PRC Labor and Employment Law Newsflash
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Precautions for Employment Termination on the Grounds of "Being Pursued Criminal Liability According to Law"

Pursuant to both Article 25 of the *PRC Labor Law* and Article 39 of the *PRC Employment Contract Law*, an employer may dismiss an employee who has his criminal liability pursued according to law. However, how to define "being pursued criminal liability according to law"? What should an employer do if any of its employees is arrested according to law but no criminal sanction is imposed yet? What shall an employer pay attention to when it terminates the employment contract on the grounds of being pursued criminal liability? You may find answers below.

I. Definition of "Being Pursued Criminal Liability According to Law"

Article 29 of the *Opinions on Several Issues Concerning the Implementation of the PRC Labor Law* sets forth that " 'being pursued criminal liability' refers to being exempt from prosecution of the people's procuratorate, being sentenced by the people's court to a criminal penalty, or being exempt from sanction by the people's court under Article 32 of the Criminal Law. An employer may terminate the employment contract if an employee is sentenced to criminal detention or fixed-term imprisonment of not more than three years is granted a suspension of sentence".

"Exemption from prosecution" occurs when a people's procuratorate makes a decision on exemption from prosecution regarding a case of which the investigation is concluded on its own or by a public security organ that although having been found to be a crime offence, does not require criminal punishment or for which he may be free from criminal punishment according to law. No provision on "exemption from prosecution" can be found in the *PRC Criminal Procedure Law* revised in March 1996, that is to say, there will no longer any case of "being exempt from prosecution" in judicial practice.

"Exemption from criminal sanction" is also called exemption from criminal punishment. In accordance with Article 37 of the prevailing *PRC Criminal Law*, a person having a minor criminal offence that is not subject to criminal punishment may be exempt from criminal punishment.

Under Article 32-35 of the *PRC Criminal Law*, "being sentenced to a criminal penalty by the people's court" refers to being sentenced to one of the following criminal penalties: (1) principal penalties, i.e., public surveillance, criminal detention, fixed-term imprisonment, life imprisonment, and death penalty; (2) supplementary penalties, i.e., fine, deprivation of political rights, and confiscation of property; and (3) deportation (only imposed to foreigners).

Therefore, according to the *Opinions on Several Issues Concerning the Implementation of the PRC Labor Law*, the prevailing *PRC Criminal Law* and the *Criminal Procedure Law*, "being pursued criminal liability" refers to being sentenced by a people's court to any of the criminal penalties set out in Article 33-35 of the PRC Criminal Law or being exempt from criminal punishment under the judgment of a people's court which has taken into legal effect.

II. What to Do if an Employee is Arrested

A criminal case shall go through three stages, i.e., investigation, examination and prosecution, and trial, which last a long time. In reality, it happens frequently that an employee is arrested or otherwise imposed coercive measures according to law, in which case his personal freedom is restricted during a certain period so that he cannot go on duty. But at that moment, as the case is still at the stage of investigation and no final verdict is made, the employer cannot terminate the employment contract for "being pursued criminal liability according to law". So what can the employer do?

In accordance with Article 28 of the *Opinions on Several Issues Concerning the Implementation of the PRC Labor Law*, if an employee, suspected of crime, undergoes custodial interrogation, detained or arrested by a competent authority, his employer may suspend performing the employment contract during the personal freedom restriction period. In such suspension, the employer shall not undertake relevant obligations under the employment contract. Therefore, I suggest that the employer send a written "employment suspension notice" to the employee if appropriate, specifying the reason and duration of suspension, and stating that the employer will temporarily stop contributing social insurance, paying salary or performing any other related obligations for him/her. If it is proved that the employee's personal freedom was wrongly restricted, the employee may claim against the competent authority for the damages caused to the employee due to such suspension of performance in accordance with the *PRC State Compensation Law*.

III. Notes on Termination of Employment Contract

In practice, as the employer is unable to have a face-to-face communication on termination of employment contract when the employee is sentenced to criminal detention or any severe penalty or otherwise restricted of personal freedom, the employer usually ignores the normal procedure to undergo for termination, from which risks arise. In my perspective, the employer shall note:

1. Terminating in a Reasonable Time Limit

It is set forth in applicable laws that an employer may terminate the employment contract with an employee who is pursued criminal liability according to law, but it is not clearly specified what is the deadline for terminating. In my opinion, the employer should terminate the employment contract within a reasonable time limit which shall depend on the specific circumstances. Given that the employee returns to work after his criminal penalty has been executed, it is obviously unreasonable that the employer terminates employment with the excuse of his being pursued criminal liability. Although the Employment Contract Law grants the right of termination, the right should be exercised in a certain period. If the employee can terminate the employment contract for such a reason at any moment, it seems that a sharp sword which might fall down from time to time hangs over the head of the employee who has been pursued criminal liability, which goes against the stability of employment relationship. I'll show a judge's brilliant argument in a case below.

