



## PRC Labor and Employment Law Newsflash

April 2015

### Labor and Personnel Disputes on the “Selective Second Child” Policy

The issue “selective second child” has been hotly debated all along since China announced its decision nearly a year ago to loosen its family planning policy and implement the “selective second child” policy, successively followed by local governments’ relevant regulations and rules<sup>1</sup>, while employers and employees are very concerned about how to cope with the policy and how to guarantee compensation and benefits. We wrote this newsletter to answer the hot issues and explain relevant laws and regulations.

#### A. What is China’s Selective Second Child Policy?

According to the policy, a couple can now have a second child on the conditions that:

1. either of the parents is an only child; and
2. only a child has been given birth to.

The new policy does not apply in case the firstborn are twins or multiple births. Therefore “selective second fetus” is not an appropriate wording, and we should put it as “selective second child” instead.

Restrictions on childbearing age and birth interval have been also specified in some provinces and municipalities. For example, a couple in Beijing can only have a second child four years after having their first or the mother should be older than 28 years when she gives birth to the second child. No restrictions have been made in Shanghai. The rules vary from province to province regarding the policy.

With the enforcement of the new policy, another dispute is also settled: whether a “selective second child” breaks the rule or not depends on whether the time of birth instead of the time of pregnancy is later than the commencement date of the new policy.

#### B. What benefits will be enjoyed if having a “selective second child”?

If a female employee gives birth to a second child in compliance with the family planning policy, she should be under the special labor protection for female employees specified by *the Labor Law, the Employment Contract Law, the Law on Protection of Women’s Rights and Interests, the*

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<sup>1</sup> It is specified in *the Resolution of the Standing Committee of the National People’s Congress on Adjusting and Improving the Family Planning Policy (December 28, 2013)* that “we approve the launching and implementation of the policy of allowing couples to have two children if either parent is an only child. The people’s congresses of all provinces, autonomous regions and municipalities directly under the Central Government or the standing committees thereof shall, in accordance with the *Law on Population and Family Planning* and this Resolution and in light of their local conditions, amend relevant local regulations or make new provisions in a timely manner.

*Special Provisions on Labor Protection of Female Employees* and other applicable laws and regulations. That is to say, she may be entitled to most of the benefits when having the first baby, specifically:

1. Special protection during the maternity leave, pregnancy and lactation period: an employer should give special protection to female employees during the above period according to law. Termination of employment contract and employment expiration shall be subject to the restrictions in *the Employment Contract Law*, and legal protection should be given in terms of their remuneration and work assignment: for example, break may be taken on working days before giving birth; employees shall not extend the working hours or arrange night shifts of female employees who are pregnant for seven (7) months or more and who breast-feed babies less than one year old; breastfeeding leave shall be deemed as normal attendance in case of salary adjustment.
2. Maternity leave: a female employee who gives birth after 28 April 2012 shall have 98 days of maternity leave, of which 15 days may be taken before giving birth. In case of a dystocia, additional 15 days of leave shall be taken. In case of a multiple birth, additional 15 days for each additional baby shall be taken.
3. Antenatal leave and breastfeeding leave: a female employee in her pregnancy of the seventh month or later (more than 28 weeks) may take antenatal leave, with approval of the employer, if her work is arranged properly. A female employee may take breastfeeding leave during the period from the date of giving birth to the date when the baby is one year old, with approval of the employer, if she is in any difficulty and her work is arranged properly. The breastfeeding leave last for 6 months and a half. Her salary during such period shall not be lower than 80% of her original salary. More protection measures are set forth in Shanghai's local regulations<sup>2</sup>.
4. Prenatal physical examination: if a pregnant female employee undergoes prenatal physical examination during working hours, the time spent for such examination shall be included in her working hours, and her salary of such time shall be paid.
5. Breastfeeding time: female employees who do not take breastfeeding leave to breastfeed babies less than one year old shall be given one hour of breast-feeding at work.

### **C. What benefits will not be enjoyed if having “selective second child”?**

However, a female employee giving birth to a second child according to the current family planning policy is not entitled to late childbirth leave and such other awards that are given to parents of only child, mainly including:

1. A female employee will not be given late childbirth leave or maternity subsidy for late childbirth, nor will her spouse enjoy late childbirth nursing leave. Some local regulations (such as Shanghai, Beijing, Tianjin and Chengdu) specify that a married female employee giving birth to her first child at the age of 24 or above may have an additional 30-day leave for the late childbirth.

