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环球劳动法律专递

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# 环球劳动法律专递 (第 3 期)

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## 环球劳动法律专递

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## ➤ 环球视角

### 面对疫情，企业应当如何正确处理复工前后以及特殊假期期间的薪资问题？

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春节期间突发的新冠肺炎疫情给全国各行业的企业都带来了一定程度的影响，现阶段诸如：某公司部分员工停薪留职 2 个月，期间只发最低工资标准的 80%；某公司 HR 在公司内部发送邮件，征询员工关于自愿降薪的意见，自愿降薪的比例在 5%~15% 的区间范围内，自愿降薪自 1 月开始，周期最长为半年，公司完成融资后将按照降薪金额的 1.3 倍返还给职工；某公司暂停晋升，取消加班费，降低绩效工资比例等类型的新闻屡见不鲜。

在当前疫情逐渐得到控制，企业开始复工复产的大环境下，企业如何从疫情带来的阴影下突围，恢复正常的生产状态已经成为全社会关注的焦点。大环境是复工复产的必要外部条件，但企业复工复产还应注重调整和梳理企业内部的小环境，尤其是在劳动用工方面。本文针对疫情期间企业薪资支付过程中可能遇到的常见问题进行了研究和梳理，以期为企业处理疫情期间的劳动用工问题提供借鉴。

#### 一、关于薪资支付标准

##### （一）普通职工

##### 1. 延长春节假期期间

疫情初期，国务院发布《国务院办公厅关于延长 2020 年春节假期的通知》（国办发明电〔2020〕1 号）（“国务院 1 号文”），宣布延长 2020 年春节假期至 2 月 2 日，2 月 3 日起正常上班。

1 月 31 日至 2 月 2 日为延长春节假期期间，对于此期间的工资支付问题，国务院 1 号文明确规定，在此期间因疫情不能休假的职工应予以安排调休或支付加班工资。因此，对此期间的性质认定问题，各地均无分歧，延长春节假期期间应视为休息日，不能调休的应按照休息日的标准向劳动者支付 200% 的工资。

##### 2. 延迟复工期间

面对严峻的疫情形势，北京、上海等各大城市均宣布延迟企业复工至2月9日，对于这些地区来说，2月3日至2月9日即为延迟复工期间。其中2月8日至9日，原为休息日，延迟复工后仍应为休息日，对于在此期间提供劳动的劳动者应给予调休或200%的工资报酬。

对于2月3日至2月7日原为工作日，延迟复工后的定性问题，中央层面未作统一规定，因此应根据各地的规定予以执行。上海人社局的观点认为，延迟复工期间均属于休息日，因此这期间应予以调休或200%的工资报酬，而北京和广州均认为2月3日至2月7日属于工作日，如果劳动者提供劳动的应正常支付工资。

### 3.延迟复工期间之后

在延迟复工期间之后，各地均要求符合复工的企业在履行一定的批准或备案手续之后进行复工，对于这个期间，企业按照何种标准向员工支付工资要看企业是否需要继续停工停产。

对于已经正常复工的企业来说，可以通过与职工协商一致采取调整薪酬、轮岗轮休、缩短工时等较为灵活的方式稳定工作岗位，安排轮流上班，此时工资应按照劳动合同约定正常支付。对于远程办公的员工是否应当正常发放工资的问题，鉴于《人力资源社会保障部 全国总工会 中国企业联合会/中国企业家协会 全国工商联 关于做好新型冠状病毒感染肺炎疫情防控期间稳定劳动关系支持企业复工复产的意见》（“人社部8号文”）鼓励有条件的企业可安排职工通过电话、网络等灵活的工作方式在家上班完成工作任务，因此我们认为在此期间进行远程办公的劳动者，应视为已经提供了劳动，企业仍应正常发放工资。

但对于无法正常复工的企业，人社部发布的《人力资源社会保障部办公厅关于妥善处理新型冠状病毒感染的肺炎疫情防控期间劳动关系问题的通知》（“人社部5号文”）规定，企业停工停产在一个工资支付周期内的，企业应按劳动合同规定的标准支付职工工资。超过一个工资支付周期的，若职工提供了正常劳动，企业支付给职工的工资不得低于当地最低工资标准。职工没有提供正常劳动的，企业应当发放生活费，而生活费的标准由各省、自治区、直辖市规定。

对于停工停产超过一个工资支付周期的工资支付问题，上海人社局《关于应对新型冠状病毒感染肺炎疫情实施人力资源社会保障支持保障措施的通知》中要求，企业因受疫情影响要求职工推迟复工，超过一个工资支付周期的，支付的工资不得低于最低工资标准。北京人社局的《北京市关于做好疫情防控期间维护劳动关系稳定有关问题的通知》（“京人社11号文”）则规定，职工未复工时间较长的，企业经与职工协商一致，可以安排职工待岗。待岗期间，企业应当按照不低于本市最低工资标准的70%支付基本生活费。

## **（二）被诊断为新型冠状病毒感染的肺炎、被隔离观察、因政府实施隔离措施或采取其他紧急措施导致不能提供正常劳动的企业职工**

对于被诊断为新型冠状病毒感染的肺炎、被隔离观察、因政府实施隔离措施或采取其他紧急措施导致不能提供正常劳动的企业职工，人社部 5 号文规定企业应支付前述职工的工作报酬，同时人社部 8 号文规定，因依法被隔离导致不能提供正常劳动的职工，要指导企业按正常劳动支付其工资；隔离期结束后，对仍需停止工作进行治疗的职工，按医疗期有关规定支付工资。

北京人社局的京人社 11 号文规定，企业职工因患病停止工作治疗休息的，应当享有医疗期。职工医疗期中，企业应当根据劳动合同或集体合同的约定，支付病假工资，病假工资不得低于北京市最低工资标准的 80%。对于新型冠状病毒感染的肺炎疑似病人及与新型冠状病毒感染的肺炎病人、疑似病人密切接触者，经隔离、医学观察排除是病人或者病原携带者后，隔离、医学观察期间的工资待遇由所属企业按正常工作期间工资支付。

上海人社局的规定与人社部 8 号文一致，虽未规定患病职工的具体支付标准，但依据《上海市企业工资支付办法》第 9 条、《上海市劳动和社会保障局关于病假工资计算的公告》第 1 条和《关于本市劳动者在履行劳动合同期间患病或者非因工负伤的医疗期标准的规定》第 2 条的规定，可根据职工享有的具体的医疗期期限推算医疗期内的病假工资支付标准。

但如果劳动者是因不遵守政府防控措施，导致被隔离治疗或接受医学观察的，浙江高院在其《关于规范涉新冠肺炎疫情相关民事法律纠纷的实施意见（试行）》（“浙江高院意见”）中认为，前述情况下劳动者主张该期间劳动报酬的，一般不予支持。

## **二、关于调整薪酬待遇**

部分企业受到疫情影响导致产能下降，希望通过调整职工薪酬的方式缓解压力，对此，我们的观点是：企业调整薪酬待遇并无不可，但必须与劳动者协商一致。

从人社部 5 号和人社部 8 号文的口径能够看出，对于受疫情影响严重的企业，国家允许通过与职工协商一致采取调整薪酬的方式稳定工作岗位，帮助企业减轻资金周转压力，这为企业与职工协商降低薪酬待遇提供了一定的政策依据，但判断调薪行为是否合规的关键在于企业是否与劳动者协商一致。原因在于，调整薪酬待遇本质上是对劳动合同的变更，根据《劳动合同法》第 35 条的规定，变更劳动合同须经用人单位和劳动者协商一致，且应采用书面形式。

因此，我们建议如企业需调整劳动者的薪酬待遇，应在与劳动者协商一致的前提下，签订书面补充协议。

### 三、关于特殊假期期间的薪资支付

关于疫情期间年休假、病假、婚假、产假、陪产假等特殊假期内的工资支付问题，国家层面并没有明文规定，各省、自治区、直辖市也鲜有提及，我们认为，此期间的工资如何支付最为关键的问题在于前述假期是否会因疫情影响而顺延。

#### （一）年休假

对于职工在疫情之前已经申请的年休假，我们认为应当根据疫情期间的性质分别进行分析：

1月31日至2月2日是国务院规定的延长春节假期，其性质为休息日，再加上国务院1号文明确规定此期间提供劳动的劳动者应予以补休，因此如果员工在节前已经将调整前属于工作日的1月31日至2月1日作为年休假申请休假，我们认为企业不得因此抵扣员工的带薪年休假天数。但如果此后涉及到相关劳动争议，各法院的观点可能存在不同，如上海市浦东新区法院就认为，若疫情之前已安排职工休带薪年假，则该二日仍应认定为休年休假。

对于职工申请的年休假在各地延迟复工期间的，我们认为应当根据各地对延迟复工期间的定性分别考虑。如上文所述，上海将延迟复工期定性为休息日，我们认为企业不得抵扣员工的年休假，而对于北京、广东等未将延迟复工期间定性为休息日的地区，则企业可以正常抵扣职工的年休假。

在延迟复工期之后的期间，我们认为延迟复工期之后各企业的年休假应当按照公司的正常规定处理。鉴于人社部8号文和北京、浙江等地的政策中均提到，对因受疫情影响职工不能按期到岗或企业不能开工生产，不具备远程办公条件的企业可与职工协商优先使用带薪年假、企业福利假等各类假，因此企业还可以根据自身的实际情况与职工协商使用年休假。

#### （二）病假、婚假、产假、陪产假

关于职工的病假、婚假、产假、陪产假可能与延长春节假期期间和延迟复工期间相重合，对于前述常见假期的处理问题，我们认为应结合这些假期的具体规定予以分析。

##### 1.病假

根据《劳动部关于贯彻<企业职工患病或非因工负伤医疗期规定>的通知》第 2 条的规定，病休期间，公休、假日和法定节日包括在内，因此，病假并无可顺延的情形。但由于各地的关于病假的规定有所不同，因此还应根据各地的规定具体判断。

如《上海市劳动和社会保障局关于病假工资计算的公告》第 1 条规定，职工疾病或非因工负伤休假日数应按实际休假日数计算，连续休假期内含含有休息日、节假日的应予剔除。因此，结合上文的分析，我们认为上海市在疫情期间的病假应当剔除春节假期、延长春节假期（1 月 31 日至 2 月 2 日）以及上海市的延迟复工期间（2 月 3 日至 2 月 9 日），并应予以相应顺延。

## **2. 婚假**

关于婚假，除法定的 3 天婚假外，各地一般均规定了奖励婚假，对于奖励婚假的休假方式，上海市有较为明确的规定，即增加的婚假遇法定节假日顺延，而疫情期间延长春节假期和延迟复工期均不是法定节假日，因此婚假不受影响。

但对于其他没有规定奖励婚假是否会因休息日或法定节假日顺延的地区，婚假在疫情期间应当如何处理还有待人社部门的进一步解释。

## **3. 产假、陪产假**

关于法定产假，按照《女职工劳动保护特别规定》的要求，产假共有 98 天，且按自然日计算，并无可中断或顺延的情形，因此疫情期间女职工的法定产假不会受到影响。

根据《人口与计划生育法》第 25 条的规定，符合一定条件的女职工会获得延长生育假的奖励，对于延长的产假和与产假相关联的配偶陪产假与疫情期间相重合应当如何处理的问题，我们进行了研究。根据《上海市计划生育奖励与补助若干规定（2016 修订）》，的规定，增加的生育假（30 天）、配偶陪产假遇法定节假日顺延，但延长春节假期期间和延迟复工期间均不是法定节假日，因此生育假和配偶陪产假不受影响。

## **四、关于薪资的延期支付**

根据《劳动合同法》第 30 条的规定，用人单位应当向劳动者及时足额支付劳动报酬，用人单位拖欠或者未足额支付劳动报酬的，劳动者可以依法向当地人民法院申请支付令。但现实情况是，很



