PRC Labor and Employment Law Newsflash

January, 2015

A Discussion about Employee Entry Legal Risk Prevention

With the high incidence of labor cases and the complexity of judgments, labor dispute has become a hot topic in recent years. Among 2014's top ten labor dispute cases there were two cases concerning staff entry. Legal risk prevention at the staff entry stage is the first line of the firewall in an enterprise's recruitment management system and involves the following several aspects that cannot be neglected:

A. Legal risk prevention in recruitment advertisements

The enterprise should pay attention to the following two aspects about legal risk prevention in advertisements:

First, the employment conditions should be specific and state the requirements of each position. These conditions are extremely important as they are the standard by which enterprises are allowed to evaluate the suitability of new recruits during the probation period. Formulating employment conditions should avoid to use fuzzy or generic phrases such as "all obey the arrangement from enterprise", or "high work enthusiasm". The enterprise should try to quantify employment conditions and enhance the interoperability and the execution.

Employment conditions usually include the following three aspects:

1. The basic situation of the employee and qualifications such as age, educational background, work experience, foreign language level, etc.;
2. The working ability of the employee, including other conditions required by the post responsibility and enterprise, etc.;
3. The moral condition of the employee, such as employees should be honest and loyal to their duties, etc. Enterprises shall not equate recruitment requirements to employment conditions. Recruitment requirements are the most basic requirements of the enterprise's recruiting job and therefore relatively simple fuzzy language can be used. Besides, recruitment conditions do not need to be confirmed to be effective by employees. Employment conditions must be specific, rigorous and careful and they need staff confirmation to go into effect. We suggest enterprises to make different employment conditions according to different posts, which can clear the post responsibilities and improve the efficiency at the same time.

Second, the job advertisement should not include employment discrimination or prohibitive contents such as privacy concerns. According to *the Employment Promotion Law* and *the Provisions of the Regulations on the Employment Service and Employment*, employees shall

have equal rights in employment. Therefore job advertisements may not concern discrimination contents involving nationality, race, gender, religion, household registration, physical disabilities, etc. Advertisement shall not be concerned with the private life of the employee, in article 8 of *the Employment Contract Law*: "the employer has the right to learn from the employee basic information which directly relates to the employment contract, and the employee shall be under an obligation to truthfully provide the information." Pursuant to this, the demonstrative obligation of employee is limited to information "which directly relates to the employment contract". The family situation, financial condition and the marital status of the employee falls within the scope of privacy protection. If the advertisement content involves the said prohibitive contents, then enterprises may face the risk of infringement lawsuit.

B. Legal risk prevention in enterprise entry review

The final step of employment is the employee review; a lot of labor dispute is occurring at this time. According to the regulation of *the Employment Contract Law*, we suggest that the enterprises should strictly review the employee's age, education back ground, qualification credentials, health, whether to terminate the employment relationship with the former employer etc. If recruiting senior management personnel, the enterprise should also examine whether there is a breach of confidentiality agreement, non-compete agreement or service agreement. Upon completing the review the enterprise can require the employees to sign a "declaration" or "guarantee" to confirm that all the information gathered is correct. In addition, when conducting the review it's important to gain confirmation for the contact information (mailing address). Once again the enterprise may require employees to sign a "confirmation", which could preserve evidence and ensure that "the contact details (mailing address) which are signed and confirmed by the employee should be deemed to the valid address for the enterprise's written document".

Just in case, we suggest that the enterprise should review whether there exists any dishonesty or deception. Any employees who are unable to provide relevant information will be deemed as "not in accord with the employment conditions" or "a serious violation of enterprises' internal rules and regulations". The enterprises can terminate the employment contract under the said circumstances according to the provisions of article 39 of *the Employment Contract Law*.

C. Correct understanding and usage of "being proved not to satisfy the employment conditions during the probation period"

Article 39 of *the Employment Contract Law* states that an employer may terminate an employment contract if the employee "(1) is proved not to satisfy the employment conditions during the probation period…" In practice, many enterprises know that "not to satisfy the employment conditions" is the reason for unilaterally termination of the employment contract. Enterprises do not need to notify the employee 30 days in advance or to pay economic compensation. However many enterprises ignore the fact that they shall bear the responsibility to prove that "the employee does not satisfy the employment conditions". Where there are only oral presentations in the arbitration or litigation without strong evidence, the predicament of the illegal termination of the employment contract befalls.

