

2020年4月

劳动与雇佣

疫情期间劳动关系的应对策略

Employment Relation Management under COVID-19

出现的挑战

Challenges

由于疫情的影响，大部分企业的生产经营状况受到了非常大的冲击和影响，部分企业处于长期停工停产状态，尽管部分企业早已选择让员工在家办公的模式，也有部分企业已正式复工，但因疫情给劳动关系带来的诸多问题不断涌现，包括但不限于：

Due to the outbreak of COVID-19, the production and operation of most companies were substantially affected. Some companies have been already in operation suspension for a while. While some companies have chosen to allow employees to work from home, and some enterprises have officially resumed work, we notice a lot of emerging problems in relation to employment issues caused by the COVID-19 such as:

- 劳动者因疫情被隔离而未能正常返岗复工的，公司能否单方解除与其的劳动关系？
If employee is isolated due to COVID-19 and fails to get back to work, can the company unilaterally terminate the labor contract?
- 劳动者害怕受疫情影响，坚持呆在老家而拒绝返岗的，公司能否单方解除与其的劳动关系？
The employee is afraid of COVID-19, and insists on staying at his home and refuse to get back to work, can the company unilaterally terminate the labor relationship?
- 公司业务因疫情受到影响，公司是否仍需要遵循劳动合同约定支付员工工资？公司是否可以减少支付员工的工资？
The company's business is negatively affected by COVID-19, does the company have to pay employee the salary as usual according to the labor contract? Can the company reduce the salary payment?

根据疫情期间相关国家政府部门及司法机关颁布的规定，我们试图从劳动关系的解除可行性

及工资支付标准两个方面，对于劳动关系处理中的典型问题进行讨论。

According to the regulations recently promulgated by various Chinese government departments, we would like to discuss two typical issues in employment management, namely, the feasibility of employment termination, as well as salary payment standard under COVID-19.

I. 疫情期间，公司单方解除劳动关系受到限制

With COVID-19, the company's right to unilaterally terminate employment contract is restricted

(a) 因受疫情影响不能解除劳动关系的情形：

Circumstances where no termination is allowed under COVID-19

根据国家人社部于2020年1月24日发布的《人力资源社会保障部办公厅关于妥善处理新型冠状病毒感染的肺炎疫情防控期间劳动关系问题的通知》，因疫情影响而无法正常履行劳动合同的员工，公司不能单方解除与其劳动关系。该通知明确不能解除劳动关系的情形包括如下：

According to Notice of the General Office of Ministry of Human Resources and Social Security of the People's Republic of China on Properly Handling employment Relations during the Prevention and Control of Pneumonia Epidemic of New Coronavirus Infection issued by Ministry of Human Resources and Social Security of the People's Republic of China dated January 24, 2020 ("Notice"), the company shall not unilaterally terminate employment contract with its employee who is unable to fulfill the employment contract due to the impact of the coronavirus. The Notice specifies circumstances where the employment contract shall not be terminated including:

(i) 处在隔离治疗期或医学观察期的新型冠状病毒感染的肺炎患者、疑似病人、密切接触者。The employee is a COVID-19 patient, suspicious patient, or close contact who is in the isolation medical treatment period or medical observation period;

如果是经医院等医疗机构诊断为确诊病例或者被报告为疑似病例的员工，处在隔离治疗期或医学观察期中不能返岗或提供正常劳动的，在该等员工向公司提供医院的诊断证明或相关部门出具的隔离证明，公司不能单方与其解除劳动关系。

If the employee is diagnosed as a confirmed case or reported as a suspicious case by hospitals or other medical institutions, and is unable to get back to work or render normal work service during the isolation medical treatment period or medical observation period, he shall present the company with the diagnosis certificate issued by the hospital or the isolation certificate issued by the relevant department, and the company shall not unilaterally terminate the employment contract with him.

(ii) 因政府实施隔离措施或采取其他紧急措施导致不能提供正常劳动的劳动者。

The employee is unable to render normal work service due to isolation measures or other emergency measures taken by the government.

例如，此次疫情最为严重的武汉地区为防控疫情采取了全市交通管制措施，使得受此等隔离措施影响的员工不能离开武汉返岗，对于此类员工，公司不能单方与其解除劳动关系。

For instance, the city of Wuhan, the most affected city by COVID-19 in China, has taken measures on transportation ban around the city to prevent the spread of the virus, which led to the result the employees located in Wuhan are not able to leave Wuhan and get back to work. For those employees, the company cannot unilaterally terminate the employment contract with them.

此外，对于上述(i)、(ii)情形中的员工，如其与公司签订的劳动合同在上述的隔离期届满前到期的，则该等员工的劳动关系将自动顺延至治疗期期满、医学观察期期满、隔离期期满或者政府采取的隔离措施、紧急措施结束。

In addition, for employee in above (i) and (ii) situations, in the event that his employment contract happens to expire during the isolation period, the labor contract shall be automatically extended until the end of the medical treatment, the medical observation or the isolation measures.

