PRC Labor and Employment Law Newsflash

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Noteworthy Points When Formulating Internal Rules and Regulations

An impeccable system of internal rules and regulations is an important means of standard management for employers, also providing strong support and guarantee towards the healthy development of employers. On the contrary, a faulty one will become the blasting fuse of the ceaseless labor disputes of employers and even become the main cause in cases where the employers lost. Therefore, this newsletter is going to briefly introduce several points deserving attention when designing the internal rules and regulations by the employers for your reference.

1. Who has the right to formulate the internal rules and regulations?

Per the regulation of *the Employment Contract Law of PRC*, the making subject is the employer, though many departments (for instance, HR department, sales department, manufacture department, etc.) also take part in the process or some of them actually make some of the rules, they cannot promulgate these rules or regulations in the name of themselves. In order to avoid the risk of voidance, the rules or regulations will be promulgated in the name of the employers at last, which will ensure the unity and authority of the rules and regulations within the corporation.

2. How to go through the democratic procedures?

A. *The Employment Contract Law of PRC* regulates: when an employer formulates, revises or decides on rules and regulations, or material matters, that have a direct bearing on the immediate interests of its workers, the same shall be discussed by the employee representative congress or all the employees. The employee representative congress or all the employees, as the case may be, shall put forward a proposal and comments, whereupon the matter shall be determined through consultations with the labor union or employee representatives conducted on a basis of equality. Therefore, we contend that only the rules and regulations that have a direct bearing on the immediate interests of its workers shall go through the democratic procedures while rules concerning process such as the financial management system, company seal management, etc. do not need the democratic procedures.

B. Considering the high cost of establishing a trade union and the lack of maneuverability through all employee discussion, the employer could set up the employee representative congress. There is no specific law in regard to selecting employee representative, so the employer could tactically use the representative ratio, selection measures, voting procedures, etc. to establish an employee representative congress in favor of the employer.

C. When carrying out the democratic procedures, the employers shall preserve the evidences of discussion and negotiation process.

D. The internal rules and regulations which have passed the democratic procedures in the previous time will be binding on employees on board afterwards only if these said rules and regulations remain the same.

3. How to effectively fix the evidence of public announcement?

Pursuant to Article 19 of *the Supreme People's Court's Interpretation on Labor Dispute Trials*, the labor rules and regulations, formulated by an employer through democratic procedures in compliance with the laws, regulations and policies of the state and made public to the employees, can be used as trial grounds for the people's court. Hence, the employers shall have evidences to prove that the employees have known these rules and regulations. We suggest not using the following ways to publicize: 1. putting on the website; 2. via email; 3. posting on the notice board, because it is hard to preserve evidences by using these ways.

4. How to ensure the legal effect of the internal rules and regulations?

A. The content must be legitimate and mustn't go against the prohibitive provisions of law. For example, the penalty regulation of some employers is illegal, because *the Regulation concerning Rewards and Disciplinary Sanctions of Company Employees* has been abolished. The employer has lost the ground for penalty. If the employer fines an employee, it will violate Article 13 of the Constitution concerning the "the lawful private properties of citizens shall not be encroached upon."

B. The content should be reasonable. When concerning issues like "degree" and "quantity", the principles of fair and reasonable must be observed, namely in accordance with the normal criteria of the average person.

C. The content shall not be in conflict with the employment contract and other agreements. Pursuant to Article 16 of *the Supreme People's Court's Interpretation on Labor Dispute Trials II*: "If the internal rules and regulations made by the employers are inconsistent with the contents of the collective contracts or the employment contracts, the employees require that the agreement shall prevail and the people's court shall uphold."

Case Study: Internal Rules and Regulations Shall Define Vague Concepts.

Mr. Li caused a damage of ten thousand to the company due to his delinquency and the company believed his behavior has fitted the regulation of *the Employment Contract Law of PRC* in regard to "committing serious dereliction of duty or practices graft, causing substantial damage to the employer", so the company terminated his employment contract. Mr. Li received the notice of termination, unsatisfied and applied labor arbitration to the arbitration commission, claiming that the company failed to specify the sum of extensive damage. The loss he caused did belong to such damage. Finally, the commission ruled in favor of Mr. Li.

