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环球劳动法律专递

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➢ 环球视角

常见劳动争议中计算基数之计算方式的梳理

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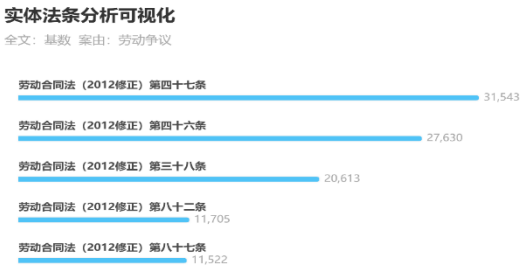
引言

劳动争议中如果涉及到计算问题，常常会遇到法条中对计算方式有明确规定，但是计算基数却不明确的情况，因此，本文以此为出发点，对劳动争议中不同的计算基数进行了梳理。

以“基数”或“计算基数”作为检索关键词，我们在 Alpha 数据库中共发现 130,659 个的劳动争议案件。从时间和地域分布可以看出，这类劳动争议案件自 2013 年之后处于上升趋势，而上海市和北京市都是这类案件的高频地区。

图一：涉及计算基数的劳动争议案件的时间和地域分布图

从这类判决引用法条的频率可以看出，《劳动合同法》第四十七条和第四十六条（解除劳动合同经济补偿金）排在首位，《劳动合同法》第八十二条（未签订书面劳动合同的双倍工资）仅次其后，除此之外，《职工带薪年休假条例》第三条（应休未休带薪年休假的折算工资）和《关于审理劳动争议案件适用法律若干问题的解释（三）》第九条（加班工资）也常在判决中被引用。



图二：法条引用频率示意图

结合上文的关于地域分布以及争议焦点的大数据分析结果，我们拟从上海市和北京市的视角出发，结合相关法律法规和典型的裁判案例，对解除劳动合同经济补偿金、未签订书面劳动合同的双倍工资、应休未休带薪年休假的折算工资和加班工资这四种常见情形的计算基数进行研究。

一、解除劳动合同经济补偿金

《劳动合同法》第四十七条规定，经济补偿按劳动者在本单位工作的年限，每满一年支付一个月工资的标准向劳动者支付。六个月以上不满一年的，按一年计算；不满六个月的，向劳动者支付半个月工资的经济补偿。劳动者月工资高于用人单位所在直辖市、设区的市级人民政府公布的本地区上年度职工月平均工资三倍的，向其支付经济补偿的标准按职工月平均工资三倍的数额支付，向其支付经济补偿的年限最高不超过十二年。本条所称月工资是指劳动者在劳动合同解除或者终止前十二个月的平均工资。

从上述条文可以看出，经济补偿金的计算基数为“劳动合同解除或者终止前十二个月的平均工资”。但是实践中对“平均工资”具体应当如何认定，是应得平均工资还是实得平均工资，通常是劳动者和用人单位都比较关心的问题。

（一）上海

根据《上海市高级人民法院关于审理劳动争议案件若干问题的意见》第 6 条的规定，经济补偿金应以劳动关系解除前十二个月的平均工资性收入为计算标准。劳动者每月应得工资与实得工资的主要差别在于各类扣款和费用，包括个人应当承担的社会保险金、税费或工会会费等。由于用人单位代扣的社会保险金、税费等均为个人劳动所得的组成部分，用人单位只是承担代缴义务。因此，该部分款项应当计入工资性收入，在计算经济补偿金时应当一并予以考虑。

简言之，在计算经济补偿金时，由用人单位代扣的社会保险金和税费等也应当被计入经济补偿金的计算基数，而非按照劳动者实际到手的收入计算。

笔者检索到上海市第一中级人民法院在（2016）沪 01 民终 3462 号案中，对上述予以援引，认为“用人单位代扣的社会保险金、税费等均为劳动者劳动所得的组成部分，用人单位只是承担代缴义务，该部分款项应当作为工资性收入计入经济补偿金计算基数”。

同样地，在（2012）沪二中民三（民）终字第 1577 号案中，上海市第二中级人民法院将工资性收入以及年终奖计入基数（扣除福利待遇，如出差所的餐费补贴），而由用人单位代扣的社会保险金、税费等费用也被认定为计算基数的一部分。

（二）北京

北京的做法与上海相似，根据《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件法律适用问题的解答》（**“《北京高院解答》”**）第 21 条第（4）款的规定，在计算劳动者解除劳动合同前十二个月平均工资时，应当包括计时工资或者计件工资以及奖金、津贴和补贴等货币性收入。其中包括正常工作时间的工资，还包括劳动者延长工作时间的加班费。劳动者应得的年终奖或年终双薪，计入工资基数时应按每年十二个月平均分摊。《劳动合同法》第四十七条规定的计算经济补偿的月工资标准应依照《劳动合同法实施条例》第二十七条规定予以确定；《劳动合同法实施条例》第二十七条中的“应得工资”包含由个人缴纳的社会保险和住房公积金以及所得税。

北京市第二中级人民法院作出的（2019）京 02 民终 1592 号判决中，劳动者的合同工资为 35,000 元/月，劳动者自 2018 年 4 月 2 日入职，2018 年 4 月 25 日与用人单位解除劳动关系，最终法院判决用人单位支付经济赔偿金 175,000 元，系按照劳动者应得的工资收入为基数计算。

北京市第二中级人民法院在 2019 年做出的某集团股份有限公司与高某劳动争议二审判决中提到，“双方当事人均认可劳动者的工资构成为实发工资 24,000 元加五险一金加个税。根据双方当事人均认可的工资发放表、社保、公积金台账及完税证明显示，劳动者离职前 12 个月平均工资为 32,205.90 元。”这表明北京市法院在认定平均工资时会按照实发工资加上单位代扣代缴部分的思路来认定，当然，本案中法院在认定平均工资之后，由于该平均工资高于北京市 2018 年度职工平均月工资的三倍，因此最终以职工平均月工资的三倍作为经济赔偿金的计算基数。

须知，除了一般情况下解除劳动合同经济补偿金外，《劳动合同法》中还规定了用人单位违法解除劳动合同后的经济赔偿金，其计算基数也是按照解除劳动合同的经济补偿金来确定。[1]

二、未签订书面劳动合同的双倍工资

（一）上海

关于未签订书面劳动合同的双倍工资（**“双倍工资制度”**）的计算基数问题，上海高院在 2010 年出具了一份《上海市高级人民法院关于审理劳动争议案件若干问题的解答》（民一庭调研指导〔2010〕34 号）（“**上海高院解答（2010）**”），其中第一条明确了双倍工资的计算基数。

根据上海高院解答（2010）第一条的原则，有约定月工资的，双方约定的正常工作时间劳动者应得的劳动报酬为计算基数，也就是按照合同工资计算。如果双方对月工资没有约定或约定不明的，应该按照《劳动合同法》第 18 条规定来确定正常工作时间的月工资，并以此为计算基数。

[1] 《劳动合同法》第四十八条、第八十七条。

但是，如果还是无法确定合同工资的，则按照劳动者实际获得的月收入扣除加班工资、非常规性奖金、福利性收入、风险性收入等项目后的正常工作时间的月工资确定。

可以看出，与计算经济补偿金不同的是，双倍工资的计算标准是正常工作时间的劳动所得，并不包括加班工资、非常规性奖金、福利等项目。另外，在适用实际获得的月收入扣除上述加班工资等项目的问题上，上海高院解答（2010）的第一条第 3 点明确规定了由用人单位承担举证责任，如果用人单位未能完成举证责任，则双倍工资的计算基数按照劳动者实际获得的月收入确定。

同时，上海高院规定了抄底的计算标准，即无论采取何种方式，计算基数不得低于上海市的月最低工资标准。

（二）北京

根据 2017 年《北京高院解答》第 21 条的规定，在确定“双倍工资”的工资标准时，因基本工资、岗位工资、职务工资、工龄工资、级别工资等按月支付的工资组成项目具有连续性、稳定性特征，金额相对固定，属于劳动者正常劳动的应得工资，应作为未订立劳动合同双倍工资差额的计算基数。

而不固定发放的提成工资、奖金等一般不作为未订立劳动合同双倍工资差额的计算基数。

三、应休未休法定带薪年休假的折算工资

《企业职工带薪年休假实施办法》（**“《年休假实施办法》”**）第十一条规定，计算未休年休假工资报酬的日工资收入按照职工本人的月工资除以月计薪天数（21.75 天）进行折算。前款所称月工资是指职工在用人单位支付其未休年休假工资报酬前 12 个月剔除加班工资后的月平均工资。在本用人单位工作时间不满 12 个月的，按实际月份计算月平均工资。职工在年休假期间享受与正常工作期间相同的工资收入。实行计件工资、提成工资或者其他绩效工资

制的职工，日工资收入的计发办法按照本条第一款、第二款的规定执行。

（一）上海

为厘清上海市法院对带薪年休假补偿中“月平均工资”的理解，笔者列举以下 2 个相关案例。

在（2016）沪 02 民终 4144 号案中，劳动者全年实际收入为 93,996.40 元，去除加班费 3,922.40 元之后，实际工资收入为 90,074 元，一审法院在计算年休假折算工资时的计算方式为：90,074 元÷12 个月÷21.75×15 天×200%，即按照扣除加班费之后的工资收入为基数计算带薪年休假补偿中的月平均工资。最终上海市第二中级人民法院维持了这一计算结果。

同样地，上海市第一中级人民法院在（2015）沪一中民三（民）终字第 1912 号案中，法院基于徐某所述的每月工资标准，计算解除劳动合同前一年的工资收入，并扣除各类加班工资，按照未休年休假为 16 天酌情核算出某公司应当支付的应休未休年休假工资。

因此，从目前检索到的上海地区的案例可以看出，法定年休假折算工资的“月平均工资”应该理解为除去加班工资之外的工资金额。

（二）北京

而北京市法院的实践与上海并不十分相同，上海地区法院在确定计算基数时将加班工资一项扣除，而北京地区法院则直接以每月固定的基本工资作为年休假的计算基数。

北京市第三中级人民法院在（2016）京 03 民终 4528 号案中认为，王某认可其所得实际工资包含夜班值班费、节日加班费、其他应发、防暑费、加班费，但上述项目的费用不应计入年假工资的计算基数。一审法院依照王某未休的年假天数并按照固定的基本工资标准进行核算，判定的数额亦无不当，本院对此予以确认。

同样地，在北京市第一中级人民法院做出的（2014）二中民终字第 04290 号判决中，法院认为 2009 年 2 月 6 日至 2011 年 9 月 5 日期间劳动者郑某享受年休假 30 天，公司应支付郑某未休年休假补偿金 13793.10 元。以上计算结果，是以每月 5000 元为计算基数得出，而 5000 元是合同约定的基本工资。

因此，北京和上海在应休未休法定年休假的折算工资的计算基数上，所适用的计算口径略有不同，上海法院是以劳动者实际收到的工资除去加班工资的数额作为基数，而北京则直接以劳动者的基本工资作为基数。

四、加班工资

（一）上海

根据《上海市企业工资支付办法》第九条的规定，加班工资的计算基数为劳动者所在岗位相对应的正常出勤月工资，不包括年终奖、上下班交通补贴、工作餐补贴、住房补贴，中夜班津贴、夏季高温津贴、加班工资等特殊情况下支付的工资。

上海市高院在 2010 年的《关于劳动争议若干问题的解答》（简称“**《上海高院解答》**”）的第二点认为，“用人单位与劳动者对月工资有约定的，加班工资基数应按双方约定的正常工作时间的月工资来确定；如双方对月工资没有约定或约定不明的，应按《劳动合同法》第 18 条 规定来确定正常工作时间的月工资，并以确定的工资数额作为加班工资的计算基数”。[2]

“如按《劳动合同法》第 18 条规定仍无法确定正常工作时间工资数额的，对加班工资的基数，可按照劳动者实际获得的月收入扣除非常规性奖金、福利性、风险性等项目后的正常工作时间的月工资确定。”

[2] 根据《劳动合同法》第 18 条的规定，在劳动报酬发生争议时，用人单位和劳动者可以协商解决；如果协商不成则适用集体合同的规定；如果没有集体合同或者集体合同未约定报酬的，施行同工同酬；在没有集体合同或者集体合同未约定劳动条件等标准的，适用国家规定。

