

PRC Labor and Employment Law Newsflash July 2016

Dealing with the Issues Concerning Premium Payment Period Falling Below the Required 15 Years

On retirement, an employee who has contributed to the Basic Pension Insurance Fund for at least 15 years will receive a pension from the government. There are, however, many cases where employees are ineligible to receive their pension payments because it is found that the minimum contributions to the Basic Pension Insurance Fund for the required 15 years are not satisfied. Hence, they are unable to reap the benefits of their Basic Pension Insurance Fund when they retire. Usually, such cases occur when employers fail to meet the mandatory statutory requirement to pay the pension contributions in full or on time. As a result, labor disputes between employees and employers often arise. In the premises, two questions arise. Firstly, how will the courts resolve these disputes? And secondly, what legal rights does an employee have when he or she is faced with such problems on retirement? This article seeks to address these legal issues and to provide solutions for employees to recover their pension payments.

1. How is Pension Entitlement Linked to Statutory Retirement Age and Premium Payment Period

Firstly, premium payment period refers to the cumulative payment period that employers and employees contribute to the basic pension fund, unemployment insurance fund and basic medical insurance fund as required by the State. Premium payment period comprises of actual payment period and deemed payment period. Actual payment period refers to the period that employers contribute to the pension system punctually and sufficiently as required by the State. Deemed payment period refers to the consecutive working years calculated based on the rules set by the State, which is prior to the actual payment period. According to the Circular of the State Council on Deepening the Reform of the Pension System for Staff and Workers of Enterprises, the successive length of service of an employee before the individual contribution policy was implemented may be deemed as premium payment period. The distribution of pension will combine payments accumulated from the deemed payment period and the actual payment period.

Secondly, the Office of the Ministry of Human Resources and Social Security issued a Reply on the Meaning of Statutory Retirement Age of Enterprise Employees and a Circular on Issues Concerning Illegally Stopping and Correcting Early Termination of Enterprise Employees. Pursuant to such reply and notice, statutory retirement age of enterprise employees refers to the age at which an employee can retire under national law. Statutory retirement age can be categorized as follows:

1. 60-years-old for men, 50-years-old for women who work in factories and 55-years-old for women working in the public-sector;
2. 55-years-old for men and 45-years-old for women, who are employed in special type of work, i.e. underground, high altitude, high temperature, arduous or unhealthy operations; and
3. 50-years-old for men and 45-years-old for women who are disabled due to illness or non-work related disabilities certified by a medical practitioner and assessed by the Labor Appraisal Committee to have fully lost the ability to work.

Lastly, pursuant to Article 16 of the Social Insurance Law of the People's Republic of China, an individual participating in basic pension insurance may receive basic pension on a monthly basis if the cumulative premium payment period reaches 15 years at the time the individual reaches the statutory retirement age. Therefore, employees who wish to receive their pension are expected to have reached the statutory retirement age and ensure that their cumulative premium payment period have reached 15 years.

2. How will the court usually deal with such disputes?

Article 1(3) of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Labor Disputes 2001 (hereinafter referred to as Interpretation I) provides that the court shall accept the case where it is a dispute arising between a retired employee and his/her former employer that has not participated in overall social insurance plan, from the recourse of retirement pension, medical expense, occupational injury insurance indemnity or other social insurance premium. Hence, the court shall only accept the case if the following two requirements are fulfilled. First, the employee involved must have reached the statutory retirement age. Second, the employer has not participated in the social insurance system.

According to Article 1 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Labor Disputes 2010 (III) (hereinafter referred to as Interpretation III), the court shall accept a case wherein an employee claims against his/her employer for his/her losses on the grounds that he/she is not entitled to social insurance benefits due to the employer's non-compliance of the formalities of social insurances for him/her and thus the social insurance agency's being unable to make up such formalities. Both Interpretations provide the precondition that employer has not participated in the social insurance system. However, Interpretation III made no mention as to whether the employees have to meet the statutory retirement age if they wish to claim compensation from their employers. Pursuant to Interpretation III, three points are explicit. First, the dispute on the premium payment period under the Basic Pension Insurance Fund does not fall within the scope of labor dispute cases. Second, issues relating to employers' failing to meet the mandatory statutory requirement to pay the pension contributions in full or on time resulting in loss of pension entitlement shall not be accepted as labor dispute cases. Third, issues relating to employers' failure to participate in the social insurance system resulting in loss of pension entitlement shall be accepted as labor dispute cases provided that the employee produces a certificate issued by the social insurance agency proving that the formalities of pension insurance can no longer be made up.

