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环球劳动法律专递

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➢ 环球视角

出差与出游期间的工伤认定（上海地区）

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引言

根据《工伤保险条例》（2010 年修订）第 14 条第 5 项的规定，职工因工外出期间，由于工作原因受到伤害或者发生事故下落不明的，应当认定为工伤。

那么，劳动者在用人单位安排的出差及出游过程中受到伤害能否构成工伤呢？对此，本文通过梳理相关法律法规以及上海地区公开裁判文书，对上海地区法院的审判思路进行简要归纳与分析。

一、概述

从《工伤保险条例》第 14 条第 5 项的措辞中可以注意到，在判断劳动者外出时所受伤害是否属于工伤时，需要考虑“双重工作原因”：一方面，“外出原因”需要与工作相关；另一方面，“受害原因”也需要与工作相关。

（一）如何判断“外出原因”是否与工作相关？

就判定“外出原因”是否与工作相关，《最高人民法院关于审理工伤保险行政案件若干问题的规定》（法释〔2014〕9 号）（“**《工伤保险规定》**”）第 5 条列举了如下三种属于“因工外出期间”的情形：

(1) 职工受用人单位指派或者因工作需要在工作场所以外从事与工作职责有关的活动期间；

(2) 职工受用人单位指派外出学习或者开会期间；

(3) 职工因工作需要的其他外出活动期间。

（二）如何判断“受害原因”是否与工作相关？

就判定“受害原因”是否与工作相关，《工伤保险规定》第 5 条并没有以列举情形的方式作出规定，而是仅列明一种除外情形：“职工因工外出期间从事与工作或者受用人单位指派外出学习开会无关的个人活动受到伤害”不属于工伤，即明确排除了“个人活动”。

对此，最高人民法院在其出版的《<关于审理工伤保险行政案件若干问题的规定>的理解与适用》（“**《工伤问题理解与适用》**”）第 6 条中也对此作出了较为细致的说明：由于“因工外出期间”较之一般工作时间存在许多不可预测的风险，这些风险由职工承担不甚公平，因此，“由于工作原因受到伤害”既包括与工作直接有关而形成的伤害，也包括开展工作过程中所发生的伤害，如外出途中产生的伤害，因住宿、餐饮等场所存在的不安全因素产生的伤害等。因此，这里的“工作原因”是一个范围很广的概念。只要不属于职工从事与工作或者受用人单位指派外出学习、开会无关的个人活动受到伤害的，都应当认定构成工伤。

二、出差期间的工伤认定

（一）原则上，整个出差期间遭遇伤害都属于“工伤”

1. 在途期间遭遇伤害，属于工伤

*在上海创明智能遮阳技术有限公司与上海市嘉定区人力资源和社会保障局工伤认定纠纷上诉案（案号：（2009）沪二中行终字第 328 号）*中，劳动者从青岛出差到黄岛工作。2007 年 11 月 13 日晚，劳动者在完成工作任务返回住处途中，于 2007 年 11 月 14 日凌晨沿钱塘江路至老年大学路段处受到机动车交通事故伤害。

*在上海莱克气割机有限公司与上海市浦东新区人力资源和社会保障局撤销工伤认定纠纷案（案号：（2012）浦行初字第 237 号）*中，劳动者经用人单位批准，自 2011 年 9 月 22 日至同年 10 月 15 日在扬州地区出差。同年 10 月 3 日，劳动者前往南通阀门公司推销用人

单位的产品。从南通阀门公司出来后，当日 13 时 55 分左右劳动者在江苏省如皋市高明镇刘黄路刘庄村九组路段发生交通事故。

在*上海科创塑料制品有限公司与上海市宝山区人力资源和社会保障局、上海市宝山区人民政府劳动和社会保障一审行政判决书（案号：（2018）沪 0115 行初 897 号）*中，劳动者受用人单位指派乘坐同事驾驶的单位车辆前往常州工作，处理完毕返沪途中猝死。

在上述三则案例中，上海地区法院都认定劳动者在出差途中遭遇的伤害属于工伤。法院认定的基本思路在于，“因工外出”有别于通常意义上在工作场所的工作，对其工作时间、工作地点均应作适当延伸，不论是从出差工作场所返回出差地住处还是从出差地来回常住地的路途上受到伤害，都应当认定构成工伤。

2. 住宿期间遭遇伤害，属于工伤

在*上海辰氏佳设备技术服务有限公司与上海市嘉定区人力资源和社会保障局等不服工伤认定纠纷一审行政判决书（案号：（2016）沪 0114 行初 9 号）*中，劳动者在喀什工作期间，于 2013 年 11 月 10 日凌晨被发现在住宿酒店客房内死亡。法院认为，职工在因工外出期间，只要没有从事与工作无关的私人活动，其整个因工外出期间都应认定为工作时间和工作原因，进而应当认定为工伤。

在*上海功源电子科技有限公司诉上海市闵行区人力资源和社会保障局等劳动和社会保障一案二审行政判决书（案号：（2014）沪一中行终字第 11 号）*中，劳动者受用人单位委派出差，于 2012 年 11 月 29 日在用人单位为其提供的酒店内突发疾病死亡。同时，法院还了解到劳动者每天晚上还会处理些当日工作未尽事宜。据此，法院认为，劳动者在出差期间的工作时间有一定的延续性，工作地点有一定的延展性，不应不分实际情况，机械地将其出差期间的工作时间理解为从某公司下班的时间，工作地点理解为在某公司内。综上，劳动者在酒店休息期间应当视为系在工作时间、工作场所内。

在*上海安京实业有限公司与上海市青浦区人力资源和社会保障局工伤认定行政纠纷上诉案（案号：（2012）沪二中行终字第 61 号）*中，劳动者受用人单位安排至昆山某项目工

地工作，于 2010 年 10 月 21 日晚在工地宿舍休息时左足被开水烫伤。法院认为，劳动者受用人单位指派至昆山工地工作，属于“因工外出”的性质，其在该工地日常工作和生活均出于工作的需要，劳动者晚间在宿舍休息并未超出外出工作期间正常生活需要的范围。据此认定劳动者晚间在工地宿舍休息时被开水烫伤属于因工作原因并无不当。

可见，在出差过程中，如果劳动者在住宿期间遭遇伤害，上海地区的法院也倾向于认定“住宿期间”与“住宿地点”也属于“工作时间”与“工作地点”的延伸范围内，进而在此期间遭受的伤害也应当纳入工伤保险的保护范围。

3. 用餐期间遭遇伤害，属于工伤

在*上海品光建筑装饰工程有限公司与上海市嘉定区人力资源和社会保障局劳动和社会保障二审行政判决书（案号：（2017）沪 02 行终 250 号）*中，2015 年 12 月 8 日，劳动者被用人单位派到苏州展览馆做展台搭建工作，单位不提供午餐。当天中午，受害劳动者与同事步行至附近的韩城广场找小餐馆吃饭，走到韩城广场迪欧咖啡门口时发生交通事故。法院认为，职工在因工外出期间，只要没有从事与工作无关的私人活动，其整个因工外出期间都应认定为工作时间、工作原因。事发时，劳动者在外出就餐途中发生交通事故受伤，而吃午餐是正常的生理需要，是劳动者为了能继续完成之后的工作，属于与履行工作职责相关，并在合理的区域和时间内受到伤害。因此，认定属于工伤。

可见，与“住宿”类似，由于“用餐”也是满足劳动者正常生理需要的活动，在出差过程中，“用餐时间”与“用餐地点”也将被视作“工作时间”与“工作地点”的延伸，在此期间遭遇的伤害也将被认定为工伤。

（二）例外：出差期间的“个人活动”不受保护

1. 长期驻外期间的“生活时间”属于“个人活动”时间

《人力资源和社会保障部关于执行<工伤保险条例>若干问题的意见（二）》第五条规定“职工因工作原因驻外，有固定的住所、有明确的作息时间，工伤认定时按照在驻在地当地

正常工作的情形处理。”

在*高健秀与上海市杨浦区人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2017）沪0110行初123号）*中，劳动者受用人单位指派至南昌出差，出差期限为2016年11月8日至2017年12月31日。2016年11月17日早晨5点12分左右，劳动者在其租住房屋内因火灾事故死亡。在分析劳动者因火灾事故死亡，是否属于工伤时，法院认为，劳动者在南昌工作期间虽然实行不定时工作制，但亦有工作与休息的合理区分，劳动者早晨5时左右在出差地南昌市租住房屋内因楼道内电动车起火事故导致死亡，不符合认定工伤或者视同工伤的情形。

可见，在劳动者受单位指派长期驻于外地的情况下，对于“工作时间”及“工作地点”的认定则不同于“短期出差”，不能再将“住宿期间”、“用餐期间”一概纳入“工作期间”。我们理解，“驻外期间”，劳动者工作与生活的界限其实是相对清晰的，作息时间也较为规律，与正常工作的差别仅在于“工作地点”的差别，进而其住宿休息期间的受伤风险不再系因“出差”这一事件而陡增，对“工作时间”及“工作地点”的认定则应当按照其正常的作息来判定。

2. 兴趣、娱乐活动属于“个人活动”

在*胡晓俊与上海市闵行区人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2016）沪0112行初138号）*中，劳动者在因工外出期间，在完成用人单位指派的工作后返回入住酒店，在更换衣服后离开酒店外出跑步，并在跑步过程中受伤。对此，法院认为，劳动者在出差期间外出跑步的行为应视为劳动者个人的兴趣爱好与生活习惯，没有证据证明与其工作存在关联，因此，劳动者在运动过程中所受伤害不属于工伤。

正如前文所述，尽管劳动者在外期间的“工作时间”与“工作地点”会较一般情况作较大的延伸与扩展。但《工伤保险规定》第5条也是明确将“个人活动”排除在工伤保护的范围外，而本案例中的兴趣活动，以及常见的购物、游览等典型的与工作无关的活动，都会被视作在因工外出期间从事“个人活动”，因此受到的伤害也不会被认定为工伤。

3. 举证上，用人单位负较高的责任

*在上海爱立信电子有限公司诉被告上海市嘉定区人力资源和社会保障局不服工伤认定一审行政判决书（案号：（2014）嘉行初字第 22 号）*中，劳动者于 2013 年 8 月 16 日至 2014 年 2 月 28 日被公司派遣至南非约翰内斯堡担任财务控制中心经理职务，2013 年 9 月 2 日 6 时 43 分（南非时间），严庄因突发疾病打电话至办公室预约医生。10 时 10 分许（南非时间）医务人员到达，10 时 19 分（南非时间）确认严庄死亡。在该案中，人社局提出，劳动者外派南非期间为因工外出，职工因工外出工作具有一定的特殊性，其中因工出境工作更加具有特殊性，因国外的社会习惯、生活环境及语言交流等与国内有很大的不同，故只要没有证据证明职工在因工出境工作期间从事私人行为，则应认定职工在此期间一直处于工作时间、工作场所和工作岗位上。法院认为，劳动者因工被派至南非工作，相对于一般情况下的因工外出更具有特殊性，据此认定其在因工出境工作期间突发疾病死亡的情形，属于工伤认定范围具有合理性。

在*新时代通成(上海)货物运输有限公司与上海市普陀区人力资源和社会保障局劳动和社会保障二审行政判决书（案号：（2014）沪二中行终字第 223 号）*中，劳动者被用人单位派往厦门出差，并于 2013 年 6 月 18 日晚发生交通事故。对此，用人单位称，在事发当日并没有指派劳动者任何工作任务，当晚受害劳动者是搭乘当地分公司员工驾驶的摩托车外出，交通事故发生时已是晚上十点多，事故发生地点离劳动者暂住地有 8 公里，且行车方向与暂住地相悖，另根据检测报告劳动者当晚喝过酒，应当已经吃过晚饭，故劳动者当晚外出伤亡既不属于工作原因，也非出于就餐等正常的生理需要。认定劳动者的死亡属于工伤属认定事实错误。人保局则称，劳动者在厦门期间的正常生活都属于因工性质，用人单位未能举证证明劳动者系因私外出，故认定其为工伤并无不当。法院采纳了普陀人保局的主张，最终认定工伤。

从上述两则案例可见，尽管出差期间在“个人活动”中受到伤害不属于工伤，在对从事“个人活动”的举证上，主张不构成工伤的一方（大多数情况下是用人单位）负有较高的证明责任，即使劳动者的行踪有可疑之处，在不能证明确实是“因私外出”的情况下，法院都会认定构成工伤。

三、集体出游过程中的工伤认定

在最高院出版的《<关于审理工伤保险行政案件若干问题的规定>的理解与适用》中提到"职工参加用人单位组织或者受用人单位指派参加其他单位组织的活动受到伤害的。关于职工在参加本单位或者受用人单位指派参加其他单位组织的集体活动受到伤害是否认定工伤的问题，争议较大。我们认为，如果属于用人单位强制要求或者鼓励参加的集体活动，这些活动可以被认为是工作的一个组成部分，应该属于工作原因，由此受到的伤害应当认定为工伤。"