Lawyers of our team are in the opinion that: when it comes to the vague concepts like "not to satisfy the conditions for employment", "incompetent of his position", "major change in the

objective circumstances", "serious dereliction of duty" and "severe violation of discipline", the employer must specify and detail by internal rules and regulations, or it equals that the employer delivers the right to judge to the adjudicatory agency, leading the lack of prediction on the consequences of employer's own behaviors and causing the loss of maneuverability of the internal rules and regulations.

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中国劳动法资讯速递
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制定规章制度应注意的问题

完善的规章制度是用人单位规范化管理的重要手段，为用人单位的健康发展提供了有力的支持和保障，而不完善的规章制度则会成为用人单位劳动争议不断的导火索，甚至成为用人单位在劳动争议案件中败诉的主要原因，为此，本期速递将简要介绍用人单位在制定规章制度的过程中应注意的几个问题，以供大家参考。

一、 谁有权制定规章制度？

依据《劳动合同法》的规定，制定主体是用人单位，虽然用人单位的许多机构（比如用人单位的人力资源部、销售部、生产部等）参与了规章制度的制定或者规章制度就是这些机构制定的，但这些机构不能以自己的名义发布，为防止规章制度的效力风险，最终都要以用人单位的名义发布，这样才能保证所制定的规章制度在本单位范围内具有统一性和权威性。

二、 如何履行民主程序？

1. 《劳动合同法》规定，用人单位在制定、修改或者决定直接涉及劳动者切身利益的规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定。据此，我们认为，只有直接涉及劳动者切身利益的规章制度才需要经过民主程序，诸如财务管理制度、印章管理制度等流程性制度无需经过民主程序。
2. 鉴于建立工会成本较高，全体职工参与讨论又缺乏操作性，所以企业可以建立职工代表大会，由于法律对职工代表的产生没有明确规定，因此，用人单位可以巧用代表比例、选举方式、表决程序等建立有利于用人单位的职工代表大会。
3. 用人单位在履行民主程序时，要保留讨论过程、协商过程的证据。
4. 前期已经过民主程序规章制度，只要没有改动，对后期入职的员工仍然具有约束力。

三、 如何有效地固定公示证据？

《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》第 19 条规定，只有向员工公示或告知的规章制度，才能作为法院的判决依据，所以用人单位必须要有证据证明员工已经知道了这样的规章制度。我们建议不要采用（1）网站公布；（2）电子邮件告知；（3）公告栏、宣传栏张贴等不易举证的公示方法。

四、 如何确保规章制度具有法律效力？

1. 内容要合法，不能与法律禁止性规定抵触。比如，许多用人单位规定的罚款制度就是违法的， 因为《企业职工奖惩条例》已经废止，所以用人单位失去了罚款的依据，如果用人单位再罚款就违反了《宪法》第 13 条关于“公民的合法的私有财产不受侵犯”的规定。
2. 内容要合理，涉及“度”“量”等问题时，应遵循公平合理原则，符合一般人的正常评判标准。
3. 内容不能与劳动合同、其他协议约定内容发生抵触，因为《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（二）》第 16 条规定：“用人单位制定的内部规章制度与集体合同或者劳动合同约定的内容不一致，劳动者请求优先适用合同约定的，人民法院应予支持。”

案例分析：规章制度应对模糊概念进行界定。

某公司员工李某因工作失职给公司造成 1 万余元的损失，公司认为李某的行为已符合《劳动合同法》关于“严重失职，营私舞弊，给用人单位造成重大损害的”的规定，于是对其作出解除劳动合同的处理。李某接到《解除合同通知书》后不服，向仲裁委提出申诉，认为公司没有明确“重大损害”的数额，自己造成的损失并不属于重大损害。结果仲裁委员会支持了李某的主张。

本团队律师认为：对于“不符合录用条件”、“不胜任工作”、“客观情况发生变化”、“严重失职”、“严重违纪”等模糊概念用人单位必须通过规章制度加以明确细化，否则就相当于用人单位把对员工行为的判断权交给了裁判机构，使得用人单位对自己行为的后果缺乏预见性，从而使规章制度失去可操作性。

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