“如工资系打包支付，或双方形式上约定的‘正常工作时间工资’标准明显不合常理，或有证据可以证明用人单位恶意将本应计入正常工作时间工资的项目归入非常规性奖金、福利性、风险性等项目中，以达到减少正常工作时间工资数额计算目的的，可参考实际收入×70%的标准进行适当调整。”

同时，《上海高院解答》规定了基数的最低标准，即“不得低于本市月最低工资标准”。

笔者注意到，在实践中，上海法院对 70%的折算标准也有采纳，以下是笔者检索到的上海市的两个案例。

在上海市第一中级人民法院作出的（2015）沪一中民三（民）终字第 389 号判决中，由于某印刷有限公司和劳动者王某对劳动报酬的金额和组成产生争议，无法确定劳动者应得的工资数额是否为打包工资，法院从公平合理的角度出发以月工资的 70%作为加班工资计算基数。

上海市第二中级人民法院在（2014）沪二中民三（民）终字第 341 号案件中，支持了原审法院的观点，即“根据上海市工资支付办法中就加班工资的计算基数的确定原则，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相对应的工资标准确定，集体合同确定的标准高于劳动合同约定标准的，按集体合同标准确定；劳动合同、集体合同没有约定、又无法协商确定的，根据劳动者所在岗位正常出勤月工资的 70%（不低于最低工资标准）确定。”并据此大连某物流有限公司上海分公司向劳动者陈某支付的加班工资按照基本工资、绩效奖等总和的 70%作为计算基数。

（二）北京

关于加班费的计算基数如何确定的问题，《北京高院解答》的第 22 点明确规定，“劳动者加班费计算基数，按照法定工作时间内劳动者提供正常劳动应得工资确定，但是每月加班费不计到下月加班费计算基数中”，同时《北京高院解答》还规定了具体的计算方法，由于篇幅较长，为了方便理解，笔者将其计算方式归纳如下：

第一，用人单位与劳动者在劳动合同中约定了加班费计算基数的从其约定，但是如果该约定低于合同工资，则按照合同工资来认定。

第二，如果劳动者在正常提供劳动的情况下，双方实际发放的工资标准高于原约定工资标准的，则视为双方变更了合同约定的工资标准，以实际发放的工资标准作为计算基数。如果实际发放的工资标准低于合同工资，在能够认定为双方变更了合同工资的情况下，也以实际发放的工资标准作为计算基数。[3]

第三，如果劳动合同没有约定工资数额或者约定不明的，应当以实际发放的工资作为计算基数。且应当包含用人单位按月直接支付给职工的工资、奖金、津贴、补贴等都属于实际发放的工资，应包括“基本工资”、“岗位津贴”等所有工资项目。但是加班费（前月）、伙食补助等应当被扣除。

第四，劳动者的当月奖金具有“劳动者正常工作时间工资报酬”性质的,属于工资组成部分。劳动者的当月工资与当月奖金发放日期不一致的,应将这两部分合计作为加班费计算基数。用人单位不按月、按季发放的奖金，根据实际情况判断可以不作为加班费计算基数。

有关年终奖是否应被纳入加班费计算基数的问题，笔者进行了案例检索，在（2018）京 02 民终 10801 号案中，北京市第二中级人民法院支持了林某主张某公司应以其离职前 12 个整月的平均工资（不含年终奖）为基数计算并向其支付加班费的诉讼请求。同样地，在（2018）京 0115 民初 1884 号、（2015）西民初字第 5241 号、（2015）西民初字第 5240 号等生效裁判中，法院也同样剔除了年终奖。因此，从目前的案例检索情况来看，笔者认为通常情况下年终奖不应被纳入加班费的计算基数。

第五，具体计算日平均工资或者每小时的平均工资时，应当按照每月工作时间为 21.75 天和

[3] 笔者检索到北京市第二中级人民法院在（2016）京 02 民终 8420 号案中，认可合同工资变更。在该案中劳动者（原告）合同工资为 14,050 元，但劳动者提供的工资表显示每月工资为 13,732 元，12,410 元，13,500 元等，低于合同工资，“在原告作为碧优缇北京分公司总经理，负责管理运营碧优缇北京分公司的五年时间里，自行统计审核上报全体员工工资，应视为对原劳动合同工资条款内容的变更与默认。”

174 小时进行折算。也就是说，如果加班的周期以天来计算，则以日平均工资为计算基数，如果加班周期以小时来计算，则以小时平均工资为基数。

以上是关于四种常见情形计算基数的梳理和总结。可以看出，即便是在相同情况下，各地的司法实践也各有差异。这种差异体现出劳动争议案件地域化的特征，也增加了我们处理劳动问题的难度。为了能够更加直观感受，也为了方便读者理清各种差异，笔者就本文的分析整理附表如下，以供读者参考。

附表一：常见劳动争议中计算基数梳理表（上海市和北京市）

序号	类别	上海市	北京市
1.	解除劳动合同经济补偿金	1） 劳动者在劳动合同解除或者终止前十二个月的平均工资； 2） 劳动者月工资高于用人单位所在直辖市、设区的市级人民政府公布的本地区上年度职工月平均工资三倍的，向其支付经济补偿的标准按职工月平均工资三倍的数额支付。 *（依据：《劳动合同法》第四十七条）*	
		平均工资=离职前 12 个月的应得工资*÷12 个月 *离职前 12 个月的应得工资包括：劳动者的工资性收入和年终奖，以及用人单位代扣代缴的个人部分的社会保险金、税费等 *（依据：《上海市高级人民法院关于审理劳动争议案件若干问题的意见》第 6 条）*	平均工资=离职前 12 个月的应得工资*÷12 个月 * 离职前 12 个月的应得工资包括：计时工资或者计件工资以及奖金、津贴和补贴等货币性收入，其中包括正常工作时间的工资，还包括劳动者延长工作时间的加班费，以及劳动者应得的年终奖或年终双薪（应按每年十二个月平均分摊）。另外，用人单位代扣代缴的社会保险和住房公积金以及所得税应当一并计入。 *（依据：《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件法律适用问题的解答》第 21 条第（4）款）*
2.	未签订书面劳动合同的双倍工资	双倍工资差额计算基数（月工资）按照如下顺序确定：	月工资*=基本工资+岗位工资+职务工资+工龄工资+级别工资-不固定发放的提成工资和奖金 *实务中，此种情形下计算月工资的范围最小，首先该工资为税后工资，其次，不包括加班费、年终奖、各种福利性津贴补贴以及不固定发放的提成工资、奖金。

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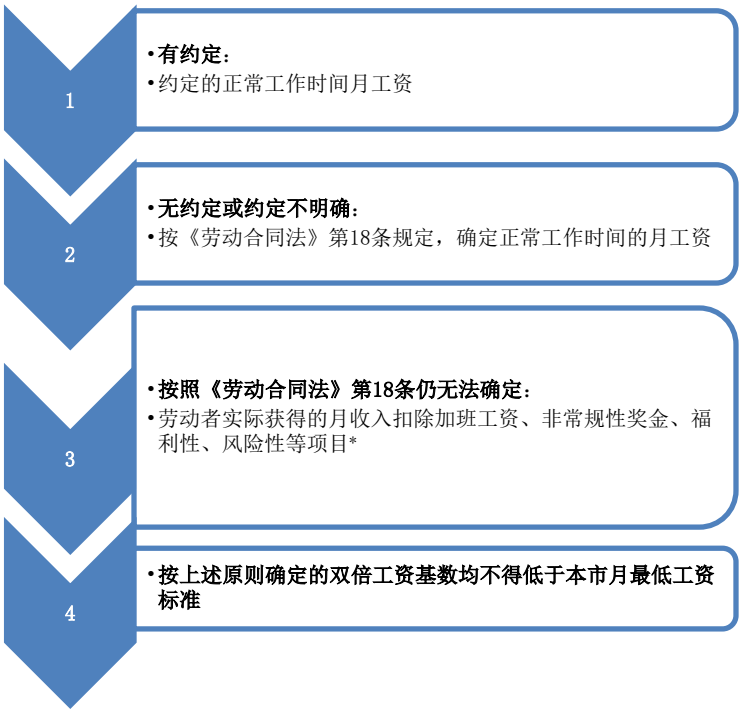
<td> 

*如月工资未明确构成项目，且用人单位无法举证的，则直接按照劳动者实际获得的月收入确定。

（依据：2010 年《上海市高级人民法院关于审理劳动争议案件若干问题的解答》第一条）</td>
<td>（依据：2017 年《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件法律适用问题的解答》第 21 条）</td>
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<td>3.</td>
<td>应休未休法定带薪年休假的</td>
<td colspan="2">1） 职工本人的月工资除以月计薪天数（21.75 天）；
2） 前款月工资是指职工在用人单位支付其未休年休假工资报酬前 12 个月剔除加班工资后的月平均工资，在本用人单位工作时</td>
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3) 职工在年休假期间享受与正常工作期间相同的工资收入，实行计件工资、提成工资或者其他绩效工资制的职工，日工资收入的计发办法按照本条第一款、第二款（即以上第 1 点、第 2 点）的规定执行。

（依据：《企业职工带薪年休假实施办法》第十一条）</td></tr>
<tr><td></td><td></td><td>日工资收入=（劳动者前 12 个月实际工资收入—加班费）÷12 个月÷21.75

（依据：《企业职工带薪年休假实施办法》第十一条；（2016）沪 02 民终 4144 号案、（2015）沪一中民三（民）终字第 1912 号案）</td><td>日工资收入=每月岗位工资÷21.75

（依据：（2016）京 03 民终 4528 号案、（2014）一中民终字第 02903 号案）</td></tr>
<tr><td>4.</td><td>加班工资</td><td>加班工资计算基数（月工资）按如下顺序确定：</td><td>加班工资计算基数（月工资）按如下顺序确定：</td></tr>
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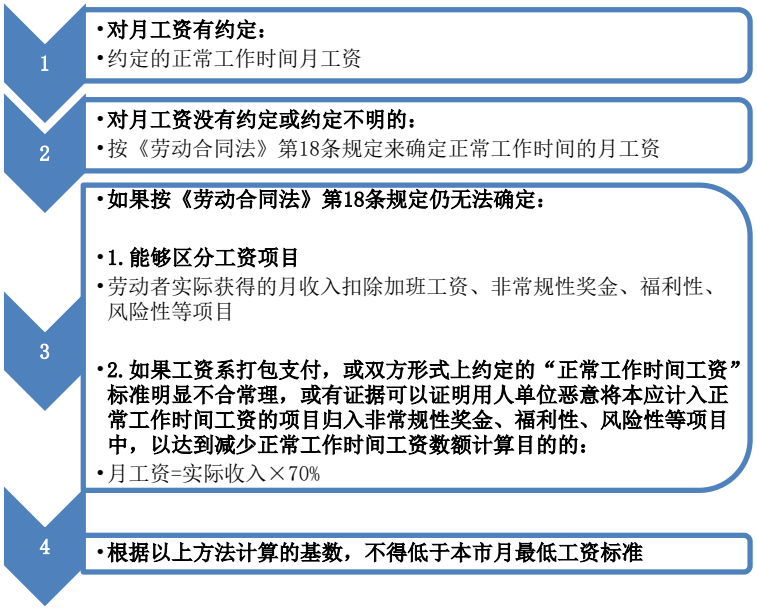
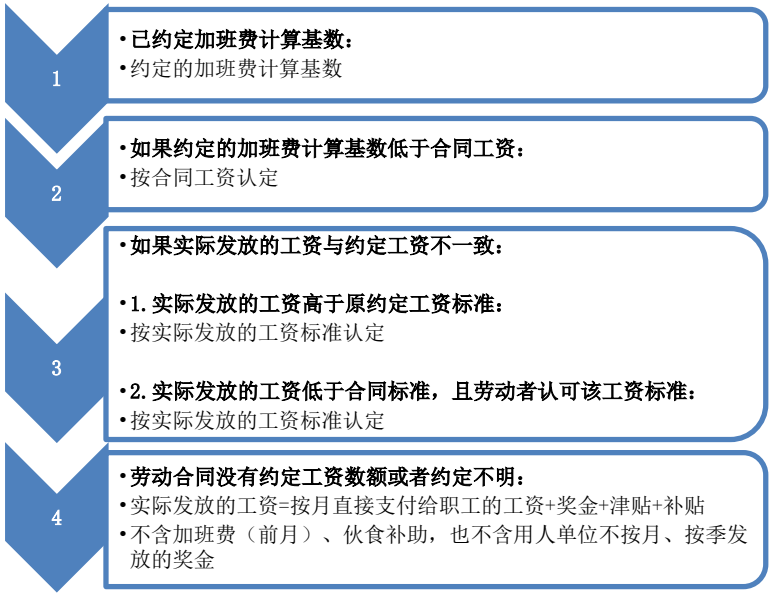


（依据：2010 年《上海市高级人民法院关于审理劳动争议案件若干问题的解答》第二条）



（依据：2017 年《北京市高级人民法院、北京市劳动人事争议仲裁委员会关于审理劳动争议案件法律适用问题的解答》第 22 条）

Methods for Calculating Common Baselines in Labor Disputes

By Wei Wei Gu / Angela Sui / Suri Hu

Introduction

When a calculation problem occurs in a labor dispute, it is common to find the baseline unclean even though the calculation method is clearly defined in the statutes. Therefore, with this as a starting point, this article will generalize different calculation baselines in labor disputes.