To avoid the failure of unsuccessfully providing evidence, we suggest that:

1. In the advertisement, the employment contract and job description, enterprises and employees make an agreement to specific employment conditions and ask the employees to sign the relevant documents as evidence;
2. If the relevant contents in the internal rules and regulations have the employment conditions, enterprises shall show them to the employees and ask the employees to sign and confirm;
3. The notice of employment contract termination shall be made during the probation period, which shall be signed by the employee within the probation period;
4. The enterprises shall explain the reasons and legal basis in the termination notice;
5. Establishing a standard appraisal system therefore making the employment conditions easy to operate and execute.

Case Study: Could Probation Period be set for Employee Twice Recruited by the Same Enterprise?

【Event Playback】On 3rd May 2011, Li Chen entered the Shuguang Company serving as a research consultant. He and the Company signed a two-year employment contract with the probation period of 3 months. On 23 April 2012, Li Chen resigned. On 19 June 2012, Li Chen re-applied for the post and entered the Company once again. He signed a new employment contract with the work contents and salary same as before. Another 3 months' probation period was agreed. Unexpectedly, during the probation period, the Company terminated the employment relationship with him on the ground of being proved to not meet the employment conditions. Li Chena applied the labor arbitration at the Labor Dispute Arbitration Commission stating that "twice probation period is illegal!" and required the Company to pay him compensation at the amount of RMB 13500 due to the illegal agreement of probation period. The Arbitration Commission did not support the request. Li Chen refused to accept this and so brought a lawsuit to the court. Shanghai No. 1 Intermediate Court rejected Li Chen's claim.

【Analysis】The probation period is an observation period for enterprises to evaluate new employees and have regard to their moral character, work attitude and work ability. *General Office of the Ministry of Labor's Reply for Instructions of Labor Employment Management (1996 No.5)* defines "probation period" as "an observation period agreed by both parties not exceeding six months for the purpose of mutual understanding and choice after enterprises and employees establish employment relationship".

Second paragraph of Article 19 of *the Employment Contract Law* regulates that "an enterprise may stipulate only one probation period with the same employee." This regulation has caused much controversy in practice. Some people think that regardless as to whether the employment contract continues or not or whether an employee resigns and enters employment again or post adjustment, the same company and the same employee can only agree on one probation period. the Human Resource and Social Security Bureau in Chongqing replied on 20 March 2014 (2014 No. 2710) that according to *the Employment Contract Law Interpretation* (drafted by the author group for *the Employment Contract Law*), "after the probation period is completed, either during the term of the employment contract or renewing the employment contract or post adjustment, the enterprises cannot set another probation period with employees. After expiration or terminating of the employment contract or after renewal of the employment contract, if the enterprise recruits the same employee again, the enterprise also cannot set a probation period

again." On the contrary, some people think "agreement of only one probation period" refers to the same term of employment relationship. If an employee leaves the enterprise for a period of time and then re-enters the same enterprise, then this is a different employment relationship. Hence, the enterprise and the employee can agree on a new probation period. The judge of the case above adopted this opinion.

In 1994, *Explanations of the General Office of the Ministry of Labor on Certain Provisions of the Labor Law (1994 No. 289)* regulates that the probation period is suitable for the employee who first gets a job or who changes his post or type of work when changing jobs. Two years later, the Ministry of Labor issued *the Notice of Several Questions on the Implementation of the Employment Contract System(1996 No. 354)*, which regulates that the enterprise can only set one probation period for an employee who hasn't change his/her post. From the perspective of the legislative evolution, the law becomes stricter.

If there's a probation period in a renewed employment contract, what will happen? In practice, the judicators generally directly hold it illegal. If the enterprise terminates the employment contract because the employee "is proved not to satisfy the employment conditions during the probation period", the enterprise will face the legal risks of illegal termination. Therefore, before new judicial interpretation is issued, we do not recommend that the enterprise sets a probation period when an employee re-enters the enterprise or renews the employment contract with the enterprise. If the enterprises do need to re-examine the employee's ability to work, they can adopt "soft" approaches such as using internal rules and regulations or salary and benefits, etc. to avoid litigation burden.

