PRC Labor and Employment Law Newsflash

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MOHRSS Issues the Opinions on Certain Issues Concerning the Implementation of the Regulations on Work-Related Injury Insurance

On April 25th, 2013, MOHRSS issued the Opinions on Certain Issues Concerning the Implementation of *the Regulations on Work-Related Injury Insurance* (herein after referred to as the Opinions), which becomes effective as of the date of issuance. Compared with the version open to public comments, the Opinions avoids some questions in dispute and only clarifies less controversial questions like facts finding, work-related injury compensation, identification procedures of work-related injury, etc.. We set forth our analysis and comments on the relevant articles of the Opinions for your consideration.

I. Relevant facts finding

1. Item 5 and 6 of Article 14 of *the Regulations on Work-Related Injury Insurance* stipulates that a staff member or worker shall be identified injured at work if durante adsentia for work, injured due to work or the whereabouts thereof is unknown due to an accident or injured in a traffic accident in which the injured person himself does not assume main responsibility or in an urban rail transit, passenger ferry or train accident on the way to work from home or back home from work.

   In consideration of this, the Opinions puts forward that "the identification of durante adsentia for work" shall consider whether it is arranged by the employer for the purpose of work and whether the injury of the accident is caused by the reason of work. As for the identification of "the injured person himself does not assume main responsibility", legal documents of relevant authority or binding verdicts or rulings of people's court shall be available.

2. In Article 16 of *the Regulations on Work-Related Injury Insurance* which regulates circumstances shall not be identified as suffering from a work-related injury or regarded as suffering from a work-related injury, "the identification of committing a criminal offense intentionally" and "getting drunk or taking drugs" shall both have legal documents of relevant authority or binding verdicts or rulings of people's court. Without the said documents, getting drunk or taking drugs could be identified by relevant evidences.

   From the above facts finding, we can easily notice that the identification of relevant facts become strict and the discretion of the identification institution is limited by giving priority to judicial legal documents or binding verdicts or rulings, which tends to protect the laborers.

II. Work-related injury compensation

1. Ensure the work-related injury compensation of former employees

   For those employees who once engaged in operation contacting hazards of occupational diseases but were not found suffering from the occupational diseases until left the work position and were diagnosed or identified as occupational diseases, the Opinions provides that they can apply the work-related injury identification since the diagnosing or identifying date of the occupational disease within one year. For the retired employees who haven't engaged in operation contacting hazards of occupational diseases ever since, the work-related injury compensation basis will be the average monthly salary for social security of the last twelve months before retirement or the average monthly pension of the last twelve months before identified as the occupational diseases and the higher amount will prevail. For the former employees who haven't engaged in operation contacting hazards of occupational diseases ever since, the work-related injury compensation basis will be the average monthly salary for social security of the last twelve months before the termination of the employment contract or the engagement contract.

   This article increases the liability of the employer. For employees who have received the occupational health checkups before leaving their jobs with normal results, the former employer shall still face the labor dispute due to occupational diseases within one year after the employee left. The employer shall deal with this situation by changing relevant rules and regulations in time.

2. The work-related injury compensation under special circumstances

   (1) The Opinions regulates that illegal practice of sub-contracting or contract-transferring to natural persons or any other organizations not possessing employment subject qualification and laborers recruited by such natural persons or organizations suffer work-related injury when engaging in contracting business, the contractor possessing employment subject qualification shall bear the liabilities of work-related injury insurance.

   (2) If the employee suffers from the work-related injuries more than once during his/her consistent service for the same employer and meets the conditions for the relevant compensation, the highest level of injury or disability of the said work-related injuries shall be application for the lump sum employment allowance for disability and the lump sum medical allowance for the work-related injury.

   (3) At the same time, other compensation paid by the work injury insurance fund shall be paid pursuant to the Regulations on Work-Related Injury Insurance and the payment of long-term compensation shall not be changed with the payment of lump sum.

   (4) After the circumstances of ceasing the compensation disappeared regulated in Article 42 of the Regulations on Work-Related Injury Insurance, the compensation will resume from the next month but the compensation of the ceasing period will not be paid.

   (5) When assessing the compensation, the average monthly salary of the employees of the year before last can be temporally applied until the data of last year come out. After reassessment, the shortfall shall be paid.