With “baseline” or “calculation baseline” as the key words in our research, we found a total of 130,659 relevant labor disputes cases in the database of Alpha. It can be seen from the distribution in terms of time and geography that the occurrence of the labor disputes cases of such type tend to increase after 2013 with Shanghai and Beijing among the areas where they occur in a high frequency.

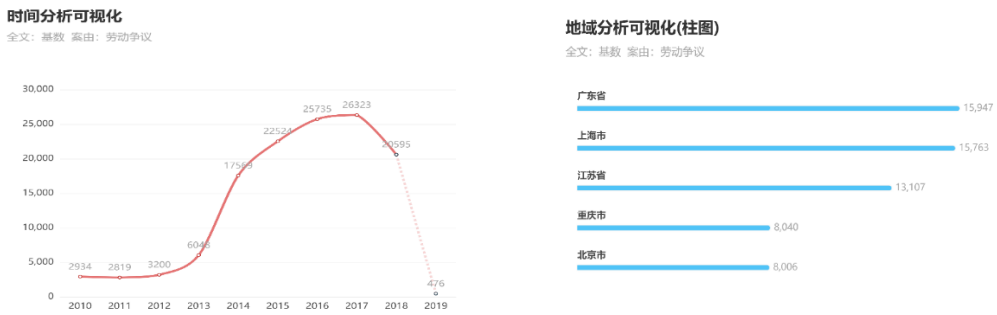


Diagram 1: Diagram Showing the Time and Geographical Distribution of Labor Disputes Cases Concerning Calculation Baseline

The citation rate of statutes in such judgments indicates that Article 47 and Article 46 of the *Labor Contract Law* (monetary compensation for terminating labor contracts) are on the top. Ranked right after it is Article 82 of the *Labor Contract Law* (double wages without a

signed written labor contract). Besides, Article 3 of the *Employees' Paid Annual Vacation Regulations* (salary conversion for the annual vacation that an employee may but did not take) and Article 9 of the *Interpretation of Several Issues Concerning the Application of Law in the Trial of Labor Disputes (III)* (overtime pay) are also often cited in judgments.

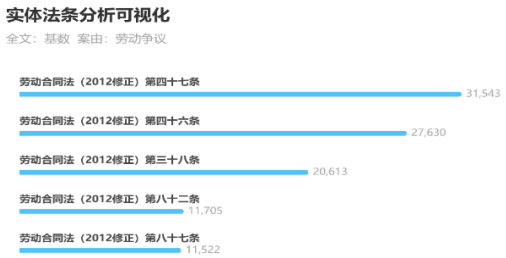


Diagram 2: Diagram Showing the Citation Rate of Statutes

In view of the results of data analysis on geographical distribution and the focus of disputes above, we are going to use Beijing and Shanghai as examples and, taking into account of relevant regulations and rules and typical cases, study four common calculation baselines in four situations, i.e., monetary compensation for terminating labor contracts, double wages without a signed written labor contract, salary conversion for the annual vacation that an employee could have taken but did not take, and overtime pay.

1. Monetary Compensation for Terminating Labor Contracts

Article 47 of the *Labor Contract Law* stipulates that an employee shall be paid monetary compensation based on the number of years he has worked for the employer at the rate of one month's wages for each full year worked. Any period of not less than six months but less than one year shall be counted as one year. The monetary compensation payable to an employee for any period of less than six months shall be one-half of his monthly wage. If the monthly wage of an employee is three times higher than the average monthly wage in the previous year for employees as announced by the government at the municipal level directly under the central government or at the city-with-district level where the employer

is located, the rate for the monetary compensation paid to him shall be three times the average monthly wage of the employee but not more than 12 years of work. The term "monthly wage" mentioned in this Article refers to the employee's average wage for the 12 months prior to the cancellation or termination of his labor contract.

According to the provision mentioned above, the calculation baseline of financial compensation is "an employee's average wage for the 12 months prior to the cancellation or termination of his labor contract." However, in practice, the determination of "average wage"—weather it means the average wage an employee deserves or his actual wages—often captures the attention of both employees and employers.

1.1 Shanghai

According to Article 6 of the *Opinions of the Shanghai Higher People's Court on Several Issues Concerning the Trial of Labor Dispute Cases*, the calculation standard of monetary compensation shall be the average wage for the 12 months prior to the termination of the labor contract. The main difference between the monthly wages an employee deserves and the actual wages lies in the various deductions and fees, including individual social insurance premiums, taxes or union dues, etc. Since the social insurance premiums, taxes , fees and the like that should be deduced by the employer are parts of the personal labor earnings, the employer only assumes the duty of deduction. Therefore, these parts of the money shall be included in the wage income and considered when calculating monetary compensation.

In short, when calculating monetary compensation, the social insurance premiums, taxes, fees and the like that shall be deducted by the employer shall also be included in the calculation baseline of the monetary compensation which should not be based on an employee's actual income.

The author found that in the case of (2016) Hu 01 Min Zhong No. 3462, the Shanghai No. 1 Intermediate People's Court cited the rule mentioned above. The court held that "Since the social insurance premiums, taxes, fees and so on are parts of personal labor earnings of the employee, the employer only assumes the duty of deduction. Therefore, these parts of the money, as wage income, shall be treated as the baseline of the monetary compensation."

Similarly, in the case of (2012) Hu II Zhong Min III (Min) Zhong No.1577, the Shanghai No. 1 Intermediate People's Court included the wage income and the year-end bonus in the calculation baseline (after deducting benefits, such as the meal subsidy for the business trip), and deemed the social insurance premiums, taxes, and other expenses that shall be deducted by the employer as part of the calculation baseline.

1.2 Beijing

The practice in Beijing is similar to that in Shanghai. According to Item 4, Article 21 of the *Beijing High People's Court and Beijing Labor and Personnel Dispute Arbitration Commission's Answers to Question Concerning the Application of Laws When Deciding Labor Dispute Cases ("Beijing High Court's Answers") the hourly wage or piece-rate wage as well as* monetary income such as bonuses, allowances and subsidies shall be included in the calculation of the average salary for 12 months before the employee terminates the labor contract. The monetary income also includes wages for normal working hours and overtime pay for extended working hours. The year-end bonus or year-end double salary the employee deserves shall be equally divided into 12 months per year when included in the calculation baseline. The monthly wage standard for calculating monetary compensation under Article 47 of the *Labor Contract Law* shall be determined in accordance with Article 27 of the *Regulations for the Implementation of the Labor Contract Law*, wherein the "wages an employee deserves" includes social insurance, housing fund and income tax paid by individuals.

In Beijing NO.2 Intermediate People's Court's judgment in the case of (2019) Jing 02 Min Zhong No.1592 , the court found the contract wage of the employee was 35,000 yuan/month, and the employer's entry date was April 2, 2018. The employer terminated the labor relationship on April 25, 2018. The court finally determined that the employer shall pay the monetary compensation in the amount of 175,000 yuan calculated on the basis of income which the employer deserves.

In a labor dispute case between a group company and Gao, the Beijing No.2 Intermediate People's Court pointed out that "both parties agreed that the wage of the employee consisted of the actual wage of 24,000 yuan, five insurances, housing fund, and individual income tax. According to the salary distribution form, social security, housing fund account and tax payment certificate stipulated by both parties, the average salary of the employer 12 months before his departure was 32,205.90 yuan. This indicates that the Beijing district court tends to calculate the average wage by adding the actual wages with the incomes deducted by the employer. Of course, in this case, after determining the average salary, the court decided that the calculation baseline of monetary compensation should be three times the amount of the employee's average monthly salary, since the employee's average monthly salary was three times higher than employees' 2018 average monthly salary in Beijing.

It should be noted that in addition to the monetary compensation for terminating labor contracts under normal circumstances, the Labor Contract Law also stipulates the calculation baseline of the punitive damages when the employer illegally terminates the labor contract should also be determined according to the monetary compensation for the termination of the labor contract.[1]

2. Double Wage Without a Signed Written Labor Contract

[1] Article 48 and Article 87 of the Labor Contract Law.

2.1 Shanghai

As to the calculation baseline of the double wage in the absence of a signed written labor contract ("**Double Wage System**"), the Shanghai High Court issued the *Answers to Several Issues Concerning the Trials of Labor Dispute Cases by the Shanghai High People's Court* in 2010 ("***Shanghai High Court Solution(2010)***"), and Article 1 clarifies the calculation baseline of double wage.

According to the principle in Article 1 of the *Shanghai High Court Solution (2010)*, if there is an agreed monthly salary, the labor remuneration for normal working hours agreed by the two parties—or the contract salary, in other words—shall be the calculation baseline. If there is no agreement or the agreement on the monthly salary is not clear, the monthly salary of normal working hours shall be determined in accordance with Article 18 of the *Labor Contract Law* and be used as the calculation baseline.

However, if the contract salary still cannot be determined, the employee's monthly income for normal working hours, that is the employee's actually paid monthly income after deducting overtime pay, unconventional bonus, welfare, and risk income and the like, shall be deemed as the calculation baseline.

It indicates that, unlike monetary compensation, the calculation baseline of double wage is the labor earnings for normal working hours, excluding the overtime wages, unconventional bonuses, welfare and other items. In addition, regarding the problem of deducing overtime pay and other items mentioned above from actually paid monthly income. Item 3, Article 1 of the *Shanghai High Court solution (2010)* stipulates that burden of proof shall be borne by the employer, and if the employer fails to complete the burden of proof, the employee's actually paid monthly income shall be deemed as the calculation baseline of double wage.

At the same time, the Shanghai High Court prescribes that the calculation baseline should not be lower than the monthly minimum wage standard in Shanghai, regardless of the type of the calculation method adopted.

2.2 Beijing

According to Article 21 of the *Beijing High Court's Answers*, since the salaries paid in a monthly, like the basic salary, post salary, job salary, seniority wage, and grade salary, are relatively fixed for they have the characteristics of continuity and stableness, they belong to the wages for normal working that an employee deserves, and shall be determined as the calculation baseline for the double wage difference without a signed labor contract when determining the standard of "double wages."

The non-fixed payment like the performance wages and bonuses are generally not used as the calculation baseline for the double wage difference without a signed labor contract.

3. Conversed Salary For Annual Vacation That Employees Could Have Taken But Did Not Take

According to Article 11 of the *Implementation Measures on Paid Annual Vacation for Employees of Enterprises* ("***Implementation Measures of Annual Vacation***"), the daily salary for the purpose of calculating the payment for the annual vacation that an employee didn't take shall be based on the amount after dividing his/her monthly salary by the number of working days in a month (21.75 days). The aforementioned monthly salary refers to the average of 12 months' salaries (excluding overtime pay) received by the employee before the employer makes the payment for annual vacation. Where the employee has been employed for less than 12 months, the average salary shall be calculated by reference to the actual number of working months. During the annual vacation, an employee is entitled for the salary on par with what he/she receives during normal working days. Where an

employee is paid piece-rate wages, processing royalties or other wages calculated by reference to accomplishment, the calculation and payment of daily wages shall be calculated by reference to the provisions in paragraph 1 and 2 of this article.

