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一、 法律：《民法典》的实施对用人单位用工管理的影响

Law: The Impact of the Civil Code on Employment Management

2020年5月28日，第十三届全国人民代表大会颁布并通过了《中华人民共和国民法典》（“《民法典》”），该部法律已于2021年1月1日生效。《民法典》中虽无直接涉及劳动法的规定，但对用人单位的用工管理提出了一定要求，以下内容值得特别注意：

The Civil Code of the People's Republic of China (the “Code”) was adopted and passed by the 13th National People's Congress on May 28, 2020, and comes into force on January 1, 2021. Although the Code does not have a direct connection with the employment related legislations, it touches upon certain issues with respect to HR management that may be

worthy of employers' attention.

1. **用人单位应加强对员工个人信息保护的重视** – 《民法典》对个人信息保护的明确规定，具有重大意义。在《网络安全法》等现行规定的基础上，《民法典》在总则中进一步明确个人信息受法律保护，并在分则中对（第 1034 条至第 1039 条）对个人信息的定义、处理原则、免责事由、权利义务等作出了详细规定。《民法典》第 1034 条进一步完善和扩展了现有个人信息的内涵，将电子邮箱、健康信息和行踪信息纳入到个人信息范畴。《民法典》第 1035 条明确了收集处理个人信息应遵循“合法、正当、必要”原则以及需要符合的其他条件。

Greater emphasis shall be placed on the protection of employees' personal information –The protection provided by the Code on personal information is of great significance. On the basis of the *Cybersecurity Law* and the other existing regulations, the Code stipulates in the general rules section that personal information shall be protected by law; the specific rules part of the Code (Article 1034 to Article 1039) further details the definition of personal information, principles of handling personal information, exemptions, rights and obligations, etc. . Article 1034 of the Code improved the definition of Personal Information to extend the protection to include the email addresses, health status and whereabouts. Article 1035 of the Code explicitly requires that collecting and processing of personal information shall abide by the principles of “legality, propriety and necessity” and other stipulation as required.

落实到劳动法框架下，用人单位仅被允许了解劳动者与劳动合同直接相关的基本情况（见《劳动合同法》第 8 条）。由于新冠肺炎的爆发，政府进一步允许企业为配合防疫政策监测和收集员工的健康信息和行踪信息（见《国务院应对新型冠状病毒感染肺炎疫情联防联控机制关于印发〈全国不同风险地区企事业单位复工复产疫情防控措施指南〉的通知》（国发明电〔2020〕12 号）等规定）。用人单位在用工管理过程中应当注意谨慎收集和使用员工个人信息，避免相关法律风险。Within the labor law context, employers are allowed to collect the personal information of employees, providing that such information is closely related to the employment contract (see Article 8 of the *Labor Contract Law*). On account of COVID-19 outbreak, the government currently requires businesses to monitor and collect its employees' health status and whereabouts in accordance with the COVID-19 prevention and control policy (see the *Circular of Joint Prevention and Control Mechanism of State Council for Coping with COVID-19 on Issuing the Epidemic Prevention and Control Guidelines for Enterprises and Institutions in Areas of Different Risk Levels to Resume Work and Production* (国发明电〔2020〕12 号), etc.). The employer shall collect and use employees' personal information with caution in the process of HR management, thus avoiding the risk thereof.

相关条款 - 《民法典》第1034条：“自然人的个人信息受法律保护。个人信息是以电子或者其他方式记录的能够单独或者与其他信息结合识别特定自然人的各种信息，包括自然人的姓名、出生日期、身份证件号码、生物识别信息、住址、电话号码、电子邮箱、健康信息、行踪信息等。个人信息中的私密信息，适用有关隐私权的规定；没有规定的，适用有关个人信息保护的规定。”

Relevant Provisions - Article 1034 of the Code: The personal information of a natural person shall be protected by the law. Personal information refers to all kinds of information recorded by electronic or otherwise that can be used to independently identify or be combined with other information to identify specific natural persons, including the natural persons' names, dates of birth, ID numbers, biometric information, addresses, telephone numbers, e-mail addresses, health status, whereabouts, etc. For the confidential information included in personal information, the relevant provisions on the right to privacy shall apply; if no provisions are available, the provisions on personal information protection shall apply.

