



PRC Labor and Employment Law Newsflash

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## **How to Handle Relationship with Employees Reaching Official Retirement Age**

China is becoming an aging society. Gradual extension of retirement age has been set as a national policy. In this article, our team is going to discuss the practices regarding how to handle employee retirement and how to properly employ retired staff for the reference of employers.

### 1. How to determine the retirement age?

Normally, the official retirement age is 60 for male, 50 for female workers and 55 for female cadres. As for workers of special types, such as those who work underground, at-height, under high temperature, whose work involves heavy manual labor and other conditions which are bad for health, if the workers meet other requirements, the retirement age is 55 for male and 45 for female. Apart from the said two scenarios, China has specific regulations for other special circumstances.

### 2. Can workers of special types refuse early retirement?

The retirement age for workers of special types is statutory and these workers actually enjoy an “early retirement” compared to normal workers. The “early retirement” is both a right and an obligation. When the workers meet the conditions for “early retirement”, the employer shall conduct retirement procedures for them and they cannot refuse to accept.

### 3. Can the employment relationship be extended upon the retirement age?

Article 21 of *the Regulations for the Implementation of the Employment Contract Law* stipulates that when the laborers reach the statutory retirement age, the employment contract expires. Article 44 of *the Employment Contract Law* stipulates that when the laborers start to receive their pension, the employment contract expires. If there is any discrepancy between the regulations, in judicial practice, *the Regulations for the Implementation* shall prevail. However, the solution is also subject to interpretations from local authorities. In Shanghai, for instance, if the employer does not terminate the employment relationship and does not go through relevant retirement procedures after a worker reached the retirement age, the employment relationship is deemed to continue. In the other words, even the laborers reach their retirement age, the employment contract does not expire automatically.

#### 4. How to define the nature of employing retired workers?

According to *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Labor Disputes (III)*, where an employer files an action with the People's Court concerning labor disputes between the employer and his employee who is entitled to endowment insurance benefits or pensions in accordance with the law. The People's Court shall treat this kind of lawsuits as civil disputes.

As for cases which involve employees who have reached retirement age but are not entitled to endowment insurance benefit due to insufficient contribution years for the social insurance, if any disputes arise when the employees find a new job, we are in the opinion that the case shall be handled as a civil dispute case between the employee and the new employer.

#### 5. How to handle work-related injuries of retired employees?

The Supreme Court holds that if the present employer bought work-related injury insurance for the retired employees, *the Regulations of the Work-related Injury Insurance* shall be applicable. If not, what should employers do? In the reply from the Office of Legislative Affairs of the State Council, the employers shall compensate the retired employees who suffer work-related injury with reference to the compensation standard of work-related injury insurance. If any disputes arise regarding work-related injuries, the parties may start civil proceedings.

#### **Case Study: Work-related Injury of Retired Employee**

A laborer is employed by a company on 10 April 2013. The company did not sign a written employment contract with him and did not contribute social insurance for him. On 11 August 2013, the laborer had a traffic accident on the way to work, and the Public Security Authority confirmed that the laborer did not bear the major responsibility for the accident. Subsequence to the accident, the laborer claimed compensation for work-related injury from the company but all his attempts failed. The arbitration commission refused to hear the case. The laborer then started a lawsuit at the court to plead the employment relationship confirmation between the laborer and the company from 10 April 2013 to 11 August 2013. After the trial, the court found that the laborer has received rural pension RMB 500 per month since he reached the age of 55. The court then held that the laborer had reached the official retirement age when he was employed, so he could not be legally qualified as a laborer. The relationship between the laborer and the company was civil instead of an employment relationship.

Our team believes that the court is right, but it does not mean the laborers do not have any channels to safeguard their rights. According to the Reply from the Supreme People's Court for the High People's Court of Shandong Province regarding whether *the Regulations on the Work-related Injury Insurance* during the work hours are applicable to rural workers who has reached official retirement age. If the workers who reached the official retirement age get injured during work hours for work-related reasons, *the Regulations on the Work-related Injury Insurance* shall apply and the identification of the work-related injury shall be conducted. The laborers could ask the administrative authority to conduct work-related injury

identification, and the laborers could start legal proceedings against the employer to claim compensation with reference to the compensation standard of work-related injury insurance

