



## PRC Labor and Employment Law Newsflash

July, 2012

### Labor Relations Management of Senior Managers in Practice

Since the implementation of *the Labor Contract Law*, employers have been cautious about handling labor relations, when it comes to the management of relations with senior managers, mistakes and omissions are frequent occurrences. Pursuant to the regulations of *the Company Law*, *the Labor Contract Law* and other relevant laws and regulations, combined with judicial practice, our team analyzes labor relations management issues of senior managers in unlisted companies that have boards of directors for your reference.

➤ **The Scope of Senior Managers.** *The Company Law* formulates that senior managers include the manager, deputy manager and the person in charge of financial affairs of a company, and the secretary of a board of directors of a listed company and the other persons specified in a company's articles of association.<sup>1</sup> While the earliest draft of the Interpretation of Several Issues Relating to Law Applicable to Hearing of Cases of Labor Disputes by the Supreme People's Court (III) formulates that the senior managers of the employer in Article 24 of *the Labor Contract Law* refer to the chairman, vice chairman of the board, the president, the director, the manager, deputy manager and the person in charge of financial affairs of a company, and the secretary of a board of directors of a listed company and the other persons specified in an employer's articles of association. Although the final and formal version of the draft deletes the content of the scope of senior managers, it is a clue that, in judicial practice, the interpretation of senior managers differs between labor law and company law but the mainstream view is in accordance with company law regulations to define the scope of senior managers.

➤ **The Signing of Senior Managers' Labor Contracts.** According to *the Company Law*, senior managers should be engaged by the board of directors, and the board of directors should sign and issue offers or the board of directors and the senior managers should sign the engagement agreements. However, offers or engagement agreements do not have the properties of labor contracts, because the board of directors cannot represent the employer. Besides, offers or engagement agreements mainly determine the functions of the employees, while the labor contract contains many other essential terms defining rights and obligations between employers and employees except for the function term. Therefore, the employer must sign the labor contract with the senior manager engaged by the board of directors. If not, but only with the offers signed and issued by the board of directors or engagement agreements

<sup>1</sup>Some regions have relevant regulations about the scope of senior managers, for instance, the Guiding Opinions of Hearing Labor and Personnel Disputes by the Higher People's Court and Labor and Personnel Disputes Arbitration Commission of Jiangsu Province (II) regulates that the scope of senior managers refers to the regulation of Item 1, Article 217 of *the Company Law of People's Republic of China*.

signed by the board of directors and the senior managers, the employer may face the risk of paying the employee twice his wage and other risks, which many courts have relevant precedent cases.<sup>2</sup>

➤ **The Obligations of Senior Managers beyond Labor Contracts.** As company's senior management, they should abide by not only *the Labor Law* and relevant laws and regulation but *the Company Law* as well. As a result, senior managers shall be fully aware of the obligations of *the Company Law* which mainly focuses on duty of care and duty of loyalty when performing their labor contracts.

➤ **The Termination of Labor Contracts of Senior Managers.** Pursuant to *the Company Law* regulations, the board of directors has the right to relieve senior managers from their posts unilaterally, but the dismissal of senior managers in company law is not equivalent to the termination of labor relations in the field of labor law. If the board of directors dismisses the senior managers because of the situation where the employers can unilaterally terminate the labor contracts in accordance with relevant labor laws and regulation, then after the board of directors dismisses the senior managers, the employer can terminate the labor contract with these senior managers according to law, or even though the board of directors dismisses the senior managers, the employer cannot terminate the labor contracts with them accordingly, and other posts should be arranged for them. Only if they are incompetent in the new post can the employers terminate the labor contracts with them then.

