PRC Labor and Employment Law Newsflash

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Electronic Evidence Management by HR

With the rapid development of computers, network techniques, office automation and paperless office, more and more parties in labor disputes supply electronic evidence such as emails, internet chat records and video materials as evidence, and in some cases, these electronic evidences form the most important and crucial evidence. Therefore, the key to success of a case is the recognition of the weight of the electronic evidence. Dacheng Labor Law Team comb and summarize many cases involving the electronic evidences we have handled and put forward the following questions and our comments for your reference:

1. Email Notarization

Article 7 of *Electronic Signature Law of the People's Republic of China* regulates: "No data messages to be used as evidence shall be rejected simply because they are generated, dispatched, received or stored by electronic, optical, magnetic or similar means." Article 11 of *Contract Law of the People's Republic of China* regulates: "Written form as used herein means any form which renders the information contained in a contract capable of being reproduced in tangible form such as a written agreement, a letter, or electronic text (including telegram, telex, facsimile, electronic data interchange and e-mail)." Hence, if the content of the email can prove the facts of a case, it can be used as evidence. On the other hand, there is a possibility of emails being amended or tampered, thus the authenticity of the email becomes the crux in deciding the effect of the evidence. Generally, in order meet the formal requirements as evidence and ensure the authenticity, we need to apply for the notarization at the notary agencies.

2. Owner of the Email Address

In a labor dispute, whether the employer or the employee uses the notarized emails as evidence, the first question confronted is how to determinate the true identity of the sender, the recipient and the person who is carbon copied. How do we decide the owner of the relevant email address? In many cases, one party in an action may deny that he or she is the owner of the email address and he or she does not send or receive emails by using that address. Therefore, proving the owner of the email address becomes the key issue.

In practice, we suggest that proving the owner can be ascertained by the following: firstly, the business card of person involved and the email address printed on it strongly indicates that this is the email address of the relevant person; secondly, the handling of other affairs with the same email address, for instance, applying for the annual leave or overtime is another strong indication of the owner of the email address. Further, from the HR management's perspective, one

cost-effective and low-risk way to prevent this issue is to specify the email address of the employee when signing the employment contract.

3. Does an email acquired by the monitoring software infringe upon the right of privacy? And can it become lawful evidence?

Article 68 of *Provisions of the Supreme People's Court on Evidence in Civil Proceedings* regulates: "Evidence obtained by encroaching on lawful rights and interests of others or by violating prohibitive provisions of the law shall not serve as the ground for ascertaining a case fact." We hold that if the email is acquired by the monitoring software without notice, it may infringe on the right of privacy or other lawful rights and interests. The emails are illegal if acquired by illegal monitoring software and shall not serve as the ground for ascertaining a case fact.

We suggest, from the angle of HR management, if relevant emails and network activities need to be monitored, it would be better to be explicitly stipulated in the employee handbook or other internal rules or regulations to standardize the employee's behaviors of network using by informing the employees that the company will monitor and check relevant log records of network activities and the disclosure of information via the company network by the employees will not be deemed as personal information, thus not infringing on their personal privacy.

Case Study: Termination of a Senior Manager due to Serious Discipline Violation by Using Emails as Evidence

In September, 2010, a foreign guarantee company (hereinafter referred to as the company) hired Mr. Shen as its market director by signing a non-fixed employment contract with hundreds of thousands as the annual salary. In March, 2012, the company fired Mr. Shen on the ground of violating the internal rules of the company, which formulates: "the employee in service has the obligation of non-compete. Any behavior of working for the third party is improper and will be deemed to as serious discipline violation and the company shall have the right to terminate the employment contract unilaterally." During the arbitration and the litigation, the company supplied many evidences. Aside from the employment contract, other evidences such as the handbook, employee conduct code, Mr. Shen's service for the third party, publication and promotion the third party's business, travel expense reimbursement application to the third party's company of Mr. Shen and his team, entrusting lawyers to review the commercial contract for the third party are in the form of email body and attachments. In regard to this, the company handed in five notarial certificates successively amounting over four hundred pages. The handbook of the company regulates: "all the visit of the internet will be recorded in the log file and will be the content subject to the company's check and all the visit shall be used in connection with the business activities. All the visit or disclosure of information will be deemed to as exclusive of employee's personal information or privacy."