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中国劳动法资讯速递
二零一五年一月刊

浅谈员工入职法律风险防范

案件的多发性和裁判结果的争议性，使劳动争议近几年一度成为社会关注的焦点，2014 年十大广受关注的劳动争议案件中，就有两件出自员工入职管理环节。员工入职法律风险防范是企业规范劳动用工管理体系的第一道防火墙，涉及以下几个方面，不容企业忽视。

一、 招聘广告的法律风险防范

关于招聘广告的法律风险防范，企业应当注意以下两个方面：

一是录用条件应当明确具体。录用条件是企业针对不同岗位所要招聘的人员自行制订的标准，是企业在试用期内考核新入职员工是否合格的标准。企业制定录用条件应当根据工作岗位的需要将条件逐一列出，避免使用“一切服从企业安排”、“较高工作积极性”等模糊语言，尽量将录用条件量化，增强操作性和执行性。录用条件通常包括以下三个方面：1.劳动者的基本情况和资质条件，比如年龄、学历、工作经验、外语水平等；2.劳动者的工作能力,包括岗位职责和用人单位要求的其他条件等;3.劳动者的道德条件，比如劳动者应忠于职守、诚实守信等。企业切勿将招聘条件等同于录用条件，招聘条件是企业招聘员工最基本的条件，语言相对简单模糊，不需要员工确认即有效。录用条件必须明确具体、严谨周密，需要员工的确认才对员工发生效力。我们建议企业尽量针对不同的工作岗位制作有别于招聘条件的录用条件，便于求职者明确工作职责，同时提高企业招聘工作效率。

二是招聘广告中不得有就业歧视或涉及隐私等禁止性内容。根据《就业促进法》、《就业服务与就业管理规定》的规定，劳动者享有平等就业的权利，招聘广告中不得有关于劳动者的民族、种族、性别、宗教信仰、户籍、身体残疾等歧视性内容。招聘广告不得涉及劳动者的隐私，《劳动合同法》第 8 条规定“用人单位有权了解劳动者与劳动合同直接相关的基本情况，劳动者应当如实说明。”据此，劳动者的说明义务仅限定在“与劳动合同直接相关”的范围内，与劳动合同无关的家庭状况、财产状况、恋爱状况等应属于隐私权的保护范围。招聘广告若涉及上述禁止性内容，企业可能面临侵权诉讼的风险。

二、 企业入职审查工作中的法律风险防范

入职审查是员工入职的最后一道关卡，很多劳动争议的发生都是在这个环节埋下的定时炸弹。根据《劳动合同法》的规定，我们建议企业应当严格审查员工的年龄、学历、资

格资历、身体健康、是否与原单位解除或终止劳动关系等方面。如果招聘高管，企业还应当审查是否有违反保密协议、竞业限制协议、服务期协议的情形。针对审查结果，企业可以制作相关书面文件，要求入职人员在《声明》或《保证书》上签字确认。另外，对联系方式（通讯地址）的确认也是入职审查不可忽视的工作。企业可以《确认书》的方式要求员工对联系方式（通讯地址）进行签字确认，《确认书》上应写明“经员工签字确认的上述联系方式（通讯地址）即为企业送达书面文件的有效地址”，并保留证据。

为防万一，我们建议企业将审查事项中存在不实和欺瞒的情形，以及员工不能提供相关资料的情形均视为“不符合录用条件”、“严重违反用人单位规章制度”的情形，企业一旦发现则可根据《劳动合同法》第 39 条的规定单方解除劳动合同，尽量将损失降至最低。

三、 “试用期间被证明不符合录用条件”的正确理解和运用

《劳动合同法》第 39 条规定，“劳动者有下列情形之一，用人单位可以解除劳动合同：（一）在试用期间被证明不符合录用条件……”实务中，很多企业都知道“不符合录用条件”是企业单方解除劳动合同的理由，不需要提前 30 天通知也不用支付经济补偿金，却忽视了企业须承担证明劳动者在试用期“不符合录用条件”的举证责任，导致仲裁或诉讼中只有口头陈述无真凭实据，从而陷入违法解除劳动合同的困境败诉。