Therefore, if the employer has undergone the formalities of social insurance for the employee but the premium payment period or the pension contribution base is in dispute, the social insurance administration authority shall be the one responsible to handle such claim, which is not a pure social insurance dispute between the employee and the employer and shall not fall in the scope of litigation or be accepted as labor dispute case by the labor dispute arbitration commission or the people's court. Hence, the court or the arbitration commission will generally reject such a dispute.

3. How to resolve the problem of pension contributions in the premium payment period of the Basic Pension Insurance Fund falling below the required 15 years?

As concluded above, neither the labor dispute arbitration commission nor the people's court will accept such a case against an employer on matters relating to pension contributions in the premium payment period. Thus, the following section seeks to provide alternative solutions on how to redeem the pension payments when an employee has reached the retirement age but his

premium payment period has not reached the minimum 15 years.

Solution 1: The employee may continue to pay the premium until the cumulative premium payment period reaches 15 years and subsequently collect the basic pension on a monthly basis

According to Article 2 of the Certain Provisions on the Implementation of the Social Insurance Law of the People's Republic of China, where an individual participating in the basic pension insurance for enterprise employees has made payments for less than 15 years cumulatively when he/she reaches the statutory retirement age, the payment period may be extended until the cumulative premium payment period reaches 15 years. Where the payment period of an individual who participates in the basic pension insurance for enterprise employees prior to the implementation of the Social Insurance Law is still less than 15 years after a 5-year extension, a one-time payment may be made for the unpaid years.

However, the State has yet to provide a unified set of policies and standards to be implemented across regions on how payment contributions to the system should carry on if the payment period is extended. Hence, employers should consult their employees and engage in negotiation in order to reach an agreement on how future payment contributions should take place. Furthermore, the onus should be on the employers to apply for an extension from the social insurance administration authority until the employee's payment period reaches 15 years.

Solution 2: The employee may transfer to the new rural social pension insurance system or the social pension insurance system for urban residents

According to Article 3 of the Certain Provisions on the Implementation of the Social Insurance Law of the People's Republic of China, where an individual participating in the basic pension insurance for enterprise employees has made payments for less than 15 years cumulatively (including the payment period extension aforementioned) after he/she reaches the statutory retirement age, he/she may apply for transferring his/her insurance to the new rural social pension insurance system or urban resident social pension insurance system at the place where his/her residence is registered to enjoy the corresponding pension insurance benefits.

However, the State has yet to establish clear guidelines and regulations on how such a transfer of pension insurance should be executed as different regions have different methods of effectuating such transfers. Therefore, employers should advise employees and provide information on the potential risks arising from a transfer of insurance aforementioned. This will allow employees to make informed decision on whether to transfer their insurance to the rural or social pension insurance system.

Solution 3: The employee can apply to release all the savings in their personal account in a lump sum payment

According to Article 3 of the Certain Provisions on the Implementation of the Social Insurance Law of the People's Republic of China, where an individual participating in the basic pension insurance for enterprise employees has made payments for less than 15 years cumulatively (including the payment extension aforementioned) after he/she reaches the statutory retirement age, and has not transferred his/her insurance to the new rural social pension insurance system or urban resident social pension insurance system to enjoy the corresponding pension insurance benefits, he/she may file a written application for terminating the basic pension insurance relationship for enterprise employees. Upon receipt of the application from an individual, a social insurance agency shall inform the individual in writing of the right to transfer his/her insurance to the new rural social pension insurance system or urban resident

social pension insurance system and the consequences of terminating the basic pension insurance relationship for enterprise employees, and shall, upon written confirmation by the individual, terminate his/her basic pension insurance relationship for enterprise employees and pay him/her all the savings in the personal account in a lump sum.

Hence, an employee who wishes to terminate the basic pension insurance relationship may send a written application to the social insurance agency. Upon receiving the application from the employee, the social insurance agency has to inform the employee of the consequences of termination. Once the employee has given a written confirmation, the social insurance agency shall proceed to terminate the basic pension insurance relationship and accordingly release all the savings in employee's personal account to the employee in one lump sum payment.

Case Study:

In January 1993, Lee started to work in Company A as a janitor. In July 2007, he entered into an employment contract with the company and the company started making payment contributions to his social insurance. In June 2008, Lee terminated the contract and left the company.