因此，用人单位对活动的"强制性"与"鼓励性"是对判断是否属于"工伤"的考量标准。

（一）纵观整体行程：是否系"因工外出"

1. "纯玩性质"集体出游活动可能不被认定为"因工外出"

在*杨东洋与上海市青浦区人力资源和社会保障局劳动和社会保障二审行政判决书（案号：（2017）沪02行终160号）*中，用人单位出资组织包括遇害的劳动者在内的十名员工，由旅行社带领，参加富春江小三峡－大奇山－桐庐琳瑶仙境3日游。

在*王本秀与上海市普陀区人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2016）沪7101行初203号）*中，用人单位与旅行社签订旅游合同，组织包括受害劳动者在内的员工前往浙江安吉旅游，游览大竹海、藏龙百瀑及白茶谷九龙峡等景区。

在*张云与上海市闸北区人力资源和社会保障局劳动和社会保障二审行政判决书（案号：（2015）沪二中行终字第264号）*中，用人单位与旅行社签订旅游合同，以补贴旅游费的形式支付全部费用，由旅行社带领包括受害劳动者在内的员工前往张家界旅游。

在*原告吕某某与某人保局，第三人某公司劳动和社会保障纠纷一审行政判决书（案号：（2016）沪0116行初5号）*中，用人单位组织包括受害劳动者在内的员工赴重庆旅游，机票和酒店等旅游费用由公司支付。

在*蒋慧与上海市虹口区人力资源和社会保障局、上海市人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2018）沪7101行初19号）*中，劳动者自愿参加了由用人单位组织的乌镇游玩活动，于次日返程途中，劳动者因乘坐的客车遭遇交通事故而受伤。

上述多则案例中，上海地区法院都倾向于认为此类“纯玩”行程具有“员工福利性质”、“未强制”、“与工作无关”等特征，进而在该等行程中遭受的伤害不属于工伤。

但需要注意的是，近年来，许多地区的法院对于单位组织“纯玩”旅游是否属于“与工作有关”的活动是持肯定态度的。在引起业内关注的*珠海市香洲区人力资源和社会保障局与时蓬蓬社会保障行政确认案（案号：（2014）珠中法行终字第79号）*中，用人单位发出《旅游通知》，通知定于2013年5月5日至6日组织全体员工外出旅游，旅游地点为深圳东部华侨城。劳动者在游玩过程中受伤。对此，广东省珠海市中级人民法院则认为“单位组织员工集体活动，从行为定性分析属单位集体行为，而不是员工私利行为，单位是集体活动的倡导者、组织者、管理者、交通工具提供者、资金提供者，员工在外集体活动中，始终处于单位组织的管理中，员工始终是被管理的状态。从单位组织员工集体活动的目的看，旨在调节员工身心，提高员工工作积极性，增强凝聚力。单位组织员工集体活动是单位福利待遇的另一种表现形式。期间发生伤害，应该获得医疗救治和经济补偿，组织者要对整个集体活动过程负责。”

鉴于对于该事项的认定实践中存在两种截然不同的态度，还是有待相关权威性文件的出台，以形成实践中的共识。

2. 包含“工作内容”的出游活动可能被认定为“因工外出”

在*李鸿英与上海市青浦区人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2018）沪0118行初42号）*中，用人单位向员工发出《安全生产、节能环保先进人员拓展训练活动的通知》，活动内容为互动加游览；参加人员为2016年安全生产、节能环保先进人员。此后，用人单位与旅行社签订旅游合同，组织了余杭2日游活动。劳动者在旅游过程中摔倒受伤。法院在审理过程中查明，以拓展训练活动的名义审批是为了便于走程序，

用人单位组织的是旅游活动，实际是与工作内容无任何关联的“纯玩”旅游活动，劳动者在旅游过程中受伤不属于工伤。

在*通济隆外币兑换(中国)有限公司与上海市浦东新区人力资源和社会保障局、上海市人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2018）沪0106行初140号）*中，用人单位组织相关员工至大连活动，劳动者在活动过程中摔伤。法院认为，尽管用人单位称该活动系自愿报名，单位并不强制，但事实上在用人单位组织的活动行程中有2016年度总结会的安排。劳动者摔伤的地方也在用人单位出发前所发的行程安排之内。应当将本次活动视为劳动者的工作范畴。劳动者是为了享受公司福利参加的本次活动且在活动过程中按用人单位的既定安排进行活动，处于被管理状态。用人单位作为活动的倡导者、组织者、管理者、资金提供者应对整个集体活动过程负责。因此，劳动者参加的活动可以认为是“因公外出期间，由于工作原因”的延伸。

从上述两则案例可见，如果外出游玩活动中还包含了“拓展训练活动”、“年度总结会”等与工作业务相关的内容，法院则较有可能认为该用人单位组织的该出游活动具有一定的强制性与鼓励性，该出游活动期间也较有可能被认定为“因工外出期间”。

（二）聚焦事发原因：是否受用人单位管控

1. 在“自由活动”及“自费项目”中受伤一般不构成工伤

在*上海索乐企业管理咨询有限公司与上海市普陀区人力资源和社会保障局、上海市普陀区人民政府不予认定工伤决定与行政复议决定二审案（案号：（2019）沪03行终67号）*中，劳动者在用人单位组织的旅游中在泰国沙美岛参加浮潜自费游玩项目时发生淹溺，法院在论证该伤害不属于工伤时分析认为，导致劳动者发生溺亡的浮潜项目性质来看，该项目明显属于高风险旅游项目，亦未强制员工参加，更与工作原因无关。

在*杨东洋与上海市青浦区人力资源和社会保障局劳动和社会保障二审行政判决书（案号：（2017）沪02行终160号）*中，劳动者在自由活动过程中与同事前往农家乐附近芦茨溪下游的溪边游泳，并在淌水过程中不慎滑倒并溺水。两级法院都认定不构成工伤。

在用人单位组织的出游活动中，往往会包含自由活动时间也会包含一些自费项目，由于劳动者在决定是否参加该类活动时具有较强的自主性，用人单位在这些活动中对劳动者的管控力则大大减弱，因此，如果劳动者在这些活动中遭受伤害，一般不会被认定为工伤。

2. 在“单位安排”行程中受伤可能构成工伤

在*通济隆外币兑换(中国)有限公司与上海市浦东新区人力资源和社会保障局、上海市人力资源和社会保障局劳动和社会保障一审行政判决书（案号：（2018）沪0106行初140号）*中，用人单位组织相关员工至大连活动，劳动者在活动过程中摔伤。劳动者摔伤的地方也是在原告出发前所发的行程安排中的内容。应当将本次活动视为劳动者的工作范畴。劳动者是为了享受公司福利参加的本次活动且在活动过程中按用人单位的既定安排进行活动，处于被管理状态。用人单位作为活动的倡导者、组织者、管理者、资金提供者应对整个集体活动过程负责。

与“自由活动”及“自费项目”相反，在用人单位为劳动者安排行程的情况下，用人单位对劳动者有较大的管控力，如果劳动者依照用人单位的要求开展行程并因此受伤，应当认定构成工伤。

四、结语

经过对上述公开案例的梳理，结合文首提到的“双重工作原因”判定，就上海地区法院对于出差期间及出游期间的工伤认定，可以简要总结如下：

1. 出差期间受到伤害：

- 在判定“外出原因”时，基本都会判定出差系与工作相关的活动。

- 在判定“受伤原因”是否与工作相关时，往往会从保护劳动者的角度拓展及延伸“工作地点”及“工作时间”，进而在劳动者的在途、住宿、用餐期间纳入“与工作相关”的范围。针对唯一被排除在外的“个人活动”，用人单位负有较高的举证责任。

- 需要注意“长期驻外”这一特殊情形。

2. 出游期间受到伤害：

- 法院一般会从活动行程安排、活动的目的、参与人员、费用承担方式等方面综合予以考量。

- 在判定“外出原因”阶段，“纯玩”的行程较有可能被认为“与工作无关”，但各地实践中尚未就该问题的认定达成共识。

- 在判定“受伤原因”阶段，则要注意劳动者的事发行程是否在用人单位安排之内。

Identification of Work Injury during Business Trip and Travel (Shanghai)

Weiwei Gu | Jason Wu | Jess Chen

Preamble

According to Item 5 of Article 14 of the *Regulations on Work Injury Insurance (revised in 2010)*, an employee shall be identified as suffering a work injury when the employee is injured or missing after an accident for work reasons when the employee is going out for work reasons .

Accordingly, can the injuries of employees caused in the process of business trips and travels arranged by the employers constitute work injuries? To address this issue, this article summarizes and analyzes the trial ideas of the courts in Shanghai by outlining relevant laws and regulations and published judgment documents in Shanghai.

1. Introduction

It can be noted from the plain language of Item 5 Article 14 of the *Regulations on Work Injury Insurance* that it is necessary to consider the "dual work-related reasons" to determine whether the injury suffered by an employee during the period of going out for work constitutes a work injury. It means that, on the one hand, the "reason for going out" shall be related to work. On the other hand, the "cause of injury" shall also be related to work.

1.1 How to Determine Whether the "Reason for Going out" Is Related to Work?

With regard to determine whether the "reason for going out" is related to work, Article 5 of *Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Administrative Cases of Work Injury Insurance ("**Work Injury Insurance Provisions**")*

(Fa Shi [2014] No.9) listed the following three circumstances:

(1) The period during which an employee engages in activities related to job duties in a place other than the workplace upon assignment by his/her employer or due to work needs;

(2) The period during which an employee is assigned by the employer to study or attend a meeting outside the workplace;

(3) The period during which an employee engages in other activities outside the workplace due to work needs.

1.2 How to Determine Whether the "Cause of Injury" Is Related to Work?

As to determine whether the "cause of injury" is related to work, Article 5 of *Work Injury Insurance Provisions* does not enumerate the circumstances, but only lists one exception thereof: "Where an employee is injured due to engaging in personal activities unrelated to job duties or the study or meeting tasks assigned by the employer during the period when he/she is supposed to engage in work activities outside the workplace" shall not be deemed as a work injure, which means that "personal activities" are clearly excluded.

In this regard, the Supreme People's Court also make a more detailed explanation in Article 6 of the "*Understanding and Application of the Provisions of the Supreme People's Court on Several Issues concerning the Hearing of Administrative Cases of Work Injury Insurance*" *("**Understanding and Application of the Work Injury Insurance Provisions**")*, which states that considering the "during the period of going out for work reasons" exists many unpredictable risks compared with those in the usual working course, it is unfair for an employee to assume those risks. Thus, "injury due to work" includes both the injuries directly related to the work and the injuries that occur in the course of carrying out work, such as injuries caused on-the-way , injury caused by the unsafe factors existing in accommodation, dining and other premises. Therefore, the "work-related reasons" here is a broad concept. Except any injury arising from any individual activity that is not related

to the work or is not related to the outside study or meeting required by the employer, the injuries caused by other reasons shall be deemed as work injury.

2. Identification of Work Injury During the Business Trip

2.1 In Principle, the Injury Suffered during the Entire Business Trip Shall Be "Work Injury"

2.1.1 Injury Suffered During the Way of Business Trip Shall Be Work Injury

In the *Appellate Case of Shanghai Chuangming Intelligent Shading Technology Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Jiading District on Work Injury Identification Dispute (Case No.: (2009) Hu 02 Zhong Xing Zhong No. 328)*, the employee took a business trip from Qingdao to Huangdao for work. In the evening of 13 November 2007, the employee was on the way back to the residence after completing the work and the employee was injured by a motor vehicle traffic accident along the Qiantangjiang Road to the University for the Aged on the morning of 14 November 2007.

In the case of *Shanghai Laike Gas Cutting Machine Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Pudong New District on Cancellation of the Work Injury Identification Dispute (Case No.: (2012) Pu Xing Chu No. 237)*, the employee, upon the approval of the employer, took a business trip in Yangzhou from 22 September 2011 to 15 October 2011. On October 3 of the same year, the employee went to Nantong Valve Company to promote the products of the employer. After getting out of Nantong Valve Company, the employee suffered the traffic accident occurred at about 13:55 on the same day at the 9th section of Liuzhuang Village, Liuhuang Road, Gaoming Town, Rugao City, Jiangsu Province.

In the *First-instance Administrative Judgment of Shanghai Kechuang Plastic Products Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Baoshan District,*

People's Government of Shanghai Baoshan District on Labor and Social Security (Case No.: (2018) Hu 0115 Xing Chu No. 897), the employee took the company's vehicle driven by a colleague to Changzhou for work assigned by the employer. After completing the work, the employee died suddenly on the way back to Shanghai.