多企业的现金流在疫情期间或多或少都受到了影响，对于部分企业来说及时足额发放工资存在困难。如果此时延期支付工资，是否存在被认定为拖欠劳动报酬的风险？

对此，我们的观点是，企业如存在困难确需延期支付工资的，在履行民主程序的前提下可以缓发。

#### **（一）劳动部认为企业在履行民主程序后可以延期支付**

劳动部《对〈工资支付暂行规定〉有关问题的补充规定》第4条规定，《工资支付暂行规定》第18条所称“无故拖欠”指用人单位无正当理由超过规定付薪时间未支付劳动者工资。不包括用人单位确因生产经营困难、资金周转受到影响，在征得本单位工会同意后，可暂时延期支付劳动者工资，延期时间的最长限制可由各省、自治区、直辖市劳动行政部门根据各地情况确定。

#### **（二）上海市关于延期支付工资的规定**

根据《上海市企业工资支付办法》第10条的规定，企业确因生产经营困难，资金周转受到影响，暂时无能按时支付工资的，经与本企业工会或职工代表协商一致，可以延期在一个月内支付劳动者工资，延期支付工资的时间应告知全体劳动者。

#### **（三）北京市关于延期支付工资的规定**

《北京市工资支付规定》第26条也规定，用人单位因生产经营困难暂时无能按时支付工资的，应当向劳动者说明情况，并经与工会或者职工代表协商一致后，可以延期支付工资，但最长不得超过30日。

因此，在用人单位确因生产经营困难需要延期支付工资的，按照北京和上海的规定，在与工会或职工代表协商一致的前提下，可以延期支付工资，但最长不超过30日。

此外，针对此次疫情，浙江高院意见认为，对于用人单位因疫情停工停产、暂时性经营困难未及时足额支付劳动报酬的，劳动者要求解除劳动关系的，应当审慎适用经济补偿金规定。

### **五、关于企业可享受的劳动用工补贴**

疫情期间用人单位的用工成本客观上确实有所增加，北京、上海等地的人社局相继出台了一系列针对企业的劳动用工补贴措施，我们将其总结如下：



补贴类型	北京市	上海市
培训费补贴	截至 4 月底企业职工平均人数同比持平或增长的企业，在 2020 年组织职工（含待岗人员）参加职业技能培训，累计不低于 40 课时（每课时 45 分钟），按照每人 1000 元的标准给补贴。	停工期间组织职工（含在企业工作的劳务派遣人员）参加各类线上职业培训的，纳入各区地方教育附加专项资金补贴企业职工培训范围，按实际培训费用享受 95% 的补贴。
疫情防控物资企业补贴 （截至 2020 年 2 月 9 日）	开工生产、配送疫情防控急需物资且经相关部门认定的企业给予一次性吸纳就业补贴。补贴金额根据 2020 年 1 月、2 月社保增员人数，按照 1000 元/人标准予以确定。	开工生产、配送疫情防控急需物资的企业，符合条件的给予一次性吸纳就业补贴。
社保费补贴	截至 4 月底企业职工平均人数与上年平均人数相比持平或增长 20%（不含）以内的，一次性给予 3 个月应缴纳社会保险费 30% 的补贴； 截至 4 月底企业职工平均人数与上年平均人数相比增长 20% 及以上的，一次性给予 3 个月应缴纳社会保险费 50% 的补贴。	对不裁员、少减员、符合条件的用人单位，返还单位及其职工上年度实际缴纳失业保险费总额的 50%。

如企业符合上述补贴领取标准，可向当地人社部门申领劳动用工补贴，能够从一定程度上缓解企业，尤其是中小微企业的用工压力。

## 六、总结

企业在处理疫情期间的薪资发放问题时，应特别注意如下问题：

区分延长春节假期期间和延迟复工期间，延长春节假期期间（1 月 31 日至 2 月 2 日）属于休息日，安排劳动者提供劳动的应予以调休或支付 200% 的加班工资。在延迟复工期间（一般为 2 月 3 日至 2 月 9 日），应根据当地对于此期间的性质认定支付工资，如上海市认为 2 月 3 日至 2 月 9 日属于休息日，而北京和广东则认为 2 月 3 日至 2 月 7 日属于工作日。

企业应正常支付被诊断为新型冠状病毒感染的肺炎、被隔离观察、因政府实施隔离措施或采取其他紧急措施导致不能提供正常劳动的企业职工的工资，隔离期结束后，对仍需停止工作进行治疗的职工，则应按医疗期的标准支付工资。

企业如需调整薪资报酬，应当在征得劳动者同意的前提下进行，且双方应当签订书面的补充协议。

对于职工申请的年休假、病假、婚假、产假、陪产假与疫情期间重合的，应根据假期性质分别予以处理。对于上海的职工来说，延长春节假期期间和延迟复工期间均为休息日，企业不得抵扣职工的年休假，病假遇延长春节假期期间和延迟复工期间应予顺延，而婚假、产假和陪产假不受影响。其他地区应当如何处理，还应根据该地的具体规定予以执行。

对于企业确有困难无法按时足额支付工资报酬的，北京和上海的企业在与工会或职工代表协商一致的前提下，可以延期支付工资，但最长不超过 30 日。

北京、上海等地对受疫情影响的企业均给出一定的劳动用工补贴政策，如企业符合相关政策要求，可向当地人社部门申领补贴。

对于企业来说，疫情期间调整薪酬待遇和延迟发放工资的问题应当尤为审慎对待，在无法确定的情况下应首先咨询专业律师，以免因未签订书面补充协议或未履行民主程序导致企业需承担劳动法项下的责任，对受疫情影响的企业造成更大的负担。

## ➤ Research Article

### How Should Employers Handle Salary and Leave Period Facing Epidemic?

**Authors:** Weiwei Gu | Angela Sui | Suri Hu

The sudden outbreak of COVID-19 during the Spring Festival has affected enterprises in various industries throughout the country to a certain extent. At the present stage, it is common to have salaries-related news. For example, 1) part of the employees of a company are suspended from work for two months, during which only 80% of the minimum wage is paid; 2) HR of a company sent an email to the employees to ask for opinions about voluntary pay cuts. The proportion of voluntary pay cuts ranges from 5% to 15%. The period of voluntary pay cuts starts from January and lasts for half a year at the longest. Upon completion of financing, the company will return to the employees the amount of the pay cuts by 1.3 times; and 3) a company decided to suspend promotion, cancel overtime pay and reduce the proportion of performance-related pay.

Under the current circumstance where the epidemic situation is gradually under control and enterprises have resumed work and production, how to break through from the shadow of the epidemic and restore normal production has become the focus of attention of the whole society. The general environment is the necessary external condition for resumption of work and production. But the enterprises should also pay attention to adjust and comb the small environment inside the enterprises, especially in the aspect of labor and employment. In order to provide guidelines for enterprises to deal with labor employment issues during the epidemic period, this article studies and sorts out the common issues that may be encountered in the process of payment during the epidemic period.

#### 1. Standards of Payment

##### 1.1 Ordinary employees

###### 1.1.1 Extension of the Spring Festival Holiday

At the early stage of the epidemic, the State Council issued *Notice of the General Office of the State Council on Extending the Spring Festival Holiday in 2020* (Guo Ban Fa Ming Dian [2020] No.1) ("**Document No.1 of the State Council**"), announcing the extension of the Spring Festival Holiday of Year 2020 to 2 February, and starting the normal business hour from 3 February.

The days from January 31 to February 2 are the extended period for the Spring Festival Holiday.

With regard to the payment during the extended period, *Document No. 1 of the State Council* specifies that employees who cannot take leave due to epidemics during such period shall be arranged to have time off or be paid overtime pay. Therefore, no local government has different opinions on the determination of the nature of this period. The extension of the Spring Festival Holiday shall be deemed as non-business days, and if the time off cannot be adjusted, the employer shall pay 200% of the rate of working days to the employee.

### **1.1.2 The Period of Delayed Resumption**

Faced with the grim epidemic situation, Beijing, Shanghai and other major cities have announced that they will postpone the enterprises' resumption of work until February 9. For these areas, the period from February 3 to February 9 is that of postponement of the resumption of work. The days of February 8 and 9 are originally non-business days, and shall be still non-business days after the delay of resumption of work, during which employees providing labor shall be given time off or 200% of the rate of working days.

Since February 3 to February 7 were originally working days, the determination of the nature of work after the delayed resumption of work was not uniformly stipulated by the Central Government, and such determination shall be implemented in accordance with local regulations. The Shanghai Municipal Human Resources and Social Security Bureau holds that the period of postponement of resumption of work is non-business period, therefore, the period shall be deemed as holidays or 200% of the rate of working days if an employee works. However, both Beijing and Guangzhou believe that the period from February 3 to February 7 belongs to working days and employees shall be paid as usual if they provide labor.

### **1.1.3 After the Delayed Resumption of work**

After the postponement of the resumption of work, various localities have required enterprises qualified for resumption of work to resume work after completing certain approval or filing procedures. For this period, the standard by which an enterprise pays to its employees depends on whether the enterprise needs to continue the work or production suspension.

For an enterprise that has resumed normal work, it may, through negotiation and consensus with employees, adopt more flexible methods such as adjusting payments, rotation & leave, shortening working hours, etc. to stabilize work positions and arrange rotation to work. At this time, payments shall be paid normally in accordance with the labor contract. With regard to the issue of whether the employees who work remotely shall be paid normally, given the fact that the *Opinions of the Ministry of Human Resources and Social Security, the All-China Federation of Trade Unions, the China*

*Confederation of Enterprises/the China Association of Entrepreneurs and the All-China Federation of Industry and Commerce on Effectively Stabilizing Labor Relations and Supporting Enterprises to Resume Work and Production during the Prevention and Control of the Pneumonia Epidemic Caused by New Type of Coronavirus Infection ("Ren She Bu No.8 Document")* encourage qualified enterprises to arrange for their employees to complete work tasks at home through telephone, the internet and other flexible ways, we consider that employees who work remotely during such period shall be deemed to have provided labor and shall still be paid.

However, for an enterprise that is unable to resume work normally, *the Circular of the General Office of the Ministry of Human Resources and Social Security on Issues concerning Labor Relations during the Prevention and Control of the Pneumonia Epidemic Caused by New Coronavirus Infection ("Ren She Bu No.5 Document")* issued by the Ministry of Human Resources and Social Security stipulates that where an enterprise suspends production within a payment period, the enterprise shall pay to its employees at the rate specified in the labor contract; and, where the suspension exceeds a payment period and the employee provides normal labor services, the enterprise shall pay the employee at the rate of no less than the minimum wage standard of the locality. If the employee does not work normally, the enterprise shall pay them living expenses, the standards for which shall be stipulated by the various provinces, autonomous regions and municipalities directly under the Central Government.

With regard to the payment for a period of more than one payment period due to work suspension, *The Circular on Implementing the Support and Guarantee Measures for Human Resources and Social Security in Response to the Epidemic Situation of New Coronavirus Infection Pneumonia* issued by Shanghai Municipal Human Resources and Social Security Bureau requires enterprises to delay the resumption of work due to the impact of the epidemic, and the payment for a period of more than one payment period shall not be lower than the minimum wage standard. *Circular of Beijing Municipality on Issues Concerning Maintaining the Stability of Labor Relations during the Period of Epidemic Prevention and Control (Jing Ren She Circular No. 11)* issued by Beijing Municipal Human Resources and Social Security Bureau stipulates that if employees fail to return to work for a long time, the enterprise may arrange for them to wait for employment upon reaching an agreement with them. During the unpaid leave period, the enterprise shall pay basic living expenses based on 70% or more of the minimum wage standard of the Municipality.

## **1.2 Employees of enterprises diagnosed with COVID-19, isolated for observation, or unable to provide normal labor due to the implementation of isolation measures or other emergency measures taken by the government**

For the employees of enterprises who cannot provide normal labor due to pneumonia diagnosed as

infection of COVID-19, isolated for observation, isolation measures implemented or other emergency measures implemented by the government, the *Ren She Bu No.5 Document* provides that the enterprises shall pay such employees at the normal rate. Meanwhile, the *Ren She Bu No.8 Document* provides that for the employees who cannot provide normal labor due to isolation in accordance with the law, the enterprises shall be guided to pay them at the normal rate; after the end of the isolation period, if the employees still need to stop working for medical treatment, they shall be paid in accordance with the relevant provisions for medical treatment period.

