PRC Labor and Employment Law Newsflash

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Analysis on Questionable Points of Paid Annual Leave

It is certain that many employees have used paid annual leave and the statutory holiday in combination during the National Day Holidays. Pursuant to relevant regulations like *the Regulations on Paid Annual Leave of Employees*, how should the company handle with questions such as: how many leave days does an employee have? Can the company arrange an employee to take a leave? How to make payment of annual leave not yet taken? Combining relevant articles of laws and regulations, our team hereby presents a brief analysis as below for your reference.

1. Definition of Consecutive Working Time
   Article 3 of *Measures for the Implementation of Paid Annual Leave for Enterprise Employees* regulates that: "an employee that has worked consecutively for over twelve months is entitled to paid annual leave." Many HR may think that consecutive means working in the same employing unit for over twelve consecutive months, then a new employee or an employee under probation period does not get paid an annual leave. In fact, it is a misunderstanding.

   In April 2009, the office of MOHRSS replied to Shanghai Human Resources and Social Security Bureau in regard to this question, reading that: "the conditions for paid annual leave regulated in Article 3 of *Measures for the Implementation of Paid Annual Leave for Enterprise Employees* include working in different employing units for over twelve months except for working in the same employing unit for over twelve months." Hence, as long as an employee has already worked for over twelve months, irrespective of in the previous employing units or spanning over two employing units, the employee is entitled to the paid annual leave first day upon on-boarding to the present employing unit.

2. Proof of Accumulated Working Time
   Article 4 of *Measures for the Implementation of Paid Annual Leave for Enterprise Employees* regulates that: "the number of days of the paid annual leave is determined by the accumulated working time of an employee." As for HR, it is difficult to determine the accumulated working time, especially for an employee who once worked in different provinces. According to Article 2 of the said reply: "the accumulated working time of an employee can be determined by records of the files, contribution records of the social security fee paid by the employing unit, employment contract and other proof materials with legal effect." On this basis, if an employee claims the accumulated working time, the employing unit could require the employee to supply proof materials like file records, payment certificate of the social security fees, etc., or the employing unit could offer paid

annual leave according to the years of service that have been confirmed by the employing unit.

3. Can the employing unit arrange an employee to take a leave?
   Generally, employees apply for the paid annual leave. Pursuant to *the Regulations on Paid Annual Leave of Employees*, the employing unit shall make payment of at 300% of daily salary for an employee whose annual leave has not yet been taken, so there might be some employees refusing to take the leave and require an employing unit to pay higher salary calculated for the annual leave. As for this, in judicial practice, an employing unit has the right to co-ordinate and arrange annual leave on the basis of considering the will of the employees other than arrange according to the application of the employees. As a result, an employing unit can control the workforce cost by controlling the salary calculated for the annual leave.

4. Calculation of Salary for Paid Annual Leave
   In practice, when the employee resigns, the employer will pay 300% daily salary for the annual leave not yet taken pursuant to Item Three of Article 5 of *the Regulations on Paid Annual Leave of Employees*: "with regard to an employee's unused annual leave days, the employer shall pay remuneration at the rate of 300% of the employee's daily salary income."

   As for this, it needs to be clarified that the employing unit has already paid 100% salary than required. Pursuant to Article 10 of *Measures for the Implementation of Paid Annual Leave for Enterprise Employees*: "the employer shall pay remuneration to the employee for the number of the days of the annual leave that is not taken. The daily remuneration for such days shall be 300% of his or her daily salary income, including his or her salary income during normal working hours paid by the employer." Therefore, the remuneration to the employee for the number of the days of the annual leave that is not taken shall be calculated at the rate of 200% of the employee's daily salary income, the remaining 100% has been already paid in the monthly salary and the payment in repetition is not necessary.

5. Calculation of Salary Basis for Paid Annual Leave
   The calculation of salary for the annual leave uses "daily salary" as the unit of account and is this daily salary calculated by standard monthly salary divided by 21.75? The answer is no. In practice, some employees do not have agreed standard salary or are implementing piecework wage or performance wage. The monthly salary varies. From the perspective of protecting employees, *Measures for the Implementation of Paid Annual Leave for Enterprise Employees* regulates that: "the calculation basis is the monthly average salary of the preceding twelve months less the overtime salary of the twelve months, then dividing the monthly average salary by 21.75 to get the daily salary.