In the abovementioned three cases, the courts in Shanghai all held that the injuries suffered by the employees on their way of business trips shall be regarded as work injuries. The basic idea that the courts held is that "going out for work" is different from the work in the workplace in a usual course, and the working time and workplace should be extended appropriately thereof. As such, the injuries that take place whenever it is on the way back from the workplace of business trip to the accommodation of the business trip or to a habitual residence, should be considered to constitute a work injury.

2.1.2 Injuries suffered in the process of accommodation shall be identified as work injury

In the *First-instance Administrative Judgment of Shanghai Chenshijia Equipment Technology Service Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Jiading District, etc. on the Work Injury Identification Dispute (Case No.: (2016) Hu 0114Xing Chu No.9)*, the employee was found dead in the hotel room in the early morning on 10 November 2013 during the work in Kashgar. The court held that as long as the employee did not engage in personal activities irrelevant to his/her work when he/she is going out for work, the entire period of going out shall be recognized as working hours and work-related reasons and shall further be recognized as work injury.

In the *Second-instance Administrative Judgment of Shanghai Gongyuan Electronic Technology Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Minhang District on Labor and Social Security, (Case No.: (2014) Hu 01 Zhong Xing Zhong No. 11)*, the employee went for a business trip delegated by the employer and died of sudden disease in the hotel provided by the employer on 29 November 2012. The court

also learned that the employee would deal with the unfinished daily work in the hotel every evening. Accordingly, the court held that the working time of the employee during the business trip had a certain continuity, and the workplace had a certain degree of extensibility. Therefore, the working time during the business trip shall not be mechanically understood as the time of getting off from a company. Neither did the workplaces be considered only as the place within a company. To sum up, the rest period of the employee in the hotels shall be deemed to be within the working hours and workplace.

In the *Appellate Case of Shanghai Anjing Industrial Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Qingpu District on Work Injury Identification Administrative Dispute (Case No: (2012) Hu 02 Zhong Xing Zhong No. 61)*, the employee was arranged by the employer to work at the construction site of a project in Kunshan and his left foot was scalded by boiled water while having a rest in the dormitory on the site on the evening of October 21, 2010. The court held that the employee was assigned to the Kunshan site by the employer and shall meet with the nature of “going out for work”. Considering the daily work and life on the work site were necessary for work, the employee’s rest in his dormitory at night did not exceed the scope of normal living needs. Therefore, it is not improper to identify the reasons why the employee is scalded by boiling water in the dormitory during the night is related to work.

It is inferred that in the process of business trip, if the employee suffers injuries during the accommodations, the courts in Shanghai also intend to determine that the “period of accommodation” and “place of accommodation” are also within the extension of “working time” and “workplace”. The injuries suffered during this period shall also be covered by the work injury insurance.

2.1.3 Injury suffered in the process of dining shall be identified as work injury

In the *Second-instance Administrative Judgment of Shanghai Pingguang Building Decoration Engineering Co., Ltd. v. Human Resources and Social Security Bureau of*

Shanghai Jiading District on Labor and Social Security (Case No.: (2017) Hu 02 Xing Zhong No. 250), the employee was sent to the Suzhou Exhibition Hall by the employer to build the stage on 8 December 2015, and the employer did not provide lunch. At noon of that day, the injured employee and his colleagues walked to the nearby Hancheng Square to find a small restaurant for lunch, and a traffic accident occurred when they walked to the door of the Dio Coffee in Hancheng Square. The court held that as long as the employee did not engage in personal activities irrelevant to his/her work during the period of a business trip, the entire period of his/her business trip shall be deemed as working hours and work-related reasons. When the accident occurs, the employee is injured in a traffic accident while eating out, and lunch is a normal physiological need, the employee is injured in connection with the performance of his or her job duties within a reasonable area and time in order to continue the work after the lunch. Therefore, the injury suffered by the employee shall be determined as work injury.

It can be inferred that, similar to “accommodation”, “dining” is also an activity that satisfies employee’s normal physiological needs. During the business trip, “dining time” and “dining place” shall also be regarded as the extension of “working time” and “workplace”, which means that the injury suffered during this period shall also be identified as a work injury.

2.2 Exception: “Personal Activities” During Business Trip Shall not be Protected

2.2.1 “Living Time” During the Period of Long-term Dispatch Belongs to “Personal Activity” Time

Article 5 of the *Opinions of the Ministry of Human Resources and Social Security on Several Issues concerning the Implementation of the Regulation on Work injury Insurance (II)* stipulates that “where an employee is dispatched abroad due to work and has a fixed residence and specific schedule, he/she shall be deemed to be working normally at the locality when identifying work injury.

In the *First-instance Administrative Judgment of Gao Jianxiu v. Human Resources and Social Security Bureau of Shanghai Yangpu District on Labor and Social Security (Case No.: (2017) Hu 0110 Xing Chu No. 123)*, the employee was assigned by the employer to Nanchang on a business trip from 8 November 2016 to 31 November 2017. At about 5:12 am on 17 November 2016, the employee died in a fire accident in the rented house. When analyzing whether the death of employee due to a fire accident shall be identified as a work injury, the court held that although the flexible working hour system was adopted for the employee during his work in Nanchang, there were reasonable distinctions between work and rest. That the employee was dead in the rented house due to fire accident of the electric bicycle in the corridor on a business trip in Nanchang at about 5 am did not comply with the identification of a work injury or being deemed as a work injury.

It can be inferred that in the case of long-term dispatch, the recognition of "working time" and "workplace" is different from the "short-term business trip", and the "accommodation period" and "dining period" can no longer be included in the "working time". From our understanding, the boundary between the work and life of the employee is relatively clear during the "long-term dispatch period", and the schedule is relatively fixed. The difference between work performed during long-term dispatch and regular work is only made in the "place of work". As such, the risk during the rest time is no longer steeply increased due to "business trip". Therefore, the identification of "working time" and "workplace" shall be judged according to an employee's normal daily routine.

2.2.2 Interests and Entertainments Shall Be "Personal Activities"

In the *First-Instance Administrative Judgement of Hu Xiaojun v. Human Resources and Social Security Bureau of Shanghai Minhang District on Labor and Social Security (Case No.: (2016) Hu 0112 Xing Chu No. 138)*, during the period of business trip, the employee return to the hotel after completing the work assigned by the employer, leave the hotel to run after changing clothes, and get injured during the running. In this regard,

the court held that the behavior of the employee going out for running during a business trip shall be regarded as the personal interests and habits of the employee. There was no evidence to prove that it was related to the work. Therefore, the injury suffered by the employee in the process of exercise is not a work injury.

As stated above, although the “working time” and “work place” of the employee during business trip will be extended and expanded to a larger extent than usual, Article 5 of the *Work Injury Insurance Provisions* also explicitly excludes “personal activities” from the scope of the protection of work injury, and the activities of interest in the aforesaid cases, as well as the typical non-work activities such as shopping and sightseeing , will be considered to be “personal activities” during the period of business trip and the injuries thus suffered shall not be considered as occupational injuries.

2.2.3 The Employer Shall Bear a Higher Burden of Proof.

In the *First-instance Administrative Judgment of Shanghai Ericsson Electronics Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Jiading District on the Dissatisfaction of the Identification of Work Injury (case number: (2014) Jia Xing Chu No. 22)*, the employee was dispatched to Johannesburg, South Africa as the manager of the Financial Control Center by the employer from 16 August 2013 to 28 February 2014. At 6:43 (South Africa time) on 2 September 2013, Yan Zhuang called the office to make an appointment for a doctor for a sudden disease. At 10:10 (South Africa time) the medical staff arrived, and (South Africa time) Yan Zhuang was confirmed to be dead at 10:19. In this case, the Human Resources and Social Security Bureau proposed that the employee was out for work during his assignment in South Africa, and that the out-for-work period of the employee had certain specialties, among which working aboard was more special because the social habits, living environment and language communications of foreign countries were very different from those of China. Therefore, as long as there was no evidence to prove that the employee was engaging in private activities during the out-for-work period, the employee shall be considered as working in working time, at workplaces

and on working position during this period. The court held that the employee was sent to work in South Africa because of his work, and it was more special than the general out-for-work situation, determining that the employee's death for sudden disease during the work-aboard period constituting work injury is reasonable.

In the *Second-instance Administrative Judgment of New Era Tongcheng (Shanghai) Cargo Transportation Co., Ltd. v. Human Resources and Social Security Bureau of Shanghai Putuo District on Labor and Social Security (Case No: (2014) Hu 02 Zhong Xing Zhong No. 223)*, the employee was sent to Xiamen for a business trip and were involved in a traffic accident in the evening of 18 June 2013. In this regard, the employer stated that it did not assign any work tasks to the employee on the day of the incident. At the night of the incident, the injured employee was out on the motorcycles driven by a staff of the local branch. Moreover, the traffic accident occurred at 10 pm at the place 8 kilometers away from the temporary residence of the employee, and the driving direction was opposite from his temporary residence. According to the test report, the employee had drunk alcohol, and should have already had dinner. Therefore, the employee's death on the night was neither a cause of work nor a cause of normal physiological needs such as dining. Thus, it was wrong to identify the death of the employee was a work injury. The Human Resources and Social Security Bureau stated that the normal life of the employee during his stay in Xiamen was of a nature of work. The employer failed to prove that the employee was out for private affairs, so it was proper to identify it as a work injury. The court adopted the claim of the Human Resources and Social Security Bureau and finally identified the injury as the work injury.

As can be seen from the two cases above, although the injury suffered due to the "personal activity" during the business trip is not a work injury, the party who claims that the injury shall not be identified as a work injury (in most cases, the employers) shall bear a higher burden of proof on the proof of the employee engaging in "personal activity". Even if the whereabouts of the employees are suspicious, the court will determine that the employee's injury constitutes a work injury if the employee cannot be proved to be "out for

private."

3. The Identification of Work Injury During Collective Trip

Understanding and Application of the Work Injury Insurance Provisions published by the Supreme People's Court specifies that "there is a big controversy to identify whether the injuries suffered by employees when participating in the activities organized by the employer or assigned by the employers organized by other companies are work injuries. We believe that if the employer mandates or encourages the employee to participate the collective activities, those activities can be considered as a part of work, which shall be in the reason of work, and the injury suffered therein shall be identified as a work injury."

Therefore, the "mandatory" and "encouragement" to the activities of the employer are the criteria for judging whether it is a "work injury".

3.1 Consideration from a Comprehensive View of the Trip: Whether It Is "Out for Work"

3.1.1 Collective trip activities with the nature of "pure entertainment" may not be considered as "Going out for work"

In the *Second-instance Administrative Judgment of Yang Dongyang v. Human Resources and Social Security Bureau of Shanghai Qingpu District on Labor and Social Security (Case No.: (2017) Hu 02 Xing Zhong No. 160)*, the employer organized 10 staffs including the injured employee to participate in a 3-day tour from Fuchunjiang Small Three Gorges to Daqi Moutain and- Tonglu Linyao Wonderland on its own cost with the leading of the travel agency.

In the *First-instance Administrative Judgment of Wang Benxiu v. Human Resources and Social Security Bureau of Shanghai Putuo District on Labor and Social Security (Case*

No.: (2016) Hu 7101 Xing Chu No. 203), the employer signed a travel contract with the travel agency to organize its staffs including the injured employee to travel to Anji, Zhejiang to visit the scenic spots such as Dazhuhai, Canglong Bai Waterfall and Baicha Valley Jiulong Gorge.

In the *Second-instance Administrative Judgement of Zhang Yun v. the Human Resources and Social Security Bureau of Shanghai Zhabei District on Labor and Social Security (Case No.: (2015) Hu 02 Zhong Xang Zhong No. 264)*, the employer entered into a travel contract with the travel agency, which stated that the travel agency shall organize the staffs of the employer including the injured employee to travel to Zhangjiajie. The fee of the trip would be paid by the employer in the form of allowance.

In the *First-instance Administrative Judgment of Lyu XX v. a Human Resources and Social Security Bureau, a Third-person Company on Labor and Social Security (case number: (2016) Hu 0116 Xing Chu No. 5)*, the employer organized its staffs including the injured employee to travel to Chongqing. The travel expenses such as airline tickets and hotels are covered by the employer.

In the *First-instance Administrative Judgment of Jiang Hui v. Human Resources and Social Security Bureau of Shanghai Hongkou District, Shanghai Municipal Human Resources and Social Security Bureau on Labor and Social Security (Case No.: (2018) Hu 7101 Xing Chu No. 19)*, the employee volunteered to participate in the Wuzhen trip organized by the employer. The employee was injured in a traffic accident on the bus on his way back the next day.

In the above cases, the courts in Shanghai tend to hold that such “purely entertaining” trips have characters of “nature of employees’ welfare”, “not mandatory”, “not related to work”, and injuries suffered during these trips are not work injuries.

