环球律师事务所

劳动法律专递

2020 年 5 月

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2020 年 05 月

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公司司法实践中对病假工资计算基数的认定

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2016 年 08 月 01 日，《上海市企业工资支付办法》（“**《工资支付办法》**”）（*沪人社综发〔2016〕，现行有效）开始施行*。《工资支付办法》第九条规定了用人单位应当向劳动者支付病假工资[1]，同时也明确了病假工资基数的确认原则：

“(一)劳动合同对劳动者月工资有明确约定的，按劳动合同约定的劳动者所在岗位相对应的月工资确定;实际履行与劳动合同约定不一致的，按实际履行的劳动者所在岗位相对应的月工资确定。

(二)劳动合同对劳动者月工资未明确约定，集体合同(工资专项集体合同)对岗位相对应的月工资有约定的，按集体合同(工资专项集体合同)约定的与劳动者岗位相对应的月工资确定。

(三)劳动合同、集体合同(工资专项集体合同)对劳动者月工资均无约定的，按劳动者正常出勤月依照本办法第二条规定的工资(不包括加班工资)的 70%确定。”

同时，我们注意到在上海现行的法律法规体系下，《上海市劳动保障局关于病假工资计算的公告》（“**《病假工资计算公告》”**）（*2004 年 11 月 01 日施行，现行有效*）以及《上海市劳动局关于加强企业职工疾病休假管理保障职工疾病休假期间生活的通知》（“**《保障病假生活的通知》**”）（*沪劳保发〔1995〕83 号，1995 年 10 月 01 日施行，现行有效*）同样对病假工资基数的计算作出了相关规定。

那么，在目前的司法实践中，病假工资的计算基数应当如何认定呢？围绕着这个问题，本文通过梳理现行的法律法规以及上海地区公开裁判文书，对上海法院对病假工资计算基数的认定进行了简要的归纳及分析。

一、《保障病假生活的通知》、《病假工资计算公告》及《工资支付办法》三文件对病假基数的规定并不一致

[1] 《工资支付办法》第九条第一款规定，企业安排劳动者加班的，应当按规定支付加班工资。劳动者在依法享受婚假、丧假、探亲假、病假等假期期间，企业应当按规定支付假期工资。

- *根据《保障病假生活的通知》第四条，*病假工资基数=70%*职工正常情况下实得工资[2]。但该通知并未区分双方是否约定病假工资基数及是否约定了劳动者月工资的情况。

- *根据《病假工资计算公告》第二条，*1）劳动合同/集体合同有约定病假工资基数的，病假工资基数按不低于劳动合同/集体合同约定的劳动者本人所在岗位（职位）相对应的工资标准确定；2）劳动合同/集体合同未有约定病假工资基数的，病假工资基数=70%*正常出勤月工资。[3]可以看出，该公告对用人单位与劳动者是否约定了病假基数进行了分类讨论。

- *而《工资支付办法》第九条，*按照劳动合同/集体合同是否约定了劳动者月工资进行了分类讨论：1）双方未约定病假工资基数的，但劳动合同/集体合同约定了月工资，则病假工资基数=月工资；2）未约定的月工资的，病假工资基数=70%*劳动者正常出勤月工资[4]。

由此可以看出，前述规定中对认定病假工资基数的分类标准和认定标准并不相同。主要区别在于《病假工资计算公告》分类讨论了用人单位与劳动者是否约定了病假基数的情况；《工资支付办法》分类讨论了双方是否约定了月工资的情况；而《保障病假生活的通知》并未进行分类讨论。

那么，在司法实践中，法院是依据前述何种法律法规如何认定病假工资基数呢？为了厘清该问题，我们在在 Alpha 系统中，以“病假工资基数”作为“法院认为”部分的关键词，将地域限定为“上海市”，得到相关案例共 62 件。在审阅前述案件的基础上，我们对关于病假工资基数的主要几点争议进行了如下分析。

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[2] 《保障病假生活的通知》第四条规定，职工疾病或非因工负伤连续休假在 6 个月以内的，企业应按下列标准支付疾病休假工资:连续工龄不满 2 年的，按本人工资的 60%计发;连续工龄满 2 年不满 4 年的，按本人工资的 70%计发;连续工龄满 4 年不满 6 年的，按本人工资的 80%计发;连续工龄满 6 年不满 8 年的，按本人工资的 90%计发;连续工龄满 8 年及以上的，按本人工资的 100%计发。

职工疾病或非因工负伤连续休假超过 6 个月的，由企业支付疾病救济费，其中连续工龄不满 1 年的，按本人工资的 40%计发;连续工龄满 1 年不满 3 年的，按本人工资的 50%计发;连续工龄满 3 年及以上的，按本人工资的 60%计发。

本人工资按职工正常情况下实得工资的 70%计算。

[3] 《病假工资计算公告》第二条规定，在制度工作日内请病假的日工资计算：按以下原则确定的计算基数除以发生当月的计薪日：

1.劳动合同有约定的，按不低于劳动合同约定的劳动者本人所在岗位（职位）相对应的工资标准确定。集体合同（工资集体协议）确定的标准高于劳动合同约定标准的，按集体合同（工资集体协议）标准确定。

2.劳动合同、集体合同均未约定的，可由用人单位与职工代表通过工资集体协商确定，协商结果应签订工资集体协议。

3.用人单位与劳动者无任何约定的，假期工资的计算基数统一按劳动者本人所在岗位（职位）正常出勤的月工资的 70%确定。

[4] 《工资支付办法》第九条第三款第(三)项规定，劳动合同、集体合同(工资专项集体合同)对劳动者月工资均无约定的，按劳动者正常出勤月依照本办法第二条规定的工资(不包括加班工资)的 70%确定。

《上海市企业工资支付办法》第二条规定，工资系以货币形式支付给劳动者的劳动报酬，包括计时工资、计件工资、奖金、津贴、补贴、加班工资等。

二、用人单位及劳动者约定了病假工资基数的，法院如何认定？

1. 双方有约定的，按双方约定的数额来确定病假工资计算基数

根据《上海高院民事审判庭 2014 年第三季度庭长例会研讨纪要》（“**《研讨纪要》**”）（*民一庭调研与参考[2015]11 号*），如劳动合同或双方签订的其他协议对病假工资计算基数有约定的，可按双方约定的数额来确定病假工资计算基数。

在司法实践中，上海法院也支持了在双方有约定的情况下按照约定的病假工资基数计算的观点。如在案号为“(2008)沪一中民一(民)终字第 3905 号”沈某某与上海某饮料有限公司劳动合同纠纷上诉案中，一审法院上海市闵行区人民法院认为，*原告沈某某与百事可乐公司于劳动合同中约定，各类假期的工资结算基数为基本工资扣除所包含的 10%的国家和企业规定的各类福利补贴。双方于劳动合同中对假期工资的结算基数的约定应属有效。现百事可乐公司实际亦按双方于劳动合同中对于假期工资的结算基数的约定计发沈某某病假期间的病假工资，故沈某某要求百事可乐公司补发其病假工资之请求，缺乏依据，难以支持*。上海市第一中级人民法院也支持了一审法院的观点。[5]

根据《研讨纪要》及上述案例可以看出，用人单位与劳动者是可以约定病假工资基数的。但是约定的方式是否仅包括劳动合同/集体合同？约定的金额是否有限制呢？我们也做了如下研究：

2. 除了劳动合同、集体合同约定之外，经劳动者签字确认的《员工手册》中对病假工资基数的约定也视为双方约定

《研讨纪要》中规定了，如劳动合同或双方签订的其他协议对病假基数有约定的可按约定。在司法实践中，我们注意到，经劳动者签字确认的《员工手册》也被普遍视为双方的约定性质之一。

在案号为“（2019）沪 01 民终 1507 号”的某电极公司劳动合同纠纷一案二审案中，公司的员工手册规定公司服务年限 2 至 4 年的，病假工资基数为 100%月工资，病假工资占正常月工资的 70%。上海市第一中级人民法院认为，*在员工手册有约定的情况下，应当按照约定计算病假工资基数。因此，最终认定胡高华的病假工资标准应当按照其正常工作期间的工资的 70%计算。*

[5] 类似案例请见（2018）沪 01 民终 14565 号案，（2019）沪 01 民终 1507 号以及（2018）沪 02 民终 11622 号案。

类似的，在（2018）沪 01 民终 14565 号[6]以及（2018）沪 02 民终 11622 号案[7]中，上海市第一中级人民法院及上海市第二中级法院均认可了经员工确认的《员工手册》中关于病假工资的约定可以作为裁判的依据。

3. 双方约定的病假工资基数需符合规定的下限标准，否则法院将依法调整

1) 病假工资基数的下限

《研讨纪要》第一点"关于病假工资基数如何确定的问题"规定，如劳动合同或双方签订的其他协议对病假工资计算基数有约定的，可按双方约定的数额来确定病假工资计算基数，但该约定的计算基数不得低于正常出勤工资（该正常出勤工资应理解为劳动者正常出勤即可获得的可预期收入，不包括一次性或临时性收入）×70%的标准。同时，《病假工资计算公告》第二条第 2 款规定，假期工资基数均不得低于本市规定的最低工资标准。

因此，即使用人单位与劳动者有权自行约定病假工资基数，但该金额不能低于正常出勤工资的 70%和本市规定的最低工资标准。

2) 法院对于用人单位与劳动者约定的"病假工资基数"是否具有调整权？

我们理解，根据《研讨纪要》及《病假工资计算公告》，上海法院对于病假工资的计算基数具有有调整权，以"月正常出勤工资的 70%"及本市最低工资标准作为判断标准。

在司法实践中，上海法院也持有相同的观点：在案号为"(2016)沪 0118 民初 8324 号"的褚艳红与某焊接集团公司劳动合同纠纷一审案中，上海市青浦区人民法院认为，*在劳动者与用人单位约定的病假工资基数低于正常出勤月工资的 70%时，法院判定用人单位应按照月工资的 70%即 6，300 元的 70%作为计算病假工资的基数。*[8]

[6] 在案号为"（2018）沪 01 民终 14565 号"的肖光健诉艾默生过程控制有限公司劳动合同纠纷一案二审案中， 2009 年，肖光健签名确认知晓艾默生公司《员工手册》（2009 年 6 月 1 日修订版）的内容，并同意遵守所有条例及条款，按其中所述的一切履行员工所有责任和义务。上海市第一中级人民法院认为，用人单位与劳动者就病假工资计算基数有约定的，可按双方约定的数额来确定病假工资计算基数。……艾默生公司上述关于病假工资计算基数的规定经肖光健签名确认知晓内容，并同意遵守，且未低于法定标准，双方可依约履行。

