PRC Labor and Employment Law Newsflash
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Calculation of Medical Leave and Termination of Employment Contract

"Medical leave" means the period during which an enterprise cannot terminate the employment with an employee because he leaves for medical treatment due to illness or non-work-related injury. Some SMEs in consideration of human resource costs, putting risks aside, dismiss employees during their medical leave as they leave for illness or non-work-related injury reason; and some employers illegally dismiss the employees suffering from illness or non-work-related injury on the ground that they are incompetent for original positions upon expiration of medical leave. Employers should be familiar with relevant regulations on medical leave and lawfully deal with relevant matters to prevent employment risks and procure employees' legitimate rights and interests.

I. Medical Leave

No employer may unilaterally terminate an employment contract during the medical leave, but how long will the medical leave last and how to calculate it?

1. Period of Medical Leave

It is specified in Article 3 of the *Provisions on Medical Leave for Illness or Non-Work-Related Injury of Enterprise Employees* that "Any employee of an enterprise who needs to leave for medical treatment due to illness or non-work-related injury shall be given a medical leave from 3 to 24 months based on his accumulative years of service and his years of service for the enterprise". Therefore the medical leave to which an employee is entitled for illness or non-work-related injury should be:

Accumulative Service	Service for the Employer	Medical Leave
Less than 10 years	Less than 5 years	3 months
	5 years or more	6 months
10 years or more	Less than 5 years	6 months
	5 years or more and less than 10 years	9 months
	10 years or more and less than 15 years	12 months
	15 years or more and less than 20 years	18 months
	20 years	24 months

However, medical leave is not capped by 24 months. It is stipulated in the *Circular of the Ministry of Labor on Implementing the Provisions on Medical Leave for Illness or Non-Work-Related Injury of Enterprise Employees ([1995] No. 236)* that "For any employee suffering from special diseases, such as cancer, mental disorder and paralysis, who cannot recover within 24 months, the medical leave may be properly extended, on realities of situation, upon approval of the enterprise and the labor administrative authority".

Moreover, special regulations have been formulated with respect to period of medical leave in some provinces and cities. For example in Shanghai, it is provided for in Article 2 of the *Provisions on the Standard of Medical Leave for Illness or Non-Work-Related Injury of Employees in Shanghai during the Term of Employment Contract* (revised on August 17, 2015) that "The medical leave shall be fixed according to the years of service of an employee for an employer. For the first year the employee works for the employer, the medical leave shall be three months; afterwards, with each additional year the medical leave shall be increased by one month, but shall not exceed twenty-four months". In this light, the medical leave of an employee working in Shanghai is not related to his accumulative years of service but related to his years of service for the current employer and will be increased by one month with each additional year, with the maximum not exceeding 24 months.

2. Calculation of Medical Leave

It is stipulated in Article 4 of the *Provisions on Medical Leave for Illness or Non-Work-Related Injury of Enterprise Employees* that "The medical leave of three months shall be calculated by the accumulative sick leave within six months; that of six months shall be calculated by the accumulative sick leave within 12 months; that of nine months shall be calculated by the accumulative sick leave within 15 months; that of 12 months shall be calculated by the accumulative sick leave within 18 months; that of 18 months shall be calculated by the accumulative sick leave within 24 months; and that of 24 months shall be calculated by the accumulative sick leave within 30 months".

It is specified in the *Circular of the Ministry of Labor on Implementing the Provisions on Medical Leave for Illness or Non-Work-Related Injury of Enterprise Employees ([1995] No. 236)* that "Medical leave shall be counted from the first day of sick leave accumulatively. For example, if an employee entitled to three-month's medical leave takes his first sick leave from March 5, 1995, then the medical leave should be taken between March 5 and September 5 and should be deemed expiring when he takes accumulative three months' sick leave during such period. Any rest day, holiday or statutory festival that falls in the medical leave shall be deemed as a part of such leave.

In Shanghai, medical leave may only be calculated day by day, and no period limitation applies.

II. Termination of Employment Contract

1. What should an employer do if an employee suffers from non-work-related injury or a

hard-to-cure illness?

Pursuant to Articles 6 and 7 of the *Provisions on Medical Leave for Illness or Non-Work-Related Injury of Enterprise Employees*, where an employee who suffers from non-work-related injury or a hard-to-cure illness is unable to engage in his original work or any separately arranged work after medical treatment during the medical leave, or where an employee's medical leave ends, the labor appraisal committee shall make appraisal of the labor capacity of the employee, and if the labor capacity is appraised to be at degree 1 to 4, the employer may legally terminate the employment contract with and conduct the retirement or resignation formalities for the employee; and if the labor capacity is appraised to be at degree 5 to 10, the employer shall not terminate the employment contract during his medical leave and shall upon expiration of the medical leave terminate the employment contract according to legal procedures (for details, see below).

2. If upon expiration of medical leave an employee has not yet recovered or is not competent for his original position although he has been recovered, can the employer terminate the employment contract directly?

According to Article 26 (1) of the *PRC Labor Law* and Article 40 (1) of the *PRC Employment Contract Law*, if an employee cannot engage in his original work, the employer may not directly terminate the employment contract, instead it shall first arrange another position for him, and only if the employee is not competent for such another position, the employer may terminate the employment contract by giving the employee 30 days' prior notice, or one month's salary in lieu of notice. Meanwhile, pursuant to the *PRC Employment Contract Law*, the employer terminating the employment contract for any of the above-said causes shall inform the labor union of the cause of termination in advance and pay the severance according to law. In addition, in accordance with Article 6 of the *Measures for Economic Compensation for Breach and Termination of Employment Contract*, Article 22 of the *Circular on Issues concerning the Implementation of Employment Contract System*, Article 35 of the *Opinions on Issues concerning the Implementation of the PRC Labor Law* and other provisions, the employer may be required to pay the medical subsidy in the amount of no less than six months' salary at the termination of the employment contract.