However, it should be noted that in recent years, courts in many regions hold a positive

attitude toward whether the “purely entertaining” trips organized by the employers are “work-related” activities. In the influential case of *Human Resources and Social Security Bureau of Xiangzhou District, Zhuhai v. Shi Pengpeng on Social Security Administrative Confirmation (Case No: (2014) Zhu Zhong Fa Xing Zhong No. 79)*, the employer issued a “Travel Notice”, and organized a trip from May 5th to 6th, 2013 for all employees. The location for the trip was Eastern Chinatown in Shenzhen. The employee was injured during the trip. In this regard, the Zhuhai Intermediate People’s Court of Guangdong Province held that “The collective activity of employees organized by the employer shall be identified as the company’s collective behavior rather than the employees’ self-interested behavior. The employer was the proponent, organizer, manager, provider of vehicles and expenses of the collective activities. The employees were always in the management of the organization of the employer, and they were always in a state of being managed during the collective activities. The purposes of the organization of the collective activities of the employees were to adjust the physical and mental health of employees, improve the enthusiasm of employees and strengthen cohesiveness. That the employer organized collective activities for the employee was the welfare to some extent. If employees suffered injuries during this period, they shall receive medical treatment and monetary compensation. The organizer shall be responsible for the entire collective activity process.”

In view of the existence of two completed opposite attitudes in the practice of identifying this matter, it is still necessary to issue relevant authoritative documents to form a consensus in practice.

3.1.2 Travel Activities with “Work Content” May Be Identified as “Going out for Work”

In the *First-instance Administrative Judgment of Li Hongying v. Human Resources and Social Security Bureau of Shanghai Qingpu District on Labor and Social Security (Case No.: (2018) Hu 0118 Xing Chu No. 42)*, the employer issued the “Notice on Expanding Training Activity for Advanced Staffs of Safe Production, Energy Conservation and Environmental Protection” to the employees. The content of the activity was interaction and tour. The

participants were the advanced staffs of safety production, energy conservation and environmental protection in 2016. Thereafter, the employer signed a travel contract with a travel agency and organized a two-day tour in Yuhang. The employee fell down and was injured during the tour. In the course of the trial, the court found that the reason for the employer to organize the tour in the name of the expanding training activity is for the purpose of examination and approval was to facilitate the procedure. What the employer actually organized was a "purely entertainment" trip, which was not related to work. The injury of the employee was not work injury during the process of trip.

In the *First-instance Administrative Judgment of Tongjilong Foreign Exchange (China) Co., Ltd. V. Human Resources and Social Security Bureau of Shanghai Pudong New District, Shanghai Human Resources and Social Security Bureau on Labor and Social Security (Case No: (2018) Hu 0106 Xing Chu No. 140)*, the employer organized relevant employees to Dalian for activities, and the employee fell down during the activity. The court held that although the employer claimed that the activity was voluntarily registered, and the company did not mandate them to participate, in fact there was an arrangement for the 2016 annual summary meeting in the activity schedule organized by the employer. The place where the employee fell down was a place planed by the employer before departing. This activity shall be regarded as within the scope of the employee's work. The employee participated in this activity in order to enjoy the company's welfare and conducted activities according to the established arrangements of the employer during the activity, and was in a state of being managed. The employer, as the proponent, organizer, manager, and fund provider of the activity, shall be responsible for the entire collective activity process. Therefore, the activities that employee participated in shall be identified as an extension of "the period of going out on business, due to work reasons"

It can be seen from the above two cases that if the outside travel activities also include content related to the work such as "expanding training activities" and "annual summary meetings", the court is more likely to hold that the travel activities organized by the employer meet with certain nature of mandatory and encouragement. Therefore, the period of trip is

also more likely to be identified as “work-related travel period”.

3.2 Focusing on the Cause of the Incident: Whether It is Controlled by the Employer

3.2.1 Injuries Suffered in “Free Activities” and “Self-Funded Projects” Generally Do Not Constitute Work Injuries

In the *Second-instance Administrative Judgement of Shanghai Sola Enterprise Management Consulting Co., Ltd. V. Human Resources and Social Security Bureau of Shanghai Putuo District, Shanghai Putuo District People’s Government on Refusing to Recognize the Work Injury Decision (Case No: (2019) Hu 03 Xing Zhong No. 67)*, the employee was drowned when participated in the self-funded project of snorkeling in Koh Samet, Thailand during the trip organized by the employer. The court held that the injury was not a work injury and analyzed that the snorkeling project which caused the death was obviously a high-risk tourism project. The employer did not force the employees to participate. What’s more, it had nothing to do with the work.

In the *Second-instance Administrative Judgment of Yang Dongyang v. Human Resources and Social Security Bureau Shanghai Qingpu District on Labor and Social Security (Case No.: (2017) Hu 02 Xing Zhong No. 160)*, the employee accidentally slipped and drown when swimming in the process of free activities with colleagues to the vicinity of the farmhouse by the downstream of Luci River. The courts of first instance and second instance both held that it shall not be a work injury.

In the tour activities organized by the employer, there is usually some free time and self-funded items. Since the employees have strong autonomy in deciding whether to participate in such activities, the employers’ controlling over the employees in these activities will be greatly weakened. Therefore, if the employees suffer from injuries in these activities, it is generally not to be identified as work injuries.

3.2.2 Injuries Suffered During the Process "Arranged by the Employer" May Constitute a Work Injury

In the *First-instance of Administrative Judgment of Tongjilong Foreign Exchange (China) Co., Ltd. V. Human Resources and Social Security Bureau of Shanghai Pudong New District, Shanghai Human Resources and Social Security Bureau on Labor and Social Security (Case No: (2018) Hu 0106 Xing Chu No.140)*, the employer organized activities of relevant employees to Dalian, and the employee fell down during the activity. The place where the employee fell down was also in the route arranged by the employer before departing. This activity shall be regarded as within the scope of the employee's work. The employee participated in this activity in order to enjoy the company's welfare and conducted activities according to the arrangement of the employer. The employee was under the management of the employer. The employer, as the proponent, organizer, manager, and fund provider of the activity, shall be responsible for the entire collective activity process.

Contrary to the "free activities" and "self-funded activities", in the case that the employers arrange the itinerary for the employees, the employers have greater control over the employees. If employees carry out the itinerary as required by the employers and are injured as a result thereof, the injuries shall be considered as work injuries.

4. Conclusion

After outlining the above-mentioned public cases, combining with the "work-related reasons" mentioned in the in the preceding paragraph, the trial ideas of the courts in Shanghai in identifying work injury in the course of business trip and travel can be briefly summarized as follows:

4.1 Injury Suffered During the Business Trip

- When determining the "reason for going out", courts in Shanghai tend to

determine that the business trip is a work-related activity.

• When determining whether the "cause of injury" is related to work, courts in Shanghai tend to expand and extend the "workplace" and "working time" from the perspective of protecting employees, and then includes the period of being on the way, accommodation and dining into the scope of "work-related". Only the "personal activities" are excluded, while the employer has a higher burden of proof for that.

- The special situation of "long-term dispatch" shall be paid attention to.

4.2 Injury Suffered During Travel

- The courts in Shanghai tend to consider the schedule, the purpose, the participants, and the cost-taking methods of the activities in a comprehensive manner.

- When determining the "reason for going out", the itinerary that is "purely entertaining" is more likely to be considered as "not related to work". But there is no consensus on this issue in practice

- When determining the "cause of injury", it is necessary to pay attention to whether the employee's itinerary is within the scope of the employer's arrangement.

➢ 案例分析

用人单位须补足的伤残津贴差额是固定的吗？

作者：顾巍巍 | 吴兆丰 | 陈嘉申

一、争议焦点

在用人单位未足额为劳动者缴纳社会保险的情况下，如何认定用人单位向劳动者支付的伤残津贴差额？

二、案情简介

黄有禄于 2012 年 9 月入职桥椿公司处工作至 2013 年 1 月，2013 年 9 月黄有禄再次入职桥椿公司处，在锌抛光部锌手动抛光组从事抛光工作，长期在工作中接触粉尘等有害物质。

2014 年 12 月 12 日黄有禄进行职业健康体检，检查结论为：“双肺纹理增多，满布点状高密度影，疑似尘肺病，建议提请职业病诊断”。自 2015 年 5 月 21 日开始，黄有禄先后三次住院治疗合计 164 天。2015 年 7 月 23 日广东省职业病防治院诊断黄有禄为“职业性尘肺病贰期 ”，桥椿公司不服并向广州市职业病诊断鉴定委员会申请首次鉴定。2015 年 9 月 29 日广州市职业病诊断鉴定委员会仍鉴定黄有禄为“职业性尘肺病贰期”。

2015 年 10 月 21 日珠海市金湾区人力资源和社会保障局认定黄有禄患“职业性尘肺病贰期”为工伤。2016 年 6 月 14 日珠海市劳动能力鉴定委员会对黄有禄伤势鉴定为四级伤残。

另查明，黄有禄生病前十二个月（即 2014 年 5 月至 2015 年 4 月）的平均工资为人民币 4,426.11 元，桥椿公司按照每月工资人民币 3,136.2 元为黄有禄缴纳社会保险，黄有禄认定工伤后，社保部门依法支付了黄有禄一次性伤残补助金人民币 65,860.2 元，并支付给黄有禄每月 2,352.15 元的伤残津贴。

黄有禄向珠海市金湾区劳动人事仲裁委员会提起仲裁，因对仲裁结果不服，黄有禄向一审法院提起诉讼。

三、审理结果

（一）一审

关于伤残津贴差额。根据《广东省工伤保险条例》（以下简称“《条例》”）第二十九条规定，桥椿公司应以黄有禄工资的百分之七十五按月支付伤残津贴。因桥椿公司没有按照黄有禄每月应发工资为基数为黄有禄缴纳社会保险，导致黄有禄从社保基金获得的伤残津贴待遇降低，由此产生的差额部分依法应当由桥椿公司承担。

桥椿公司支付的伤残津贴差额与社保支付伤残津贴性质一致，都是黄有禄依据《条例》第二十九条第一款第二项规定首次办理伤残津贴应获得的，都应依据《条例》第二十九条第四款进行调整。

伤残津贴在今后每年参照基本养老保险金的调整办法调整，桥椿公司支付伤残津贴差额也应当参照基本养老保险金的调整办法调整。如果社保支付伤残津贴增加，桥椿公司支付伤残津贴差额却相应减少，那么今后每年黄有禄获得的伤残津贴总额却不变（由社保单独支付伤残津贴超过总额的除外），违反《条例》第二十九条第四款规定：“伤残津贴每年参照基本养老保险金的调整办法调整”的规定，损害黄有禄的合法权益。

从《广东省人力资源和社会保障厅关于 2016 年度调整我省工伤伤残津贴的通知》内容可见，在核定首次领取伤残津贴的标准后，每年按照发出关于调整工伤保险伤残津贴的相关文件规定调整，故桥椿公司应支付黄有禄伤残津贴差额为：以人民币 4,426.11 元每月的 75%为基数，每年按照发出关于调整工伤保险伤残津贴的相关文件规定调整黄有禄应享受的伤残津贴 - 黄有禄从工伤保险基金领取的伤残津贴。

（二）二审

关于伤残津贴差额。根据《条例》第二十九条规定，桥椿公司应以黄有禄工资的百分之七十五按月支付伤残津贴。

因桥椿公司没有按照黄有禄每月应发工资为基数为黄有禄缴纳社会保险，而是按照每月工资 3136.2 元缴纳社保，导致黄有禄从社保基金获得的伤残津贴待遇降低，由此产生的差额部分依法应当由桥椿公司承担。

综上，桥椿公司每月应支付黄有禄伤残津贴差额为：967.43 元（4426.11 元/月×75% - 2352.15 元＝967.43 元）。一审法院对此认定有误，本院予以纠正。

（三）再审

《条例》第二十九条对于伤残津贴的规定为“由工伤保险基金按月支付，直至本人死亡，标准为：一级伤残为本人工资的百分之九十，二级伤残为本人工资的百分之八十五，三级伤残为本人工资的百分之八十，四级伤残为本人工资的百分之七十五”以及“伤残津贴每年参照基本养老保险金的调整办法调整”。

本案中，黄有禄经珠海市劳动能力鉴定委员会鉴定为四级伤残，其生病前十二个月的平均工资为人民币 4,426.11 元。由于桥椿公司按照每月 3,136.2 元的标准为黄有禄缴纳社会保险，导致黄有禄没有从社保基金获得足额的伤残津贴，由此产生的差额部分依法应当由桥椿公司承担。

