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简历造假与用人单位合法解除的浅析

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一、序言

根据《中华人民共和国劳动合同法》（**“《劳动合同法》”**）第三十九条第一款第五项，用人单位可依据《劳动合同法》第二十六条，员工以欺诈的手段，使用人单位在违背真实意思的情况下订立劳动合同的，劳动合同无效或者部分无效，由此赋予了用人单位合法单方解除劳动关系的权利。

如果员工在申请工作时，提交了虚假的简历、学历，是否会构成“欺诈”，从而直接赋予了用人单位《劳动合同法》第三十九条下的单方解除权呢？对于不同的情况，法院进行了不同的分析，在平衡了保护劳动者和用人单位的权益下，法院认为员工在申请工作时，提交了虚假的简历或者学历证明，不可一概而论的认定为是欺诈。

二、 何种情况下，求职者/员工提交了虚假简历构成了欺诈？

所谓欺诈[1]，是指一方当事人故意告知对方虚假情况，或者故意隐瞒真实情况，诱使对方当事人作出错误意思表示。

1. 求职者/员工故意告知虚假情况，或者故意隐瞒

在劳动合同法中，求职者/员工在提供虚假简历后，构成欺诈，需要满足以下条件：1）员工有欺诈的故意（故意告知或者故意隐瞒）；2）员工提交了虚假信息；3）用人单位因欺诈行为产生错误的认识；4）用人单位因错误认识而作出意思表示，即用人单位的错误认识和意思表示之间存在因果关系。

[1] 最高人民法院印发《关于贯彻执行〈中华人民共和国民法通则〉若干问题的意见（试行）》的通知,第 68 条。

在这四个条件中，争议比较多的就在于“用人单位是否因欺诈行为陷入了错误认识”。这个条件由于不同法院在对用人单位的注意义务的标准不同，而导致了这个条件比较难以界定。在以下常见情况下，法院会认定用人单位没有因欺诈行为而陷入错误认识：1）员工已经告知了用人单位简历造假，或者用人单位已经知晓了简历造假问题后，用人单位仍与员工续签合同；2）用人单位在招聘时对该岗位的学历/经历要求并未明确，用人单位在经过试用期后录用了该员工[2]。

在(2011)沪二中民三(民)终字第 535 号一案中，上海市第二中级人民法院认为员工在入职简历以及后来的人事资料卡上，填写的学历信息都是虚假的，并且不能证明用人单位已经知晓这个情况。因此，法院认为员工有故意隐瞒的意图，用人单位因为这个虚假学历从而陷入了错误认识，与员工多次签订了劳动合同。但是，本案并未着重用人单位的注意义务，此点已经在下文进行讨论。

2. 用人单位未尽到应尽的注意义务

《劳动合同法》第八条[3]，规定了用人单位的法定告知义务和劳动者的说明义务，但是对于劳动者的说明义务是有限定的，只需要对“与劳动合同直接相关的基本情况”并且在用人单位有明确要求进行提供的信息进行如实说明。

用人单位在录用员工时，对于员工的先前工作经历、学历，是否能够符合特定的岗位需求，都是重要的考量因素。因此，在需要求职人员提供相关的信息时，首先需要强化用人单位的注意义务。该注意义务最基本的便是，用人单位在招聘要求中，一定要对该特定岗位的学历要求、经历要求进行详细的描述。其次，用人单位在对求职人员提交的信息，要进行一定审核，尤其是可以经网上查询真伪的学历证书。最后，用人单位如果发现学历造假而主张无效或者提出解除的，应当在发现后及时提出，否则事后不可随意以此为由与劳动者解除劳动关系，时间节点十分关键。[4]

[2] （2016）京 03 民终 3365 号。
[3] 《劳动合同法》第八条：用人单位招用劳动者时，应当如实告知劳动者工作内容、工作条件、工作地点、职业危害、安全生产状况、劳动报酬，以及劳动者要求了解的其他情况；用人单位有权了解劳动者与劳动合同直接相关的基本情况，劳动者应当如实说明。
[4] 《劳动合同纠纷裁判精要与规则适用》，王林清、杨心忠著，北京大学出版社（2014），P48。

在（2014）一中民终字第 05797 号案件中，北京市第一中级人民法院的判决支持了上述观点。用人单位在员工入职后，度过试用期、工作逾 1 年，以其虚构工作简历存在欺诈为由将其辞退，显然有失公允。在举证方面，用人单位无法提供相关证据，来证明用人单位在招聘时对任职经历有特定要求，需要承担举证不能的法律后果。同时，用人单位在招聘时，未对求职人员提供的信息加以审查，也未尽到注意义务。因此，北京市第一中级人民法院认为员工不存在欺诈，劳动合同有效，用人单位与员工解除劳动合同属于违法，需要对员工进行赔偿。

即使劳动者应聘时的简历中具有虚假工作经历，但劳动者于入职前在用人单位发放的《信息采集表》中填写了真实工作经历且用人单位未提出异议，那么劳动者已向用人单位履行了如实告知义务，不具备欺诈的故意，也没有实施欺诈行为。用人单位具备调查能力且负有审慎审查义务，但是用人单位在怠于履行审慎审查义务的情形下与劳动者签订了劳动合同，并且在试用期届满后将其转正，应当视为认可劳动者的工作经历与职业能力。综上，用人单位不能以劳动者应聘时简历具有虚假工作经历构成欺诈导致劳动合同无效，主张解除劳动合同。

在（2012）沪二中民三（民）终字第 1204 号案件中，上海市第二中级人民法院在判决中表明了用人单位的审慎审查义务。求职者在应聘时，通过猎头向用人单位提交了包含虚假海外工作经历的简历，却在入职前向用人单位如实告知了真实的工作经历，即履行了《劳动合同法》第八条项下的如实告知义务，主观上没有实施欺诈的故意，客观上也没有实施欺诈行为。用人单位在具备调查能力且负有审慎审查义务的情况下，未及时发现劳动者在入职前告知的真实工作经历与其简历中的虚假海外工作经历不符，错不在劳动者。据此，劳动者的行为不符合欺诈的构成要件，故不构成欺诈。所以，用人单位以劳动者欺诈为由主张劳动合同无效，进而解除劳动合同的，不属于《劳动合同法》第二十六条第一项及第三十九条第五项规定的情形。

但是，法院在实际审判过程中，对于用人单位的注意义务，意见也并不是十分统一。在(2011)沪二中民三(民)终字第 535 号和（2018）沪 01 民终 7516 号案中，法院在考量了所有事实后，认为用人单位是否尽到了审核义务并不是确定合同有效的依据。判断合同是否有

效应以是否构成欺诈为前提。

综合上述案例，个人认为法院在对用人单位是否要进行合理的注意义务，来判断员工提交虚假简历是否属于欺诈，还是一个比较弹性的指标，主要还是着重于求职者/员工行为本身的性质。当然，站在用人单位的角度，即使法院在审查用人单位的注意义务时，并没有那么严格，用人单位如果能够在合理范围内，进行一定的审查，对用人单位在此类案件中是有利的。因此，建议用人单位可对求职者的简历做一个简单的调查。对于一些通过猎头提交的简历，用人单位可以外包该审查义务，委托猎头公司进行背景调查，也应在合同中约定如果猎头公司没有尽到审查义务，相应的损失需要猎头公司承担。

