

海问劳动法双月报
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一、新规速递：国家网信办《个人信息出境标准合同办法》发布

Quick View of New Regulations: The State Cyberspace Administration Issued the Measures for the Standard Contract for Outbound Transfer of Personal Information

2023年2月22日，国家互联网信息办公室发布《个人信息出境标准合同办法》（“《办法》”）及其附件《个人信息出境标准合同》。《办法》自2023年6月1日起施行，施行前已经开展的个人信息出境活动应进行整改，时间期限为自《办法》施行之日起6个月。

On February 22, 2023, the State Cyberspace Administration issued the Measures for the Standard Contract for Outbound Transfer of Personal Information (the “**Measures**”) and its annex “Standard Contract for Outbound Transfer of Personal Information”. The Measures will come into effect on June 1, 2023, and enterprises which have carried out outbound transfer of personal information activities before the implementation shall make rectification within a period of six months from the date of implementation of the Measures.

《办法》适用于《个人信息保护法》第三十八条规定的个人信息处理者通过与境外接收方订立个人信息出境标准合同（“**标准合同**”）的方式向境外提供个人信息的情形。值得注意的是，企业如果未达到安全评估的申报门槛，才可以选择订立标准合同作为个人信息出境的方式。

The Measures is applicable to the situation where a personal information processor provides personal information abroad by entering into a standard contract for the outbound transfer of personal information (the “**Standard Contract**”) with a foreign recipient, as stipulated in Article 38 of the Personal Information Protection Law. It is worth noting that enterprises may only choose to enter into a Standard Contract as a way of transferring of personal information outside China if they have not met the threshold for security assessment declaration.

《办法》明确，个人信息处理者通过订立标准合同的方式向境外提供个人信息应同时符合以下情形：

1. 非关键信息基础设施运营者；
2. 处理个人信息不满100万人的；
3. 自上年1月1日起累计向境外提供个人信息不满10万人的；
4. 自上年1月1日起累计向境外提供敏感个人信息不满1万人的。

The Measures clarifies that any personal information processor transferring personal information abroad by entering into the Standard Contract must meet all of the following conditions:

1. It is not a critical information infrastructure operator.
2. It processes the personal information of less than 1 million individuals.
3. It has cumulatively transferred abroad the personal information of less than 100,000 individuals since January 1 of the previous year.
4. It has cumulatively transferred abroad the sensitive personal information of less than 10,000 individuals since January 1 of the previous year.

根据《办法》的相关规定，个人信息处理者不得采取数量拆分等手段，将依法应当通过数据出境安全评估的个人信息通过订立标准合同的方式向境外提供，并且在向境外提供个人信息前，应当开展个人信息保护影响评估。标准合同应严格按照附件中的《个人信息出境标准合同》模板订立，个人信息处理者可以与境外接收方约定其他条款，但不得

与标准合同相冲突。在标准合同生效之日起 10 个工作日内将所签订的标准合同和个人信息影响评估报告提交至所在地省级网信部门备案。

According to the provisions of the Measures, the personal information processor shall not use the method such as quantity splitting to meet the conditions of providing personal information abroad by entering into a Standard Contract, while in fact it should go through the outbound security assessment. And the processor shall conduct a personal information protection impact assessment prior to the outbound transfer of personal information. The Standard Contract shall be concluded in strict accordance with the template of the Standard Contract in the Annex, while the processor of personal information may agree other terms with the foreign recipient, provided the terms do not conflict with the standard contract. The personal information processor shall file the signed Standard Contract and the personal information impact assessment report with the cyberspace administration authorities at the provincial level within 10 working days after the Standard Contract enters into effect.

海问建议：存在员工信息等个人信息出境活动的企业应尽早梳理自身数据出境的具体情况，依法确定数据出境合规路径。如果需要通过订立标准合同的路径出境，企业应在 2023 年 12 月 1 日整改期结束前按《办法》的要求及时开展相关工作。

Haiwen Suggestions: Enterprises that carry out outbound transfer of personal information such as employee information should sort out the details of the data to be transferred abroad as early as possible, and determine the proper methods for outbound transfer of data in accordance with the law. For those enterprises that are required to enter into a Standard Contract to transfer the personal information abroad, they should complete the rectification in a timely manner before the end of the rectification period on December 1, 2023, in accordance with the requirements of the Measures.