[7] 在案号为"（2018）沪 02 民终 11622 号"的黄浩与上海吉林实业有限公司吉臣酒店管理分公司劳动合同纠纷二审案中，吉臣酒店的《员工手册》第 4.7 条规定，病假工资的基数为本人工资的 7 折。上海市第二中级人民法院认为，吉臣酒店的《员工手册》规定，在酒店连续工龄满 6 年不满 8 年的，按本人工资七折的 90%计发。该项规定与本市相关法规的规定并无冲突，吉臣酒店已按此规定向黄浩足额计发了 2018 年 1 月 19 日至 1 月 25 日、2 月 5 日至 2 月 11 日期间病假工资，黄浩再主张上述病假期间的工资差额，理由不足，一审法院对黄浩要求吉臣酒店支付 2018 年 1 月 19 日至 1 月 25 日、2 月 5 日至 2 月 11 日期间病假工资 845.24 元的诉讼请求，不予支持。

[8] 上海市青浦区法院认为，被告主张应按工资专项集体合同约定的计算基数计算病假工资，该集体合同规定固定工资即基本工资，可作为各种假别的计算基数。根据法律规定，双方约定的计算基数不得低于正常出勤工资的 70%。从 2014 年 1 月之后，

三、劳动者与用人单位未约定病假工资基数的，法院认定的依据是什么？

我们注意到，对于该问题，在司法实践中，法院在裁判时所依据的法律法规并不一致，因此也出现了不同的裁判结果。

1. 部分案例中，上海法院依据《保障病假生活的通知》认定病假工资基数

在案号为“（2017）沪 01 民终 9536 号”的黄辉英诉深圳市华姿伊实业发展有限公司上海分公司劳动合同纠纷二审案中，黄辉英签订的劳动合同未约定病假工资基数，也未约定工资标准，但是华姿伊上海公司每月向黄辉英发放 8000 元工资。

上海市第一中级人民法院依据《保障病假生活的通知》，认定黄辉英的病假工资基数为职工正常情况下实得工资的 70%。因此，黄辉英病假工资基数应为 8,000 元×70%=5,600 元。[9]

2. 部分案例中，上海法院依据《病假工资计算公告》认定病假工资基数

在案号为“（2018）沪 02 民终 883 号”的上海豪士环境化学品有限公司、胡晓露劳动合同纠纷二审案中，2014 年 10 月 30 日，豪士化学品公司、胡晓露签订无固定期限劳动合同，约定胡晓露月工资 5,000 元。关于病假工资基数，*胡晓露主张，*根据《上海市企业工资支付办法》规定，劳动合同约定月工资的，假期工资以约定的月工资为计算基数。豪士化学品公司与胡晓露签订的劳动合同约定月工资为 5,000 元，所以应当按照 5,000 元/月计算病假工资。

而上海市第二中级人民法院认为，*至于病假工资的计算，根据相关规定，如劳动合同或双方签订的其他协议对病假工资计算基数有约定的，可按双方约定的数额来确定病假工资计算基数，双方未约定病假工资计算基数的，病假工资的计算基数应按照正常出勤工资的 70%标准来确定。现一审法院根据该期间医院开具的病休时间，并按胡晓露月工资的 70%为基数，核算胡晓露病假工资为 17,779 元正确，本院予以确认。*

原告的工资已至 6，300 元，被告以原告固定工资的 70%作为计算基数，明显低于原告本人实得工资的 70%，故本院对此不予采纳。原告要求被告按照其月工资的 70%即 6，300 元的 70%作为计算病假工资的基数，符合法律规定，本院予以采纳。

[9] 上海市第一中级人民法院认为，《上海市劳动局关于加强企业职工疾病休假管理保障职工疾病休假期间生活的通知》[沪劳保发（1995）83 号]第四条规定：“职工疾病或非因工负伤连续休假超过 6 个月的，由企业支付疾病救济费，其中连续工龄不满 1 年的，按本人工资的 40%计发；连续工龄满 1 年不满 3 年的，按本人工资的 50%计发；连续工龄满 3 年及以上的，按本人工资的 60%计发。本人工资按职工正常情况下实得工资的 70%计算。”上述规定对“本人工资”的标准进行了界定，即“本人工资”按职工正常情况下实得工资的 70%计算。因此，黄辉英“本人工资”应为 8，000 元×70%=5，600 元。又根据上述规定，黄辉英连续工龄已满 3 年及以上，故华姿伊上海公司应按黄辉英“本人工资”的 60%计发疾病救济费，即 5，600 元×60%=3，360 元。故原审法院确定的黄辉英疾病救济费的支付标准并无不当。

上海二中院在上海中远川崎重工钢结构有限公司、陈豪劳动合同纠纷二审案（（2019）沪 02 民终 1422 号）中[10]，也持有同样的观点[11]

3. 部分案例中，上海法院依据《工资支付办法》认定病假工资基数

在上海申得欧有限公司诉吴燕萍劳动合同纠纷一案二审案（*（2018）沪 01 民终 13616 号*）中，2010 年 9 月，双方劳动合同约定，吴燕萍每月基本工资 1,452 元、各类补贴和津贴 348 元。后申得欧公司与吴燕萍确认吴燕萍自 2017 年 4 月起的每月基本工资和各类津贴与补贴的总和为 7,583 元。虽然申得欧公司主张应依据《病假工资计算公告》认定病工资标准，但是上海市第一中级人民法院认为，*应当依据《工资支付办法》第九条第三款假期工资计算基数确定原则之第（一）项"实际履行与劳动合同约定不一致的，按实际履行的劳动者所在岗位相对应的月工资确定"认定按照实际履行的吴燕萍所在岗位相对应的月工资 7，583 元确定系争病假工资计算基数。*类似的，在（2017）沪 01 民终 13934 号案中，上海市徐汇区法院及上海市第一中级人民法院也持有相同的观点。[12]

由此可见，在《工资支付办法》施行之后*（即 2016 年 8 月 1 日后）*，确有案例表明在司法实践中部分法院系依据《工资支付办法》认定病假工资基数，但是仍有部分法院在部分案例中依据《保障病假生活的通知》、《病假工资计算公告》予以认定。

四、结论

综上所述，我们对司法实践中对病假工资基数的认定标准总结如下：

1. 若用人单位与劳动者约定了病假工资基数的（包括通过劳动合同/集体合同或员工手册约定），按照双方约定的数额来确定病假工资计算基数；但该数额不能低于正常出勤工资的 70%和本市规定的最低工资标准，否则法院将依法予以调整；

[10]宝山法院及二中院认为，职工疾病或非因工负伤连续休假在 6 个月以内的，职工连续工龄满 8 年及以上的，企业应按职工本人工资的 100%支付疾病休假工资；职工疾病或非因工负伤连续休假超过 6 个月的，职工连续工龄满 3 年及以上的，企业应按职工本人工资的 60%支付疾病救济费。关于假期工资的计算基数，用人单位与劳动者无任何约定的，假期工资的计算基数统一按劳动者本人所在岗位（职位）正常出勤的月工资的 70%确定。

[11] 上海第二中级人民法院认为，关于假期工资的计算基数，用人单位与劳动者无任何约定的，假期工资的计算基数统一按劳动者本人所在岗位（职位）正常出勤的月工资的 70%确定。

类似案例请见，（2016）沪 0120 民初 18186 号宋海燕与上海申意汽车零部件有限公司劳动合同纠纷一审案。

[12] 在案号为"（2017）沪 01 民终 13934 号"的通标标准技术服务(上海)有限公司诉汤耶丽劳动合同纠纷一案二审案中，上海市徐汇区法院认为，自 2016 年 1 月起，通标公司每月 5 日以银行转账形式支付上月基本工资 6，089 元、自律奖 550 元、福利费 797 元，合计 7，436 元，依据《上海市企业工资支付办法》，故通标公司应以 7，436 元为基数支付汤耶丽 2016 年 8 月起的病假工资。二审法院上海市第一中级人民法院也支持了前述观点。

2. *若用人单位与劳动者未约定病假工资基数的，*在司法实践中上海法院在适用法律方面存在争议，即《保障病假生活的通知》、《病假工资计算公告》及《工资支付办法》三文件在司法实践中均有适用。

Research Article

Determination of the Calculating Base of Sick Pay in Judicial Practice

Authors：Weiwei Gu | Fawen Wan | Qiuci Yang

The Measures for the Payment of Wages by Enterprises in Shanghai Municipality (the **"Measures for the Payment of Wages"**) (Hu Ren She Zong Fa [2016] No.29, currently valid) were implemented on August 1, 2016. Article 9 of the Measures for the Payment of Wages prescribes that an employer shall pay sick leave wages to employees[13], and also specifies the principles for determining the base of sick pay:

(1) Where there is specific provision on the worker's monthly wage in the labor contract, the computation base shall be determined in accordance with the monthly wage corresponding to the worker's job position agreed in the labor contract; where the actual job position differs from the agreement in the labor contract, the computation base shall be determined in accordance with the monthly wage corresponding to the worker's actual job position.

(2) Where there is no specific provision on the worker's monthly wage in the labor contract, but the collective contract (special collective contract on wages) has provided the monthly wage corresponding to the job position, the computation base shall be determined in accordance with the monthly wage corresponding to the worker's job position as agreed in the collective contract (special collective contract on wages).

(3) Where there is no provision in both the labor contract and the collective contract (special collective contract on wages) on the worker's monthly wage, the computation base shall be determined in accordance with 70% of the worker's wage for a regular working month in accordance with the provisions of Article 2 (excluding overtime wage) of these Measures.

Meanwhile, we have noticed that under the existing legal system of Shanghai Municipality, the Announcement of the Shanghai Municipal Labor and Social Security Bureau on the Calculation of Sick Pay (the **"Announcement on the Calculation of Sick Pay"**) (implemented as of November 1, 2004, currently valid), as well as the Notice from the Shanghai Municipal Bureau of Labor on Strengthening the Administration of Sick Leave for Enterprise Employees and Guaranteeing Their Living during Sick Leave (the **"Notice on Guaranteeing the Living during Sick Leave"**) (Hu Lao Bao Fa [1995] No.83, implemented as of October 1, 1995, currently valid) Similarly, there are relevant provisions on the calculation of the base of sick pay.

