PRC Labor and Employment Law Newsflash
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Solutions for Employment Relation during Corporate Dissolution/Liquidation

Not a few shareholders determine at their discretion to withdraw investment and dissolve their foreign-funded companies as a result of economic downturn in China. Employment relation settlement, employee placement and severance pay constitute an important part of the work of corporate dissolution and liquidation and what the shareholders and the liquidation group concern most. Now I analyze and study on relevant legal issues as below.

I. Legal Basis for Ending of Employment Contract

Pursuant to item (5) of Article 44 of the Employment Contract Law, an employment contract shall end if the employer has its business license revoked, is ordered to close or is closed down, or decides on early dissolution. It is likely to figure out that a company going through dissolution and liquidation will be closed down eventually and disqualified as a party to the employment contract so that the contract will no longer be performed but cease to be valid.

II. End Date of Employment Contract

For corporate dissolution upon the shareholders' decision or resolution, no end date of employment contract is defined in any law or regulation. In practice, "end date" is deemed as, different in opinion: (1) the date when the shareholders make a decision or the shareholder meeting adopts a resolution on dissolution; (2) the date when deregistration is completed with the administration for industry and commerce; (3) the date of formation of the liquidation group; and (4) the date of completion of liquidation (subject to the date when the liquidation group submits the liquidation report to the shareholders or the shareholder meeting).

Theoretically, in the event of corporate dissolution, the employment contract ends due to disqualification of the employer as a party to it. In such case, the end date of the employment contract should be the date when the employer is disqualified as a party to the contract, i.e., the date when the employer completes the cancellation registration with the administration for industry and commerce; while pursuant to Article 186 of the Company Law[1], in the process of liquidation, the salaries, social insurance premiums and statutory severance of the employees shall be paid before the company's remaining property is distributed, that is to say, until the above-mentioned expenses are paid (except in the event of insolvency) neither the liquidation nor the cancellation registration formalities may be gone through. However, there will be a paradox if the date of completion of cancellation registration is taken as the end date of employment contract. Obviously it is contradictory to the Company Law and impractical to take the date of completion of cancellation registration as the end date of employment contract.

[1] Company Law: Article 186 The liquidation group a company shall, after having liquidated the property of the company and prepared the balance sheet and a list of property, formulate a liquidation plan which shall be submitted to the shareholders' meeting, the general meeting or the competent people's court for confirmation.
After paying off the liquidation expenses, the salaries, social insurance premiums and statutory severance of the employees, the due and payable taxes and the debts of the company, the liquidation group shall distribute the remaining property, in the case of a limited liability company, in proportion to the shareholders' capital contribution or, in the case of a company limited by shares, in proportion to the shares held by each shareholder.
During the liquidation, the company shall continue to exist, but shall not carry out business activities irrelevant to the liquidation. The property of the company shall not be distributed to any shareholder before full payments have been made out of the property pursuant to the preceding paragraph.

Taking the "date when the shareholders make a decision or the shareholder meeting adopts a resolution on dissolution" as the end date is not appropriate either, because generally when the shareholders make a resolution of dissolution employees are not aware of it yet and it is not favorable to the employees if such timing serves as the end date; in addition, for a foreign-funded enterprise, its dissolution will be subject to the approval of the examining and approving authority. The other two, "date of formation of the liquidation group" and "date of completion of liquidation", are also inappropriate to be the end date, because employee placement and severance payment are a major part of the liquidation work between such two days and it is improper to choose any of them to be the end date.

I believe that it is not necessary or meaningful to set a specific time of end of employment contract. The liquidation group having been formed to proceed with the liquidation may at its own discretion, upon resolution of dissolution (with approval of the examining and approving authority, in case of any foreign-funded enterprise), determine a reasonable end date of employment contract based on the demands and arrangement of liquidation and promptly, before the end date, inform the employees of such date and present to them the dissolution resolution and the notice of ending of employment contract.

III. Calculation of Severance

1. Seniority before 1st January 2008

In theory, in the event that the employment contract ends due to corporate dissolution, the company is not required to include the employee's seniority prior to the effective date of the Employment Contract Law at the calculation of severance pay. Before the Employment Contract Law took effect, severance was paid according to Article 28 of the Employment Law[2] and the Measures for Economic Compensation for Breach and Termination of Employment Contract promulgated by the Ministry of Labor, under either of which payment of severance does not apply to end of employment contract due to corporate dissolution.

