Co., Ltd."* to prove that the employer's "*Performance Appraisal Management Rules"* had been announced and accepted. However, the employees did not recognize the authenticity of the evidence. The Court held that assuming the evidence was authentic, it was still insufficient to prove that the rules had gone through legal Democratic Procedures and been delivered to the employees based on the content of the evidence. Finally, the evidence was not admitted and the "*Performance Appraisal Management Rules"* provided by the employer was not adopted by the Court. Compared with the repeatedly discussed (2016) Hu 02 (Min) Zhong No. 10482 case, the employee submitted the announcement made by the employer with the official seal of the labor union committee and the confirmation form demonstrating that the employee had received the announcement, and the Court ultimately recognized the validity of the rules formulated by the employer. Since we are unable to access the specific case data, we cannot conclude the differences between the contents of the announcements in these two cases. The difference is that in the (2016) Hu 02 (Min) Zhong No.10482 case, the announcement and confirmation form were provided by the employee, the validity of the announcement was not denied. The employees raised objections to the content of announcement. However, in this case, the authenticity of the notice of holding a staff meeting submitted by the employer is not acknowledged by the employee. In addition, the employer only submits the notice of a staff meeting, instead of the final resolution according to the file name, which cannot reflect that the employer's rules have been discussed by the staff meeting. Meanwhile, the employer has not provided any evidence

that can prove the employee has signed and accepted the rules. Therefore, the court did not admit the evidence after reviewing the substantive content of the evidence.

From the above analysis, it is known that rules and decisions formulated without Democratic Procedures will not be adopted by the court. Another question is whether the rules will be invalid as long as they do not go through the Democratic Procedures?

We have conducted research on this issue, and find that Article 18 of the *Guiding Opinions on the Trial of Labor Dispute Cases* promulgated by the High People's Court of Jiangsu Province and the Labor Dispute Arbitration Commission of Jiangsu Province in 2009 stipulates that with regard to the rules formulated by the employer before the implementation of the *Labor Contract Law* (January 1, 2008), although such rules do not go through the Democratic Procedures stipulated in Article 4 of the *Labor Contract Law*, the rules can be applied as the basis for handling labor disputes under the circumstances where 1) the content of such rule does not violate laws, administrative regulations and policies; 2) such rule is without obviously unreasonable circumstances; and 3) such rule has been announced or informed to the employees,. The Article 36 of the *Minutes of the Beijing High People's Court and the Beijing Labor Dispute Arbitration Commission on the Laws Applicable to the Labor Dispute Cases* issued by the Beijing High People's Court and the Beijing Labor Dispute Arbitration Commission shares the same opinion.

3. The Democratic Procedures of the Employer Terminating the Labor Contract

In addition to the Democratic Procedures in Article 4 of the *Labor Contract Law*, the Democratic Procedure for the unilateral termination of the labor contract are also stipulated in Article 43[8] of the *Labor Contract Law* and the *Interpretations of Supreme People's Court on Several Issues Relating to Laws Applicable for Trial of Labor Dispute Cases (IV)*

[8] Article 43 of the *Labor Contract Law* provides that an employer which unilaterally rescinds a labor contract shall notify the labor union of the reason beforehand. Where the employer violates the provisions of laws and regulations or the labor contract, the labor union shall have the right to require the employer to make correction. The employer shall study the opinion of the labor union and notify the labor union in writing of the outcome.

("***Interpretations IV***"). Article 12 of *Interpretations IV* stipulates that where the rescission of a labor contract by an employer which has established a labor union complies with the provisions of Article 39[9] and Article 40[10] of the *Labor Contract Law*, but failed to notify the labor union beforehand pursuant to the provisions of Article 43 of the *Labor Contract Law*, the employee requests the employer to pay monetary compensation citing that the rescission of the labor contract by the employer is illegal. The People's Court shall support the request, except where the employer has corrected the relevant procedures prior to the lawsuit.

That is to say, in the cases of compliance with Articles 39 and 40 of the *Labor Contract Law*, the employer shall notify the labor union when exercising the right to terminate the labor contract unilaterally. According to Article 43 of the *Labor Contract Law*, the employer's notification to the union is a prerequisite procedure. If the employer fails to notify, the labor union has right to correct such misconduct. However, according to Article 12 of *Interpretations IV*, the employer may correct the procedure before the prosecution. At this time, the employer obviously has exercised the unilateral right of termination. Therefore, notification to the labor union does not mean the prior permission from the union is required.

In the case of (2018) Hu 01 (Min) Zhong No. 720, the employer terminated the labor

[9] Article 39 of the *Labor Contract Law* provides that under any of the following circumstances, the employer may rescind the labor contract:
(1) where it is proven during the probationary period that the employee does not satisfy the employment criteria;
(2) where the employee has committed a serious breach of the employer's rules and system;
(3) where the employee is guilty of serious dereliction of duties and corruption and causes the employer to suffer significant damages;
(4) where the employee holds a labor relationship with another employer concurrently which has a severe impact on his/her performance of work tasks assigned by the employer or refuses to make correction as demanded by the employer;
(5) where the labor contract is rendered void under the circumstances stipulated in item (1) of the first paragraph of Article 26; or
(6) where criminal prosecution is instituted against the employee pursuant to the law.

[10] Article 40 of the *Labor Contract Law* provides that under any of the following circumstances, the employer may rescind the labor contract by giving the employee a written notice 30 days in advance or by making an additional payment of one month's wage to the employee:
(1) where the employee suffers from an illness or a non-work-related injury and is unable to undertake the original job duties or other job duties arranged by the employer following completion of the stipulated medical treatment period;
(2) where the employee cannot perform his/her duties and remains to be incapable of performing the job duties after training or job transfer;
(3) where the objective circumstances for which the conclusion of the labor contract is based upon have undergone significant changes and as a result thereof, the labor contract can no longer be performed and upon negotiation between the employer and the employee, both parties are unable to reach an agreement on variation of the contents of the labor contract.

contract on May 16th, 2017, and notified the union on July 4th, 2017. In addition, the time for the labor arbitration tribunal was July 5th, 2017. Ultimately, Shanghai No. 1 Intermediate People's Court did not deny the effectiveness of this complementary procedure. Furthermore, in the case of (2014) Hu II Zhong Min III (Min) Zhong No. 356, the employer notified the union before the employee applied for labor arbitration, and the union also agreed with the decision of the employer. The effectiveness of the correction was also recognized by Shanghai No. 2 Intermediate People's Court.

If the employer correct the procedure after the prosecution, this correction cannot be acknowledged by the court according to *Interpretations IV*. In the case of (2013) Hu 02 Zhong Min III (Min) Zhong No. 900, the employer notified the union on February 22nd, 2013, and the prosecution was filed on February 8th, 2013. Shanghai No. 2 Intermediate People's Court did not admit the correction of the employer because the time of correction was later than that of prosecution.

In addition, when we conducted a case research on the Democratic Procedures for the employer to terminate the labor contract unilaterally in Shanghai, we found that different courts have different opinions on whether the employer still needs to notify the labor union when there is no union.

3.1 The Employer Has a Labor Union

If the employer itself has a labor union, or the employer has joined the regional labor union, the judgments of Shanghai courts agree that it shall be notified to the union when the employer exercises the unilateral right of rescission. There are many such cases[11], and no further description is given here.

[11] Such as (2017) Hu 02 (Min) Zhong No. 3174, (2016) Hu 01 (Min) Zhong No. 11268, (2015) Hu 02 Zhong Min III (Min) Zhong No. 227, (2016) Hu 01 (Min) Zhong No. 10852, etc.

