PRC Labor and Employment Law Newsflash

December, 2014

How to Handle Employee's Absence without Notice?

Sometimes, employees do not come to work without any notice and the reasons are also unknown. If the employers cannot properly response and handle this situation, they will face huge legal risks. Disputes regarding this absence without notice can be classified as the following types: the employment relationship is not terminated but continues and the employee requires the remuneration and fulfillment of the employment contract; the employment relationship continues and the employee is injured during the employment period thereupon and requires the employer for relevant treatment; the employee is in the medical care period and the employer terminates the employment relationship illegally; the employer illegally terminates the employment relationship without solid evidence to prove the absenteeism of the employee. In order to protect the legitimate rights of employers, employers shall consolidate certain facts through certain channels to make the best decision.

1. Several points that need to be clarified before handling absence without notice:

- If the employment contract or the internal rules and policies stipulate that when the employee fails to come to work exceeding a certain number of days, it will be regarded as absenteeism. This regulation is invalid and the termination using this as the ground is illegal.

  In other words, automatic resignation means the employee does not inform the employer and leaves the work position and the employer at his or her will. *The Reply of the General Office of the Labor Ministry Regarding How to Distinguish Automatic Resignation and Dismissal due to Absenteeism* has explained the "Automatic Resignation" in Item 1 of Article 2 of *the Regulations of the People's Republic of China on Settlement of Labor Disputes in Enterprises* as the behavior that employee takes the liberty to leave the work. This is the explanation from the authority. Although *the Regulations of the People's Republic of China on Settlement of Labor Disputes in Enterprises* was abolished on 8 January 2011, from the perspective of the historical mission of it, it could no longer meet the demand of social development after the implementation of *the Employment Contract Law* in

2008.

The employment contract termination can be divided into two categories: termination initiated by employees and termination initiated by employers according to the difference of terminate subject. Pursuant to *the Employment Contract Law*, termination initiated by employees can be classified as: termination through negotiation initiated by employees (Article 36); termination by advance notice (Article 37); unilateral termination (Article 38). Termination initiated by employers can be classified as: termination through negotiation initiated by employers (Article 36); termination due to faults (Article 39); non-fault termination (Article 40); redundancy termination (Article 41). In the meantime, the law explicitly forbids the agreement on termination conditions by the parties to the employment contract.

Considering the principle of legally prescribed termination conditions, the aforementioned automatic resignation is a special agreement in the employment contract or internal rules and policies, not belonging to the circumstances of the legally prescribed termination conditions. It is an agreement on termination condition. Automatic resignation, though a common practice due to customs, is not in compliance with the law under the environment of legally prescribed termination conditions of employment contract. Hence, even the employers have incorporated the automatic resignation into the employment contract or the internal rules and policies, due to the illegalness of the regulation, the employers will face the legal risks of illegal termination. Regarding this, the employers shall delete relevant regulations in the employment contract and internal rules and policies, and refine the attendance checking system and holiday system to control the legal risks.

- If employers terminate the employment relationship on the ground of absenteeism, it may constitute an illegal termination.

If employers terminate the employment relationship on the ground of absenteeism under the circumstance of automatic resignation, employers may face two common risks as below:

(1) The attendance records lack the signatures of employees, which weaken the evidentiary effect. At present, most of the companies adopt the electronic attendance checking system, such as using fingerprint and punching card, etc., and the companies only ask the employees to confirm the records by written at the end of the month. Hence, even the employees do have absenteeism situation, without the signature, there are flaws in the evidentiary effect.

(2) The employees may be sick and cannot ask for leave in time. Some HR specialists believe that the company has the sick leave application system. If the employees fail to ask for the sick leave following the procedure, it can

be regarded as absenteeism and the employers could terminate the employment contract. But from the perspective of protecting sick employees, if the employees fail to ask for sick leave following the standard procedure but the sickness is really exist, then the employers may face double challenges of legality and reasonability by making the termination decision regardless of the sickness fact.

2. The following handling procedure towards absence without notice is legal, effective and relatively low-risk:

- When absence without notice occurs, HR specialists of the companies can ask the employees to explain the reasons for the absence and provide relevant materials via emails or EMS in order to preserve the evidence.

- If the employees fail to reply the emails or EMS, or reply the emails or EMS but fail to provide proper reasons and relevant materials, the employers shall inform the employees that the employees' failure to ask for leave following standard procedure belongs to serious violation of internal rules and policies or absenteeism via email or EMS again. The employers shall ask the employees to come back to work. If the employees still fail to come back to work, the employers could terminate the employment relationship on the ground of absenteeism; as for those who come back to work, the employers could terminate the employment contract (on the ground of absenteeism) or give sick leave, leave for personal affairs, etc. according to the seriousness of the case.

