PRC Labor and Employment Law Newsflash
March 2016

Concerns to be Paid by Employers at Termination of Employment Contract due to Significant Changes of Objective Conditions

Employers may, during operation, have to make organization restructuring, business integration, change of operation mode, and even enterprise relocation, asset reorganization, etc.. In each case, employers often terminate the employment contract for the reason that "the objective conditions taken as the basis for conclusion of the employment contract have materially changed". However, that is usually held by the judicial authority as illegal termination. Therefore, the Employment Law and Human Resource Committee of Dacheng made summary and study on the problems to be noticed by employers at termination of employment contract due to significant changes of objective conditions as below for your reference.

I. Legal legislation

1. Employment Law of the People's Republic of China, Article 26;
2. Clarification on Some Articles of the Employment Law of the People's Republic of China (the "Clarification"), Article 26;
3. Employment Contract Law of the People's Republic of China, Article 40 (3); and
4. Regulations on Implementation of the Employment Contract Law of the People's Republic of China, Article 19.

II. Abstract legislation leads to uncertain results in arbitration and litigation

In spite of the above-listed legal grounds, the expression "significant changes of objective conditions" involves two abstract concepts, i.e., "objective conditions" and "significant changes"; and abstract concepts surely lead to uncertain ruling results. What are "objective conditions"? Only the Clarification generally explains and illustrates three specific conditions: enterprise relocation, takeover and asset transfer. There is no definition of "objective conditions" in the Employment Contract Law and relevant judicial interpretations. Therefore, what belong to "objective conditions" and what are "significant changes"? There is no uniform standard in judicial practice. Judges/arbitrators may exercise their sole discretion based on the specific fact of the cases, resulting in different verdicts of same type of cases in different courts or even by different judges of the same court.

III. Can the exercise of operation right be considered as significant changes of objective conditions?

Market competition has become increasingly fierce. Employers have to adjust operation direction and strategy timely to adapt to market changes, and then inevitably demand organization restructuring, business integration, change of operation mode or other actions so as to remain their competitive edge in the market. These actions are the modes by which employers exercise their independent rights of operation and may result in change or termination of employment contract, affect the labor rights of

certain employees. And then, employers' operation rights and employees' labor rights are in conflict. Provided that it is not expressly specified by laws, the legitimate rights and interests of both employers and employees will be guaranteed with the intervention of arbitrator/judge. In judicial practice, more and more courts tend to support employers' termination of employment contract due to exercise of their operation rights. In other words, where an employer fails to perform the employment contract due to exercise of its operation rights, the judicial authority may hold that a significant change of objective conditions occurs.

IV. Concerns to be paid by employers at termination of employment contract due to significant changes of objective conditions

As the legal provisions are ambiguous, employers should consider carefully before terminating any employment contract due to significant changes of objective conditions. The following points cannot be ignored:

1. Organization restructuring, business integration, change of operation mode or any other change should really happen. The court would not support the termination if it ascertains the employer terminates the employment contract on the excuse of such change.
2. The change must be significant. A slight adjustment is not enough to making it impossible to fulfill the employment contract. How to identify a significant change? It is identified on a subjective judgment. According to law, a change may be identified as significant change only if the employment contract cannot be performed for the reason of such change. So the employer should consider whether it constitutes a significant change at termination of employment contract.
3. The employer should have negotiated with the employee on change of the employment contract and fail to reach a consensus.
4. The employer should give a written notice 30 days in advance or pay the employee one month's salary in lieu of the notice.
5. Under any of the six circumstances set forth in Article 40 of the Employment Contract Law, the employer shall not terminate the employment contract due to significant changes of objective conditions.
6. The employer shall offer severance pay to the employee.

Case Study:

In August 2013, Guangzhou Branch of Beijing T Market Research and Consulting Co., Ltd. ("T") decided to transfer all the business of its DP department to Wuhan Branch and dissolve the DP department because of business integration. On August 2, 2013, T announced the company's decision in the staff meeting of the DP department. Then, upon negotiation, T reached agreement on termination of employment contracts with eight employees and on change of employment contracts with two employees. But it failed to reach agreement with the remaining four employees. On April 29, 2014, T sent the notice of termination of employment contract to the four employees with the reason that "considering the company's strategic development, the head office decided in July 2013 to dissolve the DP department and transfer all the business of the DP department to Wuhan Branch", notifying that the employment contracts will be

terminated on April 30, 2014 and T had paid severance to the four employees. The four employees refused to accept it and applied to Guangzhou Labor and Personnel Dispute Arbitration Commission for arbitration. They argued it is illegal dismissal and claimed compensation for illegal termination. After trial, the arbitration commission held that internal resources adjustment, data business integration and dissolution of Guangzhou DP department shall be deemed as T's exercise of its operation rights. Besides, T legally notified 30 days in advance and negotiated with the employees. T's termination of employment contracts after payment of severance as they failed to reach agreement through negotiation complies with Article 40 of the Employment Contract Law. So the arbitration commission did not support the employees' claim for the reason of lack of facts and legal basis. The four employees' claims were not supported in the first and second instance litigation either.