二、新规速递：广东进一步明确育儿假、护理假等假期实施细则

Quick View of New Regulations: Guangdong Further Clarified the Detailed Rules of the Parental Leave, Elderly Care Leave and Other Leave

广东省人力资源和社会保障厅、广东省卫生健康委员会于 2023 年 1 月 11 日发布《关于进一步做好<广东省人口与计划生育条例>相关假期贯彻落实工作的通知》（“《通知》”）。《通知》在《广东省人口与计划生育条例》新增的育儿假和护理假的基础上，明确了这两种假期的请休细节（各地育儿假和护理假的相关规定具体参见《海问·研究 | 海问劳动法双月报》（2021 年 11-12 月））。

The Human Resources and Social Security Department of Guangdong Province and Health Commission of Guangdong Province issued the Notice on Further Improving the Implementation of the Leave Stipulated in the Regulation on Population and Family Planning of Guangdong Province (the “**Notice**”) on January 11, 2023. The Notice clarifies the details of the leave application and taking on the basis of the new parental leave and elderly care leave added to the Regulation on Population and Family Planning of Guangdong Province (for details of the relevant provisions on parental leave and elderly care leave, please refer to the *Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter (November-December 2021)*).

《通知》明确，育儿假的请休按周年计算，即以子女周岁作为计算年度，且即使父母有多个不满 3 周岁的子女，育儿假也不可叠加。护理假的请休按自然年计算，亦不可叠加。在同一计算年度内，育儿假和护理假均可以拆分请休，各自请休原则上不超过 2 次。如果需要跨 1

个计算年度安排职工育儿假和护理假的，应与职工协商一致。

The Notice clarifies that parental leave is taken on an annual basis, i.e. according to the child's age, and parental leave is not stackable even if the parents have multiple children under the age of 3. Elderly care leave is taken on a natural year basis and also not stackable. Parental leave and elderly care leave can be split to several times within the same calculation year, in principle no more than two times for each leave. If it is necessary for an employer to arrange an employee to carry parental leave and elderly care leave over the next calculation year, a consensus should be reached with the employee.

《通知》要求用人单位应在规章制度中明确育儿假和护理假期间的工资待遇，加强与职工通过集体协商明确育儿假、护理假期间的工资待遇，签订集体合同。但《通知》尚未明确在用人单位的规章制度中未明确育儿假和护理假期间的工资待遇的情况下，应以何种标准支付职工的工资待遇。育儿假、护理假期间的工资待遇不得低于本地区最低工资标准。

The Notice requires employers to specify in their internal policies the salaries and benefits during parental and elderly care leave, and advocates employers to clarify with employees the salaries during parental and elderly care leave through collective negotiation and to sign collective contracts. However, the Notice does not clarify the standard for paying employees' salaries during parental and elderly care leave in cases where the employer's internal policies do not specify the salaries during such leave. Salaries during parental and elderly care leave shall not be lower than the local minimum wage standard.

另如果在《广东省人口与计划生育条例》实施之日（2021年12月1日）至《通知》发布之日（2023年1月11日）期间，职工最小的子女满3周岁或独生子女父母一方满六十周岁，且用人单位确因工作需要原因未给职工安排育儿假或护理假，职工提出休假申请的，用人单位应当安排职工补休。

In addition, if the youngest child of an employee reaches the age of three, or one of the parents of the employee (who is an only child) reaches the age of 60 during the period from the date of implementation of the Regulation on Population and Family Planning of Guangdong Province (December 1, 2021) to the date of publication of the Notice (January 11, 2023), and the employer has not arranged for the employee to take parental leave or elderly care leave for reasons of work needs, the employer shall arrange for the employee to take additional leave.

海问建议：广东地区的用人单位应当充分了解当地现行规则，在此基础上对内部规章制度进行及时更新完善，保护员工休息休假的权益。如果用人单位未按规定安排职工休奖励假、陪产假、育儿假和护理假，人社部门有权责令限期改正，如果用人单位拒不改正，还可能被处以罚款。

Haiwen Suggestions: Employers in Guangdong province should be fully aware of the local rules in force and on this basis update and improve their internal policies in a timely manner to protect the rights and interests of employees on rest and leave. If an employer fails to arrange for employees to take extended maternity leave, paternity leave, parental leave and elderly care leave in accordance with the rules, the labor authorities have the right to order rectification within a certain period of time. If the employer refuses to rectify, it may also be subject to a fine.