(b) 公司可解除与恶意不复工员工的劳动关系

The company is allowed to terminate employment contract with employee who does not get back to work in bad faith

在当前疫情下，我们也注意到存在部分员工因害怕疫情、或故意借疫情为由拒绝复工的情况，对于这部分员工，我们认为在符合下述条件的情况下，公司仍可采取措施，解除与其劳动关系：

Under the current COVID-19, we also noticed that some part of employees refuse to get back to work because of being afraid of the virus or just take the virus as an excuse for not getting back to work. For these employees, termination of labor contract is possible if the following conditions are met:

1. 公司已具备复工条件并已通知员工复工；

The company has resumed the work and has informed the employee to get back to work;

2. 员工不存在客观原因或其他正当理由无法返岗复工的情况，因客观原因无法返岗复工的情况，包括上述所提及的因疫情受到隔离等；

There are no objective reasons that prevent the employee from getting back to work. Objective reasons, such as the isolation measures taken to the employees due to the COVID-19;

3. 公司采取劝导措施但员工仍不遵从；

The company has reminded the employee to get back but the employee fails to follow;

4. 公司相关规章制度对于无故旷工可予解除劳动关系有相应的规定。

The availability of company regulations in relation to termination in case of absence by the

employee.

II. 疫情期间，公司如何支付劳动者工资薪酬？

During the COVID-19, how does the company pay employees?

(a) 公司应正常支付员工工资的情形：

Circumstances where the company shall pay employees as usual

根据规定，对于受到疫情影响的下述员工，公司应正常向其支付工资：

According to the Notice, the employees in the following situations shall be paid as usual:

1. 因受疫情影响成为确诊病例、疑似病例、密切接触者的员工，公司应支付隔离治疗期间或医学观察期间工资；

Employee who becomes a confirmed case, suspicious case and close contact shall be paid as usual for the period for isolation medical treatment or medical observation;

2. 因政府实施隔离措施或采取其他紧急措施导致不能提供正常劳动的员工，公司应支付政府采取措施期间工资。

Employee who is unable to render work service due to isolation measures or other emergency measures taken by the government shall be paid as usual for the period such measures are taken by the government.

(b) 公司因受疫情影响而停工停产期间的，停工停产期间的工资支付标准：

In the event that the company's operation is suspended due to COVID-19, the salary payment standard during the operation suspension is as follows:

1. 若公司停工停产在一个工资支付周期内，不管员工是否提供了正常劳动，公司均应按劳动合同规定的标准支付劳动者工资。工资支付周期的界定，一般以公司规章制度规定的工资支付周期为准，例如，每月的1日到30日；

If the operation suspension is within one salary payment cycle, salary shall be paid as usual no matter the employee has rendered work service or not. Salary payment cycle is usually based on the company rule, for instance, monthly salary payment starting from 1st day to the last day of each month.

2. 若公司停工停产超过一个工资支付周期的，且员工提供了正常劳动，则公司支付给提供员工的工资不得低于当地最低工资标准。根据我们的理解，在公司停工停产的情况下，个别员工提供的劳动可能系公司为维系最低运营所需的，因此，公司仍然应当向其支付工资，但相应工资标准可基于双方的协商确定，政府的政策规定是该等工资标准仍不得低于当地最低工资标准；

If the operation suspension exceeds one salary payment cycle, and the employee has

rendered work service, the employee shall be paid with no less than local minimum wage. According to our understanding, even if the company's operation is suspended, the company may still require some employees' work so as to maintain minimum operation of the company, such as HR/accountant's work. Such employees shall be paid but the salary payment amount can be discussed and agreed by both parties, in particular the employees are not required to work full time. However, in any circumstances, such employees shall not be paid less than local minimum wage.

3. 若公司停工停产超过一个工资支付周期的，且员工未提供正常劳动，则公司应当发放生活费。生活费标准按各省、自治区、直辖市规定的办法执行。目前，根据各地方相关规定，北京市企业应当按照不低于当地最低工资标准（即 2200 元）的 70% 发放生活费；上海市企业应当按照不低于当地最低工资标准（即 2480 元）支付劳动者生活费；广州市企业应当按照不低于当地最低工资标准（即 2100 元）的 80% 支付劳动者生活费。

If the operation suspension exceeds one salary payment cycle, and the employee does not render any work service, the employee shall be paid with living fee. The standard of living fees vary in different areas. Currently the living fee in Beijing is 70% of local minimum wage namely RMB 1540; Shanghai is equal to local minimum wage, namely RMB 2480; and Guangzhou is 80% of local minimum wage, namely RMB 1680.

(c) 公司可不支付员工工资的情形

Circumstance where no salary payment for employees

针对因害怕疫情、或故意借疫情为由拒绝复工的员工，公司除可根据本文上述规定解除与其劳动关系外，公司亦有权不支付旷工期间的工资。

For employees who refuse to get back to work because of being afraid of the COVID-19, or take the COVID-19 as an excuse not to get back to work, in addition to the right to terminate the labor contract, the company is entitled not to pay salary for the absence period.

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