



PRC Labor and Employment Law Newsflash

January, 2012

The Rules on Special Labor Protection of Female Employee (Draft for Soliciting Opinions) Solicits Opinions Publicly

Rules on the Special Labor Protection of Female Employee (Draft for Soliciting Opinions), hereinafter referred as “**the Draft**”, is released on November 21st, 2011 and solicits opinions publicly. In accordance with **the Draft** and new laws issued recently as the Social Insurance Law and relevant local regulations of Shanghai, we summarized the following key points with our comments as the following for your reference.

- **The Draft** increases the days of the maternity leave from 90 days to 14 weeks. And **the Draft** also specifies the maternity leave of miscarriage. Female employees shall receive no less than two weeks of maternity leave after a miscarriage in the first four months of pregnancy, and shall receive no less than six weeks of maternity leave after four months of pregnancy. While this national standard is lower than which of Shanghai, thus in Shanghai, local standards shall prevail, that is, female employees shall receive **thirty** days of maternity leave after a miscarriage in the first **three** months of pregnancy, and shall receive **forty-five** days of maternity leave after **three** months but before **seven** months of pregnancy. (**Article 7 of the Draft and the Article 14 Rules on Labor Protection of Female Employees of Shanghai**)
- **The Draft** makes some arrangements to coordinate with the Social Insurance Law: in case of childbirth or miscarriage, if an employer has contributed maternity insurance for its employees, the employees’ maternity-related medical fees and maternity allowance (that is the employees’ wage during the maternity leave), shall be paid from the maternity insurance fund, while those payments shall be paid by the employer if the employer has not contributed maternity insurance. Besides, the new rule issued in Shanghai stipulates that female employee’s maternity allowance shall be calculated and paid on the basis of all employees’ average monthly wages of her employer during the previous year of childbirth or miscarriage. (**Article 8 of the Draft, Article 54 of the Social Insurance Law and Article 2 of Circular on the Adaption of the Current Maternity Insurance Policy for Promulgation of the Social Insurance Law**)
- **The Draft** enforces and specifies legal liabilities for breach of the protection of female employee. In case of violation, the relevant authorities will order the employer to rectify within a time limit, and a fine between 1000RMB and 5000RMB will be imposed for each female employee being harmed. And those immediate supervisors or other management staff in a direct relation to

violation shall be subjected to the corresponding sanctions in accordance with law. (**Article 13 of the Draft**)

Based on the aforementioned regulations, we prepared the following chart to make a brief introduction about leaves and payments under the special labor protection of female employee in Shanghai for your reference.

| ITEM | SPONTANEOUS ABORTION LEAVE | | MATERNITY LEAVE ¹ | | | LATE CHILD BIRTH LEAVE | PRENATAL LEAVE | LACTATION LEAVE |
|---------|--|---------------------------------|------------------------------|-----------------------|-----------------------------------|--------------------------------|---|--|
| STATUS | in the first three months of pregnancy | from 3 to 7 months of pregnancy | normal case | difficult child birth | multiple child birth | female of or over 24 years old | after 7 months of pregnancy, not to interfere with work and being approved by employer ² | having difficulties after childbirth, not to interfere with work and approved by employer ³ |
| LEAVES | 30 days | 45 days | 14 weeks | 15 extra days | 15 days for each additional child | 30 extra days | two and a half months | six and a half months |
| PAYMENT | female employee's maternity allowance (that is the employees' wages during maternity leave) shall be calculated and paid on the basis of all employees' average monthly wages of her employer during the previous year of childbirth or miscarriage ⁴ | | | | | | monthly wage for prenatal and lactation leave shall not be less than 80% of previous wage standard | |

¹Maternity leave, prenatal leave and lactation leave shall be calculated on the basis of calendar days which includes statutory holidays, while late childbirth leave shall be calculated on the basis of working days and shall be postponed in case it comes across statutory holidays.

²Female employees who have a history of recurrent spontaneous abortion, serious pregnancy syndromes, pregnancy complications, etc. that may affect the fertility and has been confirmed by a clinic or health care facility at or above second-class, can file an application and the employer **must** approve the prenatal leave.

³Female employees who have serious diseases that have serious influence on the health of mothers and infants and have been confirmed by a clinic or health care facility at or above second-class can file an application and the employer **must** approve the lactation leave.

