

# HR Management Under the China Civil Code

## 《民法典》下的人力資源管理

Companies should be prepared for a new era following changes to employee rights that affect areas including recruitment, sick leave and sexual harassment

內地近日就僱員權益進行了修訂，對招聘、病假及性騷擾等多方面均構成影響，企業宜做好應對準備



**Since the Civil Code of the People's Republic of China came into effect on 1 January, it has attracted considerable attention from corporate Human Resources managers.**

Described as the "Encyclopaedia of Individuals' Private Rights," the Civil Code expands the scope of protection for the rights of individuals. As a result, it has had a significant impact on employers, affecting areas including reference checking, leave management, disciplinary procedures, handling of special events and discipline violations.

Hong Kong companies and multinational corporations that have entities in Mainland China may not have complete legal documents and management systems. This may lead to certain legal risks in the process of employment management.

Companies should take this opportunity to review their current legal documents, rules and regulations in connection with HR management, and consider ways to improve their core management processes to ensure compliance while maintaining the effectiveness and stability of internal management systems.

In particular, companies should consider the following:

### **Enhancing the Compliance of the Recruitment Process to Avoid Incurring Liabilities for Tort or Breach of Contract**

■ According to the Civil Code, the offer letter, which is usually issued by companies to candidates, is considered as an "Offer" with legal effect. To ensure flexibility, companies are advised to insert "Entry into Force" clauses,

including "obtaining a satisfactory reference check" and "authentic information provided in resume."

■ The Civil Code clearly stipulates that personal information is protected by law. During the on-boarding process, companies often need to collect personal information such as ID card number, residential address and bank account details. Companies must collect and use relevant personal information of employees under the principles of legitimacy, reasonableness, proportionality and necessity; in particular, the prior consent of the employee shall be obtained in advance. In order to minimize the legal risks, employees shall be required to sign a consent letter or other relevant legal documents, while companies should also formulate relevant policies on the protection of personal information.



### **Focusing on Protection of Employees' "Personality Rights" and Optimizing Relevant Rules, Regulations and Internal Management Processes**

The Civil Code contains a section on "personality rights." This not only focuses on the protection of personal information and right to privacy, but also emphasizes the protection of the interests of individuals such as the right of reputation, portrait and voice.

■ According to the Civil Code, medical records are considered to be private. Employees can therefore refuse to provide their medical records to their employer in support of sick leave application, and only need to provide a doctor's note. This may lead to new challenges in sick leave management for companies, especially for those without comprehensive internal rules and regulations. Companies are advised to reach a written agreement with employees through the process of "notification, consent and promise," which could effectively avoid any disputes on infringement of right to privacy in the future.

■ Companies should also protect employees' personality rights, such as right of reputation and portrait. For example, they should not disclose the results of an employee's performance review, or make the details of disciplinary procedures public. Before using an employee's portrait or voice, companies should sign a relevant agreement with the employee to obtain the authorisation. Policies and guidelines for the storage, use and transfer of personal information should also be clearly stipulated within the departments of the company.

### **Measures Against Potential Legal Risks Caused by Sexual Harassment, and Establishing a Mechanism to Prevent, Monitor and Handle Sexual Harassment in the Workplace**

The Civil Code clearly defines the concept of sexual harassment and stipulates companies' obligations to prevent sexual harassment in the workplace by taking reasonable measures.

■ Companies should establish relevant rules and regulations in a timely manner. These should explicitly set out measures to prevent sexual harassment in the workplace, channels for complaints, and companies' rights to investigate such cases and consequences.

■ Companies should engage lawyers and other professionals, on a regular basis, to deliver special training sessions regarding the prevention of sexual harassment at work, for management teams or all employees. Records of such training sessions should also be kept. Having such programmes in place may mitigate employers' liabilities in the case of sexual harassment at their company.

■ Companies should enhance the mechanism for handling sexual harassment at work by protecting employees' rights of reputation and privacy during the investigation, and making specific plans to transfer such cases to law enforcement agencies.

### **Setting Out Measures for Indemnity for Employees' Conduct in Office, Clarifying Agreements and Regulations on Termination of Employment**

■ The Civil Code specifies that the company may ask for compensation from employees who cause the company to be liable for indemnity either "intentionally" or due to their "gross negligence." The amount and proportion of which shall be determined in accordance with relevant laws, clauses under the employment contract, the internal rules and regulations, and based on the nature of

the fault and the degree of damage.

■ The Civil Code further clarifies the principles of "good faith" and "public orders and good morals." A company may terminate the employment of employees in the case of breaching foregoing principles and causing damage to the interests and reputation of the company. According to different opinions in previous judicial practice in Mainland China – in the absence of an express clause under "employment contract" or explicit regulation under the company's policy – terminating employment on the ground of violating principles of "good faith" and "public order and good morals" may lead to certain legal risks, such as constituting "unlawful dismissal."

■ Considering the above, it is necessary for companies to further improve the relevant legal documents by including relevant clauses in terms of indemnification for damage caused by employees' misconduct and unilateral right of summary dismissal.