3.2 The Employer Has No Labor Union

Under the circumstances that the employer has no labor union, we have found two types of viewpoints in Shanghai. One believes that even if the employer does not have a labor union, it shall listen to the opinions of the employee representatives or seek for suggestions from the local general labor union to perform the Democratic Procedures. The other holds that in the absence of a union, the employer does not have to inform the union.

Shanghai No. 2 Intermediate People's Court held in the case of (2013) Hu 02 Zhong Min III (Min) Zhong No. 1015 that the purpose of the *Labor Contract Law* and *Interpretations IV* is to prevent the employer from terminating the labor contract at will. If the employer unilaterally terminates the labor contract, it shall inform the labor union and listen to the opinions of the union or the employee representative according to the law. This is not only the statutory procedure that the employer should carry out when the labor contract is terminated, but also to ensure the employees' rights to work and survive. It means that, even though the employer has not established a basic labor union, it shall also inform the employee representatives and listen to their opinions or seek for suggestions from the local general labor union to meet the requirement of statutory procedure.

Similarly, Shanghai No. 2 Intermediate People's Court held in case (2014) Hu II Zhong Min III (Min) Zhong No. 462 that even though the employer claimed that it had not established a labor union, as a professional labor-dispatching company managing a large number of employees, it should pay more attention to protect relevant rights and interests of employees. Therefore, it shall notify the same level or higher-level labor unions to fulfill the notification obligation to prevent the employer from taking advantage of its privileged position and abusing its right of termination.

However, we also found many cases with opposite views at the same time.

In the case of (2016) Hu 02 (Min) Zhong No. 2234, Shanghai No. 2 Intermediate People's Court held that a labor union is the organization of the working class formed by the voluntary gathering of employees. The *Interpretations IV* stipulates that where the termination of a labor contract by an employer which has established a labor union complies with the provisions of Article 39 and Article 40 of the *Labor Contract Law*, but failed to notify the labor union beforehand pursuant to the provisions of Article 43 of the *Labor Contract Law*, the employee requests the employer to pay compensation twice as much as the monetary compensation stipulated in Article 47 of the *Labor Contract Law*, citing that the rescission of the labor contract by the employer is illegal, the People's Court shall support the request. According to the statement of the two parties, the employer has not yet established a union. Therefore, the Court couldn't agree with the employee's claim that the dismissal procedure was illegal because the employer did not notify the union.

Similarly, in the case of (2017) Hu 01 (Min) Zhong No. 6419, Shanghai No. 1 Intermediate People's Court held that since the employer did not form a union, it was not improper for the employer not notifying the union when it terminated the labor contract with the employee. Shanghai No. 2 Intermediate People's Court also held in the case of (2013) Hu 02 Zhong Min III (Min) Zhong No. 416 that the employee's claim that when terminating labor relations, the employer shall report to the relevant labor union lacked legal basis for the employer did not establish a union. It is nothing wrong for the employer to terminate the labor contract with the employee in accordance with the Employee Manual.

There are still many cases[12] where such views are held in practice. We will not enumerate them here. From a prudent point of view, we suggest that if the employer has a union, it must fulfill the obligation to notify the union in advance and retain relevant written evidence. If the employer has not yet established a labor union, it shall still report to a higher-level union, or the general union of registration district in avoidance of unnecessary losses due to procedural issues in the lawsuits.

[12] Such as (2017) Hu 01 (Min) Zhong No. 4559, (2015) Hu 02 Zhong Min III (Min) Zhong No. 264, (2014) Hu 01 Zhong Min III (Min) Zhong No. 1929, (2017) Hu 01 (Min) Zhong No. 7956, etc.

➢ 案例分析

女职工辞职时未知已怀孕，辞职后能否要求恢复劳动关系

作者：顾巍巍 | 万发文 | 胡翔

一、 争议焦点

女职工在辞职时不知道自己已经怀孕，辞职后能否要求恢复劳动关系？

二、 案情简介

原告：A 公司

被告：陈某

陈某于 2012 年 2 月 9 日进入 A 公司担任成本助理，双方签有期限自 2012 年 2 月 9 日至 2013 年 2 月 8 日以及 2013 年 2 月 9 日至 2015 年 3 月 31 日的劳动合同。

2013 年 9 月 23 日陈某向 A 公司人事经理甲提交辞呈，表示自己不适合担任造价岗位，决定离开，希望 A 公司同意其最长在 2 周左右离开。9 月 26 日 A 公司与陈某签订协商解除劳动合同协议书，约定经双方协商，一致同意于 2013 年 10 月 31 日解除劳动合同，A 公司向陈某支付经济补偿金 14,410 元，该笔钱款至今未支付。2013 年 9 月 27 日及 9 月 29 日双方办理了离职交接手续，陈某还未将门禁卡交还给 A 公司，其他交接工作均完成。

2013 年 10 月 5 日陈某至上海某医院做了孕检，被检测出怀孕。陈某表示 8、9 月份一直在治疗，医院开具的药物也是孕妇禁用的，所以其之前根本不可能知晓已经怀孕。

2013 年 10 月 17 日 A 公司出具通知书，要求陈某在 2013 年 10 月 31 日前办理完所有交接手续，陈某拒签此通知书。10 月 30 日 A 公司再次出具通知书，要求陈某完成交接手续，并领取经济补偿金，陈某于 10 月 31 日收到该份通知。

2013 年 11 月 4 日，陈某向上海市徐汇区劳动人事争议仲裁委员会（**“徐汇劳动仲裁委”**）申请仲裁，要求 A 公司自 2013 年 11 月 1 日起恢复劳动关系。2013 年 12 月 24 日该仲裁委员会作出裁决支持了陈某要求 A 公司自 2013 年 11 月 1 日起恢复劳动关系的仲裁请求。

A 公司不服，遂向上海市徐汇区人民法院起诉。

三、 审理结果

(一) 一审

一审法院审理后认为，根据现有证据无法反映陈某提交辞呈后，及时向 A 公司提出撤回该辞呈并得到了 A 公司的同意，反而双方在 2013 年 9 月 26 日签订了解除劳动合同的协议，该协议系双方真实意思表示，基于辞呈以及该协议，可见陈某在当时确实是想从 A 公司处离职。根据法律规定，并未禁止怀孕妇女与用人单位协商解除劳动合同，现陈某主张其已经怀孕，用人单位不得解除劳动合同而要求恢复劳动关系缺乏法律依据，不予支持。故确认双方劳动合同于 2013 年 10 月 31 日解除，双方劳动关系无需自 2013 年 11 月 1 日起恢复。

据此，一审法院判决 A 公司与陈某无需自 2013 年 11 月 1 日起恢复劳动关系。

(二) 二审

陈某不服，向上海市第一中级人民法院提出上诉，认为其在签订解除劳动合同的协议时并不知晓自己怀孕，其在 2013 年 10 月 5 日才得知自己已经怀孕，且及时告知了 A 公司。

二审法院认为，陈某与 A 公司签订的《协商解除劳动合同协议书》系双方当事人真实意思表示，协议签订过程中并不存在欺诈、胁迫的情形，陈某在签协议时不知晓自己已怀孕，亦不属于法律规定的重大误解的范畴，故该协议不具有可撤销的事由，应为合法有效，双方均应恪守履行。因双方协商解除劳动合同并非用人单位单方解除，故陈某认为用人单位无权与已经怀孕的妇女解除劳动合同，双方签订的《协商解除劳动合同协议书》无效的主张，于