[13] According to Paragraph 1 of Article 9, where an enterprise arranges for its workers to work overtime, it shall pay overtime wage pursuant to the provisions. Where a worker takes marriage leave, compassionate leave, home leave or sick leave pursuant to the law, the enterprise shall pay leave wage pursuant to the provisions.

Then, in the current judicial practice, how to determine the calculating base of sick pay? Around this question, this article briefly summarizes and analyses the calculating base of sick pay in Shanghai courts by combing laws and regulations that are currently valid, as well as public judgments made in Shanghai.

1. Provisions on the calculating base of sick pay stipulated in the Notice on Guaranteeing the Living during Sick Leave, the Announcement on the Calculation of Sick Pay and the Measures for the Payment of Wages are inconsistent.

- According to Article 4 of the Notice on Guaranteeing the Living during Sick Leave, the base of sick pay equals to 70% of the actual wage under normal circumstances.[14] However, the Notice does not distinguish whether the two parties have stipulated the base of sick pay and whether they have stipulated the employee's monthly wage.

- According to Article 2 of the Announcement on the Calculation of Sick Pay, 1) where there is any relevant provision in the labor/collective contract, the calculating base shall be determined at an amount not lower than the salary standard corresponding to the post (position) held by the employee as agreed upon in the labor/collective contract. 2) where the base of sick pay is not stipulated in the labor contract/collective contract, it equals to 70% of the normal monthly wage for attendance.[15] It can be seen that the Announcement has discussed on a classified

[14] According to Article 4 of the Notice on Guaranteeing the Living during Sick Leave, where an employee takes a leave due to illness or non-work-related injury for no more than six consecutive months, his/her employer shall pay the sick pay as per the following standards: if the consecutive length of service of such employee is less than two years, the sick pay shall be calculated and paid as per 60% of his/her wage; if the consecutive length of service of such employee is no less than two years but less than four years, the sick pay shall be calculated and paid as per 70% of his/her wage; if the consecutive length of service of such employee is no less than four years but less than six years, the sick pay shall be calculated and paid as per 80% of his/her wage; if the consecutive length of service of such employee is no less than six years but less than eight years, the sick pay shall be calculated and paid as per 90% of his/her wage; if the consecutive length of service of such employee is no less than eight years, the sick pay shall be calculated and paid as per 100% of his/her wage.

Where an employee takes a leave due to illness or non-job-related injury for more than six consecutive months, the employer shall pay him/her illness relief, which shall be 40% of the employee's wage in case he/she has worked for less than one consecutive year; 50% of the employee's wage in case he/she has worked for more than one consecutive year but less than three consecutive years; and 60% of the employee's wage in case he/she has worked for more than three consecutive years.

[15] According to Article 2 of the Announcement on the Calculation of Sick Pay, the calculation of daily wage for sick leave within the working days: the calculating base determined according to the following principles divided by the number of paid days in the current month.

1. If there is any relevant provision in the labor contract, the calculating base shall be determined at an amount not lower than the salary standard corresponding to the post (position) held by the employee as agreed upon in the labor contract. In the case that the salary standard determined in the collective contract (salary collective agreement) is higher than that as agreed upon in the labor contract, the calculating base shall be determined according to the salary standard as stipulated in the collective contract (salary collective agreement).
2. If there is no relevant provision in the labor contract or the collective contract, the calculating base may be determined through the negotiation between the employer and the employees' representatives, and a collective agreement on salary shall be concluded to confirm the negotiation results.
3. If the employer has no related agreement with the employee, the calculating base for the employee's sick pay shall be determined at 70% of the monthly salary the employee deserves for normal attendance at the employee's post (position).

basis whether employers have agreed upon the base of sick pay with employees.

- Article 9 of the Measures for the Payment of Wages has made classified discussion on whether the employee's monthly wage has been agreed on in the labor/collective contract: 1) where there is no agreement on the base of sick pay between the parties, but the labor/collective contract has agreed on the monthly wage, the base of sick pay equals to monthly wage; 2) where there is no agreement on the monthly wage, the base of sick pay equals to 70% of the employee's monthly wage for normal attendance.[16]

It can be seen that the classification standards and recognition standards for the base of sick pay set out in the aforesaid provisions are inconsistent. The main difference is that the Announcement on the Calculation of Sick Pay discusses by category whether the employer and the employees have agreed upon the base of sick pay; The Measures for the Payment of Wages discusses whether the two parties have stipulated the monthly wage on a type-by-type basis, while the Notice on Guaranteeing the Living during Sick Leave does not have classified discussion.

So, in judicial practice, among the laws and regulations mentioned, which one do the courts rely on in order to determine the base of sick pay? In order to answer this question, we use “base of sick pay” as the keyword of “court's opinion” in Alpha system, and limit the area to “Shanghai”, and get 62 cases in total. After reviewing the resulting cases from the search, we analyze the main controversies about the base of sick pay as follows.

2. If the employer and the laborer have agreed on the salary base for sick pay, how does the court determine?

2.1 If there is an agreement between the two parties, the calculating base of sick pay shall be determined according to the amount agreed by both parties

According to the "Minutes of the Regular Meeting of the President of the Civil Trial Division of the Shanghai High Court in the Third Quarter of 2014" (" Minutes of Seminar ") (Minyi Tribunal Investigation and Reference [2015] No. 11), where there are provisions in the labor contract or other agreements signed by the two parties on the sick pay calculating base, the sick pay calculating base may be determined as per the amount agreed by the two parties.

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[16] In accordance with Item 3, Paragraph 3 of Article 9 of the Measures for the Payment of Wages, where there is no provision in both the labor contract and the collective contract (special collective contract on wages) on the worker's monthly wage, the computation base shall be determined in accordance with 70% of the worker's wage for a regular working month in accordance with the provisions of Article 2 (excluding overtime wage) of these Measures.

In accordance with Article 2 of the Measures for the Payment of Wages，wages shall mean payment of labor remuneration in monetary form to workers by enterprises, including hourly wage, piece rate wage, bonus, allowance, subsidy and overtime wage.

In judicial practice, the court in Shanghai also supported the idea that the base of sick leave wage should be calculated according to the agreement between the two parties. For instance, for the appeal case of the dispute over the labor contract between Shen XX and Shanghai XX Beverage Co., Ltd. with case number “(2008) Hu Yi Zhong Min Yi (Min) Zhong Zi No.3905”, the People's Court of Minhang District, Shanghai for the first instance held that the plaintiff Shen and Pepsi Cola agreed in the labor contract that various welfare subsidies stipulated by the state and enterprises shall be 10% included in the deduction of basic wage. The agreement made by both parties in the labor contract on the base for settlement of leave pay shall be valid. Now, since the Pepsi Cola Company indeed calculates and pays Shen's sick pay for the sick leave period according to the agreement on the settlement base for the sick pay in the labor contract, Shen's request for making up the sick pay lacks basis and is difficult to be supported. Shanghai No. 1 Intermediate People's Court also upheld the view of the court of first instance.[17]

According to "Minutes of Seminar" and the above-mentioned case can be seen, the employer and workers can agree on sick leave wage base. But does the form of engagement include only the labor/collective contract? Is there any limit on the amount agreed upon? We have also done the following studies:

2.2 In addition to the agreements set forth in the labor contract and collective contract, the agreement on the sick pay base in the Employee Handbook signed by the employees shall be deemed as the agreement between the Parties.

The "Minutes of Seminar" provides that, if there is an agreement on the sick leave base in an employment contract or other agreement entered into by the Parties, such agreement may apply. In judicial practice, we notice that the Employee Handbook signed by an employee is generally deemed as one of the agreed nature between the parties.

In the second instance of the labor contract dispute case of an electrode company with the case number of "(2019) Hu 01 Min Zhong No. 1507", if it is stipulated in the employee handbook of a company that the company has served two to four years, the sick pay base shall be 100% of the monthly salary and the sick leave wage shall be 70% of the normal monthly salary. Shanghai No. 1 Intermediate People's Court holds that, if there is any stipulation in an employee's handbook, the sick leave wage base shall be calculated as agreed. Therefore, it was finally determined that Hu Gaohua's sick pay should be calculated at 70% of his salary during the normal working period.

[17] Please see the Case (2018) Hu 01 Min Zhong No. 14565, Case (2019) Hu 01 Min Zhong No. 1507 and the Case (2018) Hu 02 Min Zhong No. 11622 for similar cases.

Similarly, in the (2018) Hu 01 Min Zhong 14565[18] and (2018) Hu 02 Min Zhong 11622 cases[19], Shanghai No. 1 Intermediate People's Court and Shanghai No. 2 Intermediate People's Court both recognized that the agreement on sick pay in the Employee Handbook confirmed by the employees can be used as the basis for judgment.

2.3 The base of sick pay agreed by both parties shall satisfy the stipulated minimum standard, otherwise, the court shall adjust the base according to law.

2.3.1 the lower limit of the salary base for sick leave

Provision on "how to determine the sick pay base" in Article 1 of the "Minutes of Seminar" stipulates that, where there are provisions on the sick pay base in the labor contract or other agreements signed by the two parties, the sick pay base may be determined based on the amount agreed by the two parties. However, the stipulated calculating base shall not be lower than the standard of salary for normal attendance (the salary for normal attendance shall be understood as the predictable income that can be obtained by the employee for normal attendance, excluding one-time or temporary income) × 70%. Meanwhile, Paragraph 2 of Article 2 of the Announcement on the Calculation of Sick Pay stipulates that the sick pay base shall not be lower than the minimum wage standard specified by this municipality.

Therefore, even if an employer and an employee have the right to agree on the sick leave wage base on their own, the amount of sick leave wage shall not be lower than 70% of the normal attendance wage and the minimum wage standard stipulated by the Municipality.

2.3.2 Does the court have the right to adjust the "sick pay base" agreed upon by the employer and the employee?

We understand that, in accordance with the “Minutes of Seminar” and the Announcement on the Calculation of Sick Pay, the courts in Shanghai have the right to adjust the sick pay calculating base

[18] In the second instance of Xiao Guangjian v. Emerson Process Control Co., Ltd. labor contract dispute with the case number "(2018) Hu01 Minzhong 14565", in 2009, Xiao Guangjian signed to confirm that he knew Emerson's "Employee Handbook" (June 2009) 1st revision), and agree to abide by all regulations and terms, and perform all employees' responsibilities and obligations in accordance with all the provisions stated therein. The Shanghai No. 1 Intermediate People's Court believes that if the employer and the employee have agreed on a calculating basis for sick pay, they may determine the basis based on the amount agreed by both parties. …… Emerson ’ s above-mentioned regulations on the calculation of the sick pay base are signed and confirmed by Xiao Guangjian, and they agree to abide by them.

