



## PRC Labor and Employment Law Newsflash

November, 2014

### How to Recognize the Validity of Non-Compete Clause When Economic Compensation Standard Is Not Clearly Agreed?

In practice, employers and employees often have terms regarding non-compete obligation agreed in the employment contract or in the confidentiality agreement. Well, employers and employees sometimes do not agree upon the economic compensation standard of the non-compete obligation. Under this circumstance, the validity of the non-compete clause will directly impact the vital interests of employers and employees. Hence, the Employment Law and Human Resource Committee of Dacheng Law Offices summarize and discuss the latest judicial interpretations and relevant regulations of Beijing, Shanghai, Guangdong and Jiangsu regarding this issue for your reference.

#### **1. The latest judicial interpretation in principle recognizes the validity of non-compete clause when economic compensation standard is not clearly agreed.**

Article 6 of the *Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (IV)* regulates: 'where an employer and an employee have agreed upon a non-compete clause in the employment contract or confidentiality agreement, but have not agreed upon the payment of economic compensation to the employee in the event of the rescission or termination of the employment contract, the relevant people's court shall uphold the employee's request for monthly payment of economic compensation by the employer according to 30% of the employee's average salary over the twelve-month period preceding the rescission or termination of the employment contract if the employee has fulfilled the obligations under the non-compete clause. If the amount of 30% of the average monthly salary as prescribed in the preceding paragraph is lower than the minimum wage standard applicable in the place where the employment contract is performed, the said minimum wage standard shall prevail.'

Pursuant to this Article, if the employee has fulfilled the obligations under the non-compete clause when an employer and an employee have not agreed upon the payment of economic compensation to the employee, the court shall recognize the validity of non-compete clause. The employer should pay the economic compensation according to 30% of the employee's average salary over the twelve-month period preceding the rescission or termination of the employment contract, and the payment of economic compensation should not be lower than the minimum wage standard applicable in the place where the employment contract is performed.

**2. In Beijing and Shanghai, the non-compete clause is valid even when the economic compensation standard is not clearly agreed. Employers and employee could negotiate the specific amount.**

Article 39 of the *Minutes of the Seminar Held by Beijing High People's Court and Beijing Labor Dispute Arbitration Commission Concerning the Application of Law to Cases of Labor Disputes* regulates: 'where an employer and its employee have agreed upon a non-compete clause in the employment contract or confidentiality agreement but have failed to agree upon the detailed payment or the standard of compensation payment, the non-compete clause shall not be held invalid. The parties may negotiate the specific amount. If the negotiation fails, 20% to 60% of the annual salary of the employee during the last year preceding the rescission or termination of the employment relationship shall be paid as the amount of the compensation.'

Article 13 of *Shanghai Higher People's Court's Opinions on Several Issues Concerning the Application of the Employment Contract Law* regulates: 'where an employer and its employee have agreed upon a non-compete clause but have failed to agree upon the payment of economic compensation, or have agreed upon the payment of economic compensation but failed to agree upon the standard of economic compensation, the non-compete clause is still binding upon the parties on the grounds of expressed agreement on the non-compete clause by both parties. Where the standard of economic compensation is not clear, the parties could continue to negotiate the standard; where the negotiation fails, 20% to 50% of the employee's normal salary shall be paid by the employer.'

In accordance with these aforementioned regulations, in Beijing and Shanghai, where the compensation standard is not clearly agreed in the non-compete clause, the non-compete clause is still valid and binding upon both parties to the employment contract. The amount of the compensation payment can be determined through negotiation. Where the negotiation fails, the range of the payment standard has been stipulated.

**3. In Guangdong, under certain circumstances, the non-compete clause is invalid when the economic compensation standard is not clearly agreed.**

Article 26 of the *Opinions of Guangdong Higher People's Court and Guangdong Labor Dispute Arbitration Commission on Several Issues Concerning the Application of the Labor Dispute Mediation and Arbitration Law and the Employment Contract Law* regulates: 'Where an employer and its employee have agreed upon a non-compete clause, the employer shall pay economic compensation to the employee during the non-compete period as the law requires. If the employer fails to pay the economic compensation as agreed, the employee may require the employer to fulfill the non-compete agreement. If the employer fails to make any commitment to pay the employee economic compensation upon the completion of the work handover, the non-compete clause is not binding upon the employee.'

Per this regulation, in Guangdong, when the standard of economic compensation is not clearly agreed in the non-compete clause, the employee has the right to require the employer to fulfill the non-compete agreement and make a commitment. When the work handover is completed and the employer still has not made a commitment to pay the economic compensation to the employee, the non-compete clause shall not be binding upon the employee.

#### **4. In Jiangsu, the non-compete clause is invalid when the economic compensation standard is not clearly agreed.**

Article 13 of *the Guiding Opinions of Jiangsu Higher People's Court and Jiangsu Labor Dispute Arbitration Commission on Labor Dispute Trials* regulates: 'The employer and the employee agree upon the non-compete clause, but fail to agree upon the economic compensation, or agree upon the economic compensation payment but the employer fails to pay the agreed economic compensation, the non-compete clause shall not be binding upon the employee.'