2. Notifying the Labor Union

Pursuant to Article 43 of the *Employment Contract Law*, when an employer is to termination an employment contract unilaterally, it shall give the labor union advance notice of the reason for termination. If the employer does not do so, the employee shall be entitled to require the employer to pay compensation for illegal termination; however, except that the employer has gone through relevant procedures before the employee files a lawsuit.

3. Issuing a Written Termination Notice

An employment contract is not necessarily terminated under the premises that the employee is pursued criminal liability. In the event that the employer terminates the employment contract for such reason, it should also issue a written Termination Notice to the employee rather than ignoring it because the employee is serving a sentence. If the employer's aware of the place where the employee serves a sentence, it may deliver the notice to such place; and if the employer cannot find out where the employee serves a sentence exactly, it may deliver the notice to the address for service set out in the employment contract or the employee's domicile.

Case Study:

Xu, a former employee of Tai'an Commercial Bank (the "Bank"), was arrested and charged with fund embezzlement in January 2008. On 26 September 2008, Tai'an Daiyue People's Court sentenced him to three years in jail, but suspended the sentence. On 27 September 2008, he was released. On 16 May 2012 the Bank made a Decision on Termination Employment with Xu and Hu, and on 1 June 2012 it notified Xu of the decision by EMS. In March 2013 Xu initiated labor dispute arbitration. The case is closed after labor arbitration, first-instance trial and second-instance trial. The second-instance court held that the Bank illegally terminated the employment contract and ordered the Bank to pay compensation of RMB 63,800 to Xu.

The second-instance court held that the employer shall make a decision of termination within a reasonable time limit in consideration of: **1. Maintaining a stable employment relationship.** The employment relationship was in an ambiguous and uncertain state before the Bank declared a clear intention to terminate the employment contract. For Xu, this uncertainty made him all along face the risk of being dismissed; and for the Bank, it is deduced from the Bank's negative attitude to exercise the immediate termination right that Xu's fault caused effect acceptable and had been accepted impliedly, and such deduction can be understood by ordinary people. Therefore, it is necessary to fix the above-mentioned "time limit", for the purposing of making the de facto status that Xu did not go to work after being pursued criminal liability in line with the legal status that the Bank might have terminated employment for such reason, to end the unstable state of the rights and obligations between the Bank and Xu and facilitate them to be re-stabilized so as to maintain a stable employment relationship. **2. Urging timely exercise of right.** The right of immediate termination that the Bank is entitled to for the reason of Xu's being pursued criminal liability is a Gestaltungsrecht which is exercised without assistance. The legal elimination of employment relationship will be achieved, provided that the Bank informs Xu of its intention to terminate. If there is no reasonable time limit for exercise of such right, Xu would not know whether and how the Bank exercises the right. As the duration of such uncertainty is unpredictable, Xu would be unable to take prompt measures to reduce the loss of unemployment, and it is unfair. Thus, setting of a time limit will urge the Bank to timely decide whether to terminate the employment contract and finally determine whether to remain the employment relationship. 3. **Bias to employees.** As employee, Xu's right of survival is more disadvantage than the Bank's employment freedom. If no reasonable time limit is set, Xu's fault, under the employment contract law, of being pursued criminal liability may be a legal reason held by the Bank for a long term used to terminate the employment contract. In such case, it will result in an imbalance relationship between the parties and deviate from the value of bias to employees under the employment contract law. From the action limitation, arbitration limitation, Ausschlussfrist, maximum term of right protection and other similar systems, a right should be exercised within a certain time limit, and otherwise will not be protected by law.

