

PRC Labor and Employment Law Newsflash August 2016

Work-related Injury during Post-Retirement Re-Engagement

It is increasingly common to see individuals being re-engaged after their retirement. As a result of this growing trend, there have been more and more disputes arising due to work-related injury. In the premises, two questions arise. Firstly, how will the courts resolve these disputes? Secondly, how to prevent the risk of liabilities associating with such re-engagement? This article seeks to address these questions.

I. Those who have enjoyed pension benefits or have received their pension may be entitled to work-related insurance benefits

(I) Those entitled to work-related injury insurance benefits

Pursuant to Article 2 of the *Opinions of the Ministry of Human Resources and Social Security on Several Issues Concerning Implementation of the Regulation on Work Injury Insurance (II)* ([2016] No. 29), where an entity recruits an individual who has reached or exceeded the statutory retirement age or has received the benefits of the basic pension insurance system for urban workers and the individual is injured in an accident or suffers from an occupational disease during the period of engagement, if the entity has paid the work-related injury insurance premiums for the individual in the form of project insurance or any other forms, the Regulation on Work-Related Injury Insurance shall apply.

(II) Those not entitled to work-related injury insurance benefits

Firstly, the Legislative Affairs Office of the State Council stated in its *Reply to the Request for Instructions on Whether the Retirees Re-entering the Labor and Production Field may be Entitled to Work Injury Insurance Benefits* ([2005] No. 310) that prevailing laws and administrative regulations do not specify on how to deal with work-related injury suffered by a re-engaged individual.

Furthermore, it shall be subject to the *Circular of the General Office of the CPC Central Committee on Forwarding the Opinions of the Organization Department of the CPC Central Committee, the Propaganda Department of the CPC Central Committee, the United Front Work Department of the CPC Central Committee, the Ministry of Personnel, the Ministry of Science and Technology, the Ministry of Labor and Social Security, and the People's Liberation Army General Political Department and China Association for Science and Technology on Further Playing the Role of Retired Professionals* ([2005] No. 9), setting forth that the entity shall properly handle any work-related injury suffered by a retired professional during his/her engagement by applying, mutatis mutandis, the regulations on work-related injury insurance benefits and any dispute with the entity arising from any work-related injury may be settled through civil litigation.

Secondly, according to Article 7 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (III)*, where any labor dispute arises between an entity and an individual who has legally made pension insurance claims or received pensions when he/she is engaged by the entity, and either

party files a suit before the people's court, the people's court shall deal with it as a service dispute. If an entity has not contributed work-related injury premiums for a re-engaged individual while the individual is injured for work-related reason during the engagement period, the dispute may be settled through civil litigation and the injury will not be held as a work-related injury. Instead, the entity shall properly handle it by applying, mutatis mutandis, the regulations on work-related injury insurance benefits.

Thirdly, pursuant to Article 11 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Cases on Compensation for Personal Injury* ([2003] No. 20), where an employee suffers a personal injury in the course of carrying out an activity of employment, the employer shall bear liability for damages. Hence, the re-engaged individual shall not be entitled to work-related injury insurance benefits but may claim compensation against the entity engaging him/her for personal injury.

II. The employer shall assume the work-related injury insurance liability to those who have attained statutory retirement age but have not completed retirement formalities or does not enjoy the benefits of the basic pension insurance system

Pursuant to Article 2 of the *Opinions of the Ministry of Human Resources and Social Security on Several Issues Concerning Implementation of the Regulation on Work-Related Injury Insurance (II)* ([2016] No. 29), where an employee who reaches or exceeds the statutory retirement age but does not go through the retirement formalities or does not enjoy the benefits of the basic pension insurance system for urban employees is injured in an accident or suffers from an occupational disease during the period when he or she continues to work for the original employer, the employer shall assume the work-related injury insurance liability according to the law.

III. How to prevent the risk of liabilities arising from re-engagement of retired individuals

1. Checking whether the re-engaged individual has enjoyed his/her pension benefits or has received his/her pension before re-engagement

Whether an individual has legally made pension insurance claims or received pension would likely result in different legal relationship between the individual and the entity engaging him/her and this, in turn, determines what legal liability the entity shall bear. To keep the retired and re-engaged individual from claiming against the engaging entity for any employment rights after working for some time and thus increasing the labor costs of the entity, we suggest that the entity should, at the engagement of any retired individual, include the retirement status in the entry requirements or require him/her to provide the evidence proving that he/she has legally made pension insurance claims or received pensions.