由于基本养老保险金每年均进行调整，根据上述规定，桥椿公司支付的伤残津贴差额也应参照基本养老保险金的调整办法进行调整。因此，结合广东省人力资源和社会保障厅每年作出关于调整广东省工伤伤残津贴的相关规定，桥椿公司每年应支付黄有禄的伤残津贴差额为：以人民币 4,426.11 元每月的 75%为基数、每年按照调整伤残津贴的相关规定计算黄有禄应享受的伤残津贴减去黄有禄从工伤保险基金实际领取的伤残津贴之得数。二审法院对此处理有误，本院予以纠正。

四、本案的启示

用人单位应当依法参加工伤保险，为本单位全部职工或者雇工（以下合称“职工”）缴纳工伤保险费。对于参加工伤保险的用人单位，一旦职工发生工伤，由此发生的治疗费用、住院费用、康复费用等，只要符合工伤保险的待遇范围，均可以从工伤保险基金支付，从而减轻用人单位的负担，同时也使得工伤职工有所保障。

对于被鉴定为 1-6 级伤残的职工，可以享受一定数额的伤残津贴。对于应当参加工伤保险而未参加工伤保险的用人单位职工发生工伤的，由该用人单位自行按照相应的工伤保险待遇项目和标准支付费用。

依照现行规定，伤残津贴可以由统筹地区社会保险行政部门根据职工平均工资和生活费用变化等情况适时调整。

近年来，随着基本养老保险待遇的逐年上调，工伤保险待遇也在不断上调。如果没有缴纳或者足额缴纳的用人单位依然按照最初的数额进行支付，遭受工伤的劳动者将失去国家上调伤残津贴的待遇，会造成双重不利境地，而违法的用人单位却能够因此获益，明显违反公平原则。

本案再审法院确认了伤残津贴可以不断调整的原则，进而要求用人单位补足因此带来的差额。从经济角度而言，用人单位不足额缴纳工伤保险费用尽管短期内可以减少工伤保险费用的支出。但是，一旦职工发生工伤事件，其不仅要按照工伤保险待遇标准支付相关费用，而且会不断上调。因此，从长远考虑，用人单位依法足额缴纳工伤保险是首选，也是法定义务。

Is the Difference in Disability Subsidy the Employer Shall Make Up Fixed?

Weiwei Gu | Jason Wu | Jess Chen

1. Focus of Dispute

When the employer fails to pay social insurance for the employee in full amount, how to determine the difference in disability subsidy that the employer shall pay to the employee?

2. Facts

Huang Youlu joined the Qiaochun Company (hereinafter the "**Company**") in September 2012 and worked for it until January 2013. In September 2013, Huang Youlu rejoined the Company and worked in the manual zinc polishing group of the zinc polishing department. Over a long period of time, Huang Youlu was exposed to dust and other harmful substance during the work.

On December 12, 2014, Huang Youlu took an occupational health examination. The conclusion of the examination showed that "the lungs have increased textures and full of point-like and high-density shadows, which is suspected pneumoconiosis, and it is recommended to conduct an occupational disease diagnosis." Since May 21, 2015, Huang Youlu had been hospitalized three times for a sum of 164 days. On July 23, 2015, Guangdong Province Hospital for Occupational Disease Prevention and Treatment diagnosed Huang Youlu as "occupational pneumoconiosis II". The Company objected and applied to Guangzhou's Committee for Occupational Disease Diagnosis and Appraisal for the first appraisal. On September 29, 2015, Guangzhou's Committee for Occupational Disease Diagnosis and Appraisal still appraised Huang Youlu as "occupational pneumoconiosis II".

On October 21, 2015, the Human Resources and Social Security Bureau of Jinwan District in Zhuhai City identified that the occupational pneumoconiosis Huang Youlu had was work-related injury. On June 14, 2016, Zhuhai's Committee for Labor -Ability Appraisal identified the injury of Huang Youlu as a fourth-level disability.

It was also found that Huang Youlu's average salary for the 12 months before illness (i.e., May 2014 to April 2015) was RMB 4,426.11. The Company paid social insurance for Huang Youlu based on the monthly salary of RMB 3,136.2. After the appraisal of Huang Youlu's work-related injury, the social security department paid Huang Youlu a one-off disability allowance of RMB 65,860.2 and a disability subsidy of RMB 2,352.15 per month.

Huang Youlu filed a labor arbitration with the Labor and Personnel Arbitration Commission of Jinwan District in Zhuhai City. Due to the dissatisfaction with the arbitration reward, Huang Youlu filed a lawsuit with the court of first instance.

3. Trial Results

(1) First Instance

With respect to the difference in disability subsidy, in accordance with Article 29 of *the Regulations on Work-related Injury Insurance of Guangdong Province* (《广东省工伤保险条例》, hereinafter the "**Regulations**"), the Company should pay the disability subsidy monthly based on 75% of Huang Youlu's salary. As the Company did not pay the social insurance for Huang Youlu based on Huang Youlu's actual monthly salary, the disability subsidy benefits that Huang Youlu received from the social security fund was reduced. The consequent difference shall be borne by the Company.

The characters of the difference in disability subsidy paid by the Company and the disability subsidy paid by social insurance are the same. They are both what Huang Youlu is entitled to obtain after applying for the first-time disability subsidy according to the second subparagraph of Article 29(1) of the Regulations. And they both should be adjusted pursuant to Article 29(4) of the Regulations.

In the future, the disability subsidy will be adjusted with reference to the adjustment method of the basic pension insurance, and the difference in disability subsidy paid by the Company shall also be adjusted with reference to such method. If payment for disability subsidy from social insurance increases but the difference in disability subsidy is reduced, then the total amount of disability subsidy received by Huang Youlu will remain the same

every year (except in the case where the payment for disability subsidy from social insurance exceeds the total amount). It violates Article 29(4) of the Regulations, which stipulates that "the disability subsidy shall be adjusted with reference to the adjustment method of the basic pension insurance on a yearly basis", consequently infringing Huang Youlu's legitimate rights and interests.

According to *the Notice on Adjusting the Disability Subsidy for Work-related Injury in 2016 Issued by the Guangdong Department of Human Resources and Social Security* (《广东省人力资源和社会保障厅关于 2016 年度调整我省工伤伤残津贴的通知》), after rectification of the standard for first-time collection of disability subsidy, it shall be adjusted annually pursuant to the relevant regulations on the adjustment of the disability subsidy for work-related injury. Therefore, the difference in disability subsidy that the Company shall pay to Huang Youlu should be calculated based on a monthly basis of 75% of RMB 4,426.11. Meanwhile, the disability subsidy that Huang Youlu should receive is annually adjusted in accordance with the relevant regulations on the adjustment of the disability subsidy for work-related injury, subtracting the disability subsidy Huang Youlu receives from the work-related injury insurance fund.

(2) Second Instance

With respect to the difference in disability subsidy, in accordance with the Article 29 of the Regulations, the Company should pay the disability subsidy monthly based on 75% of Huang Youlu's salary.

Instead of paying social insurance for Huang Youlu based on his actual monthly salary, the Company paid the social security insurance based on the monthly salary of RMB 3,136.2, which resulted in the reduction of the disability subsidy Huang Youlu received from the social security fund. The consequent difference shall be borne by the Company.

In conclusion, the difference in disability subsidy paid by the Company to Huang Youlu is RMB 967.43 (RMB 4,426.11/month × 75% - RMB 2,352.15 = RMB 967.43). The court of first instance made a wrongful determination on it and the court of second instance hereby corrected it.

(3) Retrial

Article 29 of the Regulations on the disability subsidy specifies that "it shall be paid by the work-related injury insurance fund on a monthly basis until the death of the employee. The standard shall be: for first-level disability, 90% of his/her salary; for second-level disability, 85% of his/her salary; for third-level disability, 80% of his/her salary; for fourth-level disability, 75% of his/her salary". In addition, "the disability subsidy shall be adjusted with reference to the adjustment method of the basic pension insurance".

In this case, Huang Youlu was identified as fourth-level disabled by Zhuhai's Committee for Labor Ability Appraisal, and his average salary for the first 12 months before illness is RMB 4,426.11. As the company paid social insurance for Huang Youlu on a monthly basis of RMB 3136.2, Huang Youlu did not receive the disability subsidy from the social security fund in full amount. The consequent difference shall be borne by the Company.

Since the basic pension insurance is adjusted annually, according to the above regulations, the difference in the disability subsidy paid by the Company should also be adjusted with reference to the adjustment method of the basic pension insurance. Therefore, in conjunction with the annual regulations on adjusting the work-related injury and disability subsidy of Guangdong Province issued by Guangdong Department of Human Resources and Social Security, the annual disability subsidy which the Company shall pay to Huang Youlu is on a monthly basis of 75% of RMB 4,426.11. Meanwhile, the formula of aforesaid subsidy is that the disability subsidy calculated according to the relevant regulations on the annual adjustment of disability subsidy subtracts the amount of disability subsidy Huang Youlu receives from the work-related injury insurance fund. The court of second instance dealt with this issue wrongfully and the court of retrial hereby corrected it.

4. Enlightenment of the Case

The employers shall participate in the work-related injury insurance in accordance with the law, and pay the work-related injury insurance premium for all employees or workers (hereinafter collectively referred to as "**employees**"). For the employers participating in the

work-related injury insurance, once employees suffer from work-related injuries, the expenses arising from such work-related injuries (such as the treatment expenses, hospitalization expenses, and rehabilitation expenses, etc.) can be paid by the work-related injury insurance fund as long as they are within the scope of the work-related injury insurance, which can reduce the burden on the employers and provide protection for injured employees.

For employees appraised as first-level to sixth-level disability, a certain amount of disability subsidy is available. Where an employer should have participated in work-related injury insurance but did not do it, the employer shall pay the expenses according to the corresponding work-related injury insurance benefits and standards.

According to current regulations, the disability subsidy can be adjusted in a timely manner by the social insurance administrative department of coordinating districts according to the changes in an average salary and living expenses of employees.

In recent years, as the basic pension insurance benefits have been raised year by year, the work-related injury insurance benefits have also been raised. If an employer who fails to pay or pay in full and still pays at the initial amount, the employees suffering from work-related injuries will lose the benefits of national increase of disability subsidy, whereas the employer violating the law can benefit from it, which will cause a dual disadvantage to the employees and obviously violates the principle of fairness.

The court of retrial in this case confirmed the principle that the disability subsidy can be adjusted continuously, and the employers shall make up the difference. From an economic point of view, the employers' insufficient payment of work-related injury insurance premium can reduce the cost of work-related injury insurance in the short term. However, once a work-related injury happens, the employers will have to pay the relevant expenses according to the standard of work-related injury insurance benefits and the expenses will constantly increase. Therefore, in terms of long-term interests,, it is the first choice and the statutory obligation for the employers to pay the work-related injury insurance in full amount pursuant to the law.

➢ 新规速递

《职业病诊断与鉴定管理办法（征求意见稿）》

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2019 年 10 月 8 日，国家卫生健康委发布了《关于<职业病诊断与鉴定管理办法（征求意见稿）>公开征求意见的通知》（以下简称“**《征求意见稿》**”），拟对 2013 年颁布的《职业病诊断与鉴定管理办法》（以下简称“**《办法》**”）进行修订。

目前，该稿的本轮征求意见阶段已经结束，以下是该《征求意见稿》的主要修改要点：

一、新增集中明确用人单位的义务

《征求意见稿》在总则部分新增了第五条，该条明确规定：用人单位应当依法履行职业病诊断、鉴定的相关义务：（一）安排职业病病人、疑似职业病病人进行诊治；（二）如实提供职业病诊断、鉴定所需的资料；（三）承担职业病诊断、鉴定的费用；（四）报告职业病和疑似职业病；（五）《职业病防治法》规定的其他相关义务。

这实际是整合了《职业病防治法》的相关条款，涵盖了职业病诊断和鉴定流程中的诊断、资料提供、费用承担、报告等方面，更加突出了对用人单位的义务要求。

二、取消职业病诊断机构的行政审批而改为备案管理

《征求意见稿》取消了职业病诊断机构的行政审批制度，符合条件的医疗机构（第七条）只要向省级卫生健康主管部门备案就可以开展职业病诊断工作；省级卫生健康主管部门应当及时向社会公布备案的职业病诊断机构的相关信息。

同时，《征求意见稿》规定：职业病诊断机构在其备案开展的诊断项目范围内不得拒绝

劳动者进行职业病诊断的要求。

三、进一步细化职业病诊断反向推定的证据种类

《职业病防治法》第四十六条第二款规定：“没有证据否定职业病危害因素与病人临床表现之间必然联系的，应当诊断为职业病”。

依照该规定，《征求意见稿》第二十条细化了该证据的具体内容，即“包括疾病的证据、接触职业病危害因素的证据，以及用于判定疾病与接触职业病危害因素之间因果关系的证据”。