The *Jing Ren She Circular No. 11* released by the Beijing Municipal Human Resources and Social Security Bureau provides that enterprise employees shall be entitled to have a medical treatment period if they stop working to have a rest due to illness. During an employee's medical treatment period, the enterprise shall pay the employee according to the stipulations of the labor contract or collective contract. Such a payment shall not be less than 80% of the minimum wage standard of Beijing Municipality. For suspected patients of COVID-19, or those employees who have close contact with confirmed COVID-19 patients or suspected COVID-19 patients and are excluded from patients or pathogen carriers after isolation or medical observation, their payments during the period of isolation and medical observation shall be paid by the enterprises at the rate of their normal working days.

The provisions of the Shanghai Municipal Human Resources and Social Security Bureau are consistent with those of the *Ren She Bu No.8 Document*. Although there are no specific standards for the payment to employees who suffer from illnesses, in accordance with Article 9 of the *Measures of Shanghai Municipality for the Payment of Wages to Enterprises*, Article 1 of the *Announcement of the Shanghai Municipal Labor and Social Security Bureau on the Calculation of Sick Pay*, and Article 2 of the *Provisions on the Standards for the Medical Treatment Period of Employees in Shanghai Municipality Suffering from Illnesses or Non-Work-Related Injuries during the Period of Performance of Labor Contracts*, the standards for the payment for sick leave during the medical treatment period can be calculated based on the specific medical treatment period enjoyed by employees.

However, if the laborers are isolated for treatment or under medical observation due to failure to comply with the prevention and control measures of the governments, Zhejiang High Court holds in its *Implementation Opinions on Regulating Civil Legal Disputes Concerning the Epidemic Situation of Xinguan Pneumonia (for Trial Implementation)* ("**Opinions of Zhejiang High Court**") that if the laborers claim for payments for the above circumstance, such claim shall generally not be supported.

## **2. Payment Adjustments**

Some enterprises are affected by the epidemic resulting in the decline in production capacity, and

hope to release the pressure by adjusting payments of employees. In our view, it is acceptable for enterprises to adjust the payments, but enterprises shall have the agreements with the employees.

It can be seen from the standards of the *Ren She Bu No.5 Document* and the *Ren She Bu No.8 Document* that, for the enterprises seriously affected by the epidemic, the State allows the adoption of payment adjustment method with the consensus of the employees to stabilize the job positions and help the enterprises alleviate the pressure on the turnover of funds, which provides a certain policy basis for the negotiation on payment adjustments between the enterprises and the employees. However, the key to determine the compliance of payment adjustment is whether the enterprises and employees have reached an agreement. The reason is that the payment adjustment is essentially an amendment to an employment contract and, according to Article 35 of the *Labour Contract Law*, an amendment to an employment contract shall be agreed upon by the employer and the employee in writing.

Therefore, we suggest that if an enterprise needs to adjust the compensation of its employees, it shall enter into a written supplementary agreement with its employees based on mutual consents.

### **3. Payment During Special Leave Period**

With regard to annual leave, sick leave, marriage leave, maternity leave, paternity leave and other special vacations during the epidemic period, there is no explicit stipulation at the national level, and few provinces, autonomous regions and municipalities directly under the Central Government have mentioned it. We believe that the most critical issue for how employees are paid during this period is whether the above-mentioned vacations will be postponed due to the impact of the epidemic.

#### **3.1 Annual Leave**

With respect to the annual leave applied by employees prior to the epidemic, we have the opinion that it should be analyzed separately according to the nature of the epidemic period:

The period from January 31 to February 2 is the extended Spring Festival Holiday specified by the State Council, and is in nature non-business days, plus the *Document No.1 of the State Council* explicitly stipulates that the employees who provide labor in such a period shall have deferred time off. Therefore, if an employee has applied for annual leave for January 31-February 1 that falls within working days prior to the adjustment, we deem that enterprises shall not deduct the employee's days of paid annual leave. However, in case of any related labor dispute involved thereafter, the courts may have different opinions. For example, Shanghai Pudong New Area Court held that if the employees had been arranged to take paid annual leave prior to the epidemic, such two days shall



still be determined to be annual leave.

If the annual leave applied for by an employee is during the period of postponement of resumption of work in various regions, we hold that it shall consider the nature of the period of delayed resumption of work in various places. As mentioned above, the postponed resumption period in Shanghai is determined as non-business days. In our opinion, employees' annual leave shall not be deducted. In the regions such as Beijing and Guangdong, where the postponed resumption period is not determined as non-business days, employees' annual leave may be deducted normally.

For the period after the postponement of the resumption of work, in our opinion, the annual leave of each enterprise shall be handled in accordance with the normal regulations of such a company. Given that the *Ren She Bu No.8 Document* and the policies of Beijing, Zhejiang and other regions all mention that, where employees fail to resume working on time or the enterprises fail to start production due to the impact of the epidemic, the enterprises that do not have the remote working conditions may negotiate with the employees to prioritize to take the various types of leaves such as paid annual leave and enterprise welfare leave, and so the enterprises may also negotiate with the employees to take the annual leave according to their actual situations.

### **3.2 Sick Leave, Marriage Leave, Maternity Leave and Paternity Leave**

With regard to employees' sick leave, marriage leave, maternity leave and paternity leave, which may coincide with the extended period of the Spring Festival Holiday and the period of delayed resumption of work, we think that the nature of the above-mentioned common leaves should be analyzed in combination with the specific provisions of these holidays.

#### **3.2.1 Sick Leave**

According to Article 2 of the *Circular of the Ministry of Labor on Implementing the Provisions on the Duration of Medical Treatment for Enterprise Employees Due to Illnesses or Non-Work Related Injuries*, public holidays, festivals and legal holidays are included in the sick leave period. Therefore, sick leave shall not be postponed. However, regulations on sick leave may vary from place to place, and therefore shall be specifically determined in accordance with such regulations.

For example, according to Article 1 of the *Announcement of the Shanghai Municipal Labor and Social Security Bureau on the Calculation of Sick Pay*, the number of sick leave or non-work-related injury leave of an employee shall be calculated at the number of actual leave days, excluding non-business days and holidays during the consecutive leave. Therefore, based on the above analysis, we hold that the sick leave of Shanghai during the duration of the epidemic shall exclude the Spring Festival

Holiday, the extended Spring Festival Holiday (January 31 to February 2) and the period of delayed resumption of work (February 3 to February 9) in Shanghai, and shall be extended correspondingly.

### 3.2.2 Marriage Leave

With respect to marriage leave, incentive marriage leave is generally granted locally, except for the statutory 3-day marriage leave. The incentive marriage leave is more definitely provided in Shanghai, i.e. the increased marriage leave shall be extended accordingly in case of statutory holidays while the extended Spring Festival Holiday during epidemic periods and the delayed resumption of work period are not statutory holidays. Therefore, the marriage leave shall not be affected.

But for other areas where there is no stipulation on whether the marriage leave may be postponed due to non-business days or statutory holidays, there may be a further explanation on how to deal with the marriage leave during the epidemic period by the human resources and social security departments.

### 3.2.3 Maternity Leave and Paternity Leave

As for statutory maternity leave, according to the requirements of the *Special Provisions on the Labor Protection of Female Employees*, the total maternity leave is 98 days, calculated by natural days, and shall not be interrupted or postponed. Therefore, the statutory maternity leave of female employees during the epidemic period shall not be affected.

In accordance with the provisions of Article 25 of the *Population and Family Planning Law*, female employees in certain conditions are rewarded for their extended maternity leave, and we have conducted research on the issue for how to deal with the overlapping of the extended maternity leave and paternity leave of spouses relating to maternity leave and those leaves in the epidemic period. In accordance with the *Several Provisions of Shanghai on Award and Subsidization for Family Planning (Revision 2016)* ("**Shanghai Family Planning Provisions**"), the added maternity leave (30 days) and paternity leave shall be extended accordingly in case of statutory holidays. While neither the extended Spring Festival Holiday nor the extended period for resumption of work is a statutory holiday. Therefore, maternity leave and paternity leave for spouses shall not be affected.

## 4. Deferred Payments

In accordance with Article 30 of the *Labour Contract Law*, an employer shall pay the employee remuneration on time and in full. If the employer defaults on payment or fails to pay the employee remuneration in full, the employee may file an application for a payment order with the local court.

However, the reality is that the cash flows of many enterprises have been affected more or less during the epidemic period, and it is difficult for some enterprises to pay its employees in full and on time. If the payment is delayed on this occasion, is there any risk of delay in payment?

In this regard, our view is that enterprises with difficulties may defer the payments in the context of the implementation of democratic procedures.

#### **4.1 The Ministry of Labor Considers that Enterprises May Postpone Payments after Performing Democratic Procedures**

According to Article 4 of the *Supplementary Provisions on Issues concerning the Interim Provisions on the Payment of Wages of the Ministry of Labor*, "delay without reason" as mentioned in Article 18 of the *Interim Provisions on the Payment of Wages* means an employer fails to pay to a laborer without justified reason when the time for payment is overdue. It does not include a circumstance where an employer has difficulty in production and operation or capital turnover, it may temporarily defer payments to laborers with the consent of its trade union, and the maximum extension may be determined by the labor administrative departments of all provinces, autonomous regions and municipalities directly under the Central Government based on the local situation.

#### **4.2 Provisions of Shanghai Municipality on Deferred Payments**

Pursuant to the provisions of Article 10 of the *Measures of Shanghai Municipality on Wage Payment by Enterprises*, where an enterprise is unable to pay wages on time temporarily due to manufacturing and business difficulties which affect cash flow, upon negotiation and agreement with the enterprise's trade union or employees' representatives, the enterprise may defer payments to its employees within one month, and all its employees shall be notified of the deferred date of payments.

#### **4.3 Provisions of Beijing Municipality on Deferred Payment of Wages**

Article 26 of the *Provisions of the Beijing Municipality on Wage Payment* also stipulates that where an employer is unable to pay wages on time temporarily due to difficulties in production and operation, it shall explain the situation to laborers, and may delay the payments after reaching an agreement with the trade union or employee's representatives, but it shall not delay more than 30 days.

Therefore, where an employer needs to defer payments due to difficulties in production and operation, it may, in accordance with the provisions of Beijing and Shanghai and in the premise of consensus with the trade union or employee's representatives, defer payments within 30 days at most.

In addition, in view of the epidemic, *Opinions of Zhejiang High Court* held that if an employer fails to timely pay the full amount of labor remuneration due to work suspension or temporary business difficulties and an employee requests to terminate the employment relationship, the provisions on economic compensation shall be prudently applied.

## 5. On the Labor Subsidies Available to the Enterprises

During the epidemic period, the employment cost of the employers did increase objectively. The Human Resources and Social Security Bureau of Beijing, Shanghai and other places provided a series of labor subsidies for enterprises. We summarize them as follows:

Type of subsidy	Beijing	Shanghai
<b>Subsidies for training cost</b>	For an enterprise, which has the average number of their employees by the end of April keeps constant or increases on a year-on-year basis and organizes their employees (including those waiting for new positions) to participate in vocational skill training in 2020, with the cumulative class hours not less than 40 classes (45 minutes per class), it shall be provided subsidies of CNY 1,000 will be given to each person.	For an enterprise, which organizes employees (including dispatched personnel working in enterprises) to participate in various types of online vocational training in the scope of enterprise employee training covered by the special subsidies of local education surtax of various districts during the period of work stoppage, it shall be reimbursed 95% of the actual training expenses.
<b>Subsidies for materials for epidemic prevention and control to enterprises (by February 9, 2020)</b>	Lump-sum employment subsidies will be granted to enterprises that start production, distribute materials urgently needed for epidemic prevention and control and are recognized by relevant authorities. The amount of subsidy shall be determined based on the number of new employees covered by social	Enterprises that start production and distribute materials urgently needed for epidemic prevention and control shall be provided employment subsidies in a lump sum to qualified enterprises.