Per this rule, in Jiangsu, when the standard of economic compensation is not clearly agreed, the non-compete clause is invalid, and the clause shall not be binding upon the employee who bears the non-compete obligation.

#### **Case Study: Can Court Rule Non-compete Clause Invalid when Economic Compensation Is Not Clearly Agreed?**

In May 2009, Wang was hired by a technology company in Jiangsu, serving as the chief technology officer. Because of the particularity of the position, Wang and the company signed a confidentiality and non-compete agreement. In May 2012, Wang left the company and was hired by an internet company in Jiangsu which had a competitive relationship with the technology company. Hence, the technology company brought a lawsuit against Wang for Wang's violation of the non-compete obligation, requiring Wang to bear the liability for the breach of the contract.

After hearing the case, the court found that the standard of economic compensation was not clearly agreed in the confidentiality and non-compete agreement. The technology company paid Wang three months' basic salary as the economic compensation for non-compete when Wang left the company. Therefore, the court held that the employer and the employee should not only agree upon the non-compete clause, but should agree upon the payment of economic compensation for non-compete after the termination or expiration of the employment contract as well. The non-compete clause was invalid if the economic compensation of non-compete was not agreed or the compensation amount itself was too low to meet the requirement of the law. In this case, Wang and the technology company failed to agree upon the payment or the standard of the economic compensation in the confidentiality and non-compete agreement and the technology company only paid Wang three months' basic salary as the economic compensation for non-compete, which was still lower than the standard stipulated in *the Regulations on Employment Contract of Jiangsu Province*.

As a result, the non-compete clause in the confidentiality and non-compete agreement shall not be binding upon Wang. Even though Wang's behavior that Wang worked at the internet company after leaving the technology company violated the non-compete obligation, Wang shall not bear the liability of the breach of the contract. The claim of requiring Wang to pay liquidated damages, namely two times of the actual economic compensation Wang received from the technology company was not upheld by the court. Both sides did not appeal at a higher court and the judgment went into effect.

We are in the opinion the unity of opposites exist in rights and obligations. When the employers and employees sign a non-compete agreement, they should agree upon the standard of economic compensation for non-compete under fair and reasonable conditions and safeguard their legitimate rights and interests in compliance with the law.

*If you have any inquiries regarding the PRC employment law matters, please contact us at [hrlaw@dachenglaw.com](mailto:hrlaw@dachenglaw.com).*

Disclaimer: this newsflash is prepared by the Employment Law and Human Resource Committee of Dacheng Law Offices, which is for informational purposes only and does not constitute legal advice. Readers should contact us for legal advice on any particular issue. Entire content copyright is owned by the Committee. Reproduction and distribution of this newsflash in whole or in part without the written permission of the Committee is expressly prohibited.

Dacheng Law Offices  
24/F, Shanghai World Financial Center  
100 Century Avenue, Shanghai 200120, P. R. China  
Tel: 86-21-5878 5888  
Fax: 86-21-2028 3853  
[www.dachenglaw.com](http://www.dachenglaw.com)



中国劳动法资讯速递

二零一四年十一月刊

## 经济补偿支付标准约定不明，竞业限制条款的效力如何认定？

实践中，用人单位与劳动者之间签署劳动合同或保密协议时常约定竞业限制义务，但往往对竞业限制经济补偿的支付标准约定不明，此时竞业限制条款效力的认定，直接影响用人单位与劳动者的切身利益。为此，大成劳动法与人力资源管理专业委员会就此问题结合最新司法解释及北京、上海、广东、江苏等地区的相关规定进行了探讨和总结，供大家参考。

### 一、最新司法解释通过确定经济补偿的支付标准原则上肯定了约定不明时竞业限制协议的效力

《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（四）》第6条规定：“当事人在劳动合同或者保密协议中约定了竞业限制，但未约定解除或者终止劳动合同后给予劳动者经济补偿，劳动者履行了竞业限制义务，要求用人单位按照劳动者在劳动合同解除或者终止前十二个月平均工资的30%按月支付经济补偿的，人民法院应予支持。前款规定的月平均工资的30%低于劳动合同履行地最低工资标准的，按照劳动合同履行地最低工资标准支付。”

根据该规定，竞业限制条款对经济补偿的支付标准未有明确约定的，在劳动者履行了竞业限制义务的情形下，人民法院认定竞业限制条款有效，用人单位需按照劳动者离职前十二个月平均工资的30%支付相应的经济补偿，且该标准不得低于劳动合同履行地最低工资标准。

### 二、北京、上海地区认为竞业限制经济补偿金给付标准约定不明时竞业限制条款具有法律效力，具体金额可通过双方协商予以补救。

北京市高级人民法院、北京市劳动争议仲裁委员会《关于劳动争议案件法律适用问题研讨会会议纪要》第39条规定：“用人单位与劳动者在劳动合同或保密协议中约定了竞业限制条款，但未就补偿费的给付或具体给付标准进行约定，不应据此认定竞业限制条款无效，双方可以通过协商予以补救，经协商不能达成一致的，可按照双方劳动关系终止前最后一个年度劳动者工资的20%—60%支付补偿费。”