3.1 Shanghai

To clarify Shanghai court's understanding of the concept of "monthly average salary" in the compensation of paid annual vacation, the author lists the following two related cases.

In the case of(2016) Hu 02 Min Zhong No.4144, the employer's annually actual income was 93,996.40 yuan, and the actual wage was 90,074 yuan after deducting the overtime pay of 3,922.40 yuan. The calculation method adopted by the first instance court was: 90,074 yuan ÷ 12 months ÷ 21.75 × 15 days × 200%. It means the calculation baseline for the compensation of paid annual vacation was the monthly average wage without overtime pay. The Shanghai NO.2 Intermediate People's Court finally upheld this calculation result."

Similarly, in the case of (2015) Hu I Zhong Min III Zhong No. 1912, the Shanghai NO.2 Intermediate People's Court calculated the salary in the year prior to the termination of labor contract on the basis of the standard of monthly salary described by Yang. After finding the fact that the employee could have taken sixteen days of vocation but didn't take it, the court determined the salary to be paid by the employer for the annual vacation that the employee could have taken but didn't take after deducting all types of overtime pay.

Therefore, from the cases in Shanghai that we've searched, the "monthly average wage" of conversed salary for annual vacation shall be the wages after deducting overtime pay.

3.2 Beijing

Quite different from the practice in Shanghai where in the determination of calculation

baseline district people's courts would deduce the overtime pay, district courts in Beijing would directly use the monthly fixed base salary as the calculation baseline for the conversed salary for annual vacation.

In the case of (2016) Jing III Min Zhong No. 4528, the Beijing No.3 Intermediate People's Court held that as Wang acknowledged, the actual salary of his income should include night shift duty, overtime pay for holidays, other payables, heatstroke prevention fee, and overtime pay. But the above items shall not be included in the calculation baseline of the conversed salary for annual vacation. The court of first instance runs the calculation based on number of days when Wang didn't take annual vacation and his fixed monthly basic salary. The Beijing No.3 Intermediate People's Court found the calculation result in the first trial correct and upheld it.

Similarly, in the case of (2014)No.2 Zhong Min Zhong No. 04290, the Beijing No.1 Intermediate People's Court held that during the period of February 6, 2009 to September 5, 2011, the employee Zheng had 30 days of annual vacation, and the company shall pay Zheng the conversed salary in the amount of 13,793.10 yuan for the annual vacation she did not take. The calculation result was based on 5000 yuan each month, the amount of the basic wage agreed in the labor contract.

Therefore, in terms of the calculation baseline of the conversed salary for the statutory annual vacation, the calculation methods adopted by Beijing and Shanghai are nuanced. District courts in Shanghai used an employee's actually paid salary after deducting overtime pay as the calculation baseline, while district courts in Beijing directly used the basic wage of an employee as the baseline.

4. Overtime Pay

4.1 Shanghai

According to Article 9 of the *Measures for the Payment of Wage in Shanghai Enterprises*, the calculation baseline for overtime pay is the monthly salary for employee's position for a normally attendance rate, excluding year-end bonus, subsidies for commuting to and from work, work meals and housing, allowance for midnight shift and summer high-temperature, overtime pay, and salaries paid under special circumstances.

Article 2 of the *Shanghai High Court's 2010 Answers to Certain Issues Concerning Labor Disputes* ("***Shanghai High Court's Answers***") stipulates that "If there is an agreement on monthly wages between an employer and an employee, the baseline of overtime wages shall be determined according to the monthly salary of the normal working hours agreed by the parties. If the parties do not agree on the monthly wages or the agreement is unclear, the calculation baseline shall be the monthly salary for normal working hours which shall be determined according to Article 18 of the *Labor Contract Law*."[2]

"If it fails to determine the wages for normal working hours according to Article 18 of the *Labor Contract Law*, the baseline for overtime wages is the monthly income earned by the employee, and non-conventional bonus, welfare, risk and other items shall be subtracted from it."

"With 70% of the actual income as a reference for calculation, proper adjustment can be made if wages are paid in the form of a package, when the 'normal working hours wages' standard agreed by the parties is obviously unreasonable, or there is evidence showing that the employer maliciously classifies the items that should've been included in the normal working hours wages into non-routine bonuses, welfare, risk and other items to reduce the wages for normal working hours."

[2] According to Article 18 of the Labor Contract Law, where a dispute occurs because a labor contract is unclear on the provisions for labor remuneration, the employer and the employee may re-negotiate; where the negotiation is unsuccessful, the provisions of the collective contract shall apply; where there is no collective contract or where the collective contract has no provision on labor remuneration, same remuneration shall be paid for same job position; where there is no collective contract or where the collective contract has no provisions on working conditions etc., the relevant provisions of the State shall apply.

At the same time, the *Shanghai High Court's Answers* stipulates the minimum standard of the baseline "shall be no less than the monthly minimum wage standard of this city."

The author noticed that, in practice, courts in Shanghai also adopted the 70% conversion standard, as can be shown by the two typical cases in Shanghai as below.

In the case of (2015) Hu YI Zhong Min III (Min) Zhong No. 389, the Shanghai No. 1 Intermediate People's Court adopted 70% of the monthly salary as the baseline of overtime pay from a fair and reasonable perspective, since there were disputes between the Print Company and Wang over the amount, the component, and the form of payment whether in the form of a package or not of the wage.

In the case of (2014) Hu II Zhong Min III (Min) Zhong No. 341, the Shanghai No. 2 Intermediate People's Court upheld the judgement of the first instance court that "According to the principle of determining the baseline of overtime pay in the *Measures for the Payment of Wage in Shanghai Enterprises*, if there is an agreement in the labor contract, the baseline shall be no less than the wage standard corresponding to the position of the employee in the labor contract. If wage standard of the collective contract is higher than the labor contract, the baseline shall be determined by the collective contract. In the case that there is no agreement in the labor contract or the collective contract and the parties fail to reach consensus, the baseline shall be determined according to 70% of the monthly position salary for normal attendance (no less than the minimum wage)." Therefore, the calculation baseline of overtime pay that Dalian Logistic Company shall pay to the employee Chen was 70% the amount of his basic salary and performance bonus.

4.2 Beijing

Regarding the determination of the calculation baseline for overtime pay, Article 22 of the *Beijing High Court's Answers* clearly stipulates that "The calculation baseline of overtime pay

shall be determined according to an employee's legally available working hours in the statutory working hours, but the overtime pay for previous month shall not be counted in the calculation baseline." At the meanwhile, the *Beijing High Court's Answers* also stipulates the specific calculation method, and due to its length, we summarize it as follows for your understanding convenience:

First, if an overtime pay calculation baseline is agreed between an employer and an employee in the labor contract, it shall be determined according to their agreement. But if the agreed amount is lower than the contract salary, the overtime pay shall be determined according to the contract salary.

Second, if the actual wages for normal working are higher than the standard of originally agreed wages for normal work, it shall be deemed that the two parties have changed the wages standards in the labor contract. The actual wages shall be deemed as the calculation baseline. If the actual wages are less than the contract salary, the actual wages shall also be deemed as the calculation baseline provided it can be decided that the contract salary has been changed by both parties.[3]

Third, where the amount of wages is not specified in the labor contract or the specification is unclear, the actual wages shall be deemed as the calculation baseline, which should include the wages, bonuses, allowances, subsidies and all items belonging to actual salary that are paid by the employer on a monthly basis, whether in the names of "basic salary," "post allowance" and all other items of salary. However, the overtime pay, food allowance and the like paid in the previous month shall be deducted.

[3] The author found in the judgment of (2016) Jing 02 Min Zhong No.8420, the Beijing NO.2 Intermediate People's Court recognized the adjustment of contract salary. The employee (plaintiff)'s contract salary was 14,050 yuan, but his salaries were 13,732 yuan, 12,410 yuan,13,500 yuan, etc., as reflected by the salary sheet submitted by the employee, which was lower than the contract salary. The court held that "In the five years during the plaintiff was the general manager of Biyouti Beijing Branch and responsible for managing the operation of Biyouti Beijing Branch, he examined, audited and reported the salary of all employees. Accordingly, it should be considered that the original labor contract salary clause have been adjusted and defaulted.".

Fourth, an employee's monthly bonus should be considered a part of wages if it bears the nature of "remunerations for an employee's normal working time." If the date of an employee's wages being paid is inconsistent with that of his bonuses being paid, the sum of these two shall be considered the basis for calculating overtime pay. The bonuses not paid on a monthly or quarterly basis by the employer may not be calculated as the baseline for overtime pay according to actual conditions.

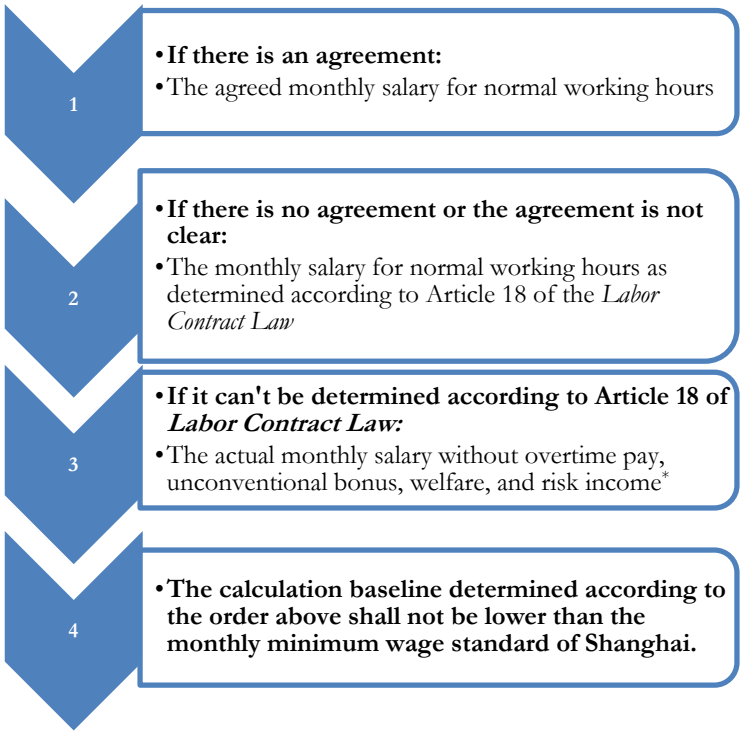
We searched relevant cases regarding the problem weather the year-end bonus shall be included in the calculation baseline of overtime baseline. In the case of (2018) Jing 02 Min Zhong No. 10801, the Beijing No.2 Intermediate People's Court supported Lin's claim that the employer should pay Liu the overtime pay on the basis of the average salary of 12 full months before his departure (excluding the year-end bonus). Similarly, courts also deduced the year-end bonus in the effective judgments of (2018) Jing 0115 Min Chu No. 1884, (2015) Xi Min Chu No. 524, and (2015) Xi Min Chu No. 5240. Therefore, in light of the case research results so far, the author takes the view that year-end bonus generally should not be included in the calculation baseline.

Fifth, average daily wage or average hourly wage should be converted on the basis of 21.75 days or 174 hours as the working time in a month. In other words, if the overtime pay cycle is calculated on days, the average daily wage shall be the baseline; and if calculated on hours, the average hourly wage shall be the baseline.