[19] In the second trial of the labor contract dispute between Huang Hao and Shanghai Jilin Industrial Co., Ltd. Jichen Hotel Management Branch with the case number “(2018) Hu02Minjun 11622”, Article 4.7 of the “Employee Handbook” of Jichen Hotel stated that: The base of sick leave wage is 30% of the wage. The Second Intermediate People's Court of Shanghai believes that the "Employee Handbook" of Jichen Hotel stipulates that 90% of the 30% discount of the employee's salary shall be paid for those who have worked continuously for 6 years but less than 8 years in the hotel. Jichen Hotel has calculated and paid in full the sick pay for the period from 19 January 2018 to 25 January 2018 and from 5 February 2018 to 11 February 2018 according to this provision, but Huang Hao claims that the balance of salary during the aforesaid sick leave is insufficient. Therefore, the court of first instance shall not uphold Huang Hao's claim for payment of the sick pay of 845.24 yuan for the period from 19 January 2018 to 25 January 2018 and from 5 February 2018 to 11 February 2018.

by taking “70% of the normal monthly attendance wage” and the minimum wage standard of Shanghai as the judgment standard.

In judicial practice, the courts in Shanghai also held the same view: In the trial of first instance of the case concerning the labor contract dispute between Chu Yanhong and a Welding Group Company ((2016) Hu 0118 Min Chu No. 8324), the People's Court of Qingpu District of Shanghai held that when the sick pay base agreed by the laborer and the employer was lower than 70% of the normal monthly wage for attendance, the court ruled that the employer shall take 70% of the monthly wage, i.e. 70% of RMB 6,300, as the base for calculating the sick pay.[20]

3. Where the employee and the employer have not agreed on the base for sick pay，what is the basis of the court's determination?

We notice that, regarding this question, in the judicial practice, the laws and regulations on which the courts base their judgments are inconsistent, so different judgment results appear.

3.1 In some cases, the Shanghai courts identified the base of sick pay based on Notice to guaranteeing the life during sick leave

In the trial of the second instance of labor contract disputes between Huang Huiying and Shenzhen Huazui Industrial Development Co., Ltd. Shanghai Branch under the case number of "(2017) Hu 01 Min Zhong No. 9536", Huang Huiying did not specify the base salary during the sick leave period or the salary standard in the labor contract signed by her. However, Huazui Shanghai paid Huang Huiying RMB 8,000 salary each month.
Shanghai No. 1 Intermediate People's Court identified that Huang Huiying's sick pay base was 70% of the actual salary of an employee under normal circumstances in accordance with the Notice to guaranteeing the life during sick leave Therefore, Huang Huiying's sick pay base shall be RMB 8,000 × 70% = RMB 5,600.[21]

[20] The Shanghai Qingpu District Court held that the defendant claimed that the sick leave wage shall be calculated based on the calculating base as agreed in the special collective contract on wages, and the collective contract provides that the fixed wage, the basic wage, may be used as the calculating base for various holidays. According to the law, the base figure agreed by both sides shall not be less than 70% of the normal attendance wage. From January 2014, the salary of the plaintiff reached RMB 6,300. The defendant's calculation base was 70% of the plaintiff's fixed salary, which is significantly lower than 70% of the plaintiff's actual salary. Therefore, this court does not accept it. The plaintiff requested the defendant to use 70% of his monthly salary, that is, 70% of 6,300 yuan, as the base for calculating the salary for sick leave. Therefore, this court upholds the claim.

[21] The Shanghai No. 1 Intermediate People's Court holds that Article 4 of the Circular of the Shanghai Labor Bureau on Strengthening the Administration of Enterprise Employees' Sick Leave and Guaranteeing Employees' Life during Sick Leave (Hu Lao Bao Fa [1995] No. 83) provides: "Where an employee takes a leave for more than six consecutive months due to illness or non-work-related injury, the enterprise shall pay the sickness relief fee. Among them, if the continuous working period is less than 1 year, it will be paid at 40% of his/her salary；if the continuous working period is more than 1 year and less than 3 years it will be paid at 50% of his/her salary; if the continuous working period is more than 3 year, it will be paid at 60% of his/her salary.he salary of the employee shall be 70% of his/her actual salary under normal circumstance.The above provisions have defined the standard of "personal wage", "personal wage" shall be calculated at 70% of the actual wage of an employee under normal circumstances. Therefore, Huang Huiying's wage should be RMB 8,000 * 70% = RMB 5,600. Furthermore, in accordance with the above provisions, Huang Huiying had worked more than three consecutive years, so Huaziying Shanghai

3.2 In some cases, the Shanghai courts determine the sick pay base according to the Announcement on the Calculation of Sick pay

In the trial of the second instance of the labor contract dispute case of Shanghai Haoshi Environmental Chemicals Co., Ltd. and Hu Xiaolu with the case number of "(2018) Hu 02 Min Zhong No.883", on October 30, 2014, Haoshi Chemicals Company and Hu Xiaolu signed a non-fixed-term labor contract, agreeing to Hu Xiaolu's monthly wage of RMB 5,000. In respect of the sick leave wage base, Hu Xiaolu claimed that, in accordance with Measures for the Payment of Wages by Enterprises in Shanghai Municipality Measures for the Payment of Wages by Enterprises in Shanghai Municipality where the monthly wage is stipulated in the labor contract, the agreed monthly wage shall serve as the calculating base. Haoshi Chemicals Company and Hu Xiaolu signed a labor contract, agreeing that the monthly wage shall be RMB 5,000. Therefore, the sick leave wage shall be calculated at RMB 5,000 per month.

However, the Shanghai No. 2 Intermediate People's Court held that as for the calculation of sick pay, subject to relevant provisions, where there are provisions on the sick pay calculating base in the labor contract or other agreements signed by the two parties, the sick pay calculating base may be determined based on the amount agreed by the two parties; where the two parties fail to agree on the sick pay calculating base, the sick pay calculation base shall be determined as 70% of the normal attendance wage. Now the court of first instance has correctly calculated Hu Xiaolu's sick pay as 17,779 yuan on the basis of the medical leave issued by the hospital during that period and 70% of Hu Xiaolu's monthly salary, which has been confirmed by this court.
Shanghai No.2 Intermediate Court also held the same view[22] in the trial of the second instance of Shanghai Zhongyuanchuanqi Heavy Industry and Steel Structure Co., Ltd. and Chen Hao labor contract dispute (Hu (2019) Min Zhong No. 1422).[23]

3.3 In some cases, the Shanghai courts identified the sick pay base in accordance with Measures for the Payment of Wages by Enterprises

shall calculate and pay the disease allowance at 60% of Huang Huiying's wage, that is, RMB 5,600 * 60% = RMB 3,360. Therefore, the standards for paying Huang Huiying's disease allowance set by the court of original trial were not inappropriate.

[22] The Baoshan Court and the Second Intermediate Court held that where an employee takes a leave for a period of no more than six consecutive months due to illness or non-job-related injury and the employee has a consecutive length of service of not less than eight years, the enterprise shall pay the employee the sick pay of 100% of his/her salary; where an employee takes a leave for a period of no less than six consecutive months due to illness or non-job-related injury and the employee has a consecutive length of service of not less than three years, the enterprise shall pay the employee the disease allowance of 60% of his/her salary.

[23] The Shanghai No. 2 Intermediate People's Court holds that, in terms of the base for calculating the sick pay, if there is no agreement between the employer and the employee, the base for calculating the sick pay shall be determined at 70% of the salary for a month with normal attendance at the employee's post (position).

Please see the Case (2016) Hu 0120 Min Chu No. 18186, Shanghai Haiyan: First Instance of Labor Contract Dispute between Shanghai Shenyi Auto Parts Co., Ltd. for similar cases.

In the second instance of the labor contract dispute case of Shanghai Shendeou Co., Ltd v. Wu Yanping ((2018) Hu 01 Min Zhong No. 13616), in September 2010, the labor contract between both parties agreed that Wu Yanping's basic monthly salary was RMB 1,452 and various subsidies and allowances were RMB 348. Then, Shende Ou and Wu Yanping confirmed that the total of Wu Yanping's basic monthly salary and various allowances and subsidies since April 2017 were RMB 7,583. Although Shendeou Company advocates that the sick salary standard should be determined based on the Announcement on the Calculation of Sick. However, the Shanghai No. 1 Intermediate People's Court held that the calculation base for the sick pay in dispute shall be determined according to Item 1, Paragraph 3 of Article 9 of the Measures for the Payment of Wages by Enterprises which provides that "if the actual performance is inconsistent with the labor contract, the monthly salary corresponding to the position of the laborer who actually performs shall prevail. The determination of the sick pay calculating base shall be based on the actual paid monthly salary of RMB7,583 corresponding to the position of Wu Yanping. Similarly, in the case of (2017) Hu 01 Min Zhong 13934, the Shanghai Xuhui District Court and Shanghai No. 1 Intermediate People's Court held the same view.[24]

Thus it can be seen that after the implementation of the Measures for the Payment of Wages by Enterprises, there are cases showing that in judicial practice, some courts recognize the base for sick leave salary in accordance with the Measures for the Payment of Wages by Enterprises, but still some other the courts recognize base for sick leave salary in accordance with the Notice on Guaranteeing the Living during Sick Leave and the Announcement on the Calculation of Sick Pay.

Conclusion

To sum up, we summarize the standards for determining the base of sick pay in judicial practice as follows:

1. Where the employer and the employee have agreed on the base of sick pay (including as agreed in the labor/collective contract or employee's handbook), the base shall be determined as agreed by both parties, provided that the amount shall not be lower than 70% of the normal attendance wage and the minimum wage standard of Shanghai. Otherwise, the court shall make adjustment pursuant to the law;

2. Where the employer and the employee have no agreement on the base of sick pay, courts in Shanghai have differences in the application of laws in judicial practice. All three documents, the Notice on Guaranteeing the Living during Sick Leave, the Announcement on the Calculation of Sick Pay and the Measures for the Payment of Wages, have been referred to in judicial practice.