三、若提交了虚假简历，但不属于欺诈，用人单位可否合法解除劳动关系？

经过上述分析，我们可以发现，并不是所有情况下，法院都会认定员工提交了虚假简历，就必定属于欺诈。那么此时，用人单位则不可使用《劳动合同法》第三十九条第一款第五项的规定，从合同无效角度来合法解除劳动关系。但是，用人单位还可以通过其他多种方式来解除劳动合同。

1. 在劳动合同中，约定“如果提供了虚假信息，用人单位可合法解除劳动合同。”

用人单位作为起草劳动合同的主体，在签订劳动合同时，可在劳动合同中，约定“如果乙方（员工）提供了虚假信息，包括简历、求职信息表中的信息、学历等，用人单位发现后，可以随时解除劳动合同。”虽然用人单位属于强势主体，但是该合同条款不违反法律法规，也不属于格式条款。如果用人单位依据合同来行使解除权，有理有据，也可得到法院的支持。

在（2015）一中民终字第 2091 号一案中，北京市第一中级人民法院认定员工确实存在简历造假的事实，并不影响合同效力，劳动合同是有效的。但是根据双方签订的劳动合同约定，乙方（员工）在应聘时所提供的资料或信息被查实有虚假的，甲方（用人单位）可以随时解除本合同，并不支付乙方经济补偿金。双方的约定是双方的真是意思表示，不违反法律法规，因此，法院依照该合同，认定用人单位是合法解除劳动关系，并且不需要支付任何赔偿金。

2. 在《员工手册》[5]中，规定员工以欺骗手段虚报各项履历或者简历信息，将予以解雇。

我国劳动法在充分保护劳动者合法权利的同时亦依法保护用人单位正当的用工权利。用人单位可以通过企业的规章制度对员工进行必要的约束，这是用人单位进行人员管理重要手段。[6]如果用人单位在《员工手册》中予以规定，员工违反《员工手册》的情况下，用人单位可依据《劳动合同法》第三十九条第二项，提出解除劳动合同，并且无需对员工进行赔偿。

在(2011)沪二中民三(民)终字第 535 号一案中，法院明确指出，员工提供虚假学历，是用人单位规章制度严令禁止的，并且员工对该规章制度并未提出任何异议。用人单位依据企业的规章制度与该员工解除劳动合同，是其依法行使管理权的体现，应当予以支持。苏州市中级人民法院在（2016）苏 05 民终 4164 号案中，持有相同观点。

3. 用人单位在劳动合同有效情况下，可否直接依据违反诚实信用原则，解除劳动合同？

《劳动合同法》第三条，明确规定订了劳动合同，应当遵循合法、公平、平等自愿、协商一致、诚实信用的原则。但是，用人单位在员工提交了虚假简历后，在解除劳动合同中，使用的理由仅仅是因为违反诚实信用，可能会产生一定的问题。

民法上的“帝王条款”诚实信用原则，也同时被列为劳动合同法的基本原则，贯穿于劳动合同法始终。只有在一方当事人利益受损，而法律又缺乏对其进行保护的明确规定时，为避免显失公平，法院才可以援引法律的基本原则来实现对当事人的救济。除此之外，法院不应直接将基本原则作为裁判的依据，否则容易导致法律具体条款的弱化，向一般条款逃避。尤其在劳动争议案件中，法律已就用人单位的单方解除权做出明确规定，《劳动合同法》第八条关于劳动者的如实说明义务也是诚信原则在具体条款的体现，此时如果允许用人单位直接援引一般条款作为解除劳动合同的依据，那么无疑将为处于优势地位的用人单位无故解聘劳动者，提供了大量借口，会导致用人单位对解除权的滥用，从而侵犯劳动者的合法权益。[7]

[5] 《员工手册》作为用人单位解除劳动关系的合法依据，需要经过一系列的民主程序，法院在对该证据的有效性问题审核也有相关案例。在此，我们假设情况是《员工手册》经过合法有效的民主程序，为所有员工所知悉。其余情况不多赘述。

[6] 《劳动争议案件司法观点集成》，李盛荣、马千里著，法律出版社（2017 年），P92。

[7] http://blog.sina.com.cn/s/blog_565fb29d0102vqv6.html，访问时间 2019 年 8 月 14 日。

在（2016）京 03 民终 3365 号一案中，北京市第三中级人民法院认定员工在入职时提供了虚假学历信息，行为违背了诚实信用原则，但是用人单位没有在招聘时对岗位相关学历提出具体要求，也多次与员工续签劳动合同。即使员工违背了诚实信用原则，但不构成欺诈。在（2014）一中民终字第 05797 号案件中，北京市第一中级人民法院也持有相同观点。在（2018）京 0108 民初 9009 号案中，北京市海淀区人民法院曾判决员工存在简历造假情形，违反了诚实信用原则以及劳动者最基本的职业道德，因此用人单位以员工简历造假为由解除双方劳动关系并无不当。但是该案已被其上级法院改判。

在经过检索后，我们发现多数案例在援引诚实信用原则时，作为一种利益的平衡手段。法院即使在判决中援引了诚实信用原则，也是和《劳动合同法》第三十九条的内容相结合，从而来判断用人单位是否可以合法解除劳动关系。在(2011)沪二中民三(民)终字第 535 号与（2017）京 03 民终 11023 号二案中，可以体现这一点。

四、总结

根据现有的案例，我们可以看出，我国《劳动合同法》对员工的保护会更多一点。因此，对于用单人单位在解除与员工的劳动关系的时候需要更加的谨慎。在此，对于用人单位有几点建议：

1. 在招聘时，对于特定的岗位，明确说明/告知学历要求、工作经历要求，并进行留存，以便发生纠纷时，可以提供证据。需要注意的是，《劳动合同法》规定了用人单位在订立劳动合同过程中没有明确要求了解的信息，劳动者没有说明义务，即使提供了虚假陈述或隐瞒相关情况，也不构成欺诈。

2. 在收到求职者或者员工提供的信息时，进行必要的审查。如一些可以网上查询核实的信息，一定要审核。如果已经发现问题或者疑问，一定要及时询问调查，否则出现纠纷后，用人单位十分被动。

3. 在签订劳动合同时，可以在合同中，规定“如果乙方提供了虚假信息，则公司有权随时

解除合同，并且对乙方不进行任何的赔偿。”

4. 在相关的公司规章制度中，明确规定“如果员工被发现提供了虚假信息，则公司有权随时解除劳动关系，并无需对员工进行赔偿。”需要注意的是，规章制度需要经过民主程序，以便在作为证据提交时，得到法院的认可。

Analysis on Fake Resumes and Employer's Legal Termination

Gu, Weiwei | Sui, Angela | Li, Ramona

I Preamble

In accordance with Article 39 Paragraph 1 Subparagraph 5 of Labor Contract Law of the PRC (hereinafter "**Labor Contract Law**"), employer is entitled to terminate the labor relationship with its employee under the circumstance that employer enters the labor contract with the employee in the condition of being deceived by the employees, which may cause invalidity or partial invalidity of the contract.