当然，何为“必然”联系，需要从医学的角度进行判断。但是至少依照该条规定，只要不存在明确的证据否定疾病与职业病危害因素之间的必然联系，应当直接诊断为职业病。这大大增强了对劳动者的保护。

四、确立方便劳动者原则

《征求意见稿》第二十二条规定：劳动者进行职业病诊断的，需要提供本人掌握的职业病诊断有关资料。

“本人掌握”更加明确了劳动者的提交资料的义务范围。为了避免资料不全导致无法做出诊断结论，《征求意见稿》增加了“工友旁证资料、卫生健康等有关部门日常监督检查信息”等来源作为诊断结论做出的依据。如果还不能做出结论，还可以依据“病人的临床表现以及辅助检查结果，作出疾病的诊断”。

五、避免“缠诊”原则

《征求意见稿》第三十二条规定：职业病诊断结束后，在没有新证据的情况下，当事人不应重复要求进行职业病诊断。新证据是指原职业病诊断过程中未提交或未发现，并且经初步判断可能变更原职业病诊断结论的新的疾病或职业病危害接触史等证据材料。

这也就意味着，在缺乏新证据的情况下，职业病诊断机构可以直接做出决定，但是应当对劳动者提供的新证据材料做出认定并出具书面意见。对于用人单位而言，可以减少因为重复诊断要求带来的重复处理。

六、整体缩短诊断、鉴定时限

一是明确了诊断时限。《征求意见稿》第二十条规定：职业病诊断机构做出诊断结论的时限是三十日，而原《办法》未作规定。

二是缩短鉴定时限。《征求意见稿》第四十五条规定：职业病鉴定办事机构应当在受理鉴定申请之日起四十日内组织鉴定、形成鉴定结论，并出具职业病鉴定书。再加上第四十九条规定：职业病鉴定书应当于出具之日起十日内由职业病鉴定办事机构送达当事人。而原《办法》规定：职业病鉴定办事机构应当在受理鉴定申请之日起六十日内组织鉴定、形成鉴定结论，并在鉴定结论形成后十五日内出具职业病鉴定书。职业病鉴定书应当于鉴定结论作出之日起二十日内由职业病鉴定办事机构送达当事人。

相对于原《办法》,《征求意见稿》的时限要求大大缩短，给各方当事人以明确的时限预期。

七、补充了相关处罚条款

针对修改的内容，《征求意见稿》规定了相应的处罚条款，一是针对行政审批改为备案制度，未经备案从事职业病诊断工作的，由县级以上地方卫生健康主管部门责令改正，给予警告，可以并处三万元以下罚款（第五十六条）。二是针对新增的用人单位的义务的规定，明确按照《职业病防治法》的七十二条、七十四条规定进行处罚（第六十二条）。

总的来说，《征求意见稿》反映了最新修订的《职业病防治法》的最新修改，对于用人单位的义务并没有超出《职业病防治法》的新的规定。对于劳动者而言，相关程序和标准的认定上进行了更加有利于劳动者权利保护的倾斜。当然，这些问题将来究竟如何规范有待于最终的规章规定。

Measures on the Administration of Diagnosis and Appraisal of Occupational Diseases (Draft for Comments)

Weiwei Gu | Jason Wu | Jess Chen

On October 8, 2019, the National Health Commission of People's Republic of China issued the *Circular on the Open Consultation of Comments on Measures on the Administration of Diagnosis and Appraisal of Occupational Diseases (Draft for Comments)* (hereinafter referred to as the "***Draft for Comments***"), proposing to revise the *Measures on the Administration of Diagnosis and Appraisal of Occupational Diseases* (hereinafter referred to as the "***Measures***") promulgated in 2013.

At present, the current round of consultation on the *Draft for Comments* has been completed, and the main revised points of the draft are as follows:

1. Adding New Articles for the Concentration on Clarifying the Obligations of Employers

Article 5 has been added to the general provision in the *Draft for Comments*, which clearly stipulates that employers shall fulfill the relevant obligations for the diagnosis and appraisal of occupational diseases in accordance with the laws. Such obligations are (1) to arrange for the diagnosis and treatment of patients with occupational diseases and suspected occupational diseases; (2) to truthfully provide the necessary information for the diagnosis and appraisal of occupational diseases; (3) to bear the expenses for the diagnosis and appraisal of occupational diseases; (4) to report occupational diseases and suspected occupational diseases; and (5) other relevant obligations under the *Law of the People's Republic of China on Prevention and Control of Occupational Diseases* (hereinafter referred to as the "**Prevention and Control of Occupational Diseases Law**").

This is actually the integration of the relevant provisions of the *Prevention and Control*

of Occupational Diseases Law, covering diagnosis, provision of information, cost allocation, reporting and other aspects in the process of the diagnosis and appraisal of occupational diseases, which highlights more on the obligations of employers.

2. Changing from the Administrative Examination and Approval of Occupational Disease Diagnosis Institutions to Registration Management

The *Draft for Comments* cancels the administrative approval system for occupational disease diagnosis institutions. The qualified medical institutions (Article 7) may carry out the work of occupational disease diagnosis after registration to the health administrative departments of provincial level. Meanwhile, the health administrative departments of provincial level shall promptly publish the relevant information of the occupational disease diagnosis institutions that have been registered to the public.

At the same time, the *Draft for Comments* stipulates that occupational disease diagnosis institutions shall not refuse the requests of employees to carry out occupational disease diagnoses within the scope of their diagnostic projects for registration.

3. Further Refining the Types of Evidences for the Reverse Presumption of Occupational Disease Diagnosis

As stipulated in Paragraph 2 of Article 46 of the *Prevention and Control of Occupational Diseases Law,* "an occupational disease shall be diagnosed if there is no evidence that refutes any inevitable connection between occupational disease hazard factors and the patient's clinical symptoms."

In accordance with this provision, Article 20 of the *Draft for Comments* details the specific content of such evidences, i.e. "including evidences of diseases, factors for exposure to occupational disease hazard, and the causal relationship to determine the evidence between the diseases and factors for exposure to occupational disease hazard".

It is certain that the "inevitable" connection shall be identified from a medical point of view. However, at least in accordance with the provisions of this article, the occupational diseases shall be diagnosed when there is no clear evidence to negate the inevitable connection between diseases and occupational disease hazard factors, which has greatly enhanced the protection for employees.

4. Establishing the Principle of Providing Convenience for Employees

Article 22 of the *Draft for Comments* stipulates that if an employee carries out the diagnosis of occupational diseases, such an employee shall provide the relevant information on the diagnosis of occupational diseases possessed by himself/herself.

"Possessed by himself/herself" outlines more clearly the scope of the obligation of employees to submit information. In order to avoid failure to make a diagnostic conclusion due to incomplete information, the *Draft for Comments* adds the sources such as "co-worker's circumstantial evidence, health and other relevant departments' daily supervision and inspection information" as the basis for the diagnostic conclusion. If no conclusion can be reached, "the diseases may also be diagnosed according to the clinical manifestations of the patients and the results of auxiliary examinations."

5. Principle of Avoiding the "Repeated Requirements for Occupational Disease Diagnosis"

Article 32 of the *Draft for Comments* stipulates that the parties concerned shall not repeatedly require for the diagnosis of occupational diseases in the absence of new evidences after the diagnosis of occupational diseases has been completed. "New evidences" refers to the evidence information of new diseases or history of exposure to occupational disease hazard that have not been submitted or found during the original occupational disease diagnosis process and may change the original occupational disease

diagnosis conclusion after preliminary judgment.

This means that in the absence of new evidences, occupational disease diagnosis institutions can make decisions directly, provided that they shall identify and issue written opinions on the new evidence information provided by employees. For employers, repeated processing due to repeated diagnostic requirements can be reduced.

6. Shortening of the Time Limit for Diagnosis and Appraisal

First, it clarifies the time limit of diagnosis. Article 20 of the *Draft for Comments* stipulates that the time limit for an occupational disease diagnosis institution to make a diagnosis is thirty (30) days, which is not stipulated in the original *Measures*.

Second, it shortens the time limit for appraisal. Article 45 of the *Draft for Comments* stipulates that the appraisal departments of occupational disease shall, within forty (40) days from the date of accepting the appraisal application, organize the appraisal, form the appraisal conclusion, and issue an occupational disease diagnosis and appraisal report. In addition, Article 49 provides that the aforesaid report shall be delivered to the parties by the appraisal departments of occupational diseases within ten (10) days from the date of issuance. While the original *Measures* stipulates that the appraisal departments of occupational diseases shall organize the appraisal and form the appraisal conclusion within sixty (60) days from the date of accepting the appraisal application, and issue an occupational disease diagnosis and appraisal report within fifteen (15) days after the conclusion of the appraisal is formed. Such a report shall be delivered to the parties concerned by the appraisal departments of occupational diseases within twenty (20) days from the date of the conclusion of the occupational disease appraisal.

Compared with the original *Measures*, the time limit of the *Draft for Comments* is greatly shortened, which provides the parties a clear expectation of the time limit.

7. Supplementing the Relevant Penalty Provisions

With regards to the revised contents, the *Draft for Comments* stipulates the corresponding penalty provisions. First, for the system changing from approval to registration, if the occupational disease diagnosis institutions are engaged in the diagnosis of occupational diseases without registration, the local health administrative department at or above the county level shall make orders of rectification, warnings and may concurrently impose a fine of not more than 30,000 yuan (Article 56). Second, for the new obligations of employers, the punishment shall be clearly carried out in accordance with Article 72 and Article 74 of the *Prevention and Control of Occupational Diseases Law* (Article 62).

In general, the *Draft for Comments* reflects the latest revision of the *Prevention and Control of Occupational Diseases Law*, and the obligations of employers do not exceed the new provisions of the *Prevention and Control of Occupational Diseases Law*. For employees, the relevant procedures and standards are more favorable to the protection of laborers' rights. Certainly, exactly how these issues will be regulated in the future is subject to finalized regulation.

附：

国家卫生健康委关于《职业病诊断与鉴定管理办法（征求意见稿）》公开征求意见的通知

发文日期	2019-10-08	有效范围	全国
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正文内容：

国家卫生健康委关于《职业病诊断与鉴定管理办法（征求意见稿）》公开征求意见的通知

2019 年 10 月 8 日

为维护劳动者职业健康合法权益，确保劳动者职业病诊断与鉴定工作有序进行，根据 2017 年、2018 年全国人大常委会对《职业病防治法》的两次修改，国家卫生健康委对 2013 年原卫生部制定的《职业病诊断与鉴定管理办法》进行了修订，形成了《职业病诊断与鉴定管理办法（征求意见稿）》。根据《规章制定程序条例》及立法工作要求，现向社会公开征求意见。公众可通过以下途径和方式提出意见：

1.登陆中国政府法制信息网（网址：http：//www.chinalaw.gov.cn），进入首页主菜单的“立法意见征集”提出意见。

2.登陆国家卫生健康委网站（网址：http://www.nhc.gov.cn），点击网站首页左侧的“互动”栏，然后进入“征求意见”栏，点击“国家卫生健康委关于《职业病诊断与鉴定管理办法（征求意见稿）》公开征求意见的通知”，提出意见。

3.电子邮箱：jiankangzhg@163.com。

4.通信地址：国家卫生健康委员会职业健康司，北京市海淀区知春路 14 号，邮编：100191。来信请注明“《职业病诊断与鉴定管理办法（征求意见稿）》征求意见”字样。

意见反馈截止时间为 2019 年 11 月 8 日。

职业病诊断与鉴定管理办法（征求意见稿）

第一章 总 则

第一条 为了规范职业病诊断与鉴定工作，加强职业病诊断与鉴定管理，根据《中华人民共

和国职业病防治法》（以下简称《职业病防治法》），制定本办法。

第二条 职业病诊断与鉴定工作应当按照《职业病防治法》、本办法的有关规定、《职业病分类和目录》和国家职业病诊断标准进行，遵循科学、公正、及时、便捷的原则。

第三条 国家卫生健康委负责全国范围内职业病诊断与鉴定工作的监督管理，县级以上地方卫生健康主管部门依据职责负责本行政区域内的职业病诊断与鉴定工作的监督管理。

省、自治区、直辖市人民政府卫生健康主管部门（以下简称省级卫生健康主管部门）应当结合本行政区域职业病防治工作实际和医疗卫生服务体系规划，充分利用现有医疗卫生资源，实现职业病诊断机构区域覆盖。

第四条 各地要加强职业病诊断机构能力建设，提供必要的保障条件，配备相关的人员、设备和工作经费，以满足职业病诊断工作的需要。

各地要按照国家职业病诊断与鉴定信息化建设的有关规定，持续推进职业病诊断与鉴定信息化建设，建立健全劳动者接触职业病危害、开展职业健康检查、进行职业病诊断与鉴定等全过程的信息化系统，不断提高职业病诊断与鉴定信息报告的准确性、及时性和可靠性。