Type of subsidy	Beijing	Shanghai
	insurance in January and February 2020 at the standard of CNY 1,000 per person.	
<b>Social Insurance Premium Subsidies</b>	Where the average number of enterprise employees by the end of April is equal to or within 20% (exclusive) of that of the previous year, a lump-sum subsidy of 30% of the social insurance premiums payable for three months shall be paid; and where the average number of enterprise employees by the end of April increases by 20% or above as compared to the average number in the previous year, the enterprise will be provided a lump-sum subsidy equal to 50% of the payable social insurance premiums for three months.	For qualified employers that do not lay off or reduce lay-off of staff, 50% of the total unemployment insurance premiums actually paid by employers in the previous year shall be returned.

If the enterprises meet the above-mentioned standards, they may apply for employment subsidies to the local departments of human resources and social security, which can relieve the employment pressure of enterprises, especially the micro, small and medium-sized enterprises to some extent.

## 6. Summary

When dealing with issues of payments during the epidemics, enterprises shall pay more attention to the following issues:

6.1 The extended Spring Festival holiday period and the extended period for resumption of work shall be differentiated, as the extended Spring Festival Holiday (January 31 to February 2) falls on non-business days, and the employees who are arranged to work shall be given adjusted holidays or paid 200% of overtime payments. During the period of delayed resumption of work (usually from February 3 to February 9), remuneration shall be paid according to the nature of the period specified by local governments. For example, Shanghai considers the period from

February 3 to February 9 as non-business days, while Beijing and Guangdong consider the period from February 3 to February 7 as working days.

- 6.2 The enterprises shall pay their employees who are diagnosed with COVID-19, or under quarantine for observation, or cannot provide normal labor due to the implementation of isolation measures or other emergency measures by the government. After the end of the isolation period, for the employees who still need to stop working for medical treatment, the enterprises shall pay them in accordance with the standards for medical treatment period.
- 6.3 Where an enterprise needs to adjust payments, it shall seek the consent of the employees, and both parties shall enter into a written supplementary agreement.
- 6.4 Where the annual leave, sick leave, marriage leave, maternity leave or paternity leave applied by an employee overlaps with the period of the epidemic, the case shall be handled according to the nature of the leave. For the employees in Shanghai, the extended Spring Festival Holiday and the extended period for resumption to work are all non-business days, so enterprises shall not deduct employees' annual leave. The extended sick leave period and the extended period for resumption to work shall be extended accordingly, but marriage leave, maternity leave and paternity leave shall not be affected. How to deal with these leaves in other areas shall also be implemented according to the specific provisions of such areas.
- 6.5 With respect to enterprises with difficulties in paying its employees in full and on time, enterprises in Beijing and Shanghai may defer the payments to the most extent of 30 days, provided that they reach an agreement with trade unions or employees' representatives.
- 6.6 Beijing Municipality, Shanghai Municipality and other regions have provided certain policies for employment subsidies to the enterprises affected by the epidemics, and the enterprises may apply for subsidies to the local departments of human resources and social security if they meet the requirements of the relevant policies.

For enterprises, issues such as the payments adjustment and delay of payments during the epidemic period shall be treated with particular prudence. If employers are uncertain, professional lawyers shall be consulted at first to avoid that the enterprises may assume liabilities under the *Labor Law* due to failure to sign written supplementary agreements or perform democratic procedures, which will cause greater burden to the enterprises affected by the epidemic.

## ➤ 案例评析

### 用人单位有权解聘不能胜任工作的劳动者，但不得滥用用工自主权

作者：顾巍巍 | 隋天娇 | 胡翔

#### 一、争议焦点

劳动者不能胜任工作，用人单位能否直接依据《劳动合同法》第 40 条第（二）款的规定解除劳动合同？

#### 二、案情简介

原告：王某

被告：A 公司

王某于 2009 年进入 A 公司工作，职务为总经理助理，2012 年 10 月 31 日与 A 公司签订无固定期限劳动合同。2014 年 7 月 9 日，A 公司认为其不能胜任工作转岗至运营专员。根据 A 公司劳动手册规定，年度考评成绩小于等于 75 分是被视为不能胜任工作，转岗之后，王某 2014 年及 2015 年年度考评均在 75 分以下，因此被 A 公司认定其仍不能胜任工作。故 A 公司于 2016 年 4 月 20 日向王某发出解雇通知，并支付了解除劳动合同经济补偿金和代通知金。

王某不服，向上海市虹口区劳动人事争议仲裁委员会（“劳动仲裁委”）申请劳动仲裁，要求 A 公司支付违法解除劳动合同赔偿金 90,735.58 元，劳动仲裁委支持了这一项请求。

A 公司不服上述仲裁结果，向虹口区人民法院起诉。

#### 三、审理结果

##### （一）一审

在一审过程中，A 公司提供了员工手册（2016 年 1 月生效）及确认书（有王某签名），其中员工手册规定：6.1 薪资支付与调整（3）年度考评成绩小于等于 75 分是被视为不能胜任工作，原则上不上调薪资，若上调不得超过 10%。同时，A 公司还提供了电子邮件公证书、王某 2014 年及 2015 年



年度考评表，以及从 2014 年 7 月 8 日公司总经理向王某发送的电子邮件，以证明当时王某确因不能胜任岗位而转岗。

原审法院审理后认为，A 公司与王某解除劳动合同所依据的理由不成立，对于王某不胜任工作的依据缺乏客观性，考核表反映了王某次年薪资的升降幅度，不能作为解除的依据。王某要求支付违法解除劳动合同赔偿金并无不当。

最终一审法院判令 A 公司支付王某违法解除劳动合同赔偿金 90,735.58 元。

## （二）二审

A 公司不服，上诉至上海市第二中级人民法院。

二审法院认为，A 公司认为王某曾在 2014 年 7 月 9 日因不能胜任总经理助理转岗至运营专员，经 2014 年、2015 年年度考评评分均在 75 分以下，仍不能胜任工作，对此 A 公司提供了电子邮件证书、王某 2014 年及 2015 年年度考评表佐证。从 2014 年 7 月 8 日公司总经理向王某发送电子邮件的内容来看，证明当时王某确因不能胜任岗位而转岗。

对于两份年度考评表，二审法院认为，A 公司员工手册 6.1“薪资支付与调整”规定，员工薪资通过每年的年度考评重新审核，年度考评的最终得分对薪资涨幅有一定的限制，年度考评成绩小于等于 75 分时，被视为不能胜任工作，原则上不上调薪资，若上调，不得超过 10%。从上述规定来看，年度考评是衡量薪资涨幅的依据，但不能作为界定员工是否胜任工作的标准，从考评表所体现的对王某在业务能力、工作效果、工作态度、团队合作、服从性各方面的评价来看，以“良好”及“一般”居多，说明其表现虽然并非优秀，但也并未达到不能胜任工作的程度，故 A 公司认为王某不能胜任运营专员岗位依据不充分。

此外，A 公司在王某 2014 年 7 月 9 日转岗后，应及时对其转岗后的表现进行考核，对其是否胜任工作作出客观的评价，而在事隔近两年后，A 公司以王某转岗后仍不胜任工作为由将其解雇缺乏合理性。

因此，二审法院认为，原审法院根据查明的事实，依法所作判决，并无不当。故驳回上诉，维持原判。

#### 四、法律分析

根据《劳动合同法》第 40 条第（二）款规定，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，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。用人单位有一定的用工自主权，但用人单位应制定相关考核机制，并在公司规章制度中予以明确，严格按照公司规章制度的要求执行。

本案中，根据 A 公司员工手册的规定，考核仅仅是作为调整薪资的参考，而非评判劳动者是否不能胜任工作岗位的标准，且考核表中对劳动者的评价为“良好”及“一般”，即便从评价来看，也无法达到不能胜任工作岗位的程度。

在上海一中院审理的（2016）沪 01 民终 8997 号案中，用人单位也是依据《劳动合同法》第 40 条第（二）款规定单方解除劳动合同，但最终却被法院认定为合法解除。

该案中，用人单位提交了员工手册，其中规定：为明确年度绩效要求，员工必须在每年年初制定当年度的工作目标（又称蓝筹）；员工首先查看当年度运营计划或参考主管的蓝筹，然后起草个人的蓝筹，主管和员工共同讨论修改蓝筹并确认……所有员工每年年终必须进行绩效评估，该评估以员工年初设定的蓝筹及年中更新过的蓝筹为基础。对于评估不能达到公司岗位绩效目标，即不能胜任工作岗位的员工，公司将在一个月到三个月的期间内，为该员工提供机会以改善其工作绩效；在设定的绩效改进期结束后，将对该员工再次进行评估，如果工作绩效仍不能达到所设定的绩效目标，即仍然不能胜任工作岗位，则公司有权将员工调到一个新的工作岗位，或根据《劳动合同法》的规定单方面解除与该员工的劳动合同。

在该案中，劳动者制定了工作计划，且有明确的时间节点、相关比例要求。在用人单位提供的劳动者与其上级领导的往来邮件，能够证明其上级领导对劳动者完成上述 12 项工作任务的情况非常不满，且劳动者未能证明其按上述时间节点完成了相关的工作。故法院认为，故用人单位在 2015 年 6 月 4 日根据岗位职责和蓝筹进展认定劳动者 2015 年度首次评估结论是不能胜任工作岗位，有事实依据。之后，用人单位对劳动者进行了培训，经培训后，其上级领导对劳动者完成工作任务的情况仍不满意，劳动者亦未提供有效证据证明其工作成绩有所提升，故用人单位于 2015 年 9 月 14 日再次认定劳动者考核不合格，法院对此亦予以确认。本案中，用人单位解除劳动合同的行为符合《劳动合同法》第 40 条的规定，并且用人单位亦已依法向劳动者支付了解除劳动合同的经济补偿及一个月工资的代通知金，最终，用人单位的解除行为被认定为合法。

对比两个案例可以看出，法院在判决时会对个案进行考量，如果用人单位要根据《劳动合同法》第 40 条第（二）款规定无过失性辞退劳动者，应当以公司规章制度中有明确且合理的考核机制为前提，且应当提供能够证明劳动者不能胜任工作的有效证据。

此外，根据《劳动合同法》第 40 条第（二）款的规定，在劳动者首次考核为不能胜任工作后，不能直接与其解除劳动合同，而应当对其进行培训，或者调整劳动者的岗位。如果培训/调岗后仍然不能胜任工作的，用人单位才能依据前述规定，在提前 30 日书面形式通知劳动者或额外支付劳动者一个月工资后，方可解除劳动合同。

## ➤ Case Study

# Employers Shall Have Rights to Dismiss Incompetent Employee Legally

Authors: Weiwei Gu | Angela Sui | Suri Hu

### 1. Focus of Dispute

**If the employee is not competent for the job, can the employer directly terminate the according to Paragraph 2 of Article 40 of the *Labor Contract Law*?**

### 2. Case Brief

Plaintiff: Wang

Defendant: Company A

Wang joined Company A in 2009 as an assistant of the general manager and entered into a flexible-term labor contract with Company A on October 31, 2012. On July 9, 2014, Company A decided that he was not competent for the job and transferred to the position of operation specialist. According to the Employee Handbook of Company A, any employee shall be deemed as incompetent for his/her work if his/her annual review score is less than or equals to 75 points. After Wang was transferred to the new position, his annual reviews for 2014 and 2015 are below 75 points, which led Company A deem Wang as incompetent again. Due to Wang's incompetence, Company A issued a dismissal notice to Wang on April 20, 2016 and paid economic compensation and payment in lieu of notice for termination of the labor contract.

Wang was not satisfied with this termination and submitted a labor dispute arbitration to the Hongkou District Labor and Personnel Dispute Arbitration Commission ("**Hongkou Labor Arbitration Commission**") requesting Company A to pay compensation of 90,735.58 yuan for illegal termination of labor contract. Hongkou Labor Arbitration Commission upheld this request.