It is questionable that whether the employee's submission of fake resume or education information in his or her job application constitutes fraudulence, and whether it triggers the employer's legal termination right. Under different circumstances, the Courts analyze different situations and balance the benefits between employer and employee. Finally, the Courts stand a point that even if the employee submits fake resume or untrue information when he/she applies a job, whether it constitutes fraudulence depends on many factors.

II Under which circumstances, that employee/applicant submits a fake resume constitutes fraudulence?

Fraudulence[1] means that one party meaningfully informs the counterparty of false statements, or meaningfully conceals actual conditions, which induces the counterparty to mispresent its intention.

A. An applicant/employee intentionally informs false statements or conceals actual conditions.

[1] Article 68 of the Supreme Court's Notification of Issuance of Implementation Regarding Opinions of Several Questions of General Principles of Civil Law of the PRC.

Under the labor contract, after an applicant/employee submits fake resumes or false statements, it is fraudulent if 1) the employee's action is intentional (intentionally informs or conceals); 2) the employee submits the false information; 3) the employer forms false recognition because of the employee's fraudulent actions; 4) and, based on the false recognition, the employer expresses its intention, which means there's proximate cause between the employer's false recognition and its expression of intention.

Among the above four factors, the fourth element is the focus of disputes. Whether the employer forms false recognition due to the fraudulence varies with the Courts' different standards for the employer's duty of care. Therefore, it is hard to define such element. Generally speaking, in the following conditions, the Courts may hold that the employer doesn't form false recognition if 1) the employee has informed the employer of submission of a fake resume; or after the employer has known the submission of a fake resume, it still enters/renews the labor contract the employee; 2) when the employer posts its job vacancy without specifying the requirements for experience or education, the employer hires the employee after the probation period[2].

In the case of (2011) Hu Second Intermediate Civil Three (Civil) No. 535, Shanghai No.2 Intermediate People's Court held that the employee failed to prove the employer knew or should have known that the employee submitted the false resume when he submitted the job application. Therefore, in the Court's view, the employee had intent to conceal the false statements and the employer was induced to enter several labor contracts with the employees based on the false recognition. It is worthy-noted that the Court did not put emphasis on the employer's duty of care. With regard to the employer's duty of care, we'll analyze it in the following section.

[2] (2016) Jing 03 Civil No. 3365.

B. The employer fails to fulfill the duty of care.

Article 8 of Labor Contract Law[3] stipulates the statutory duty of notification for the employer and the duty of providing necessary information for the employee. However, in accordance with the article, the employee's duty of providing necessary information is limited to directly work-related information which is requested by the employer.

When the employer decides whether to hire a job applicant, it is important to consider the applicant's prior experience or education. Therefore, it should emphasize on the employer's duty of care for the examination of information provided by the applicant. The basic requirement of duty of care is to specify the requirements for education and prior experience when the employer posts its job vacancy. In addition, the employer should check the applicant's information if necessary, especially some education information can be checked easily online. Finally, if the employer discovers the false resume, it should claim the invalidity of the labor contract at once. Otherwise, it may lose the right to terminate the labor relationship at will. The time is of essence.

In the case of (2014) First Intermediate Civil No. 05797, Beijing No.1 Intermediate People's Court supported the above points. The employer claimed the invalidity of the labor contract, after the employee passed the probation period and had worked for the employer over one year. The Court held that this situation is unfair for the employee. The Court also held that the employer failed to provide the evidence to prove the employer had specified the requirements for the position. As a result, the employer should bear the adverse effects of failure to provide evidence. Meanwhile, the employer failed to check the applicant's providing information. It failed to fulfill the duty of care. Therefore, the Court ruled that the employee's actions did not constitute fraudulence and the labor contract was valid. Thus, it is illegal for the employer to terminate the contract unilaterally. The employer should pay

[3] Article 8 of Labor Contract Law: When recruiting a worker, the employer shall truthfully notify the worker of the job duties, working conditions, work premises, occupational hazards, work safety and health conditions, labor remuneration and any other information in which the worker is interested to know; an employer shall have the right to ask about basic information of the worker in direct relation to the labor contract, the worker shall answer truthfully.

the damages to the employee.

Even if the applicant submits the false resume at the beginning, and then he/she provides the true information when filling in the employee's basic information form provided by the employer, it may be deemed the employee's fulfillment of duty of providing the true information if the employer fails to find the contradictions. It means the employee's action doesn't constitute fraudulence. The employer has the capacity to check the information and owns the duty of care. If the employer concludes the labor contract with the employee and continues to hire the employee after probation period without checking the information, it should deem the employer admits the employee's experience and professional ability. Based on the above analysis, the employer is prohibited from terminating the labor contract because the invalidity of contract is triggered by the reason of fraudulence.

In the case of (2012) Hu Second Intermediate Civil Three (Civil) No. 1204, Shanghai No.2 Intermediate People's Court confirmed that the employer has duty of care. The job applicant submitted a false statement when he provides the resume to job hunter. In the following, he provided the actual experience information before he was hired. The Court confirmed that the employee fulfilled its duty of telling the truth under Article 8 of Labor Contract Law. The employee did not have intention to deceive the employer or conceal information from the employer. Neither did the employee implement the fraudulence. Under the circumstances that the employer failed to discover the difference between the actual experience and the prior resume, it was not the employee's fault. Hereby, the employee's action didn't constitute fraudulence. Thus, it is baseless for the employer to terminate the contract based on the Articles 26 and 39 of Labor Contract Law.

However, in the trial cases, the Courts holds different standards to whether the employer fulfills the duty of care. In the case of (2011) Hu Second Intermediate Civil Three (Civil) No. 535 and (2018) Hu 01 Civil No. 7516, the Court took considerations of all factors and held the point that whether the employer fulfilled the duty of care was not a decisive factor for the validity of a contract. The courts had a standing that whether a labor contact

is valid still depended on whether the employee's actions constituted fraudulence.

Based on the above cases, the author thinks that it is the court's discretion to decide whether the employer is required to fulfill the duty of care when the court consider the constitution of fraudulence. Generally, the Courts focus more on the attributes of the employee's actions. For the standing of the employer, it is beneficial for the employer to fulfill the necessary examination of the applicant's information when such disputes arise. Therefore, it is recommended for the employer to check the applicant's information before it hires the applicant. If the employer uses the external human resources to obtain the information, it's better appoint the job hunter to carry out the background check. It is safe for the employer to specify the damages if the job hunter fails to do the background check and provide false information.

III If the applicant submits a false resume, but it doesn't constitute fraudulence, is the employer entitled to terminate the labor contract?

Based on the analysis, we concluded that the Courts is no always deemed the employee fraudulent if the employee submits a false resume. In this condition, the employer cannot apply Article 39 Paragraph 1 Subparagraph 5 of Labor Contract Law to terminate the contract. Nevertheless, the employer can terminate the contract in other ways.

A. The labor contract stipulates that if the applicant provides false statements, the employer is entitled to terminate the contract.

The employer, as the drafter of the labor contract, has the right to state that "if the employer discovers that the employee provides false statements including resumes, application form, education and so on, the employer is entitled to terminate the contract at any time." Although the employer is powerful party in the aspect of employment, the above clause in the labor contact doesn't violate any law or regulation. Neither does it belong to

the standard clause. If the employer terminates the labor relationship based on the labor contract, the Courts will support it.