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<sup>2</sup> Article 23 of *the Measures of Shanghai Municipality for Implementation of the Law on Protection of Women's Rights and Interests* dated 26 April 2007: “A female employee who is pregnant at elder age or who is certified by the medical and health institution at grade 2 or above that she has recurrent miscarriages, major pregnancy syndrome, pregnancy complication or other conditions that may affect normal fertility may apply for antenatal leave and the employer shall approve it. An female employee who is certified by the medical and health institution at grade 2 or above that she has any postpartum disease seriously affecting the health of mother and infant may apply for breastfeeding leave and the employer shall approve it.”

2. Neither a female employee nor her spouse may have the only-child parent allowance and a lump-sum award at retirement or any other benefits given to such parents that have been issued the Honor Certificate for Only-Child Parents.

#### **D. Can employers require female job candidates to promise not giving birth to a second child?**

It is specified in the laws of China that an employer shall neither refuse to hire a woman nor increase its threshold in hiring women with the excuse of gender in recruitment, other than the jobs or positions unfit to women as specified by the State's laws and regulations, and shall not make any provision restricting its female employees from getting married or pregnant in the employment contract<sup>3</sup>. In real life, many enterprises are not willing to recruit female employees, especially female employees giving birth to a second child, for avoiding extra expenses, which comes down to a sort of employment discrimination and is not allowed by laws.

#### **E. Can employers terminate the employment contract with female employees giving birth to a second child in violation of the policy?**

Article 4 of *the Provisions on Labor Protection of Female Employees* implemented before 28 April 2012 provides that "neither the base wage shall be lowered nor the employment contract dissolved of a female employee during her pregnancy, confinement or lactation", while Article 15 prescribes that "where a female employee violates the State's family planning policy, her labor protection shall be subject to the family planning policy and these Provisions shall not apply". In practice, some employers terminate, directly according to such Provisions, the employment contracts of the employee unmarried and giving birth to a baby or the employee giving birth to a second child in violation of the policy, or include such actions as serious discipline violation in their internal rules and regulations and then employment relationship will be terminated on this basis. It was supported by some authorities in some provinces at that time, and even more, it was directly stipulated in some local regulations that employment contract may be terminated directly if a female employee breaches the family planning policy.

An outstanding change appears in *the Special Provisions on Labor Protection of Female Employees* that came into effect as of 28 April 2012, i.e., Article 15 of *the Provisions on Labor Protection of Female Employees* is deleted, and it is specified in Article 5 of the Special Provisions that "An employer shall not lower the salary of the female employee, dismiss, or terminate the employment or engagement contract with any female employee because she is pregnant or gives birth to or breastfeeds a baby."

In addition, the Supreme People's Court issued a typical case this year to confirm it an illegal termination that the employer set forth noncompliant second-child birth-giving as serious discipline violation in its internal rules and regulations and then terminated the employment contract with the involved employee on the ground of serious discipline violation. The employer may criticize or educate the female employees breaching the family planning policy who are taking maternity leave, withhold payment of salary or pay sick-leave salary, etc.

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<sup>3</sup> Article 27 of *the Employment Promotion Law*: "An employer shall neither refuse to hire a woman nor increase its threshold in hiring women with the excuse of gender in recruitment, other than the jobs or positions unfit to women as specified by the State's laws and regulations. An employer, when recruiting female employees, shall not make any provision restricting them from getting married or pregnant in the employment contract."

## **Case Study: Guiding Case of the Supreme People's Court: Illegal Dismissal of Female Employee Giving Birth to a Second Child**

Ms. Tan joined a media company in October 2007 and her employment contract will expire in 2016. In 2012 Ms. Tan gave birth to a second child without obtaining a Birth Permit and had not gone to work since then. In February 2013, the media company discharged the employment relation with Ms. Tan with the reason of absenteeism. The media company claimed that Ms. Tan did not inform the company that she would give birth to a second child until she asked for maternity leave in December 2012 and did not present the Service Certificate for Child-Bearing so it did not approve her leave application; Ms. Tan left her post without permission, so the company had legal ground to terminate the employment contract and did not need to pay compensation. Ms. Tan argued that no absenteeism was made because she took the maternity leave with the oral consent of her supervisor.

The first instance court ruled that the media company would have to pay compensation for illegal termination of employment contract to Ms. Tan. The media company lodged an appeal. The court for second instance held that Ms. Tan applied to the media company for maternity leave before she gave birth while the media company did not approve it for the reason that Ms. Tan had not presented the Service Certificate for Child-Bearing and decided the termination of employment contract on ground of absenteeism, however it is not specified in the labor rules and regulations of the media company or the employment contract with Ms. Tan that the employment relationship may be discharged in the abovementioned circumstance. Therefore, the court dismissed the appeal and sustained the original judgment.