法无据。故驳回上诉，维持原判。

四、 法律分析

为了保护女职工的合法权益，我国《劳动合同法》对女职工有特别的保护，《劳动合同法》第四十二条规定，女职工在孕期、产期、哺乳期（“**三期**”）的，用人单位不得依照《劳动合同法》第四十条[13]、第四十一条[14]的规定解除劳动合同，即不能“非过失性解除”与“三期”女职工的劳动合同，不能以不能胜任工作、客观情况发生重大变化、经济型裁员等理由解雇女职工。

在（2017）沪 02 民终 5255 号案中，上海市第一中级人民法院就认为“我国法律法规对女职工怀孕生产所享受的待遇有着明确的规定，女职工在怀孕生产哺乳期限内用人单位不得与其解除劳动合同关系，这属于国家给予女职工待遇保障的范畴，也是用人单位所必须履行的法定义务。”而用人单位因经营方式上的调整不属于“客观情况发生重大变化，致使劳动合同无法履行”的情况，因此用人单位与劳动者解除劳动合同不符合法律规定的事由和程序，最终一中院判决恢复劳动关系。

但上述情形是用人单位与女职工解除劳动合同，而本案中是“三期”女职工主动提出解

13 《劳动合同法》第四十条 有下列情形之一的，用人单位提前三十日以书面形式通知劳动者本人或者额外支付劳动者一个月工资后，可以解除劳动合同：
（一）劳动者患病或者非因工负伤，在规定的医疗期满后不能从事原工作，也不能从事由用人单位另行安排的工作的；
（二）劳动者不能胜任工作，经过培训或者调整工作岗位，仍不能胜任工作的；
（三）劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容达成协议的。

14 《劳动合同法》第四十一条 有下列情形之一，需要裁减人员二十人以上或者裁减不足二十人但占企业职工总数百分之十以上的，用人单位提前三十日向工会或者全体职工说明情况，听取工会或者职工的意见后，裁减人员方案经向劳动行政部门报告，可以裁减人员：
（一）依照企业破产法规定进行重整的；
（二）生产经营发生严重困难的；
（三）企业转产、重大技术革新或者经营方式调整，经变更劳动合同后，仍需裁减人员的；
（四）其他因劳动合同订立时所依据的客观经济情况发生重大变化，致使劳动合同无法履行的。
裁减人员时，应当优先留用下列人员：
（一）与本单位订立较长期限的固定期限劳动合同的；
（二）与本单位订立无固定期限劳动合同的；
（三）家庭无其他就业人员，有需要扶养的老人或者未成年人的。
用人单位依照本条第一款规定裁减人员，在六个月内重新招用人员的，应当通知被裁减的人员，并在同等条件下优先招用被裁减的人员。

除劳动合同，如果“三期”女职工自行辞职或自行提出与用人单位协商一致解除劳动合同的，该解除行为应当被认可，这是尊重劳动者意思自治的表现，“三期”女职工应当享有自我选择和自我处置劳动关系的权利。[15]

而且，怀孕女职工在提出辞职时，其提起解除劳动关系的时机是由自己选择的，其完全可以等到医院的检查结果出来之后再提出辞职，在未得到确切的检验结果时提出辞职是劳动者自我意识的表现，并不存在重大误解或者意思表示错误，而此种行为产生的风险应当由表意人自行承担。

北京高院对此也有十分明确的审判口径，北京市《关于劳动争议案件法律适用问题研讨会会议纪要（二）》第 45 条规定，女职工与用人单位协商解除劳动合同后，发现自己怀孕后又要求撤销协议或者要求继续履行原合同的，一般不予支持。

[15] 参见李盛荣、马千里著《劳动争议案件司法观点集成》，法律出版社 2017 年 3 月第 1 版，第 418 页。

Can A Resigned Employee Unknowing Pregnancy Restore Employment?

Weiwei Gu | Fawen Wan | Suri Hu

1. Focus of Dispute

When a female employee voluntarily resigns without the knowledge of her pregnancy, whether the agreement on termination of labor contract is void and whether the labor relationship can be restored?

2. Facts

Plaintiff: Company A

Defendant: Chen

On February 9th, 2012, Chen was employed by Company A as cost assistant. Chen and Company A entered into two labor contracts with terms separately from February 9th, 2012 to February 8th, 2013 and from February 9th, 2013 to March 31st, 2015.

Chen submitted the resignation letter to Personnel Manager of Company A on September 23rd, 2013, indicating that she was not suitable for the position and decided to resign. Meanwhile, she requested Company A to approve the resignation within 2 weeks. Chen signed the agreement on terminating the labor contract ("**Termination Agreement**") with Company A on September 26th, 2013, where both parties agreed to terminate the labor contract on October 31st, 2013. It also stated that Company A agreed to pay Chen monetary compensation of CNY 14,410, yet the monetary compensation has not been paid. On September 27th and 29th, 2013, Chen completed resignation procedures, and handed over all her responsible work except for returning the access card to Company A.

On October 5th, 2013, Chen went to a hospital in Shanghai for a pregnancy test and was confirmed pregnant. Chen claimed that she was impossible to know that she was pregnant since she took drugs which should not be used on pregnant women during her medical treatment in August and September.

On October 17th, 2013, Company A issued a notification to Chen requesting her to complete all handover procedures before October 31st, 2013. However, Chen refused to sign this notification. Company A issued another notification on October 30th, 2013, requesting Chen to complete the handover procedure and receive her monetary compensation. Chen received the second notification on October 31st, 2013.

On November 4th, 2013, Chen applied to the Shanghai Xuhui District Labor and Personnel Dispute Arbitration Commission ("**Xuhui Labor Arbitration Commission**") for labor arbitration, and requested Company A to restore the employment relationship from November 1st, 2013. On December 24th, 2013, Xuhui Labor Arbitration Commission upheld Chen's claim and restored her employment relationship with Company A from November 1st, 2013.

Company A objected the verdict and then filed a lawsuit with Shanghai Xuhui District People's Court.

3. Trial Results

(1) First Instance

The court of first instance held that, according to the existing evidence, Chen failed to prove that she had promptly withdrawn her resignation and obtained the consent of the Company A after the submission of the resignation. On the contrary, on September 26th, 2013, both parties signed the Termination Agreement based on mutual consent, which along with the resignation letter submitted by Chen, both evidences demonstrated the Chen's intent to leave Company A at the time. In accordance with the law, pregnant women

are not prohibited from negotiating with the employer to terminate the labor contract. Hence, the Chen's assertion that the employer should not terminate the labor contract and the employment relationship should be restored because of her pregnancy lacks legal basis and should not be upheld. Therefore, the court ruled that the labor contracts between both parties were terminated on October 31st, 2013 and the employment relationship between both parties need not be restored from November 1st, 2013.

Accordingly, the court of first instance ruled that Company A was not required to restore the employment relationship with Chen since November 1st, 2013.

(2) Second Instance

Chen then appealed to Shanghai No. 1 Intermediate People's Court, contending that she signed the Termination Agreement without the knowledge of her pregnancy, and had promptly informed Company A of her condition once she learned the pregnancy on October 5th, 2013.