2. **用人单位应建立完善“性骚扰”相关内部制度** - 尽管《中华人民共和国妇女权益保障法》、《女职工劳动保护特别规定》中有关于禁止性骚扰的原则性规定，北京、江苏等地的地方性法规对何种行为构成性骚扰有一些描述，但国家层面一直缺乏针对该行为的统一定义。《民法典》第1010条一方面明确定义了“性骚扰”的内涵，另一方面要求机关、企业、学校等单位应当采取合理的预防、受理投诉、调查处置等措施，防止和制止利用职权、从属关系等实施性骚扰。该条款标志着我国禁止性骚扰立法方面的重要进步。用人单位应当对此提起特别注意，在内部规章制度中增加禁止性骚扰的内容，设计相应的预防、投诉、调查处理机制，满足《民法典》对雇主义务的新要求。

Employers to establish and improve sex harassment related internal policy - While local regulations provide definitions of sexual harassment applicable at the local level (e.g. Beijing and Jiangsu), China does not have a uniform definition of sexual harassment at a national level, and previous national legislation (e.g. *the Law of the People's Republic of China on the Protection of Women's Rights and Interests* and *the Special Provisions on Labor Protection of Female Employees*) only contains a general principle of sexual harassment being prohibited. Article 1020 of the Code sets out a clear definition of sexual harassment on the one hand and on the other hand requires employers (including government organs, businesses, and schools) to adopt appropriate measures (e.g. preventive measures, complaint mechanism or internal investigation) to prevent and stop workplace harassment that happens because of authority or hierarchy. This provision symbolizes a significant achievement in this area of law in China. It is worth noting for employers that your internal rules shall explicitly prohibit the sexual harassment and a mechanism for preventing, reporting of, and investigating sex harassment shall be established to meet the employer obligations newly proposed by

the Code.

相关条款 - 《民法典》第1010条：“违背他人意愿，以言语、文字、图像、肢体行为等方式对他人实施性骚扰的，受害人有权依法请求行为人承担民事责任。机关、企业、学校等单位应当采取合理的预防、受理投诉、调查处置等措施，防止和制止利用职权、从属关系等实施性骚扰。”

Relevant Provisions - Article 1010 of the Code: Where a person conducts sexual harassment of another person in the forms of verbal remarks, written language, images, physical behaviors or otherwise against the will of another person, the victim has the right to request the person to bear civil liability according to the law. Agencies, enterprises, schools, etc. shall adopt reasonable measures on prevention, acceptance and handling of complaints, investigation and disposal, etc. to prevent and curb sexual harassment by making use of official powers and affiliation, etc.

3. **电子劳动合同为有效的书面形式** – 在疫情期间，人力资源和社会保障部和北京市人力资源和社会保障局（“北京市人社局”）分别在2020年3月和10月先后发文，旨在推动用人单位采用电子方式订立劳动合同。《民法典》第469条再次肯定了电子合同具有和书面合同相同的法律效力，对进一步推动用人单位用工文件电子化具有积极意义。相关内容可参考[《海问观察：采用电子形式订立书面劳动合同的新规解读及实务建议》](#)。

Electronic contracts of employment deemed legally effective – During the pandemic, the Ministry of Human Resource and Social Security and Beijing Municipal Human Resources and Social Security Bureau (“**Beijing Labor Bureau**”) successively issued rules (in March 2020 and October 2020) to encourage employers to conclude employment contracts by using electronic ways. Article 469 of the Code reconfirmed that an employment contract signed electronically has the same legal effect as a hand-signed one, which is of positive significance to further promote the usage of e-employment documents among enterprises. *For more information you can refer to “Haiwen Observation: Interpretation of New Rules and Practical Advice for Conclusion of Written Employment Contract in Electronic Form” ([《海问观察：采用电子形式订立书面劳动合同的新规解读及实务建议》](#)).*

相关条款 - 《民法典》第469条：“当事人订立合同，可以采用书面形式、口头形式或者其他形式。书面形式是合同书、信件、电报、电传、传真等可以有形地表现所载内容的形式。以电子数据交换、电子邮件等方式能够有形地表现所载内容，并可以随时调取查用的数据电文，视为书面形式。”

Relevant Provisions - Article 469 of the Code: The parties may conclude a contract in writing, orally or in some other form. A writing form refers to any form that renders the content contained therein capable of being represented in a tangible form, such as a

written contract, letter, telegram, telex, or facsimile. A data message in any form, such as electronic interexchange and emails that renders the content contained therein capable of being presented in a tangible form and accessible for reference and used at any time shall be regarded as a written form.