Company A was not satisfied with the award and filed a lawsuit to the Hongkou District People's Court.

### **3. Trial Results**

#### **3.1 First Instance**

During the first instance, Company A provided the Employee Handbook (effective as of January 2016) and the Confirmation Letter (signed by Wang). The Article 6.1 Salary Payment and Adjustment of the Employee Handbook stipulated that “(3) The employee whose annual review score is less than or equals to 75 points shall be deemed as incompetent for the work and shall not qualify for pay rise in principle, in the case of pay rise, it shall not exceed 10% of the original payment. ” Meanwhile, Company A also provided notarized emails, Wang’s annual review forms for Year 2014 and Year 2015, and the email sent from the General Manager of the Company A to Wang on July 8, 2014 to prove that Wang was transferred to a new position due to incompetence at that time.

After trial, the court of the original trial held that the reason for termination of the labor contract between Company A and Wang was not reasonable/persuasive and it lacked objective evidence to show that Wang was incompetent. Moreover, the annual review form only reflected the rate of pay rise or pay cut in the next year, so it could not be the ground on which the labor contract was terminated. It is not improper for Wang to claim the compensation for the illegal termination of the labor contract.

Finally, the court of first instance ordered Company A to pay compensation of 90,735.58 yuan for the illegal termination of labor contract to Wang.

#### **3.2 Second Instance**

Company A was not satisfied with the judgment and appealed to Shanghai No. 2 Intermediate People's Court.

The court of second instance held that Company A believed that Wang had been transferred to the operation specialist on July 9, 2014 because of his incompetence, and that Wang was still incompetent after his annual review scores were below 75 points in 2014 and 2015. Regarding this, Company A provided the notarized emails, Wang's 2014 and 2015 annual review forms to corroborate his incompetence. Based on the mail sent by the General Manager of Company A on July 8, 2014, it proved that Wang was indeed incompetent for the position and transferred to another position.

With respect to the two annual review forms, the court of second instance held that, as provided in Article 6.1 Salary Payment and Adjustment of the Employee Handbook of Company A, employees’

salaries shall be reviewed once again upon completion of the annual review. The final score of the annual review has certain restriction on pay rise. If the final annual review score is less than or equals to 75 points, the employees shall be deemed as incompetent for the work and shall not qualify for the pay rise in principle, and in the case of pay rise, the pay rise shall not exceed 10% of the original payment. In terms of the above article, the annual review is the basis to decide the pay rise, but should not be used as the standard to determine whether an employee is competent for the work. Based on the Wang's annual review forms, Company A provided almost "good" or "average" for Wang's business capability, work effect, work attitude, team cooperation and compliance, which indicated that Wang's performance was not excellent but failed to prove that he is not incompetent for the work. Therefore, it was not reasonable for Company A to deem Wang incompetent for the position of operation specialist.

In addition, after Wang was transferred to another position on July 9, 2014, Company A shall timely review his performance after the transfer and give objective evaluation of whether he was competent for the work. However, with the lapse of nearly two years, it was unreasonable for Company A to dismiss Wang on the ground that he was still incompetent after the transfer.

Therefore, the court of second instance deemed that the judgment made by the court of first instance complied with the evidential facts and was appropriate. The court of second instance dismissed the appeal and upheld the original judgment.

#### **4. Legal Analysis**

In accordance with Paragraph 2 of Article 40 of the *Labor Contract Law*, if an employee is incompetent and remains incompetent after training or being transferred to another position, the employer may terminate the labor contract with a prior written notice in advance of 30 days or extra one month's salary in lieu of such a notice. Employers shall have the right of autonomous employment to some extent, provided that the employers develop the relevant review mechanism and specify such review mechanism in the company's rules and regulations. In addition, employers shall implement the rules strictly in accordance with the company's rules and regulations.

In this case, according to the rules of Company A's Employee Handbook, the review is only used as a reference to adjust the salary, but not a reference to determine whether the employee is incompetent for the position. Furthermore, for the review form of the employee showed "good" or "average", it cannot indicate that the employee was incompetent for the position.

In the case of [2016] Hu 01 Min Zhong No.8997 heard by Shanghai No.1 Intermediate Court, the employer unilaterally rescinded the labor contract in accordance with Paragraph 2 of Article 40 of the

*Labor Contract Law*. Contrary to the abovementioned case, the court upheld the employer terminated the labor contract lawfully.

In such a case, the employer submitted its Employee Handbook, which provided that “to clarify the annual performance requirements, the employee must set the work goal (“**blue-chip**”) for the current year at the beginning of each year. At first, the employee must review the annual operation plan or refer to the blue-chip provided by his or her supervisor and then draft his or her individual blue-chip. His or her supervisor and the employee shall discuss the modification of the blue-chip and confirm .... All the employees must conduct a performance evaluation at the end of each year based on the blue-chip set by the employee at the beginning of the year and the blue-chip updated in the middle of the year. For any Employee who is evaluated as incompetent for his or her position in the Company, i.e., he or she will be incompetent for his or her position, the Company will provide such an Employee with the opportunity to improve his or her job performance for a period of one to three months. The employee will be evaluated again after the end of the performance improvement period set for him/her. If evaluation result still fails to meet the set Performance Target, i.e., Employee remains incompetent for the job, the Company has the right to transfer such an Employee to a new position or unilaterally terminate the labor contract with such employee in accordance with the Labor Contract Law.”

In this case, the employee formulated the work plan with clear time nodes and relevant proportion requirements. The employer provided all the emails between the employee and his supervisor, which proved that his supervisor was very dissatisfied with the employee's completion of the 12 tasks, and the employee failed to prove that he completed the relevant tasks by the deadline. Therefore, the court held that, based on job responsibilities and blue-chip progress made by the employer on June 4, 2015, it was reasonable for the employer to have the conclusion of the first evaluation of the employee in 2015 was incompetent for the job. Thereafter, the employer provided trainings for the employee. After the trainings, the employee's supervisor was still not satisfied with the completion of his tasks by the employee, and the employee did not provide any effective evidence to prove that his performance had improved. Therefore, on September 14, 2015, the employer determined that the employee failed to pass the evaluation, which was also confirmed by the court. In this case, the employer's termination of the labor contract complied with Article 40 of the *Labor Contract Law*, and the employer has also paid the employee economic compensation for the termination of the labor contract and one month's salary in lieu of 30-day prior notice. Finally, the employer's termination was deemed as lawful.

From the comparisons between the two cases, it can be seen that the court will consider each individual case in making judgment. If an employer intends to dismiss an employee without fault in accordance with Paragraph 2 of Article 40 of the *Labor Contract Law*, it shall make sure that it



establishes a clear and reasonable review mechanism in its rules and regulations, and shall provide effective evidence that the employee is incompetent for the job.

**Besides**, according to Paragraph 2 of Article 40 of the *Labor Contract Law*, after an employee is deemed as incompetent for his or her job for the first time, the employer shall not directly terminate the labor contract with the employee, and shall train the employee or adjust the employee's position. Where the employee is still not competent for the job after the training/position adjustment, the employer may only terminate the labor contract after providing the employee a written notice 30-day in advance or paying the employee an extra month's salary according to the aforesaid article.

## ➤ 新法速递

### 《保障农民工工资支付条例》

作者：顾巍巍 | 隋天娇 | 胡翔

2019年12月4日，为了规范农民工工资支付行为，保障农民工按时足额获得工资，国务院颁布了《保障农民工工资支付条例》（“**支付条例**”），该条例自2020年5月1日起施行。

支付条例共分为七个章节，分别规定了总则、工资支付形式与周期、工资清偿、工程建设领域特别规定、监督检查、法律责任和附则。笔者将这部支付条例各部分的亮点归纳如下：

#### 一、总则

第一，总则明确用人单位应对农民工进行实名制管理，与农民工书面约定或者通过依法制定的规章制度规定工资支付标准、支付时间、支付方式等内容，不得拖欠农民工工资（“**欠薪**”）。

第二，总则还明确了各部门的职责。县级以上地方人民政府负责本行政区域内农民工工资支付工作。人力资源社会保障行政部门（“**人社部门**”）有组织协调、管理指导和监督检查的职责。

除此之外，住房城乡建设、交通运输、水利等相关行业工程建设主管部门，发展改革、财政、公安等职能部门，以及工会、共青团、妇联、残联等组织共同保障农民工的工资支付。

第三，总则规定新闻媒体应当进行公益宣传，引导用人单位依法用工，及时足额支付农民工的工资，同时也起到引导农民工依法维权的作用。

#### 二、工资支付形式与周期

第一，用人单位应当按照与农民工书面约定或者依法制定的规章制度规定的工资支付周期和具体支付日期足额支付工资。用人单位实行月、周、日、小时工资制的，按照月、周、日、小时为周期支付工资；实行计件工资制的，工资支付周期由双方约定。

第二，用人单位应当通过银行转账或者现金支付的方式，不得以实物或者有价证券等其他形式替代。

第三，用人单位向农民工支付工资时，应当提供工资清单，且应当编制书面工资支付台账，并至少保存 3 年。

### 三、工资清偿

用人单位欠薪，应当予以清偿，工资清偿部分对六种情形进行了规定：

第一，不具备合法经营资格的单位招用农民工，农民工已经付出劳动而未获得工资的，由该单位或者其出资人清偿。

第二，用工单位使用个人、不具备合法经营资格的单位或者未依法取得劳务派遣许可证的单位派遣的农民工，如发生欠薪的，由用工单位清偿。

第三，用人单位将工作任务发包给个人或者不具备合法经营资格的单位，导致欠薪的，由发包的组织与承包经营者承担连带赔偿责任。若用人单位允许个人、不具备合法经营资格或者未取得相应资质的单位以用人单位的名义对外经营，导致欠薪的，由用人单位清偿。

第四，对于合伙企业、个人独资企业、个体经济组织等用人单位欠薪的，如果不清偿的，则由出资人清偿。

第五，用人单位合并或者分立时，应当在合并或者分立前清偿欠薪，但如果能够与农民工书面协商一致，可以由合并或者分立后的主体清偿。

第六，用人单位被依法吊销营业执照或者登记证书、被责令关闭、被撤销或者依法解散的，应当在申请注销登记前依法清偿欠薪；未按规定清偿的用人单位主要出资人，应当在注册新用人单位前清偿。

### 四、工资建设领域特别规定

在工程建设领域出现欠薪的现象比较集中，因此支付条例特别对工程建设领域做了规定，具体包括以下方面。

第一，在工程启动前，若建设单位未满足施工所需资金安排的，不得开工建设或者颁发施工许可证。同时，建设单位应向施工单位提供工程款支付担保。

第二，在规范农民工用工形式和工资支付方面，支付条例要求施工总承包单位或者分包单位应对所招用的农民工进行实名登记管理。

农民工工资由分包单位委托施工总承包单位代发，施工总承包单位应当开设农民工工资专用账户，专项用于支付该工程建设项目农民工工资，建设单位按照约定将人工费用及时足额拨付至农民工工资专用账户。而且，农民工工资专用账户资金和工资保证金不得因支付为本项目提供劳动的农民工工资之外的原因被查封、冻结或者划拨。

施工总承包单位还应当存储工资保证金（或者提供金融机构保函），专项用于支付农民工被拖欠的工资。

第三，在保障农民工维权途径方面，支付规定要求施工总承包单位应当在施工现场醒目位置设立维权信息告示牌，明示以下三个方面的信息：（1）建设单位、施工总承包单位及所在项目部、分包单位、相关行业工程建设主管部门；（2）当地最低工资标准、工资支付日期；（3）投诉举报电话、劳动争议调解仲裁申请渠道、法律援助申请渠道、公共法律服务热线等。

第四，在发生欠薪时，除本文第三部分提及的清偿方式外，金融机构若发现资金未按约定拨付，应及时通知施工总承包单位，由施工总承包单位报告人社部门和相关行业工程建设主管部门，并纳入欠薪预警系统。