In the case of (2015) First Intermediate Civil No. 2091, Beijing No.1 Intermediate People's Court held that the employee submitted a false resume. However, the employee's action did not invalidate the labor contract. The labor contract was valid. Furthermore, according to both parties' executing contract, the contract stated that if the employee submitted false statements, the employer had the right to terminate the contract once the condition was confirmed. It also stated that the employer was not required to pay any damages to the employer in such termination. The Court held that the contract was mutually agreed and it didn't violate any law or regulation. Thus, based on this contract, the Court supported the employer to terminate the contract without any compensation.

B. The Employee's Manuals[4] stipulates that if the employee provides untrue information in the resume or other forms, the employer will dismiss him/her.

Our labor law protects not only the legal rights of employees but also the rights of employers. An employer can reinforce the restrain its employees through its internal rules or systems, which is an important way for the employer to manage the employees.[5] If the Manuals list the condition under which the employee violates the Manuals, the employer is entitled to terminate the labor contract under Article 29 Subparagraph 2 and pay no damages to the employee.

In case of (2011) Hu Second Intermediate Civil Three (Civil) No. 535, the Court definitely pointed out that the employee's submission of a false resume was prohibited by the Employee's Manuals. Moreover, the employee did not oppose the existence of the Manuals. The employer was entitled to terminate the labor contract, which showed the

[4] Employee's Manuals should be passed through democracy procedures before it becomes effective. When the employer submits to the court as evidence, the court always consider question of democracy procedures before it is deemed as valid evidence. We presume the Employee's Manuals are effective and known by all the staff. We omit the disputes of democracy procedures.
[5] Li, Shengrong; Ma, Qianli, *Integrated Judicial Views of Labor Disputes Cases*, Law Publisher 2019, page 92.

power of management. It should be supported. Suzhou Intermediate People's Court showed the same point in the case of (2016) Su 05 Civil No. 4164.

C. Whether the employer can apply the principle of honesty and trustworthiness to terminate the labor contract if the contact is valid?

Article 3 of Labor Contract Law rules that conclusion of labor contracts shall comply with the principles of legality, equitableness, fairness, voluntary participation, negotiation and agreement and honesty and trustworthiness. It is not applicable for the employer to terminate the labor contract with the reason of violation of principle of honesty and trustworthiness.

The principle of honesty and trustworthiness is named as a king principle in the civil law. It is also characterized as a general principle in labor contract law. Only if law doesn't specify the damages for the harmed party, the court is permitted to apply the principle of honesty and trustworthiness to compensate the harmed party in order to avoid unfairness. Except such condition, the courts are not allowed to apply the principle directly to make the final judgement, or it will weaken the specific clauses in the law and lead the court to flee to a general principle. Especially, in labor dispute cases, there are already specific articles stating the legal termination rights for the employer. Article 8 of Labor Contract Law, it requires the employee to provide the true information, which also demonstrates the principle of honesty and trustworthiness. If the court allows the employer to terminate the contract with general principles, it provides the opportunity for the employer to take advantage of its powerful position to dismiss the employee without cause. It also causes the employer to abuse the power of termination. As a result, it infringes the employee's legal rights.

In the case of (2016) Jing 03 Civil No. 3365, Beijing No.3 Intermediate People's Court held that the employee violated the principle of honesty and trustworthiness when he submitted a false resume to apply for the job. However, the employer did not specify the

detailed requirements for the position when it posted the job vacancy and renewed the labor contract for several times. Based on these facts, even if the employee violated the principle of honesty and trustworthiness, it didn't constitute fraudulence. In the case of (2014) First Intermediate Civil No. 05797, Beijing No.3 Intermediate People's Court held the same position. In the case of (2018) Jing 0108 Civil No. 9009, Beijing Haidian District Court once ruled that it was appropriate for the employer to terminate the contract because the employee submitted a false resume and violated the principle of honesty and trustworthiness. However, this judgement was overruled by its appellate court.

After our legal research, we discover that the courts apply the principle to the cases as a way of balance of benefits. The courts usually combine the principle with Article 39 of Labor Contract Law to make judgements. Both (2011) Hu Second Intermediate Civil Three (Civil) No. 535 and (2017) Jing 03 Civil No. 11023 aligns with this point.

IV Summary

According to the current cases, we find that our Labor Contract Law provides more protection to employees. Therefore, it is cautious for the employer to terminate the labor contract with employees. As following, there are several recommendations for employers:[6]

1. When an employer posts a job description, it should specify the requirements for the position such as experience, education. The employer should keep this description in record in case of labor disputes. It is noted that Labor Contract Law only requires the employee to answer the employer's questions truthfully. If the employee provides the extra false information which the employer doesn't request, the employee's action doesn't constitute fraudulence.

2. After an applicant submits all the information, the employer needs to check the information. If such information can be checked online, it is good for the employer to check

[6] http://blog.sina.com.cn/s/blog_565fb29d0102vqv6.html, visited August 14th 2019.

it. If the employer finds any questions or discrepancies, it should investigate or inquire the applicant on time. Or it is adverse for the employer when the dispute arises.

3. When both parties conclude the labor contract, the employer stipulates the right to terminate the contract without any compensation if the employee provides untrue information.

4. In the internal bylaws or documents, the employer rules that if the employee provides false statements, the employer is entitled to terminate the contract without any compensation at any time. It is noted that these documents should pass democracy procedures. Only after democracy procedures makes it effective and the court will admit it as evidence.

➢ 案例分析

用人单位的不实不良评价是否构成名誉侵权？

作者：顾巍巍 | 隋天娇 | 李丘怿

一、争议焦点

用工单位对劳动者作出不实、不良的评价，是否构成对劳动者名誉权的侵犯？

二、案情简介

原告：徐某

被告：上海某冶金建设公司

自 1983 年 8 月 1 日起原告徐某进入被告公司工作。

1996 年 12 月，原告与被告签订“劳动合同书”，约定：上海某机械设备安装工程公司(“**机装公司**”，该机装公司为被告下属的分支机构。)根据生产需要，录用原告。合同的期限为无固定期限。

自 1997 年 1 月 1 日起，若双方约定的解除或终止条件出现，劳动合同即解除或终止。双方在合同中还约定：经双方协商一致，同意解除劳动合同的，双方可以解除劳动合同；原告严重违反公司劳动纪律及规章制度的，被告可解除劳动合同；原告提前 30 日书面通知被告解除劳动合同，并履行了劳动合同约定的赔偿、违约条款，原告可以随时解除劳动合同。

2001 年 1 月 4 日，原告向被告提交书面辞职报告。同年 1 月 8 日，机装公司副经理杨某某签字同意了原告的辞职申请。当日，原告将工作移交给被告。随后，原告一直未到被告处上班。

2001 年 5 月 30 日，被告因原告于 2001 年 1 月提出辞职后一直未上班，也未办理任何请假手续，解除了与原告的劳动关系。同日，被告开出上海市职工退工通知书，在通知书上写明：因原告违纪解除，于 2001 年 5 月 30 日退工。

被告于 2001 年 5 月 30 日开出上海市职工退工通知单后，将其中一联给了上海市宝山区月浦镇劳动服务所，但未将上海市职工退工通知单交给原告。

2005 年 2 月，原告到上海某自动化技术有限公司应聘，该公司以原告曾因违纪被原单位解除劳动合同为由拒绝录用原告。原告于 2005 年 8 月从被告处领取了上海市职工退工通知单，才正式得知退工单上载明“因原告违纪解除，于 2001 年 5 月 30 日退工”的内容。在被告公司辞职后，原告多次求职未果，在 2005 年才得知真正原因。

