PRC Labor and Employment Law Newsflash
November 2016

Obligations of Reporting Employment Status and Non-compete

I. Definition of non-compete

Non-compete, refers to the agreement concluded between the employer and the employee, which provides that for a certain period after the termination or rescission of the employment contract, the employee cannot conduct business of same or relevant kind to the employer's on his/her own or for others, nor can the employee be employed by other employers conducting the same or relevant kind of business. In a brief, non-compete means a specific party cannot be engaged in specific business in a specific region for a specific period.

II. Nature of the obligation of reporting employment status

The obligation of reporting employment status, means the employer stipulates in the non-compete agreement that the employee should make a statement of his/her employment status after the termination and provide corresponding employment materials. In civil law theory, there is distinction between positive act and negative act according to the forms of expression. Positive act, i.e. action, refers to the legal act positively and actively happens to the object such as the sales personnel completes the monthly sales mission. Negative act, i.e. inaction, refers to the legal act manifested in negative or restraining form such as the duty of not being absent from work, not being late for work or not leaving early.

III. The connection between the obligation of reporting employment status and non-compete

The non-compete agreement is a contract in nature and is concluded for the purpose of clarifying the employee's non-compete obligation. The core of the agreement is non-compete obligation. However, in addition to that, the scope of trade secret, employee's duty to keep confidentiality and report employment status may also be provided in the agreement. As can be seen from the above analysis, the non-compete obligation is negative act which is expressed in the form of inaction. Whereas the obligation to report employment status is positive act in the form of action. Therefore, non-compete obligation and report obligation are two different aspects of the non-compete agreement. Therefore, the non-compete obligation is a negative duty designed for the employee which should be performed in the form of inaction by the employee. Only when the employee conducts positive behavior violating the prohibitive or restrictive covenants stipulated by non-compete clause, the employer is entitled to claim liquidated damages from the employee.

Case Study:

Whether an employee breaches non-compete obligation for not reporting employment status after termination.

Event playback

Mr. Wang was employed as a client manager by a materials company in Nanjing. On 17 April 2012, the company (referred as "Party A" hereinafter) and Mr. Wang (referred as "Party B" hereinafter) entered into a *Confidentiality and Non-compete Agreement*, in which Clause 4 "non-compete after Party B leaves company" provided that: "…if Party B leaves Party A for whatever reason, Party B shall actively report to Party A in written form as regards to the performance of the non-compete agreement no later than 30th every month for the period of two years after termination. The first non-compete report shall be submitted within 15 days after Party B leaves Party A otherwise it shall be deemed as breach of agreement. Clause 6 "liability for breach of contract" provided that: "…2. If Party B fails to fulfill non-compete obligation and violates Clause 3 and Clause 4 Sub-clause 1 to 4 of this Agreement, it constitutes serious breach of contract and Party B shall pay liquidated damages of 500,000 RMB to Party A…"

"4. It shall be deemed as serious breach of contract if Party B fails to provide monthly non-compete report in writing after receiving written notification twice from Party A."

"5. If Party B's default has caused damages to Party A, in addition to the liquidated damages, Party B shall also compensate for Party A's loss and return all profits achieving from the default of non-compete obligation to Party A."

On 16 July 2012, the company terminated the employment relationship with Mr. Wang on the ground of expiration of employment contract. From August to November in 2012, the company remitted 1,000 RMB to Mr. Wang's wage account and had remitted 4,000 RMB in total. On 5 November 2012, the company applied for labor arbitration to Labor Dispute Arbitration Committee and the Committee didn't accept the case within 5 days. According to procedural rules, the company filed an action with the court afterwards. The company argued that Mr. Wang had failed to provide monthly non-compete report for three months consecutively, therefore it claimed for RMB 500,000 liquidated damages to be awarded for breach of the non-compete obligation. During the trial, the company claimed that Mr. Wang didn't submit non-compete report in compliance with the *Confidentiality and Non-compete Agreement*, constituting breach of contract. Nevertheless, it failed to provide any evidence to prove Mr. Wang had breached the obligation of non-compete and the benefits from the breach. The court of first instance rejected the company's claims.

Case analysis

According to Article 25 of *Employment Contract Law*, except for the circumstances stipulated in Article 22 (special training) and Article 23 (non-compete), an employer shall not negotiate with an employee on liquidated damages paid by the employee. In the present case, the company set up a positive obligation of submitting monthly non-compete report on the employee through *Confidentiality and Non-compete Agreement*. It stipulated that the employee's failure to submit such a report will be deemed as breach of agreement and high liquidated damages shall be paid consequently. Such a clause was in contrary to the prohibitory labor law provisions and shall be regarded as void without any binding effect on the employee. Besides, the company failed to provide any evidence to prove the employee's default of non-compete obligation in the *Agreement*, nor does it have any evidence of profits achieving from the breach. Therefore, there are no factual or legal grounds for claims of liquidated damages paid by the employee, submission of non-compete reports ought to be made and returning the profits to the company by the employee.

During the performance of a non-compete agreement, the employer is entitled to request the employee to report employment status. Nevertheless, what is more important is to collect evidence of violation of non-compete obligation. The evidence includes but is not limited to the employment/working contract or other agreements concluded with the competing company, the proof of payment of social security fees and building provident contribution, pay slip of wages or other service fees, work certificate, key card to the office, the evidence proving the employee conducting business and transactions in the capacity of the competing company's personnel, employees' list of the competing company, promotional materials containing the employee's information, the approval or filing by the special industry's administrative department, witness statements and audio-visual materials etc.