三、新规速递：北京、四川两地发布通知，更新人力资源社会保障行政处罚裁量标准 **Quick View of New Regulations: Beijing and Sichuan Issued Notices to Update the Human Resources and Social Security Administrative Penalty Discretion Standards**

2023年1月13日，北京市人力资源和社会保障局（“北京市人社局”）印发《北京市人力资源社会保障行政处罚裁量基准表（涉及妇女权益保障法部分）》（“《基准表》”），进一步明确《妇女权益保障法》中规定的涉及妇女权益保障的违法行为之行政处罚裁量基准（《妇女权益保障法》的修订参见《海问·研究 | 海问劳动法双月报》（2022年9-10月））。此前北京市人社局于2022年3月22日印发《北京市人力资源社会保障行政处罚裁量基准表》，本次专门针对涉及妇女权益保障法部分。

On January 13, 2023, the Beijing Municipal Human Resources and Social Security Bureau (“Beijing Labor Authority”) issued the Benchmark Sheet for Human Resources and Social Security Administrative Penalty Discretion (Concerning the Law on the Protection of Women’s Rights and Interests) (the “Discretion Benchmark Sheet”), further clarifying the benchmark of administrative penalty for violations involving the protection of women’s rights and interests stipulated in the Law on the Protection of Women’s Rights and Interests (for the specific protection of female workers in the Law on the Protection of Women’s Rights and Interests, please refer to the *Haiwen Research: Haiwen Labor Law Bi-monthly Newsletter (September-October 2022)*). Previously, the Beijing Labor Authority issued the Benchmark Sheet of Beijing Municipal Human Resources and Social Security for Administrative Penalty Discretion on March 22, 2022, and on June 24, 2022, the purpose of this release is to specifically regulate administrative penalty for the protection of female worker’s rights and interests.

本次发布的《基准表》共包括四项违反《妇女权益保障法》行为及一项违反《人才市场管理规定》行为的处罚依据、违法情形、裁量基准、处罚公示期限、可依申请缩短的公示期限，五项违法行为的处罚方式都为罚款。这五项违法行为分别为：

1. 用人单位在招录（聘）过程中，以性别为由拒绝录（聘）用妇女或者差别化地提高对妇女录（聘）用标准；
2. 用人单位因结婚、怀孕、产假、哺乳等，降低女职工的工资和福利待遇，限制女职工晋职、晋级、评聘专业技术职称和职务，辞退女职工，单方解除劳动（聘用）合同或者服务协议；
3. 用人单位在女职工怀孕以及依法享受产假期间，终止劳动（聘用）合同或者服务协议；
4. 用人单位在执行国家退休制度时，以性别为由歧视妇女；
5. 用人单位以民族、宗教信仰为由拒绝聘用或者提高聘用标准情节严重的。

The Discretion Benchmark Sheet released this time includes the legal basis of punishment, the circumstances of the violation, the benchmark of discretion, the period of public notice of punishment and the period of public notice that can be shortened on application, for four violations of the Law on the Protection of Women’s Rights and Interests and one violation of the Regulations on the Administration of the Talent Market. All five violations will be punishable by fines. The five violations are as follows:

1. The employer refuses to employ women on the grounds of gender or applies higher standards for recruiting women in a differentiated manner.
2. The employer decreases a female employee’s wage and benefits, restricts the female employee from promotion in post, rank, professional qualification certification or appointments, fires the female employee, or terminates the labor (employment)/service

contract with female employee, by reason of matrimony, pregnancy, maternity leave or breastfeeding, among others.

3. The employer terminates the labor (employment) /service contract of a female employee during her pregnancy and maternity leave in accordance with the law.
4. The employer discriminates against women on the basis of gender when implementing the national retirement policies.
5. The employer refuses to hire or raises the employment standard on the grounds of ethnicity or religious beliefs in serious cases.