上海市高级人民法院《关于适用〈劳动合同法〉若干问题的意见》第13条规定“劳动合同当事人仅约定劳动者应当履行竞业限制义务，但未约定是否向劳动者支付补偿金，或者虽约定向劳动者支付补偿金但未明确约定具体支付标准的，基于当事人就竞业限制有一致的意思表示，可以认为竞业限制条款对双方仍有约束力。补偿金数额不明的，双方可以继续就补偿金的标准进行协商；协商不能达成一致的，用人单位应当按照劳动者此前正常工资的20-50%支付。”

根据前述规定，在北京、上海地区，对竞业限制条款中未明确约定经济补偿金给付标准的，竞业限制条款有效，对劳动合同双方当事人仍有约束力。至于经济补偿金额的确定，可通过协商解决的方式予以补救，协商不能达成一致的，亦划定了支付标准的区间范围。

### **三、 广东地区认为竞业限制经济补偿给付标准约定不明时，在一定条件下，竞业限制条款不具有法律效力**

广东省高级人民法院、广东省劳动争议仲裁委员会《关于适用〈劳动争议调解仲裁法〉、〈劳动合同法〉若干问题的指导意见》第 26 条“用人单位与劳动者约定竞业限制的，应当在竞业限制期限内依法给予劳动者经济补偿，用人单位未按约定支付经济补偿的，劳动者可要求用人单位履行竞业限制协议。至工作交接完成时，用人单位尚未承诺给予劳动者经济补偿的，竞业限制条款对劳动者不具有约束力。”

根据前述规定，在广东地区，竞业限制条款中未明确约定经济补偿金支付标准的，劳动者有权要求用人单位履行竞业限制协议并做出承诺。工作交接完成时，用人单位尚未承诺给予劳动者经济补偿的，竞业限制条款对劳动者不具有约束力。

### **四、 江苏地区认为竞业限制经济补偿金给付标准约定不明时，竞业限制条款不具有法律效力**

江苏省高级人民法院、江苏省劳动争议仲裁委员会《关于审理劳动争议案件的指导意见》第 13 条“用人单位与劳动者约定了竞业限制条款但未约定经济补偿，或者约定了经济补偿但未按约定支付的，该竞业限制条款对劳动者不具有法律约束力。”

根据前述规定，江苏地区对竞业限制条款中未明确约定经济补偿金支付标准的，认为竞业限制条款无效，对负有竞业限制义务的劳动者不具有法律约束力。

## 案例分析：竞业限制条款未约定经济补偿，法院判决认定该条款对劳动者不具有法律约束力

2009 年 5 月，王某应聘至江苏某科技公司，担任技术主管一职。因该职位特殊性，王某与科技公司签署了《保密及竞业限制协议》。2012 年 5 月，王某离开科技公司，并于当年 10 月应聘至与科技公司存在竞争关系的江苏某网络公司。为此，科技公司以王某违反竞业禁止义务为由诉至法院，要求王某承担违约责任。

法院经审理查明：王某与科技公司签订的《保密及竞业限制协议》未对补偿金的给付或具体给付标准进行约定。在王某离职时，科技公司向王某支付了其三个月的基本工资作为竞业限制经济补偿金。因此，法院认为用人单位与劳动者约定竞业限制义务的同时，还应约定在双方解除或终止劳动合同后，由用人单位给予劳动者一定的竞业限制经济补偿。没有约定竞业限制经济补偿或者补偿数额过低，不符合规定的，竞业限制协议没有法律约束力。本案中王某与科技公司签订的《保密及竞业限制协议》未对补偿金的给付或具体给付标准进行约定，且科技公司实际支付给王某的竞业限制经济补偿金也仅是王某三个月的基本工资，仍低于《江苏省劳动合同条例》规定的标准。

因此可以认定，涉案《保密及竞业限制协议》中竞业限制条款对王某不具有约束力。即使王某从科技公司离职后又到网络公司工作的行为违反了竞业限制义务，王某亦不应承担违约责任。科技公司要求王某按照实际领取的竞业限制补偿金的二倍支付违约金的诉求不能成立，依法不予支持。判决后，双方均为上诉，该判决已生效。

我们认为，权利和义务是对立统一的。用人单位在与劳动者签署竞业限制协议时，应当公平、合理地明确约定竞业限制经济补偿的支付标准，依法维护自身的合法权益。

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 [hrlaw@dachenglaw.com](mailto:hrlaw@dachenglaw.com) 联系我们。

声明：本资讯速递仅供参考，并不构成法律意见。读者如有任何具体问题应及时联系本委员会以征询适当的法律意见。本资讯速递所有内容均由大成劳动法与人力资源管理专业委员会创作、编辑、翻译或整理，本委员会对该等内容享有著作权。未经本委员会书面明示同意，任何个人或实体不得转载或以任何其他方式使用本资讯速递内容之任何部分，否则本委员会将追究其法律责任。

大成律师事务所  
上海市世纪大道 100 号环球金融中心 24 层（200120）  
电话：86-21-5878 5888  
传真：86-21-2028 3853  
[www.dachenglaw.com](http://www.dachenglaw.com)