Written by: Simon Wang

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

大成 DENTONS
3, 30/F, China Development Bank Tower,
500 Pudong South Road, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888
Fax: 86-21-5878 6866

中国劳动法资讯速递
二零一六年三月刊

客观情况发生重大变化，用人单位解除劳动合同时应当注意的问题

用人单位经营过程中经常会出现组织架构调整、业务整合、经营方式变更，甚至是企业迁移、资产重组等情形。遇到上述情形，用人单位常以“劳动合同订立时的客观情况发生重大变化”为由解除与劳动者签订的劳动合同。但用人单位以此为由解除劳动合同常常被司法机构认定为违法解除劳动合同。为此，大成劳动法与人力资源管理专业委员会就劳动合同订立时的客观情况发生重大变化，用人单位解除劳动合同时应当注意的问题进行了总结和探讨，供大家参考。

一、相关法律规定

1、《中华人民共和国劳动法》第二十六条规定；
2、《关于〈中华人民共和国劳动法〉若干条文的说明》（以下简称“《说明》”）第26条；
3、《中华人民共和国劳动合同法》第四十条第(三)项；
4、《中华人民共和国劳动合同法实施条例》第十九条。

二、法律规定的抽象性导致了裁判结果的不确定性

尽管以上罗列了四个法律依据，但“客观情况发生重大变化”这一表述包括了两个抽象的概念，即“客观情况”和“重大变化”。而概念的抽象性决定了裁判结果的不确定性。何谓“客观情况”，只有《说明》进行了笼统的解释并例举了企业迁移、被兼并、企业资产转移三种具体情形。《劳动合同法》及相关司法解释并未对“客观情况”的含义进行任何规定。因此，实践中对于哪些情况属于“客观情况”、什么变化才是“重大变化”没有统一的标准，只能由裁判者根据案件的具体事实进行自由裁量，导致同样类型的案件在不同的法院，甚至是同院不同的法官作出不同的判决。

三、用人单位行使自主经营权可否被认定为客观情况发生重大变化？

市场竞争日趋激烈，为因应市场的变化，用人单位需要及时调整经营方向和策略，不可避免地需要进行组织架构调整、业务整合、经营方式变更等操作，以保持在市场上的竞争力。用人单位进行组织架构调整、业务整合、经营方式变更等实质上是用人单位行使企业自主经营权。用人单位进行这些操作，可能需要变更或解除劳动者的劳动合同，影响部分劳动者的劳动权益，造成了用人单位的自主经营权与劳动者的劳动权益产生冲突。二者合法的权益均应予以保障，在法律并无明确规定的情况下，就需要司法者进行平衡。就司法实践而言，越来越多的法院对用人单位因行使自主经营权而解除劳动合同持支持的态度。换句话说，对于用人单位行使经营自主权而导致劳动合同不能履行时，司法机构可以认定客观

情况发生了重大变化。

四、客观情况发生重大变化，用人单位解除劳动合同应当注意的事项

由于法律规定并不明确，用人单位以客观情况发生重大变化为由解除劳动合同时更需要慎重，我们认为，以下几点不能被忽略：

1、用人单位的组织架构调整、业务整合、变更经营方式等应当是真实发生的；若仅以此为借口而解除劳动合同，一旦被法庭查明，就不能得到法庭的支持。

2、客观情况必须是发生重大变化。稍许的变化调整并不足以造成原劳动合同的不能履行。重大变化如何认定？这是一个主观判断的问题，按法律规定，此变化应导致原劳动合同不能履行的程度方可称为重大变化。故用人单位在解除劳动合同时需要评估变化是否构成重大变化。

3、用人单位必须曾经与劳动者协商变更劳动合同，且就变更劳动合同的协商未能达成一致。

4、用人单位需要提前一个月书面通知或额外支付劳动者一个月的工资。

5、劳动者具有某些特殊情形时，用人单位不得以此理由解除劳动合同。劳动者有《劳动合同法》第四十二条规定的六种情形的，用人单位不能以客观情况发生重大变化为由而解除劳动合同。

6、用人单位需要向劳动者支付解除劳动合同的经济补偿金。

案例分析：

2013 年 8 月，北京 T 市场研究咨询有限公司广州分公司（下简称“T 公司”）因业务整合，决定将该公司的 DP 部门的全部业务转移至武汉分公司并撤销该公司的 DP 部门。2013 年 8 月 2 日，T 公司召开 DP 部门全体员工会议，通告了公司的决定。随后，公司与该部门的员工就解除劳动合同进行了协商，与该部门的八名员工协商解除了劳动合同，与该部门的二名员工协商变更了劳动合同，但另有四名员工经协商未能达成一致。2014 年 4 月 29 日，T 公司以“因总公司基于公司战略发展的考虑，于 2013 年 7 月决定将 DP 部门解散并将该部门的业务全部转移至武汉”为由，向四名员工发出解除劳动合同通知书，通知于 2014 年 4 月 30 日解除与四名员工的劳动合同，并向四人支付了解除劳动合同的经济补偿金。四人不服，向广州市劳动人事争议仲裁委员会申请仲裁，认为是违法解除，并要求支付违法解除劳动合同的赔偿金。该案经审理，仲裁委员会认为，T 公司调整公司内部资源，进行数据业务的整合，解散广州 DP 部门，应视为合理行使经营自主权的行为；并且 T 公司根据上述情况已履行提前 30 天通知并与申请人协商的法定程序，因协商不成向其支付经济补偿金，之后与其解除劳动合同的情形符合劳动法第四十条的规定，故员工主张违法解除劳动合同的赔偿金的要求、事实和法律依据不足，仲裁委员会不予以支持。后该案经一审、二审，均未支持四名员工的请求。

作者：王朝阳

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 联系我们。

大成 DENTONS
上海市浦东南路 500 号国家开发银行大厦 3、30 层（200120）
电话：86-21-5878 5888
传真：86-21-5878 6866