同月，2023年1月31日，四川省人力资源和社会保障厅印发《四川省人力资源社会保障行政处罚裁量标准（2023年本）》（“《裁量标准》”），2018年修订的裁量标准同时废止。

In the same month, on January 31, 2023, the Department of Human Resources and Social Security of Sichuan Province issued the Discretion Standards for Human Resources and Social Security Administrative Penalties in Sichuan Province (2023 Version) (“**Discretion Standards**”), and the Discretion Standards revised in 2018 were simultaneously repealed.

《裁量标准》包含五十九项违法行为，涉及人力资源服务机构中介活动、社保缴纳、工作时间、劳动报酬、妇女权益保障等，明确了相关违法行为的处罚依据、适用情形和裁量标准。

The Discretion Standards contains fifty-nine violations, involving intermediary activities of human resources service agencies, social security contributions, working hours, labor remuneration and protection of women’s rights and interests. The Discretion Standards specifies the legal basis for penalties, applicable circumstances and discretion standards.

海问建议：随着《妇女权益保障法》的修订，各地人社部门将加强对用人单位在妇女权益保障方面合规情况的监督检查执法，用人单位应注意及时落实法律法规对女职工权益保障的要求。

Haiwen Suggestions: Along with the revision of the Law on the Protection of Women’s Rights and Interests, the local labor authorities will strengthen the supervision and enforcement of employers’ compliance with the requirements regarding female employee protection. Employers should pay more attention to implement the legal requirements on the protection of rights and interests of female employees in a timely manner.

四、新规速递：上海发布《上海市就业促进条例》，强化就业优先政策

Quick View of New Regulations: Employment Promotion Ordinance of Shanghai Was Issued to Strengthen the Policies of Employment Promotion

2023年2月25日，上海市人民代表大会常务委员会印发《上海市就业促进条例》（“《条例》”），在2005年12月29日发布的《上海市促进就业若干规定》的基础上，结合相关规定施行以来的经验，回应就业形势和就业领域新情况、新问题，提出新的要求。

On 25 February 2023, the Standing Committee of People’s Congress of Shanghai issued Employment Promotion Ordinance of Shanghai (the “**Ordinance**”). On the basis of Provisions of Shanghai Municipality on the Promotion of Employment issued on 29 December 2005, and combining the experience gained since the implementation of the relevant provisions, the Ordinance responded to the new situations and issues in the employment situation and employment field as well as put forward new requirements.

《条例》涵盖了就业政策、创业扶持、公平就业、就业服务与管理、职业教育和培训、就业援助和重点群体就业、灵活就业等多方面内容，并对以下新形势下的问题作出规定：The Ordinance covers employment policies, supports for start-up, fair employment, employment services and management, vocational education and training, employment assistance, employment of key groups, and flexible employment, etc., and stipulates the following issues in the new situation:

1. **【女性平等劳动权利】**保障女性在就业创业、职业发展、职业培训、劳动报酬、福利待遇、职业健康与安全等方面的合法权益，构建生育友好的就业环境。

[Women's Equal Labor Rights] Ensures women's legitimate rights and interests in employment, start-up, career development, vocational training, labor remuneration, welfare benefits, occupational health and safety and other aspects according to law, and build a childbearing-friendly employment environment.

2. **【后疫情时代的反歧视要求】**不得以劳动者是传染病病原携带者或者曾患传染病为由拒绝录用，不得以劳动者患传染病为由与其解除劳动关系（另有规定的除外），及时对“后疫情时代”可能存在的就业歧视作出回应。

[Anti-discrimination Requirements in the Post-Pandemic Era] Prohibits employers from refusing to employ a worker on the ground that he/she is a pathogen carrier of an infectious disease or has ever suffered from an infectious disease, and dissolving the labor relationship with a worker on the ground that he/she suffers from an infectious disease (unless otherwise required by law), to timely response to possible employment discrimination in the “post-pandemic era”.

3. **【个人信息保护】**用人单位和人力资源服务机构在招用人员或者提供人力资源服务时，不得查询劳动者的诊疗记录、医学检测报告、违法犯罪记录等信息，或者要求劳动者提供与履行劳动合同无关的信息（另有规定的除外）。

[Personal Information Protection] Prohibits employers and human resources service agencies from accessing information such as diagnosis and treatment records, medical test reports, criminal records, etc., of the employees or requiring the employees to provide information unrelated to the performance of the labor contract at the time of recruitment or the provision of human resources service (unless otherwise required by law).

