

PRC Labor and Employment Law Newsflash
February 2016

A Brief Study on Cancellation of Late-Marriage and Late-Childbirth Leaves

On 27th December 2015 an amendment to the PRC Population and Family Planning Law (the “Amendment”) was adopted by the Standing Committee of the National People’s Congress under which, in addition to a fundamental state policy of “The State shall encourage a couple to give birth to two children” being established as a major change, the original provision “Citizens who marry late and delay childbearing may be entitled to rewards of longer marriage and maternity leaves or other welfare benefits” is revised to read as “Couples who give childbirth pursuant to laws and regulations may be entitled to rewards of longer maternity leave or other welfare benefits”, arousing wide concern and debate. Given that, this newsflash sums up what effect the major policy changes have on employers’ personnel policies and the relevant hot issues in employment management as below:

I. Neither late-marriage nor late-childbirth is encouraged any longer

Late-marriage and late-childbirth leaves came out as the State advocated and encouraged late marriage and late childbirth under the background of the “only child” policy. At that time, late childbirth was encouraged for population control purpose, and late marriage followed. Now that “A couple giving birth to two children” has been established as a new fundamental state policy, the guiding role of the late-marriage and late-childbirth policy obviously does not match the new normalcy of current encouragement of proper childbirth giving. The revisions under the Amendment aim to encouraging childbirth giving in compliance with the family planning policy, so late childbirth is no longer worth being encouraged, neither is late marriage, and it became inevitable to cancel late-marriage and late-childbirth leaves.

II. Late-marriage leave has been cancelled

In the Amendment, the provision on rewards for late-marriage and late-childbirth is deleted and replaced by “couples who give childbirth according to law may be entitled to longer maternity leave or other welfare benefits”, thus the late-marriage leave has been cancelled indeed. I don't exclude the possibility that an enterprise might offer late-marriage leave as an employee benefit under its internal rules and policies or some local governments specify that late-marriage leave is still entitled to before the amendment of local rules, but as local governments have amended (such as Guangdong, Tianjin and Jiangxi) or proposed to amend (such as Beijing, Shanghai and Shandong) relevant local policies by 31st January 2016, the late-marriage leave has really been cancelled locally. Generally there is only three-day statutory marriage leave. The original 7-30 day late-marriage leave has been or is to be cancelled.

III. Cancellation of late-childbirth leave does not mean shortening of maternity leave

Though the late-childbirth leave is cancelled, “may be entitled to rewards of longer maternity leave” is specified in the Amendment. Therefore, in spite of such cancellation, couples applying longer maternity leave are expanded from those who “as only-child, are at the age of late-childbirth” to those “who give childbirth pursuant to laws and regulations”. Following the Amendment, all local policies show such trend. For example, 15-day late-childbirth leave (under Article 35 of the original Guangdong Population and Family Planning Regulation) and 35-day only-child leave (under Article 37 of the original Regulation) are cancelled, while it is specified in the revised Regulation that all those who give childbirth pursuant to laws and regulations, whether the first or the second child, and those who give birth to additional child(ren) pursuant to laws and regulations, may be entitled to reward of additional 30-day maternity leave (see Article 31 of the revised Regulation). In the revised Tianjin Population and Family Planning Regulation effective on 14th January 2016, it is specified that those who give childbirth pursuant to laws and regulations may be entitled to reward of additional 30-day maternity leave. Additional (as long as) 60-day maternity leave is specified in the Amendment to Yunnan Population and Family Planning Regulation (Draft), entitled to by those who give childbirth pursuant to laws and regulations.

IV. Not a few other welfare benefits

In addition to longer maternity leave, “other welfare benefits” may be enjoyed in accordance with the Amendment. As it is specified in the Amendment those who are rewarded for family planning should be “couples” giving childbirth according to law, and those who “may be entitled to rewards of longer maternity leave or other welfare benefits” should also be couples, following the Amendment, longer paternity leave of male employees is also specified in local regulations. For example, in the revised Guangdong Population and Family Planning Regulation, paternity leave is extended from 10 days to 15 days; and in the revised regulation of Yunnan, paternity leave is extended from 15 days to 30 days.

V. How employers deal with the policy change following the Amendment

First, effective date of the Amendment.

As the Amendment came into effect as of 1st January 2016, who made marriage registration or gave childbirth before such date shall still be entitled to late-marriage or late-childbirth leave. Please be noted that whether an employee is entitled to late-marriage or late-childbirth leave has nothing to do with the time of taking leave. This is to say, an employee might be entitled to late-marriage or late-childbirth leave according to the old version of Population and Family Planning Law on and after 1st January 2016, if only he/she married or gave childbirth before such date.

Secondly, coping with the transition.

Since the Amendment, new regulations have been promulgated locally to cancel late-marriage and late-childbirth rewards, while it will take some time to define new family planning rewards. During such period, employers may take the following options to cope with relevant leaves: 1. If no new local regulation is issued while it is specified that the original local regulation shall apply for the time being, employers should arrange employee leaves pursuant to the original local regulation; 2. If no new local regulation is issued and it is not specified that the original local regulation shall

apply, employers may be flexible in arrangement of employee leaves according to its internal management demands and by reference to the original local regulation. For example, first arranging leave given that late-marriage and late-childbirth leaves are (not) included, and then settling whether to make up the deference as the case may be after the local policy comes into force; and 3. Employers may also adjust the arrangement of late-childbirth leave based on the outcome of application for maternity allowance. If the social security authority still approves maternity allowance according to the standard of late-maternity leave, employers may also arrange relevant leave; otherwise they may not arrange late-childbirth leave at the first.