- As for the employees replying sick, the employers could require them to provide sick leave application materials stipulated by the internal rules and policies and inform the employees that failure to do so will be deemed as serious violation of the internal rules and policies via emails or EMS. After informing the employees, the employers could terminate the employment relationship on the ground of absenteeism or serious violation of the leave application policy for those employees who fail to provide relevant materials. As for those providing sick leave materials, if the employers hold no objection, the employers shall determine the medical care period and inform the employees of it. If the employers hold objection regarding the sick leave materials, they could confirm and investigate at the hospital and with the doctor. The employers could terminate the employment contract (on the ground of absenteeism or fraud) or give sick leave according to the investigation results.

Case Study: Employees Resign without Notice; Employers Shall Handle Cautiously.

In April 2009, Sun was hired by a Construction Group. Due to his poor performance, the Group transferred him from the Group financial department to the subordinate branch company financial department and Sun signed the transfer document. The branch company had relatively loose management on attendance check and Sun was always late and left early, causing negative impacts on the business development and management of the branch company. In order to improve the management, the branch company stipulated the attendance checking system and implemented it after discussing with all the employees. The signing for attendance was adopted. After a week since the implementation of the attendance checking system, Sun did not come to work at the branch company. Considering this, the Group terminated his employment contract on the ground of absenteeism. Until the termination date, Sun was absent for ten days and did not hand in any documents to the Group or the branch company. Then Sun applied for arbitration claiming double severance pay for illegal termination. Sun handed in clinic medical record, diagnosis certificate, etc. as evidence during the absence period to prove that he was sick at that time. The arbitration commission held that Sun had solid evidence to prove his illness and the Group's termination on the ground of absenteeism was illegal.

We are in the opinions that although Sun failed to follow the sick leave application system, from the perspective of termination procedure of the Group, the Group did not perform the obligation of reasonable notice and did not evaluate the potential risks or obtain evidence regarding the termination, leading the termination of the Group had flaws, which constitutes an illegal termination. Hence, we advise that when absence without notice occurs, the employers shall collect evidence of violation. Before termination, the employers shall evaluate the legality as well as the reasonability, which will make the termination more acceptable by the judicial authority.

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

Dacheng Law Offices
24/F, Shanghai World Financial Center
100 Century Avenue, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888
Fax: 86-21-2028 3853
www.dachenglaw.com

中国劳动法资讯速递

二零一四年十二月刊

用人单位如何处理员工“不辞而别”?

员工“不辞而别”是指员工在未有任何说明的情况下，未到用人单位处工作的情形,员工未能到岗的原因无法获知。若用人单位未能作出及时有效的应对和处理，将面临较大的法律风险。因员工“不辞而别”而引发的争议，较为常见的有以下几种：劳动关系未解除，一直存续，劳动者要求工资报酬和继续履行劳动合同；劳动关系一直存续，期间员工受到伤害，向用人单位主张相关待遇；员工处于病假期，用人单位违法解除劳动合同；未有充分证据证明员工旷工，违法解除劳动合同等。出于对用人单位合法利益的保护，用人单位需要通过一定的渠道，确定一定的事实，进而作出最有利的决策。

一、 应对“不辞而别”之前需要明确的几个问题

1. 劳动合同或规章制度中约定，员工超过一定天数未能到岗工作的，视为“自动离职”。该约定无效，用人单位据此解除劳动合同应当被认定为违法。

通俗地讲，自动离职是劳动者不向用人单位打招呼，随意脱离所在工作岗位和所在单位的行为。而根据《劳动部办公厅关于自动离职与旷工除名如何界定的复函》中对《中华人民共和国企业劳动争议处理条例》第 2 条第 1 项中的“自动离职”的解释，自动离职是指职工擅自离职的行为。这是官方文件对“自动离职”的界定。虽然《中华人民共和国企业劳动争议处理条例》于 2011 年 1 月 8 日才废止，但是从其历史使命上来说，在 2008 年《劳动合同法》颁布实施后，其已经不符合社会发展需求了。

根据解除劳动合同主体的不同，解除劳动合同分为员工解除与用人单位解除。在《劳动合同法》中，员工解除又分为员工动议协商解除（第三十六条）、员工预告解除（第三十七条）、员工单方解除（第三十八条）；用人单位解除又分为用人单位动议协商解除（第三十六条）、过失性解除（第三十九条）、无过失性解除（第四十条）、经济性裁员（第四十一条）。同时，法律明确禁止了双方约定解除劳动合同的情形。