4. **用人单位可向致人损害的员工行使有限的追偿权** – 原《侵权责任法》规定用人单位应当对其员工造成的第三人损害承担责任。但该法中未明确规定，承担了侵权责任的用人单位是否可以向造成损失的劳动者行使追偿权。《民法典》第 1191 条明确了用人单位承担侵权责任后，可以向有故意或者重大过失的工作人员追偿。该条内容响应了一些地方性法规的在先规定，同时也是对当前主流司法审理意见的确认。

Employer may seek civil remedies from its employee who caused damages to the third party - The original Tort Liability Law states that when an employee causes damages to a third party during the performance of their work duties, the employer of the employee should be responsible, but it does not clarify whether the employer is permitted to seek compensation from the employee. Article 1191 of the Code expressly addresses this matter, allowing an employer to seek compensation from an employee for damages caused intentionally or by his or her gross negligence. This provision echoes some local previous rules, and is also a confirmation of the current mainstream judicial view.

相关条款 - 《民法典》第 1191 条第 1 款：“用人单位的工作人员因执行工作任务造成他人损害的，由用人单位承担侵权责任。用人单位承担侵权责任后，可以向有故意或者重大过失的工作人员追偿。”

Relevant Provisions - Article 1191, paragraph 1 of the Code: Where an employee of an employer has caused damage to others as a result of performance of work assignment, the employer shall assume tort liability. The employer may, after assuming the tort liability, seek recourse from the employee who acts intentionally or with gross negligence.

二、 部门规章：银行保险机构绩效薪酬追索扣回制度指导性意见出台

Regulation: Guiding Opinions on Claw-back Mechanism of Performance-based Remuneration for Banks and Insurance Institutions Issued

2021 年 1 月 28 日，中国银保监会办公厅发布《关于建立完善银行保险机构绩效薪酬追索扣回机制的指导意见》（银保监办发〔2021〕17 号）（“《意见》”）。《意见》在原有《商业银行稳健薪酬监管指引》、《保险公司薪酬管理规范指引（试行）》等规定的基础上，提出了银行保险机构建立并完善绩效薪酬追索扣回机制的具体要求，其中涉及到该机制的适用范围、方式、追回情形、责任主体等，具有较强的指导意义。

On January 28, 2021, the General Office of China Banking and Insurance Regulatory Commission issued the *Guiding Opinions on Claw-back Mechanism of Performance-based Remuneration for Banks and Insurance Institutions* (银保监办发(2021)17号) (“**Opinions**”). On the basis of the existing regulations of *Guidelines for the Supervision of Sound Remuneration of Commercial Banks* and *Guidelines for Remuneration Management Standards of Insurance Companies (Trial)*, the Opinions put forward specific requirements for banks and insurance institutions to establish and improve a performance-based remuneration claw-back mechanism, which involves the scope of application of the mechanism, methods, applicable circumstances, subject of responsibility, etc., and is of strong guidance significance.

《意见》所称银行保险机构包括银行机构、保险机构和在中国境内依法设立的金融资产公司、信托公司、企业集团财务公司、金融租赁公司、汽车金融公司、消费金融公司、货币经纪公司，且经银保监会批准设立的其他金融机构参照适用。有关本部分的具体内容可参考[《海问观察 新规解读：银保机构绩效薪酬追索扣回机制 – 监管视角与劳动法视角》](#)。

For the purpose of the Opinions, the banks and insurance institutions include banking institutions, insurance institutions, and the following organizations legally established in China: financial asset management companies, trust companies, finance companies of enterprise group, financial leasing companies, auto finance companies, consumer finance companies, and currency brokerage companies. This Opinions is applicable as reference to other financial institutions approved by the China Banking and Insurance Regulatory Commission. *For the specific content of this part, please refer to “Haiwen Observation | Interpretation of New Regulations: Performance-based Remuneration Recovery and Deduction System for Banks and Insurance Institutions - Regulatory Perspective and Labor Law Perspective”* ([《海问观察 新规解读：银保机构绩效薪酬追索扣回机制 – 监管视角与劳动法视角》](#)).