➤ **The Remuneration of Senior Managers.** As senior managers have the right to participate in the designing of the employer's remuneration plan, in order to avoid moral hazards, *the Company Law* regulates that the remuneration of the senior managers is decided by the board of director. In judicial practice, there have been many cases in which general managers have sued their employers for large sum of salary. In Shanghai, if the general manager cannot supply the corresponding decision of the board of directors, he will assume the risk of losing a lawsuit. Additionally, sometimes the regulation of the decision of the board of directors is in conflict with the regulation of the labor contract. How to handle this? If applying the regulation of *the Company Law*, the decision of the board of directors should be followed. Whilst there is specific regulation in Jiangsu Province, the term in the labor contract should prevail. Accordingly, when handling the remuneration disputes between the employer and the senior manager, local regulations should be paid attention to.

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<sup>2</sup>Many regions does not support doubling the wage, for instance, the Guiding Opinions of Hearing Labor and Personnel Disputes by the Higher People's Court and Labor and Personnel Disputes Arbitration Commission of Jiangsu Province (II) regulates that if the employer does not sign the written contract with the senior manager but is able to supply the engagement agreement to prove the rights and obligations between both sides existed and executed practically, the senior manager claims for twice the wage because of not signing written contract, the court will not support.

**Case Study: Can an Employer Terminate Labor Relations with the Employee because of the Dismissal by the Board of Directors?**

Mr. Zhang has served as the general manager of a company for 6 years. In April, 2011, Mr. Zhang was relieved from the post of general manager at the board meeting. On the following day, Mr. Zhang received the termination notice from the HR department because he no longer served as the general manager and he was required to turn over his work within one month. Mr. Zhang disagreed with the settlement and applied for arbitration at the local labor and personnel disputes arbitration commission (Hereinafter referred to as arbitration commission) two months later, claiming damages due to the illegal termination of his labor contract. After trial, the arbitration commission held that the employment termination by the company was illegal and ruled against the company by ordering it to pay damages to Mr. Zhang.

The focus of the case is Mr. Zhang's dual role, as he was both administrator and worker of the company. His employment relationship with the company should be ruled by both the regulations in *the Company Law* and the regulations in *the Labor Contract Law*. In this case, the dismissal decision by the board of director is consistent with the regulations in *the Company Law*; the second concern is to check whether the termination of the labor relation between the company and Mr. Zhang is consistent with the relevant provisions of *the Labor Contract Law*. In this case, the termination is not compliant with the aforementioned regulations, so the company must accept the consequences of illegal termination of the labor contracts. It is fortunate for the company that Mr. Zhang claimed for damages for illegal termination; if he required the company to resume labor relation, judging by the present arbitration practice, the arbitration commission would probably support this claim, which means the company should resume the labor relation with Mr. Zhang until his labor contract expires. In this scenario, the company would also be obligated to pay his salary according to the original standard.

We submit the following advice through this case: 1. Except for signing the engagement agreements from the board of directors, the employer shall sign labor contracts with senior managers; 2. When signing labor contracts with senior managers, the employer shall pay attention to the uniformity of the engagement term decided by the board of directors and the term of the labor contract; 3. The labor contract shall contain terms like the handling of the senior managers' labor relations when the engagement term is expired or they are dismissed, especially the work content, remuneration, welfare and so on with regard to the engagement expiration to avoid the incurrence of labor disputes; 4. The legality of the dismissal of the post by the board of directors pursuant to *the Company Law* is, by no means, the legal ground to

terminate the labor contract; 5. After the termination of the labor contract, if the senior manager asks to resume the labor relation, the best response is to collect evidence to prove that the execution of the labor contract is objectively impossible.

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## 中国劳动法资讯速递

二零一二年七月刊

### 高级管理人员劳动关系管理实务

自《劳动合同法》实施以来，用人单位在处理劳动关系方面日益谨慎，但在其与高级管理人员之间的劳动关系中，却常常出现管理的误区和盲区。我们现依据《公司法》、《劳动合同法》等相关法律法规的规定，结合司法实务，就设有董事会的非上市公司的高级管理人员的劳动关系的管理问题，作如下分析，以备参考。

