PRC Labor and Employment Law Newsflash

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How to lawfully Adjust Employees' Post or Salary Unilaterally by Employers?

Unilateral adjustment of post or salary is the most likely situation where a labor dispute may arise. It involves the balance between employers' right to recruitment and employees' right to employment. Hence, the Employment Law and Human Resource Committee of Dacheng Law Offices summarizes the main practices regarding this difficult issue for your reference.

1. Circumstances stipulated by law where employers are entitled to adjust employee' post or salary

Article 35 of *the Employment Contract Law of PRC* regulates: 'an employer and an employee may amend the provisions of their employment contract if they so agree after consultations. ' This regulation means that consultation is one way to amend the employment contract, but it does not exclude an employer's right to revise the employment contract unilaterally. On the contrary, Item one and Item two of Article 40 of *the Employment Contract Law of PRC* not only grant an employer the right to terminate the employment relationship with an employee who does not violate the internal rules or regulations of the employer but grant an employer the right to adjust the post of an employee unilaterally under the circumstances where the employee's medical treatment period expires or the employee is not competent to his job. While pursuant to Item three of Article 40 of *the Employment Contract Law of PRC* and *the Reply regarding Relevant Questions of Disputes due to Post Adjustment between Employees and Employers issued by the General Office of Ministry of Labor*, when a major change in the objective circumstances relied upon at the time of conclusion of the employment contract renders it unperformable, if the employers put forward the offer of post or salary adjustment, the employee should either take the offer

or accept the termination. Employers, in fact, have the right to unilaterally adjust the employees' posts or salaries.

2. Circumstances recognized by law where employers are entitled to adjust employee' post or salary indirectly by the lawful internal rules or regulation formulated by the employers

Item one of Article 4 of *the Employment Contract Law of PRC* regulates that employers shall establish and improve internal rules and regulations, so as to ensure that employees enjoy their labor rights and perform their labor obligations. Besides, Item two of Article 4 of *the Employment Contract Law of PRC* regulates that the internal rules and regulations cover matters, that have a direct bearing on the immediate interests of employees, such as those concerning labor compensation, work hours, rest, leave, work safety and hygiene, insurance, benefits, employee training, work discipline or work quota management. The post and salary of employees are of course within the scope. Considering this, the evaluation of the legality concerning the unilateral adjustment of employees' post or salary by employers conducted by the judicial authority will focus on whether the employers' internal rules and regulations are lawful, whether these internal rules and regulations are passed through democratic procedures, violate laws, administrative regulations or policies, and are publicly displayed to the employees.

3. The latest judicial interpretation lowers the strictness of the regulation of Article 35 of *the Employment Contract Law of PRC* that amendments to an employment contract shall be made in writing. As a result, this leads the legalization of the unilateral adjustment of post or salary for some employees who could not prove their clear objection.

Article 11 of *the Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (IV)* regulates that amendments to an employment contract not made in writing, namely made in verbal and the amendments do not go against with the law, administrative regulation, state policies and pubic order and good customs and have been performed for over a month. If the party involved claims that the orally amended employment contract is invalid due to the lack of written form, the People's court shall not uphold. It may mean that if employers unilaterally adjust

employees' post or salary and the amended employment contracts which do not go against with the law, administrative regulation, state policies and pubic order and good customs and have been performed for over a month, without opposite evidence to prove that employees have rejected the adjustment, employers' unilateral adjustment of post or salary will become legitimate due to employees' failure to provide evidence.

4. Of course, employers' right to recruitment which includes the unilateral adjustment of post or salary shall be subject to the law and is likely to receive the judicial review on reasonability.

Article 5 of *Special Provisions on Labor Protection of Female Workers* regulates that employers shall not reduce the wages of female workers, dismiss female workers or rescind the labor or employment contracts with female workers when the female workers are pregnant, give birth or breast-feed their babies. As for the female workers who are pregnant, give birth or breast-feed their babies, employers can adjust their post but cannot lower their salary. Besides, although Article 11 of *the Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (IV)* gives convenience to employers, it puts forward the review requirement that the amended employment contract shall not go against with the law, administrative regulation, state policies and pubic order and good customs. That is to say, the judicial authority will not only review the legality of unilateral adjustment of post or salary but will review the reasonability of that as well. Hence, there are some local trial practices. For example, Article 22 of *the Directive Opinion about Several Issues regarding the Application of Employment Contract Law of PRC and Labor Dispute Mediation and Arbitration Law of PRC Issued by Guangdong Supreme People's Court and Guangdong Provincial Labor Dispute Arbitration Commission* in 2012 stipulates that employers adjusting the employees' post would be viewed as the act that employers are exercising the autonomous right of recruitment legally if the circumstances below would be followed at the same time, if the employees request to rescind the employment contract and ask the employers to pay economic compensation using the reason that employers' post adjustment is without permission, the court shall not uphold:(1) post adjustment is out of the need of employers' production and operation; (2) employees' salary of new post is evenly matched to salary of their former ones; (3) post adjustment is not used for insult or punishment; (4) there