III. Identification procedures of work-related injury

1. The Opinions requires that the employer must report the death of the employee to the social security administrative department within five working days since the date of death if the employee dies because of sudden illness or dies despite emergency rescue efforts within 48 hours during work hours and at the work position.

   This regulation increases the employer's obligation of death report within a fixed period of time. If the employer fails to do so, it may bear relevant legal liabilities.

2. The employer shall notify the employee to apply arbitration at the labor dispute commission if there is a dispute about the employment relationship. During the period, the time limit of work-related injury identification suspends and the social security administrative department will resume the identification procedures since the date of receiving effective legal documents confirming the employment relationship.

   This article confirms that the time limit of identification in arbitration suspends in the employment relationship confirmation case, but the court litigation period will not be applicable in such situation where the identification period suspends and this change deserves the attention of the employer.

Case Study: Occupational Disease Dispute after Termination

Mr. Wang once worked at a pharmaceuticals company as chemical analyst, and then he resigned and worked as a quality inspector at a chemical company. In the third month after on-boarding, he felt uncomfortable and the medical examination at the hospital confirmed that he got pneumonia caused by toluene poisoning. Then Mr. Wang applied occupational disease identification, work-related injury compensation and compensation that the chemical company should pay. The chemical company held that the new work position that Mr. Wang worked at did not belong to poisonous or harmful positions and Mr. Wang had no chance to contact toluene at it, thus the chemical company shall not bear the liabilities of work-related injury. Consequently, Mr. Wang sued this chemical company along with his former employer as the jointly and severally liable party. After investigation and trial, the arbitration court held that both work positions of the chemical company and the pharmaceuticals company had the contact chance of toluene. Considering the fact that Mr. Wang had worked in the pharmaceuticals company for three years but the chemical company for three months, the arbitration court ruled that the two employers bear the relevant work-related injury liabilities of occupational disease according to the proportion of 90% and 10%.

The lawyers of our team believes that as for the poisonous and harmful positions or positions with high risks of occupational diseases, the employer shall properly handle the occupational disease health inspection and pre-service, in-service and job leaving occupational health checkups and emergency checkups annually. Meanwhile, keep files on occupational health. As for new employees, pre-service checkups shall be strictly conducted as well as the position safety training. If a health problem is found in the checkups, it shall be well put down in the file and dealt with punctually. As for the employees leaving the company, apartment from the must-do job leaving occupational health checkups, the employer must well keep all the health files for at least one year in case of future investigation and to reduce the legal risks of lacking evidences for the potential labor disputes.

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人社部发布《关于执行<工伤保险条例>若干问题的意见》

2013 年 4 月 25 日，人力资源社会保障部发布了《关于执行<工伤保险条例>若干问题的意见》（以下简称“《意见》”）并自即日起实施。将此与之前的征求意见稿相比，正式稿回避了一些争议较大的焦点问题，仅就争议较小的事实认定、工伤待遇及工伤认定程序问题作出了厘定。敝所结合《意见》相关条文，梳理并简评如下，以备参考。

一、 相关事实认定

1. 《工伤保险条例》第十四条第(五)项、第(六)项规定，“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；在上下班途中，受到非本人主要责任的交通事故或者城市轨道交通、客运轮渡、火车事故伤害的，应当认定为工伤。”

   对此，《意见》提出，这里的“因工外出期间”认定，应当考虑职工外出是否属于用人单位指派的因工作外出，遭受的事故伤害是否因工作原因所致。“非本人主要责任”的认定，应当以有关机关出具的法律文书或者人民法院的生效裁决为依据。

2. 《工伤保险条例》第十六条中关于不得认定或视同工伤的情形中，“故意犯罪”的和“醉酒或者吸毒”的认定，均应以有关机关出具的法律文书或者人民法院的生效裁决为依据。无法获得上述依据的，“醉酒或吸毒”也可以结合相关证据认定。