Written by: Wentao Wang, Eric

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

15, 16/F, Shanghai Tower, 501 Yincheng Road (M),
Pudong New Area, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888
Fax: 86-21-5878 6866

中国劳动法资讯速递
二零一六年十一月刊

就业报告义务与竞业限制

一、竞业限制的定义

所谓竞业限制，是指用人单位与负有保密义务的劳动者签订协议，约定在劳动合同终止或解除后一定期限内，劳动者不得自营、为他人经营与用人单位相同、相关业务或到经营同类、相关业务的其他用人单位任职。简而言之，竞业限制即特定人在特定时间、特定地域、特定行业内不得从事特定行为。

二、就业报告义务的性质

就业报告义务，是用人单位在竞业限制协议中约定，要求劳动者在离职后就其就业情况进行说明并提供相应就业资料的行为。在民法理论中，根据行为的表现形式区分为积极行为和消极行为。积极行为，又称作为，是指以积极、主动作用于客体的形式表现的、具有法律意义的行为，比如销售专员完成月度销售任务。消极行为，又称不作为，则是指以消极的、抑制的形式表现的、具有法律意义的行为，比如员工不得旷工、迟到、早退等。

三、就业报告义务与竞业限制的关系

竞业限制协议本质上属于合同，是为了明确劳动者的竞业限制义务而产生的。竞业限制协议的核心是竞业限制义务，但是在竞业限制义务之外可能还会约定商业秘密的范围、劳动者的保密义务及就业报告义务等。从上文的分析中可以看出，竞业限制义务属于消极行为，是以不作为的形式表现的。而就业报告义务属于积极行为，是以作为的形式表现的。因此竞业限制义务、就业报告义务属于竞业限制协议中不同的两个内容。故竞业限制义务是为劳动者设定的一种消极义务，劳动者应当以不作为的形式来履行竞业限制义务。只有当劳动者实施了积极行为、违反了竞业限制条款所约定的禁止性或限制性规定时，用人单位才可向劳动者主张违约金。

案例分析：员工离职后未履行就业报告义务，是否违反了竞业限制义务？

事件回放

王某原在南京某物资有限公司任客户经理。2012 年 4 月 17 日，公司（即下文中的甲方）和王某（即下文中的乙方）签订《保密与竞业禁止协议》，其中第四条“乙方离职后的竞业禁止义务”约定：……4、不论因何种原因从甲方离职，离职后两年内，乙方需要在每月 30 日前以书面形式主动向甲方汇报竞业禁止约定的履行情况，第一份竞业报告须在乙方离职后 15 日内提交，否则视为违约等。第六条“违约责任”约定：……2、乙方不履行竞业禁止义务，违反本协议第三条、第四条第一项至第四项的属于严重违约，需向甲方支付违约金 50 万元；……4、乙方拒绝提供书面的月度《竞业报告》经甲方两次书面告知后仍未提供的视为严重违约；5、如乙方的违约行为给甲方造成损失的，乙方在支付违约金的基础上，还应当赔偿甲方的损失，并且乙方自违反竞业禁止义务时所获得的收益应当全部归还甲方。

2012 年 7 月 16 日，公司以劳动合同到期为由解除了与王某的劳动关系。2012 年 8 月至 11 月，公司每月向王某的工资卡上汇款 1000 元，合计汇款 4000 元。2012 年 11 月 5 日，公司向劳动人事争议仲裁委员会申请仲裁，该委在 5 日内未

立案，后公司起诉至法院，认为王某未按月提供《竞业报告》，且已连续三个月未提供，请求判令王某向公司支付违反竞业禁止义务的违约金 500000 元。审理中，公司主张王某未按《保密与竞业禁止协议》中的约定提交《竞业报告》，故王某构成违约，但未能提交任何证据证明被告违反了竞业限制义务以及违反竞业限制义务获何收益。一审判决驳回了公司的诉讼请求。

案件评析

根据劳动合同法第二十五条规定，除本法第二十二条（专项培训）和第二十三条（竞业限制）规定的情形外，用人单位不得与劳动者约定由劳动者承担违约金。本案中，公司通过《保密与竞业禁止协议》为员工设定了每月提交《竞业报告》的积极义务，如未提交即视为违约，且约定了高额的违约金，该条款违反法律强制性规定，应属无效条款，对劳动者不产生约束力。此外，公司未能提供任何证据证明员工离职后违反了《保密与竞业禁止协议》中约定的竞业限制义务，也无证据证明员工违反竞业限制义务获何收益，故其要求员工支付违反竞业限制义务违约金、补交《竞业报告》并将所获收益归还公司等，没有事实和法律依据。

用人单位在履行竞业限制协议过程中，可以要求劳动者报告就业情况，但更重要的是就劳动者违反竞业限制义务的行为收集证据，包括但不限于与竞争单位的劳动合同、劳务合同或者其他协议，社会保险和住房公积金缴纳证明、工资或者劳务费用支付凭证、工作证件、办公场所出入证件、劳动者以竞争单位员工身份从事经营和开展业务的证明、竞争单位的员工名册和包含劳动者信息的宣传资料、特殊行业的主管部门的从业审批或者备案、证人证言、视频资料等。

作者：王文涛

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@dentons.cn 联系我们。

上海市浦东新区银城中路 501 号上海中心大厦 15、16 层（200120）
电话：86-21-5878 5888
传真：86-21-5878 6866