为避免举证不能，我们建议：1.在招聘广告、劳动合同、任职说明等书面文件中约定明确具体的录用条件，并要求劳动者对相关证据签字确认；2.规章制度的相关内容作为录用条件的，向员工公示后要求员工签字确认；3.《解除劳动合同通知书》应在试用期内作出，同时在试用期内交由员工签收；4.企业应当在《解除劳动合同通知书》中说明理由和法律依据；5.建立规范的考核制度，使录用条件易于操作和执行。

案例分析：员工再次入职同一用人单位能否约定试用期？

【事件回放】2011 年 5 月 3 日，李晨进入曙光公司工作，担任研究顾问职务。双方签订为期两年的劳动合同，试用期 3 个月。2012 年 4 月 23 日，李晨提出辞职。2012 年 6 月 19 日，李晨再次进入曙光公司工作，双方签订了新的劳动合同，工作内容和薪资与离职前完全相同，可重新签订的劳动合同中又约定了 3 个月的试用期。没想到，还没过试用期李晨就被单位以试用期内不符合录用条件解除劳动合同。“两次约定试用期是违法的！”李晨向劳动人事争议仲裁委员会提出申诉，要求曙光公司支付违法约定试用期赔偿金 1.35 万元。经仲裁裁决，对该请求不予支持；李晨不服，向法院提起诉讼。上海一中院二审判决驳回了李晨的诉讼请求。

【评析】试用期是指用人单位对新入职员工进行思想品德、工作态度、工作能力等方面进行考察的时间期限。《劳动部办公厅对<关于劳动用工管理有关问题的请示>的复函》（劳办发【1996】5 号）对试用期的定义是，“用人单位和劳动者建立劳动关系后为相互了解、选择而约定的不超过六个月的考察期”。

《劳动合同法》第 19 条第二款规定，“同一用人单位与同一劳动者只能约定一次试用期”。

该条款的理解和运用，实务中向来存在争论。一种观点认为，不论是否存在劳动合同续订、劳动者离职一段时间后再入职或者劳动者换岗等情形，同一用人单位与同一劳动者只能约定一次试用期。重庆市人力资源与社会保障局 2014 年 3 月 20 日答复来信（渝人社信箱【2014】2710）时明确说明，“根据《劳动合同法释义》（《中华人民共和国劳动合同法》起草小组编）的解释，劳动者试用期结束后，无论在劳动合同期限内还是劳动合同续订，劳动岗位发生变化，用人单位不得再约定试用期。劳动合同续订或者终止后一段时间又招用劳动者的，对该劳动者，用人单位不得约定试用期。”另一种观点则认为，“只能约定一次试用期”仅指“同一劳动关系存续期间”，劳动者离职一段时间后再入职同一用人单位，是不同的劳动关系存续期间，因此可以再次约定试用期，本案裁判者或也持这种观点。

1994 年，《劳动部办公厅关于<劳动法>若干条文的说明》（劳办发【1994】289 号）规定，“试用期适用于初次就业或再次就业时改变劳动岗位或工种劳动者”。1 两年后，劳动部又在《关于实行劳动合同制度若干问题的通知》（劳部发【1996】354 号）规范性文件中规定，“用人单位对工作岗位没有发生变化的同一劳动者只能试用一次”。从立法沿革看，立法趋于严格。

那么，续签劳动合同时再次约定试用期又该如何处理？实务中，裁判者一般都直接认定违法，用人单位如果在重新约定的试用期内以劳动者不符合录用条件为由解除劳动合同，即面临违法解除劳动合同的法律风险。因此，新的司法解释出台之前，我们不建议企业在员工离职一段时间后再入职，以及续签劳动合同的场合与该员工再次约定试用期。企业确需对员工的工作能力等方面重新考核的，不妨利用规章制度、薪资福利等相对“柔和”的管理手段实现资源的优化配置，避免讼累。

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。

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