We hold opinion that the employer shall stipulate detailed employee leave application process and conditions and shall keep relevant employee leave proofs well with a sound management system. The employer should properly keep relevant evidence on and legally deal with in a positive manner any non-compliance of employee, and must handle with great care in case of termination of employment contract or any other major labor issues without haste.

*If you have any inquiries regarding the PRC employment law matters, please contact us at [hrlaw@dachenglaw.com](mailto:hrlaw@dachenglaw.com).*

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## 中国劳动法资讯速递

二零一五年四月刊

### “单独二胎”相关人事政策之问答

国家层面放开“单独二胎”政策，并授权各地方政府制定本地区相关法规及规定<sup>1</sup>后，近一年来，“单独二胎”一直是社会热议问题，而用人单位及职工更是对相关人事福利待遇如何保障以及如何应对非常关注。本所特撰写本期速递，就热议问题进行解答并解析相关法律法规规定，以飨读者。

#### 一、“单独二胎”如何界定？

按照现有政策，一方是独生子女的夫妇可生育两个孩子的政策。该政策的前提是：

- 1、夫妇双方有一方是独生子女；
- 2、原来只生育一个子女。

如果单独家庭第一胎生的是双胞胎或多胞胎，一般就不能适用新政策再次生育。故此，社会上“单独二胎”的说法是不准确的，“单独二胎”才是准确说法。

另外，部分省市对生育年龄和间隔做出了限制。如北京目前安排的生育间隔为四年或超过 28 岁，而上海则是不设限。各地政策不尽相同。

另一争议问题也随新政落地而得到解决：“单独二胎”是否违规应按照出生时间是否在新政生效之日后确定，而非按照怀孕时间来判断。

#### 二、“单独二胎”生育能享受哪些待遇？

生育“单独二胎”的女职工符合计划生育规定，可享受《劳动法》、《劳动合同法》、《妇女权益保障法》、《女职工劳动保护特别规定》等法律法规对女职工的特别劳动保护。即符合“单独二胎”政策的女职工可以享受头胎大部分的福利待遇。主要包括：

1. 产假、孕期及哺乳期特殊保护：在此期间用人单位按规定对女职工实行特殊保护，如解除、终止劳动合同都应符合《劳动合同法》的限制性条款，劳动报酬及工作安排等都受相关法规保护，如产前工间休息、怀孕 7 个月以上的女职工以及哺乳未满 1 周岁婴儿的女职工用人单位不得延长劳动时间或者安排夜班劳动，以及调整工资时，哺乳假视作正常出勤等。
2. 产假：2012 年 4 月 28 日以后生育的女职工享受 98 天产假，其中产前可以休假 15 天，难产的增加产假 15 天，生育多胞胎的，每多生育 1 个婴儿，增加产假 15 天。
3. 产前假及哺乳假：女职工妊娠七个月以上（按二十八周计算），工作许可，本人

<sup>1</sup> 《全国人民代表大会常务委员会关于调整完善生育政策的决议》（2013 年 12 月 28 日）指出：“同意启动实施一方是独生子女的夫妇可生育两个孩子的政策。各省、自治区、直辖市人民代表大会或者其常务委员会应当根据人口与计划生育法和本决议，结合本地实际情况，及时修改相关地方性法规或者作出规定。”

申请，单位批准，可休产前假。女性生产后至婴儿满周岁期间，哺乳假女职工生育后，若有困难且工作许可，由本人提出申请，经单位批准，可休哺乳假。哺乳假为期 6 个半月。上述期间，女职工工资不得低于其原工资性收入的 80%。上海的地方规定对女职工的保护则更为全面<sup>2</sup>。

4. 产前检查：怀孕女职工在劳动时间内进行产前检查，所需时间计入劳动时间，单位应当支付其工资。
5. 哺乳时间：不休哺乳假的哺乳未满 1 周岁婴儿的女职工，每天安排 1 小时哺乳时间。

### 三、 哪些待遇“单独二胎”生育时不能享受？

按照现行政策，符合计划生育规定、生育“单独二胎”的职工，仍然无法享受晚育假等对独生子女父母的奖励。主要包括：

1. 女职工不能享受晚育假及晚育期间的生育津贴。同样，女职工的配偶同样也不能享受晚育护理假。如上海、北京、天津、成都都是规定已婚妇女年满 24 周岁初育的为晚育，可以享受晚育假期 30 天。
2. 女职工和配偶不能享受独生子女津贴及退休时的一次性奖励，也不能享受给予持《独生子女父母光荣证》人员的其他福利待遇。