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中国劳动法资讯速递
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医疗期计算与劳动合同解除

医疗期是指企业员工因患病或非因工负伤停止工作治病休息、企业不得解除劳动合同的时限。出于人力资源成本的考虑，部分中小企业存在医疗期内解聘患病、非因工负伤停止工作的员工，却忽视了风险的情形；亦存在医疗期届满，员工无法胜任原有工作，用人单位违反法定程序解聘患病、非因工负伤的员工的情形。为维护员工的合法权益，防范劳动法律风险，用人单位应熟知医疗期的相关规定，并依法予以处理。

一、医疗期

医疗期内，用人单位不得单方解除劳动合同，但是，医疗期有多长，如何计算呢？

1.医疗期的期限

《企业职工患病或非因工负伤医疗期规定》第三条规定："企业职工因患病或非因工负伤，需要停止工作医疗时，根据本人实际参加工作年限和在本单位工作年限，给予三个月到二十四个月的医疗期。"根据该条规定，患病或非因工负伤员工可享受的医疗期具体如下：

实际工作年限	本单位工作年限	医疗期
10 年以下	5 年以下	3 个月
	5 年以上	6 个月
10 年以上（含 10 年）	5 年以下	6 个月
	5 年以上 10 年以下	9 个月
	10 年以上 15 年以下	12 个月
	15 年以上 20 年以下	18 个月
	20 年以上	24 个月

但是，医疗期的最长时限并非 24 个月。根据《劳动部关于贯彻<企业职工患病或非因工负伤医疗期规定>的通知》（劳部发［1995］236 号）规定："根据目前的实际情况，对某些患特殊疾病（如癌症、精神病、瘫痪等）的职工，在 24 个月内尚不能痊愈的，经企业和劳动主管部门批准，可以适当延长医疗期。"

此外，某些省市对医疗期的期限作出了特别的规定。以上海为例，《关于本市劳动

者在履行劳动合同期间患病或者非因工负伤的医疗期标准的规定》(2015 年 8 月 17 日修订）第二条规定：“医疗期按照劳动者在本用人单位的工作年限设置。劳动者在本单位工作第 1 年，医疗期为 3 个月；以后工作每满 1 年，医疗期增加 1 个月，但不超过 24 个月。”根据该规定，上海市员工可享受的医疗期与社会工龄无关，而仅与企业工龄有关，且根据在本单位工作年限长短，逐年递增 1 个月，但不超过 24 个月。

2.医疗期的计算

《企业职工患病或非因工负伤医疗期规定》第四条规定：“医疗期三个月的按六个月内累计病休时间计算；六个月的按十二个月内累计病休时间计算；九个月的按十五个月内累计病休时间计算；十二个月的按十八个月内累计病休时间计算；十八个月的按二十四个月内累计病休时间计算；二十四个月的按三十个月内累计病休时间计算。”

《劳动部关于贯彻<企业职工患病或非因工负伤医疗期规定>的通知》(劳部发[1995]236 号）明确：“医疗期计算应从病休第一天开始，累计计算。如：应享受三个月医疗期的职工，如果从 1995 年 3 月 5 日起第一次病休，那么，该职工的医疗期应在 3 月 5 日至 9 月 5 日之间确定，在此期间累计病休三个月即视为医疗期满。其它依此类推。病休期间，公休、假日和法定节日包括在内。”

根据前述规定，医疗期的具体计算如下：

医疗期（月）	累计计算周期（月）
3	6
6	12
9	15
12	18
18	24
24	30

而上海市有关医疗期的使用则仅逐日累计，并没有统计周期一说。

二、劳动合同解除

1.员工非因工致残或患有难以治疗的疾病，如何处理？

根据《企业职工患病或非因工负伤医疗期规定》第六条、第七条，员工非因工致残或患有难以治疗的疾病的，医疗期内终结医疗但不能从事原工作或另行安排的工作，或者医疗期届满的，均应由劳动鉴定委员会进行劳动能力鉴定，鉴定结果为一到四级的，用人单位可依法与员工解除劳动合同，并为员工办理退休、退职手续；鉴定结果为五到十级的，医疗期内用人单位不得解除劳动合同，医疗期届满，用人单位应依照法定程序与员工解除劳动合同，详见下文。

2.医疗期届满，员工尚未痊愈或者已经痊愈但无法胜任原有工作，用人单位能否直接与员工解除劳动合同呢？

根据《劳动法》第二十六条第（一）项和《劳动合同法》第四十条第（一）项，医疗期届满，员工不能胜任原有工作的，用人单位不能直接与员工解除劳动合同，而必须先另行安排其他工作，员工无法胜任用人单位另行安排的工作的，用人单位才可以提前三十天通知员工或额外支付一个月代通金后解除劳动合同。同时，根据《劳动合同法》的规定，用人单位因此解除员工的，应当事先将解除理由通知工会，且应依法支付员工经济补偿金。另外，根据《违反和解除劳动合同的经济补偿办法》第 6 条、《关于实行劳动合同制度若干问题的通知》第 22 条、《关于贯彻执行〈中华人民共和国劳动法〉若干问题的意见》第 35 条等规定，用人单位可能仍需在解除劳动合同时另行支付不低于六个月工资的医疗补助费。

期待我们的资讯速递能对您有所裨益。若您有任何问题，请通过电邮 hrlaw@dachenglaw.com 联系我们。

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