⁴The maternity allowance of the female employees whose employer has contributed maternity insurance less than one year or her contribution bases of maternity insurance is lower than the minimum standard of maternity allowance of Shanghai will be calculated and paid on the basis of minimum standard (2892RMB). If all employees' monthly average wage in the previous year of her employer is higher than the 300% of monthly average wage of Shanghai, the female employees' maternity allowance shall be calculated and paid on the basis of 300% of monthly average wage of Shanghai; if it lower than the 60% of monthly average wage thereof, it shall be calculated and paid on the basis of 60% of monthly average wage, but if the it is even lower than the minimum standard of 2892RMB, it will be calculated and paid as 2892RMB. The exceeding part of the maternity allowance between all employees' monthly average wage in the previous year of the employer and 300% of monthly average wage of Shanghai shall be paid by the employers.

Case Study: Can an Employer Unilaterally Terminate The Employment Contract With a Pregnant Female Employee?

A famous multinational company (“the Company”) noticed that a female employee had been on sick leave for three months immediately after being pregnant. The Company then went to investigate her sick-leave certificate with the hospital and proved that one month’s certificate of sick leave was forged. Hence, the Company terminated the employment contract with the female employee for her violation of the rules of the staff handbook, which stipulates that “the Company has the right to terminate the employment contract with employees if he/she fabricates or tampers with the proof documents.” But the female employee refused to accept this termination because she thought she was in the period of pregnancy and thus the Company had no right to unilaterally terminate her employment contract, therefore the employee submitted the dispute to the labor arbitration committee.

This dispute reveals a common misconception that no matter in what case the employer has no right to unilaterally terminate the employment contract with female employees during pregnant period or within the maternity leave or post-natal period.

In accordance with Article 42 of *the Labor Contract Law of PRC*, if the employee is a female employee who is currently pregnant or within the maternity leave or post-natal period, the employer cannot terminate an employment contract in the following four special cases, that is, if the employee unable to undertake work for illness or non-work related injury after the completion of the medical treatment leave period, is incompetent and remains so even after training or reassignment to a new position, where major changes have occurred in the objective circumstances under which the employment contract was concluded and the contract can no longer be performed, or in the case of layoff.

Nevertheless, the employer still has the right to unilaterally terminate aforementioned female employee if the Article 39 is applicable to her, namely, where the employee is proven during the probationary period not to meet the criteria for employment; where the employee has committed a serious violation of the employer's policies and rules; where the employee has committed a serious dereliction of duty or has engaged in embezzlement, causing severe losses to the Employers' interests; where the employee has simultaneously established an employment relationship with another Employer, severely hampering his ability to complete work duties, or has refused to rectify the matter following a request to do so by the Employer; where the employment contract is invalid due to it is concluded or modified against the true intentions of the other party through the use of fraud, coercion or exploitation of the unfavorable position of a party; or where the employee is being pursued for criminal liabilities.

In this case, the employer had sufficient evidence to prove that this female employee had committed a serious violation of the relevant rules under the Company’s staff handbook, and the disciplinary action rules of the handbook are specified and reasonable. Moreover, the staff handbook is legitimate in both forms and procedures, for the staff handbook has been passed democratic procedures and the Company has publicly display the staff handbook to all employees. As a result, the unilateral termination of the employment contract with the pregnant female employee by the Company was

supported by the arbitration award and was deemed as a lawful termination.

This newsflash is prepared by the employment team of Dacheng Law Offices, including Maggie Kong, Anderson Zhang, Susan Shan, John Zhou, Elle Gao, Novel Sun and Kent Xu. If you have any inquiries regarding the PRC employment law matters, please contact us at laborlaw@dachenglaw.com.

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中国劳动法资讯速递

二零一二年一月刊

《女职工特殊劳动保护条例（征求意见稿）》向社会征求意见

《女职工特殊劳动保护条例（征求意见稿）》（以下简称“征求意见稿”）于 2011 年 11 月 21 日公布并公开征求意见。我们综合近期颁布之新法律，如《社会保险法》以及上海市地方政策相关规定，分析其重要内容如下，以备参考。

- 将产假由 90 天增至 14 周并细化了流产假期：女职工怀孕未满 4 个月流产的，不少于 2 周的产假；怀孕满 4 个月流产的，不少于 6 周的产假，然而该标准低于上海市标准，故上海地区仍按上海市地方标准执行：即怀孕未满 3 个月流产的，产假 30 天；怀孕满 3 个月不足 7 个月流产的，产假 45 天。（征求意见稿第七条、《上海市女职工劳动保护办法》第十四条）
- 与《社会保险法》相衔接：女职工生育或者流产的，其工资或者生育津贴以及生育、流产的医疗费用，所在单位已经参加生育保险的，由生育保险基金支付；未参加生育保险的，由用人单位支付。而上海市也颁布了新规定：女职工生育生活津贴标准，为其生产或者流产当月所在用人单位上年度职工月平均工资。（征求意见稿第八条、《社会保险法》第五十四条以及《上海市关于贯彻实施〈社会保险法〉调整本市现行有关生育保险政策的通知》第二条）
- 严格并具体化法律责任：由相关部门责令用人单位限期改正，按照受侵害女职工每人 1000 元以上 5000 元以下处以罚款，或者对直接负责的主管人员以及其他直接责任人员依法给予处分。（征求意见稿第十三条）