2. Signing a written service agreement with the re-engaged individual upon re-engagement

The entity should sign a service agreement with the re-engaged individual who has enjoyed pension benefits or has received his/her pension. The agreement should set forth the job description, amount of remuneration, labor protection conditions and the rights and obligations. The rights and obligations of the parties to the service agreement shall be confined to what was agreed in the service agreement and shall exclude any relevant provisions of labor law.

3. Effecting relevant insurance(s) for the re-engaged individual according to the individual's conditions and the entity's demands

When an entity engages an individual who has enjoyed pension benefits or has received his/her

pension, the entity shall contribute work-related injury insurance premiums or purchase employer's liability insurance for the re-engaged individual based on the individual's condition and the entity's demands.

Case Study:

In May 2010, Lee went through the retirement formalities in Company A according to applicable PRC policies and began to receive his pension at RMB 1,223.2 per month from Changde Dingcheng Social Labor Insurance Office. However, Lee continued to work at Company A's assembly workshop and was paid by the company based on his service. On 9 February 2012, a bus hit Lee on his way home from work. It was identified by the police that the bus driver was solely responsible for the accident. Following his accident, Lee received an insurance compensation of RMB 47,000 from the traffic accident vehicle insurer. On 29 August 2012, Lee applied to Changde Labor and Personnel Dispute Arbitration Commission for arbitration on the grounds that he should be entitled to relevant work-related injury insurance benefits because he was injured on his way home from work. Lee also requested confirmation of his employment relationship with Company A. On 30 August 2012, the Commission rejected the application because it found that Lee had received his pension and was enjoying his pension benefits. Following the Commission's decision, Lee brought a lawsuit before the District People's Court on 10 September 2012, claiming that Company A should compensate his losses for a sum of RMB 127,029.

The court held that Lee and Company A were in a service relationship. Therefore, Lee's injury should not be recognized as a work-related injury under Article 14 of the *Regulation for Work-Related Injury Insurance*.

As a retired and re-engaged individual, Lee may demand from either the third party or Company A to bear liability and compensate Lee in accordance with Article 11 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Cases on Compensation for Personal Injury*. Accordingly, two possible scenarios arise. First, the injured person may at his option demand a third party directly or the engaging party to bear liability for compensation. Second, if the injured person chooses to demand from the engaging party to bear liability, the engaging party may pursue a claim against the third party. However, the injured person can only choose to claim compensation from either the third party or the engaging party.

In addition, Lee's claim may not apply pursuant to Article 4 of the *Opinions of the General Office of the CPC Central Committee and the General Office of the State Council on Further Playing the Role of Retired Professionals* because he was unable to prove that he is a qualified professional and that his injury was an occupational injury. Lastly, since Lee had already received compensation from the traffic accident vehicle insurer, his claim for compensation against Company A no longer applies, as there is no factual and legal basis for doing so.

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中国劳动法资讯速递

二零一六年八月刊

退休返聘人员在工作时间受伤如何处理？

当前，用人单位聘用退休返聘人员的情形愈发常见，因退休返聘人员在工作时间受伤而引发的纠纷也日渐增多。那么，当发生这类纠纷时，法院通常如何处理？用人单位又该如何防范用工风险？

一、已经依法享受养老保险待遇或领取退休金的，可能享受工伤保险待遇

（一）享受工伤保险待遇的情形

根据《人力资源社会保障部关于执行<工伤保险条例>若干问题的意见（二）》（人社部发〔2016〕29号）第二条的规定，用人单位招用已经达到、超过法定退休年龄或已经领取城镇职工基本养老保险待遇的人员，在用工期间因工作原因受到事故伤害或患职业病的，如招用单位已按项目参保等方式为其缴纳工伤保险费的，应适用《工伤保险条例》，按工伤处理。

（二）不享受工伤保险待遇的情形

首先，国务院法制办公室在《关于重新进入劳动生产领域的离退休人员能否享受工伤保险待遇的请示》的复函（[2005]310号）中认为，关于离退休人员重新就业后发生工伤如何处理的问题，现行法律、行政法规没有明确规定；应当参照《中共中央办公厅转发<中央组织部、中央宣传部、中央统战部、人事部、科技部、劳动保障部、解放军总政治部、中国科协关于进一步发挥离退休专业技术人员作用的意见>的通知》（中办发[2005]9号）的规定办理；该通知规定，离退休专业技术人员受聘工作期间，因工作发生职工伤害的，应由聘用单位参照工伤保险的相关待遇妥善处理；因工作发生职业伤害与聘用单位发生争议的，可通过民事诉讼处理。