The court of second instance held that the Termination Agreement was signed on mutual consent with no deception or coercion in the process of the conclusion thereof. Chen's assertion of not knowing her pregnancy when she signed the Termination Agreement did not constitute "substantial misunderstanding" stipulated by Labor Contract Law. For no legitimate causes for the revocation of the Termination Agreement, it should be valid. Both parties should fulfill its duties based on the agreement. Besides, considering that the employer did not terminate the labor contract unilaterally, Chen's contention that the Termination Agreement is invalid because the employer has no right to terminate the labor contract during the female employee's pregnancy lacks legitimate justification. Accordingly, the court of second instance dismissed the appeal and upheld the original judgment.

4. Legal Analysis

The Labor Contract Law of the People's Republic of China ("***Labor Contract Law***") provides special protection to safeguard the legal rights and interests of female employees. For example, Article 42 of the *Labor Contract Law* stipulates that during the pregnant, puerperal or breast-feeding stage ("**Three-Phase**") of the employee, the employer shall not terminate the labor contract based on the provisions of Articles 40[1] and 41[2] of *Labor Contract Law.* It is said that the labor contract of Three-Phase female employees cannot be terminated due to "non-negligent" causes. In another word, the employer should not dismiss aforementioned female employee due to incompetence, the material change of circumstances, or economic layoffs and etc.

In (2017) Hu 02 Min Zhong No. 5255, Shanghai No.1 Intermediate People's Court held that "female employees during Three-Phase are specially protected by the laws and regulations of PRC, for example, the employers are prohibited to terminate the labor contract with pregnant and lactating female employees which serves as a special protection for female employees and is a statutory obligation that the employer shall fulfill." Whereas the adjustment of the employer's business mode did not constitute "a material change in the objective circumstances relied upon at the time of conclusion of the labor

[1] Article 40 of the *Labor Contract Law*, an employer may terminate the labor contract under any of the following circumstances by giving the employee 30 days' prior written notice or one month's wages in lieu of notice:
(1) where the employee is unable to resume his original work nor engage in other work arranged for him by the employer after the expiration of the prescribed medical treatment period for an illness or non-work-related injury;
(2) where the employee is incompetent and remains incompetent after training or adjustment of his position; or
(3) a material change in the objective circumstances relied upon at the time of conclusion of the labor contract renders it impossible for the parties to perform and, after consultation, the employer and the employee are unable to reach an agreement on amending the labor contract.

[2] Article 41 of the *Labor Contract Law*, if any of the following circumstances makes it necessary to reduce the workforce by 20 persons or more, or less than 20 persons but accounting for 10% or more of the total number of employees of the employer, the employer may only do so after it has explained the situation to the labor union or to all of its employees 30 days in advance, has considered the opinions of the labor union or the employees, and has submitted its workforce layoff plan to the labor administrative department:
(1) restructuring pursuant to the Enterprise Bankruptcy Law;
(2) serious difficulties in production and/or business operation;
(3) the enterprise switches production, introduces significant technological innovation or adjusts its business model, and still needs to reduce its workforce after amending the labor contracts; or
(4) a material change in the objective economic conditions relied upon at the time of conclusion of the labor contracts renders it impossible for the parties to perform.
When reducing its workforce, the employer shall retain in priority personnel:
(1) who have concluded a fixed-term labor contract with the employer with a relatively long term;
(2) who have concluded an open-ended labor contract with the employer; or
(3) who are the sole bread winner in the family with dependent family members who are elderly or minors.
If an employer that has reduced its workforce pursuant to the first paragraph hereof intends to hire new employees again within six months, it shall notify the employees dismissed at the time of the layoff and such employees shall have priority to be re-hired under the same conditions.

contract renders it impossible for the parties to perform", the termination of the labor contract did not comply with relevant legal requirements and procedures. Finally, the court held that the employment relationship should be restored.

However, such ruling was made under the circumstance where the employer terminated the labor contract unilaterally. In contrast, the female employee of "Three-Phase" in current case voluntarily terminated the labor contract. Given the conclusion of the Termination Agreement of the labor contract was based on voluntary resignation of the female employee or the mutual consent between the employer and the employee, such agreement shall be regarded as valid so as to demonstrate the employee's autonomy. It also shows that the Three-Phase female employee has her own right of choice and disposal of labor relationship[3].

Besides, the pregnant female employee has the right to choose when to resign, for example, she could have submitted her resignation letter after receiving the result of the pregnancy test. If the employee decides to resign before she can get a certain result, which is employee's autonomy. Since the resignation letter is not concluded under substantial misunderstanding or wrongful manifestation of intent, the employee shall bear the risk arising from such conduct.

Beijing Supreme People's Court defines in Article 45 of the *Summary on Seminar on the Application of the Law in Labor Dispute Cases (II)* clearly, stating that in case where a female employee voluntarily resigns without the knowledge of her pregnancy, if she requests to revoke the termination agreement or to continue performing the original labor contract, such claims shall generally not be upheld by the court.

[3] *See* Shengrong Li, Qianli Ma, *Judicial Opinions on Labor Disputes Cases*, Law Press 2017 March, 1st ed., p. 418.

➢ 新规速递

《上海市城乡居民基本养老保险办法》

作者：顾巍巍 | 万发文 | 胡翔

2019 年 4 月 10 日，上海市人民政府修订了《上海市城乡居民基本养老保险办法》（“**办法**”），修订后的办法于 2019 年 5 月 1 日起实施，有效期至 2024 年 4 月 30 日。

办法共分为七个章节，分别为总则、基金筹集、养老保险待遇、转移接续与制度衔接、基金管理、经办管理服务与信息化建设和附则。笔者将办法各部分的亮点归纳如下：

一、 总则

办法的指导原则是为了更好保障参保城乡居民的老年基本生活。参保人选需满足三个要求：本市户籍，年满 16 周岁，以及不属于职工基本养老保险制度覆盖范围的城乡居民。

上海市城乡居民养老保险的主管部门是市人力资源社会保障局（“**人社局**”），除此之外，市财政局、市民政局、市残联、市农业农村委和市税务局等也在各自的职能范围内协助办法的实施。

二、 基金筹集

城乡居民养老保险基金，由个人缴费、集体补助、政府补贴三个部分组成，前述三个部分的缴费情况终身记录在参保人员的养老保险个人账户中，个人账户的储存额按照国际的规定计算利息。

个人缴费部分共有 10 个档次，参保人员可以自主选择，多缴多得。

集体补助部分并非必须，办法鼓励有条件的村集体经济组织对参保人员进行补助，同时也鼓励其他社会经济组织、公益慈善组织、个人为参保人员进行资助。其中，补助标准由村民会议或村集体成员会议讨论决定，但补助和资助金额都不能超过最高缴费档次。

政府补贴部分是由区政府对本辖区户籍的参保人员给予补助，补助的标准也有相应的10 个档次。

另外，办法第八条规定区政府对本辖区户籍的重度残疾人等缴费困难的群众代缴部分或者全部的养老保险费，重度残疾人的个人缴费标准为每年 1100 元，个人承担 5%（领取重残无业人员生活补助的，个人无需缴费），残疾人就业保障金承担 600 元，其余部分由区财产代缴。

办法第九条规定，市人社局和市财政局可以向市政府提出调整个人缴费标准和缴费补贴标准，报市政府批准后公布实施。

三、 养老保险待遇

参保人员在年满 60 周岁、累计缴费满 15 年后，未领取国家和本市规定的基本养老保障待遇的，可以按月领取城乡居民养老保险待遇（“**待遇**”），城乡居民养老保险经办机构每年会对城乡居民养老保险待遇领取人员进行核对，以确保不重、不漏、不错。