➤ **关于高级管理人员的范围。**《公司法》规定：高级管理人员，是指公司的经理、副经理、财务负责人，上市公司董事会秘书和公司章程规定的其他人员<sup>1</sup>。而《最高人民法院关于审理劳动争议案件适用法律若干问题的解释（三）》起初的征求意见稿曾规定：《劳动合同法》第二十四条中“用人单位的高级管理人员”，是指用人单位的董事长、副董事长、总裁、总监、经理、副经理、财务负责人、上市公司董事会秘书以及用人单位章程规定的其他人员。虽然征求意见稿中关于“高级管理人员”范围的内容最终未出现在颁布实施的正式稿中，但可见，司法实践中，劳动法范畴与公司法范畴对“高级管理人员”的理解略有不同，而主流的观点还是按《公司法》的规定界定高级管理人员的范围。

➤ **关于高级管理人员劳动合同的签订。**依据《公司法》的规定，高级管理人员应由用人单位董事会聘任，并由董事会签发《聘书》或由董事会与高级管理人员签订《聘用协议》。但是《聘书》或《聘用协议》并不具有劳动合同的性质，因为董事会对外并不能代表用人单位，且《聘书》或《聘用协议》主要是确定劳动者的职务，而《劳动合同》除了涉及职务外，还有许多其它必备条款，是明确用人单位与劳动者双方权利义务约定，所以对董事会聘用的高级管理人员，用人单位必须与其签订《劳动合同》。如果只有董事会签发的《聘书》或董事会与高级管理人员签订的《聘用协议》，而没有签订《劳动合同》，用人单位可能会面临双倍工资及其他风险，对此许多法院已有相关案例<sup>2</sup>。

➤ **关于高级管理人员劳动合同外的义务。**作为公司高级管理人员，不仅受我国《劳动法》相关法律法规的约束，还受我国《公司法》的约束，因此，高级管理人员在履行《劳动合同》过程中，应充分注意到自己应该履行的《公司法》上的法定义务，这些义务主要集中在注意义务和忠诚义务。

➤ **关于高级管理人员劳动合同的解除。**依据《公司法》的规定，董事会会有权单方解除高级管理人员的职务，但是要注意公司法领域对高级管理人员的解聘，并不等同于劳动法领域对高级管理人员劳动关系的解除。如果董事会对高级管理人员的解聘是基于其存在劳动法相关法律法规中规定的用人单位可以单方面解除劳动合同的情形，则该高级管理人员被董事会解聘后，用人单位可以依法与其解除劳动合同；否则，即使高级管理人员被董事会解聘，用人单位也不能据此单方解除与其的劳动

<sup>1</sup> 有些地方对“高级管理人员”的范围也有相关规定，如《江苏省高级人民法院江苏省劳动人事争议仲裁委员会关于审理劳动人事争议案件的指导意见（二）》规定：高级管理人员的范围依据《中华人民共和国公司法》第二百一十七条第（一）项的规定予以确定。

<sup>2</sup> 有些地方对于此类情形不支持双倍工资，如《江苏省高级人民法院江苏省劳动人事争议仲裁委员会关于审理劳动人事争议案件的指导意见（二）》规定：用人单位未与其高级管理人员签订书面劳动合同，但用人单位能够提供聘任决定或聘任书，证明双方存在劳动权利义务且已实际履行的，高级管理人员以未签订书面劳动合同为由请求用人单位每月支付二倍工资的，不予支持。



合同，而是应另行为其安排其他工作岗位，如果其仍不能胜任新岗位的工作，用人单位才可解除与其的劳动合同。

► **关于高级管理人员的劳动报酬。**由于高级管理人员有权参与用人单位薪酬方案的设计，为避免高级管理人员的道德风险，《公司法》规定，高级管理人员的报酬应由董事会决定。司法实践中，已出现多起总经理状告用人单位要求高额工资的案件。在上海，总经理如果对自己的主张提不出相应的董事会决定，一般要承担败诉风险。另外，有时《董事会决议》中关于报酬的规定与《劳动合同》中关于报酬的约定相冲突，在此情况下，应该如何处理呢？若依《公司法》的规定，应以《董事会决议》为准，但江苏省却有明确规定，即“优先适用劳动合同的约定”。所以，在处理用人单位与高级管理人员报酬纠纷时应关注当地的规定。

