



## PRC Labor and Employment Law Newsflash

September, 2012

### ***Analysis on the Non-Competition Related Regulation in the Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (IV) (Draft)***

We have analyzed several issues such as jurisdiction of the labor dispute litigation, final arbitration award, democratic procedures for internal rules and policies surrounding *the Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (IV)(Draft)* (Hereinafter referred to as **Interpretation IV**) in the last newsletter produced by Dacheng Labor Law team. This time, we will concentrate on the issues relevant to non-competition like monetary compensation standard for non-competition and its timing for payment, the legal effect influenced by the termination reasons and the revocation of the non-competition clauses.

1. The legal consequences of the absence of the monetary compensation standard for non-competition in relevant agreement (Article 8):
  - For employees: the clause of non-competition will have no legal binding.  
If the employer and the employee only generally agree on the clause of the non-competition but fail to specify the monetary compensation therein when the employment contract is terminated or expires, the clause has no legal binding to the employee and he or she can refuse to fulfill the obligation of non-competition.
  - For employers: the clause of non-competition would have legal binding if the employee has observed the obligation therein and the employer shall pay the employee average monthly salary as the monetary compensation for non-competition.  
If the employer and the employee only generally agree on the clause of the non-competition but fail to specify the monetary compensation therein and the employee has fulfilled the obligation of non-competition, the employee has the right to request the employer to pay for relevant compensation with that standard of average monthly salary prior to the 12 months of the termination or expiration of the employment contract. In other words, if the employee has fulfilled the non-competition obligation for 6 months, he or she has the right to request 6 months' compensation based on his or her aforesaid average monthly salary. Therefore, employers shall pay great attention to the clause of non-competition: not only shall the employers stipulate the obligations of non-competition, but also specify the payment standard of the monetary compensation for the same, or else unfavorable legal consequences may arise.
2. There is no national-wide uniform standard on the monetary compensation for the non-competition.  
Interpretation IV clearly indicates that the employer and the employee shall specify the monetary compensation in the clause of non-competition, however it have not given a

national uniform criteria, at this stage, the employer shall still obey local regulations.<sup>1</sup>

3. The legal effect of non-competition clauses influenced by the termination reasons (Article 9):

- Termination through negotiation: the clause of non-competition is binding to both parties, except otherwise agreed upon by the two parties.
- In the event that the employee resigns involuntarily or is illegally terminated by the employer, except that the employee is willing to fulfill the obligation, the clause has no legal binding to the employee and the employee can refuse to fulfill the obligation.
- Being legally dismissed or the employee resigns illegally: the clause is binding to both the employees and the employers and both parties shall fulfill their respective obligations.

4. The time of the monetary compensation payment (Article 10):

Pursuant to the provisions of *the Labor Contract Law of PRC*<sup>2</sup>, the non-competition monetary compensation should be paid monthly during the limitation period. While the Interpretation IV put forward higher requirements to the employers: the compensation shall be paid on agreed period; if overdue one month, except the employee agrees to continue carrying out, the employer has no right to request the employee to continue carrying out the obligation. As for this provision, the employer shall lay more importance on the management on the employees who would be leaving or have left the employers. If they are under non-competition obligation, the employers shall take measures to ensure punctually payment and keep payment evidences.

5. The revocation of the clause of non-competition (Article 11):

- Interpretation IV restricts the right of the employers to revoke the clause unilaterally. During the non-competition period, the clause could only be revoked by mutual agreement rather than revoking by unilateral notice. The period of non-competition starts from the next day of the termination or expiration of the employment contract. The Interpretation IV prohibits the employer from revoking the clause in the period of non-competition by notice. It is unclear whether the employer can revoke the clause during the fulfillment of the employment contract (before entering in the non-competition period) by notice, in this connection, the judicial practice should be paid close attention to.
- Under special circumstances, the employer has the right to revoke the non-competition clause unilaterally on conditions.  
If the confidential information is in public, the enterprise can revoke the non-competition clause conditioned on 60 days in advance in writing.