根据办法第十一条的规定，新型农村社会养老保险（“**新农保**”）或者城镇居民社会养老保险（“**城居保**”）实施时已年满 60 周岁的无需缴费即可领取基础养老金。45 周岁以上的，不足年份应当逐年缴费，同时也允许补缴（累计缴费年限不超过 15 年）。45 周岁以下的，应当按年缴费（累计缴费年限不少于 15 年）。

上述待遇包括基础养老金和个人账户养老金。基础养老金由市财政和区财政各承担50%，每月发放 1010 元，累计缴费超过 15 年的参保人员每超过 1 年基础养老金增加 20 元。个人账户养老金的月发放标准为个人账户全部储存额除以 139，参保人员死亡的，从次

月起停止支付养老金，家属可以领取丧葬补助金共计 6000 元（由市财政和区财政各承担50%），个人账户的资金余额可以作为遗产被继承。

四、 转移接续与制度衔接

（一） 地区转移

参保人员在缴费期间户籍转移需要跨省市转移养老保险关系的，可以在迁入地申请转移养老保险，并按照迁入地的规定继续参保缴费，缴费年限累计计算。但如果户籍转移时已经开始按照规定领取待遇的，养老保险关系不转移。

（二） 制度衔接

城乡居民养老保险制度与职工基本养老保险制度、因工死亡职工供养亲属抚恤金制度、优抚安置、城乡居民最低生活保障、农村五保（吃、穿、住、医、葬）供养等社会保障制度以及农村部分计划生育家庭奖励扶助制度相衔接。

被征地人员、非因工死亡职工遗属、精减退职回乡老职工配偶参加城乡居民养老保险的办法，按照国家和本市有关规定执行。

（三） 新旧衔接

建立城乡居民养老保险制度后，涉及到与新农保和城居保的新旧制度衔接问题。

新农保制度中原参加过农村社会养老保险的人员按照规定可以领取的过渡性养老金继续享受，所需资金由新农保基金中的“原统筹基金”承担，使用完毕后由区财政继续承担。新农保制度中原享受老年农民养老金补贴人员按照规定领取的过渡性养老金补贴继续享受，所需资金由区财政承担。

城居保制度中原享受城镇老年居民养老保障待遇人员按照规定领取的高于基础养老金的 100 元继续享受，所需资金由市财政和区财政按照 50%和 50%的比例分担。

五、 基金管理

（一）基金管理

新农保基金和城居报基金合并为城乡居民养老保险基金，实行市级管理，城乡居民养老保险基金纳入市社会保障基金财政专户，单独记账、独立核算，任何部门、单位和个人均不得挤占挪用、虚报冒领。

城乡居民养老保险基金按照国家规定统一投资运营，实现增值保值。

（二）基金监督

办法第二十二条规定，人社局对基金筹集、上解、划拨、发放、存储、管理等进行监控和检查。财政局和审计部门在各自的职责范围内，对基金的收支、管理和投资运营情况实施监督。

办法第二十二条同时规定，对于虚报冒领、挤占挪用、贪污浪费等违纪违法行为应当进行严肃处理。

六、 经办管理服务与信息化建设

（一） 经办机构

办法第二十三条规定，市社会保险事业管理中心负责管理上海市的城乡居民养老保险经办工作，街道（乡、镇）社区事务受理中心负责受理具体事务。

（二） 经办服务

办法第二十四条规定，区政府应当为经办机构提供必要的工作场地、设施设备和经费保障，经费由同级财政预算承担，不得从城乡居民养老保险基金中开支。同时，社保经办机构应当加强城乡居民养老保险工作人员的专业培训。

（三） 信息化建设

办法第二十六条规定，应当建立市级集中的城乡居民养老保险信息管理系统，并与其他公民信息管理系统实现信息资源共享，实现市、区、乡镇（街道）、社区实时联网，方便参保人员查询参保信息。

Measures for Basic Pension Insurance for Urban and Rural Residents in Shanghai

Weiwei Gu | Fawen Wan | Suri Hu

Shanghai Municipal People's Government issued the revised "*Measures for Basic Pension Insurance for Urban and Rural Residents in Shanghai*" ("***Measures***") on April 10, 2019. The revised measures were implemented on May 1, 2019, and will be valid until April 30, 2024.

The *Measures* consist of 7 chapters as General Provisions, Collection of Fund, Pension Insurance Treatment, Transfer and System Convergence, Fund Management, Agency's Management, Services and Information Construction, and Supplementary Rules. The upshots of these *Measures* are summarized as follows:

1. General Provisions

The guiding principle of the *Measures* is to ensure elder urban and rural residents' basic life. Insured person shall meet the following three requirements: he/she has Shanghai household registration; his/her age is at least 16 years old; and urban and rural residents who are not covered by the basic pension insurance system for employees.

Shanghai Municipal Human Resources and Social Security Bureau ("**Municipal Human and Social Security Bureau**") supervises and manages Shanghai urban and rural residents' pension insurance. In addition, Shanghai Municipal Finance Bureau, Shanghai Civil Affairs Bureau, Shanghai Municipal Disabled Persons' Federation, Shanghai Municipal Agricultural Commission, and Shanghai Municipal Tax Service and State Taxation Administration also assist in the implementation of the *Measures* within their respective responsibilities.

2. Collection of Fund

The pension insurance fund for urban and rural residents consists of three parts: individual payment, collective subsidy and government subsidy. The aforementioned payments are recorded in the individual account of the insured person's pension insurance during the lifetime. The individual account's principal will be paid interests, of which rate is in accordance with international regulations.

The individual payment is divided into 10 levels, and the insured person can choose whichever level he/she prefers. The more he/she pays, the more he/she gains.

The collective subsidy is not compulsory. The *Measures* encourage the qualified rural economic collectives to subsidize the insured people, and also encourage other social economic organizations, charitable organizations, and individuals to provide financial aids for the insured people. Moreover, the subsidy standard shall be decided by the village meeting or the collective member meeting, but the amount of subsidy and the financial aid cannot exceed the aforementioned maximum level.

The government subsidy is the subsidy funded by the district government for the insured people of the household registration in the jurisdiction. The subsidy standard is also divided into 10 levels.

In addition, Article 8 of the *Measures* stipulates that the district government shall pay part or all of the pension insurance premiums for the severely-handicapped residents, residing in the district jurisdiction, who have difficulties in paying insurance premiums. The individual payment standard for the severely-handicapped residents is 1100 yuan per year of which the individuals pay 5% (Severely-handicapped unemployed people who is qualified for the life subsistence allowance shall not pay the premium). The employment security fund for the handicapped pays 600 yuan, and the rest shall be paid by the district

finance.

Article 9 of the *Measures* stipulates that the Municipal Human and Social Security Bureau as well as the Municipal Finance Bureau may propose to adjust the individual payment standards and payment subsidy standards to the municipal government, which shall be promulgated and enforced with the approval of the municipal government.

3. Pension Insurance Treatment

The insured residents shall enjoy the treatment of pension insurance for urban and rural residents ("**Treatment**") on a monthly basis at the age of 60 under the circumstances that 1) they have paid the accumulated insurance premiums for 15 years and 2) have not enjoyed the basic pension insurance treatment stipulated by the State and Shanghai Municipal. The authority responsible for handling the pension insurance for urban and rural residents shall check the residents who enjoy the treatment to ensure no repetition, no missing and no mistake.