In July 2011, Lee submitted an application to the local Labor Arbitration Commission, claiming:

1. That Lee was in a employment relationship with Company A during the period between 1993 to July 2007; and
2. That Company A should compensate Lee for the reliance loss for failing to make sufficient contributions to Lee's social insurance.

However, the Labor Arbitration Commission rejected his application with the reason that it was over the limitation of action. Lee then sued Company A in the People's Court, claiming:

1. That Lee's premium payment period and pension contribution base should be in accordance with the provisions of the State Council for urban residents and Company A should pay in arrears the pension contributions from January 1993 to June 2007; and
2. That Company A should compensate Lee as required by the State for the reliance loss because he had reached the statutory retirement age but is unable to receive his pension due to Company A's failure to make sufficient contributions to Lee's premium payment period.

The court rejected Lee's appeal on the basis that the social insurance administration authorities are responsible for administering of social insurance throughout the country. In response to Lee's second submission, the court decided that it is not within the court's scope of adjudication on labor disputes. Instead, the court held that social insurance administration authorities should be the ones to deal with these disputes. Hence, Lee's claims for compensation failed to fall within scope of labor disputes.

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中国劳动法资讯速递 二零一六年七月刊

如何处理养老保险缴费未满足 15 年问题

现实中因某些用人单位未依法为员工参保，存在断缴、欠缴社会保险费等情形，导致员工在办理退休手续过程中才发现其基本养老保险缴费年限未满足 15 年，退休后无法享受养老保险待遇。此时，员工便会以基本养老保险费的缴费年限、缴纳数额不足为由与用人单位发生纠纷。那么，当发生这类情况时，法院通常如何处理？员工因此无法办理退休手续，无法享受养老保险待遇又该如何解决？

一、享受养老保险待遇与退休年龄、社保缴费期限的关系

首先，缴费年限是指用人单位和职工按照规定缴纳养老、医疗、失业等有关社会保险费的累计年限，广义上，包括实际缴费年限和视同缴费年限。实际缴费年限是职工参加基本养老保险后，按规定按时足额缴纳基本养老保险费的年限。视同缴费年限是职工全部工作年限中，其实际缴费年限之前的按国家规定计算的连续工作时间。根据国务院《关于深化企业职工养老保险制度改革的通知》的规定，实行个人缴费制度前，职工的连续工龄可视同缴费年限。视同缴费年限可以与实际缴费年限合并计算发放基本养老金。

其次，《劳动和社会保障部办公厅关于企业职工“法定退休年龄”涵义的复函》及《关于制止和纠正违反国家规定办理企业职工提前退休有关问题的通知》明确规定，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。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）的，退休年龄为男年满 55 周岁、女年满 45 周岁；因病或非因工致残，由医院证明并经劳动鉴定委员会确认完全丧失劳动能力的，退休年龄为男年满 50 周岁、女年满 45 周岁。

最后，根据《中华人民共和国社会保险法》第十六条第一款规定：“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十五年的，按月领取基本养老金。”因此，企业职工要享受养老保险待遇既需要达到规定的退休年龄，也需要满足社会保险缴纳期限的最低要求。

二、此类纠纷法院通常如何处理？

2001 年《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》（以下简称司法解释一）第一条第（三）项规定，劳动者退休后，与尚未参加社会保险统筹的原用人单位因追索养老金、医疗费、工伤保险待遇和其他社会保险费而发生的纠纷，作为劳动争议处理。根据以上规定，人民法院受理养老保险待遇损失有两个方面的限制：第一，劳动者必须达到退休年龄；第二，用人单位没有参加社会保险统筹。

2010 年《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）》（以下简称司法解释三）第一条规定，劳动者以用人单位未为其办理社

会保险手续，且社会保险经办机构不能补办导致其无法享受社会保险待遇为由，要求用人单位赔偿损失而发生争议的，人民法院应予受理。这条规定与司法解释一的规定一致之处在于用人单位完全未参加社会保险，不同之处在于没有限定劳动者在退休之后才能主张权利。根据司法解释三的规定，可以明确：一，养老保险缴费年限争议不属于劳动争议受案范围；二，未足额、及时缴纳养老保险导致的待遇损失不属于劳动争议受案范围；三，未办理养老保险导致的待遇损失属于劳动争议受案范围，但前提是劳动者必须提交社会保险经办机构出具的不能补办证据证明养老保险已经不能补办。