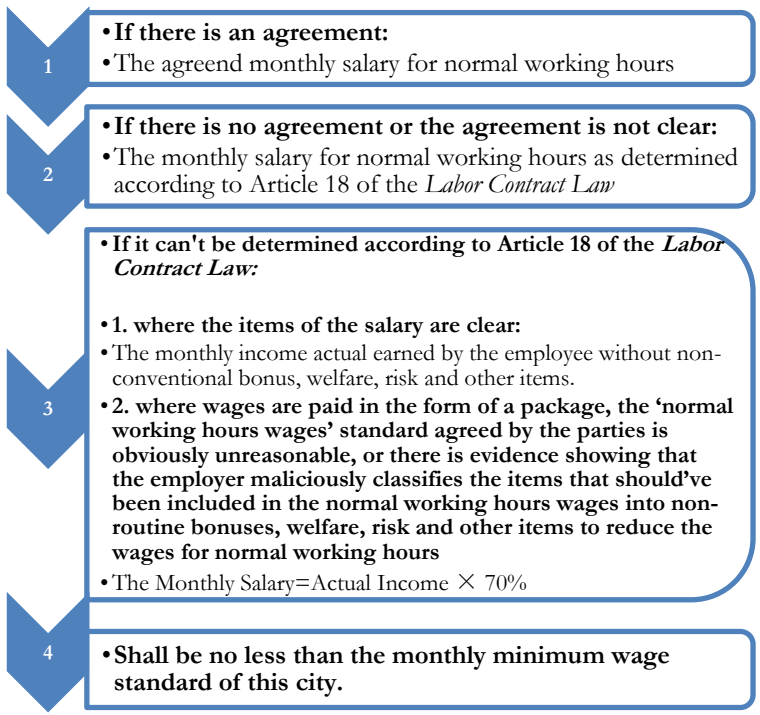
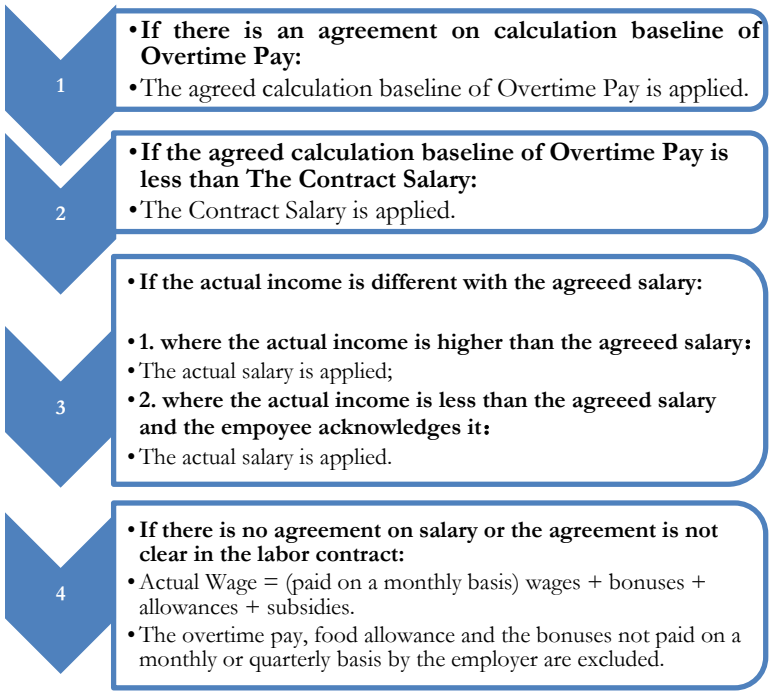
The above is a collection and summary of the calculation baselines in four common situations. It can be seen that even in the same situation, judicial practices vary among different areas. The differences reflect the regional characteristic of labor dispute cases and increase the difficulty in our dealing with labor issues. To enable all sorts of these practical differences to be understood more intuitively and also facilitate readers' understanding, the author summarizes this article into the following table for readers' reference.

Table 1: The Collection Table of Common Calculation Baselines in Labor Disputes (Shanghai and Beijing)

NO.	Types	Shanghai	Beijing
5.	Monetary Compensation for Terminating Labor Contracts	3) The employee's average wage for the 12 months prior to the cancellation or termination of his labor contract 4) If the monthly average wage of the employee is three times higher than the average monthly wage in the previous year for employees as announced by the government at the municipal level directly under the central government or at the city-with-district level where the employer is located, the rate for the financial compensations paid to him shall be three times the average monthly wage of employees and shall be for not more than 12 years of work. *(Basis: Article 47 of the Labor Contract Law)*	
		Average Wage = gross-pay of 12 months prior to departure* ÷ 12 months * Gross-pay of 12 months prior to departure includes: the employee's wage income, year-end bonus, social insurance premiums, taxes and fees and so on that should be reduced by the employer. *(Basis:* Article 6 of *the Opinions of the Shanghai Higher People's Court on Several Issues Concerning the Trial of Labor Dispute Cases.)*	Average Wage= gross-pay of 12 months prior to departure* ÷ 12 months * Gross-pay of 12 months prior to departure includes: hourly wages or piece-rate wages as well as monetary income such as bonuses, allowances and subsidies, which extends to wages for normal working hours, overtime pay for extended working hours, and the year-end bonus or year-end double salary that the employee deserves (which shall be equally divided into 12 months per year). Besides, social insurance, housing fund and income tax that should be deduced by the employer should also be included in the calculation as well. *(Basis:* Item 4, Article 21 of the *Beijing High People's Court and Beijing Labor and Personnel Dispute Arbitration Commission's Answers to Question Concerning the Application of Laws When Deciding Labor Dispute Cases.)*
6.	Double Wages Without a	The calculation baseline of double wages (monthly salary) is determined in the following order:	Monthly Salary* = Basic Salary + post salary + job salary + seniority

	Signed Written Labor Contract	 * If the salary item is not clear and the employer fails to prove it, the employee's actual monthly income shall be determined as the baseline *(Basis:* Article 1 of the *Shanghai High Court solution (2010).)*	wage + grade salary - performance wages that are not fixedly issued or bonuses * In practice, the range of monthly salary is the smallest. First, the salary is after-tax wages. Second, overtime pay, year-end bonuses, various welfare subsidies, and unpaid fixed commissions and bonuses are not included.

			(Basis: Article 21 of the *Beijing High People's Court and Beijing Labor and Personnel Dispute Arbitration Commission's Answers to Question Concerning the Application of Laws When Deciding Labor Dispute Cases.)*
7.	Conversed Salary for Annual Vacation that Employees May but Did not Take	4) Dividing the monthly salary of an employee by the number of working days in a month (21.75 days). 5) Where the monthly salary aforementioned refers to the average of 12 months' salary (excluding overtime pay) received by the employee before the employer makes him/her payment for annual vacation, or where the employee has been employed for less than 12 months, the average salary shall be calculated by reference to the actual number of months. 6) Where the employee is entitled to be paid during annual vacation in an amount on par with what he/she receives during normal working days, or where the employee is paid piece-rate wages, processing royalties or other wages calculated by reference to accomplishment, the calculation and payment of daily wages shall be calculated by reference to paragraph 1 and 2 of this article (i.e., the aforementioned point 1 and point 2). *(Basis:* Article 11 of the *Implementation Measures on Paid Annual Vacation for Employees of Enterprises.)*	
		Daily Salary = (an employee's actual salary of 12 months prior to departure – overtime wages) ÷ 12 months ÷ 21.75 *(Basis: Article 11 of the Implementation Measures on Paid Annual Vacation for Employees of Enterprises, case of (2016) Hu 02 Min Zhong No.4144, case of (2015) Hu I Zhong Min III Zhong No. 1912)*	Daily Salary = Monthly Post Salary ÷ 21.75 *(Basis: case of (2016) Jing III Min End NO. 4528, case of (2014) No.1 Zhong Min Zhong No. 02903)*
8.	Overtime Pay	The calculation baseline of overtime pay (Monthly Salary) is determined in the following order:	The calculation baseline of overtime pay (Monthly Salary) is determined in the following order:

		 *(Basis: Article 2 of thee Shanghai High Court's 2010 Answers to Certain Issues Concerning Labor Disputes)*	 *(Basis:* Article 22 of the *Beijing High People's Court and Beijing Labor and Personnel Dispute Arbitration Commission's Answers to Question Concerning the Application of Laws When Deciding Labor Dispute Cases.)*

➢ 案例分析

劳动者违反竞业限制义务，用人单位如何进行权利救济

作者：顾巍巍 | 隋天娇 | 胡翔

一、争议焦点

劳动者违反竞业限制义务后，用人单位存在哪些权利救济途径？

二、案情简介

原告：刘某

被告：A 公司

刘某与 B 公司于 2012 年 6 月 21 日订立了期限自 2012 年 7 月 2 日至 2014 年 7 月 1 日的劳动合同，2014 年 6 月 16 日，刘某与 A 公司订立了期限自 2014 年 7 月 2 日至 2016 年 7 月 1 日的劳动合同，合同约定刘某税前工资每月 4,020 元。

刘某与 A 公司之间的劳动合同中关于竞业禁止作了如下约定：“28.不论何种原因从甲方（即 A 公司）离职，未经甲方书面同意，乙方（即刘某）在本合同解除或终止后的 1 年内不得自营或者为他人经营生产与甲方有竞争关系的产品或服务，不得从事有竞争关系的业务。……29.从乙方离职后开始计算竞业禁止期时起，甲方应按竞业禁止期限每月 1,000 元的标准向乙方支付竞业禁止补偿费，竞业禁止期满，甲方即停止补偿费的支付。……32.如乙方违反竞业禁止条款，乙方应当承担违约责任，违约金需一次性向甲方支付，违约金金额为乙方离开甲方时年薪总额的 3 倍。”

刘某于 2015 年 3 月 25 日以个人原因为由提出辞职，A 公司于当日向刘某发出《解除劳动合同通知书》，同意与刘某解除劳动合同，并在通知中注明："双方签订的竞业禁止相关条款劳动合同自 2015 年 3 月 25 日起自动生效。"刘某离职前 12 个月的年薪收入为 113,226 元，离职后收到 A 公司支付的竞业限制补偿金 2,000 元。

刘某于 2015 年 4 月 8 日入职 C 公司，其经营范围为"投资咨询（经纪除外），企业管理咨询，商务信息咨询，经济信息咨询，贸易信息咨询，市场营销策划咨询（广告除外）"。

同年 4 月 26 日，B 公司更名为 A 公司，并修改了经营范围为"信息技术服务，软件开发，投资咨询，企业管理咨询，商务信息咨询，市场营销咨询，企业形象策划咨询，贸易信息咨询"。而在变更前，A 公司的经营范围是"投资咨询，企业管理咨询，商务信息咨询，市场营销咨询，企业形象策划咨询，贸易信息咨询"。

A 公司认为 C 公司属于与其存在竞争关系的企业，遂向上海市闸北区劳动人事争议仲裁委员会（"闸北劳动仲裁委"）提出申请，要求刘某继续履行竞业限制义务并停止为 C 公司工作、支付违反竞业限制违约金 339,687 元、返还 2015 年 4 月 1 日至 2015 年 5 月 31 日期间已支付的竞业限制补偿金 2,000 元。

该劳动仲裁委于 2015 年 9 月 2 日作出闸劳人仲（2015）办字第 700 号裁决：刘某继续履行与 A 公司之间竞业限制条款的约定至 2016 年 3 月 25 日并停止为 C 公司工作；刘某向 A 公司支付违反竞业限制条款的违约金计 339,678 元；刘某向 A 公司返还 2015 年 4 月 8 日至 2015 年 5 月 31 日期间的竞业限制补偿金计 1,586.21 元。

刘某不服，遂向上海市闸北区人民法院起诉。

三、审理结果

（一）一审

一审法院审理后认为，用人单位与劳动者可以在劳动合同中约定保守用人单位的商业秘密和与知识产权相关的保密事项；对负有保密义务的劳动者，用人单位可以在劳动合同或者保密协议中与劳动者约定竞业限制条款，并约定在解除或者终止劳动合同后，在竞业限制期限内按月给予劳动者经济补偿；劳动者违反竞业限制约定的，应当按照约定向用人单位支付违约金。

本案刘某、A 公司在劳动合同中对于离职后 1 年内不得从事有竞争关系的业务，该部分的约定内容于法不悖，对双方具有约束力。刘某于 2015 年 3 月 25 日与 A 公司解除劳动合同后，于 2015 年 4 月 8 日即与 C 公司建立了劳动关系，两个企业的经营范围高度相似，属于两个从事同类业务的企业，不能排除双方的竞争关系。

根据最高人民法院《关于审理劳动争议案件适用法律若干问题的解释（四）》明确规定，劳动者违反竞业限制约定，向用人单位支付违约金后，用人单位要求劳动者按照约定继续履行竞业限制义务的，人民法院应予支持。