For the purpose of smooth placement of employees and reduction or elimination of labor disputes, and in consideration of the hard work and contribution of longtime employees to the company, generally I suggest that the company may include the seniority prior to 1st January 2008 into the calculation of employee severance, namely, severance may be calculated as of the date of actual employment.

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[2] Employment Law: Article 28 Severance shall be paid pursuant to applicable national regulations if the employer terminates the employment contract in accordance with Article 24, 26 or 27 hereof.

Employment Law: Article 24 The employment contract may be terminated if the parties thereto so agree after consultation.

Employment Law: Article 26 An employer may terminate an employment contract by giving the employee 30 days' prior written notice, if:
(1) after the period of medical care for an illness or non-work-related injury, the employee can engage neither in his/her original work nor in any other work arranged for him/her by the employer;
(2) the employee is incompetent and remains incompetent after training or adjustment of his/her position; or
(3) a major change in the objective circumstances relied upon at the conclusion of the employment contract renders it unable to perform and, after consultations, the employer and the employee fail to reach agreement on amending the employment contract.

Employment Law: Article 27 If it is really necessary for the employer to reduce the workforce due to its being on the verge of bankrupt and going through the statutory streamlining or due to serious difficulties in its production and/or business operations, the employer may reduce the workforce after it has explained the situation to its labor union or to all of its employees 30 days in advance, has considered the opinions of the labor union or the employees, and has subsequently reported the workforce reduction to the labor administration authority.
If the employee that has reduced its workforce pursuant to this article hires again within six (6) months, it shall hire the persons dismissed at the reduction on a preferential basis.

2. Seniority after 1st January 2008

It is expressly specified in the Employment Contract Law that the employer shall pay severance to the employee if it decides on early dissolution[3].

IV. Ex-gratia Compensation in Special Circumstances

At the dissolution and liquidation, should the employer make ex-gratia payment to the employee who suffers a work-related injury or is in the period of medical care or (for female employee) the pregnancy, confinement or nursing period?

Just because the employee falls in any of the special circumstances under which the employment contract shall not be terminated specified in Article 42 of the Employment Contract Law, it does not mean that it cannot apply the ending of employment contract. Non-termination of employment contract applies to the employee who is under any of such special circumstances, while corporate dissolution is one of the statutory circumstances for ending of employment contract.

Despite all this, it doesn't mean that the employer may during corporate dissolution ignore the interests of the employees who suffer work-related injury, are during the pregnancy, confinement or nursing period or otherwise under special circumstances; on the contrary, comparing with common employees, the employees under such special circumstances are in a weaker position, so shall they be paid ex-gratia compensation in addition to statutory severance.

Other than the provisions of the Regulation on Implementation of the Employment Contract Law with respect to the extra compensation for the employees suffering work-related injury[4], the ex-gratia payment for the employees under such special circumstances is not specified in any national law or regulation; instead, it appears in some local normative documents and court trial guidance documents, for example, the Reply of Wuxi Labor and Social Security Bureau to the Request for Instructions on Solutions for Employment Relation and Relevant Benefits of the Employees in the Period of Medical Care, Pregnancy, Confinement or Nursing upon Legal Bankruptcy or Dissolution of the Foreign-Funded Enterprise: "I. If an employee leaves in the period of medical care for an illness or non-work-related injury, his/her employment contract may end. For the employee whose employment contract ends, ……the employer shall pay medical subsidies and once and for all pay the sick pay (sick benefit) that he/she is entitled to during the remaining period of medical care"; and Clause 7 of the Summary of Jiangsu Labor Arbitration Case Seminar: "Corporate dissolution or business

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[3] Employment Contract Law: Article 46 The employer shall pay severance to the employee if:
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(6) the employment contract ends pursuant to item (4) or (5) of Article 44 hereof;
……

Employment Contract Law: Article 44 An employment contract shall end if:
……
(4) the employer is declared bankrupt according to law;
(5) the employer has its business license revoked, is ordered to close or is closed down, or decides on early dissolution;
……

[4] Regulation on Implementation of the Employment Contract Law: Article 23 Where an employer terminates the employment contract with an employee suffering from work-related injury, it shall, apart from paying severance pursuant to Article 47 of the Employment Contract Law, pay medical subsidies for work-related injury and employment subsidies for the disabled once and for all in accordance with national regulations on work-related injury insurance.

license being legally revoked is a statutory circumstance for ending of employment contract. In any of such circumstances, the employment during the employee's pregnancy, confinement or nursing period shall end and the employer shall pay severance to the employee pursuant to relevant regulations. To protect the female employee's legitimate rights and interests, in the principle of benefiting employees, the employer shall pay in a lump sum the living costs, maternity-leave salary, birth-giving expenses and other benefits of the female employee during the pregnancy, confinement and nursing period, however, there is no clear and definite provision in these documents on how to calculate the ex-gratia payments.

