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劳动与雇佣

如何界定退休返聘人员的从业属性

HOW TO DEFINE THE LEGAL NATURE OF EMPLOYMENT OF RETIRED STAFFS

越来越多的用人单位愿意使用达到或超过退休年龄（一般情况下，男职工达到 60 周岁，女职工达到 50 周岁）的员工。这不仅仅因为这些员工的工作技术、能力更为娴熟，而且由于在用人单位多年的工作经验，多数属于企业的管理或技术骨干力量，对于企业的生产和发展具有不可替代的作用。然而，这些达到或超过退休年龄的员工，用人单位究竟应当是以劳动关系处理，还是以劳务关系处理，实践中仍然存在一些误区。由于这些误区的存在，一旦处理不当，在发生用工纠纷的时候，用人单位可能不得不承受巨大的用工风险。

More companies tend to use staffs reaching or over their retirement age (generally speaking, the retirement age for male staffs is 60 years old while 50 years old for female staffs). This is because these staffs are with skilled technology and working capability. More importantly, due to years of working experience in the company, most of them are the key management or technical personnel, who play an irreplaceable role in business production and development. However, for these staffs reaching or over retirement age, shall the company deem them as employees under labor relationship, or service providers under labor service relationship? This may bring some misunderstanding which may cause huge risk to the company once the dispute arises between the staffs and the company.

事实上，仅仅以达到退休年龄这一事实，难以得出用人单位与员工之间是建立了劳动关系或劳务关系的结论。

In fact, it is difficult to make a conclusion over the labor relationship or labor service relationship merely replying on the fact of the staffs reaching the retirement age.

I. 法律律所规范的界定标准的演变

The historical changes of the criteria under the laws and regulations

事实上，对于以何种条件作为区别劳动关系和劳务关系的标准，现行法律的规定存在一个演变的过程，包括如下：

In fact, the criteria for differing the labor relationship and labor service relationship has gone through a historical change as below:

1.2008 年 1 月 1 日起施行的《劳动合同法》第 44 条规定，劳动者开始依法享受基本养老保险待遇的，劳动合同终止；

1.According to Article 44 of Labor Contract Law coming into force on January 1, 2008, the labor contract shall terminate from the date the employee starts enjoying the basic pension insurance treatment;

2.2008 年 9 月 3 日起施行的《劳动合同法实施条例》第 21 条规定，劳动者达到法定退休年龄的，劳动合同终止；

2.According to Article 21 of Implementing Rules of Labor Contract Law coming into force on September 3, 2008, the labor contract shall terminate when the employee reaches his retirement age;

3.2010 年 9 月 14 日起施行的《最高人民法院关于审理劳动争议案件适用法律若干问题的解释三》第 7 条规定，用人单位与其招用的已经依法享受养老保险待遇或领取退休金的人员发生用工争议，向人民法院提起诉讼的，人民法院应当按劳务关系处理。

3.According to Article 7 of Interpretation of Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Labor Dispute Three coming into force on September 14, 2010, in case of dispute between the company and its staffs who has started enjoying the basic pension insurance treatment or receiving pension and the dispute is brought to the court, the court shall deal with as labor service relationship.

根据上述规定，显然，现有区分劳动关系和劳务关系的标准应当为劳动者是否开始依法享受养老保险待遇或领取退休金。

Thus, obviously the current criteria to differ the labor relationship and labor service relationship shall be the fact whether the staff starts enjoying the basic pension insurance treatment or receiving pension.

II. 为何达到退休年龄 \neq 开始依法享受基本养老保险待遇或领取退休金

Why reaching retirement age \neq starting enjoying the basic pension insurance treatment or receiving pension

上述问题的出现源于《社会保险法》对于享受基本养老保险待遇或领取基本养老金的条件限制。其中：

The above issue arises due to the limit of the conditions for enjoying basic pension insurance treatment or receiving pension as specified in the Law of Social Insurance.

1. 《社会保险法》第16条规定，参加基本养老保险的个人，达到法定退休年龄时累计缴费满15年的，按月领取基本养老金。参加基本养老保险的个人，达到法定退休年龄时累计缴费不足15年的，可以缴费至满15年，按月领取基本养老金；

1. According to Article 16 of the Law of Social Insurance, for individual who has joined the basic pension insurance program and the payment of social insurance fee has accumulatively reached 15 years when he reaches the retirement age, he is entitled to receive pension on a monthly basis. For individual who has joined the basic insurance pension program but the payment of social insurance fee has not accumulatively reached 15 years when he reaches the retirement age, he can only start receiving the pension on a monthly basis after the payment of social insurance fee reaches 15 years;

2. 《实施中华人民共和国社会保险法若干规定》第2条规定，参加职工基本养老保险的个人达到法定退休年龄时，累计缴费不足15年的，可以延长缴费至15年。

2. According to Article 2 of Several Regulations on Implementing the Law of Social Insurance of P.R.C, for individual who has joined the basic pension insurance program and the payment of social insurance fee is accumulatively less than 15 years when he reaches the retirement age, the payment of social insurance fee can be extended to 15 years.