4. **【灵活就业人员保护】**将灵活就业人员纳入公共就业服务范围，以及职业技能培训和评价体系，明确其可以按照有关规定参加社会保险，依法享受社会保险待遇，符合条件的可以申请社会保险补贴、就业岗位补贴，纳入相应的社会救助范围，建立和完善新就业形态劳动者职业伤害保障制度。

[Protection for Flexible Employment Personnel] Includes the persons who are employed in a flexible manner into the scope of public employment services, as well as the training and evaluation system for vocational skills; clarifies that they may participate in the social insurance scheme in accordance with relevant provisions, enjoy social insurance benefits according to law, and apply for social insurance subsidy and job subsidy if qualified; includes them into the scope of corresponding social reliefs if qualified; and establishes and improves

the occupational injury security system for workers of new forms of employment.

海问建议：企业应注意在用工管理各环节中避免可能被认定为就业歧视、侵犯女性平等就业权、侵犯员工个人信息的行为。

Haiwen Suggestions: Enterprises shall avoid behavior that may be identified as employment discrimination, violations of women's equal employment rights, or violations of employees' personal information in their whole process of employment management.

五、典型案例：最高院发布第三批人民法院大力弘扬社会主义核心价值观典型民事案例 **Exploration of Typical Cases: The Supreme People's Court Released the 3rd Batch of Typical Civil Cases of People's Courts Vigorously Carrying Forward Socialist Core Values**

2023年3月1日，最高人民法院发布第三批人民法院大力弘扬社会主义核心价值观典型民事案例，其中案例九和案例十为劳动争议，体现出人民法院下述裁判观点：

On 1 March 2023, the Supreme People's Court released the 3rd batch of typical civil cases of People's Courts vigorously carrying forward socialist core values. Among them, the ninth case and the tenth case are labor disputes, which reflect the following judicial views of the courts:

1. 劳动者有权拒绝用人单位以虚拟货币支付工资，工资应当以法定货币支付。
Employers have the right to refuse to be paid in virtual currency by the employer, and wages shall be paid in legal tender.

2. 员工请假照看病危父亲，用人单位应以善意、包容和合理的方式行使用工管理权，该情形下用人单位以申请材料不齐全为由不批准员工请假并不合情合理，因而以员工构成旷工为由解除劳动合同应属违法。

The employer shall exercise its right to manage the employment in a good faith, tolerant and reasonable manner when an employee applies for leave to look after his dying father. In such situation, it is not reasonable for the employer to refuse to approve the employee's leave application on the grounds that the application documents are incomplete. Accordingly, if the employer terminates the employment contract on the grounds that the employee has been absent from work, it shall be deemed illegal.

六、典型案例：上海高院发布上海法院弘扬社会主义核心价值观典型案例 **Exploration of Typical Cases: Shanghai High People's Court Released Typical Cases of Shanghai Courts Carrying Forward Socialist Core Values**

2023年1月5日，上海市高级人民法院发布上海法院弘扬社会主义核心价值观典型案例，其中案例一和案例三为劳动争议，涉及工伤认定和职场性骚扰。相关案例体现出上海法院的下述裁判观点：

On 5 January 2023, Shanghai High People's Court released typical cases of Shanghai courts carrying forward socialist core values. Among them, the first case and the third case are labor disputes, involving verification of work injury and workplace sexual harassment. The

relevant cases reflect the following judicial views of Shanghai courts:

1. 对于外卖骑手从业人员伤亡认定中的“上下班途中”问题，应结合其行业特点，根据其上线时间、事故发生时间、事故发生地点等实际情况综合认定，以切实保障骑手及其公司的合法权益。

Regarding the issue of how to identify “commuting to or from work” in the recognition of work injury for takeaway riders, considering their industry characteristics, it shall be comprehensively determined based on the actual circumstances such as the time they logged into the system, the time of the accident and the location of the accident, in order to effectively protect the legitimate rights and interests of both the riders and the companies.