For ending of employment contract due to corporate dissolution, local regulations on the ex-gratia compensation to employees under any special circumstance are different from place to place and there is not a consistent and definite reference, resulting in disputes arising frequently in practice. Under the current legislation, I propose that during liquidation extra-payments should follow applicable local regulations if any or, in case there are no such local regulations, be agreed reasonably between the employer and the employee through negotiation and if no agreement is reached the employer may refer it to the local labor administrative authority for mediation so as to make proper placement and compensation.

Case Study: Replacement and Compensation for Pregnant Employee in Corporate Dissolution

[Event Replay]
On 1st March 2006, Ms. Zhang was employed by a Chongqing tools company. In June 2015, the company's shareholders decided to dissolve the company due to its poor performance and failure to achieve the expected operating results and made a shareholder meeting resolution. Ms. Zhang was 3-month pregnant at that moment. Then the company made a dissolution announcement to all of its employees, sent the employment end notice to each employee, negotiated on execution of the compensation agreement, and calculated the severance based on each employee's years of service for the company.
In September 2015, Ms. Zhang initiated a labor arbitration before the labor dispute arbitration commission at the place where the company is located, claiming against the company for the living costs, maternity-leave salary, birth-giving expenses and other benefits she was entitled to during the pregnancy, confinement and nursing period (hereafter the Benefits). The company contested the claim, refusing to pay the Benefits. In the end the arbitration commission did not uphold such claim.

[Analysis]
As there is no specific local regulation or normative document in Chongqing expressly setting forth ex-gratia payment to pregnant employees in case of corporate dissolution, the arbitration commission did not uphold the claim of the applicant for the Benefits.
In issue of special protection involved in this case for pregnant employees during corporate dissolution and liquidation is a contentious focus in the current employment law practices. As stated above, since there are no consistent and definite legal provisions, the practices and judicial trial practice guides are different from place to place. To a certain extent, it is to the disadvantage of the employees who are in the pregnancy, confinement and nursing period. To protect employee interests (especially, to take particular care of the special employees in a weak position) and facilitate the liquidation, I expect that it would be defined and refined legally under a same standard and with practical and flexible measures.

Written by: Kisa Wong

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

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
二零一六年四月刊

公司解散清算过程中员工劳动关系处理解析

由于国内经济下行，不少外资公司股东选择撤回投资，决议解散公司。在解散清算的过程中，劳动关系的处理、对员工的安置和补偿是清算工作的重要组成部分。现在笔者就有关法律问题进行分析探讨。

一、劳动合同终止的法律依据

根据《劳动合同法》第四十四条第（五）项的规定，用人单位被吊销营业执照、责令关闭、撤销或者用人单位决定提前解散的，劳动合同终止。不难理解，公司解散清算，劳动合同一方主体消灭，劳动合同无法继续履行，只能终止。

二、劳动合同终止的时间

在股东决定或决议解散公司的情形下，法律、法规并未明确规定劳动合同终止之日。对于劳动合同终止日的确定，实践中有几种不同的观点：一是股东作出决定或股东会作出决议解散之日；二是完成工商注销登记之日；三是清算组成立之日；四是清算结束之日（以清算组向股东或股东会提交清算报告之日为准）。

理论上而言，公司解散情形下的劳动合同终止，是基于用人单位主体资格消灭。那么，劳动合同终止日就应当是用人单位主体资格消灭之日，即公司完成工商注销登记之日。但是，根据《公司法》第一百八十六条的相关规定[1]，清算过程中，公司财产必须先行支付完毕职工工资、社会保险费用和法定补偿金，才可进行剩余财产的分配，也即需先行支付前述费用（资不抵债的情形除外）才可能完成清算，才能办理工商注销登记手续。那么，如果以完成工商注销登记之日作为劳动合同终止日，则会出现悖论。可见，在实践中，如将完成注销登记之日作为劳动合同终止日与《公司法》相关规定是矛盾的，并且不具有可操作性。“股东作出决定或股东会作出决议解散之日”也不适宜作为劳动合同终止日，因为股东作出决议解散之时，员工通常还不了解公司解散之事，以此时间点作为劳动合同终止日，不利于维护员工的利益；另外，对于外商投资企业来说，其解散需要获得审批机关的批准。 另外两个时间点“清算组成立之日”和“清算结束之日”也不适宜作为劳动合同终止日，因为对员工的安置和补偿，是这两个时间点之间的清算期间清算工作的重要组成部分，选择前后哪一个时间点都不合适。