According to Article 11 of the *Measures*, residents who have reached the age of 60, when the New Rural Social Pension Insurance ("**NRSPI**") or the Pension Insurance for Urban Residences ("**URPI**") was enforced, can receive the basic pension without paying insurance premium. For those over 45 years old, they shall pay the premiums annually if he/she fails to pay the accumulated insurance premiums for 15 years and the supplementary payment shall be allowed at the same time (the accumulated payment period shall not exceed 15 years). Those under 45 years old shall pay the insurance premium annually (the accumulated payment period shall not be less than 15 years).

The above treatment includes basic pensions and personal account pensions. The basic pension is covered by the municipal finance and the district finance by 50% each, and was paid as a standard of 1010 yuan monthly. The resident with an accumulated

payment period for more than 15 years shall receive extra 20 yuan monthly as basic pension for every extra year. The monthly payment standard of individual account pension is the total amount of individual accounts divided by 139. If the insured resident dies, the payment of pension shall be suspended from the following month of death, and the family members can receive a funeral subsidy with the amount of 6,000 yuan (covered by the municipal finance and the district finance by 50% each). The balance of the individual account can be inherited as a legacy.

4. Transfer and System Convergence

4.1 Regional Transfer

If the insured resident transfers the household registration during the payment period and needs to transfer the pension insurance relationship across provinces and cities, he/she may apply to transfer his/her pension insurance locally, and continue to pay the insurance premium according to the local regulations. The payment period is calculated cumulatively. However, the pension insurance relationship shall not be transferred, if the resident, who has already enjoyed the treatment, transfers the household registration.

4.2 System Convergence

The system of pension insurance for urban and rural residents is converged with the system of basic pension insurance for employees, employees' dependent pension system for work-related deaths, the special care and settlement, the minimum living-level insurance for urban and rural residents, five basic-guaranteed (food, clothing, housing, medical care and funeral) system for rural residents and other social security systems, and the rewards and assistance system for rural families executing birth control.

The way for the following personnel to participate in pension insurance for residents

of urban and rural shall be implemented in accordance with the relevant stated and municipal regulations, including personnel whose land is expropriated, the survivors of non-work-related death, and the spouses of employees who was retired in advance due to policy adjustment.

4.3 The Convergence of the New and Old Systems

After establishing the pension insurance system for urban and rural residents, there is the problem of convergence of the new and old systems of NRSPI and URPI.

NRSPI residents who have participated in the rural social pension insurance can continue to receive the transitional pensions that can be obtained according to the regulations. The funds shall be covered by the “original overall fund” in the NRSPI, and the insufficient part shall be covered by the district finance. NRSPI residents who enjoy the treatment of receiving pension subsidies for elder farmers in accordance with the regulations shall continue to receive the transitional pensions, and the required funds shall be covered by the district finance.

URPI residential who enjoy the treatment of pension insurance for elder urban residents shall continue to receive the pension 100 yuan more than the basic pension level, and the required fund shall be covered by the municipal finance and the district finances by 50% each.

5. Fund Management

5.1 Fund management

The fund of NRSPI and URPI shall be merged into the pension insurance for urban and rural residents fund, and shall be managed by municipal department. The pension

insurance for urban and rural residents fund shall be attributed to the specific financial account of municipal social security fund, which shall be accounted separately and calculated independently. Any department, unit or individual shall not embezzle, misappropriate, overstate or falsely claim.

The pension insurance for urban and rural residents fund shall be invested and operated uniformly in accordance with state regulations to achieve value addition and retention.

5.2 Fund Supervision

Article 22 of the *Measures* stipulates that the Human and Social Security Bureau shall monitor and inspect the raising, settlement, allocation, distribution, storage and management of the fund. The Finance Bureau and the Audit Department shall supervise the revenue, expenditure, management and situation of investment operations of the fund within their respective functions and responsibilities.

Article 22 of the *Measures* also stipulates that disciplinary violations such as overstate, falsely claim, embezzlement, misappropriation, corruption or waste and etc. shall be seriously punished.

6. Agency's Management, Services and Information Construction

6.1 Service Agency

Article 23 of the *Measures* stipulates that the Municipal Social Insurance Enterprise Management Center is responsible for the management of pension insurance for urban and rural residents in Shanghai. In the meantime, the street (township, town) community affairs centers are responsible to handle specific affairs.

6.2 Agency's Services

Article 24 of the *Measures* stipulates that the district government shall provide the necessary working places, facilities, equipment and financial guarantees for the service agencies. The budgets shall be paid by the corresponding government's financial budget and shall not be paid by the pension insurance for urban and rural residents fund. At the same time, service agencies shall strengthen the professional training of the service staff who services pension insurance for urban and rural residents.

6.3 Information Construction

Article 26 of the *Measures* stipulates that a municipal centralized information management system of pension insurance for urban and rural residents shall be established. The system shall be shared with other citizen information management systems to realize real-time networking between cities, districts, townships (streets) and communities to make it convenient for insured residents to search insurance information.

附：

上海市城乡居民基本养老保险办法

第一章　总则

第一条（目的和依据）

为全面推进覆盖本市全体城乡居民的基本养老保险制度建设，根据《中华人民共和国社会保险法》、《国务院关于建立统一的城乡居民基本养老保险制度的意见》，结合本市实际，制定本办法。

第二条（指导原则）

按照全覆盖、保基本、有弹性、可持续的方针，以增强公平性、适应流动性、保证可持续性为重点，建立本市城乡居民基本养老保险（以下简称“城乡居民养老保险”）制度。与职工基本养老保险制度相衔接，与社会救助、社会福利等其他社会保障政策相配套，充分发挥家庭养老等传统保障方式的积极作用，更好保障参保城乡居民的老年基本生活。

第三条（适用范围）

本市户籍，年满16周岁（不含在校学生），不属于职工基本养老保险制度覆盖范围的城乡居民，可以参加城乡居民养老保险。

第四条（管理部门）

市人力资源社会保障局是城乡居民养老保险的行政主管部门。

市财政局、市民政局、市残联、市农业农村委、市税务局等部门按照各自职责，协同实施本办法。

各区政府负责做好本辖区内城乡居民养老保险的组织管理和实施工作。

第二章　基金筹集

第五条（基金构成）

城乡居民养老保险基金，由个人缴费、集体补助、政府补贴构成。

第六条（个人缴费）

参加城乡居民养老保险的人员，应当按照规定缴纳养老保险费。个人缴费标准目前设为每年500元、700元、900元、1100元、1300元、1700元、2300元、3300元、4300元、5300元10个档次。

参保人自主选择档次缴费，多缴多得。

第七条（集体补助）

有条件的村集体经济组织应当对参保人缴费给予补助，补助标准由村民委员会召开村民会议，或由村集体经济组织召开成员会议民主确定。鼓励有条件的社区将集体补助纳入社区公益事业资金筹资范围。鼓励其他社会经济组织、公益慈善组织、个人为参保人缴费提供资助。补助、资助金额不超过最高缴费档次标准。

第八条（政府补贴）

政府对符合领取城乡居民养老保险待遇条件的参保人全额支付基础养老金。

区政府对本辖区户籍参保人缴费给予补贴。按照每年500元、700元、900元、1100元、1300元、1700元、2300元、3300元、4300元、5300元缴费标准，对应的缴费补贴标准为每年200元、250元、300元、350元、400元、450元、525元、575元、625元、675元。

区政府为本辖区户籍的重度残疾人等缴费困难群体代缴部分或全部的养老保险费。重度残疾人的个人缴费标准按照每年 1100 元确定。其中，个人按照缴费标准的 5%缴费，残疾人就业保障金代缴 600 元，其余部分由区财政代缴。重度残疾人中领取重残无业人员生活补助人员，个人不缴费，残疾人就业保障金代缴 600 元，区财政代缴 500 元。具体办法，由市残联和市财政局等有关部门另行制定。