刘某与 A 公司订立的劳动合同中关于竞业限制的补偿金总额为 12,000 元，而 A 公司主张的违约金的总额为 339,678 元（用人单位按照刘某离职前年薪的三倍主张），两者差距过于悬殊，对劳动者显失公平，A 公司也无法证明其因原告违约而造成的实际损失，故根据刘某所任职务、在 A 公司处的服务年限、可能对 A 公司竞争造成的损害等因素予以酌定，刘某应按补偿金总额的 3 倍支付 A 公司违反竞业限制约定的违约金 36,000 元。

据此，一审法院判决，刘某继续履行与 A 公司之间竞业限制条款的约定至 2016 年 3 月 25 日；刘某应于判决生效之日起七日内支付 A 公司违反竞业限制条款的违约金计 36,000 元；刘某应于判决生效之日起七日内返还 A 公司 2015 年 4 月 8 日至 2015 年 5 月 31 日期间的竞业限制补偿金计 1,586.21 元。

（二）二审

刘某不服，向上海市第二中级人民法院提出上诉。

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

四、法律分析

我国劳动立法设立劳动者竞业限制义务的同时要求用人单位支付经济补偿，其目的是平衡劳动者与用人单位之间利益。在竞业限制条款中，双方约定，用人单位支付竞业限制补偿金，而劳动者承担一定期限的限制就业义务，这种条款对双方均有拘束力，而当竞业限制条款生效时，双方已经不具备劳动关系，但用人单位和劳动者都应遵守诚实信用原则，履行各自的义务。

在实践中，常常会有“挖角”的说法，即将掌握竞争对手商业秘密的重要员工直接挖到本公司，以实现掌握竞争对手商业秘密的目的。如果本案中刘某为掌握 A 公司重要商业秘密的人员，而 C 公司出于前述目的故意利诱或教唆刘某违反竞业限制条款，则本案的处理则会发生变化。

首先，A 公司与 C 公司不存在合同约束，不存在违约的可能。

劳动者与原用人单位之间由于存在竞业合同或竞业条款的约束，如果劳动者违反竞业限制义务，是一种违约行为。但是新用人单位与原用人单位之间不可能存在合同约束，自然也就不存在承担违约责任的可能性。

因此，如果此时 A 公司基于《劳动合同法》第 91 条的规定，要求 C 公司承担违约责任，应会被法院判决驳回该主张。[1]

其次，C 公司与刘某可能被认定为共同侵权。

[1] 参见最高人民法院民事审判第一庭编著：《最高人民法院劳动争议司法解释（四）理解与适用》，人民法院出版社 2013 年版，第 207 页。

从最高院的观点来看，就新用人单位与劳动者对原用人单位的共同侵权行为，现实中主要表现为劳动者在新用人单位利诱、教唆下违反竞业限制约定，泄露相关商业秘密给新用人单位或者新用人单位出于取得竞争优势的需要，在明知劳动者还在竞业限制期限内的情况下，仍将其招用至该单位。[2]

因此，本案中的 C 公司和刘某如果存在故意、共同泄漏商业秘密的行为，则 A 公司主张 C 公司和刘某承担共同侵权责任是有可能被支持的。

最后，即便本案的 A 公司并不希望 C 公司承担共同侵权责任，也可以单独向刘某主张由其承担侵权责任。

在陈建新与化工部南通合成材料厂等商业秘密纠纷管辖权异议案[3]中，最高院认为，在涉及违约责任与侵权责任的竞合时，原告有权选择提起合同诉讼还是侵权诉讼，人民法院也应当根据原告起诉的案由依法确定能否受理案件以及确定案件的管辖；对于因劳动者与用人单位之间的竞业限制约定引发的纠纷，如果当事人以违约为由主张权利，则属于劳动争议，依法应当通过劳动争议处理程序解决；如果当事人以侵犯商业秘密为由主张权利，则属于不正当竞争纠纷，人民法院可以依法直接予以受理。

笔者检索到最高院的（2009）民申字第 1065 号案中，用人单位与劳动者之间也是由于竞业限制条款的履行发生争议，用人单位即是采取上述思路，以不正当竞争纠纷作为案由，要求劳动者承担侵权责任，而非根据劳动合同中竞业条款的约定，要求其承担违约责任。

[2] 参见刘德权编著：《最高人民法院司法观点集成（新编版）·民事卷 V》，中国法制出版社 2017 年 9 月版，第 3375 页。
[3] 本案案号为：（2008）民三终字第 9 号。

Remedies for Employee's Violation of Non-Competition Duty

By Weiwei Gu / Angela Sui / Suri Hu

1. Focus of Dispute

If an employee violates the non-competition duty, what remedies are available to the employer?

2. Case Brief

Plaintiff: Liu

Defendant: Company A

On June 21, 2012, Liu and Company B entered into a labor contract with a term from July 2, 2012 to July 1, 2014. On June 16, 2014, Liu and Company A entered into a labor contract with term from July 2, 2014 to July 1, 2016, wherein it is stipulated that Liu's pre-tax salary shall be RMB 4,020 per month.

The non-competition clauses in the labor contract between Liu and Company A stipulate: "28. For whatever reason, if leaving Party A (i.e., Company A), Party B (i.e., Liu), without the written consent of Party A, shall not be self-employed or employed by others for the operation and production of the products or services that compete with those of Party A, and shall not engage in any competitive business within one year after the cancellation or termination of this contract....29. The non-competition period commences when Party B leaves the company. Party A shall pay Party B the non-competition compensation fee during the non-competition period with 1,000 yuan per month as the standard. Party A shall stop the payment of the compensation fee when the non-competition period expires.... 32.

If Party B violates the non-competition clause, Party B shall bear the liability for breach of contract, and the liquidated damages shall be paid to Party A in a lump in the amount of three times the total annual salary of Party B when leaving Party A.”

Liu resigned for personal reasons on March 25, 2015. On the same day, Company A issued a Notice Dismissal of Labor Contract to Liu, agreeing to terminate the labor contract with Liu and indicating in the notice that “the non-competition clauses agreed by the two parties shall come into effect from March 25, 2015 automatically. The annual salary of Liu 12 months before leaving work is 113,226 yuan. It is confirmed that Liu has received the compensation of 2000 yuan in total as the compensation from Company A after his departure.

On April 2015, Liu joined Company C whose business scope consists of “Investment Consulting (except brokerage), Business Management Consulting, Business Information Consultation, Economic Information Consultation, Trade Information Consultation, and Marketing Planning Consultation (except advertising).”.

On April 26 of the same year, Company B changed its name to Company A and revised its business scope to be “Information Technology Services, Software Development, Investment Consulting, Enterprise Management Consulting, Business Information Consulting, Marketing Consulting, Corporate Image Planning Consulting, and Trade Information Consulting.” Prior to the change, Company A’s business scope was “Investment Consulting, Business Management Consulting, Business Information Consulting, Marketing Consulting, Corporate image Planning Consulting, and Trade Information Consulting.”

Company A believed that Company C was in a competitive relationship with it, and therefore submitted an application to the Zhabei District Labor and Personnel Dispute Arbitration Commission (“Zhabei Labor Arbitration Commission”), demanding Liu to

continue to fulfill the non-competition obligations, stop working for Company C, pay the liquidated damages of 339,687 yuan, and return the non-competition compensation of 2,000 yuan already paid from April 1, 2015, to May 31, 2015.

On September 2, 2015, Zhabei Labor Arbitration Commission rendered the verdict of Zha Lao Zhong (2015) Ban No. 700: Liu shall continue to perform the non-competition agreement with Company A till March 25, 2016 and stop working for company C. Liu shall pay the liquidated damages of 339,687 yuan to Company A for violating the non-competition clause and return the non-competition compensation of 1,586.21 yuan for the period from April 8, 2015 to May 31, 2015 to Company A.

Liu objected the verdict and filed a lawsuit with the Zhabei District People's Court of Shanghai.

3. Trial Results

(1) First Instance

After the trial, the court of first instance held that an employer and an employee may agree in the labor contract on the employer's trade secrets and other confidential matters related to intellectual property; if an employee has a confidentiality duty, the employer may contract with the employee to include non-competition provisions in the labor contract or enter into a confidentiality agreement, and agree to pay financial compensation to the employee on a monthly basis during the non-competition period after the termination or cancellation of the labor contract; and if the employee breaches the non-competition provisions, he/she shall pay liquidated damages to the employer in accordance with the stipulated terms.

In this case, Liu and Company A agreed in the labor contract that Liu must not engage in a competitive business within one year after leaving the company. The content of the

agreement did not violate law and is binding on both parties. Liu established a labor relationship with Company C on April 8, 2015 after he terminated the labor contract with Company A on March 25, 2015. The business scopes of the two companies are highly similar, and the two companies can be regarded as engaging in similar businesses. As such, the competitive relationship between the two companies cannot be ruled out.

In accordance with *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (IV)*, where an employee violates the non-competition agreement and thus pays the relevant liquidated damages to the employer, the people's court shall support the employer's request for demanding the employee's continued performance of the non-competition duty as agreed.

The total amount of compensation for the non-competition duty in the labor contract between Liu and Company A was 12,000 yuan, while the total amount of liquidated damages claimed by Company A was 339,678 yuan (three times the annual salary before Liu's departure). The significantly wide gap between the amount of compensation and the claimed liquidated damages is obviously unfair to the employee. Also, Company A could not prove it suffered loss which was caused by the plaintiff's breach of contract. As such, the amount of the liquated damages shall be determined according to the factors, including Liu's position, Liu's service years at Company A, and the damage that may be caused to the competition of Company A. Liu shall pay company A the liquidated damage of 3,600 yuan, three times the total amount of the compensation, for the breach of the non-competition duty.

Accordingly, the court of first instance ruled that Liu shall continue to perform the non-competition agreement with Company A till March 25, 2016. Liu shall pay the liquidated damages of 36,000 yuan to Company A for the violation of the non-competition clause within seven days from the effective date of the judgment. Liu shall return to Company A the non-competition compensation of 1,586.21 yuan for the period from April 8, 2015 to

May 31, 2015.

(2) Second Instance

Liu refused the judgement and appealed to Shanghai No. 2 Intermediate People's Court.

The court of second instance held that the judgment of first instance, which was made according to law on the basis on ascertained facts, was not improper, and therefore dismissed the appeal and upheld the original judgment.

4. Legal Analysis

The legislative purpose of requiring an employer to pay financial compensation when the employee fulfills the non-competition obligations is to balance the interests between the employee and the employer. Under the terms of the non-competition duty, the parties agree that the employer shall pay the compensation for the non-competition duty, and the employee shall bear the obligation of employment restriction for a certain period of time. Such terms are binding on both parties. Although the two parties no longer had labor relations when the non-competition clauses came into effect, the employer and the employee shall abide by the principle of good faith and fulfill their obligations respectively.

In practice, there is often a saying of "poaching," which refers to the practice of directly recruiting from a rival company a pivotal employee who possesses business secrets of the said company for the purpose of obtaining the rival company's business secrets. In this case, if Liu had been a person in possession of important business secrets of Company A, and Company C had deliberately induced or incited Liu to violate the non-competition clause for the purpose above, the result of the case would have been different.

First, there is no possibility of default in the absence of a binding contract between

Company A and Company C.

Where the employer and the employee are bound by a non-competition contract or a non-competition clause, the employee's violation of the non-competition duty constitutes a breach of contract. However, as there is no binding contract between the new employer and the original employer. So, there is no possibility for the new employer to bear the burden of default.

Therefore, if Company A claims that Company C should be held liable for breach of contract under Article 91 of the Labor Contract Law, the court shall reject it.[1]

Besides, it may be deemed that Company C and Liu had committed a joint infringement

From the viewpoints of the Supreme People's Court, the joint infringement of the new employer and the employee against the former employer is mainly manifested when the employee violates the non-competition duty by revealing relevant business secrets to the new employer under the lure and solicitation of the new employer, or when the new employer with the knowledge that the employee is still on the non-competition period recruits the employee for the purpose of gaining a competitive advantage.[2]

Therefore, in this case, if Company C and Liu had deliberately and jointly disclosed business secrets, the court may support the claim that Company C and Liu shall assume the joint tort liability.

Finally, if Company A hadn't intended to have Company C bear the burden of joint tort, it may assert the claim against Liu alone, demanding Liu to bear the tort liability.