### **Case Study: Does the Employer Have the Right to Unilaterally Revoke the Non-Competition Agreement?**

Mr. Wang signed a labor contract with Company A in April, 2008 with a term of two year, serving as the sales director of the company. On the same day of signing the labor contract, Mr. Wang and Company signed a non-competition agreement, specifying the monetary compensation

<sup>1</sup> For example, the employer and the employee can agree on the monetary compensate; if there is no agreement and no consensus is reached afterwards, the compensation can be 20-50% of the normal salary. In Beijing, the employer and the employee can also agree on the monetary compensate; if there is no agreement and no consensus is reached afterwards, the compensation can be 20-60% of the average monthly salary of the last year before the termination. In Shenzhen, the compensation should not be less than the half of the average monthly salary of the last twelve months before leaving the company..

<sup>2</sup> Article 23 of *the Labor Contract Law*: An Employer and a worker may include in their employment contract provisions on confidentiality matters relating to maintaining the confidentiality of the trade secrets of the Employer and to intellectual property. If a worker has a confidentiality obligation, the Employer may agree with the worker on competition restriction provisions in the employment contract or confidentiality agreement, and stipulate that the Employer shall pay financial compensation to the worker on a monthly basis during the term of the competition restriction after the termination or ending of the employment contract. If the worker breaches the competition restriction provisions, he shall pay liquidated damages to the Employer as stipulated.

is 3000RMB per month for one year's time. On April 30<sup>th</sup>, 2010, the labor contract between the two parties expired. On August 24<sup>th</sup>, Mr. Wang sent a mail to Company A, requesting the monetary compensation. On 30<sup>th</sup>, the company replied that Mr. Wang did not need to carry out the obligation of non-competition. On March 24<sup>th</sup>, Mr. Wang applied for labor arbitration, requiring Company A to pay monetary compensation during the period of May 1<sup>st</sup>, 2010 to April 30<sup>th</sup>, 2011. The arbitration commission held after trial that the reply that Company A gave on August 30<sup>th</sup>, 2010 should be regarded as a notice a month in advance to revoke the non-competition agreement, so the company shall pay Mr. Wang five months' monetary compensation for the period of May 1<sup>st</sup>, 2010 to September 30<sup>th</sup>, 2010. Both parties did not sue in the court.

While pursuant to the provisions of Interpretation IV, the employer does not have the right to revoke the non-competition agreement unilaterally and should pay the monetary compensation to the employees for the already passed period of the non-competition term. Furthermore, Interpretation IV is more inclined to limiting the employer to use non-competition. Any carelessness will cost the employer high numbers of monetary compensation. Therefore, the employers should be exceptionally cautious and consult with professional lawyers when handling non-competition issues like determining the scope of employees under non-competition, signing the agreement, specifying the amount of monetary compensation, management on the employees who would be leaving or have left the employers, payment of said monetary compensation and the timing for the monetary compensation payment, or the limitation is imposed not on the employees but on the employers instead.

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中国劳动法资讯速递  
二零一二年九月刊

《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）（征求意见稿）》  
之竞业限制解读

大成劳动法团队在上期中国劳动法资讯速递中，围绕《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）（征求意见稿）》（以下简称《解释四》）关于劳动争议诉讼管辖、一裁终局、规章制度民主程序等问题做了评析。本期资讯速递将针对竞业限制经济补偿及其支付时间、劳动合同解除原因对竞业限制条款效力的影响、竞业限制条款的解除等相关问题予以解读，以备参考。

1. 未约定竞业限制经济补偿的法律后果（第八条）：

➤ 对员工不具有法律约束力。

若企业只是与员工约定了竞业限制条款，但未约定解除或终止劳动合同后给予经济补偿的，该竞业限制条款对员工没有约束力，员工可以不履行竞业限制义务。

➤ 如员工选择实际履行的，对企业有法律约束力，且须按员工月平均工资支付经济补偿金。

若双方签署了竞业限制条款，但未约定经济补偿，如员工已经履行了约定的竞业限制义务的，则有权要求企业支付竞业限制经济补偿金，且补偿金标准为：员工劳动合同解除或终止前 12 个月的平均工资。也就是说，若员工履行了竞业限制义务 6 个月，则有权要求企业按其月平均工资支付 6 个月的补偿金。因此，企业须特别关注，涉及竞业限制条款，不仅要约定员工必须遵守的竞业限制义务，还应明确约定经济补偿的支付标准，否则将面临前述不利法律后果。