三、 审理结果

(一) 一审法院

原告徐某向其所在单位、被告公司下属分支机构机装公司提交了辞职报告，机装公司副经理杨某某于 2001 年 1 月 8 日签字同意了原告的辞职要求。杨某某的行为应视为被告的行为，且原告随后也于当日完成了工作移交，故应当认定原告与被告于 2001 年 1 月 8 日协商解除了劳动合同。

被告辩称，根据其公司内部规定，原告应向公司劳动人事部门提出辞职报告，杨某某无权批准原告的辞职申请，故杨某某的签字不能视为被告同意原告的辞职。法院认为，杨某某作为被告下属分支机构机装公司的副经理，是否有权同意原告提出的辞职申请，属于被告内部规定公司领导成员分工的事项，原告作为一般员工并不知情。

本案中，杨某某应当知道自己无权批准原告的辞职申请，但杨某某并未告知原告应向公司劳动人事部门提出辞职要求，而是自行作出批准决定，原告认为杨某某批准后双方即可解除劳动合同，并无不当，故对被告的上述辩解意见不予采纳。

被告公司在事实上已经与原告徐某解除劳动合同后，又以原告旷工违纪为由，再次单方面解除与原告间的劳动合同关系，并在退工单上写明原告因违纪被解除劳动合同，缺乏事实依据，其行为具有过错。因被告将其中一联退工单交给了上海市宝山区月浦镇劳动服务所，使得原告在求职市场上存在了不良记录，导致包括上海某自动化技术有限公司在内的不特定的用人单位了解到原告“曾因违纪被解除劳动合同”这一不真实的情况。被告的行为损害了原告的名誉，侵犯了原告的名誉权。

对原告要求被告停止侵害其名誉权、书面赔礼道歉的请求，应予支持。

(二) 二审法院

名誉是指根据公民的观点、行为、作用、表现等所形成的关于公民品德、才干及其他素质的总体社会评价，是对公民社会价值的一般认识。公民享有名誉权，法律禁止用侮辱、诽谤等方式损害公民的名誉。劳动用工单位有权对劳动者实施管理并对劳动者的劳动、工作情况作出客观、公正的评价，这种评价也是劳动者总体社会评价的重要组成部分。劳动用工单位对劳动者作出不实、不良的评价是否构成对劳动者名誉权的侵犯，应当根据劳动用工单位的行为是否具有过错、劳动者的名誉有无被损害的事实、劳动用工单位的行为与劳动者的名誉受损之间有无因果关系等因素加以认定。

被上诉人徐某（原审原告）原系上诉人公司（原审被告）下属分支机构机装公司的员工。2001 年 1 月 4 日，徐某向机装公司提交辞职报告，经机装公司副经理杨某某签字同意后，徐某办理了工作移交。上诉人称杨某某无权批准徐某辞职，徐某尚未正式办理退工手续即不来上班，属于旷工，上诉人以徐某违反劳动纪律为由解除劳动合同，并无不当。

法院认为，杨某某是否有权决定批准徐某的辞职申请，涉及上诉人公司内部管理问题，徐某作为普通员工对此并不了解。杨某某在接到徐某的辞职报告后并未指示徐某到公司相关职能部门办理辞职事宜，而是直接在辞职报告上签字同意，徐某因此认为已经与上诉人之间解除劳动合同并无不当。上诉人在已经与徐某解除劳动合同关系后，又以徐某尚未正式办理退工手续即不来上班，属于违反劳动纪律为由，再次作出解除劳动合同的决定，并在退工通

知书中记载“因违纪而解除合同”，致使徐某在求职市场上存在不良记录，其行为缺乏依据并具有过错。

上诉人在被上诉人徐某退工通知书中作出的关于徐某“因违纪而解除劳动合同”的不实记载，是对徐某劳动、工作情况的负面评价。该不实记载存在于求职市场，为相关用人单位所知悉，事实上降低了对徐某的社会评价，并对其就业、求职产生了一定的负面影响。

一审认定上诉人的行为构成对徐某名誉权的侵犯，并根据侵权的行为方式、手段、场合及所造成的后果判令上诉人承担相应的民事责任，并无不当。

四、法律分析

我们认为，用人单位对其内部员工享有依法管理的自主权，包括对员工进行绩效考核、内部评价、对违纪员工进行通报批评等等。但是如果用人单位滥用其管理权限，超出客观、真实的评价范围，则用人单位可能造成对员工的名誉权侵权。根据《最高人民法院关于审理名誉权案件诺干问题的解答》第七条[1]，构成侵害名誉权的责任，应当根据受害人确有名誉被损害的事实、行为人行为违法、违法行为与损害后果之间有因果关系、行为人主观上有过错来认定。

因此，用人单位对员工的不良不实评价，构成名誉侵权的要件形式为：

1) 名誉被损害的事实：用人单位对不真实的不良内容，进行了宣扬。该宣扬可以是在公司内部，可以是通过其他渠道，告知了公司外部。其他不知情人士在看到这些不真实的不良内容后，对内容所指向的个人，产生了不良印象，从而导致其社会评价的降低。

2) 用人单位的行为：在劳动单位和员工之间，一般体现为用人单位对员工做出了不真实的

[1] 《最高人民法院关于审理名誉权案件诺干问题的解答》第七条，侵害名誉权的责任认定：
是否构成侵害名誉权的责任，应当根据受害人确有名誉被损害的事实、行为人行为违法、违法行为与损害后果之间有因果关系、行为人主观上有过错来认定。
以书面或者口头形式侮辱或者诽谤他人，损害他人名誉的，应认定为侵害他人名誉权。
对未经他人同意，擅自公布他人的隐私材料或者以书面、口头形式宣扬他人隐私，致他人名誉受到损害的，按照侵害他人名誉权处理。
因新闻报道严重失实，致他人名誉受到损害的，应按照侵害他人名誉权处理。

不良评价或者认定。

3) 用人单位的行为与员工的损害结果之间有因果关系：主要表现为以不真实的不良的评价为由，解除了劳动关系，或者影响员工后续的求职结果。

4) 用人单位有过错：用人单位在未查实情况，或者已经知道不符合实际情况的条件下，仍对员工做出不实的不良评价，用人单位就存在过错。

该侵权责任认定的方式，在（2018）粤 03 民终 19507 号中，也有相同的体现。深圳市中级人民法院认为，公司在公司微信群里公布、公告栏上张贴恶意事件调查的公告，该公告虽未公布具体姓名，但公司最终以员工操作了此次人为恶意事件为由，解除与该员工的劳动关系。但事实证明，公司并未有确凿证据，因此，与员工解除劳动关系系违法解除。公司发布公告在先，再以员工操作了此次人为恶意事件为由解除劳动关系在后，客观上宣扬了不具有确凿证据的调查结果。公司该行为已经超出了单纯违反公司劳动管理纪律的范畴，行为性质恶劣。公司妄下结论且开除可疑员工，行为客观上导致了员工社会评价的降低，名誉受损，应当对员工承担赔偿责任。

结合上述案例，对于用人单位有一下几点建议：

1) 用工单位对劳动者的劳动、工作情况作出的评价也是劳动者总体社会评价的重要组成部分。公司在对员工做出评价时，一定要秉持真实、客观的态度。

2) 员工向用人单位提出辞职申请，该申请需要由哪些人员或者部门批准，员工需要履行何种辞职手续，都是用人单位的内部管理问题。因此，用人单位应向员工在入职后进行明确告知。用人单位可通过制定发放《员工手册》或者员工培训，来履行此告知义务。

Whether Employer's Untrue Negative Review Infringes Employee's Fame?