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[1] 《公司法》第一百八十六条 清算组在清理公司财产、编制资产负债表和财产清单后，应当制定清算方案，并报股东会、股东大会或者人民法院确认。

公司财产在分别支付清算费用、职工的工资、社会保险费用和法定补偿金，缴纳所欠税款，清偿公司债务后的剩余财产，有限责任公司按照股东的出资比例分配，股份有限公司按照股东持有的股份比例分配。

清算期间，公司存续，但不得开展与清算无关的经营活动。公司财产在未依照前款规定清偿前，不得分配给股东。

笔者认为，规定一个具体的劳动合同终止的时间点并无必要，也无多大意义。解散决议作出后（外资企业还需经审批机关批准解散）且清算组成立开始清算工作时，清算组即可根据清算工作的需要和安排，自行确定一个合理的劳动合同终止日，在终止日前及时告知员工、向员工公示公司解散决议和劳动合同终止通知。

三、经济补偿金的计算

1、2008 年 1 月 1 日之前的工龄

理论上，公司解散情形下的劳动合同终止，公司在计算员工经济补偿金时无需将《劳动合同法》生效之前的员工工龄计算进去。在《劳动合同法》生效之前，经济补偿金的支付依据是《劳动法》第二十八条 [2]及劳动部颁布的《违反和解除劳动合同的经济补偿办法》，两者关于支付经济补偿金的情形，均不包括用人单位解散、劳动合同终止的情形。

在实践中，为了清算过程中员工安置工作的顺利进行，减少或避免劳动争议，同时也考虑到老员工多年来为公司的辛勤付出，笔者一般建议公司在计算员工经济补偿金时，将 2008 年 1 月 1 日之前的工作年限也计算在内，也即经济补偿金自实际用工之日开始起算。

2、2008 年 1 月 1 日之后的工龄

《劳动合同法》明确规定用人单位决定提前解散的，应当依法向劳动者支付经济补偿金 [3]。

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[2] 《劳动法》第二十八条 用人单位依据本法第二十四条、第二十六条、第二十七条的规定解除劳动合同的，应当依照国家有关规定给予经济补偿。

《劳动法》第二十四条 经劳动合同当事人协商一致，劳动合同可以解除。

《劳动法》第二十六条 有下列情形之一的，用人单位可以解除劳动合同，但是应当提前三十日以书面形式通知劳动者本人：

（一）劳动者患病或者非因工负伤，医疗期满后，不能从事原工作也不能从事由用人单位另行安排的工作的；

（二）劳动者不能胜任工作，经过培训或者调整工作岗位，仍不能胜任工作的；

（三）劳动合同订立时所依据的客观情况发生重大变化，致使原劳动合同无法履行，经当事人协商不能就变更劳动合同达成协议的。

《劳动法》第二十七条 用人单位濒临破产进行法定整顿期间或者生产经营状况发生严重困难，确需裁减人员的，应当提前三十日向工会或者全体职工说明情况，听取工会或者职工的意见，经向劳动行政部门报告后，可以裁减人员。

用人单位依据本条规定裁减人员，在六个月内录用人员的，应当优先录用被裁减的人员。

[3] 《劳动合同法》第四十六条 有下列情形之一的，用人单位应当向劳动者支付经济补偿：

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（六）依照本法第四十四条第四项、第五项规定终止劳动合同的；

……

四、特殊情况员工的额外补偿

公司解散清算时，当员工属于《劳动合同法》第四十二条规定的因工致残、医疗期内、女职工“三期”内等情况时，公司是否应当向这些特殊情况的员工支付额外的补偿？

这些员工的特殊情况，属于《劳动合同法》第四十二条规定的不得解除劳动合同的情形，但并不意味着不能适用劳动合同终止的规定。处于特殊情况下的员工不得解除劳动合同适用的是劳动合同解除的情形，而公司解散是劳动合同终止的法定情形。