三、 地方法规：北京、上海针对共享用工各出新政

Local Rules: Beijing and Shanghai Issue New Guides to Promote Shared Employee Model

共享用工是新冠疫情之下出现的新型用工形式。劳动力富余的企业（“**原企业**”）被允许将员工安排到缺工企业工作（“**缺工企业**”），合理配置人力资源。2020年12月9日，北京市人社局发布了《北京市共享用工指导和服务指引》，围绕共享用工涉及的劳动者、劳动力富余企业、缺工企业等各主体的权利义务，以及人力资源社会保障部门的职责进行了说明。

Employee sharing is a new form of work emerged because of the COVID-19 pandemic. In order to allocate human resources wisely, companies with surplus labor (the “**Home**

Company”) are allowed to arrange their full-time employees to work at companies without sufficient workforce (the “**Host Company**”). On 9 December 2020, the Beijing Labor Bureau issued a *Guide to Employee Sharing of Beijing*, delineating the rights and obligations of each involved parties (Host companies, Home companies and “shared” employees) and the duties of the labor authorities.

2021年2月5日，上海市人力资源和社会保障局也发布了《上海市共享用工指导和服务工作指引》，规定了共享用工企业和劳动者之间的法律关系、共享用工协议的签订、劳动者合法权益保障、加强对共享用工就业和培训服务、相关劳动争议处理等方面的内容。On 5 February 2021, Shanghai Municipal Human Resources and Social Security Bureau issued a similar paper, the *Guide to Shared Employee of Shanghai*, regulating the legal relationship among the companies and the shared employees, the conclusion of the employee-sharing agreement, protections on the legal rights and interests of shared employees, improvement of training service for such employees, dispute resolution, etc.

京沪两地指引对共享用工的诸多重点问题达成共识，比如劳动者的事先同意是共享用工的前提；原有劳动关系不得改变；企业不得以营利为目的出借员工，也不得出借在本企业工作的劳务派遣员工；原企业和缺工企业应当订立共享用工合作协议等。值得注意的是，北京要求原企业应当与借出的劳动者书面变更原劳动合同，而上海不强制要求书面变更原劳动合同。

Two Guides have reach a consensus on a lot of key issues of employee-sharing arrangement, for example, prior consent of the employees is the pre-condition of the arrangement; the current employment relationship must not be changed or altered by the shared employee arrangement; the original employer is not allowed to charge any other fees; dispatch workers are not allowed to be engaged in the employee-sharing arrangements; the Home Company and the Host Company must conclude an employee-sharing agreement. It is worth noting that Beijing requires the Home Company to amend the current employment contract with the shared employees to reflect such arrangement, while it is not mandatory in Shanghai.

我们建议有相关需求的用人单位在了解当地监管要求、评估共享用工风险后，务必事先取得劳动者同意、与合作企业订立相关协议并详细划分权利义务后，在法律允许的范围内谨慎操作。

It is advisable for the employers to do the following preparation before starting an employee-sharing arrangement: analyze the local supervision requirements, conduct legal risk assessment, obtain employee’s consent beforehand and have a cooperation agreement to delineate respective rights and obligations of parties. The job-sharing arrangement shall be conducted with caution and within the scope permitted by law.

四、 地方法规：江苏省发布补缴企业职工基本养老保险费办法

Local Rules: Jiangsu Province Issues Measures on Making up Payment of Pension Insurance Premiums

2021年1月22日，江苏省人力资源和社会保障厅、江苏省财政厅、国家税务总局江苏省税务局联合发布《江苏省规范完善补缴企业职工基本养老保险费办法》（“《办法》”，苏人社规〔2021〕1号），该文件已于3月1日正式生效。《办法》规定了11种可以补缴养老保险费的情形，明确了补缴基数和比例，以及缴费年限如何计算的问题。

On January 22, 2021, Department of Human Resources and Social Security of Jiangsu Province, Department of Finance of Jiangsu Province, and Jiangsu Provincial Tax Service, State taxation Administration jointly issued the *Measures of Jiangsu Province on Regulating and Improving the Compensating of Basic Pension Insurance Premiums for Enterprise Employees* (“Measures”, 苏人社规(2021)1号), which has come into effect since March 1st. The Measures lists 11 situations in which unpaid pension insurance premiums can be compensated retroactively, and clarifies the base and proportion of the deficiency and how to calculate the payment period.