### **Conclusion**

The Civil Code not only brings new challenges to employers' HR management, but also provides strong support to the protection of their own rights and interests. Companies should take this opportunity to review their employment-related documentation, including:

- 1) employment contract, addendum to employment contract, employee handbook and company's policies;
- 2) enhance office systems and relevant procedures;
- 3) optimize daily management; and
- 4) carry out special training for employees at all levels in order to minimize legal risks and further protect the interests of the company.

2021年1月1日，《中華人民共和國民法典》（《民法典》）正式生效，引起了企業人力資源管理人員的極大關注。

《民法典》被譽為「彰顯個人私權的百科全書」，擴大了對個人權利的保護範圍，對僱主在執行背景調查、休假管理、紀律處分、特殊事件處理及違紀管理等方面產生較為深遠的影響。

一些港資公司及跨國企業在中國內地的營業機構可能不具備完善的法律文件和管理制度，因而在僱傭管理過程中存在一定的法律風險。

企業應當借此機會重新審視現有的人力資源管理相關法律文件及規章制度，思考如何在保持內部管理制度有效穩妥的前提下，對核心管理流程進行合規升級。



企業應留意以下要點：

### 提升招聘入職流程的合規程度，避免產生違約或侵權責任

■ 企業通常會向擬錄用的候選人發出「錄用通知」，而根據《民法典》的規定，錄用通知屬於「要約」，並在候選人收到後自動產生法律效力。為增加企業的自主權，建議企業在通知中加入「生效」條款，包括但不限於「通過背景調查」、「簡歷資料屬實」等。

■ 《民法典》明確了個人資料受到法律保護。企業在僱員入職階段往往需要收集僱員的身分證號碼、住址、銀行賬戶等個人資料，以供人力資源管理之用。企業應遵

循合法、正當、適度和必要的原則收集和處理僱員的相關個人資料，尤其應事先徵得當事人的同意。為使相關法律風險降至最低，建議企業要求僱員簽署同意書等相關法律文件，並制定關於個人資料保護的相關政策。

### 注重對員工人格權的保護，優化相關規章制度及內部管理流程

《民法典》新設「人格權篇」，集中保護個人資料和隱私權，同時亦強調保障自然人的名譽權、肖像權、聲音權等一系列人格權益。

■ 根據《民法典》的規定，病歷屬於個人隱私。僱員在申請病假時可能會以此為由

拒絕向僱主提供病歷，而僅提供病假證明。這對企業的病假管理帶來了新挑戰，這一點在企業內部規章制度不健全的情況下尤為突出。建議企業通過「告知、同意和承諾」的方式與僱員達成書面協議，避免日後發生侵犯隱私權的爭議。

■ 企業也應注意保護僱員的名譽權和肖像權等人格權益，例如避免公開僱員的績效考核結果或處分決定；使用僱員的肖像或聲音前，應先與僱員簽訂相關協議，獲得僱員授權；明確各部門在個人資料儲存、使用和轉移方面應遵守的政策指引。

### 應對性騷擾帶來的潛在法律風險，建立職場性騷擾預防、監督及處理的機制

《民法典》對性騷擾進行定義的同時，也明確了企業有責任採取合理措施防止職場性騷擾。

■ 企業應及時建立相應規章制度，明確職場性騷擾的預防措施，設立投訴渠道，以及明確企業調查許可權和處罰方式等。

■ 企業宜聘請律師等專業人士，向管理團隊或全體僱員定期進行防範職場性騷擾的專題培訓，並保留培訓紀錄。日後一旦出現職場性騷擾個案時，此等措施有助減輕僱主責任。

■ 企業應完善職場性騷擾的處理機制，注意調查過程中對僱員名譽權和隱私權的保護，做好將案件移送執法部門處理的預案等。

### 明確對僱員職務行為的追責措施，完善僱傭關係解除的約定及規定

■ 《民法典》明確了企業可向因「故意」或「重大過失」而使企業承擔賠償責任的僱員追討賠償。賠償的額度及比例應依據相關法律規定，結合企業與僱員簽訂的僱傭合同中的條款及公司內部的規章制度，並在考慮過失及損害程度的基礎上確定。

■ 《民法典》中進一步明確了「誠信」和「公序良俗」原則，當僱員違反前述原則，並對企業利益和聲譽造成損害時，企業可單方面與其解除僱傭關係。根據中國內地以往司法實踐中的不同裁判觀點，倘企業沒有在僱傭合同或其他規章制度中作出明確的約定或規定，以僱員違反「誠信」和「公序良俗」原則解除僱傭關係存在一定的法律風險，例如構成「違法解僱」。

■ 基於上述原因，企業有必要進一步完善相關法律文件中針對職務行為追償及僱傭關係解除的相關條款。

### 總結

《民法典》為僱主的人力資源管理帶來新挑戰的同時，亦為企業自身權益的保障提供了有力支援。企業應借此機會：

- 1) 重新審視僱傭合同、補充協議、員工手冊和公司政策等相關法律文件；
- 2) 完善辦公系統及相關流程；
- 3) 優化日常管理；及
- 4) 為全體僱員提供專項培訓，從而把法律風險降至最低，並進一步保障企業利益。