   After the long holidays, the year is going to reach an end and many employing units will conduct timely examination of the remaining annual leave and make timely payment. We hope this newsflash could be helpful.

Case Study: the Compensation Dispute of Paid Annual Leave

Ms. Chi has been working for a medical corporation for 9 consecutive years. The last employment contact agrees that Ms. Chi has annual leave of 15 days. At the same time, the staff handbook regulates that if the employee takes a sick leave, it can be handled as taking annual

leave as long as the employee has paid annual leave.

In 2012, Ms. Chi took a sick leave for 14 days because of enterogastritis and the company handled this as annual leave. At the beginning of 2013, Ms. Chi resigned and required the company to pay the salary for the unused annual leave, but the company quoted the staff handbook and only paid one day's salary for the annual leave. Ms. Chi was not satisfied and applied labor arbitration, claiming the company to pay 14 days' salary for the annual leave.

The labor arbitration commission held that pursuant to *the Regulations on Paid Annual Leave of Employee*, the home leave, marriage and funeral leave and other holidays that an employee is entitled to in accordance with state regulations as well as the period of suspension of work, but reservation of salary due to occupational injury cannot be counted into the paid annual leave. Sick leave is a statutory holiday and cannot be counted into the paid annual leave. Hence, although Ms. Chi has signed the staff handbook, it goes against Article 26 of *the Employment Contract Law*: "An employment contract shall be invalid or partially invalid if the employer disclaims its legal liability or denies the worker his rights". The arbitration commission ruled that the company shall pay Ms. Chi 14 days' salary for the unused annual leave.

The Company dissatisfied with the arbitration award and sued at the people's court of first instance. After trial, the court ruled that the company shall pay Ms. Chi the said salary.

We are in the opinion that sick leave is a statutory leave. An employee can enjoy sick pay during the period of medical care, and the paid annual leave is a fully-paid holiday. Unless the sick leave exceeds a certain period of time, these two kinds of leaves do not reject each other. In this case, the regulation of the staff handbook equivalently deprives the right of the employee to enjoy the treatment during the period of medical care, which goes against Article 26 of *the Employment Contract Law*, so both the arbitration commission and the court of first instance ruled against the company. From this case, we advise that the employer shall strictly be in compliance with the employment laws and regulations, or even agreed in the staff handbook or the employment contract, if the employee applies labor arbitration or sues in the court, the company may face the risk of losing.

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中国劳动法资讯速递

二零一三年十月刊

带薪年休假疑点浅释

十一国庆，肯定有不少公司员工将带薪年休假与法定长假合并使用。那么根据《职工带薪年休假条例》等相关规定，员工能有几天带薪年休假，员工是否可以“被休假”以及员工应休未休年休假如何折算报酬等问题，公司应如何处理与对待呢？敝文结合相关条文规定，梳理并简评如下，供大家商榷。

一、 连续工作时间的定义

《企业职工带薪年休假实施办法》第三条规定:“职工连续工作满 12 个月以上的，享受带薪年休假。”很多 HR 可能认为享受带薪年休假必须在本单位连续工作满 12 个月以上，所以新进单位员工、试用期内员工当然没有带薪年休假。其实这是一个误区。

2009 年 4 月，人力资源和社会保障部办公厅就对上海市人力资源和社会保障局提出的这一问题进行回复并释明：“关于带薪年休假的享受条件，《企业职工带薪年休假实施办法》第三条中的‘职工连续工作满 12 个月以上’，既包括职工在同一用人单位连续工作满 12 个月以上的情形，也包括职工在不同用人单位连续工作满 12 个月以上的情形。”因此，只要员工曾经连续工作满 12 个月以上，无论是否发生在前用人单位，或是否跨越两个以上用人单位，员工在现任单位入职第一天即应享有带薪年休假。

二、 累计工作时间的证明

《企业职工带薪年休假实施办法》第四条规定：“年休假天数根据职工累计工作时间确定。”对于 HR 来说，对累计工作时间的确认确实是个难题，特别是对于之前在不同省市工作过的员工。根据前述复函第二条规定：“职工的累计工作时间可以根据档案记载、单位缴纳社会保险费记录、劳动合同或者其他具有法律效力的证明材料确定。”据此，员工主张累计工作时间的，公司可以要求员工提供其档案记录、社会保险缴纳凭证等材料予以证明，否则可以仅按已查明的工龄给予相应的年休假。

三、 员工是否可以“被休假”?