## 五、监督检查

支付条例在第五章监督检查部分进一步明确了各个部门的职责。

第一，县级以上地方人民政府应建立民工工资支付监控预警平台，使各部门信息共享。

第二，人社部门、相关行业工程建设主管部门和其他有关部门按照职责，对劳动合同签订、工资支付、用工实名制、工资专用账户、施工总承包单位代发工资、工资保证金存储、维权信息公示等情况进行监管。

人社部门在查处欠薪案件时，经批准有权查询相关单位金融账户和相关当事人的财产情况。

第三，其他部门应配合人社部门查处欠薪案件。如用人单位拒不配合调查，人社部门可请求公安机关协助。对欠薪涉嫌构成拒不支付劳动报酬罪的，应及时移送公安机关。人社部门作出责令支付农民工工资的决定，如相关单位不支付的，可以依法申请法院强制执行。

第四，人社部门应对用人单位开展守法诚信等级评价，将用人单位的欠薪行为对社会公布，并计入信用记录。对造成严重不良社会影响的案件，涉案用人单位及其法定代表人或者主要负责人、直接负责的主管人员将被列入失信联合惩戒对象名单，在政府资金支持、政府采购、招投标、融资贷款、市场准入、税收优惠、评优评先、交通出行等方面予以限制。

## 六、法律责任

支付条例在第六章法律责任部分明确了用人单位、施工总承包单位、分包单位、建设单位和政府部门的法律责任。

### （一）用人单位

如用人单位出现以实物或者有价证券等代替货币支付工资、未编制并保存工资支付台账、未向农民工提供工资清单、扣押或变相扣押用于支付工资的社会保障卡或者银行卡等行为，由人社部门责令限期改正。若用人单位逾期不改正的，在对单位给予罚款的同时，对法定代表人或者主要负责人、直接负责的主管人员和其他直接责任人员给予罚款。

### （二）施工总承包单位

如果施工总承包单位未对分包单位劳动用工实施监督管理，或未在施工现场公示维权信息，由人社部门责令改正，逾期不改正的予以罚款。

此外，如果施工总承包单位未按规定开设或者使用农民工工资专用账户、未按规定存储工资保证金（或提供金融机构保函）、未实行劳动用工实名制管理的，人社部门应责令改正，逾期不改正的，应责令项目停工，并予以罚款。情节严重的，可给予施工单位限制承接新工程、降低资质等级、吊销资质证书等处罚。

### （三）分包单位

如果分包单位未按月考核农民工工作量、编制工资支付表并经农民工本人签字确认，或者未配合施工总承包单位对其劳动用工进行监督管理的，由人社部门责令改正，逾期不改正的予以罚款。

### （四）建设单位

如果建设单位未依法提供工程款支付担保、未按约定及时足额向农民工工资专用账户拨付工程款中的人工费用，或者拒不提供或者无法提供工程施工合同、农民工工资专用账户有关资料的，由人社部门责令改正，逾期不改正的予以罚款。

#### **（五）政府部门**

政府投资项目政府投资资金不到位欠薪的，经人社部门报本级政府批准后，责令限期足额拨付所拖欠的资金，逾期不拨付的，对有关部门负责人进行约谈，必要时进行通报，并约谈地方政府负责人。情节严重的，应对政府及其有关部门负责人、直接负责的主管人员和其他直接责任人员依法依规给予处分。

若人社、发展改革、财政、公安等部门和相关行业工程建设主管部门的工作人员在履行农民工工资支付监督管理职责过程中滥用职权、玩忽职守、徇私舞弊的，依法依规给予处分，构成犯罪的，依法追究其刑事责任。

## ➤ Regulations

### Regulations on Ensuring Payment of Wages for Migrant Workers

**Authors:** Weiwei Gu | Angela Sui | Suri Hu

On December 4, 2019, for the purpose of regulating wage payments to migrant workers and ensuring the timely and full payment of wages to migrant workers, the State Council has promulgated the *Regulations on Ensuring Payment of Wages to Migrant Workers* ("**Payment Regulations**"), with effect from May 1, 2020.

The Payment Regulations are divided into seven chapters, including the general provisions, methods and cycle of wage payment, wage back pay clearance, special provisions for the field of engineering construction, supervision and inspection, legal liability, and supplementary provisions. This article will summarize the highlights of all parts of the Payment Regulations as follows:

#### 1. General Provisions

Firstly, the General Provisions stipulate that employers shall manage migrant workers on a real-name basis, reach an agreement with migrant workers in writing or stipulate the wage payment standards, time of payment, payment methods and other contents in the rules and regulations formulated in accordance with the law, and shall not delay wage payment of migrant workers ("**wage arrears**").

Secondly, the General Provisions also specify the duties of each department. Local people's Governments of county level or above shall be responsible for the wage payment of migrant workers within their respective administrative regions. Administrative departments of human resources and social security ("**HRCC Departments**") are responsible for the organization and coordination, guidance management, supervision and inspection.

Besides, the engineering construction authorities in charge of housing and urban-rural development, transportation, water resources and other relevant departments in the engineering construction industry, the functional authorities of development and reform, finance and public security as well as labor unions, communist youth leagues, women's federations, disabled persons' federations and other organizations shall jointly ensure the wage payment of migrant workers.

Thirdly, the General Provisions stipulate that news media shall conduct public service advertisement,



which can guide employers to employ workers in accordance with the law and to timely pay wages to migrant workers in full. Meanwhile, it also guide migrant workers to safeguard their rights in accordance with the law.

## **2. Methods and Cycle of Wage Payment**

Firstly, employers shall pay wages in full amount according to the wage payment cycle and specific payment date stipulated in the written agreement with the migrant workers or in the rules and regulations formulated in accordance with the law. Where an employer implements a monthly, weekly, daily or hourly wage system, wages shall be paid on a monthly, weekly, daily or hourly basis; where an employer implements a piecemeal wage system, the wage payment cycle shall be agreed by both parties.

Secondly, employers shall pay by bank transfer or cash, and shall not replace such payment with other forms such as real objects or negotiable securities.

Thirdly, when paying wages to migrant workers, employers shall provide a list of wages, prepare written ledgers for the payment of wages and keep them for at least three years.

## **3. Wage Back Pay Clearance**

The wage arrears shall be paid off by the employer. The part of wage back pay clearance specifies the six following circumstances where the employer shall be responsible to pay off the wage arrears.

Firstly, where an employer without lawful operation qualifications recruits migrant workers and those workers have worked but have not received wages, such an employer or its investors shall pay off the wages.

Secondly, where an employer hires an individual or a migrant worker who is dispatched by an entity without lawful operation qualifications or an entity that has not obtained the labor dispatch license in accordance with the law, once wage arrears take place, such wages arrears shall be paid off by the employer.

Thirdly, where the employer contracts work tasks with individuals or entities without legal operation qualifications, the contracting organization and the contractor shall be jointly and severally liable for the wage arrears. If the employer allows an individual or an entity without legal operation qualification or without corresponding qualification to operate in the name of the employer, the employer shall pay off the wage arrears.

Fourthly, where partnership enterprises, sole proprietorship enterprises, individual economic organizations and other employers fail to pay off wages arrears, such wages shall be paid off by the investors.

Fifthly, in case of merger or division of an employer, the wages arrears shall be paid off prior to the merger or division, except that such wages may be paid off by the bodies after the merger or division provided that the employer and migrant workers can reach an written agreement.

Sixthly, where the business certificate or registration certificate of an employer is revoked, or an employer is ordered to close down, cancelled or dissolved in accordance with law, the wage arrears shall be paid off in accordance with law before the application for cancellation of registration; where the aforesaid employer fails to pay off wages arrears, the main investors of such an employer shall pay off the wage arrears before these investors register any new employer.

#### **4. Special Provisions in the Field of Engineering Construction**

The phenomenon of wage arrears in the field of engineering construction is more concentrated, so the Payment Regulations have made special provisions in the field of engineering construction, including the following aspects.

Firstly, before a project starts, if the construction unit fails to meet the required funds for construction, it shall not start the construction or be allowed to obtain the construction permit. Besides, the construction unit must provide guarantee for the project payment to the contractor unit.

Secondly, with respect to regulating the forms of employment of and payment of wages for migrant workers, the Payment Regulations require that general contractor enterprise or subcontractor enterprise shall conduct real-name registration and management of migrant workers employed by them.

Where the wages for migrant workers are paid by the general contractor enterprise entrusted by the subcontractor enterprise, such general contractor enterprise shall establish a special account for the wages for migrant workers, which shall be specifically used to pay the wages for migrant workers of such a construction project. The construction unit shall timely pay labor costs in full to the special account for the wages of migrant workers as agreed. In addition, funds in the special wage accounts and wage security deposits for migrant workers shall not be sealed up, frozen or transferred for the reasons other than the payment of wages to migrant workers for the project.

A general contractor enterprise shall also provide wage security deposits (or provide a letter of guarantee issued by a financial institution), which is specifically used to pay the wage arrears of migrant workers.

Thirdly, with respect to the ways to safeguard the rights of migrant workers, the Payment Regulations require that the general contractor enterprise shall set up a right protection information bulletin board at an eye-catching position of the construction site, clearly stating the information in the following three aspects: (1) the construction unit, the general contractor enterprise and the project department, the subcontractor enterprise and engineering construction departments of relevant industries; (2) local minimum wage standards and wage payment dates; and (3) complaint and report hotlines, channels for applying for labor dispute mediation and arbitration, channels for applying for legal aid, and public legal service hotlines.

Fourthly, in the event of wage arrears, besides the back-pay clearance methods mentioned in Part 3 hereof, if the financial institution identifies that the funds have not been appropriated as agreed, it shall promptly notify the general contractor enterprise. The general contractor enterprise shall report the case to the HRCC Departments and the engineering construction department of the relevant industries, and list the payors into the warning system of wage arrears.

## **5. Supervision and inspection**

The duties of each department are further defined in the part of supervision and inspection of Chapter V in the Payment Regulations.

Firstly, the Local People's Governments of county level and above shall establish a monitoring and warning platform for the wage payment of migrant workers, so that all departments can share information via such a platform.

Secondly, the HRCC Departments, engineering construction authorities of the relevant industries and other relevant authorities shall, pursuant to their duties, supervise execution of labor contracts, wage payments, real-name employment system, designated wage account, wage payments by the general contractor enterprise, wage security deposits, announcement of rights protection information etc.

When investigating a case of wage arrears, the HRCC Departments have the right, upon approval, to inquire about the financial accounts of the relevant entities and the property of the parties concerned.

Thirdly, other departments shall cooperate with the HRCC Departments in investigating and dealing with wage arrears. If the employers refuse to cooperate with the investigation, the HRCC Departments may request the public security departments to provide assistance. Those who are suspected of committing the crime of refusing to pay labor remuneration shall be timely handed over to the public security departments. If the HRCC Departments orders the relevant entities to make the payment and such entities refuse to obey, the HRCC Departments may apply to the courts for enforcement.

Fourthly, the HRCC Departments shall carry out the credit rating of employers' law abidance, announce the employers' behavior of wage arrears to the public, and record such behavior in credit records. Where a case has caused serious adverse social impact, the employer concerned and its legal representative or person chiefly in charge and directly responsible person shall be put in the list of jointly-punished dishonesty personnel. Meanwhile, such personnel shall be imposed restrictions on government funding support, government procurement, bidding, financing loans, market access, tax preferences, merit evaluation, transportation, and etc.

## **6. Legal Liability**

The Chapter VI "Legal Liabilities" of the Payment Regulations specifies the legal liabilities of the employers, general contractor enterprise, subcontractor enterprise, construction unit and government departments.

### **6.1 Employers**

If an employer replaces currency with real objects or negotiable securities, fails to compile and maintain wage payment ledgers, fails to provide migrant workers with wage lists, or withholds social security cards or bank cards used for wage payment in any manner, the HRCC Departments shall order it to make corrections within a prescribed time limit. If the employer fails to make corrections within the time limit, besides the monetary punishment for the employer, its legal representative or the person chiefly in charge, directly responsible person in charge and other directly responsible persons shall be fined as well.