根据劳动合同解除情形法定的原则，上文所提及自动离职属于在劳动合同或规章制度中特别约定的“视为自动离职”，不是法定解除劳动合同的任何一种情形，系双方约定解除劳动合同的情形。“自动离职”虽然约定俗成，也还在广泛使用，但是在劳动合同解除情形法定化的环境下，已经不符合法律规定。因此，企业在劳动合同或者规章制度中，虽然约定了“自动离职”的情形，但是鉴于其不具备合法性，企业据此解除劳动合同就会构成违法，从而产生不必要的法律风险。基于此，企业应当删除劳动合同和制度中的相应内容，进而细化规章制度中的考勤及休假制度，通过制度、流程控制法律风险。

2. 用人单位以旷工为由解除劳动合同，可能构成违法解除劳动合同。

用人单位以旷工为由直接解除劳动合同，会面临以下两个比较常见的风险：

考勤记录未经员工签字确认，证据效力欠缺。目前大多数公司的考勤都使用电子考勤，比如指纹考勤、打卡考勤等，而且公司往往只是在月底时才要求员工对考勤进行签字确认。因此，即便存在员工旷工的情形，在没有员工本人签字确认的情形下，证据效力上存在瑕疵。

不排除员工生病但未及时请假的情形。部分 HR 认为，企业管理制度明确了病假申请的流程，员工未按照流程申请病假的，可以认定为旷工，企业据此可以进行解除劳动合同。但是从对病假员工保护的角度来看，如果员工没有履行请假审批手续，但确实存在生病的事实，企业置员工生病的事实于不顾而解除劳动合同的决定就会面临合法性、合理性的双重挑战。

二、 应对员工“不辞而别”情形，合法有效、相对稳妥的处理流程，可参考以下内容：

1. 在员工出现“不辞而别”的情形时，企业 HR 可以通过电子邮件或 EMS 等方式，要求员工对未能到岗的原因进行说明并要求提供相关材料，便于保留证据。

2. 员工未能回复电子邮件或 EMS 的，或者是回复了电子邮件或 EMS 但缺乏适当理由及相关材料的，再次通过电子邮件或 EMS 告知员工未能遵照请假流程申请假期，属于严重违纪或旷工行为，催促其返岗工作。对于未能返岗的，按照旷工解除劳动合同；对于返岗的，要求其进行书面情况说明，进而视情节轻重作解除劳动合同（以旷工为由）或病假、事假等其他操作。

3. 对于员工答复生病的，可以通过电子邮件或 EMS 的方式要求其提供规章制度所要求的病假申请材料并明确告知，未能提供相关材料的将被认定为严重违纪。在催告后，对于未能提供相关材料的员工，公司可以据此以旷工及严重

违反请假审批制度为由辞退该员工。对于已提交病假材料的员工，如公司无异议，核定医疗期并告知员工；若公司对病假材料有异议，可以向员工就诊的医院、医生进行了解、核实，视核查结果进行解除劳动合同（以欺诈、旷工为由）或病假操作。

案例分析：员工“不辞而别”，公司解除劳动合同时需谨慎

2009 年 4 月，孙某入职某建设集团公司。鉴于孙某的表现欠佳，集团公司将其从集团的财务部门调整到下属分公司的财务部门，孙某签收了调岗文书。分公司考勤管理相对宽松，以致孙某在工作期间，经常迟到、早退，给分公司的管理和业务开展造成了一定的影响。为了规范管理，分公司制定了考勤管理制度并经全体员工讨论通过后实施，实行员工签到考勤。但是在考勤制度实施一周后，孙某一直未到分公司上班。据此集团公司径直以旷工为由解除劳动合同。截至劳动合同解除日，孙某累计未到岗工作十天，也未向集团公司或分公司提交任何说明。后孙某申请仲裁，要求集团公司支付违法解除劳动合同赔偿金。孙某在仲裁程序中提交了未工作期间的门诊病历、诊断证明书等证据材料，证明其未到岗期间生病，处于医疗期。仲裁庭认为，孙某有充分证据证明其处于病假期间，集团公司以旷工为由解除劳动合同违法。

我们认为，虽然孙某未按照考勤制度履行病假审批程序，但是从集团公司的辞退程序来看，集团公司并未履行合理的告知义务，也没有就解除劳动合同可能存在的风险进行评估、取证，致使集团公司解除劳动合同的事实根据有瑕疵，构成违法解除劳动合同。因此，我们建议，在出现员工“不辞而别”的情形时，要注意收集员工违纪的证据，辞退前不仅要考虑到合法性，同时也要兼顾合理性，具备充分合理性的辞退决定进而更易获得裁判机构的认可和支持。

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。

大成律师事务所
上海市世纪大道 100 号环球金融中心 24 层（200120）
电话：86-21-5878 5888
传真：86-21-2028 3853
www.dachenglaw.com