### 案例分析：用人单位可否以董事会解聘为由解除与高级管理人员的劳动关系？

张某在某公司担任总经理已经有 6 年。2011 年 4 月，在公司董事会上，董事会决定即日起撤销张某总经理职务。次日，张某又收到公司人力资源部发出的与他解除劳动合同的通知，解除理由是“张某已不再担任公司总经理一职”，并要求他在一个月内将工作移交完毕。张某不服，两个月后向当地劳动人事争议仲裁委员会（以下简称“仲裁委员会”）提起申诉，要求公司支付违法解除劳动合同的赔偿金。仲裁委员会审理后认为，公司解除劳动合同的行为违法，裁定公司败诉，并向张某支付违法解除劳动合同的赔偿金。

本案的争议焦点是，张某既是公司的管理者，又是公司的劳动者，具有双重身份，其工作关系除适用《公司法》的相关规定外，还应考虑《劳动合同法》等相关法律法规。在本案中，董事会对张某的免职行为符合《公司法》的规定；那么第二步就要看公司解除张某的劳动关系的行为是否符合《劳动合同法》的相关规定。本案中，由于公司解除与张某的劳动关系不是基于《劳动合同法》规定的法定情形，所以公司必须承担违法解除劳动合同的后果。公司幸运的是，本案中张某提出了违法解除劳动合同赔偿金的要求；若张某要求恢复劳动关系，依据目前的仲裁实践，仲裁委员会可能会支持恢复劳动关系，那就意味着要恢复张某的劳动关系直至劳动合同期满，同时，公司还要按原约定的标准向其支付相应工资。

通过这个案例，我们向用人单位建议：1、除董事会《聘用协议》外，用人单位应该与高级管理人员签订《劳动合同》；2、用人单位在与高级管理人员签订《劳动合同》时，应该注意《劳动合同》期限与董事会决定的聘任期限相对应；3、《劳动合同》应对高级管理人员任期届满或解聘后的劳动关系如何处理作出约定，特别是针对在任前后工作内容、劳动报酬、福利待遇等条款作出特别约定，以避免劳动争议的产生；4、董事会根据《公司法》解除高级管理人员职务的合法行为，不能当然成为解除《劳动合同》的依据；5、解除《劳动合同》后，如果高级管理人员要求恢复劳动关系，最好的应对方法就是收集证据，以证明客观上“劳动合同已经不能继续履行”。

本资讯速递系大成劳动法团队撰拟，责任编辑：周军、徐智强、孔琪、张根旺、高海燕、单训平、和孙颖。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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## 劳动法团队简介

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### LABOUR LAW TEAM INTRODUCTION

大成劳动法团队拥有多名毕业于著名学府的资深律师，自建年以来，劳动法团队在劳动法业务领域积累了广泛的实务经验，包括：协助客户制订与员工相关的各类规章制度及各类协议，为客户提供改制及并购中的员工解决方案、企业裁员方案、劳务派遣方案、高管人员用工方案等，并代表客户参与劳资谈判，协助客户解决群体性纠纷，代表客户处理各类劳动仲裁及诉讼。团队已为包括世界 500 强及中国 500 强在内的许多企业提供了优质服务，被公认为业内之翘楚。

Dacheng labor law team is constituted of several senior lawyers who graduated from prestigious universities in China. Since Dacheng Law Offices founded, our team has accumulated vast practical experience in labor law services including giving assistance to clients to draft all types of agreements and rules with employees, providing placement solution to structure reform and merger & acquisitions, layoffs plans, labor dispatching plans, senior executives staffing and so on. We also participate in collective bargaining on behalf of clients, help resolve collective disputes, represent clients in all kinds of labor arbitrations and litigations. The team has offered professional and dedicated services to its clients who include Fortune 500 companies and China's top 500 enterprises.