《办法》并非新出台的政策，而是三部门根据国家规定，对不同时期发布的补缴养老保险政策的整理和汇编，极大地提高了补缴政策的完整性和透明度，可以对用人单位在实际补缴时起到清晰的指导作用。

The Measures is not a newly promulgated policy in a sense, but a collation and compilation of previous rules for making up pension insurance issued by the three departments in accordance with national laws in different periods, which greatly improves the integrity and transparency of the policies and may provide a clearer guide to employers when they make up the insurance premiums in reality.

五、 最高人民法院：研讨九则典型劳动争议案例

The Supreme People’s Court Organizes Discussion on Nine Typical Labor Dispute Cases

2021年1月15日，最高人民法院司法案例研究院和中国法学会案例法学研究会共同召开了案例大讲堂，参加者包括各地法官代表。会议选择并深入讨论了九例与新型经济模式有关的典型劳动争议，并由主审法官介绍了裁判理念、规则和经验。

On January 15, 2021, the Judicial Case Research Institute of the Supreme People’s Court and the Case Law Research Institute of the China Law Society held a case seminar, with the participation of judges from all over the country. In the seminar, nine typical employment law cases related to the emerging economy business model were selected and discussed in depth. Judges who heard the cases and made the decisions shared the theory of the judicial decisions, legal rules and their experiences.

研讨的九例案例的争议类型和焦点包括：

Types of disputes and issues of the nine cases mainly include:

2021年1月15日，最高人民法院司法案例研究院和中国法学会案例法学研究会共同召开了案例大讲堂，参加者包括各地法官代表。会议选择并深入讨论了九例与新型经济模式有关的典型劳动争议，并由主审法官介绍了裁判理念、规则和经验。

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研讨的九例案例的争议类型和焦点包括：

Types of disputes and issues of the nine cases mainly include:

(一) 新型用工模式相关争议：（1）“互联网+”经济模式下，外卖骑手、网络主播、平台网约工等劳动力的劳动关系认定问题；（2）共享用工过程中如果出借单位破产，共享员工的劳动关系认定问题。

Disputes related to the new types of work arrangement: (1) under the gig economy business model, whether take-away riders, network anchors, or platform network contractors can be deemed as employees; (2) in the process of employee-sharing arrangement, if the Home Company goes bankrupt, how to deal with the employment relationship of the shared employees.

(二) 疫情相关争议：用人单位不能援引疫情作为不可抗力规避雇主支付工资义务。

Disputes related to the COVID-19 pandemic: the employer cannot invoke the COVID-19 pandemic as a *force majeure* event to escape the employer's obligation to pay salary.

(三) 竞业限制相关争议：（1）企业营业执照经营范围重合不是认定劳动者违反竞业限制义务的充分条件；（2）在用人单位未行使解除权的情况下，劳动者不得以用人单位未支付竞业限制补偿金为由不履行竞业限制协议；（3）用人单位可以在竞业限制协议中限制劳动者通过利害关系人间接从事竞业行为。

Disputes related to non-compete restrictions: (1) the overlaps of business scope in business licenses (of previous and current employers) is not a sufficient condition to determine that the employee has violated non-competition obligations; (2) in the case that the employer does not release the employee from non-compete obligation, the employee is not allowed to stop performing the non-compete agreement on the grounds that the employer fails to pay the non-competition compensation; (3) the employer may, through the

non-competition agreement, restrict employees from engaging in competing activities via stakeholders indirectly.

(四) 户口违约金相关争议：基于办理户口而约定的服务期及违约金条款无效，但劳动者提前离职将被视为违反诚信原则并承担损害赔偿责任。

Disputes related to liquidated damages for Hukou: The clauses on service period and liquidated damages agreed based on the application of Hukou are invalid, but the employee who leaves early shall bear the liability of compensation as a result of the breach of the legal principle of good faith.

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