are no other circumstances that would violate laws or regulations. Item three of Article 6 of *Answers to Several Questions regarding Labor Dispute Case Trial Issued by Shanghai Supreme Court* specifies that if the employment contract has stipulated the relative conditions of post and salary adjustment, both parties can follow those articles. Although there is agreement in the employment contract and the adjustment conditions and directions are not clear, employers should provide sufficient evidence to prove the reasonability of adjustment. Otherwise, employees could request employers to revoke the decision of adjustment.

Case Study: Cautiously Handling Post Adjustment though Employee fails to Pass Year-end Evaluation but Rejects

In November 2010, a worker found a job at a company, working at the post A. As the worker's year-end evaluation of 2012 was just competent, the company decided not to grant him the year-end bonus and to adjust his post to post B. The worker refused to work at the post B and the company unilaterally terminated his employment relationship pursuant to the company's internal rules and regulations: refusing to obey reasonable post adjustment should be deemed as absent from work for three days.

The worker then applied for labor arbitration, claiming the company to pay the year-end bonus of 2012 and economic compensation for illegal termination. The arbitration commission rejected his claim of year-end bonus but upheld his claim of economic compensation. The company dissatisfied with the award and sued at the court. The court held that when the company adjusted the employee's post according to his working performance but could not reach an agreement with the employee, the company shall positively communicate and negotiate with the employees to reach an agreement upon post adjustment, work suspension or termination of the employment contract. However, when the employee expressively rejected the post adjustment and the company did not put forward evidence to prove that it had notified the employee to work at the new post within specific time limit, the unilateral termination on the ground 'refusing to obey reasonable post adjustment should be deemed as absent from work for three days' was clearly not appropriate. Hence, the court ruled that the company lost the lawsuit. The company appealed, and both parties reached settlement in the second instance.

Our Committee is in the opinion that the ruling of the court in the first instance is not appropriate. Employers' unilateral adjustment of employees' post according to effective internal rules and regulation and employees' working performance belongs to the employers' right to recruitment. The court's request

of further communication and negotiation by the company when the employees expressively reject reasonable post adjustment does not have legal grounds. While, as the labor law adopts the tendency of protecting the employees, from the perspective of lowering the legal risks of employers, employers shall formulate effective internal rules and regulations to prove the legality of post adjustment on the one hand. On the other hand, employers shall be cautious when the employees expressively reject the post adjustment by offering reasonable waiting period for employees. If the employees still refuse reasonable adjustment when the waiting period expires, the employer may terminate the employment contract on the ground of material violation of the internal rules and regulations of the employers, which may be recognized by judicial authority more easily.

If you have any inquiries regarding the PRC employment law matters, please contact us at laborlaw@dachenglaw.com.

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中国劳动法资讯速递
二零一四年十月刊

用人单位如何合法地单方调岗调薪？

单方调岗调薪是最易引发劳动争议的情形之一，它涉及用人单位自主用工权和劳动者就业权的平衡。为此，大成劳动法与人力资源管理专业委员会就如何合法单方调岗调薪这道摆在诸多企业面前的实务难题进行了探讨和总结，供大家参考。

一、法律直接认可用人单位有权依法单方调岗调薪

《劳动合同法》第 35 条“用人单位与劳动者协商一致，可以变更劳动合同约定的内容。”该规定系将协商作为变更劳动合同的方式之一，并未排除用人单位单方变更劳动合同的权利。恰恰相反，《劳动合同法》第 40 条第一项、第二项之规定既赋予了用人单位非过失性辞退劳动者的权利，也同时赋予了用人单位在劳动者医疗期满不能从事原工作、不能胜任工作时单方变更劳动者岗位的权利。而根据《劳动合同法》第 40 条第三项及《劳动部办公厅关于职工因岗位变更与企业发生争议等有关问题的复函》之规定，劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行时，如用人单位提出调岗调薪的要约，劳动者要么接受调岗调薪，要么接受辞退，用人单位实际拥有了单方调岗调薪的权利。

二、法律通过认可用人单位制定的合法有效的劳动规章制度间接赋予了用人单位根据规章制度单方变更劳动者的岗位的权利

《劳动合同法》第 4 条第 1 款规定，用人单位应当依法建立和完善劳动规章制度，保障劳动者享有劳动权利、履行劳动义务。而根据《劳动合同法》第 4 条第 2 款之规定，劳动规章制度涵盖劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利、职工培训、劳动纪律以及劳动定额管理等直接涉及劳动者切身利益的事项，劳动者的岗位和薪酬自然也包含在内。在此种情形下，司法机关对用人单位单方调岗调薪是否合法的认定将很大程度上转化为审查用人单位的规章制度是否合法有效，即是否经过民主程序、是否违反法律、行政法规及政策规定，是否向劳动者公示。