依据上述新规定，上海女职工特殊保护相关假期及待遇最新汇总请参见以下一览表：

| 项目 | 自然流产产假 | | 生育产假 ¹ | | | 晚育假 | 产前假 | 哺乳假 |
|----|--|------------------|-------------------|---------|------------|-------------|-----------------------------------|--------------------------------|
| 情况 | 3 个月内 | 3 个月以上 7 个月以下 | 正常 | 难产 | 多胞胎（每多生一个） | 年满 24 周岁女青年 | 妊娠 7 个月以上且工作许可，经单位批准 ² | 生育后有困难且工作许可，经单位批准 ³ |
| 假期 | 30 天 | 45 天 | 14 周 | 另加 15 天 | 另加 15 天 | 另加 30 天 | 两个半月 | 六个半月 |
| 待遇 | 女员工生产或者流产当月所在用人单位上年度职工月平均工资 ⁴ | | | | | | 原工资标准的百分之八十 | |

¹ 产假、产前假及哺乳假按照自然天计算，包含法定节假日。晚育假则遇法定节假日顺延。

² 经二级以上医疗保健机构证明有习惯性流产史、严重妊娠综合症、妊娠合并症等可能影响生育的，本人提出申请，用人单位应当批准其产前假。

³ 经二级以上医疗保健机构证明患有产后严重影响母婴身体健康疾病的，本人提出申请，用人单位应当批准其哺乳假。

⁴ 缴费未满一年或缴费基数低于市生活津贴标准最低标准的产假待遇，按最低标准（2892 元）计发。单位上年度职工月平均工资高于上年度市月平均工资 300% 的，按 300% 计发；低于市月平均工资 60% 的，按 60% 计发。但低于生育生活津贴最低标准（2892 元）的，按最低标准计发。上年度用人单位月平均工资高于市平均工资 300% 的部分，由用人单位补发。

案例分析：用人单位是否可以单方解除孕期女员工？

某知名外企 A 公司发现其某女员工自怀孕后已持续请病假三个月，公司持其病假单至医院调查后发现，其中有一个月的病假单系伪造。公司遂以该员工违反公司员工手册中“员工私自编造或篡改证明文件的，公司将与其解除劳动合同关系”的规定，解除了该员工的劳动合同。该员工不服，认为自己系孕期女员工，公司无权单方解除其劳动合同，遂就此争议申请劳动仲裁。此争议涉及到一个普遍存在的误解：用人单位在任何情形下均无权单方解除孕期或哺乳期的女员工。但是，根据《劳动合同法》第四十二条规定，唯有该法第四十条、四十一条规定的四种非过错性情形时，即存在员工因病或非因工负伤医疗期满无法从事原工作的、不胜任工作且经培训或调岗后仍不胜任的、客观情况发生重大变化导致劳动合同无法继续履行的或经济性裁员的情形，用人单位不能据此解除处于孕期、产假及哺乳期的女员工。然而，如处于上述期间的女员工有任何违反《劳动合同法》第三十九条情形之一的，即试用期不符合录用条件的、严重违纪的、失职或营私舞弊造成用人单位重大损失的、与其他用人单位建立劳动关系严重影响本职工作或拒不改正的、以欺诈胁迫手段或乘人之危使用用人单位在违背真实意思情况下订立劳动合同的，以及被依法追究刑事责任的，用人单位仍然有权单方解除其劳动合同。正如本案中用人单位有充分证据证明该员工存有严重违纪行为，其员工手册对相关违纪行为及其处罚的规定明确、合理，且员工手册经过了民主及公示程序，形式及程序上均合法。故此，A 公司据此做出的单方解除该孕期女员工的行为最终获得了仲裁裁决的支持，被认定为合法解除。

本资讯速递系大成劳动法团队撰拟，本期责任编辑：孔琪；其他编辑：高海燕、单训平、孙颖、徐智强、周军和张根旺。期待我们的资讯速递能对您有所裨益。若您有任何问题，请通过电邮 laborlaw@dachenglaw.com 联系我们团队。

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