根据上述规定，达到法定退休年龄时如果累计缴纳基本养老保险费不满15年的，则如果用人单位继续使用该员工的，则双方之间应当建立的是劳动关系，而非劳务关系，直至该员工开始依法享受基本养老保险待遇或开始领取养老金时，双方的关系才转为劳务关系。

According to the above laws and regulations, for staff who has reached the retirement age while the accumulatively payment of basic social insurance fee is less than 15 years, if the company intends to use the staff, a labor relationship, instead of labor service relationship, shall be established between the company and the staff, which shall continue until the staff is able to enjoy the basic social pension insurance treatment or receive the pension. After that, a labor service relationship shall be established.

III. 劳动关系和劳务关系的区别

The difference between labor relationship and labor service relationship

劳动关系和劳务关系存在诸多的区别，简而言之，对于用人单位而言，劳动关系受制于国家劳动法律法规的限制，用人单位负有在劳动法律规定下针对劳动者的工资支付（包括加班工资）、社保保险费缴纳、休假（病假、产假、年休假等）、工伤赔偿、单方解除劳动合同限制、经济补偿金支付、劳动保护等诸多义务。

Many differences exist between labor relationship and labor service relationship. In short, from the perspective of the company, the labor relationship is subject to the state's labor

laws and regulations. The company is under the liabilities of payment of salary (including overtime payment), payment of social insurance fee, leave (sick leave, maternity leave, annual leave etc), work-related injury compensation, limits in terminating the labor contract unilaterally, payment of severance, labor protection etc.

相比较而言，劳务关系系一种平等民事主体之间的合同关系，其主要受《合同法》的约束和调整。其中，上海地区对于退休返聘人员在工作时间、最低工资和劳动保护方面明确应当参照《劳动法》规定执行。双方可在报酬、合同解除、违约金支付等方面做出更为灵活的约定。

Comparatively speaking, labor service relationship is a civil contract which is mainly subject to the Law of Contract. In Shanghai, for use of retirement persons, the local law requests that the aspects of working time, minimum salary and labor protection shall follow the Labor Law. However, both parties can agree with more flexibility on issue of the remuneration, termination, penalty etc.

因此，劳务关系对于用人单位而言，是一种更为灵活、负担和风险更小的用工形式。

Therefore, for the company, labor service relationship is a more flexible way to use the staff with less burden and risk.

IV. 我们的建议:

Our Suggestions:

根据本文的论述，正确区别和对待劳动关系和劳务关系具有积极的意义。在实际操作中，我们建议如下：

According to above, it may bring positive meanings to understand and recognize the labor relationship and labor service relationship. Our suggestions are as below:

1.慎重调查已达到或超过退休年龄的员工是否开始享受基本养老保险待遇或开始领取退休金，以此确定应当签署劳动合同还是劳务合同；

1.The company shall have a duly investigation that whether the staff who has reached or over the retirement age has started enjoying the basic pension insurance treatment or receiving the pension, and from that, determine a labor contract or a labor service contract shall be concluded;

2.对于已达到退休年龄但尚未缴纳基本养老保险费满 15 年的员工，如用人单位希望继续使用该员工的，则应当签署劳动合同；

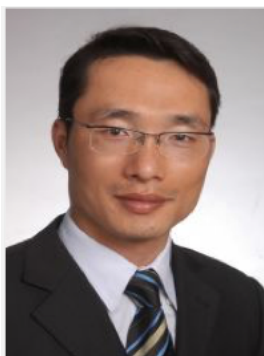
2.For staff who has reached the retirement age but the payment of social insurance fee is less than 15 years, if the company wants to use the staff, then a labor contract shall be concluded;

3.对于符合签署劳务合同的员工,用人单位在工作时间、最低工资、劳动保护方面参照劳动法执行外,其他方面完全有权自主作出灵活约定,而不再受劳动法和劳动合同法等条款约束。

3.For staff with a labor service contract to be concluded, the company is able to make flexible agreements with the staff except the issues of working time, minimum salary and labor contract, which shall be subject to the labor laws and regulations.

如您对本文有任何问题,请联系:

If you have any questions about this article, please contact us via:



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