[24] In the second instance of the labor contract dispute case between Tongbiao Technical Services (Shanghai) Co., Ltd. and Tang Yeli (Case No. (2017) Hu 01 Min Zhong No. 13934), the Shanghai Xuhui District Court held that as of January 2016, Tongbiao shall pay RMB6,089, RMB550, and RMB797 (the total amount of RMB7,436) of the basic salary, self-discipline bonus, and welfare expenses for the previous month in the form of bank transfer on the fifth day each month. Therefore, according to the Measures for the Payment of Wages by Enterprises, Tongbiao shall pay Tang Yeli the sick pay starting from August 2016 based on RMB 7,436.

案例分析

劳动者与事业单位存在人事关系不当然妨碍其与其他用人单位形成劳动关系

作者：顾巍巍 | 万发文 | 杨秋词

一、 争议焦点

事业单位人员身份能否阻却其与用人单位形成劳动关系。

二、 案情简介

原告：A 公司

被告：曾某

曾某系电灌站在编人员，因电灌站属财政定额补助的事业单位，其收入无法正常发放职工工资，曾某等多名职工外出自谋职业维持生存，仅在农忙灌溉季节回电灌站从事相应工作。

2015 年，曾某与 A 公司签订《劳务雇佣合同书》，约定：A 公司雇佣曾某为基地经理，为 A 公司日常生产经营和管理方面提供劳务；曾某遵守 A 公司制定的《员工手册》中员工应遵守的规定及处罚规定，接受 A 公司的考核。

曾某自协议签订之日遂入职 A 公司处担任基地经理一职，按 A 公司要求从事相应工作，A 公司也向其发放工作牌，按照公司管理制度对曾某进行考勤、考核并按月发放工资。2016 年 9 月一年期满后，双方又续签一份合同。2016 年 12 月 18 日，曾某因在工作中受伤，此后双方就该事宜协商不成，曾某遂未再至 A 公司处上班。

2017 年，曾某向申请劳动仲裁，要求确认与 A 公司之间存在劳动关系，劳动仲裁支持了这项请求。

A 公司不服上述仲裁结果，向人民法院提起诉讼。

三、 审理结果

（一）一审

在一审过程中，A 公司主张曾某与 A 公司之间签订的为雇佣合同，双方形成雇佣关系，而非劳动关系。而曾某主张，双方形成劳动法律关系。

原审法院认为：本案的主要争议焦点为曾某的事业单位人员身份能否阻却其与原告形成劳动关系。

A 公司向曾某发放工牌，要求曾某遵守其制定的各项规章制度，并以此对其考核、考勤并发放工作报酬，曾某依约提供劳动并领取报酬，双方之间权利义务关系符合劳动法律关系的内涵。

曾某虽与事业单位存在人事关系，但由于该单位经费等多方面原因，双方并未保持正常的劳动关系履行状态，该事业单位发放的生活费亦不足以维持曾某的正常生活，曾某在此情况下至 A 公司处就职以维持生计，是行使其基本及天然的权利，于法并无不妥，A 公司所诉事由无依据。

最终一审法院判决：确认 A 公司与曾某之间存在劳动关系。

（二）二审

A 公司不服，上诉至某中级人民法院，请求撤销一审判决，改判确认上诉人与被上诉人之间不存在劳动关系。

二审法院认为：本案的争议焦点为，曾某与 A 公司之间是劳动关系还是劳务关系。

虽然 A 公司与曾某所签订的合同名称为《劳务雇佣合同书》，但该合同内容却反映，A 制定的各项规章制度适用于曾某，曾某受 A 公司的劳动管理，从事 A 公司安排的有报酬的劳动，且曾某提供的劳动是其业务的组成部分，故该合同约定的权利义务内容并不符合劳务合同的法律特征，而与劳动关系法律特征相符，因此应当认定本案合同性质为劳动合同。

虽然在 A 公司与曾某签订合同之后，曾某仍然与事业单位存在人事关系，但由于该单位经费等多方面原因，双方并未保持正常的履行状态。A 公司上诉所称应参照适用的《公务员法》中不得兼职的限制条件，是在保障公务员及相应人员正常的基本生活水平的前提下确定的，现该事业单位发放的生活费难以维持正常生存，在此情况下，曾某至 A 公司处工作，并不违反法律限制性规定。

因此，二审法院驳回上诉，维持原判。

四、 法律分析

（一）劳动关系的认定：曾某与 A 公司之间是形成劳动关系还是劳务关系？

劳务关系，是指提供劳务一方为接受劳务一方提供劳务服务，由接受劳务一方按照约定支付报酬而建立的一种民事权利义务关系。[25]在实践中，因为劳动关系与劳务关系的相似性，两者很容易混淆，但是双方存在着多个方面的区别。[26]

根据我们的经验，双方最基本、最明显的区别在于劳务关系的双方是一种平等主体之间的关系，劳动者只是按约提供劳务，用工者也只是按约支付报酬，双方不存在隶属关系，没有管理与被管理、支配与被支配的权利和义务。而劳动关系反之。[27]在司法实践中，我们的这一观点也被法院观点所支持。[28]

在本案中，虽然曾某与 A 公司签订的合同名称为“《劳务雇佣合同书》”，且合同条款中多处提及了“提供劳务”“劳务报酬”等与“劳务”相关的字眼，但是我们注意到，《劳务雇佣合同书》第三条第 2 款及第 3 款明确约定了“乙方（曾某）接受甲方（A 公司）对其提供劳务的考核”，曾某“遵守甲方制定的《员工手册》中员工应遵守的规定及处罚规定”，并且在入职后 A 公司也向曾某发放工作牌，按照公司管理制度对曾某进行考勤、考核并按月发放工资。由此可以看出，双方之间存在着隶属关系，存在管理与被管理、支配与被支配的权利与义务，符合劳动关系的法律特征。因此，我们认为曾某与 A 公司存在劳动关系，而非劳务关系。这一观点也被本案中一审法院及二审法院所认可。

（二）双重劳动关系的合法性：曾某与电灌站的劳动关系是否阻碍其与 A 公司形成劳动关系？

[25] 《中华人民共和国侵权责任法释义》(第 2 版)，全国人大常委会法制工作委员会，第 195-196 页。

[26] 《中华人民共和国侵权责任法释义》(第 2 版)，全国人大常委会法制工作委员会，第 195-196 页，（1）劳务关系由民法通则和合同法进行规范和调整。企业和个体经济组织与形成劳动关系的劳动者之间的劳动关系，由劳动法规范和调整。（2）劳务关系的主体可以是两个自然人或者自然人与单位之间，但本条仅调整个人之间形成的劳务关系。劳动关系中的一方应是符合法定条件的用人单位，另一方必须是符合劳动年龄条件，且具有与履行劳动合同义务相适应的能力的自然人。（3）劳务关系中，提供劳务一方不是接受劳务一方的职工，双方不存在隶属关系。劳动关系中的用人单位与员工之间存在隶属关系。（4）劳务关系中，接受劳务一方可以不承担提供劳务一方的社会保险。比如，国家没有规定要求居民必须为其雇用的保姆缴纳社会保险。劳动关系中的用人单位必须按照相关规定为职工购买社会保险。（5）劳务关系中，接受劳务的一方有权中断劳务关系，但没有用人单位对职工处分等权利。用人单位对职员违反用人单位劳动纪律和规章制度等行为，有权依法进行处理。（6）劳务关系中，报酬完全由双方当事人协商确定。劳动关系中，用人单位对职工有工资、奖金等方面的分配权利。用人单位向员工支付的工资应遵循按劳分配、同工同酬的原则，并遵守当地有关最低工资标准的规定。

[27] 见人民法院案例选 2010 年第 2 辑 总第 72；

[28] 在案号为“（2014）沪高民一（民）申字第 1257 号”的万相伦与上海中医药大学附属岳阳中西医结合医院劳动合同纠纷申诉案中，上海市高级人民认为，劳动者与用人单位是否具有身份上的隶属关系是判断劳动关系成立与否的重要标准。岳阳医院虽按月支付万相伦劳动报酬，但金额并不固定，且计算方式是按照万相伦等人的工程量以劳务费形式按实结算；万相伦的工作时间不受考勤限制，工作方式上也存在灵活性；岳阳医院自 2007 年 6 月之后未再为万相伦缴纳综合保险。原审法院依据上述事实认定双方身份上的隶属关系不强，亦无建立劳动关系的合意，应属于劳务关系并无不当。万相伦提供的胸卡和缴纳综合保险凭证等证据尚不足以证明双方存在事实劳动关系。类似的，在（2014）沪高民一（民）申字第 1256 号中，上海市高级人民法院表达了相同的观点。

司法实践中是否承认双重劳动关系，存在着截然不同的两种观点[29]。我们理解，目前我国法律法规并没有明确禁止双重法律关系[30]，相反的，最高人民法院《关于审理劳动争议案件适用法律若干规定的解释（三）》第八条规定，1）企业停薪留职人员；2）未达到法定退休年龄的内退人员；3）下岗待岗人员；4）企业经营性停产放长假人员，因与新的用人单位发生争议提起诉讼的，法院应当按照劳动关系处理。同时，我们也注意到，在司法实践中，上海市高级人民法院在实际判例中，也认可了双重劳动关系的合法性。[31]

显然，在本案中，一审及二审法院也持有相同的观点：在本案中，虽然 A 公司与曾某签订合同之后，曾某仍然与事业单位存在人事关系，但现该事业单位发放的生活费难以维持正常生存，双方并未保持正常的履行状态。在此情况下，曾某至 A 公司处工作，并不违反法律禁止性规定。因此，曾某与事业单位的劳动关系并不当然阻碍曾某与 A 公司形成劳动关系。

[29] 《劳动合同规则裁判精要与规则》，王林请，杨心忠著，第 32 页。

[30] 最高人民法院民一庭在《最高人民法院劳动争议司法解释（三）的理解与适用》认为，《劳动法》第九十九条和《劳动合同法》第九十一条都规定，用人单位招用与其他用人单位尚未解除或者终止劳动合同的劳动者，给其他用人单位造成损失的，应当承担连带赔偿责任。但是，需要注意的是，这并非对主动型双重劳动关系的否定，而是对后一用人单位侵权责任的规定。而《劳动合同法》第三十九条第（四）项 规定的用人单位对劳动者因建立双重劳动关系而严重影响本单位工作任务的完成时，用人单位有解除权的规定，也并非对双重劳动关系的否定，而是对劳动者出现违约行为时赋予用人单位的救济权。

[31] 在案号为“（2015）沪高民一（民）再提字第 9 号”的徐某某与北京外企德科人力资源服务上海有限公司、仲量联行测量师事务所（上海）有限公司物业管理部劳动合同纠纷再审案中，上海市高级人民法院认为，申诉人徐某某原系中国人民解放军第四三〇六工厂的下岗人员，其与北京外企于 2012 年 3 月 23 日签订了期限自 2012 年 4 月 10 日起至 2014 年 4 月 9 日止的《劳务协议》，并被北京外企外派至仲量联行工作，系属于双重劳动关系。

Case Study

Analysis of the Legitimacy of Double Labor Relationships

Authors：Weiwei Gu | Fawen Wan | Qiuci Yang

1. Focus of Dispute

Whether the identity of employees of government-affiliated institutions can prevent them from forming labor relationships with employers.