第九条（标准调整）

个人缴费标准和缴费补贴标准的调整，由市人力资源社会保障局会同市财政局依据本市城乡居民收入增长等情况提出意见，报市政府批准后公布实施。

第十条（建立个人账户）

本市为每位参保人员建立终身记录的养老保险个人账户。个人缴费、区政府对参保人的缴费补贴、集体补助，以及其他社会经济组织、公益慈善组织、个人对参保人的缴费资助，全部记入个人账户。个人账户储存额按照国家规定计息。

第三章　养老保险待遇

第十一条（养老保险待遇领取条件）

参加城乡居民养老保险的人员，年满 60 周岁、累计缴费满 15 年，且未领取国家和本市规定的基本养老保障待遇的，可以按月领取城乡居民养老保险待遇。

本市新型农村社会养老保险（以下简称“新农保”）制度或城镇居民社会养老保险（以下简称“城居保”）制度实施时，已年满 60 周岁且未领取国家和本市规定的基本养老保障待遇的，不用缴费，自本办法实施之月起，可以按月领取城乡居民养老保险基础养老金；距规定领取年龄不足 15 年的，不足年份应当逐年缴费，也允许补缴，补缴后累计缴费年限不超过 15 年；距规定领取年龄超过 15 年的，应当按年缴费，累计缴费不少于 15 年。

第十二条（待遇构成）

城乡居民养老保险待遇，由基础养老金和个人账户养老金构成，支付终身。

第十三条（基础养老金）

基础养老金的月计发标准为1010元（含中央确定的基础养老金最低标准）；累计缴费超过15年的参保人员，每超过1年，其基础养老金增加20元。

基础养老金由市财政（含中央财政补助资金）和区财政按照50%和50%的比例分担。其中，区财政对本辖区户籍的城乡居民养老保险待遇领取人员承担相应的基础养老金。

第十四条（待遇调整）

本市建立城乡居民养老保险基础养老金正常调整机制。城乡居民养老保险基础养老金根据全国基础养老金最低标准调整以及本市经济发展和物价变动等情况，适时调整。

第十五条（个人账户养老金）

个人账户养老金的月计发标准为个人账户全部储存额除以139。参保人死亡，其个人账户资金余额可以依法继承。

第十六条（丧葬补助金）

城乡居民养老保险待遇领取人员死亡的，从次月起停止支付养老金，其家属可以领取标准为6000元的丧葬补助金。

丧葬补助金所需资金，由市财政和区财政按照50%和50%的比例分担。其中，区财政对本辖区户籍的城乡居民养老保险待遇领取人员承担相应的丧葬补助金。

丧葬补助金标准的调整，由市人力资源社会保障局会同市财政局依据本市经济发展和物价变动等情况提出意见，报市政府批准后公布实施。

第十七条（资格认证）

城乡居民养老保险经办机构应当每年对城乡居民养老保险待遇领取人员进行核对；村（居）民委员会应当协助城乡居民养老保险经办机构开展工作，在行政村（社区）范围内对参保人员待遇领取资格进行公示，并与国家和本市规定的基本养老保障待遇等领取记录进行比对，确保不重、不漏、不错。

第四章　转移接续与制度衔接

第十八条（制度内转移接续）

参加城乡居民养老保险的人员在缴费期间户籍迁移，需要跨省市转移城乡居民养老保险关系的，可以在迁入地申请转移养老保险关系，一次性转移个人账户全部储存额，并按照迁入地规定，继续参保缴费，缴费年限累计计算。

已经按照规定领取城乡居民养老保险待遇的，无论户籍是否迁移，其养老保险关系不转移。

第十九条（相关制度衔接）

城乡居民养老保险制度与职工基本养老保险制度、因工死亡职工供养亲属抚恤金制度、优抚安置、城乡居民最低生活保障、农村五保供养等社会保障制度以及农村部分计划生育家庭奖励扶助制度的衔接，按照国家和本市有关规定执行。

被征地人员、非因工死亡职工遗属、精减退职回乡老职工配偶参加城乡居民养老保险的办法，按照国家和本市有关规定执行。

第二十条（新老制度衔接）

建立城乡居民养老保险制度后，新农保制度中原参加过农村社会养老保险人员、原享受老年农民养老金补贴人员，以及城居保制度中原享受城镇老年居民养老保障待遇人员，按照“锁定人群、待遇平稳过渡”原则处理。

（一）新农保制度中原参加过农村社会养老保险的人员按照规定可以领取的过渡性养老金继续享受，所需资金由新农保基金中的“原统筹基金”承担，使用完毕后由区财政继续承担。

（二）新农保制度中原享受老年农民养老金补贴人员按照规定领取的过渡性养老金补贴继续享受，所需资金由区财政承担。

（三）城居保制度中原享受城镇老年居民养老保障待遇人员按照规定领取的高于基础养老金的 100 元继续享受，所需资金由市财政和区财政按照 50%和 50%的比例分担。

第五章　基金管理

第二十一条（基金管理和运营）

将新农保基金和城居保基金合并为城乡居民养老保险基金，实行市级管理。

城乡居民养老保险基金纳入市社会保障基金财政专户，基金实行收支两条线管理，单独记账、独立核算，任何部门、单位和个人均不得挤占挪用、虚报冒领。

市财政和区财政承担的资金纳入各级财政预算，并由市财政和区财政分项目拨付至市社会保障基金财政专户。

城乡居民养老保险基金按照国家统一规定投资运营，实现保值增值。

建立城乡居民养老保险基金财务会计制度。具体办法由市财政局会同市人力资源社会保障局另行制定。

第二十二条（基金监督）

人力资源社会保障部门应当会同有关部门认真履行基金监管职责，建立健全内控制度和基金稽核监督制度，对基金的筹集、上解、划拨、发放、存储、管理等进行监控和检查，并按照规定披露信息，接受社会监督。

财政部门、审计部门按照各自职责，对基金的收支、管理和投资运营情况实施监督。积极探索有村（居）民代表参加的社会监督有效方式，做到基金公开透明、制度在阳光下运行。

对虚报冒领、挤占挪用、贪污浪费等违纪违法行为，有关部门按照国家和本市有关规定严肃处理。

第六章　经办管理服务与信息化建设

第二十三条（经办机构）

本市城乡居民养老保险经办工作由市社会保险事业管理中心负责管理，区政府确定本区社会保险经办机构具体承办，街道（乡、镇）社区事务受理中心具体受理。

第二十四条（经办管理服务）

区政府应当加强城乡居民养老保险经办能力建设，科学整合现有公共服务资源和社会保险经办管理资源，充实加强基层经办力量，做到精确管理、便捷服务；注重运用现代管理方式和政府购买服务方式，降低行政成本，提高工作效率；为经办机构提供必要的工作场地、设施设备、经费保障。

社会保险经办机构应当加强城乡居民养老保险工作人员专业培训，提高公共服务水平。建立各项业务管理规章制度，认真记录城乡居民参保缴费和领取待遇情况，建立参保档案，并按照规定妥善保存。

第二十五条（工作经费）

城乡居民养老保险工作经费纳入同级财政预算，不得从城乡居民养老保险基金中开支。

第二十六条（信息化建设）

建立市级集中的城乡居民养老保险信息管理系统，纳入社会保障信息管理系统（“金保工程”）建设，并与其他公民信息管理系统实现信息资源共享，将信息网络向基层延伸，实现市、区、乡镇（街道）、社区实时联网，有条件的区可以延伸到行政村，以方便城乡居民参保缴费、待遇领取和参保信息查询。

第七章　附则

第二十七条（实施细则）

市人力资源社会保障局、市财政局等部门可以根据本办法，制定实施细则。

第二十八条（施行期限）

本办法自 2019 年 5 月 1 日起实施，有效期至 2024 年 4 月 30 日。本市其他有关规定与本办法不一致的，按照本办法执行。

本期作者简介

顾巍巍律师为环球律师事务所常驻上海的合伙人，其主要执业领域为争议解决，合规、反垄断政府调查，劳动等。

邮箱：guweiwei@glo.com.cn

Mr. Weiwei Gu is a partner based in our Shanghai office. His main practice areas include dispute resolution, compliance, antitrust and employment-related matters.