To sum up, the second-instant court held that it is a common sense that the Bank in the first place knew or should have known Xu was arrested in January 2008, sentenced to probation on 26 September 2008 and released on 27 September 2008, and the Bank's assertion that it did not know Xu's being pursued criminal liability until April or May 2012 is against common sense and is inadmissible. The Bank made the decision of termination in May 2012, almost 4 years after Xu was pursued criminal liability, obviously beyond the reasonable time limit that makes sense to common people. Therefore, the court upheld that it is an illegal termination and the Bank should pay compensation to Xu.[1]

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[1] Excerpt from the Civil Judgment (2014) Tai Min Si Zhong No. 180

中国劳动法资讯速递
二零一六年六月刊

以“被依法追究刑事责任”为由解除劳动合同的注意事项

《劳动法》第二十五条及《劳动合同法》第三十九条均规定，劳动者被依法追究刑事责任的，用人单位可以解除劳动合同。但是，“被依法追究刑事责任”应该如何准确定义？劳动者尚未被追究刑事责任但被依法逮捕时用人单位该如何处理？用人单位以劳动者被依法追究刑事责任为由解除劳动合同时又有哪些注意事项？本文将就上述问题一一解答。

一、“被依法追究刑事责任”的定义

《关于贯彻执行〈中华人民共和国劳动法〉若干问题的意见》第二十九条规定：“‘被依法追究刑事责任’是指：被人民检察院免予起诉的、被人民法院判处刑罚的、被人民法院依据刑法第三十二条免予刑事处分的。劳动者被人民法院判处拘役、三年以下有期徒刑缓刑的，用人单位可以解除劳动合同。”

免于起诉是指人民检察院对自己侦查终结的案件或公安机关侦查终结的案件，经审查认为犯罪嫌疑人的行为虽已构成犯罪，但依法不需要判处刑罚或者应当免除刑罚所做的免予追究刑事责任的处理决定。1996 年 3 月，《刑事诉讼法》修改后不再有免于起诉的规定，即司法实践中将不再有免于起诉的案例。

“免于刑事处分”即免于刑事处罚，根据现行《刑法》的第三十七条的规定，对于犯罪情节轻微不需要判处刑罚的，可以免予刑事处罚。

根据《刑法》第三十二条至三十五条可知，被人民法院判处刑罚是指被判处下列刑罚之一：（1）被判处管制、拘役、有期徒刑、无期徒刑、死刑等主刑；（2）被判处罚金、剥夺政治权利、没收财产等附加刑；（3）被判处驱逐出境（仅适用于外国人）。

据此，根据《关于贯彻执行〈中华人民共和国劳动法〉若干问题的意见》、现行《刑法》及《刑事诉讼法》的规定，“依法被追究刑事责任”是指依法被人民法院判处《刑法》第三十三条至三十五条规定的刑罚，或者被人民法院判决免于刑事处罚，且人民法院的判决已依法生效。

二、劳动者被依法逮捕时的处理

刑事案件需要经历侦查、审查起诉及审判三个阶段，是个漫长的过程。实践中，常会出现劳动者被依法逮捕或被依法采取其他强制措施，导致劳动者在一定期限内被限制人身自由，从而无法正常到岗上班的情形。但此时，案件尚在侦查

阶段，并无定论，用人单位不得以“被依法追究刑事责任”为由与其解除劳动合同，那用人单位此时该如何处理？

根据《关于贯彻执行〈中华人民共和国劳动法〉若干问题的意见》第二十八条的规定，劳动者涉嫌违法犯罪被有关机关收容审查、拘留或逮捕的，用人单位在劳动者被限制人身自由期间，可与其暂时停止劳动合同的履行。暂时停止履行劳动合同期间，用人单位不承担劳动合同规定的相应义务。因此，笔者建议用人单位在现实条件允许的情况下向劳动者发出书面的《中止劳动合同履行通知书》，并明确告知劳动者中止劳动合同履行的原因、期限以及用人单位将暂时停止为其缴纳社保、发放工资等事项。若劳动者经证明被错误限制人身自由的，暂时停止履行劳动合同期间劳动者的损失，可由劳动者依据《国家赔偿法》要求有关部门赔偿。

三、解除劳动合同的注意事项

实践中，因劳动者被判处拘役以上的刑罚，劳动者被限制人身自由，用人单位无法就劳动合同解除事宜与其当面沟通，很多用人单位因此忽略了解除劳动合同应履行的正常程序，从而导致风险。笔者认为，用人单位应注意以下几点：

1. 应当在合理期限内解除

现行法律仅规定了劳动者被依法追究刑事责任的，用人单位可以与其解除劳动合同，但是对于用人单位应在多长期限内与劳动者解除劳动合同，没有明确规定。笔者认为，用人单位应在合理期限内与劳动者解除劳动合同，合理期限应视具体情况而定。若劳动者已完全履行刑事处罚，且劳动者重新到岗工作，此后，用人单位再以劳动者被依法追究刑事责任而与劳动者解除劳动合同显然是不合理的。《劳动合同法》赋予了用人单位该项权利，但权利行使应有一定的期间，若用人单位随时可以“被追究刑事责任”与劳动者解除劳动合同，则等于在一个曾经被追究刑事责任的劳动者头上悬了一把随时可能挥落的利剑，不利于劳动关系的稳定。下文将通过一个案例展示承办法官精彩的说理。