### 四、 用人单位可以要求求职者承诺不生二胎吗？

我国法律有明确规定，在录用职工时，除国家规定的不适合妇女的工种或者岗位外，不得以性别为由拒绝录用妇女或者提高对妇女的录用标准，更不得在劳动合同中规定限制女职工结婚、生育的内容<sup>3</sup>。在现实生活中，许多企业为了避免因女职工生育可能发生额外的费用，不愿意录取女职工，尤其是生育两孩的妇女，其实质上是一种就业歧视，不为法律所允许。

### 五、 女职工违规生育二胎用人单位能否解除劳动合同？

2012 年 4 月 28 日之前实施的《女职工劳动保护规定》第四条规定：“不得在女职工怀孕期、产期、哺乳期降低其基本工资，或者解除劳动合同。”但是第十五条规定：“女职工违反国家有关计划生育规定的，其劳动保护应当按照国家有关计划生育规定办理，不适用本规定。”实践中有的用人单位直接依据该法规解除未婚生育、违规生二胎职工的劳动合同，或者在单位规章制度中将此列为严重违纪行为，按严重违纪解除劳动合同，这种情况当时在一些地方还是得到有关部门支持的。而有些地方性法规也是直接规定违规生育的女职工可以直接予以解除劳动合同。

但是 2012 年 4 月 28 日起实施的《女职工劳动保护特别规定》有了一个很显著的变化，就是删除了《女职工劳动保护规定》第十五条规定，而且在第五条明确规定：“用人单位不得因女职工怀孕、生育、哺乳降低其工资、予以辞退、与其解除劳动合同或者聘用合同。”

另外，今年最高院亦以发布典型案例的方式，明确了用人单位在规章制度中将违规二

<sup>2</sup> 《上海市实施〈中华人民共和国妇女权益保障法〉办法》第 23 条：“用人单位对高龄产妇或者经二级以上医疗保健机构证明有习惯性流产史、严重的妊娠综合症、妊娠合并症等可能影响正常生育，本人提出申请的，应当批准其产前假。用人单位对经二级以上医疗保健机构证明患有产后严重影响女性和儿童身体健康疾病，本人提出申请的，应当批准其哺乳假。”

<sup>3</sup> 《中华人民共和国就业促进法》第 27 条：“用人单位招用人员，除国家规定的不适合妇女的工种或者岗位外，不得以性别为由拒绝录用妇女或者提高对妇女的录用标准。用人单位录用女职工，不得在劳动合同中规定限制女职工结婚、生育的内容”

胎列为严重违纪行为，再按严重违纪解除违法生育职工的劳动合同，系违法解除。故此，我们建议用人单位解除违法生二胎职工的劳动合同应当谨慎。对于违反计划生育的职工，产假期间用人单位可以采取批评教育、不发工资或发病假工资等方式对待。

## 案例分析：最高法院指导案例：解除违规生二胎员工 单位被判违法解除赔偿

谈女士于 2007 年 10 月入职某传媒公司，2016 年劳动合同期限届满。2012 年，谈女士在未取得生育许可的情况下生育二胎，此后未再到公司上班。2013 年 2 月，传媒公司以谈女士旷工为由解除双方之间的劳动关系。传媒公司诉称，谈女士于 2012 年 12 月向公司申请休产假时才告知公司将生育二胎，但未提交《生育服务证》，故公司未批准其休产假申请。谈女士此后擅自离岗属旷工行为，公司系合法解除劳动合同，无需支付违法解除劳动合同赔偿金。谈女士辩称，自己获得公司领导口头同意后休产假，无旷工行为。

一审法院判决传媒公司支付谈女士违法解除劳动合同赔偿金，传媒公司上诉。二审法院经审理认为，谈女士在生育前向传媒公司提出休产假申请，传媒公司因谈女士未提供《生育服务证》而不予批准，并以谈女士旷工为由作出解除劳动合同关系的决定。但是，传媒公司的劳动规章制度及与双方签订的劳动合同均未规定上述情形可解除劳动合同关系。故判决驳回上诉，维持原判。

我们认为，公司应从制度管理着手，详细规定员工假期申请流程、条件并妥善保管员工相关假期证明。如遇员工违规行为，应妥善保管相关证据，并应依据相关法律规定积极合法应对，在遇到解除劳动合同重大事宜时，须谨慎处理，不能草率决定。

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