Email: guweiwei@glo.com.cn

万发文为环球律师事务所常驻上海的顾问，其主要执业领域为诉讼、仲裁、各类纠纷的非诉解决，以及法人名誉权保护、互联网直播领域、家事方面的相关业务。

邮箱：wanfawen@glo.com.cn

Mr. Fawen Wan is an of-counsel based in our Shanghai office. His main practice areas include litigation, arbitration, alternative dispute resolution, corporate reputation right protection, webcast, and family disputes-related matters.

Email: wanfawen@glo.com.cn

胡翔为环球律师事务所常驻上海的律师，其主要执业领域是争议解决和合规。

邮箱：surihu@glo.com.cn

Ms. Suri Hu is an associate based in our Shanghai office. Her main practice areas include dispute resolution and compliance.

Email: surihu@glo.com.cn

环球简介

环球律师事务所（“我们”）是一家在中国处于领先地位的综合性律师事务所，为中国及外国客户就各类跨境及境内交易以及争议解决提供高质量的法律服务。

历史. 作为中国改革开放后成立的第一家律师事务所，我们成立于 1984 年，前身为 1979 年设立的中国国际贸易促进委员会法律顾问处。

荣誉. 作为公认领先的中国律师事务所之一，我们连续多年获得由国际著名的法律评级机构评选的奖项，如《亚太法律 500 强》（The Legal 500 Asia Pacific）、《钱伯斯杂志》（Chambers & Partners）、《亚洲法律杂志》（Asian Legal Business）等评选的奖项。

规模. 我们在北京、上海、深圳三地办公室总计拥有 400 余名的法律专业人才。我们的律师均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，部分合伙人还拥有美国、英国、德国、瑞士和澳大利亚等地的律师执业资格。

专业. 我们能够将精湛的法律知识和丰富的执业经验结合起来，采用务实和建设性的方法解决法律问题。我们还拥有领先的专业创新能力，善于创造性地设计交易结构和细节。在过去的三十多年里，我们凭借对法律的深刻理解和运用，创造性地完成了许多堪称“中国第一例”的项目和案件。

服务. 我们秉承服务质量至上和客户满意至上的理念，致力于为客户提供个性化、细致入微和全方位的专业服务。在专业质量、合伙人参与程度、客户满意度方面，我们在中国同行中名列前茅。在《钱伯斯杂志》2018 及 2012 年举办的“客户服务”这个类别的评比中，我们名列中国律师事务所首位。

环球劳动业务简介

我们能够为客户提供全面的劳动与雇佣法律服务. 我们不仅为客户处理在交易过程中与劳动相关的事务，还协助客户处理日常运营过程中与劳动相关的事务，以及帮助客户解决各类劳动争议。

我们拥有丰富的劳动与雇佣法律专业知识. 在劳动与雇佣领域，我们的劳动法律师不仅深刻理解国家层面的各种法律法规规定，还谙熟地方层面的各种法律法规规定，并时刻关注国家和地方层面法律法规的最新变化和进展。尤其是，我们还能够将我们对相关法律法规的认识以及对复杂问题的理解准确和清楚地传达给我们的客户。

我们能够为客户提供实用的劳动与雇佣法律建议. 我们秉承客户满意至上的理念，致力于为客户提供个性化、细致入微和全方位的专业服务。为此我们不仅要求自己提供的法律建议及时、准确，更要求我们提供的法律建议能够直接帮助客户解决实际的具体问题。

我们拥有丰富的劳动与雇佣法律服务经验. 我们在劳动与雇佣领域的经验包括：（1）处理劳动合同订立、履行、解除或终止过程中的各种劳动争议，包括但不限于劳动合同效力、劳动合同期限、试用期、培训和服务期、薪酬待遇、工时休假、劳动合同解除、劳动合同终止、经济补偿金、竞业限制、劳务派遣等方面的劳动仲裁和劳动争议诉讼案件；（2）就企业日常运营过程中的劳动相关问题为客户提供咨询服务；（3）参与谈判并起草、审阅及修订各种与劳动相关的协议，包括个人劳动合同、集体劳动合同、劳务派遣协议、培训协议、竞业限制协议、保密协议、期权协议、协商解除劳动合同协议等；（4）设计、起草、审阅及修订各种与劳动相关的规章制度，包括员工手册、员工行为准则、工时休假制度、薪酬福利制度、股权激励计划、差旅报销制度等；以及（5）协助企业处理并购、重组、破产、清算以及解散等过程中的员工安置与规模裁员等劳动相关事务。

版权与免责

免责. 本报告及其内容不代表环球律师事务所对有关问题的法律意见，任何仅依照本报告的全部或部分内容而做出的作为和不作为决定及因此造成的后果由行为人自行负责。如您需要法律意见或其他专家意见，应该向具有相关资格的专业人士寻求专业帮助。

联系我们. 如您欲进一步了解本报告所涉及的内容，您可以通过下列联系方式联系我们。

环球律师事务所（北京总部）

北京市朝阳区建国路 81 号华贸中心 1 号写字楼 15 层&20 层 邮编：100025

电话：(86 10) 6584 6688

传真：(86 10) 6584 6666

电邮：global@glo.com.cn

环球律师事务所（上海）

上海市黄浦区湖滨路 150 号企业天地 5 号楼 26 层 邮编：200021

电话：(86 21) 2310 8288

传真：(86 21) 2310 8299

电邮：shanghai@glo.com.cn

环球律师事务所（深圳）

深圳市南山区深南大道 9668 号华润置地大厦 B 座 27 层 邮编：518052

电话：(86 755) 8388 5988

传真：(86 755) 8388 5987

电邮：shenzhen@glo.com.cn

环球律师事务所

北京市朝阳区建国路81号华贸中心
1号写字楼15层&20层 邮编: 100025
15 & 20/F Tower 1, China Central Place,
No. 81 Jianguo Road Chaoyang District,
Beijing 100025, China
电话/T. (86 10) 6584 6688
传真/F. (86 10) 6584 6666

上海市黄浦区湖滨路150号企业天地
5号楼26层 邮编: 200021
26F, 5 Corporate Avenue,
No. 150 Hubin Road, Huangpu District,
Shanghai 200021, China
电话/T. (86 21) 2310 8288
传真/F. (86 21) 2310 8299

深圳市南山区深南大道9668号
华润置地大厦B座27层 邮编: 518052
27th Floor Tower B, China Resources Land Building,
No. 9668 Shennan Avenue, Nanshan District,
Shenzhen 518052, China
电话/T. (86 755) 8388 5988
传真/F. (86 755) 8388 5987