2. Case Brief

Plaintiff: Company A

Defendant: Zeng

Zeng was a permanent staff member of the power irrigation station. As the power irrigation station was a government-affiliated institution with fixed financial subsidies and its income could not be normally paid to its employees, Zeng and several other employees went out to seek jobs on their own to survive and only return to the power irrigation station to engage in the corresponding work in busy irrigation seasons.

In 2015, Zeng and Company A entered into the Labor Service Contract, providing that Company A employed Zeng as the base manager to provide services in respect of daily production, operation and management of Company A; Zeng complied with the rules on employee compliance and punishment contained in the Employee Handbook formulated by Company A and accepted evaluation of Company A.

Zeng became a base manager of Company A on the date hereof and engaged in corresponding work as required by Company A. Company A also issued work card to him and checked, assessed and paid salaries to him on a monthly basis in accordance with the management system of the Company. Upon the expiry of the one-year contract in September 2016, the Parties renewed the contract. On December 18, 2016, Zeng was injured in work. Thereafter, the parties failed to reach an agreement with respect to the matter and Zeng stopped working for Company A.

In 2017, Zeng applied for labor arbitration to confirm the existence of labor relationship with Company A, which was supported by the labor arbitration.

Company A objected the verdict and filed a lawsuit with the People's Court.

3. Trial Results

3.1 First Instance

In the first instance, Company A claimed that the agreement between Zeng and Company A was a service contract and they formed a service relationship rather than a labor relationship. According to Zeng, the parties have entered into labor relationship

The trial court held: the main controversy of the case was whether Zeng's status as a staff member of a government-affiliated institution could prevent him from forming a labor relationship with the plaintiff.

Company A granted work card to Zeng and requested Zeng to comply with various rules and regulations formulated by Company A, so as to review, check work attendance and pay remuneration to him. Zeng worked as agreed and received remuneration. The rights and obligations between the parties were in conformity with the connotation of labor legal relationship.

Although Zeng had personnel relationship with a government-affiliated institution, the parties failed to maintain the normal labor relationship due to reasons such as funds of the government-affiliated institution and the living cost paid by the government-affiliated institution was insufficient to maintain Zeng's normal life. Zeng worked for Company A to make a living under such circumstances and such labor was the exercise of Zeng 's basic and natural rights. There is no improper regulation in the laws and the causes of action of Company A were groundless.

Accordingly, the court of first instance ruled that: there was a labor relationship between Company A and Zeng.

3.2 Second Instance

Company A refused the judgement and appealed to an Intermediate People's Court, requesting to revoke the first-instance judgment and to amend the judgment to confirm that there was no labor relationship between the appellant and the appellee.

The court of second instance held: the focus of the dispute in this case is whether the relationship between Zeng and company A is labor relationship or service relationship.

Although the name in the contract concluded by Company A and Zeng was the Labor Service Contract, the content of the contract reflected that the various rules and regulations formulated by Company A applied to Zeng, Zeng was subject to the labor management of Company A and engaged in paid labor arranged by Company A, and the labor provided by Zeng was a part of Company A's business. Therefore, the rights and obligations stipulated in the contract were not in line with the legal characteristics of the service contract, but consistent with the legal characteristics of the labor relationship. Therefore, this case shall be determined as a labor contract in nature.

Although Zeng still had personnel relationship with the government-affiliated institution after Company A signed the contract with him, due to various reasons such as expenses of the institution,

the parties did not maintain the normal status of performance. The appeal of Company A claimed that the restrictions of no part-time job in the applicable *Civil Servant Law* applied mutatis mutandis were determined on the premise of safeguarding the normal basic living standard of civil servants and the corresponding personnel. Currently, the living allowance paid by the government-affiliated institution cannot maintain a normal existence. Under such circumstance, Zeng worked for Company A and there was no violation of the legal restrictions.

Therefore, the court of second instance dismissed the appeal and upheld the original judgment.

4. Legal Analysis

4.1 Determination of labor relationship: Is there labor relationship or service relationship between company A and Zeng?

The service relationship refers to a kind of relationship of civil rights and obligations established by the party providing the service to provide the service to the party receiving the service, and the party receiving the service pays the remuneration according to the agreement.[32] In practice, because of the similarity between labor relationship and service relationship, the two are easily confused, but there are many differences between the two sides.[33]

According to our experience, the most basic and obvious difference between the two sides lies in the fact that the two sides of the service relationship are equal subjects. The employees only provide services as agreed, and the employers only pay the remuneration as agreed. The two parties do not have a relationship of subordination, and have no rights or obligations to manage and be managed,

[32] Interpretation of the Tort Law of the People's Republic of China (Second Edition), Legislative Affairs Commission of the Standing Committee of the National People's Congress, p. 195-196.

[33] Interpretation of the Tort Law of the People's Republic of China (Second Edition), Legislative Affairs Commission of the Standing Committee of the National People's Congress, p. 195-196. (1) Service relationships shall be regulated and adjusted by the General Principles of Civil Law and Contract Law. The labor relationships between enterprises or individual economic organizations and the employees who have formed labor relationships shall be regulated and adjusted by the Labor Law. (2) The subject of the service relationship may be two natural persons or between a natural person and an entity, but this Article only regulates the service relationship formed between individuals. One party in the labor relationship shall be an employer that meets the statutory conditions, and the other party shall be a natural person that meets the conditions of labor age and has the ability adaptable to fulfill the obligations in the labor contract. (3) In a service relationship, the party providing labor services is not an employee of the party receiving labor services, and there is no subordination relationship between the two parties. There is a relationship of administrative subordination between an employer and an employee in a labor relationship. (4) In a service relationship, the party receiving labor services may not undertake the social insurance of the party providing labor services. For example, the State has not provided that residents must pay social insurance for their employed baby-sitters. Employers in labor relationship must purchase social insurance for their employees in accordance with the relevant provisions. (5) In a service relationship, the party receiving labor services has the right to suspend the service relationship, but has no right to dispose of employees and so on. The employer shall have the power to deal with according to law the acts of staff members who have violated the employer 's labor discipline and rules, etc. (6) In a service relationship, the remuneration is entirely determined through negotiation between the parties. In labor relationships, an employer has the right to distribute wages, bonuses and other benefits to its employees. When paying employees wages, employers shall follow the principles of distribution according to work and equal pay for equal work, and shall comply with the local provisions on minimum wage standards.

or to control and be controlled. The labor relationship is the opposite[34]. In the judicial practice, our view is also supported by the court. [35]

In this case, although the name of the contract signed by Zeng and Company A was " Labor Service Contract ", and many terms related to "labor service" such as "providing labor service" and "labor service compensation" were mentioned in many terms. However, we have noticed that Articles 3.2 and 3.3 of the Labor Service Contract expressly provide that “Party B (Zeng) shall accept the performance review conducted by Party A (Company A)” and “shall comply with the provisions on employee compliance and punishment as set forth in the Employee Handbook formulated by Party A”. After the employment, Company A also issued work card to Zeng and checked, assessed and paid salaries to Zeng on a monthly basis in accordance with the management system of the Company. It can be seen from this that there is an affiliation relationship between the two parties, and there are rights and obligations of management and being managed, dominating and being dominated, which is in line with the legal characteristics of the labor relationship. Therefore, we believe that Zeng has a labor relationship with Company A, not a service relationship. This view was also recognized by the court of first instance and the court of second instance in this case.

4.2 Legitimacy of double labor relationships: Does the labor relationship between Zeng and electric irrigation station hinder its formation of labor relationship with Company A?

There are two different viewpoints on the recognition of double labor relationship in judicial practice[36]. We understand that at present, the laws and regulations of our country do not clearly prohibit double legal relations. On the contrary, Article 8 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (III)*provides that: 1) persons who remain at post without pay; 2) persons internally retired before the statutory age for retirement; 3) laid-off persons waiting for post; and 4) persons who are taken a long leave due to operational suspension of production of the enterprise and file a lawsuit due to disputes with new employers, the court shall handle the lawsuit in accordance with labor relationships. At the same

[34] See People’s Court Case Selection 2010 Part 2 General 72;

[35] In the labor contract dispute petition case between Wan Xianglun and Yueyang Hospital of Integrated Traditional Chinese and Western Medicine Affiliated to Shanghai University of Traditional Chinese Medicine under case number of (2014) Hu Gao Min Yi (Min) Shen Zi No.1257, The Shanghai Higher People's Court believes that whether an employee has an affiliation with an employer is an important criterion for judging whether a labor relationship is established. Although Yueyang Hospital paid Wan Xiang Lun labor remuneration on a monthly basis, the amount was not fixed, and the calculation method was actual settlement in the form of labor fees as per the work quantity of Wan Xiang Lun et al.; the working hours of Wan Xiang Lun were not restricted by work attendance, and there was flexibility in work methods; Yueyang Hospital did not pay the comprehensive insurance for Wan Xiang Lun since June, 2007. Based on the above facts, the court of original trial believed that the subordination of the two parties is not strong, and there is no consensus to establish labor relationship, so there is nothing improper to attribute to service relationship. Such evidence as work card and comprehensive insurance payment certificate provided by Wan Xianglun was insufficient to prove the existence of factual labor relationship between the parties. Similarly, in the case (2014) Hu Gao Min Yi (Min) Shen Zi No.1256, the Shanghai High People's Court expressed the same opinion.

[36] Essentials and Rules of Labor Contract Rules, Wang Linqing, Yang Xinzhong, p. 32.

time, we have also noticed that in judicial practice, the Shanghai High People's Court has also recognized the legitimacy of double labor relationships in actual jurisprudence. [37]

Obviously, in this case, the First Instance Court and the Second Instance Court also held the same opinions: in this case, although Zeng still had personnel relationship with the government-affiliated institution after the execution of the contract between Company A, the living allowance paid by the government-affiliated institution could not maintain normal existence and the parties did not maintain normal performance status. Under this circumstance, Zeng worked for Company A, which did not violate the prohibitive provisions of laws. Therefore, the labor relationship between Zeng and the government-affiliated institution did not naturally prevent Zeng from forming the labor relationship with Company A.