Lastly, employers should adjust their internal rules and policies timely in line with new regulations. After the Amendment took effect, employers are required to examine and organize the provisions in their internal rules and policies on family planning: for example, there are no provisions on possible adjustment following the changes of national and local laws and regulations, but only provisions on late-marriage and late-childbirth leaves and conditions for entitlement. Employers should make appropriate adjustment and revision according to actual personnel management state and on the basis of national and local policies.

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中国劳动法资讯速递 二零一六年二月刊

简析晚婚假晚育假被取消

2015年12月27日全国人大常委会通过了《人口与计划生育法》修正案(以下简称“《修正案》”),修正案除明确“国家提倡一对夫妻生育两个子女”这一基本国策的重大变化之外,将原规定“公民晚婚晚育,可以获得延长婚假、生育假的奖励或者其他福利待遇”修改为“符合法律、法规规定生育子女的夫妻,可以获得延长生育假的奖励或者其他福利待遇”这一变化,也引起了广泛关注与议论。有鉴于此,本期资讯谨就相关重大政策变化对用人单位人事政策的影响以及用工管理中相关热点问题归纳要点如下,以飨读者。

一、 晚婚晚育不被提倡了

晚婚晚育假是“独生子女”政策背景下,国家倡导和鼓励晚婚晚育的产物。当时,鼓励晚育是控制人口数量的需要,鼓励晚婚则是一脉相承于对晚育的鼓励。而在国家已确定“一对夫妻生育两个子女”这一新的基本国策的新形势下,晚婚晚育政策的引导作用显然与当前鼓励适当生育的新常态不相匹配。《修正案》的调整方案在于鼓励符合计划生育政策的生育,在此背景下,晚育不再值得鼓励,晚婚也不再值得提倡,取消晚婚晚育假也就成为应有之义。

二、 晚婚假是真的取消了

《修正案》删除了关于晚婚晚育奖励规定,改为合法生育的夫妻可获延长生育假或其他福利,因而《修正案》确实取消了晚婚假。虽然不排除企业通过规章制度将晚婚假作为员工福利待遇或部分地方明确在地方规定调整前仍可继续享受晚婚假情形,但截止2016年1月31日,从各地修改当地相关政策(如广东、天津与江西)或拟修订政策(如北京、上海与山东)来看,晚婚假确实都被删除了。基本都只是保留了三天的法定婚假。原来7天~30天的晚婚假纷纷已经或即将被取消。

三、 取消晚育假并不意味着产假变少了

虽然晚育假被取消,但《修正案》明确了“可以获得延长生育假”。故此,虽然晚育假被取消,但产假期限延长、延长假期的适用范围也从原来的“符合晚育年龄的独生子女”扩展到了“符合法律、法规规定生育子女”。《修正案》之后,各地的落地政策也纷纷体现了这一趋势。如修改后的《广东省人口与计划生育条例》虽然取消了原有的晚育假十五天(原条例35条)以及独生子女假三十五天(原条例37条),但同时也规定了只要符合法律法规规定生育的,不论是生育一孩、还是二孩,以及符合法律法规规定再生育的,都可以享受增加30天产假的奖励(新条例第31条)。此外,天津市在其2016年1月14日新修订的《天津市人口

与计划生育条例》也规定了，符合法律法规规定生育的，都可以享受增加 30 天产假的奖励。多的如云南，在其《〈云南省人口与计划生育条例〉修正案（草案）》更是规定了符合法律法规规定生育的，女方均可延长生育假 60 天。

四、 其他福利待遇也不少

《修正案》除了规定可以延长生育假之外，还规定了可以获得“其他福利待遇”。考虑到《修正案》将计划生育的奖励对象明确为合法生育的“夫妻”，“延长生育假的奖励或者其他福利待遇”针对的主体也是夫妻，故此《修正案》环境下，各地新规也纷纷将男性护理假或陪产假做了延长。如新的《广东省人口与计划生育条例》就将男方的陪产假从 10 天增加到 15 天。云南省的新规则将男方护理假从 15 天增加到了 30 天。

五、 用人单位如何应对《修正案》后的政策更迭

首先，《修正案》新规生效时间问题。

鉴于《修正案》2016 年 1 月 1 日起生效，故在《修正案》生效前登记结婚、生育的仍应享受晚婚假和晚育假。此处提请注意，是否享受晚婚晚育假与员工休假时间并无关系，也就是说，只要结婚、生育的事实发生在 2016 年 1 月 1 日前，就可以在 2016 年 1 月 1 日以后按照原规定享受晚婚晚育假。

其次，关于过渡期内的应对。

《修正案》出台后，地方出台新规定取消现有晚婚晚育奖励，明确新的计划生育假奖励需要一定时间。对此段时间内用人单位相关假期可以考虑以下几种应对方案：1. 地方新规未出台，但明确暂时适用现有规定的，企业应按照地方现有规定安排员工休假。2. 地方新规未出台，也未明确适用旧规的，企业可根据企业内部管理需要，参照地方现有规定，灵活安排员工休假。如，先按照包含（不包含）晚婚晚育假的标准休假，待地方政策落地后，根据情况安排是否补休奖励假期的相关差额。3. 对晚育假的安排，企业也可根据生育津贴申领结果进行调整。如社保部门仍按照晚育假的标准核准生育津贴，则企业可继续安排相关假期，反之则可先不予安排晚育假。

最后，企业内部规章制度应随新规及时予以调整。《修正案》生效后，企业有必要对内部规章制度中计划生育相关条款进行审查梳理，如，是否仅规定了晚婚晚育假及享受条件，而未规定可根据国家及地方法律法规变化自行调整。对于此类条款，企业应根据人事管理实际情况并结合国家及地方政策进行调整修订。

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