尽管如此，但并不意味着公司解散时就可以对这些特殊情况的员工利益置之不理，相反，工伤职工、处于“三期”的女职工等特殊情况下的职工相比一般职工来说，处于更弱势的地位，在公司解散时，理应给予这些职工法定经济补偿金以外的补偿。

对于上述特殊情况员工的额外补偿，除《劳动合同法实施条例》对于工伤职工的额外补偿有规定[4]以外，其余特殊情况员工的额外补偿未能有国家法律、法规层面上的规定。对于特殊情况员工的额外补偿多见诸于一些地方性规范文件或法院审判的指导文件中，如无锡市《对“关于外资企业依法破产、解散时医疗期内职工和怀孕期、产期、哺乳期内的女职工劳动关系及相关待遇处理的请示”的复函》规定：“一、职工患病或非因工负伤在医疗期内的，可以终止劳动合同。对被终止劳动合同的人员，……发给医疗补助费，并按其在剩余医疗期内应享受的病假工资（疾病救济费）总额，由企业一次性支付。”；《江苏省劳动仲裁案件研讨会纪要》第七条规定：“用人单位解散，或被依法撤销是终止劳动合同的法定情形。故用人单位出现上述终止劳动合同的情形后，亦应终止“三期”女职工的劳动合同，并依据规定支付女职工经济补偿金。为保护女职工的合法权益，从有利于劳动者的原则出发，用人单位应一次性支付女职工三期内的生活费、产假工资、生育费用等。”但是，这些文件中关于各项额外补偿的费用如何计算并不是很明确。

公司解散劳动合同终止情形下，关于特殊情况员工的额外补偿，各地的规定都不一致，缺乏统一、明确的做法，导致实践操作中容易发生争议。就目前的立法现状，笔者建议公司在清算过程中，对特殊情况员工的额外补偿，有地方性规定的从规定，没有规定的就与员工协商确定合理的补偿数额，协商不成的，可请当地劳动行政部门居中协调沟通，妥善安置和补偿这部分特殊情况的员工。

《劳动合同法》第四十四条　有下列情形之一的，劳动合同终止：

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（四）用人单位被依法宣告破产的；

（五）用人单位被吊销营业执照、责令关闭、撤销或者用人单位决定提前解散的；

……

[4]《劳动合同法实施条例》第二十三条 用人单位依法终止工伤职工的劳动合同的，除依照劳动合同法第四十七条的规定支付经济补偿外，还应当依照国家有关工伤保险的规定支付一次性工伤医疗补助金和伤残就业补助金。

案例分析：公司解散清算，怀孕女职工如何安置和补偿？

【事件回放】

2006 年 3 月 1 日，张某入职重庆某工具公司。2015 年 6 月，因公司效益不佳，未达预期的经营效果，公司股东决定提前解散公司，并作出了股东会决议。此时，张某已怀孕三个月。随后，公司向全体员工公示解散公告，并向每一位员工发送了劳动合同终止通知书，协商与各员工签订补偿金协议，按照员工在公司的工作年限计算补偿金数额。但张某无法接受公司的安排。

2015 年 9 月，张某向公司所在地劳动争议仲裁委员会提起劳动仲裁，要求公司额外支付其女职工“三期”内的生活费、产假工资、生育费用等待遇（以下简称“三期”待遇）。公司提出答辩意见，拒绝支付其“三期”待遇。最终，仲裁委没有支持张某的前述仲裁请求。

【评析】

本案中因案涉当地并未有明确的法律、法规或规范性文件对公司解散清算情况下怀孕女职工的额外补偿进行明确的规定，故仲裁委对申请人张某提出的“三期”待遇的请求未予支持。

本案中涉及到的公司解散清算过程中怀孕女职工的特殊保护问题，是现今劳动法实务领域的一个争议焦点。如前所述，由于缺乏统一、明确的法律规定，各地在这方面的实践操作及司法审判实务的导向都是不同的。一定程度上来说，对“三期”内女职工特殊利益的保护是不利的。从保护劳动者利益（尤其要特别照顾弱势的特殊劳动者）以及便于公司清算工作开展的角度考虑，希望能够从立法层面上尽快明确和完善，规定应当既有较为统一的标准，又有相对实际、灵活的措施。

作者：王莹莹

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。

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