Gu, Weiwei | Sui, Angela | Li, Ramona

I Dispute

Whether employer's untrue negative review constitutes reputation infringements to its employee?

II Facts

Plaintiff: Xu

Defendant: Shanghai Metallurgy Construction Company

Since August 1st 1983, Xu has become an employee of Defendant.

On December 1996, Plaintiff and Defendant signed a labor contract. It stipulated that Shanghai Mechanical Equipment Installment Project Company (hereinafter "**SMEIPC**"), which is one branch of Defendant, hired Plaintiff for the needs of production. The term for the labor contract is non-fixed.

Both parties agreed that starting from January 1st, 1997, if the agreed termination conditions were satisfied, the labor contract shall be terminated. Both parties also stated in the contract that 1) if both parties have a mutual agreement to terminate the contract after negotiation, the contract will be terminated; 2) if Plaintiff violates the company's disciplines or rules, Defendant has right to terminate the contract; 3) if Plaintiff notifies Defendant in advance of 30 days and pays the agreed damages or default payments, Plaintiff has right to terminate the contract at any time.

On January 4th 2001, Plaintiff submitted a resignation letter to Defendant. On January 8th of the same year, the vice manager of SMEIPC agreed Plaintiff's resignation and signed to approval. On the same day, Plaintiff handed over all his work to Defendant. Since then, Plaintiff never went to work.

On May 30th 2001, for Plaintiff never went to work after January 2001 and neither did he apply for leaves, Defendant unilaterally terminated the labor relationship with Plaintiff. On the same day, Defendant issued Shanghai Municipal Employee Dismiss Notification (hereinafter "**Notification**"), on which it stated that for Plaintiff violated the disciplines, he was dismissed on May 30th 2001.

After Notification was issued, Defendant handed one copy of the Notification to Shanghai Municipal Baoshan District Yuepu Town Labor Service Center (hereinafter "**LSC**"). However, Defendant has never given one copy to Plaintiff.

On February 2005, Plaintiff applied a job vacancy in Shanghai Automated Technology Limited Company (hereinafter "**SAT**"). The SAT rejected application for the reason that Plaintiff was dismissed because of violation of disciplines. Plaintiff has not known the contents of Notification until he obtained the Notification from Defendant on August 2005. After Plaintiff resigned from Defendant, Plaintiff failed to find a job for many times. He knew the real reason in 2005.

III Judgements

A. First Instance

Plaintiff submitted his resignation letter to his working unit, which is a branch of Defendant, and vice manager Yang of SMEIPC approved it on January 8th 2001. The Yang's approval shall be deemed as made on behalf of Defendant. Meanwhile, Plaintiff

completed the handover procedures on the same day. It shall be deemed that Plaintiff and Defendant had agreed to terminate the labor contract on that day.

Defendant alleged that according to its internal rules, Plaintiff shall come to Human Resources Department to submit resign application. The vice manager of SMEIPC has no right approve the resignation. Therefore, Yang's signature cannot be deemed Defendant's approval for Plaintiff's resignation. The Court held that Yang was vice manager of SMEIPC, a branch of Defendant, and whether Yang had right to approve the employee's resignation application was an internal allocation of responsibilities for executive staff. Plaintiff, as an ordinary employee, had no reason to know it.

In the case at hand, Yang should know or had reason to know he did not have the right to approve Plaintiff's resignation. However, Yang did not request Plaintiff to submit resignation application to Human Resources Department. Instead, he approved Plaintiff's resignation by himself. It is appropriate for Plaintiff to consider he terminated the labor relationship with Defendant after Yang's approval. Therefore, the Court cannot adopt Defendant's allegation.

Defendant dismissed Plaintiff again due to violation of disciplines after Plaintiff and Defendant had already terminated the contract. Meanwhile, Defendant issued a Notification stating that Plaintiff was dismissed due to violation of disciplines. Defendant's actions were baseless and in fault. As result of sending one copy of Notification to LSC, the negative record was displayed to the employment market. It caused unspecified employers including SAT saw the untrue record that Plaintiff was dismissed because of violation of disciplines. Defendant's action harmed and infringed Plaintiff's reputation.

Plaintiff's claims for Defendant's cessation of infringement and written apology shall be supported.

B. Second Instance

Reputation is formed of citizen's points, actions, functions, performance and so on, which is an integrated social appraisal of citizen's morals, abilities and other qualities. It is a general cognition of citizen's social value. Citizen shall enjoy the right of reputation, and the law forbids using offensive or defamatory method to infringe other's right of reputation. An employer has right to manage its employees and review its employees' performance in an objective and fair way. The employer's review session is also an important composition of an employee's integrated social appraisal. Whether an employer's untrue and negative reviews on its employees constitutes a reputation infringement shall consider the following elements: 1) whether the employer's action is in fault; 2) whether the employee's reputation is harmed; and 3) whether there's proximate cause between the employer's actions and the employee's reputation harm.

Appellee (as Plaintiff in First Instance) was an employee of Appellant's (as Defendant in First Instance) branch. On January 4th 2001, Appellee submitted a resignation letter to SMEIPC. The vice manager Yang of SMEIPC approved and signed. After Yang's approval, Appellee handed over all the work. Appellant alleged that Yang had no right to approve Appellee's resignation, and Appellee did not complete the resignation procedures and stopped to work. Therefore, Appellant claimed that Appellee's actions belonged to absence without leave or cause and it is appropriate for Appellant to dismiss him based on violation of disciplines.

The Court held that it was an internal management question about whether Yang had right to approve Appellee's resignation, which Appellee, as an ordinary staff, had no reason to know. Yang did not direct Appellee to relevant departments to handle resignation, instead, he approved the resignation directly. Therefore, it was proper for Appellee to deem the contract was terminated. It was Appellant's fault to dismiss

Appellee again due to violation of disciplines after Appellee had terminated labor relationship with Appellant. It was also baseless and faulty for Appellant to issue a Notification stating Appellee was dismissed due to violation of disciplines and caused the negative effects on the employment market.

Appellant recorded on Notification with violation of disciplines to dismiss Appellee, which is an untrue and negative review on Appellee's performance. The untrue review was disseminated in the employment market, which was obtained by related employers. As a result, it harmed Appellee's social appraisal and had negative effects on Appellee's employment.

The Court agreed with the Court of First Instance that Appellant's actions constituted reputation infringements. It also ruled that Appellant shall be responsible for civil liabilities for Appellee based on its tortious methods, ways, situations and results.