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中国劳动法资讯速递  
二零一四年七月刊

## 用人单位如何处理与退休相关的员工关系

我国正逐步迈入老龄化社会，渐进式延迟退休也已被定为国策。为此，本团队就用人单位如何处理员工退休及如何使用退休人员的实务方面做了一些探讨，供大家参考。

### 一、退休年龄如何确定？

国家法定的企业职工退休年龄，是指国家法律规定的正常退休年龄，即：男年满 60 周岁，女工人年满 50 周岁，女干部年满 55 周岁。而对于从事井下、高空、高温、特别繁重体力劳动或其他有害身体健康工作(以下称特殊工种)并符合其他条件的，退休年龄为男年满 55 周岁、女年满 45 周岁。除这两种情形外，我国对特殊情况还有一些特殊的规定。

### 二、特殊工种员工可否拒绝提前退休？

从事特殊工种的劳动者的退休年龄是一种特殊的国家法定的退休年龄，这些劳动者相对于从事普通工种的劳动者来说可以“提前退休”，“提前退休”既是一种权利，也是一种义务，当这些劳动者符合“提前退休”的条件时，用人单位应当为其办理退休手续，在用人单位为其办理退休手续时，他们不得拒绝。

### 三、达到退休年龄后劳动关系可否延续？

《劳动合同法实施条例》21 条规定，劳动者达到法定退休年龄时，劳动合同终止。《劳动合同法》第四十四条规定，劳动者开始依法享受基本养老保险待遇时，劳动合同终止。可见两者的相关规定有不一致之处，在司法实践中以适用实施条例的规定为原则，但各地也会有自己的特殊理解，比如在上海，对于虽已达到法定退休年龄，但用人单位未与其解除劳动关系仍继续用工，未按规定办理退休手续的，仍按劳动关系处理，即劳动者达到法定退休年龄时，劳动合同并非自动终止。

### 四、已达退休年龄的劳动者被聘用的性质如何认定？

2010 年 9 月 14 日起施行《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）》规定，用人单位与其招用的已经依法享受基本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，应按劳务关系处理。

对于已达退休年龄，且用人单位与其已解除劳动关系，但因劳动者社会保险费缴费年限不够，不能享受养老保险待遇的，劳动者再就业与用工单位发生争议的，我们认为按劳务关系处理比较恰当。

#### 五、退休人员被聘用期间受伤如何处理？

最高人民法院认为，“离退休人员受聘于现工作单位，现工作单位已经为其缴纳了工伤保险费，其在受聘期间因工作受到事故伤害的，应当适用《工伤保险条例》的有关规定处理。”如果现工作单位没有为其缴纳了工伤保险费，该如何处理呢？国务院法制办公室《对〈关于重新进入劳动生产领域的离休人员能否享受工伤保险待遇的请示〉的复函》中明确规定“应由聘用单位参照工伤保险的相关待遇标准妥善处理；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”。

#### 案例分析：退休员工发生工伤

劳动者于 2013 年 4 月 10 日应聘至某公司，入职后某公司不与劳动者签订劳动合同，不给劳动者缴纳社会保险费。2013 年 8 月 11 日劳动者在上班路上发生交通事故，经公安机关认定本次事故劳动者非主要责任。事后劳动者多次向某公司申请为劳动者申报工伤，但某公司不肯，仲裁机构也不受理，于是起诉，请求确认原、被告之间自 2013 年 4 月 10 日至 2013 年 8 月 11 日存在劳动关系。经开庭审理查明，劳动者从年满 55 周岁起开始领取农村养老金，每月 500 多元。法院认为：劳动者入职时已经达到法定退休年龄，不具备法律意义上的劳动者主体资格，原、某公司双方建立的是劳务关系而非劳动关系。

本团队认为：法院处理是正确的，但并不表示劳动者没有维权渠道，首先依据最高人民法院给山东省高级人民法院答复即“你院报送的《关于超过法定退休年龄的进城务工农民工作时间内受伤是否适用〈工伤保险条例〉的请示》收悉。经研究，原则同意你院的倾向性意见。即：用人单位聘用的超过法定退休年龄的务工农民，在工作时间内、因工作原因伤亡的，应当适用《工伤保险条例》的有关规定进行工伤认定。”，劳动者可以要求行政机关对工伤进行认定。其次依据工伤认定，劳动者可以提起民事诉讼，要求用人单位参照工伤保险的相关待遇标准处理。

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