[1] See The Supreme People's Court's Understanding and Application of Judicial Interpretation of Labor Disputes (IV), First Chamber of the Civil Trial of the Supreme People's Court, People's Court Press, 2013 edition, pp. 207.
[2] See Supreme People's Court Judicial Perspective Integration (New Edition) · Civil Volume V, Liu Dequan, China Legal Publishing House, September 2017 edition, pp. 3375.

In *Chen Jianxin v. The Ministry of Chemical Industry Nantong Synthetic Material Factory, et al,*[3], which is a business secrets case about the dispute over the jurisdiction, the Supreme Court held that the plaintiff was entitled to choose between bringing a contract litigation and tort litigation when the liability for contract and tort converges. Also, the people's court shall decide whether the case can be put into its docket and determine the jurisdiction according to the cause of action in plaintiff's complaint; for disputes arising from the non-competition agreement between the employee and the employer, if a party brings a claim for breach of contract, it should be considered a labor dispute and resolved through the procedures for settling labor disputes; and if a party brings a claim for infringement of trade secrets, it should be considered as an unfair competition dispute and heard by a people's court directly.

We found in the Supreme Court case of (2009) Min Shen No. 1065, the employer and the employee had dispute over the performance of the non-competition duty. The employer adopted the above-mentioned strategy of using the dispute over unfair competition as the cause of action, thereby demanding the employee to bear the liability for tort, rather than demanding the employee to bear the liability for breach of contract under the non-competition clauses in the labor contract.

[3] Case number: (2008) Min NO.3 Zhong NO.9.

➢ 新规速递

关于《人力资源市场暂行条例》之解读

作者：顾巍巍 | 隋天娇 | 胡翔

2018 年 6 月 29 日，为规范人力资源市场活动，促进人力资源合理流动和优化配置，促进就业创业，国务院发布《人力资源市场暂行条例》（“暂行条例”）。该办法自 2018 年 10 月 1 日起施行。

暂行条例共分为七个章节，分别规定了总则、人力资源市场培育、人力资源服务机构、人力资源市场活动规范、监督管理、法律责任和附则。笔者将这部暂行条例各部分的亮点归纳如下：

一、总则

暂行条例第一条至第六条是总则部分，规定了通过人力资源市场求职、招聘和开展人力资源服务需遵循合法、公平诚实信用的原则。

同时，第四条规定了各级人力资源社会保障行政部门（**“劳保部门”**）的职责，国务院劳保部门统筹全国的人力资源市场。县级以上地方人民政府的劳保部门则负责本行政区域内的管理工作，而发展改革、教育、公安、财政、商务、税务和市场监督等部门负责本部门职责范围内的管理工作。

二、人力资源市场培育

第七条至第十三条是有关人力资源市场培育的，我国政府建立统一开放、竞争有序的人力资源市场体系。国家、县级以上人民政府在各自的职责范围内促进人力资源在机关、企业、事业单位、社会组织之间以及不同地区之间合理流动。

三、人力资源服务机构

第十四条至第二十二条对公共人力资源服务机构和经营性人力资源服务机构的服务范围和收费进行了规制。

公共人力资源服务机构不得收取费用，国家同时通过政府购买服务的方式支持经营性人力资源服务机构提供公益人力资源服务。

经营性人力资源服务机构开展职业中介服务的，应当取得人力资源服务许可证，而开展人力资源供求信息的收集和发布、就业和创业指导、人力资源管理咨询、人力资源测评、人力资源培训、承接人力资源服务外包等人力资源服务业务的，应当自开展业务之日起 15 日内向劳保部门备案。

另外，如果经营性人力资源服务设立分支机构的，也应当在工商登记办理完毕后的 15 日内，书面报告分支机构所在地的劳保部门。相似地，在变更名称、住所、法定代表人或终止经营活动时，也应当向劳保部门书面报告。

同时，劳保部门还应当及时向社会公布取得行政许可或者经过备案的经营性人力资源服务机构名单及其变更、延续的情况。

四、人力资源市场活动规范

第二十三条至三十三条从个人求职者、用人单位和人力资源服务机构三个维度规范了人力资源的市场活动。

（一）个人求职者

个人求职者必须如实提供个人基本信息，以及其掌握的与应聘岗位相关的知识、技能和工作

经历。

（二）用人单位

用人单位发布的单位基本情况、招聘人数、招聘条件、工作内容、工作地点、基本劳动报酬等招聘信息，应当真实、合法，不得含有民族、种族、性别、宗教信仰等方面的歧视性内容。

除此之外，暂行条例特别强调了，建立劳动关系的必须与劳动者签订劳动合同，并依法办理社会保险等手续。

（三）人力资源服务机构

1、审查义务

暂行办法赋予人力资源服务机构对用人单位提供的招聘简章、营业执照或者有关部门批准设立的文件、经办人的身份证件、用人单位的委托证明等资料真实性、合法性进行审查的义务。

同时，人力资源服务机构还应当确保发布的信息真实、合法、有效。

2、合规义务

人力资源服务机构不得采取欺诈、暴力、胁迫或者其他不正当手段，不得以招聘为名牟取不正当利益，不得介绍单位或者个人从事违法活动。

经营性人力资源服务机构接受用人单位委托提供人力资源服务外包的，不得改变用人单位与个人的劳动关系，不得与用人单位串通侵害个人的合法权益。

通过互联网提供人力资源服务的，除了应当遵守暂行条例外，还应当同时遵守国家有关网络安全、互联网信息服务管理的规定。

3、安全义务

在举办现场招聘会的情况下，人力资源服务机构必须做好实施办法、应急预案和安全保卫工作方案，保证招聘现场的安全。

4、保密义务

暂行条例还强调了人力资源服务机构在业务活动中不得泄露或者违法使用所知悉的商业秘密和个人信息。

5、记录义务

人力资源服务机构应当如实记录服务对象、服务过程、服务结果等信息，且服务台账应当保存 2 年以上。

6、经营性人力资源服务机构的明示义务

所有的人力资源服务机构都应当遵循以上五项义务，而对于经营性人力资源服务机构，暂行条例还特别规定了其应当将营业执照、服务项目、收费标准、监督机关和监督电话在服务场所明示。

除此之外，从事职业中介活动的，还应当明示人力资源服务许可证。

五、监督管理

第三十四条至第四十一条对人力资源服务机构的监管进行了规制，监管机关除了劳保部门之外，公安机关还可以对人力资源市场存在的违法犯罪行为进行查处，而劳保部门应当予以配合。

就劳保部门的监管职责而言，其存在监督检查、公示、信息共享、信用分类监管、党员监管、畅通投诉举报渠道等职责。

（一）监督检查

劳保部门可以随机抽取检查对象、随机选派执法人员，对经营性人力资源服务机构进行监督检查。

在检查时，检查人员不得少于 2 人，且应当出示执法证件，并保守被检查单位的商业秘密。

（二）公示

劳保部门的检查结果应当及时向社会公布，行政处罚、监督检查结果可以通过国家企业信用信息公示系统或者其他系统向社会公示。

对经营性人力资源服务机构提交的经营情况年度报告，劳保部门可以依法公示或者引导经营性人力资源服务机构依法公示年度报告的有关内容。

（三）信息共享

劳保部门应当加强与市场监督管理等部门的信息共享。通过信息共享可以获取的信息，不得要求经营性人力资源服务机构重复提供，避免人力资源服务机构重复提供信息的情况。

（四）信用分类监管

劳保部门应当加强人力资源市场诚信建设，把用人单位、个人和经营性人力资源服务机构的信用数据和失信情况等纳入市场诚信建设体系，建立守信激励和失信惩戒机制，实施信用分类监管。

（五）流动党员监管

人力资源服务机构应当建立党组织并开展活动，加强对流动党员的教育监督和管理服务。

（六）畅通投诉举报渠道

劳保部门应当畅通对用人单位和人力资源服务机构的举报投诉渠道，依法及时处理有关举报投诉。

六、法律责任

第四十二条至第四十七条规定了人力资源服务机构以及劳保部门及其工作人员违反暂行条例相关规定的法律责任。

（一）人力资源服务机构的法律责任

未经许可擅自从事职业中介活动的，由劳保部门给予关闭或责令停业，如有违法所得的，则没收违法所得，并处 1 万元以上 5 万元以下的罚款。

开展人力资源服务业未备案的，设立分支机构、办理变更或者注销登记未书面报告的，由劳保部门责令改正，拒不改正则处以 5000 元以上 1 万元以下的罚款。

发布的招聘信息不真实、不合法，未依法开展人力资源服务业务的，由劳保部门责令改正；有违法所得的，没收违法所得；拒不改正的，处 1 万元以上 5 万元以下的罚款；情节严重的，吊销人力资源服务许可证；给个人造成损害的，依法承担民事责任。

未尽到明示义务，或建立健全内部制度或者保存服务台账，未提交经营情况年度报告的，由劳保部门责令改正；拒不改正的，处 5000 元以上 1 万元以下的罚款。

对于公共人力资源服务机构违反暂行条例规定的，由上级主管机关责令改正；拒不改正的，对直接负责的主管人员和其他直接责任人员依法给予处分。

（二）劳保部门及其工作人员的法律责任

对于不依法作出行政许可决定；或者在办理行政许可或者备案、实施监督检查中，索取或者收受他人财物，或者谋取其他利益；或者不依法履行监督职责或者监督不力，造成严重后果；或者有其他滥用职权、玩忽职守、徇私舞弊的情形的劳保部门和有关主管部门及其工作人员，则对劳保部门直接负责的领导和其他直接责任人给予处分。

另外，无论是何主体，违反暂行条例规定，构成违反治安管理行为的，应当依法给予治安管理处罚；构成犯罪的，依法追究刑事责任。

Understanding on the Interim Regulation on Human Resources Market

By Weiwei Gu / Angela Sui / Suri Hu

For purposes of regulating the market activities of human resources, promoting the rational flow and optimal allocation of human resources, and facilitating employment and entrepreneurship, the State Council issued the *Interim Regulation on Human Resources Market (“**Interim Regulation**”)* on June 29, 2018. The *Interim Regulation* came into force as of October 1, 2018.

The *Interim Regulation* consists of 7 chapters with each chapter respectively prescribing General Provisions, Cultivation of Human Resources Market, Human Resources Service Providers, Rules on Human Resources Market Activities, Supervision and Administration, Legal Liability and Supplementary Provisions. The upshots of this *Interim Regulation* are summarized as follows:

1. General Provisions

Article 1 to Article 6 are general provisions, which stipulate that job hunting, recruitment and human resources services on the human resources market shall follow the principles of legality, fairness, honesty and trustworthiness.

Meanwhile, Article 4 stipulates the responsibilities of administrative departments of human resources and social security (“**HRCC Departments**”) at all levels. The HRCC Department under the State Council shall be responsible for coordinating the national human resources market. The HRCC Departments under local people’s governments at county level or above shall be responsible for the administration of the human resources market within their own administrative regions. Various departments, including those in charge of development and reform, education, public security, finance, commerce, taxation, and

market supervision and administration, shall conduct the administration work within their respective duties.

2. Cultivation of Human Resources Market

Article 7 to Article 13 are relevant to the cultivation of human resources market. The state shall establish a human resources market system that is unified, open, competitive and orderly. The state and people's governments at county level or above shall, within their respective duties, promote the human resources to flow in a reasonable manner between governmental departments, enterprises, public institutions, and social organizations, as well as between different regions.

3. Human Resources Service Providers

Article 14 to Article 22 stipulate the service scope and rate of charges of both public HR service providers and for-profit HR service providers.

The public HR service providers shall provide services free of charge. At the same time, the state shall support for-profit HR service providers in providing public welfare human resources services in the form of government procurement service.

Where a for-profit HR service provider engages in job intermediary activities, it shall obtain the license for providing human resources services. Where it engages in such human resources services as collecting and distributing supply and demand information of human resources, guiding employment and business startup, providing human resources management and consultation, human resources assessment, human resources trainings, and human resources outsourcing services, it shall file the business for recordation with the HRCC Department within 15 days after the business gets started.

Besides, where a for-profit HR service provider sets up a branch office, it shall, within 15 days after the industrial and commercial registration is completed, report it in writing to the HRCC Department of the place where the branch office is located. Similarly, if it modifies its name, address, legal representative, or terminates its operational activities, it shall also report in writing to the local HRCC Department.