第五条 用人单位应当依法履行职业病诊断、鉴定的相关义务：

（一）安排职业病病人、疑似职业病病人进行诊治；

（二）如实提供职业病诊断、鉴定所需的资料；

（三）承担职业病诊断、鉴定的费用；

（四）报告职业病和疑似职业病；

（五）《职业病防治法》规定的其他相关义务。

第二章 诊断机构

第六条 医疗卫生机构开展职业病诊断工作，应当在开展之日起十五个工作日内向省级卫生健康主管部门备案。

省级卫生健康主管部门应当及时向社会公布备案的医疗卫生机构名单、地址、诊断项目（即《职业病分类和目录》中的职业病类别和病种）等相关信息，并告知核发其《医疗机构执业许可证》的卫生健康主管部门。

第七条 医疗卫生机构开展职业病诊断工作应当具备下列条件：

（一）持有《医疗机构执业许可证》；

（二）具有相应的诊疗科目及与备案开展的诊断项目相适应的职业病诊断医师及相关医疗卫生技术人员；

（三）具有与备案开展的诊断项目相适应的场所和仪器、设备；

（四）具有与职业病信息报告相应的条件；

（五）具有健全的职业病诊断质量管理制度。

第八条 医疗卫生机构进行职业病诊断备案时，应当提交证明其符合本办法第七条规定条件的有关资料：

（一）《医疗机构执业许可证》复印件；

（二）职业病诊断医师资格等相关资料；

（三）相关的仪器设备清单；

（四）负责职业病信息报告人员名单；

（五）职业病诊断质量管理制度文本等相关资料。

第九条 职业病诊断机构对备案信息的真实性、准确性、合法性承担全部法律责任。

当备案信息发生变化时，应当自信息发生变化之日起十个工作日内向省级卫生健康主管部门提交变更信息。

第十条 设区的市没有医疗卫生机构备案开展职业病诊断的，省级卫生健康主管部门应当根据职业病诊断工作的需要，指定医疗卫生机构承担职业病诊断工作，并使其在规定时间内达到本办法第七条规定的条件。

第十一条 职业病诊断机构的职责是：

（一）在备案的诊断项目范围内开展职业病诊断；

（二）及时向卫生健康主管部门报告职业病；

（三）定期向卫生健康主管部门报告职业病诊断工作情况；

（四）承担《职业病防治法》中规定的其他职责。

第十二条 职业病诊断机构依法独立行使诊断权，并对其作出的职业病诊断结论负责。

第十三条 职业病诊断机构在其备案开展的诊断项目范围内不得拒绝劳动者进行职业病诊断的要求。

第十四条 职业病诊断机构应当建立和健全职业病诊断管理制度，加强职业病诊断医师等有关医疗卫生人员技术培训和政策、法律培训，并采取措施改善职业病诊断工作条件，提高职业病诊断服务质量和水平。

第十五条 职业病诊断机构应当公开职业病诊断程序和诊断项目范围，方便劳动者进行职业病诊断。

职业病诊断机构及其相关工作人员应当尊重、关心、爱护劳动者，保护劳动者的隐私。

第十六条 从事职业病诊断的医师应当具备下列条件，并取得省级卫生健康主管部门颁发的职业病诊断资格证书：

（一）具有医师执业证书；

（二）具有中级以上卫生专业技术职务任职资格；

（三）熟悉职业病防治法律法规和职业病诊断标准；

（四）从事职业病诊断、鉴定相关工作三年以上；

（五）按规定参加职业病诊断医师相应专业的培训，并考核合格。

省级卫生健康主管部门应当依据本办法的规定和国家卫生健康委制定的职业病诊断医师培训大纲，制定本行政区域职业病诊断医师培训考核办法并组织实施。

第十七条 职业病诊断医师应当依法在职业病诊断机构备案的诊断项目范围内从事职业病诊断工作，不得从事超出其职业病诊断资格范围的职业病诊断工作；职业病诊断医师应当按照有关规定参加职业卫生、放射卫生、职业医学等领域的继续医学教育。

第十八条 省级卫生健康主管部门应当指定机构负责本辖区内职业病诊断机构的质量控制管理工作，组织开展职业病诊断机构质量控制评估。

职业病诊断质量控制规范和医疗卫生机构职业病报告规范由中国疾病预防控制中心制定。

第三章 诊 断

第十九条 劳动者可以选择用人单位所在地、本人户籍所在地或者经常居住地的职业病诊断机构进行职业病诊断。

第二十条 职业病诊断机构应当按照《职业病防治法》、本办法的有关规定、《职业病分类和目录》和国家职业病诊断标准，依据劳动者的职业史、职业病危害接触史和工作场所职业病危害因素情况、临床表现以及辅助检查结果等，进行综合分析，材料齐全的情况下，应当在三十日内作出诊断结论。

没有证据否定职业病危害因素与病人临床表现之间必然联系的，应当诊断为职业病。

本办法所称“证据”，包括疾病的证据、接触职业病危害因素的证据，以及用于判定疾病与接触职业病危害因素之间因果关系的证据。

第二十一条 职业病诊断需要以下资料：

（一）劳动者职业史和职业病危害接触史（包括在岗时间、工种、岗位、接触的职业病危害因素名称等）；

（二）劳动者职业健康检查结果；

（三）工作场所职业病危害因素检测结果；

（四）职业性放射性疾病诊断还需要个人剂量监测档案等资料。

第二十二条 劳动者依法要求进行职业病诊断的，职业病诊断机构应当接诊，并告知劳动者职业病诊断的程序和所需材料。劳动者应当填写《职业病诊断就诊登记表》，并提供本人掌握的职业病诊断有关资料。

第二十三条 职业病诊断机构进行职业病诊断时，应当书面通知劳动者所在的用人单位提供其掌握的本办法第二十一条规定的职业病诊断资料，用人单位应当在接到通知后的十日内如实提供。

第二十四条 用人单位未在规定时间内提供职业病诊断所需要资料的，职业病诊断机构可以依法提请用人单位所在地卫生健康主管部门督促用人单位提供。

第二十五条 劳动者对用人单位提供的工作场所职业病危害因素检测结果等资料有异议，或者因劳动者的用人单位解散、破产，无用人单位提供上述资料的，职业病诊断机构应当依法提请用人单位所在地卫生健康主管部门进行调查。

卫生健康主管部门应当自接到申请之日起三十日内对存在异议的资料或者工作场所职业病危害因素情况作出判定。

职业病诊断机构在卫生健康主管部门作出调查结论或者判定前应当中止职业病诊断。

第二十六条 职业病诊断机构需要了解工作场所职业病危害因素情况时，可以对工作场所进行现场调查，也可以依法提请卫生健康主管部门组织现场调查。

第二十七条 在确认劳动者职业史、职业病危害接触史时，当事人对劳动关系、工种、工作岗位或者在岗时间有争议的，职业病诊断机构应当告知当事人依法向用人单位所在地的劳动人事争议仲裁委员会申请仲裁。

第二十八条 经卫生健康主管部门督促，用人单位仍不提供工作场所职业病危害因素检测结果、职业健康监护档案等资料或者提供资料不全的，职业病诊断机构应当结合劳动者的临床表现、辅助检查结果和劳动者的职业史、职业病危害接触史，并参考劳动者自述或工友旁证资料、卫生健康等有关部门提供的日常监督检查信息等，作出职业病诊断结论。仍不能作出职业病诊断的，可依据病人的临床表现以及辅助检查结果，作出疾病的诊断，并提出相关医学意见或者建议。

第二十九条 职业病诊断机构可以根据诊断需要，聘请其他单位职业病诊断医师参加诊断。必要时，可以邀请相关专业专家提供咨询意见。

第三十条 职业病诊断机构作出职业病诊断结论后，应当出具职业病诊断证明书，职业病诊断证明书应当由参与诊断的取得职业病诊断资格的执业医师签署。

职业病诊断机构应当对职业病诊断医师签署的职业病诊断证明书进行审核，确认诊断的依据与结论符合有关法律法规、标准的要求，并在职业病诊断证明书上盖章。

职业病诊断证明书的书写应当符合 GBZ/T 267《职业病诊断文书书写规范》或 GBZ/T 156《职业性放射疾病报告格式与内容》的要求。

职业病诊断证明书一式四份，劳动者、用人单位及用人单位所在地卫生健康主管部门各一份，诊断机构存档一份。

第三十一条 职业病诊断机构应当建立职业病诊断档案并永久保存，档案应当包括：

（一）职业病诊断证明书；

（二）职业病诊断记录；

（三）用人单位、劳动者和相关部门、机构提交的有关资料；

（四）临床检查与实验室检验等资料。

职业病诊断机构不再开展职业病诊断工作的，应当在停止开展的十五个工作日之前告知其备案的省级卫生健康主管部门和所在地卫生健康主管部门，妥善处理职业病诊断档案。

第三十二条 职业病诊断结束后，在没有新证据的情况下，当事人不应重复要求进行职业病诊断。新证据是指原职业病诊断过程中未提交或未发现，并且经初步判断可能变更原职业病诊断结论的新的疾病或职业病危害接触史等证据材料。

职业病诊断机构应当对劳动者提供的新证据材料做出认定并出具书面意见。

第三十三条 职业病诊断机构发现职业病病人或者疑似职业病病人时，应当及时向所在地卫生健康主管部门报告。

确诊为职业病的，职业病诊断机构可以根据需要，向卫生健康主管部门、用人单位提出专业建议；告知职业病病人依法享有的职业健康权益。

第三十四条 未备案开展职业病诊断工作的医疗卫生机构，在诊疗活动中发现劳动者的健康损害可能与其所从事的职业有关时，应及时告知劳动者到职业病诊断机构进行职业病诊断。

第四章 鉴 定

第三十五条 当事人对职业病诊断机构作出的职业病诊断有异议的，可以在接到职业病诊断证明书之日起三十日内，向作出诊断的职业病诊断机构所在地卫生健康主管部门申请鉴定。

职业病诊断争议由设区的市级以上地方卫生健康主管部门根据当事人的申请组织职业病诊断鉴定委员会进行鉴定。

第三十六条 设区的市级卫生健康主管部门负责职业病诊断争议的首次鉴定。

当事人对设区的市级职业病鉴定结论不服的，可以在接到鉴定书之日起十五日内，向原鉴定组织所在地省级卫生健康主管部门申请再鉴定，省级鉴定为最终鉴定。

第三十七条 设区的市级以上地方卫生健康主管部门可以指定办事机构，具体承担职业病诊断鉴定的组织和日常性工作。职业病鉴定办事机构的职责是：

（一）接受当事人申请；

（二）组织当事人或者接受当事人委托抽取职业病诊断鉴定专家；

（三）组织职业病诊断鉴定会议，负责会议记录、职业病诊断鉴定相关文书的收发及其他事务性工作；

（四）建立并管理职业病诊断鉴定档案；

（五）报告职业病诊断鉴定相关信息；

（六）承担卫生健康主管部门委托的有关职业病诊断鉴定的工作。

职业病诊断机构不能作为职业病鉴定办事机构。

第三十八条 设区的市级以上地方卫生健康主管部门应当向社会公布本行政区域内依法承担职业病诊断鉴定工作的办事机构的名称、工作时间、地点、联系人、联系电话和鉴定工作程序。

第三十九条 省级卫生健康主管部门应当设立职业病诊断鉴定专家库（以下简称专家库），并根据实际工作需要及时调整其成员。专家库可以按照专业类别进行分组。

第四十条 专家库应当以取得职业病诊断资格的不同专业类别的医师为主要成员，吸收临床相关学科、职业卫生、放射卫生等相关专业的专家组成。专家应当具备下列条件：

（一）具有良好的业务素质和职业道德；

（二）具有相关专业的高级专业技术职务任职资格；

（三）熟悉职业病防治法律法规和职业病诊断标准；

（四）身体健康，能够胜任职业病诊断鉴定工作。

第四十一条 参加职业病诊断鉴定的专家，应当由当事人或者由其委托的职业病鉴定办事机构从专家库中按照专业类别以随机抽取的方式确定。抽取的专家组成职业病诊断鉴定委员会（以下简称鉴定委员会）。

经当事人同意，职业病鉴定办事机构可以根据鉴定需要聘请本省、自治区、直辖市以外的相关专业专家作为鉴定委员会成员，并有表决权。

第四十二条 鉴定委员会人数为五人以上单数，其中相关专业职业病诊断医师应当为本次鉴定专家人数的半数以上。疑难病例应当增加鉴定委员会人数，充分听取意见。鉴定委员会设主任委员一名，由鉴定委员会成员推举产生。