一般而言，对于带薪年休假以员工申请为主。但是，鉴于《职工带薪年休假条例》规定，对于职工应休未休年休假，用人单位应当按照职工日工资收入的 300%支付年休假工资报酬，故有部分员工可能拒绝休假而要求用人单位支付较高的年休假折算工资。对此，根据司法实践，用人单位可以依据《职工带薪年休假条例》第五条之规定，在考虑员工本人意愿的基础上，统筹安排员工年休假，而不再依员工申请后再予安排，从而控制因年休假折算工资而提高的用工成本。

四、 未休年休假工资之折算

实践中，多见用人单位在员工离职时，对员工应休未休年休假按照 300%日工资进行折算，其依据是《职工带薪年休假条例》第五条第三款规定：“对职工应休未休年休假天数，单位应当按照职工日工资收入的 300%支付年休假工资报酬。”

对此，亟需纠正，因为用人单位已经多支付了一倍的工资折算。根据《企业职工带薪年休假实施办法》第十条规定：“对职工应休未休年休假天数，按照其日工资收入的 300%支付未休年休假工资报酬，其中包含用人单位支付职工正常工作期间的工资收入。”因此，对于未休年休假折算按日工资 200%折算即可，剩余 100%已经在员工月工资中支付，不必重复发放。

五、 年休假工资基数之计算

带薪年休假折算，以“日工资”为计算单位，而“日工资”是否指每月标准工资除以 21.75 呢？答案是否定的。实践中，有些员工没有约定标准工资或实行计件工资、绩效工资，每月工资收入差异较大。从保护员工角度出发，《企业职工带薪年休假实施办法》规定，应当以员工前 12 个月平均工资（不包括加班工资），作为计算未休年休假折算的计算基数，然后再除以 21.75，计算出“日工资”。

十一长假后，即将进入年末，许多用人单位将对员工当年度剩余年休假进行清理。对此，希望本文关于带薪年休假的几点浅释，对大家有所帮助。

案例分析：带薪年休假补偿之争议

池小姐在某医药公司连续工作了 9 年，双方最后一份劳动合同约定：池小姐可以享受带薪年休假 15 天。同时，公司员工手册规定，员工请病假的，如果有带薪年休假的，先按带薪年休假处理。

2012 年池小姐因肠胃炎请病假 14 天，公司主动将其病假按年休假处理。2013 年初，池小姐提出辞职，要求公司折算去年 15 天的未休年假，但公司以员工手册规定，仅折算了 1 天年休假工资。对此，池小姐不满，提起劳动仲裁，要求公司支付 14 天年休假的折算工资。

劳动仲裁庭认为，根据《职工带薪年休假条例》，职工依法享受的探亲假、婚丧假、产假等国家规定的假期以及因工伤停工留薪期间不计入年休假假期。病假系国家法定休假，并不纳入年休假之内。因此，公司员工手册虽有池小姐签字，有违《劳动合同法》第二十六条之“用人单位免除自己法定责任、排除劳动者权利的，劳动合同无效或部分无效”之规定，故裁决公司应当支付池小姐 14 天未休年休假的折算工资。

公司对仲裁裁决不服，起诉至一审法院，法院经审理后，仍判决公司须支付池小姐 14 天未休年休假折算工资。

我们认为，病假系法定福利休假，员工在医疗期内请病假的，可以享受病假工资，而年休假属于员工可以享受的全薪休假。除非员工病假超过一定时间，否则两者并不排斥。本案中，公司员工手册之规定相当于剥夺了员工休病假享受医疗期待遇之权利，有违劳动合同法第二十六条的规定，故劳动争议仲裁委员会与一审法院均裁判公司败诉。鉴于此案，我们建议用人单位严格遵守劳动法律法规之规定，否则即使有员工手册规定或劳动合同约定，如果员工提起劳动仲裁或诉讼，公司仍将面临败诉之风险。

本资讯速递系大成劳动法团队撰拟，责任编辑：孙颖、徐智强、杨傲霜、张根旺、周军、孔琪、罗欣、单训平。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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