2. 应当通知工会

根据《劳动合同法》第四十三条的规定，用人单位单方解除劳动合同的，应当事先将理由通知工会。否则，劳动者有权以用人单位违法解除劳动合同为由请求用人单位支付赔偿金。当然，劳动者起诉前用人单位已经补正有关程序的除外。

3. 应当发出书面的《解除劳动合同通知书》

虽然劳动者被依法追究刑事责任，但劳动合同并不当然解除。用人单位以劳动者被依法追究刑事责任为由解除劳动合同的，同样也应向劳动者发出书面的《解除劳动合同通知书》，不能因为劳动者正在服刑而忽略。若用人单位明确劳动者服刑的场所，可将《解除劳动合同通知书》送达至该服刑的场所；若用人单位无法得知劳动者具体的服刑场所，可将《解除劳动合同通知书》送达至劳动合

同约定的送达地址或劳动者的住所地。

案例分析：

徐某原系泰安市商业银行股份有限公司（以下简称“泰安商行”）的职工，2008 年 1 月因涉嫌挪用资金罪被逮捕。2008 年 9 月 26 日被泰安市岱岳区人民法院以挪用资金罪判处徐某有期徒刑三年，缓刑三年。2008 年 9 月 27 日被释放。2012 年 5 月 16 日，泰安商行作出《关于与徐某、胡某解除劳动关系的决定》，并于 2012 年 6 月 1 日以特快专递的形式通知徐某。2013 年 3 月，徐某提起劳动争议仲裁。后该案经劳动争议仲裁、法院一审、二审后结案，二审法院认定泰安商行违法解除劳动合同，判决泰安商行支付徐某赔偿金 63800 元。

二审法院认为：考虑如下因素，用人单位应在合理期限内作出解除劳动合同的决定：**一是维护劳动关系稳定。**在泰安商行明确其解除劳动合同的意思表示前，双方劳动关系处于两可的不确定状态，对于徐某而言，这种不确定状态使其长期处于可能被辞退的风险之中；对于泰安商行而言，其怠于行使即时解除权的行为，可以推定徐某的过错行为对其造成的影响在其可以接受的范围之内、泰安商行已默许徐某的过错行为，这一推定能为一般常人所理解。因此，确定本案合理期限的作用就在于使徐某在被追究刑事责任后未到单位上班的事实状态与泰安商行可据此与其解除劳动合同的法律状态相一致，从而结束泰安商行与徐某之间权利义务的不稳定状态，使之在法律上尽快重新固定从而维护劳动关系的稳定。**二是督促权利及时行使。**泰安商行因徐某被追究刑事责任而享有的劳动合同即时解除权是一种形成权，该权利的行使无需他人协助，只需泰安商行将解除劳动合同的意思表示告知徐某即可达到双方劳动关系消灭的法律结果。如不对该权利行使予以合理期间的限制，泰安商行是否行使该解除权、何时行使，徐某均不得而知，由于无法预知这种不确定状态的持续时间，也就不利于徐某尽快采取措施减少失业的损失，有违公平。因此，合理期间的确定将督促泰安商行及时做出是否解除劳动关系的决定，并最终确定双方劳动关系是否继续。**三是倾斜保护劳动者。**徐某作为劳动者，其生存权相对于用人单位的用工自主权来说处于弱势地位，如不限定合理期限，徐某被追究刑事责任这一劳动合同法意义上的过错行为可能会成为泰安商行长期持有的法定理由，不管经过多长时间均有权解除劳动合同，将导致双方关系失衡，与劳动合同法定位的向劳动者倾斜的价值取向相背离。我国法律诉讼时效、仲裁时效、除斥期间、最长权利保护期限等制度都意味着权利的行使需在一定期限之内，超过期限的，法律不再予以保护。

综上，本院认为，泰安商行在第一时间知道或应当知道徐某于2008年1月被逮捕、于同年9月26日被依法追究刑事责任判处缓刑并于同月27日被释放这一事实应为一般常识，泰安商行主张在2012年4、5月份才知道徐某被追究刑事责任有违常理，本院不予采信。因此，泰安商行于2012年5月即距徐某被追究刑事责任已近4年才作出与其解除劳动关系的决定，显然超出一般常人所能理解的合理期限，本院据此确认为违法解除，泰安商行应当向徐某支付解除劳动合同赔偿金。[1]

[1] 以上内容节选至编号为(2014)泰民四终字第 180 号的《民事判决书》

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