2. 竞业限制经济补偿仍无全国统一标准：

《解释四》明确规定，企业与员工在竞业限制条款中应约定竞业限制的经济补偿，但未进一步给出全国统一的补偿标准，各地企业仍应遵循地方性规章的规定。<sup>1</sup>

3. 劳动合同解除原因对竞业限制条款效力的影响（第九条）：

➤ 协商解除：竞业限制条款对员工、企业都具有约束力，但双方另有约定的除外。

➤ 员工被动辞职或企业违法解雇：除员工同意履行的外，竞业限制条款对员工没有约束力，员工可以不履行竞业限制义务。

➤ 依法辞退或员工违法辞职：对员工和企业都有约束力，双方仍应履行各自的义务。

4. 经济补偿支付时间（第十条）：

根据《劳动合同法》的规定<sup>2</sup>，竞业限制的经济补偿应该在竞业限制期限内按月支付。

<sup>1</sup> 例如：上海规定，可由双方约定；未约定，事后又协商不成的，按劳动者此前正常工资的 20-50% 计算。北京规定，可由双方约定；未约定，事后又协商不成的，按劳动关系终止前最后一个年度员工工资的 20-60% 计算。深圳规定，不得少于该员工离开企业前最后十二个月月均工资的二分之一。

<sup>2</sup> 《劳动合同法》第二十三条 对负有保密义务的劳动者，用人单位可以在劳动合同或者保密协议中与劳动者约定竞业



《解释四》对企业提出了更高的要求：经济补偿必须按约定期限支付；逾期一个月的，除员工同意继续履行外，企业无权再要求员工继续履行竞业限制义务。针对此条规定，企业应更加重视员工离职管理，关注员工是否涉及竞业限制，采取措施保证经济补偿的及时支付并保留支付的证据。

5. 竞业限制条款的解除（第十一条）：

➤ 限制了企业单方解除竞业限制条款的权利。

在竞业限制期限内，双方应协商一致才能解除，而不能单方通知解除。竞业限制期限从劳动合同解除或终止后的第二日开始计算。此规定不允许企业在竞业限制期限内通知解除，企业能否在劳动合同期限内（即尚未进入竞业限制期限时）提前通知解除，尚需关注将来司法实践的走向。

➤ 特殊情况下，企业有附条件的单方解除权。

保密事项确已公开，企业要求解除竞业限制条款的，应当提前 60 日书面通知员工。

**案例分析：企业是否有权单方解除竞业限制协议？**

王某与 A 公司于 2008 年 4 月签订了期限为 2 年的《劳动合同》，王某任公司销售总监；双方于同日签订《员工竞业限制协议》，约定竞业限制经济补偿金为 3000 元/月，竞业限制期限为 1 年。2010 年 4 月 30 日，双方劳动合同到期终止。2010 年 8 月 24 日，王某发函给 A 公司，要求支付竞业限制补偿金。2010 年 8 月 30 日，公司回函告知王某无需履行竞业限制义务。2011 年 3 月 24 日，王某提起劳动仲裁，要求 A 公司支付 2010 年 5 月 1 日至 2011 年 4 月 30 日期间的竞业限制补偿金。仲裁委审理后认为：A 公司 2010 年 8 月 30 的回函可视为提前 1 个月通知解除了竞业限制协议，故 A 公司应向王某支付 2010 年 5 月 1 日至 2010 年 9 月 30 日共计 5 个月的竞业限制补偿金。此后双方均未诉至法院。

若按《司法解释四》的规定，则企业没有单方通知解除竞业限制协议的权利，企业应按员工已经履行的竞业限制期间支付补偿金。不仅如此，《司法解释四》整体上更倾向于限制企业采用竞业限制的机制；企业稍有不慎，将很可能陷入承担高额经济补偿金的不利情形中。因此，企业在确定竞业限制的员工范围、签署竞业限制条款、约定竞业限制经济补偿金、员工离职管理、竞业限制经济补偿金的支付及其支付时间，都需格外慎重并咨询专业律师。否则，受到限制的可能不是员工，而是企业自身。

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限制条款，并约定在解除或者终止劳动合同后，在竞业限制期限内按月给予劳动者经济补偿。劳动者违反竞业限制约定的，应当按照约定向用人单位支付违约金。