### **6.2 General Contractor Enterprise**

If the general contractor enterprise fails to supervise and administer the labor employment of the subcontractor enterprise or fails to disclose the information on right protection at the construction site, the HRCC Departments shall order it to make corrections, and fine it if it fails to make corrections within the prescribed time limit.

In addition, if the general contractor enterprise fails to establish or use a special account for the wages of migrant workers, make wage security deposits (or provide a letter of guarantee issued by a financial institution), or adopt the real-name employment system, the HRCC Departments will order it to make corrections. If it fails to make corrections within the time limit, it will be ordered to suspend the construction of the project and be fined. Where the circumstances are serious, the general contractor enterprise may be imposed restrictions on undertaking new projects, lowering of its qualification grade, revocation of its qualification certificate and other penalties.

### **6.3 Subcontractor Enterprise**

If the subcontractor enterprise fails to review the workload of the migrant workers on a monthly basis, prepare the wage payment form and have such a form signed by the migrant workers themselves for confirmation, or fails to cooperate with the general contractor enterprise in supervising and administering their employment, the HRCC Departments shall order the subcontractor enterprise to make corrections, and impose a fine if it fails to make corrections within the prescribed time limit.

### **6.4 Construction unit**

If the construction unit fails to provide the guarantee for payment of project funds in accordance with the law, or fails to appropriate labor costs of the project funds to the special account for wages of migrant workers in full and on time as agreed, or refuses to provide or is unable to provide the project construction contract or the materials relating to the special account for wages of migrant workers, the HRCC Departments shall order it to make corrections, and impose a fine if it fails to make corrections within the prescribed time limit.

### **6.5 Government Departments**

Where the government investment funds for a government-invested project are not sufficient and causes wage arrears, the HRCC Departments, upon approval from the government at the same level, shall order the government to appropriate all funds of wage arrears within a prescribed time limit. If the government fails to appropriate the funds within the prescribed time limit, the head of the relevant department shall be interviewed, a notice of criticism shall be published if necessary, and the head of the local government concerned shall be interviewed. Where the case is serious, the persons-in-charge of the government and the relevant departments, the persons-in-charge who are directly accountable and other directly accountable personnel shall be punished pursuant to the laws and regulations.

Where any staff of the HRCC Departments, development and reform, finance and public security as well as the engineering construction departments of relevant industries abuses his power, neglects his duty or engages in malpractice for personal gains in the process of supervising and administering the wage payments of migrant workers, such a staff shall be punished in accordance with the laws and regulations; if it constitutes a crime, such a staff shall be investigated for criminal liability in accordance with the law.

附件 1:

## 保障农民工工资支付条例

《保障农民工工资支付条例》已经 2019 年 12 月 4 日国务院第 73 次常务会议通过，现予公布，自 2020 年 5 月 1 日起施行。

总理 李克强

2019 年 12 月 30 日

### 第一章 总则

**第一条** 为了规范农民工工资支付行为，保障农民工按时足额获得工资，根据《中华人民共和国劳动法》及有关法律的规定，制定本条例。

**第二条** 保障农民工工资支付，适用本条例。

本条例所称农民工，是指为用人单位提供劳动的农村居民。

本条例所称工资，是指农民工为用人单位提供劳动后应当获得的劳动报酬。

**第三条** 农民工有按时足额获得工资的权利。任何单位和个人不得拖欠农民工工资。

农民工应当遵守劳动纪律和职业道德，执行劳动安全卫生规程，完成劳动任务。

**第四条** 县级以上地方人民政府对本行政区域内保障农民工工资支付工作负责，建立保障农民工工资支付工作协调机制，加强监管能力建设，健全保障农民工工资支付工作目标责任制，并纳入对本级人民政府有关部门和下级人民政府进行考核和监督的内容。

乡镇人民政府、街道办事处应当加强对拖欠农民工工资矛盾的排查和调处工作，防范和化解矛盾，及时调解纠纷。

**第五条** 保障农民工工资支付，应当坚持市场主体负责、政府依法监管、社会协同监督，按照源头治理、预防为主、防治结合、标本兼治的要求，依法根治拖欠农民工工资问题。

**第六条** 用人单位实行农民工劳动用工实名制管理，与招用的农民工书面约定或者通过依法制定的规章制度规定工资支付标准、支付时间、支付方式等内容。

**第七条** 人力资源社会保障行政部门负责保障农民工工资支付工作的组织协调、管理指导和农民工工资支付情况的监督检查，查处有关拖欠农民工工资案件。

住房城乡建设、交通运输、水利等相关行业工程建设主管部门按照职责履行行业监管责任，督办因违法发包、转包、违法分包、挂靠、拖欠工程款等导致的拖欠农民工工资案件。



发展改革等部门按照职责负责政府投资项目的审批管理，依法审查政府投资项目的资金来源和筹措方式，按规定及时安排政府投资，加强社会信用体系建设，组织对拖欠农民工工资失信联合惩戒对象依法依规予以限制和惩戒。

财政部门负责政府投资资金的预算管理，根据经批准的预算按规定及时足额拨付政府投资资金。

公安机关负责及时受理、侦办涉嫌拒不支付劳动报酬刑事案件，依法处置因农民工工资拖欠引发的社会治安案件。

司法行政、自然资源、人民银行、审计、国有资产管理、税务、市场监管、金融监管等部门，按照职责做好与保障农民工工资支付相关的工作。

**第八条** 工会、共产主义青年团、妇女联合会、残疾人联合会等组织按照职责依法维护农民工获得工资的权利。

**第九条** 新闻媒体应当开展保障农民工工资支付法律法规政策的公益宣传和先进典型的报道，依法加强对拖欠农民工工资违法行为的舆论监督，引导用人单位增强依法用工、按时足额支付工资的法律意识，引导农民工依法维权。

**第十条** 被拖欠工资的农民工有权依法投诉，或者申请劳动争议调解仲裁和提起诉讼。

任何单位和个人对拖欠农民工工资的行为，有权向人力资源社会保障行政部门或者其他有关部门举报。

人力资源社会保障行政部门和其他有关部门应当公开举报投诉电话、网站等渠道，依法接受对拖欠农民工工资行为的举报、投诉。对于举报、投诉的处理实行首问负责制，属于本部门受理的，应当依法及时处理；不属于本部门受理的，应当及时转送相关部门，相关部门应当依法及时处理，并将处理结果告知举报、投诉人。

## 第二章 工资支付形式与周期

**第十一条** 农民工工资应当以货币形式，通过银行转账或者现金支付给农民工本人，不得以实物或者有价证券等其他形式替代。

**第十二条** 用人单位应当按照与农民工书面约定或者依法制定的规章制度规定的工资支付周期和具体支付日期足额支付工资。

**第十三条** 实行月、周、日、小时工资制的，按照月、周、日、小时为周期支付工资；实行计件工资制的，工资支付周期由双方依法约定。

**第十四条** 用人单位与农民工书面约定或者依法制定的规章制度规定的具体支付日期，可以在农民工提供劳动的当期或者次期。具体支付日期遇法定节假日或者休息日的，应当在法定节假日或者休息日前支付。

用人单位因不可抗力未能在支付日期支付工资的，应当在不可抗力消除后及时支付。

**第十五条** 用人单位应当按照工资支付周期编制书面工资支付台账，并至少保存3年。

书面工资支付台账应当包括用人单位名称，支付周期，支付日期，支付对象姓名、身份证号码、联系方式，工作时间，应发工资项目及数额，代扣、代缴、扣除项目和数额，实发工资数额，银行代发工资凭证或者农民工签字等内容。

用人单位向农民工支付工资时，应当提供农民工本人的工资清单。

### 第三章 工资清偿

**第十六条** 用人单位拖欠农民工工资的，应当依法予以清偿。

**第十七条** 不具备合法经营资格的单位招用农民工，农民工已经付出劳动而未获得工资的，依照有关法律规定执行。

**第十八条** 用工单位使用个人、不具备合法经营资格的单位或者未依法取得劳务派遣许可证的单位派遣的农民工，拖欠农民工工资的，由用工单位清偿，并可以依法进行追偿。

**第十九条** 用人单位将工作任务发包给个人或者不具备合法经营资格的单位，导致拖欠所招用农民工工资的，依照有关法律规定执行。

用人单位允许个人、不具备合法经营资格或者未取得相应资质的单位以用人单位的名义对外经营，导致拖欠所招用农民工工资的，由用人单位清偿，并可以依法进行追偿。

**第二十条** 合伙企业、个人独资企业、个体经济组织等用人单位拖欠农民工工资的，应当依法予以清偿；不清偿的，由出资人依法清偿。

**第二十一条** 用人单位合并或者分立时，应当在实施合并或者分立前依法清偿拖欠的农民工工资；经与农民工书面协商一致的，可以由合并或者分立后承继其权利和义务的用人单位清偿。

**第二十二条** 用人单位被依法吊销营业执照或者登记证书、被责令关闭、被撤销或者依法解散的，应当在申请注销登记前依法清偿拖欠的农民工工资。

未依据前款规定清偿农民工工资的用人单位主要出资人，应当在注册新用人单位前清偿拖欠的农民工工资。

#### 第四章 工程建设领域特别规定

**第二十三条** 建设单位应当有满足施工所需要的资金安排。没有满足施工所需要的资金安排的，工程建设项目不得开工建设；依法需要办理施工许可证的，相关行业工程建设主管部门不予颁发施工许可证。

政府投资项目所需资金，应当按照国家有关规定落实到位，不得由施工单位垫资建设。

**第二十四条** 建设单位应当向施工单位提供工程款支付担保。

建设单位与施工总承包单位依法订立书面工程施工合同，应当约定工程款计量周期、工程款进度结算办法以及人工费用拨付周期，并按照保障农民工工资按时足额支付的要求约定人工费用。人工费用拨付周期不得超过 1 个月。

建设单位与施工总承包单位应当将工程施工合同保存备查。

**第二十五条** 施工总承包单位与分包单位依法订立书面分包合同，应当约定工程款计量周期、工程款进度结算办法。

**第二十六条** 施工总承包单位应当按照有关规定开设农民工工资专用账户，专项用于支付该工程建设项目农民工工资。

开设、使用农民工工资专用账户有关资料应当由施工总承包单位妥善保存备查。

**第二十七条** 金融机构应当优化农民工工资专用账户开设服务流程，做好农民工工资专用账户的日常管理工作；发现资金未按约定拨付等情况的，及时通知施工总承包单位，由施工总承包单位报告人力资源社会保障行政部门和相关行业工程建设主管部门，并纳入欠薪预警系统。

工程完工且未拖欠农民工工资的，施工总承包单位公示 30 日后，可以申请注销农民工工资专用账户，账户内余额归施工总承包单位所有。

**第二十八条** 施工总承包单位或者分包单位应当依法与所招用的农民工订立劳动合同并进行用工实名登记，具备条件的行业应当通过相应的管理服务信息平台进行用工实名登记、管理。未与施工总承包单位或者分包单位订立劳动合同并进行用工实名登记的人员，不得进入项目现场施工。

施工总承包单位应当在工程项目部配备劳资专管员，对分包单位劳动用工实施监督管理，掌握施工现场用工、考勤、工资支付等情况，审核分包单位编制的农民工工资支付表，分包单位应当予以配合。

施工总承包单位、分包单位应当建立用工管理台账，并保存至工程完工且工资全部结清后至少 3 年。

**第二十九条** 建设单位应当按照合同约定及时拨付工程款，并将人工费用及时足额拨付至农民工工资专用账户，加强对施工总承包单位按时足额支付农民工工资的监督。

因建设单位未按照合同约定及时拨付工程款导致农民工工资拖欠的，建设单位应当以未结清的工程款为限先行垫付被拖欠的农民工工资。

建设单位应当以项目为单位建立保障农民工工资支付协调机制和工资拖欠预防机制，督促施工总承包单位加强劳动用工管理，妥善处理与农民工工资支付相关的矛盾纠纷。发生农民工集体讨薪事件的，建设单位应当会同施工总承包单位及时处理，并向项目所在地人力资源社会保障行政部门和相关行业工程建设主管部门报告有关情况。