同时根据《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）》第七条之规定，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，人民法院应当按照劳务关系处理。用人单位未为退休返聘人员缴纳工伤保险费的，在用工期间因工作受事故伤害的，可通过民事诉讼，按照劳务关系处理，不认定为工伤，由用人单位参照工伤保险的相关待遇妥善处理。

其次，根据最高人民法院《关于审理人身损害赔偿案件适用法律若干问题的解释》（法释〔2003〕20号）第十一条规定，雇员在从事雇佣活动中遭受人身损害，雇主应当承担赔偿责任。此种情形下，退休返聘人员无法享受工伤保险待遇的，但可以按照此规定主张人身损害赔偿。

二、达到或超过法定退休年龄，但未办理退休手续或者未依法享受城镇职工基本养老保险待遇的，用人单位承担工伤保险责任

根据《人力资源社会保障部关于执行〈工伤保险条例〉若干问题的意见（二）》第二条之规定，达到或超过法定退休年龄，但未办理退休手续或者未依法享受城镇职工基本养老保险待遇，继续在原用人单位工作期间受到事故伤害或患职业病的，用人单位依法承担工伤保险责任。

三、用人单位如何防范用工风险

（一）在入职前，严格审查退休返聘人员是否已经依法享受养老保险待遇或领取退休金

退休返聘人员是否已经依法享受养老保险待遇或者领取退休金，很有可能直接导致退休返聘人员与用人单位之间法律关系性质的不同，从而决定了用人单位承担的法律责任完全不同。为了防止退休返聘人员在工作一段时间后向用人单位主张劳动权利，增加用人单位的用工成本，建议用人单位在聘用退休返聘人员时，将其身份作为入职条件之一，或者要求其提供已经依法享受养老保险待遇、领取退休金的证据。

（二）入职后，与退休返聘人员签订劳务合同

用人单位应与退休返聘人员签订劳务合同，明确工作内容、报酬、劳动保护条件等权利、义务。双方的权利、义务仅限于劳务合同约定的内容，不适用劳动法的相关规定。

（三）根据员工具体情况及企业自身需求，为员工购买相应保险

用人单位在聘用退休返聘人员时，可按员工具体情况、企业自身需求，为退休返聘人员缴纳工伤保险费或购买雇主责任险。

案例分析：

2010年5月，依据国家相关政策规定，李某在A公司处办理退休手续，并自该月起在常德市鼎城区社会劳动保险处按月领取养老金1223.2元。但李某实际仍在A公司装配车间一直上岗工作，A公司对李某另行实行按劳计酬。2012年2月9日，李某下班回家途中，被一辆大型客车撞伤，经公安部门认定，大客车驾驶员负事故全部责任。其后，李某自事故车辆保险人处领取保险理赔款47000元。2012年8月29日，李某以其系下班途中受伤应按工伤享受相关待遇为由向常德市劳动人事争议仲裁委员会申请劳动仲裁，要求确认其与A公司系劳动关系。同年8月30日，该委以李某已享受基本养老保险待遇为由决定不予受理。李某不服，于2012年9月10日诉至区人民法院，诉请判令被告A公司赔偿其各项损失127029元。

法院审理后认为：原告李某与被告 A 公司之间系劳务关系，对原告李某的人身损害后果，不能适用《工伤保险条例》第十四条从而认定为工伤。交通事故发生后，原告李某作为返聘人员，确实可以按照《最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释》第十一条的规定，请求第三人承担赔偿责任，也可以请求雇主承担赔偿责任；但是该司法解释包含两层含义：一是受害人在人身受到伤害后，可以直接选择请求第三人承担赔偿责任，或者请求雇主承担替代赔偿责任；二是在受害人请求雇主承担替代赔偿责任后，雇主可以向第三人追偿，而不是受害人可以同时或分别向致害人以及雇主请求进行赔偿。同时，原告李某虽然有一技之长，但其未举证证明自己具有专业技术人员的主体资格，且其所受到的人身伤害，不是离退休专业技术人员受聘期间，因工作发生的职业伤害，对其诉讼请求不适用中共中央办公厅、国务院办公厅《关于进一步发挥离退休专业技术人员作用的意见》第四条的相关政策。最后原告李某在交通事故发生后，已经从致害人处获得实际赔偿，其在本案中再行向雇主主张赔偿权，没有事实和法律依据。

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