2. 员工的职场性骚扰行为有违公序良俗，也违反了劳动者基本职业道德，公司以此为由解除双方劳动合同是合法的。从该案可知，即使在用人单位没有明确的针对性骚扰行为的规章制度的情况下，以严重违反劳动纪律为由解除劳动合同，也具有一定的适用空间。

The employee’s sexual harassment in the workplace violates the public order and good morals, as well as the basic professional ethics of workers. Therefore, it shall be deemed as a legal termination if the employer terminates the employment contract on this ground. According to this case, even in the absence of specified internal policies against sexual harassment by the employer, it still leaves some space for the employer to terminate the employment contract on the grounds of serious breach of labor discipline.

七、典型案例：苏州中院发布服务保障稳就业十大案例

Exploration of Typical Cases: Suzhou Intermediate People’s Court Released Ten Typical Cases Regarding Employment Promotion

日前，苏州市中级人民法院系统性梳理了苏州法院服务保障稳就业的十大典型案例，涉及竞业限制、奖金支付、居家办公期间工资支付、工伤保险待遇等方面。其中有三个案例涉及劳动关系确认及工伤认定，体现出苏州法院的下述裁判观点：

Recently, Suzhou Intermediate People’s Court systematically sorted out ten typical cases of Suzhou Courts serving to provide judicial services and protection for stable employment, involving non-competition, bonus payment, payment of wages during working from home, and work injury insurance, etc. Among them, the cases related to the identification of labor relationship and the recognition of work injury reflect the following judicial views of Suzhou courts:

1. 案例三和案例四均涉及劳动关系确认相关问题。案例三中劳动者在外卖配送服务商的站点从事外卖配送工作，用人单位以劳动者注册成为个体工商户为由主张双方并非劳动关系，法院未以外观认定双方之间不存在劳动关系，并最终认定双方构成劳动关系。

The third case and the fourth case are both related to the identification of labor relationship. In the third case, the employee was engaged in delivery work at the site of a takeaway delivery service provider, and the employer claimed that the two parties were

not in a labor relationship on the grounds that the worker had registered as an individual business owner. The court did not deny the labor relationship between the two parties based on the appearance, and ultimately confirmed that the two parties constituted a labor relationship.

案例四中从业者通过注册 APP 来自愿地承担劳务并结算,企业不限制从业者是否参与劳动及何时提供劳务,且禁止从业者受雇于其他平台。法院认定企业不管理和控制从业者,因此双方之间不存在人格从属性,未支持从业者确认存在劳动关系的主张。

In the fourth case, the worker voluntarily undertook labor work and settlement by registering in the app. The enterprise did not restrict whether and when the worker participated in the labor work, and did not prohibit the worker from being employed by other platforms. The court held that there was no subordination of personality between the parties since the enterprise did not manage or control the worker, and therefore did not support the worker's claim to confirm the labor relationship between the two parties.

由此可见,法院对于外卖员、配送员等网络平台的劳动者与平台企业或服务外包企业之间是否存在劳动关系的问题,以双方的法律关系是否符合劳动关系本质特征作为判断标准,而非仅以签订何种合同、是否注册为个体工商户等外观因素作为依据。Accordingly, regarding whether there is a labor relationship between workers on online platforms such as takeaway riders or delivery workers and the platform enterprises or service outsourcing enterprises, the courts judged based on whether the legal relationship between the two parties conformed to the essential characteristics of a labor relationship, rather than the appearance of the legal relationship such as the type of agreement concluded, whether the worker is registered as an individual business owner.

2. 案例八涉及工伤认定相关问题。法院认为职工午休期间因私外出,在返回单位途中发生非本人主要责任的交通事故,不属于《工伤保险条例》第十四条第六项所规定的“上下班途中”受到非本人主要责任的交通事故应当认定为工伤的情形。

The eighth case is related to the recognition of work injury. The court held that since the employee was out for personal reasons during his lunch break and was involved in a traffic accident which he was not primarily responsible on his way back to the workplace, it shall not be deemed as the circumstance in which the employee is injured in a traffic accident which was not caused by him/her “while commuting to or from work” as stipulated in Article 14(6) of the Regulations on Work Injury Insurance, and therefore shall not be determined as a work injury.

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