C. Legal analysis

In our view, an employer has right to manage its employees, including reviews on employee's performance, internal appraisals, announcements on employees' disciplines, etc. However, if an employer abuses its managing rights exceeding the limitation of objective and true appraisals, it may infringe employee's reputation rights. In accordance with Article 7 of Answers to Several Questions of the Supreme People's Court on the Trial of Reputation Infringement Cases[1], constitution of reputation infringement shall be decided by 1) the person is actually harmed; 2) actioner's actions

[1] Article 7 of Answers to Several Questions of the Supreme People's Court on the Trial of Reputation Infringement Cases, the responsibility of reputation infringement shall be decided if one of the following conditions occurs:
constitution of reputation infringement shall be decided by 1) the person is actually harmed; 2) actioner's actions are illegal; 3) there's proximate cause between illegal actions and harmed results; and 4) actioner is in fault;
he/she insults or defames other person in writing or orally to harm the other's reputation;
he/she discloses other's privacy or disseminates other's privacy in writing or orally without other's consents, which harms the other's reputation;
or, the news release reports untrue news about one person which harms the other's reputation.

are illegal; 3) there's proximate cause between illegal actions and harmed results; and 4) actioner is in fault.

Therefore, employer's untrue negative reviews constitute reputation infringements, if:

1) reputation is harmed: the employer disseminates the untrue and negative contents. The way of dissemination may be internal or external by other channels. The unknown parties, who see the untrue and negative contents, have bad impression on the specific employee. It leads to harm the employee's social appraisal;

2) employer's actions: generally, employer has untrue and negative reviews on its employees;

3) there's proximate cause between illegal actions and harmed results: it is always that the employer terminates the labor relationship with its employee with the reason of untrue and negative reviews, which affects employee's following job applications;

4) and, the employer is in fault: the employer has untrue and negative reviews under the circumstances that the employer does not exam the factual conditions or the employer has known the reviews are conflicted with facts.

The above constitution of reputation infringement is supported by (2018) Yue 03 Civil No. 19507. In that case, Shenzhen Intermediate People's Court held that the employer disseminated the investigation report of a vicious event via Wechat and posted the same contents on the bulletin board. Although the investigation report did not specify the name, the employer terminated the labor contract with the employee

with this cause. At the same time, the employer did not have sufficient evidence to support its investigation report. Therefore, it was illegal for the employer to terminate the labor contract. The employer disseminated the investigation report and then terminated the labor relationship with the employee, which objectively disseminated the untrue information. The employer's action exceeded the limitation of autonomous labor management. Its action was malicious. The employer dismissed the employee with baseless ground, which caused the bad effects on the employee's social appraisal. The employer shall be responsible for the employee's reputation harm.

Based on above case analysis, there are several suggestions for employers:

1) The employer's review on the employee's performance is an important component of employee's integrated social appraisal. The employer shall review its employees in a real and objective way.

2) The employee submits his/her resignation application to the employer. Which departments or who can approve the application is decided by the employer. Therefore, the employer shall notify all the employees with regard to the resignation procedures. The employer may notify the employees by the way of implementation of Employee's Manuals or internal trainings.

➢ 新规速递

《上海市工伤保险实施办法》 - 伤残津贴和生活护理费标准的调整

作者：顾巍巍 | 隋天娇 | 李丘怿

2019 年 6 月 20 日，上海市人力资源和社会保障局发布通知，为保障工伤人员的基本生活，经市政府同意，自 2019 年 1 月 1 日起对本市致残一级至四级工伤人员的伤残津贴和生活不能自理工伤人员的生活护理费标准进行调整。通知自 2019 年 7 月 1 日起执行，有效期至 2021 年 6 月 30 日。

根据《上海市工伤保险实施办法》（**“《实施办法》”**）第四十三条规定，伤残津贴、供养亲属抚恤金、生活护理费的标准由市劳动保障局根据全市职工平均工资和居民消费价格指数变化等情况适时调整。调整办法由市劳动保障局拟订，报市政府批准后执行。

本次调整的内容主要包括五个方面，分别是伤残津贴、生活护理费、基本养老金、伤残津贴和生活护理费的最低标准，以及增加费用的承担主体。

一、 伤残津贴

调整前：

2018 年 12 月 31 日前发生工伤且致残一级至四级工伤人员的伤残津贴在目前享受的标准基础上调整，其中致残一级增加 618 元/月，致残二级增加 563 元/月，致残三级增加 523 元/月，致残四级增加 491 元/月。

调整后：

2018 年 12 月 31 日前发生工伤且致残一级至四级工伤人员的伤残津贴在 2018 年享受的标准基础上调整，其中致残一级增加 960 元/月，致残二级工伤人员增加 875 元/月，致残三级增加 812 元/月，致残四级增加 763 元/月。

二、 生活护理费

调整前：

2018 年 12 月 31 日前发生工伤且经确认生活不能自理工伤人员的生活护理费在目前享受的标准基础上调整，其中生活完全不能自理增加 350 元/月，生活大部分不能自理增 280 元/月，生活部分不能自理增加 210 元/月。

调整后：

2018 年 12 月 31 日前发生工伤且经确认生活不能自理工伤人员的生活护理费在 2018 年享受的标准基础上调整，其中生活完全不能自理工伤人员增加 817 元/月，生活大部分不能自理工伤人员增加 653 元/月，生活部分不能自理工伤人员增加 490 元/月。

三、 基本养老金

2018 年 12 月 31 日前已按规定办理按月领取养老金手续的致残一级至四级工伤人员，按照本通知规定增加的伤残津贴低于其 2019 年基本养老金增加额的，按养老金增加额计发。

四、 最低标准

(一) 伤残津贴的最低标准

调整前：

伤残津贴最低标准为：致残一级 7044 元/月、致残二级 6599 元/月、致残三级 6195 元/月、致残四级 5810 元/月。

调整后：

调整后的伤残津贴最低标准为：致残一级 7386 元/月，致残二级 6911 元/月，致残三级 6484 元/月，致残四级 6082 元/月。

2019 年 1 月 1 日至 12 月 31 日期间发生工伤且致残一级至四级的工伤人员，

按《实施办法》规定计发的伤残津贴低于本通知伤残津贴的最低标准的，按最低标准计发。

(二) 生活护理费的最低标准

调整前：

生活护理费标准为：生活完全不能自理 3916 元/月，生活大部分不能自理 3133 元/月，生活部分不能自理 2350 元/月。

调整后：

调整后的生活护理费标准为：生活完全不能自理 4383 元/月，生活大部分不能自理 3506 元/月，生活部分不能自理 2630 元/月。

五、 增加费用的承担主体

由工伤保险基金按照《实施办法》规定支付伤残津贴和生活护理费的工伤人员，其按本通知规定调整后增加的费用由工伤保险基金支付。目前仍由用人单位按照《实施办法》规定支付伤残津贴和生活护理费的工伤人员，其按本通知规定调整后增加的费用由用人单位支付。

Adjusting Standards of Disability Subsidies and Nursing Care Subsidies

Gu, Weiwei | Sui, Angela | Li, Ramona

On June 20th 2019, Shanghai Municipal Human Resources and Social Security Bureau announced that in order to ensure the basic life of work-related injured workers, Shanghai Municipal Governments approved to adjust the standards of disability subsidies for those injured workers of disabled grade 1 to 4 and nursing care subsidies for those injured workers of self-care disability. The adjustment started to enforce from July 1st 2019 and is valid until June 30th 2021.