The attorney of the employee replied and rebutted as follows: the company did not fulfill the procedure of public announcement of the handbook, so it had no binding effect on Mr. Shen. The main and key evidences of the case were emails, and although they were notarized, thus meeting the requirements of formality, the authenticity and legitimacy of the emails nevertheless could not be determined. The reasons were that behaviors of the company installing the monitoring software infringed on the right of privacy of the employee and the emails acquired via monitoring were illegal. The notarial position was not at the notarial agency's office and the

computer used for notarization was not controlled by the notary beforehand. Further, the notary did not check the computer's hard disk to make sure it was "clean" and it had no connection with the present case. Furthermore, the notary failed to confirm that the emails were collected in the network environment. The attorney of the company emphasized that Mr. Shen, as a senior manager, had participated in the whole process of formulation and promulgation of the handbook and the company had sent emails to notify the handbook to Mr. Shen, which explicitly regulates that all the visit shall be used in connection with the business activities. All the visit or disclosures of information will be deemed to exclude an employee's personal information or privacy. The company had the right to monitor the network activities and check the log files; the emails were notarized and Mr. Shen did not supply any other opposing evidence to challenge the authenticity; the content of these emails corroborates with each other, which was enough to prove the authenticity, legitimacy and effect of the emails.

In this case, both the arbitration commission and the court confirmed the validating effect of the emails and deemed the termination as lawful. What we can draw from this case is that the confirmation of email evidence is a systematical work, which needs specific rules in regard to network using and monitoring, notarization of relevant emails and needs to form chains of email evidence and with other supporting evidence. In light of this, it is difficult and costly to win the case by electronic evidences, thus we suggest periodically preparing and reserving written evidences for key documents like the handbook.

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中国劳动法资讯速递

二零一三年七月刊

HR 对电子证据的管理与运用实务

伴随着电脑和网络技术的迅猛发展，办公自动化及无纸化办公的发展，在越来越多的劳动争议案件中，当事人提供电子邮件、网络聊天记录、视频资料等电子数据作为证据，甚至于在某些案件中，最重要和最关键的证据就电子证据。因此电子证据的效力能否被认定就成为了决定案件胜败的关键。大成劳动法团队梳理和总结已办理的大量涉及电子证据的案件，提出如下问题及我们的意见，供大家参考：

1. 电子邮件的公证

《电子签名法》第七条规定，“数据电文不得仅因为其是以电子、光学、磁或者类似手段生成、发送、接收或者储存的而被拒绝作为证据使用。”《合同法》第十一条规定，“书面形式是指合同书、信件和数据电文(包括电报、电传、电子数据交换和电子邮件)等可以有形地表现所载内容的形式。”所以，如果电子邮件的内容能够证明案件事实，当然可以作为证据使用。而另一方面，由于电子邮件存在被修改或篡改的可能性，因此，电子邮件的真实性就成为了判定电子邮件有无证据效力的关键所在。通常，为了满足电子邮件作为证据的形式要件，保证其真实性，需要对相关电子邮件申请公证机关进行公证。

2. EMAIL 地址的归属

在劳动争议案件中，无论是用人单位还是员工将电子邮件公证书作为证据提交时，面临的第一个问题是，如何确认邮件地址中发件人、收件人、抄送人对应的真实身份？相应 EMAIL 地址的归属？很多这类案件中，也常常遇到一方否认 EMAIL 地址为自己 EMAIL 地址的情形，辨称该 EMAIL 地址不是自己的 EMAIL 地址，没有通过该 EMAIL 地址发送或接收过电子邮件。这时，如何证明 EMAIL 地址的归属就成为了关键。