   以上事实认定可以看出，对于相关事实的认定进一步严格，且限制了工伤认定机构的自由裁量权，多凭有关司法机构法律文书或生效裁决认定，更趋向于保护劳动者。

二、 工伤待遇

1. 保障离岗职工工伤待遇

   针对曾经从事接触职业病危害作业、当时没有发现罹患职业病、离开工作岗位后被诊断或鉴定为职业病的人员，《意见》规定，可以自诊断、鉴定为职业病之日起一年内申请工伤认定。未再从事接触职业病危害作业的退休人员，按就高原则以本人退休前 12 个月平均月缴费工资或者确诊职业病前 12 个月的月平均养老金为基数计发。离职后未再从事接触职业病危害作业的人员，按本人终止或者解除劳动、聘用合同前 12 个月平均月缴费工资计发相关工伤待遇。

此条加重了用人单位的责任。对一些已经做了离职 前职业病体检且为正常的员工，原用人单位仍有可能面临其在离职后一年内因职业病再发生劳动争议。用人单位须及时变更相关制度安排以应对。

2. 特殊情况下的工伤待遇

(1) 《意见》规定违法转包、分包给不具备用工主体资格的组织或者自然人，而该组织或者自然人招用的劳动者从事承包业务时因工伤亡的，由该具备用工主体资格的承包单位承担工伤保险责任。

(2) 职工在同一用人单位连续工作期间多次发生工伤的，符合相关规定领取相关待遇时，按照其在同一用人单位发生工伤的最高伤残级别，计发一次性伤残就业补助金和一次性工伤医疗补助金。

(3) 同时，由工伤保险基金支付的各项待遇应按《条例》相关规定支付，不得采取将长期待遇改为一次性支付的办法。

(4) 在《工伤保险条例》第四十二条规定的停止支付待遇的情形消失后的下月起恢复工伤保险待遇，停止支付期间的待遇不补发。

(5) 核定待遇时，可暂按前一年度的职工月平均工资核定和计发，待上一年度相关数据公布后再重新核定再予以补发差额部分。

三、 工伤认定程序

1. 《意见》规定职工在工作时间和工作岗位突发疾病死亡或者在 48 小时之内经抢救无效死亡的，用人单位原则上应自职工死亡之日起 5 个工作日内向所在社会保险行政部门报告。

此条增加了用人单位时限内报告工亡的义务，如果用人单位未在时效内报告，可能导致由用人单位承担相关法律责任。

2. 劳动关系存在争议应告知当事人向劳动人事争议仲裁委员会申请仲裁。在此期间，工伤认定时限中止，社会保险行政部门自收到确认劳动关系生效法律文书之日起恢复工伤认定程序。

此条只规定了劳动关系确认之诉中劳动仲裁阶段工伤认定时限中止，未将法院诉讼期间纳入工伤认定时限中止情形，须引起用人单位对此变化之注意。

案例分析：离职后职业病纠纷

某制药公司化验员王某辞职后去了一家化工企业担任质检员。入职新单位后第三个月王某因身体不适在医院检查时确诊为甲苯中毒导致肺炎。王某遂申请职业病鉴定并要求工伤待遇及该化工企业给予相关赔偿。化工企业表示王某的新岗位不属于有毒有害岗位，且没有可能接触到甲苯，不应由其承担工伤待遇赔偿责任。王某遂将前雇主制药公司作为连带责任人一并诉至劳动仲裁委员会。仲裁庭经调查和审理后认为，制药公司和化工企业提供给王某的岗位均会接触到甲苯，但考虑到王某在制药公司工作三年，而在化工企业才入职三个月，遂裁决前后两家单位按照各自百分之九十和百分之十的比例承担相应职业病工伤待遇之赔偿责任。

本团队律师认为：对于有毒有害或其他职业病高发岗位，用人单位应做好职业病健康检查工作，及上岗前、在岗期间的每年度、离岗时和应急的健康检查。同时也要做好职业健康档案管理工作。对于入职员工，须严格入职健康体检及岗位安全培训，如体检时发现健康问题，须计入健康档案并予以及时处理。对于离职员工，除必须做离职健康检查外，须在其离职后妥善保管其所有健康档案及其他文档至少一年备查，以避免劳动争议发生时可能因证据不足而带来的法律风险。

本资讯速递系大成劳动法团队撰拟，责任编辑：孔琪、罗欣、单训平、孙颖、徐智强、杨傲霜、张根旺和周军。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 laborlaw@dachenglaw.com *联系我们团队。*

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