In accordance with Article 43 of *Implementation Measures of Shanghai Municipality on Work-related Injury Insurance* ("*Implementation Measures*"), the standards of disability subsidies, next-of-kin compensation and nursing care subsidy etc. shall be adjusted by the municipal labor and social security bureau based on changes in the average monthly wage of workers in the municipality and consumption price index etc. The adjustment method shall be formulated by the municipal labor and social security bureau and implemented upon approval by the municipal government.

The current five (5) adjustments involve disability subsidies, nursing care subsidies, basic pension, the minimum standards of disability subsidies and nursing care subsidies, and undertaking authorities for the increased amount.

I Disability Subsidies

Before Adjustments:

The adjustments shall be made to the current disability subsidies of work-related injured workers who is disabled grade 1 to 4 and was injured before December 31st

2019. The adjustments are: for grade 1, increasing RMB 618/mon.; for grade 2, increasing RMB 563/mon.; for grade 3, increasing RMB 523/mon.; for grade4, increasing RMB 491/mon.

After Adjustments:

The adjustments shall be made to the Year 2018 disability subsidies of work-related injured workers who is disabled grade 1 to 4 and was injured before December 31st 2019. The adjustments for disability subsidies are: for grade 1, increasing RMB 960/mon.; for grade 2, increasing RMB 875/mon.; for grade 3, increasing RMB 812/mon.; for grade4, increasing RMB 763/mon.

II Nursing Care Subsidies

Before Adjustments:

The adjustments shall be made to the current nursing care subsidies of work-related injured workers who was injured before December 31st 2018 and is certified to be self-care disabled. The adjustments for are nursing care subsidies: for totally self-care disabled, increasing RMB 350/mon.; for substantially self-care disabled, increasing RMB 280/mon.; for partially self-care disabled, increasing RMB 210/mon.

After Adjustments:

The adjustments shall be made to the Year 2018 nursing care subsidies of work-related injured workers who was injured before December 31st 2018 and is certified to be self-care disabled. The adjustments for are nursing care subsidies: for totally self-care disabled, increasing RMB 817/mon.; for substantially self-care disabled, increasing RMB 653/mon.; for partially self-care disabled, increasing RMB 490/mon.

III Basic Pension

For work-related injured workers of disabled grade 1 to 4, who has completed the monthly pension procedures before December 31st 2018, if his/her increased amount of disability subsidies under the current adjustments' announcement is lower than those of the Year 2019 basic pension, the increased amount of the Year 2019 basic pension shall prevail.

IV Minimum Standards

A. The Minimum Standards for Disability Subsidies

Before Adjustments:

The minimum standards for disability subsidies are: for grade 1, RMB 7044/mon.; for grade 2, RMB 6599/mon.; for grade 3, RMB 6195/mon.; for grade 4, RMB 5810/mon.

After Adjustments:

The minimum standards for disability subsidies are: for grade 1, RMB 7386/mon.; for grade 2, RMB 6911/mon.; for grade 3, RMB 6484/mon.; for grade 4, RMB 6082/mon.

For work-related injured workers, who is disabled grade 1 to 4 and was injured during January 1st, 2019 to December 31st, 2019, if the disability subsidies under the *Implementation Measures* is lower than minimum standards under the current announcement, the minimum standards of disability subsidies prevail.

B. The Minimum Standards for Nursing Care Subsidies

Before Adjustments:

The standards for nursing care subsidies are: for totally self-care disabled, RMB 3916/mon.; for substantially self-care disabled, RMB 3133/mon.; partially self-care disabled, RMB 2350/mon.

After Adjustments:

The after-adjustment standards for nursing care subsidies are: for totally self-care disabled, RMB 4383/mon.; for substantially self-care disabled, RMB 3506/mon.; partially self-care disabled, RMB 2630/mon.

V Undertaking Authorities for the Increased Amount

For work-related injured worker whose disability subsidies and nursing care subsidies are paid by the work-related injury insurance fund under the *Implementation Measures*, his/her increased amount under the current announcement shall be paid by the work-related injury insurance fund. In present, for work-related injured worker whose disability subsidies and nursing care subsidies are paid by his/her employer, the increased amount under the current announcement shall be paid by his/her employer.

附：

发 文 机 关： 上海市人力资源和社会保障局

发 布 日 期： 2019.06.20

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文 号： 沪人社规〔2019〕24 号

上海市人力资源和社会保障局关于调整本市工伤人员伤残津贴和生活护理费标准的通知（2019 年 6 月）

沪人社规〔2019〕24 号

各委、办、局，控股（集团）公司，市社会保险事业管理中心，各区人力资源和社会保障局：

为保障工伤人员的基本生活，根据《上海市工伤保险实施办法》（以下简称《实施办法》）规定，经市政府同意，自 2019 年 1 月 1 日起对本市致残一级至四级工伤人员的伤残津贴和生活不能自理工伤人员的生活护理费标准进行调整，具体通知如下：

一、2018 年 12 月 31 日前发生工伤且致残一级至四级工伤人员的伤残津贴在 2018 年享受的标准基础上调整，其中致残一级增加 960 元/月，致残二级工伤人员增加 875 元/月，致残三级增加 812 元/月，致残四级增加 763 元/月。

调整后的伤残津贴最低标准为：致残一级 7386 元/月，致残二级 6911 元/月，致残三级 6484 元/月，致残四级 6082 元/月。

二、2018 年 12 月 31 日前发生工伤且经确认生活不能自理工伤人员的生活护理费在 2018 年享受的标准基础上调整，其中生活完全不能自理工伤人员增加 817 元/月，生活大部分不能自理工伤人员增加 653 元/月，生活部分不能自理工伤人员增加 490 元/月。

调整后的生活护理费标准为：生活完全不能自理 4383 元/月，生活大部分不能自理 3506 元/月，生活部分不能自理 2630 元/月。

三、2018 年 12 月 31 日前已按规定办理按月领取养老金手续的致残一级至四级工伤人员，按照本通知第一条规定增加的伤残津贴低于其 2019 年基本养老金增加额的，按养老金增加额计发。

四、2019 年 1 月 1 日至 12 月 31 日期间发生工伤且致残一级至四级的工伤人员，按《实施办法》规定计发的伤残津贴低于本通知第一条第二款规定的最低标准的，按最低标准计发。

五、由工伤保险基金按照《实施办法》规定支付伤残津贴和生活护理费的工伤人员，其按本通知规定调整后增加的费用由工伤保险基金支付。目前仍由用人单位按照《实施办法》规定支付伤残津贴和生活护理费的工伤人员，其按本通知规定调整后增加的费用由用人单位支付。

六、本通知自 2019 年 7 月 1 日起执行，有效期至 2021 年 6 月 30 日。本通知实施前已按《关于调整本市工伤人员伤残津贴和生活护理费标准的通知》（沪人社规〔2019〕7 号）规定调整伤残津贴和生活护理费标准的工伤人员，按本通知规定的标准重新核定后予以补差。

《关于调整本市工伤人员伤残津贴和生活护理费标准的通知》（沪人社规〔2019〕7 号）同时废止。

上海市人力资源和社会保障局

2019 年 6 月 20 日

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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 400 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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联系我们. 如您欲进一步了解本报告所涉及的内容，您可以通过下列联系方式联系我们。

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