[37] In a case involving a retrial of a labor contract dispute between Xu and FESCO Adecco Co., Ltd, the Property Management Department of Zhongliang Lianhang Surveyor's Firm (Shanghai) Ltd [Case No. (2015) Hu Gao Min Yi (Min) Zai Ti Zi No. 9], the Shanghai High People's Court held that the appellant Xu was formerly a laid-off employee of the 4306 Factory of the Chinese People's Liberation Army, and signed the Labor Service Contract on March 23, 2012 between him and a foreign enterprise in Beijing for a period from April 10, 2012 to April 9, 2014, and was assigned by a foreign enterprise in Beijing to work in Zhongliang Lianhang, which constituted double labor relationships.

新规速递

关于疫情影响下劳动争议案件处理相关指导的意见

作者：顾巍巍 | 万发文 | 杨秋词（实习生聂真璇子亦有贡献）

2020 年 4 月 13 日，为妥善化解新冠肺炎疫情防控期间上海市劳动争议纠纷，统一裁审执法口径，上海市高级人民法院、上海市人力资源和社会保障局联合发布了《关于疫情影响下劳动争议案件处理相关指导的意见》（“**《指导意见》**”）。

《指导意见》共规定了九部分内容，笔者将该指导意见的亮点归纳如下：

一、关于处理涉疫情劳动争议案件的基本原则及多元化解机制

《指导意见》强调，在处理疫情期间劳动争议案件过程中需注重把握如下原则：一是坚持协商求同的原则；二是坚持平衡保护原则；三是坚持稳定劳动合同关系原则；四是坚持促进劳动合同协作履行原则。

同时，各级法院、仲裁机构要积极会同各级工会、司法局、调解组织鼓励和引导争议双方通过协商、调解等方式解决纠纷，不断推进多元共治、诉源治理机制建设。

其中，1）对于群体性、突发性、敏感性纠纷，应当切实发挥多元化解机制的作用，将多元纠纷化解机制挺在前面；2）对于申请仲裁和诉讼的案件，应当贯彻调解为主、调解优先的原则，尽可能加大调解力度，妥善化解矛盾纠纷。

二、劳动者未按用人单位要求在延长的 3 天春节假期加班的，用人单位一般不得以旷工为由解除劳动合同

国家延长 2020 年春节假期是属于疫情防控特殊措施，如用人单位要求劳动者在延长假期内加班，应参照《劳动法》第 41 条[38]规定的加班原则与工会和劳动者协商一致。在未协商一致的情况下，用人单位一般不得以旷工为由解除劳动合同。

[38] 《劳动法》第 41 条规定，用人单位由于生产经营需要，经与工会和劳动者协商后可以延长工作时间，一般每日不得超过一小时；因特殊原因需要延长工作时间的，在保障劳动者身体健康的条件下延长工作时间每日不得超过三小时，但是每月不得超过三十六小时。

同时，对于因疫情防控在延长的春节假期内不能休假的职工，指导用人单位应先安排补休。不能安排补休的，依法支付百分之二百的加班工资。

三、用人单位受疫情影响停工停产超过一个工资支付周期的，与劳动者协商确定停产停工期间的待遇支付标准；协商不成的，用人单位支付相应的生活费

用人单位因受疫情影响而停工停产的，可通过与职代会、工会或职工代表进行民主协商的方式确定待遇支付标准。

若不能通过上述民主协商方式达成一致意见的，用人单位停工停产超过一个工资支付周期的，用人单位应当与劳动者协商支付相应的生活费。

如少数劳动者在停工停产期间提供正常劳动的，用人单位应当按规定支付不低于上海市最低工资标准的工资。

四、审慎处理劳动合同解除和经济补偿支付问题

用人单位或劳动者以受疫情影响为由，要求解除劳动合同的，应重点审查当事人要求解除合同的理由，尽可能通过和解、调解等方式化解矛盾纠纷，严格限制判决解除劳动合同。

一些用人单位如受疫情影响未及时足额支付工资、未依法缴纳社会保险，经审查该未支付或未缴纳行为确非用人单位主观原因造成，对于劳动者依据《劳动合同法》第 38、46 条规定要求支付经济补偿的请求，应坚持审慎处理的原则，一般不宜支持。

五、用人单位通过法定程序形成的关于调岗降薪、延迟支付工资、停工停产等事项的意见可作为裁判依据

对于用人单位按照法定程序通过与职代会、工会、职工代表进行民主协商的方式对调岗降薪、延迟支付工资、轮岗轮休、停工停产等事项达成一致意见，可以作为裁审依据。但应注意的是该决议需要公平合理且仅适用于疫情期间。

六、在隔离期间到期的劳动合同可顺延至隔离期、医学观察期或其他紧急措施期满时终止

如劳动者系新冠肺炎患者、疑似病人、密切接触者，根据相关规定被采取隔离观察、医学观察或其他紧急措施，在此期间劳动合同到期的，劳动合同可以顺延至隔离期、医学观察期或其他紧急措施期满时终止。

七、“共享用工”模式下仅在劳动者与借出单位间形成单一劳动关系，不形成双重劳动关系

对于借出单位（即与劳动者存在劳动关系的用人单位）非以营利为目的，与借入单位、劳动者三方在疫情期间签订员工借调协议，约定劳动者在疫情期间为借入单位提供劳动，疫情结束后回到借出单位工作的，不应认定借出单位、借入单位、劳动者三者之间形成双重劳动关系。借调期间劳动者与借出单位仍为单一劳动关系，双方劳动权利义务不变。

八、 劳动者主张仲裁时效或起诉期间扣除受疫情影响期间的，原则上应予以支持。

劳动者因患新冠肺炎、疑似新冠肺炎或因疫情防控被隔离等原因而无法在规定期间内及时申请仲裁或提起诉讼，其主张仲裁时效或起诉期间扣除受疫情影响期间的，原则上应予以支持。

政府在疫情期间采取的防控政策原则上可被理解为不可抗力，当事人因受此影响不能正常参加仲裁或诉讼的，可适用有关仲裁、诉讼程序中止的规定，但法律另有规定的除外。

附件： 上海高级人民法院 上海市人力资源和社会保障局关于疫情影响下劳动争议案件处理相关指导的意见

（沪高法[2020]203 号）

市第一、第二中级人民法院、各区人民法院，各区人力资源和社会保障局：

为全面贯彻落实党中央、国务院、最高法院、人社部、市委、市政府关于新冠肺炎疫情防控的相关工作部署，努力实现保企业保就业保稳定的工作目标，妥善化解新冠肺炎疫情防控期间本市劳动争议纠纷，统一裁审执法口径，现就涉疫情劳动争议案件处理提出如下意见：

一、关于涉疫情劳动争议案件处理基本原则

近期受新冠肺炎疫情影响，部分用人单位面临较大生产经营压力，部分劳动者面临待岗失业、收入减少等风险，劳动关系领域不稳定、不确定因素增加。在依法及时处理相关案件过程中需注重把握如下原则：**一是坚持协商求同的原则。**通过案件审理进一步强化劳动关系双方同力协契、共克时坚的理念，尽可能通过调解协商等方式化解劳动争议纠纷。**二是坚持平衡保护原则。**案件处理要始终贯彻依法保护劳动者合法权益和促进企业稳定发展并重的原则，既要注重保障劳动者基本生活和就业，又要努力为企业生存和发展创造条件。**三是坚持稳定劳动合同关系原则。**对劳动合同解除纠纷，案件审理中要积极贯彻援企稳岗、保就业保企业保稳定等政策要求，坚持审慎处理，充分考虑疫情期间的特殊情况，经审查劳动合同有继续履行可能的，对当事人主张解除劳动合同的，一般不宜支持。**四是坚持促进劳动合同协作履行原则。**对于劳动合同履行受疫情影响的，要引导当事人通过协商调整履行时间、履行地点、履行方式等方法变更劳动合同，促使劳动合同继续履行。

二、关于劳动关系矛盾纠纷中进一步推动多元共治、加大调解力度的问题

各级法院、仲裁机构要积极会同各级工会、司法局、调解组织建立健全沟通便利、预防及时、化解有效的工作机制，切实加强合作联动，形成工作合力。要鼓励和引导争议双方通过协商、调解等方式解决纠纷，不断推进多元共治、诉源治理机制建设。对于群体性、突发性、敏感性纠纷，应当切实发挥多元化解机制的作用，将多元纠纷化解机制挺在前面。对于申请仲裁和诉讼的案件，应当贯彻调解为主、调解优先的原则，尽可能加大调解力度，妥善化解矛盾纠纷。

三、关于延长的 3 天春节假期劳动者未按用人单位要求加班是否属于旷工、如劳动者加班工资应如何支付的问题

为加强新冠肺炎疫情防控、阻断疫情传播，国务院通知2020年春节假期延长至2月2日，即比原安排多休息3天。对于少数用人单位出于防控、保障国计民生或其他生产经营需要，要求劳动者在延长的 3 天春节假期内提供正常劳动，如劳动者拒绝，用人单位可否以旷工为由解除劳动合同的问题。我们认为，国家延长2020年春节假期是为了应对疫情防控采取的特殊措施，如用人单位要求劳动者在这3天内加班，应参照《劳动法》第41条规定的加班原则与工会和劳动者协商一致。在未协商一致的情况下，用人单位一般不得以旷工为由解除劳动合同。

根据人社部、全国总工会、中国企联/中国企业家协会、全国工商联等四部门《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》【人社部发（2020）8号，以下简称8号文】的相关规定，参照《人力资源和社会保障部关于2015年9月3日放假期间安排劳动者工作工资计发问题的通知》【人社部发（2015）74 号】，对于因疫情防控在延长的春节假期内不能休假的职工，指导用人单位应先安排补休。不能安排补休的，依法支付百分之二百的加班工资。