因此，对于已经由用人单位办理了社保手续，但因用人单位欠缴、拒缴社会保险费或者因缴费年限、缴费基数等发生的争议，目前仍然属于行政管理的范畴，不是单一的劳动者与用人单位之间的社保争议，应由社保管理部门解决处理，不纳入人民法院受案范围，也不属于仲裁委员会或人民法院劳动争议受理范围，仲裁委员会或人民法院一般对此类争议不予受理。

三、如何解决缴费未满 15 年的养老保险待遇问题？

虽然仲裁委员会或人民法院不受理上述类型案件，但依照国家法律和政策的规定，当职工年龄已经达到退休年龄，其社会保险实际缴费年限与视同缴费年限之和仍不满 15 年的，并非绝对不能享受养老保险待遇，企业与职工在面对这类问题时，仍然有路可走。

方案一：缴费至满 15 年，按月领取基本养老金

根据《实施〈中华人民共和国社会保险法〉若干规定》第二条规定：“参加职工基本养老保险的个人达到法定退休年龄时，累计缴费不足十五年的，可以延长缴费至满十五年。社会保险法实施前参保、延长缴费五年后仍不足十五年的，可以一次性缴费至满十五年。”

由于各地区存在不同差异，国家并未统一规定继续缴费的方式。此时，企业应当与职工充分协商，在与职工就缴费方式达成一致的基础上，为职工向社保部门申请办理延期缴费，直至缴费期限满足社会保险缴纳期限最低标准后，方可办理退休手续。

方案二：转入新型农村社会养老保险或者城镇居民社会养老保险

根据《实施〈中华人民共和国社会保险法〉若干规定》第三条第一款规定：“参加职工基本养老保险的个人达到法定退休年龄后，累计缴费不足十五年（含依照第二条规定延长缴费）的，可以申请转入户籍所在地新型农村社会养老保险或者城镇居民社会养老保险，享受相应的养老保险待遇。”

但国家至今并未对基本养老保险转换新型农村社会养老保险或者城镇居民社会养老保险的规则进行详细规定，具体执行在各地也存在差异，因此在职工作出选择时，企业应当给予职工相应的提示，积极防范因转移保险给企业带来的风险。

方案三：一次性领取个人账户储存额

根据《实施〈中华人民共和国社会保险法〉若干规定》第三条第二款规定：“参加职工基本养老保险的个人达到法定退休年龄后，累计缴费不足十五年（含依照

第二条规定延长缴费)，且未转入新型农村社会养老保险或者城镇居民社会养老保险的，个人可以书面申请终止职工基本养老保险关系。社会保险经办机构收到申请后，应当书面告知其转入新型农村社会养老保险或者城镇居民社会养老保险的权利以及终止职工基本养老保险关系的后果，经本人书面确认后，终止其职工基本养老保险关系，并将个人账户储存额一次性支付给本人。”

职工若选择终止基本养老保险关系，必须本人向社会保险经办机构提出书面申请。社会保险经办机构收到职工书面申请后，必须书面告知相应后果，并经职工本人书面确认，方可终止职工基本养老保险关系，而后一次性支付个人账户储存额给职工本人。

案例分析：

1993年1月李某进入A公司工作，从事保洁等杂务工作。2007年7月，双方签订劳动合同且A公司开始为其缴纳社会保险。2008年6月，A公司与李某就解除劳动合同关系达成一致，并办理了离职手续。

2011年7月，李某向当地劳动仲裁委员会提出仲裁申请，要求：1、确认与A公司在1993年至2007年7月存在劳动关系；2、要求A公司赔偿1993年至2007年期间未依法缴纳社会保险的损失。劳动仲裁委以超过时效为由不予受理。而后李某又向法院提出诉讼，要求：1、按城镇职工性质确认李某社会保险缴费基数和缴费年限，A公司依法补缴1993年1月到2007年6月社会保险费；2、确认李某到达退休年龄无法办理退休手续，A公司依法赔偿李某退休金损失。

法院经过审理后认为：李某要求按城镇职工性质确认社会保险缴费基数和缴费年限、并依法补缴1993年1月到2007年6月社会保险费，属社保征缴机构的职能，不属于人民法院受理劳动争议案件的范围，对此请求不予理涉。劳动者是否退休并领取养老金由社保部门审核，属社保部门的行政职能，李某要求确认达到退休年龄无法办理退休手续，不属于人民法院受理劳动争议案件的范围，对此请求该院不予理涉。李某亦无证据证明存在达到退休年龄不能补缴社会保险费的情形，其赔偿请求不符合人民法院受理劳动争议案件的条件。

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