At the same time, the HRCC Department shall timely made public the list of for-profit HR service providers that have obtained the administrative license or undergone recordation, as well as the status of the modification and extension of the license.

4. Rules On Human Resources Market Activities

Article 23 to Article 33 regulate human resources market activities from the dimensions of individuals, employers and HR service providers.

4.1 Individual Job Seekers

An individual job seeker shall truthfully provide his or her basic information and knowledge, skills and work experience related to the position he or she applies for.

4.2 Employers

An employer shall publish true and legitimate recruitment information of its basic conditions, number of people to be employed, requirements for employment, duty of work, work site, basic wages and so forth without containing any content discriminatory on the basis of ethnic status, race, gender, religious belief and the like.

Besides, the *Interim Regulation* emphasizes that to form an employment relationship, an employer shall sign a labor contract with its employee, and undergo social security

procedures and other matters as required by law.

4.3 HR Service Providers

4.3.1 The Obligation of Examination

The *Interim Regulation* imposes on HR service providers the obligation to examine the veracity and legality of an employer's materials, including recruitment information, business license, or documents for approval of formation by the competent authorities, identity card of the handling person, and the letter of authorization from the employer.

Meanwhile, HR service providers shall ensure the veracity, legality and validity of the disclosed information.

4.3.2 The Obligation of Compliance

An HR service provider shall not resort to fraud, violence, coercion, or other illicit means, nor shall it seek any illicit benefits in the name of employment or introduce entities or individuals to engage in any illegal activities.

Where a for-profit HR service provider accepts an employer's authorization to provide human resources outsourcing services, it shall not change the employment relationship between the employer and individuals, nor shall it collude with the employer to infringe upon the legitimate rights and interests of any individual.

Where an HR service provider provides human resources services through the Internet, it shall not only abide by this Interim Regulation, but also the state's regulations on network security, Internet information and service management.

4.3.3 The Obligation of Safety

Where holding a job fair, the HR service provider shall determine and develop the measures for organization and implementation, emergency plan and security protection work plan to ensure the job fair is safe.

4.3.4 The Obligation of Confidence

The *Interim Regulation* also emphasizes that an HR service provider shall not disclose or unlawfully use the trade secrets and personal information within its knowledge during its business operations.

4.3.5 The Obligation of Recording

An HR service provider shall keep the record of service objects, service process, and service results, and keep service ledger for at least two years.

4.3.6 The Obligation of Indication for For-profit HR Service Providers

All HR service providers shall fulfill the five obligations above. For in-profit HR service providers, the *Interim Regulation* particularly provides that they shall expressly show their business licenses, items of services, rate of charges, supervising authorities and supervising contact information in their business operations.

In addition, HR service providers acting as an intermediator in their business activities shall expressly show HR service provider licenses.

5. Supervision and Administration

Article 34 to Article 41 stipulate the supervision and administration for HR service providers. As required, supervising departments except HRCC Departments and the public security departments may also investigate and punish illegal and criminal activities on the human resources market, and HRCC Departments shall cooperate in this regard.

As to the duties of supervision and administration, HRCC Departments are responsible for various duties including the supervision and inspection, publication, information sharing, classified supervision of credit information, supervision and management for migrant party members, and streamlining the tip-off and complaint channels.

5.1 Supervision and Inspection

HRCC Departments may randomly select inspection objects and randomly assign law enforcement officers to supervise and inspect for-profit HR service providers.

There shall be at least two supervision and inspection officers in the course of HRCC Department's supervision and inspection, and they shall show their law enforcement certificates and keep confidential the trade secrets of the inspected entity.

5.2 Publication

The results of inspection shall be made public in a timely manner. The results of administrative punishments and supervision and inspection may be disclosed through the National Enterprise Credit Information Publicity System or other systems.

As to the annual report delivered by for-profit HR service providers, HRCC Departments may announce the relevant content of the annual reports in accordance with law, or guide for-profit HR service providers to disclose the content of the said reports in accordance with the law.

5.3 Information Sharing

HRCC Departments shall strengthen the sharing of information with market supervision and administration departments. But in order to avoid HR service providers from providing the same information multiple times, HRCC Departments shall not require for-profit HR service providers to repeatedly provide information obtainable through sharing.

5.4 Classified Supervision of Credit Information

HRCC Departments shall promote the development of good faith on the human resources market by incorporating the credit data and dishonesty information of employers, individuals and for-profit HR service providers into the system of developing good faith on the market, establishing a mechanism of “incentives for honesty and punishment for dishonesty,” and implementing the classified supervision of credit information.

5.5 Supervision and Management for Migrant Party Members

HR service providers are required to establish the grass-roots Party organizations, conduct Party-related activities and strengthen the education, supervision and management services for migrant party members.

5.6 Streamlining the Tip-Off and Complaint Channels

HRCC Departments shall streamline the tip-off and complaint channels against employers and HR service providers, and handle relevant tip-offs and complaints in a timely manner.

6. Legal Liability

Article 42 to Article 47 stipulate the legal liability of HR service providers, HRCC Departments and its working staffs for violating relevant provisions of the *Interim Regulations*.

6.1 Legal Liability of HR Service Providers

Where an HR service provider engages in job referral services without license, the HRCC Department shall close down its business or order it to terminate its engagement in such services; and the illegal income, if any, shall be confiscated, and a fine not less than RMB 10,000 and not more than RMB 50,000 shall be imposed.

Where an HR service provider conducts human resources service business without recordation, or sets up a branch office, or undergoes registration modification and cancellation without submitting a written report, the HRCC Department shall order it to take corrective actions; and if it refuses to do so, it shall be fined not less than RMB 5,000 and not more than RMB 10,000.

Where an HR service provider publishes untrue or illicit recruitment information and fails to conduct human resources service business in accordance with law, the HRCC Department shall order it to take corrective actions, and the illegal income, if any, shall be confiscated; if it refuses to do so, a fine not less than RMB 10,000 nor more than RMB 50,000 shall be imposed; if the circumstances are serious, its human resources service license shall be suspended; and if any damage is caused to any individual, it shall bear civil liabilities in accordance with the law.

Where an HR service provider fails to indicate relevant matters, to establish and improve the internal system, to store the service ledger, or to submit the annual report of its business operations, the HRCC Department shall order it to take corrective actions; and if it refuses to do so, a fine not less than RMB 5,000 and not more than RMB 10,000 shall

be imposed.

Where a public HR service provider violates the provisions set forth in this regulation, the competent authority at a higher level shall order it to take corrective actions; and if it refuses to do so, a disciplinary action shall be taken against the directly responsible person in charge and other directly liable persons according to aw

6.2 Legal Liability for HRCC Departments and Its Working Staffs

Where HRCC Departments and relevant competent authorities and their working staff members: fail to make a decision on the administrative license according to law; fail to ask for or accept other people's property, or to seek other benefits when handling the administrative license, recordation, or conducting supervision or inspection; fail to fulfill the duties of supervision or conduct effective supervision, causing serious consequences; or commit other conducts of abusing power, dereliction or favoritism, a disciplinary action shall be imposed on the person with direct responsibility for the HRCC Department and other directly liable persons.

Additionally, where the violation by an entity, regardless of its type or nature, of the *Interim Regulation* constitutes an act violating public security administration, a punishment of public security management shall be imposed according to law; and if such violation constitutes a crime, the violator shall be held criminally liable according to law.

附件：深圳市劳动保障违法信息公布办法

第一条 为规范劳动保障违法信息公布工作，提高用人单位的劳动保障守法自律意识，根据《企业信息公示暂行条例》《重大劳动保障违法行为社会公布办法》和《拖欠农民工工资“黑名单”管理暂行办法》等有关规定，制定本办法。

第二条 本办法所称劳动保障违法信息是指市人力资源和社会保障部门（以下简称市人力资源保障部门）、各区人力资源部门（含各新区社会建设部门，以下统称区人力资源部门）在劳动保障监察执法过程中制作或者获取的用人单位违反劳动保障法律法规的信息。

第三条 劳动保障违法信息公布应当遵循合法、公正、准确、及时的原则，依法维护企业合法权益，保守国家秘密，保护商业秘密和个人隐私。

第四条 市人力资源保障部门负责推进、指导、协调、监督全市劳动保障违法信息公布工作,并负责公布全市社会保险违法信息。

各区人力资源部门依据行政执法管理权限，负责本辖区的劳动保障违法信息公布工作。

第五条 用人单位存在重大劳动保障违法行为的信息，应当予以公布。

下列劳动保障违法行为属于重大劳动保障违法行为：

（一）涉嫌拒不支付劳动报酬犯罪，依法移送司法机关的；

（二）非法使用童工的；

（三）未按照劳动合同的约定或者国家规定及时足额支付劳动者劳动报酬，数额达到认定拒不支付劳动报酬罪数额标准，经责令支付逾期未支付的；

（四）违反工作时间和休息休假规定，情节严重的；

（五）违反女职工和未成年工特殊劳动保护规定，情节严重的；

（六）不依法参加社会保险或者不依法缴纳社会保险费，情节严重的；

（七）因劳动保障违法行为引发 100 人以上劳动者集体上访、堵路、冲击党政机关或引发群体性械斗、冲突、造成人员伤亡，严重影响社会稳定，或者侵害劳动者权益案件经上级部门批办督办、网络等媒体反映造成重大影响的；

（八）其他重大劳动保障违法行为。

第六条 用人单位违反劳动保障法律法规行为的行政处罚信息，应当予以公布。

第七条 公布劳动保障违法信息应当包括下列内容：

（一）用人单位的名称、统一信用代码及地址，法定代表人或主要负责人姓名；

（二）违法事实及法律依据；

（三）作出行政处罚决定书或责令改正文书的文号、行政处罚种类和依据或责令改正依据、执法机关的名称和日期。

第八条 公布劳动保障违法信息不得泄露国家秘密，不得涉及商业秘密以及自然人住所（与经营场所一致的除外）、肖像、通讯方式、身份证号码、财产状况等个人隐私。

第九条 市、区人力资源部门应当通过本级人民政府或本部门门户网站公布劳动保障违法信息，也可以通过公告栏、新闻发布会以及报刊、广播、电视等便于公众知晓的方式予以公布。

市、区人力资源部门应当按照有关规定，将劳动保障违法信息纳入我市信用信息共享平台，由相关部门在各自职责范围内依法依规实施联合惩戒。

第十条 市、区人力资源部门应当在依法送达行政处罚决定书或确认用人单位重大劳动保障违法行为之日起 7 个工作日内公布。

重大劳动保障违法信息的公布期限为三年；其他劳动保障违法信息公布期限为一年。

第十一条 区人力资源部门在向社会公布本辖区劳动保障违法行为的同时，应当将公布的信息报送市人力资源保障部门。市人力资源保障部门可向社会公布在全市范围内有重大影响的劳动保障违法信息。

第十二条 市、区人力资源部门发现其公布的劳动保障违法信息不准确的，应当及时更正。公民、法人或者其他组织有证据证明公布的劳动保障违法信息不准确的，应当向公布部门提出更正申请，公布部门应当在 10 个工作日内核实，情况属实的，予以更正。

行政处罚或者责令改正出现因行政复议、行政诉讼或者其他原因被变更或者被撤销的，公布部门应当自变更或者撤销之日起 10 个工作日内，对社会公布内容予以更正。

第十三条 市、区人力资源部门工作人员在劳动保障违法信息公布中滥用职权、玩忽职守、徇私舞弊的，依法予以处理。

第十四条 本办法自 2018 年 12 月 1 日起施行，有效期 5 年。《深圳市用人单位劳动保障违法信息公布办法》（深人社规〔2015〕12 号）同时废止。

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环球简介

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

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

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

规模. 我们在北京、上海、深圳三地办公室总计拥有 300 余名的法律专业人才。我们的律师均毕业于中国一流的法学院，其中绝大多数律师拥有法学硕士以上的学历，多数律师还曾学习或工作于北美、欧洲、澳洲和亚洲等地一流的法学院和国际性律师事务所，部分合伙人还拥有美国、英国、德国、瑞士和澳大利亚等地的律师执业资格。

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

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

环球劳动业务简介

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

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

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

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

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