**第三十条** 分包单位对所招用农民工的实名制管理和工资支付负直接责任。

施工总承包单位对分包单位劳动用工和工资发放等情况进行监督。

分包单位拖欠农民工工资的，由施工总承包单位先行清偿，再依法进行追偿。

工程建设项目转包，拖欠农民工工资的，由施工总承包单位先行清偿，再依法进行追偿。

**第三十一条** 工程建设领域推行分包单位农民工工资委托施工总承包单位代发制度。

分包单位应当按月考核农民工工作量并编制工资支付表，经农民工本人签字确认后，与当月工程进度等情况一并交施工总承包单位。

施工总承包单位根据分包单位编制的工资支付表，通过农民工工资专用账户直接将工资支付到农民工本人的银行账户，并向分包单位提供代发工资凭证。

用于支付农民工工资的银行账户所绑定的农民工本人社会保障卡或者银行卡，用人单位或者其他人员不得以任何理由扣押或者变相扣押。

**第三十二条** 施工总承包单位应当按照有关规定存储工资保证金，专项用于支付为所承包工程提供劳动的农民工被拖欠的工资。

工资保证金实行差异化存储办法，对一定时期内未发生工资拖欠的单位实行减免措施，对发生工资拖欠的单位适当提高存储比例。工资保证金可以用金融机构保函替代。

工资保证金的存储比例、存储形式、减免措施等具体办法，由国务院人力资源社会保障行政部门会同有关部门制定。

**第三十三条** 除法律另有规定外，农民工工资专用账户资金和工资保证金不得因支付为本项目提供劳动的农民工工资之外的原因被查封、冻结或者划拨。

**第三十四条** 施工总承包单位应当在施工现场醒目位置设立维权信息告示牌，明示下列事项：

（一）建设单位、施工总承包单位及所在项目部、分包单位、相关行业工程建设主管部门、劳资专管员等基本信息；

（二）当地最低工资标准、工资支付日期等基本信息；

（三）相关行业工程建设主管部门和劳动保障监察投诉举报电话、劳动争议调解仲裁申请渠道、法律援助申请渠道、公共法律服务热线等信息。

**第三十五条** 建设单位与施工总承包单位或者承包单位与分包单位因工程数量、质量、造价等产生争议的，建设单位不得因争议不按照本条例第二十四条的规定拨付工程款中的人工费用，施工总承包单位也不得因争议不按照规定代发工资。

**第三十六条** 建设单位或者施工总承包单位将建设工程发包或者分包给个人或者不具备合法经营资格的单位，导致拖欠农民工工资的，由建设单位或者施工总承包单位清偿。

施工单位允许其他单位和个人以施工单位的名义对外承揽建设工程，导致拖欠农民工工资的，由施工单位清偿。

**第三十七条** 工程建设项目违反国土空间规划、工程建设等法律法规，导致拖欠农民工工资的，由建设单位清偿。

## 第五章 监督检查

**第三十八条** 县级以上地方人民政府应当建立农民工工资支付监控预警平台，实现人力资源社会保障、发展改革、司法行政、财政、住房城乡建设、交通运输、水利等部门的工程项目审批、资金落实、施工许可、劳动用工、工资支付等信息及时共享。

人力资源社会保障行政部门根据水电燃气供应、物业管理、信贷、税收等反映企业生产经营相关指标的变化情况，及时监控和预警工资支付隐患并做好防范工作，市场监管、金融监管、税务等部门应当予以配合。

**第三十九条** 人力资源社会保障行政部门、相关行业工程建设主管部门和其他有关部门应当按照职责，加强对用人单位与农民工签订劳动合同、工资支付以及工程建设项目实行农民工实名制管理、农民工工资专用账户管理、施工总承包单位代发工资、工资保证金存储、维权信息公示等情况的监督检查，预防和减少拖欠农民工工资行为的发生。

**第四十条** 人力资源社会保障行政部门在查处拖欠农民工工资案件时，需要依法查询相关单位金融账户和相关当事人拥有房产、车辆等情况的，应当经设区的市级以上地方人民政府人力资源社会保障行政部门负责人批准，有关金融机构和登记部门应当予以配合。

**第四十一条** 人力资源社会保障行政部门在查处拖欠农民工工资案件时，发生用人单位拒不配合调查、清偿责任主体及相关当事人无法联系等情形的，可以请求公安机关和其他有关部门协助处理。

人力资源社会保障行政部门发现拖欠农民工工资的违法行为涉嫌构成拒不支付劳动报酬罪的，应当按照有关规定及时移送公安机关审查并作出决定。

**第四十二条** 人力资源社会保障行政部门作出责令支付被拖欠的农民工工资的决定，相关单位不支付的，可以依法申请人民法院强制执行。

**第四十三条** 相关行业工程建设主管部门应当依法规范本领域建设市场秩序，对违法发包、转包、违法分包、挂靠等行为进行查处，并对导致拖欠农民工工资的违法行为及时予以制止、纠正。

**第四十四条** 财政部门、审计机关和相关行业工程建设主管部门按照职责，依法对政府投资项目建设单位按照工程施工合同约定向农民工工资专用账户拨付资金情况进行监督。

**第四十五条** 司法行政部门和法律援助机构应当将农民工列为法律援助的重点对象，并依法为请求支付工资的农民工提供便捷的法律援助。

公共法律服务相关机构应当积极参与相关诉讼、咨询、调解等活动，帮助解决拖欠农民工工资问题。

**第四十六条** 人力资源社会保障行政部门、相关行业工程建设主管部门和其他有关部门应当按照“谁执法谁普法”普法责任制的要求，通过以案释法等多种形式，加大对保障农民工工资支付相关法律法规的普及宣传。

**第四十七条** 人力资源社会保障行政部门应当建立用人单位及相关责任人劳动保障守法诚信档案，对用人单位开展守法诚信等级评价。

用人单位有严重拖欠农民工工资违法行为的，由人力资源社会保障行政部门向社会公布，必要时可以通过召开新闻发布会等形式向媒体公开曝光。

**第四十八条** 用人单位拖欠农民工工资，情节严重或者造成严重不良社会影响的，有关部门应当将该用人单位及其法定代表人或者主要负责人、直接负责的主管人员和其他直接责任人员列入拖欠农民工工资失信联合惩戒对象名单，在政府资金支持、政府采购、招投标、融资贷款、市场准入、税收优惠、评优评先、交通出行等方面依法依规予以限制。

拖欠农民工工资需要列入失信联合惩戒名单的具体情形，由国务院人力资源社会保障行政部门规定。

**第四十九条** 建设单位未依法提供工程款支付担保或者政府投资项目拖欠工程款，导致拖欠农民工工资的，县级以上地方人民政府应当限制其新建项目，并记入信用记录，纳入国家信用信息系统进行公示。

**第五十条** 农民工与用人单位就拖欠工资存在争议，用人单位应当提供依法由其保存的劳动合同、职工名册、工资支付台账和清单等材料；不提供的，依法承担不利后果。



**第五十一条** 工会依法维护农民工工资权益，对用人单位工资支付情况进行监督；发现拖欠农民工工资的，可以要求用人单位改正，拒不改正的，可以请求人力资源社会保障行政部门和其他有关部门依法处理。

**第五十二条** 单位或者个人编造虚假事实或者采取非法手段讨要农民工工资，或者以拖欠农民工工资为名讨要工程款的，依法予以处理。

## 第六章 法律责任

**第五十三条** 违反本条例规定拖欠农民工工资的，依照有关法律规定执行。

**第五十四条** 有下列情形之一的，由人力资源社会保障行政部门责令限期改正；逾期不改正的，对单位处2万元以上5万元以下的罚款，对法定代表人或者主要负责人、直接负责的主管人员和其他直接责任人员处1万元以上3万元以下的罚款：

- （一）以实物、有价证券等形式代替货币支付农民工工资；
- （二）未编制工资支付台账并依法保存，或者未向农民工提供工资清单；
- （三）扣押或者变相扣押用于支付农民工工资的银行账户所绑定的农民工本人社会保障卡或者银行卡。

**第五十五条** 有下列情形之一的，由人力资源社会保障行政部门、相关行业工程建设主管部门按照职责责令限期改正；逾期不改正的，责令项目停工，并处5万元以上10万元以下的罚款；情节严重的，给予施工单位限制承接新工程、降低资质等级、吊销资质证书等处罚：

- （一）施工总承包单位未按规定开设或者使用农民工工资专用账户；
- （二）施工总承包单位未按规定存储工资保证金或者未提供金融机构保函；
- （三）施工总承包单位、分包单位未实行劳动用工实名制管理。

**第五十六条** 有下列情形之一的，由人力资源社会保障行政部门、相关行业工程建设主管部门按照职责责令限期改正；逾期不改正的，处5万元以上10万元以下的罚款：

- （一）分包单位未按月考核农民工工作量、编制工资支付表并经农民工本人签字确认；
- （二）施工总承包单位未对分包单位劳动用工实施监督管理；
- （三）分包单位未配合施工总承包单位对其劳动用工进行监督管理；
- （四）施工总承包单位未实行施工现场维权信息公示制度。

**第五十七条** 有下列情形之一的，由人力资源社会保障行政部门、相关行业工程建设主管部门按照职责责令限期改正；逾期不改正的，责令项目停工，并处5万元以上10万元以下的罚款：

- (一) 建设单位未依法提供工程款支付担保；
- (二) 建设单位未按约定及时足额向农民工工资专用账户拨付工程款中的人工费用；
- (三) 建设单位或者施工总承包单位拒不提供或者无法提供工程施工合同、农民工工资专用账户有关资料。

**第五十八条** 不依法配合人力资源社会保障行政部门查询相关单位金融账户的，由金融监管部门责令改正；拒不改正的，处2万元以上5万元以下的罚款。

**第五十九条** 政府投资项目政府投资资金不到位拖欠农民工工资的，由人力资源社会保障行政部门报本级人民政府批准，责令限期足额拨付所拖欠的资金；逾期不拨付的，由上一级人民政府人力资源社会保障行政部门约谈直接责任部门和相关监管部门负责人，必要时进行通报，约谈地方人民政府负责人。情节严重的，对地方人民政府及其有关部门负责人、直接负责的主管人员和其他直接责任人员依法依规给予处分。

**第六十条** 政府投资项目建设单位未经批准立项建设、擅自扩大建设规模、擅自增加投资概算、未及时拨付工程款等导致拖欠农民工工资的，除依法承担责任外，由人力资源社会保障行政部门、其他有关部门按照职责约谈建设单位负责人，并作为其业绩考核、薪酬分配、评优评先、职务晋升等的重要依据。

**第六十一条** 对于建设资金不到位、违法违规开工建设的社会投资工程建设项目拖欠农民工工资的，由人力资源社会保障行政部门、其他有关部门按照职责依法对建设单位进行处罚；对建设单位负责人依法依规给予处分。相关部门工作人员未依法履行职责的，由有关机关依法依规给予处分。

**第六十二条** 县级以上地方人民政府人力资源社会保障、发展改革、财政、公安等部门和相关行业工程建设主管部门工作人员，在履行农民工工资支付监督管理职责过程中滥用职权、玩忽职守、徇私舞弊的，依法依规给予处分；构成犯罪的，依法追究刑事责任。

## 第七章 附 则

**第六十三条** 用人单位一时难以支付拖欠的农民工工资或者拖欠农民工工资逃匿的，县级以上地方人民政府可以动用应急周转金，先行垫付用人单位拖欠的农民工部分工资或者基本生活费。对已经垫付的应急周转金，应当依法向拖欠农民工工资的用人单位进行追偿。

**第六十四条** 本条例自2020年5月1日起施行。



## 本期作者简介 Introduction to the Author



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## 环球简介 Introduction to GLO

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逾 400 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》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。

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**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。

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