四、关于受疫情影响停工停产超过一个工资支付周期是否需要支付劳动者工资的问题

受疫情影响导致用人单位停工停产与用人单位因经营、管理不善导致停工停产不同，并非劳动者或用人单位一方原因所致。对于停工停产期间的待遇支付标准可以通过用人单位与职代会、工会或职工代表进行民主协商的方式确定；如不能达成一致意见的，可按《人力资源和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》【人社厅明电（2020）5号】和8号文规定，用人单位停工停产超过一个工资支付周期的，用人单位应当与劳动者协商支付相应的生活费。如少数劳动者在停工停产期间提供正常劳动的，用人单位应当按规定支付不低于上海市最低工资标准的工资。

五、关于劳动合同解除和经济补偿支付的问题

用人单位或劳动者以受疫情影响为由，要求解除劳动合同的，应重点审查当事人要求解除劳动合同的理由。对于确受疫情影响劳动者无法及时返岗复工、用人单位未能及时足额支付劳动报酬、未依法缴纳社会保险等情形，应审慎处理，尽可能通过和解、调解等方式化解矛盾纠纷，稳定劳动关系，不宜轻易判决解除劳动合同。

一些用人单位如受疫情影响未及时足额支付工资、未依法缴纳社会保险，经审查该未支付或未缴纳行为确非用人单位主观原因造成，对于劳动者依据《劳动合同法》第38、46条规定要求支付经济补偿的请求，应坚持审慎处理的原则，一般不宜支持。

六、关于受疫情影响用人单位调岗降薪、延迟支付工资是否属于劳动合同变更的问题

在疫情防控的特殊时期，保障用人单位有序复工复产复市，尽可能减轻用人单位生产经营压力、稳定劳动者工作岗位和保障就业，是当前的首要任务。对于用人单位按照法定程序通过与职代会、工会、职工代表进行民主协商的方式对调岗降薪、延迟支付工资、轮岗轮休、停工停产等事项达成一致意见，且该意见公平合理、仅适用于疫情期间的，可以作为裁审依据。

七、关于劳动合同在隔离期间到期是否可以终止的问题

如劳动者系新冠肺炎患者、疑似病人、密切接触者，根据相关规定被采取隔离观察、医学观察或其他紧急措施，在此期间劳动合同到期的，劳动合同期限可以顺延至隔离期、医学观察期或其他紧急措施期满时终止。

八、关于“共享用工”法律关系的问题

疫情期间，“共享用工”等新型灵活用工模式，在一定程度上缓解了用人单位的用工压力和劳动者的就业压力，起到了多方共赢的效果。在处理相关纠纷时，要注意区分共享用工、劳务派遣、劳务外包等的差别。对于借出单位（即与劳动者存在劳动关系的用人单位）非以营利为目的，与借入单位、劳动者三方在疫情期间签订员工借调协议，约定劳动者在疫情期间为借入单位提供劳动，疫情结束后回到借出单位工作的，不应认定借出单位、借入单位、劳动者三者之间形成双重劳动关系。借调期间劳动者与借出单位仍为单一劳动关系，双方劳动权利义务不变。

九、关于受疫情影响仲裁时效和起诉期间如何计算的问题

当事人提供患新冠肺炎、疑似新冠肺炎或因疫情防控被隔离等受疫情影响的证据，证明其无法在《劳动争议调解仲裁法》第 27 条规定的仲裁时效内申请仲裁或无法在《劳动争议调解仲裁法》第 48 条规定的期间内向法院提起诉讼，主张仲裁时效或起诉期间扣除受疫情影响期间的，原则上应予以支持。

根据《传染病防治法》和市政府相关防疫政策规定，新冠肺炎疫情防控期间，原则上可以将政府采取的疫情防控政策理解为不可抗力。当事人因受疫情影响，不能正常参加仲裁或诉讼活动的，可以根据《民法总则》、《民事诉讼法》、《突发事件应对法》等相关规定，适用有关仲裁时效中止和仲裁、诉讼程序中止的规定，但法律另有规定的除外。

上海高级人民法院 上海市人力资源和社会保障局

2020 年 4 月 13 日

Regulations

Guiding Opinions on Handling Labor Dispute Cases under the Influence of COVID-19

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On April 13, 2020, the Shanghai High People's Court and the Shanghai Municipal Human Resources and Social Security Bureau jointly issued the Guiding Opinions on Handling Labor Dispute Cases under the Influence of COVID-19 (the **"Guiding Opinions"**), in order to properly resolve labor disputes and unify judgment criteria in Shanghai during the prevention and control of the COVID-19.

The Guiding Opinions consists of nine parts, and the main points of which are summarized as follows:

1. Basic Principles and Diversified Resolution Mechanism for Handling Labor Dispute Cases Involving the COVID-19

The Guiding Opinions emphasizes that the following principles shall be abided by in the course of handling labor dispute cases during the COVID-19 outbreak: first, the principle of negotiation; second, the principle of balanced protection; third, the principle of stabilizing labor relations; fourth, the principle of promoting the cooperative performance of labor contracts.

Meanwhile, courts and arbitration institutions at all levels shall, in conjunction with labor unions, bureaus of justice and mediation organizations at all levels, encourage and guide the parties to resolve disputes through negotiation and mediation, and constantly promote the construction of the mechanism of diversified and joint governance and the governance mechanism for sources of litigation.

Specifically, 1) with respect to mass, unexpected and sensitive disputes, it is required to maximize the role of diversified dispute settlement mechanisms, and place it at the forefront; 2) with respect to arbitration or litigation cases, it is required to implement the principle of giving priority to mediation, and intensify mediation efforts to properly resolve conflicts and disputes.

2. Where an employee fails to work overtime during the extended three-day Spring Festival holiday as required by the employer, the employer shall generally not rescind the labor contract on the ground of absence.

Extension of the 2020 Spring Festival holiday is a special measure for prevention and control of COVID-19. If the employers require the employees to work overtime during the extended holidays,

they shall, in accordance with Article 41 of the Labor Law[39], negotiate with the labor unions and the employees. Where the negotiation fails to result in a consensus, the employers shall generally not rescind the labor contract on the ground of absence.

Meanwhile, if an employee cannot take a leave during the extended Spring Festival holiday due to the prevention and control of COVID-19, the employer shall firstly arrange a compensatory holiday. Where the employee is unable to arrange another holiday, 200% of the overtime wage shall be paid pursuant to the law.

3. Where the suspension of production and business operations due to the COVID-19 exceeds a wage period, the employer shall negotiate with the employees on remuneration during the suspension. Where the negotiation fails, the employer shall pay the corresponding living expenses.

Where an employer suspends production and business operations due to the COVID-19, it may determine the remuneration through democratic negotiation with the workers' congress, labor union or workers' representatives.

Where agreement cannot be reached through the aforesaid democratic negotiation, and the suspension of production and business operations exceeds a wage period, the employer shall negotiate with the employees and pay the corresponding living expenses.

Where a small number of employees provide work normally during the period of suspension, the employer shall pay wages which are not lower than the minimum wage standard of Shanghai Municipality pursuant to the provisions.

4. Prudently deal with issues of labor contract rescission and economic damages payment.

Where an employer or an employee requests the rescission of a labor contract on the grounds of the impact of COVID-19, it is required to prudently investigate the grounds on which the party requests the rescission, resolve conflicts and disputes through reconciliation, mediation, etc., and strictly restrict the decision on the rescission of the labor contract.

Where some employers fail to pay employees wages in full in a timely manner or pay social insurance premiums due to the influence of the COVID-19, and such failure is indeed not caused by the employer's subjective reasons upon examination, the request of employees for economic

[39] Article 41 According to the requirements of production and business operations, an employer unit may extend the working hours of a worker after consulting with the trade union and the worker concerned, however, the overtime worked shall in general not exceed one (1) hour per day; in special circumstances where and extension of working hours is required, the overtime worked shall not exceed three (3) hours per day under conditions which ensure the health of the workers, and the amount of overtime worked shall not exceed thirty-six (36) hours per month.

compensation in accordance with Articles 38 and 46 of the Labor Contract Law shall be treated prudently and shall not be upheld in general.

5. Agreements on matters such as position adjustment, salary reduction, delayed payment and business suspension formed by employers through statutory procedures can be used as a basis for adjudication.

Agreements on matters such as position adjustment, salary reduction, delayed payment, post shift and job rotation, business suspension, etc. that have been reached by employers through democratic consultations with workers' congresses, labor unions, and employee representatives in accordance with the statutory procedures may be used as a basis for adjudication. However, it shall be noted that the agreements aforesaid are required to be fair and reasonable and are only applicable during the period of COVID-19 outbreak.

6. Labor contracts that expire during the period of isolation may be extended until the expiration of the isolation, medical observation period or any other emergency measures.

Where an employee is a patient or a suspected patient infected with COVID-19 or a close contact, and is placed under isolation observation, medical observation or any other emergency measures in accordance with the relevant regulations, the term of his labor contract which expires during the period aforesaid may be extended until the expiration of such period.

7. Under the "shared employment" mode, a single labor relationship is formed between the employee and the lending entity instead of a dual labor relationship.

Where a lending entity (i.e. the employer that has labor relationship with the employee) concludes a labor transfer agreement with the borrowing entity and the employee for non-profit purposes during the period of COVID-19 outbreak, agreeing that the employee will provide work for the borrowing entity during the period aforesaid and will return to work for the lending entity after, such circumstance shall not be deemed that a dual labor relationship has been formed between the lending entity, the borrowing entity and the employee. During the temporary transfer, the employee and the lending entity remain in a single labor relationship, with their rights and obligations unchanged.

8. In principle, the employees' claim for deducting the period affected by the COVID-19 from the limitation of action or arbitration shall be upheld.

Where an employee cannot timely apply for arbitration or file a lawsuit within the prescribed period due to being patient or suspected patient infected with COVID-19, or being isolated, etc., his claim for deducting the period affected by the COVID-19 from the limitation of arbitration or action shall be upheld in principle.

In principle, the prevention and control policies adopted by the government during the period of COVID-19 outbreak may be deemed as force majeure. If the party concerned cannot normally participate in the arbitration or litigation due to such impact, the provisions on suspension of arbitration or litigation procedures may be applied, unless otherwise provided by the law.

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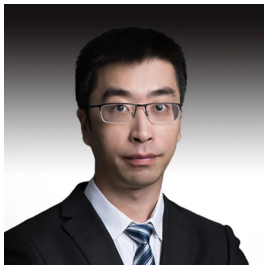

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规模. 我们在北京、上海、深圳、成都四地办公室总计拥有近 500 名的法律专业人才。我们的律师 均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，部分合伙人还拥有美国、英国、德国、瑞士和澳大利亚等地的律师执业资格。

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