三、最新司法解释降低了《劳动合同法》第 35 条所规定的“变更劳动合同，应当采用书面形式”的刚性，客观上也将部分劳动者无法证明其明确表示反对的单方调岗调薪合法化

《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 11 条规定，“变更劳动合同未采用书面形式，但已经实际履行了口头变更的劳动合同超过一个月，且变更后的劳动合同内容不违反法律、行政法规、国家政策以及公序良俗，当事人以未采用书面形式为由主张劳动合同变更无效的，人民法院不予支持。”这就很有可能意味着，若用人单位单方调岗调薪，变更后的劳动合同实际履行超过一个月、且变更后不违反法律、行政法规、国家政策以及公序良俗，如果劳动者没有相反证据证明其对用人单位单方调岗调薪的行为提出异议，用人单位的单方调岗调薪将因为劳动者无法承担举证责任而归于合法。

四、当然，包括单方调岗调薪在内的用人单位的自主用工权也在法律的限制之内，且很有可能需要接受司法机构的合理性审查

《女职工劳动保护特别规定》第 5 条规定，用人单位不得因女职工怀孕、生育、哺乳降低其工资、予以辞退、与其解除劳动或者聘用合同。因此，对于“三期”女职工，用人单位可以调岗，但不能降薪。另外，《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 11 条在给予用人单位便利的同时，也对变更后的劳动合同提出了“不违反法律、行政法规、国家政策以及公序良俗”的审查要求，即司法机关对于用人单位的单方调岗调薪除了合法性审查之外，还会进行合理性审查。为此，不少地方还规定了具体的审理口径。如,2012 年《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 22 条便规定：“用人单位调整劳动者工作岗位，同时符合以下情形的，视为用人单位合法行使用工自主权，劳动者以用人单位擅自调整其工作岗位为由要求解除劳动合同并请求用人单位支付经济补偿的，不予支持：（一）调整劳动者工作岗位是用人单位生产经营的需要；（二）调整工作岗位后劳动者的工资水平与原岗位基本相当；（三）不具有侮辱性和惩罚性；（四）无其他违反法律法规的情形。”《上海市高级人民法院关于审理劳动争议案件若干问题的解答（2006）》第 6 条第三款规定：“劳动合同中明确约定调岗调薪的有关条件，当事人可按约定履行。如果劳动合同中虽有约定，但调整的条件和指向不明确的，用人单位应当提供充分证据证明调整的合理性；若不能证明合理性的，劳动者可以要求撤销用人单位的调整决定”。

案例分析:员工不符合年终绩效考核可调岗，但员工拒不服从时须慎处

2010 年 11 月，某员工应聘至某公司，担任 A 岗位。因该员工 2012 年年终考核为基本称职，某公司决定根据考核制度不发放 2012 年度年终奖，并决定将其调整至 B 岗位。该员工拒绝到 B 岗位工作，某公司遂根据“拒不服从工作合理调动视为旷工三天”的规章制度单方解除劳动合同。

该员工于是申请劳动仲裁，要求某公司支付 2012 年度年终奖和解除劳动合同赔偿金。仲裁驳回了该员工支付年终奖的请求，但要求某公司支付赔偿金。某公司不服，向法院起诉，法院认为，“公司根据员工的工作表现对其进行调整，在未能与员工就调岗达成一致的情况下，应积极与员工进一步沟通和协商，就调岗、待岗或者解除劳动合同等处理方式达成一致。但在员工明确表示拒绝调岗的情况下，公司未举证证明通知员工限期到岗，即以员工不到新岗位工作视为旷工三天为由解除劳动合同，此做法明显不妥，应属违法解除”，判决某公司败诉。某公司上诉，在二审阶段双方达成调解。

我们认为，一审法院的判决不妥。用人单位基于员工表现，根据有效的考核制度单方调整员工岗位属于用人单位自主用工权范围，法院强行要求公司在员工明确拒绝合理调岗的情况下继续与员工进行进一步的沟通和协商没有法律依据。但是，由于劳动法上整体上采取有利于保护劳动者的倾向，从降低用人单位法律风险的角度出发，用人单位一方面要出台有效规章制度以证明调岗的合法性及合理性，另一方面在员工拒绝合理调岗时还是要保持适度弹性，给予员工合理的待岗期。如员工待岗期满仍然拒绝合理调岗的，用人单位再以员工严重违纪为由解除劳动合同更易获得司法机关认可。

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