职业病诊断鉴定会议由鉴定委员会主任委员主持。

第四十三条 参加职业病诊断鉴定的专家有下列情形之一的，应当回避：

（一）是职业病诊断鉴定当事人或者当事人近亲属的；

（二）已参加当事人职业病诊断或者首次鉴定的；

（三）与职业病诊断鉴定当事人有利害关系的；

（四）与职业病诊断鉴定当事人有其他关系，可能影响鉴定公正的。

第四十四条 当事人申请职业病诊断鉴定时，应当提供以下资料：

（一）职业病诊断鉴定申请书；

（二）职业病诊断证明书。申请省级鉴定的还应当提交市级职业病鉴定书。

第四十五条 职业病鉴定办事机构应当自收到申请资料之日起五个工作日内完成资料审核，

对资料齐全的发给受理通知书;资料不全的,应当一次性书面通知当事人补充。资料补充齐全的,应当受理申请并组织鉴定。

职业病鉴定办事机构收到当事人鉴定申请之后，根据需要可以向原职业病诊断机构或者组织首次鉴定的办事机构调阅有关的诊断、鉴定资料。原职业病诊断机构或者组织首次鉴定的办事机构应当在接到通知之日起十日内提交。

职业病鉴定办事机构应当在受理鉴定申请之日起四十日内组织鉴定、形成鉴定结论，并出具职业病鉴定书。

第四十六条 根据职业病诊断鉴定工作需要，职业病鉴定办事机构可以向有关单位调取与职业病诊断、鉴定有关的资料，有关单位应当如实、及时提供。

鉴定委员会应当听取当事人的陈述和申辩，必要时可以组织进行医学检查，医学检查应在三十日内完成。

需要了解被鉴定人的工作场所职业病危害因素情况时，职业病鉴定办事机构根据鉴定委员会的意见可以组织对工作场所进行现场调查，或者依法提请卫生健康主管部门组织现场调查。现场调查应在三十日内完成。

医学检查和现场调查时间不计算在职业病鉴定规定的期限内。

职业病诊断鉴定应当遵循客观、公正的原则，鉴定委员会进行职业病诊断鉴定时，可以邀请有关单位人员旁听职业病诊断鉴定会议。所有参与职业病诊断鉴定的人员应当依法保护当事人的个人隐私、商业秘密。

第四十七条 鉴定委员会应当认真审阅鉴定资料，依照有关规定和职业病诊断标准，经充分合议后，根据专业知识独立进行鉴定。在事实清楚的基础上，进行综合分析，作出鉴定结论，并制作职业病鉴定书。

鉴定结论应当经鉴定委员会半数以上成员通过。

第四十八条 职业病鉴定书应当包括以下内容：

（一）劳动者、用人单位的基本信息及鉴定事由；

（二）鉴定结论及其依据，鉴定为职业病的，应当注明职业病名称、程度（期别）；

（三）鉴定时间。

鉴定书加盖职业病诊断鉴定委员会印章。

首次鉴定的职业病鉴定书一式五份,劳动者、用人单位、用人单位所在地卫生健康主管部门、原诊断机构各一份,职业病鉴定办事机构存档一份;省级鉴定的职业病鉴定书一式六份,劳动者、用人单位、用人单位所在地卫生健康主管部门、原诊断机构、首次职业病鉴定办事机构各一份,省级职业病鉴定办事机构存档一份。

职业病鉴定书的格式由国家卫生健康委员会统一规定。

第四十九条 职业病鉴定书应当于出具之日起十日内由职业病鉴定办事机构送达当事人。

第五十条 鉴定结论与诊断结论或者首次鉴定结论不一致的，职业病鉴定办事机构应当及时

向相关卫生健康主管部门报告。

第五十一条 职业病鉴定办事机构应当如实记录职业病诊断鉴定过程，内容应当包括：

（一）鉴定委员会的专家组成；

（二）鉴定时间；

（三）鉴定所用资料；

（四）鉴定专家的发言及其鉴定意见；

（五）表决情况；

（六）经鉴定专家签字的鉴定结论。

有当事人陈述和申辩的，应当如实记录。

鉴定结束后，鉴定记录应当随同职业病鉴定书一并由职业病鉴定办事机构存档，永久保存。

第五章 监督管理

第五十二条 县级以上地方卫生健康主管部门应当定期对职业病诊断机构进行监督检查，检查内容包括：

（一）法律法规、标准的执行情况；

（二）规章制度建立情况；

（三）备案的职业病诊断信息真实性情况；

（四）按照备案的诊断项目开展职业病诊断工作情况；

（五）开展职业病诊断质量控制、参加质量控制评估及整改情况；

（六）人员、岗位职责落实和培训情况；

（七）职业病报告情况。

省级卫生健康主管部门应当对本辖区内的职业病诊断机构进行定期或者不定期抽查；设区的市级卫生健康主管部门每年应当至少组织一次监督检查；县级卫生健康主管部门负责日常监督检查。

第五十三条 设区的市级以上地方卫生健康主管部门应当加强对职业病鉴定办事机构的监督管理，对职业病诊断鉴定工作程序、制度落实情况及职业病报告等相关工作情况进行监督检查。

第五十四条 县级以上地方卫生健康主管部门监督检查时，有权查阅或者复制有关资料，职业病诊断机构应当予以配合。

第六章 法律责任

第五十五条 无《医疗机构执业许可证》擅自开展职业病诊断的，由县级以上地方卫生健康主管部门依据《医疗机构管理条例》第四十四条的规定进行处理。

第五十六条 职业病诊断机构未按本办法备案开展职业病诊断的，由县级以上地方卫生健康

主管部门责令改正，给予警告，可以并处三万元以下罚款。

第五十七条 职业病诊断机构有下列行为之一的，由县级以上地方卫生健康主管部门按照《职业病防治法》第八十条的规定进行处罚：

（一）超出诊疗项目登记范围从事职业病诊断的；

（二）不按照《职业病防治法》规定履行法定职责的；

（三）出具虚假证明文件的。

第五十八条 职业病诊断机构未按照规定报告职业病、疑似职业病的，由县级以上地方卫生健康主管部门按照《职业病防治法》第七十四条的规定进行处罚。

第五十九条 职业病诊断机构违反本办法规定，有下列情形之一的，由县级以上地方卫生健康主管部门责令限期改正；逾期不改正的，给予警告，并可以根据情节轻重处以三万元以下的罚款：

（一）未建立职业病诊断管理制度；

（二）不按照规定向劳动者公开职业病诊断程序；

（三）泄露劳动者涉及个人隐私的有关信息、资料；

（四）未按照本办法规定参加质量控制评估，或者质量控制评估不合格且未按要求整改的；

（五）拒不配合卫生健康主管部门监督检查的；

（六）其他违反本办法的行为。

第六十条 职业病诊断鉴定委员会组成人员收受职业病诊断争议当事人的财物或者其他好处的，由省级卫生健康主管部门按照《职业病防治法》第八十一条的规定进行处罚。

第六十一条 县级以上地方卫生健康主管部门及其工作人员未依法履行职责，按照《职业病防治法》的八十三条规定进行处理。

第六十二条 用人单位有下列行为之一的，由县级以上地方卫生健康主管部门按照《职业病防治法》的七十二条、七十四条规定进行处罚：

（一）未安排职业病病人、疑似职业病病人进行诊治的；

（二）拒不提供职业病诊断、鉴定所需资料的；

（三）未承担职业病诊断、鉴定费用的；

（四）未报告职业病、疑似职业病的。

第七章 附 则

第六十三条 本办法自 年 月 日起施行。

《职业病诊断与鉴定管理办法（征求意见稿）》修订说明

一、修订背景

2017 年、2018 年全国人大常委会两次对《职业病防治法》进行修改，取消了三名以上取得职业病诊断资格的执业医师集体进行职业病诊断、职业病诊断机构资质行政审批事项，并要求卫生行政部门加强对职业病诊断工作的规范管理。

经深入研究，组织地方卫生健康主管部门、有关机构和专家专题研究，并征求了有关部门、相关企事业单位的意见，形成了《职业病诊断与鉴定管理办法(征求意见稿)》（以下简称《办法》）。

二、修订原则

（一）以人民健康为中心。坚持以维护劳动者职业健康为目标，紧紧围绕落实劳动者职业健康合法权益、方便劳动者进行职业病诊断与鉴定等开展修订工作。

（二）放管服相结合。适应“放管服”行政审批制度改革要求，取消诊断机构资质审批环节，强化事中、事后监管；优化诊断服务，取消集体诊断，简化诊断程序。

（三）突出重点与循序渐进相结合。坚持问题导向，突出解决职业病诊断与鉴定工作中的重点难点问题；注意新旧职业病诊断与鉴定制度的衔接，保持连续性，注重可操作性。

三、主要修改内容及说明

修订后的《办法》（征求意见稿）共七章六十三条，主要修改了以下内容：

（一）优化诊断与鉴定相关程序及要求。

针对职业病诊断难的问题，《办法》（征求意见稿）在以下五个方面进行了修改：一是根据《职业病防治法》第四十六条第二款“没有证据否定职业病危害因素与病人临床表现之间必然联系的，应当诊断为职业病”的规定，细化了证据的具体内容，即“包括疾病的证据、接触职业病危害因素的证据，以及用于判定疾病与接触职业病危害因素之间因果关系的证据”，以便于诊断机构与诊断医师的具体操作，也利于用人单位和劳动者理解（第二十条）。二是减少劳动者提供职业病诊断资料的要求。规定诊断所需资料主要由用人单位向诊断机构提供，劳动者只提供本人掌握的有关资料（第二十二条）。三是明确了职业病诊断时限，大幅减少职业病鉴定办理时限，规定从受理至送达鉴定书的时限由 95 天减至 50 天（第四十五、四十九条）。四是针对职业病患者因所需诊断资料不全等原因导致无法诊断职业病的问题，提出“职业病诊断机构可依据病人的临床表现以及辅助检查结果，作出疾病的诊断，并提出相关医学意见或者建议”，方便患者进行疾病的治疗康复及医疗费用报销（第二十八条）。五是将职业病诊断鉴定结论应当经鉴定委员会“三分之二以上成员通过”修改为“半数以上成员通过”，进一步提升诊断鉴定效率（第四十七条）。

（二）明确职业病诊断机构的备案管理制度。

鉴于职业病诊断与鉴定工作具有很强的技术性和政策性，根据《职业病防治法》相关规定，在取消职业病诊断机构资质行政审批的同时，《办法》（征求意见稿）规定职业病诊断机构实行备案管理制度，并明确了备案方式、基本条件、变更备案等要求（第六、七、八、九条）。

（三）加强质量控制，规范职业病诊断管理。

《办法》（征求意见稿）从四个方面提出了新的要求：一是为保证诊断医师的业务能力，明确由国家卫生健康委制定职业病诊断医师培训大纲，省级卫生健康主管部门制定本行政区域职业病诊断医师培训考核办法并组织实施（第十六、十七条）。二是增加了职业病诊断机构应当“确

认诊断的依据与结论符合有关法律法规、标准”的具体审核要求（第三十条第二款）。三是提出职业病诊断文书的书写应当符合 GBZ/T267《职业病诊断文书书写规范》或 GBZ/T156《职业性放射疾病报告格式与内容》的要求（第三十条第三款）。四是要求省级卫生健康主管部门应当指定机构负责职业病诊断机构的质量控制管理工作，组织开展质量控制评估（第十八条）。

（四）突出了用人单位的相关义务。

《办法》（征求意见稿）整合《职业病防治法》有关条款，在总则部分集中明确了用人单位应当履行的职业病诊断、鉴定相关义务，如：安排职业病病人与疑似职业病病人进行诊治、提供职业病诊断与鉴定所需资料、承担职业病诊断与鉴定费用等（第五条）。

（五） 明确国家与地方的监督管理责任。

按照属地、分级的监管原则，《办法》（征求意见稿）增加了“国家卫生健康委负责全国范围内职业病诊断与鉴定工作的监督管理，县级以上地方卫生健康主管部门依据职责负责本行政区域内的职业病诊断与鉴定工作的监督管理”的要求（第三条）。

（六）其他重要修订内容。

针对近年来同一当事人重复申请职业病诊断，导致行政资源浪费的现象，本次修订提出“在没有新证据的情况下，当事人不应重复要求进行职业病诊断”的要求，并对新证据进行了界定（第三十二条）。在法律责任章节补充了相关违规行为的相应罚则（第五十五、五十六、五十七、五十九、六十二条）。

LexisNexis-法律法规/Legislation

国家卫生健康委关于《职业病诊断与鉴定管理办法（征求意见稿）》公开征求意见的通知

https://hk.lexiscn.com/topic/legal.php?tps=ip&act=detail&newstype=1&provider_id=1&isEnglish=N&origin_id=3515132&keyword=&crid=4e7e136b-643e-4390-aaf8-c1cae9dddd60&prid=268f7600-932d-4272-8c23-01c11dbc8c86

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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。

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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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