我们认为通常可以从以下几个方面证明：相关人员的名片及名片上记载的 EMAIL 地址；通过同样 EMAIL 收发电子邮件处理其他事务的证据，如通过同样的 EMAIL 发送邮件申请年休假或申请加班等。此外，从 HR 管理的角度看，如果能做到未雨绸缪，在签署劳动合同中就将员工的 EMAIL 地址作为联系方式加以明确并由双方签署确认乃是成本低效果佳的防范和降低风险的举措之一。

3. 通过监控软件获得的电子邮件是否侵犯个人隐私权，是否为合法证据

《最高人民法院关于民事诉讼证据的若干规定》第六十八条规定：“以侵害他人合法权益或者违反法律禁止性规定的方法取得的证据，不能作为认定案件事实的依据。”我们认为，如果是未经告知而监控获得的电子邮件涉嫌侵犯个人隐私权或其他合法权益，通过非法软件监控获得的电子邮件也是非法的，均不能作为认定案件事实的依据。

我们建议，从 HR 管理的角度看，若需要对相关电子邮件、网络活动进行监控，最好在相关《员工手册》或规章制度中事先明确规定，对员工使用网络的行为予以规范，告知员工，公司将予以监控并稽核有关上网活动的日志记录等；员工通过公司网络披露的信息均不视为个人信息，不涉及个人隐私。

案例分析：以大量电子邮件证明公司高管严重违纪解雇案

2010 年 9 月某外资担保公司（以下简称“公司”）聘用沈某担任市场总监，双方签订了无固定期限劳动合同，约定年薪数十万元。2012 年 3 月，公司以沈某违反公司规章制度中关于“在职竞业禁止的规定，员工在任职期间为第三方服务的不当行为构成严重违纪，公司有权单方解雇”之规定而将其解雇。在劳动仲裁及诉讼中，公司提供的证据中除了《劳动合同》外，其他证据，如《员工手册》、《员工行为准则》、关于沈某为第三方提供服务，宣传推广第三方公司业务，沈某带领的团队到第三方公司出差的差旅费报销申请，为第三方公司商务合同委托律师审核等大量证据都是电子邮件正文及邮件附件的形式。为此，公司先后提交了五份公证书，文件内容多达四百页。公司的《员工手册》中规定；“所有对因特网的访问均会在日志文件上留有记录，将是公司稽核审查的内容之一，且仅应用于与公司业务相关的活动，所有访问或信息披露都视为不包含员工的私人信息或个人隐私”。

在仲裁及诉讼中，员工方的代理律师答辩及反驳要点是：公司没有向沈某公示公告《员工手册》,《员工手册》对沈某没有约束力。该案主要和关键的证据都是电子邮件，电子邮件虽然经过了公证，满足了形式上的要求。但电子邮件的真实性、合法性不予确认。理由为：公司安装监控软件监控员工收发邮件等上网行为侵犯了员工的隐私权，监控取得的电子邮件不合法；公证地点不在公证机构办公场所；公证所使用的电脑事先不为公证人员控制；公证人员没有事先进行“清洁性”检查，没有对所操作的计算机服务器硬盘中事先没有任何与本案相关内容进行检查，未确认是在网络环境下采集电子邮件。公司的代理律师强调：沈某作为公司高管参与了《员工手册》的制定及颁布过程，且公司通过发送电子邮件方式向沈某公示公告了《员工手册》，且明确规定任何对因特网的访问仅应用于与公司业务相关活动，访问或披露视为不包含个人信息或个人隐私，公司有权对网络活动监控并稽核日志文件；电子邮件经过公证且沈某方未提供任何相反证据证明电子邮件不真实；且大量电子邮件内容相互印证，都足以证明电子邮件的真实、合法、有效。

本案中，劳动仲裁委员会和法院都确认了电子邮件的证明效力，认定公司解雇合法。该案的启示是：电子邮件证明力的确认可以说是个系统工程，既需在公司规章制度中明确规定网络使用及监控规则，相关电子邮件还需公证，电子邮件证据相互之间或与其他证据之间还需形成证据链。由此可见，通过电子证据获得案件的主动和胜诉，确属不易且成本相当高，因此，我们也建议用人单位 HR 管理中，不妨定期对关键文档、如《员工手册》准备和保留书面形式的证据。

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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