



PRC Labor and Employment Law Newsflash

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Circumstances to Conclude an Open-ended Employment Contract

Article 14 of the *Employment Contract Law* regulates that: if a worker proposes or agrees to renew his employment contract or to conclude an employment contract in any of the following circumstances, an open-ended employment contract shall be concluded, unless the worker requests the conclusion of a fixed-term employment contract:

- (1) the worker has been working for the Employer for a consecutive period of not less than 10 years;
- (2) when his employer introduces the employment contract system or the state owned enterprise that employs him re-concludes its employment contracts as a result of restructuring, the worker has been working for the employer for a consecutive period of not less than 10 years and is less than 10 years away from his legal retirement age; or
- (3) prior to the renewal, a fixed-term employment contract was concluded on two consecutive occasions and the worker is not characterized by any of the circumstances set forth in Article 39 and items (1) and (2) of Article 40 hereof.

In accordance with this regulation, if the employee proposes to conclude an open-ended employment contract under any of above-mentioned circumstances, the employer shall conclude an employment contract with the employee. However, there still exist many problems when concluding open-ended employment contracts in practice. The following analysis focuses on two aspects handled in Shanghai's judicial practice.

1. The effect of concluding fixed-term employment contract while the condition of concluding an open-ended employment contract is met

The employee meets the conditions to conclude an open-ended employment contract (e.g. the worker has been working for the employer for a consecutive period of not less than 10 years), but he still concludes a fixed-term employment contract with the employer. This fixed-term employment contract is binding on the two parties. The employee does not have the right to revoke it and to ask the employer to sign an open-ended employment contract again. Therefore, once the employee and the employer have come to an agreement and concluded a fixed-term employment contract, this contract is legitimate and binding. Both parties shall fully perform it.

2. Employment contract renewal after a fixed-term employment contract was concluded on two consecutive occasions

When a fixed-term employment contract was concluded on two consecutive occasions, pursuant to term 3 of Item 2 of Article 14 of the *Employment Contract Law* and Shanghai's judicial practice, this regulation shall be interpreted as the followings: 1) if the employer does not want to renew the employment contract, the employment contract expires; 2) if the employer agrees to

conclude the employment contract for a third time, it should be an open-ended employment contract if the employee proposes as such; 3) if the employee agrees to conclude a fixed-term employment contract, this contract is valid and the employee cannot ask the employer to conclude an open-ended employment contract again. Before the expiration of the employment contract, if both parties cannot reach a consensus on the renewal, the employment contract expires.

Case Study: Concluding Fixed-term Employment Contracts on Four Consecutive Occasions

Ms. Jiang entered into a consulting company in May, 2009. Ms. Jiang concluded fixed-term employment contracts with the company for 4 times consecutively. The term of the last one is from 26 May 2012 to 25 May 2013. Ms. Jiang asked the company by email for the renewal the employment contract at the beginning of May, 2013. Since then, both sides discussed the matters concerning the renewal and post salary by emails but did not come to an agreement. On 24 May 2013, the company informed Ms. Jiang in written that the employment contract will not be renewed upon expiration, since both sides have not reached a consensus.

Ms. Jiang was in the opinion that she had concluded four fixed-term labor contracts consecutively with the company, and pursuant to *the Employment Contract Law*, she met the conditions to conclude an open-ended employment contract. The company shall renew the employment contract and had no right to end it unilaterally.

Ms. Jiang brought the dispute to the Labor Dispute Arbitration Commission and the Court. Both the Labor Dispute Arbitration Commission and the Court did not support Ms. Jiang's claims and held that, pursuant to *the Employment Contract Law*, in spite that both parties agree to conclude a fixed-term employment contract, an open-ended employment contract should be concluded if the employee and employer have concluded two fixed-term employee contracts consecutively and agreed to renew it. In this case, Ms. Jiang has concluded four fixed-term employment contracts consecutively, and the fourth one should be binding on the both parties. Since both sides did not reach a consensus on the renewal of the employment contract upon expiration, it is proper for the company to terminate the employment relationship when the fourth employment contract expires.

In the end, the above contents are just the quotation and analysis of the cases judged by the Labor Dispute Arbitration Commission and the Court in Shanghai. The employer shall still be prudent during the daily employment and personnel operation.

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中国劳动法资讯速递
二零一四年五月刊

浅议签订无固定期限劳动合同之情形

《劳动合同法》第十四条规定：有下列情形之一，劳动者提出或者同意续订、订立劳动合同的，除劳动者提出订立固定期限劳动合同外，应当订立无固定期限劳动合同：（一）劳动者在该用人单位连续工作满十年的；（二）用人单位初次实行劳动合同制度或者国有企业改制重新订立劳动者时，劳动者在该用人单位连续工作满十年且距法定退休年龄不足十年的；（三）连续订立二次固定期限劳动合同，且劳动者没有本法第三十九条和第四十条第一项、第二项规定的情形，续订劳动合同的。

根据上述法律规定，劳动者提出订立无固定期限劳动合同的请求符合法律规定，用人单位必须与劳动者签订无固定期限劳动合同。但在具体实务操作时，仍有很多涉及无固定期限劳动合同的问题。以下将根据目前上海域内仲裁实务操作涉及的两个方面进行分析，供大家商榷。

（一）符合订立无固定期限合同的条件，但双方订立了固定期限劳动合同的效力

劳动者符合签订无固定期限劳动合同条件（例如：劳动者已经在用人单位连续工作满十年），其在原劳动合同期满后仍与用人单位签订了固定期限劳动合同的，则该份固定期限劳动合同对劳动者与用人单位均有约束力，劳动者无权反悔要求用人单位重新与其签订无固定期限劳动合同。因此，只要劳动者与用人单位自愿协商一致，签订了固定期限劳动合同，即受法律保护，劳动者与用人单位均应当全面履行。

（二）用人单位与劳动者连续订立二次固定期限劳动合同以后续订劳动合同之情形

根据《劳动合同法》第十四条第二款第（三）项规定，根据目前上海仲裁实务操作，应当是指劳动者已经与用人单位连续订立两次固定期限劳动合同后：1）如果用人单位不愿意与劳动者续订合同，则劳动合同期满终止；2）如果用人单位同意与劳动者第三次续订合同，只要劳动者提出签订无固定期限劳动合同的，用人单位必须与劳动者签订无固定期限劳动合同；3）如果劳动者同意与用人单位续签固定期限劳动合同的，该劳动合同合法有效，劳动者不得要求用人单位重新签订无固定期限劳动合同。在该劳动合同期限届满时，如果双方不能就续订劳动合同达成一致的，合同期满终止。

案例分析：连续签订四次固定期限劳动合同

蒋小姐于 2009 年 5 月进入某咨询管理公司工作，双方共签订固定期限的劳动合同 4 次，最后一份《劳动合同》的期限从 2012 年 5 月 26 日起至 2013 年 5 月 25 日止。2013 年 5 月初，蒋小姐发邮件询问公司劳动合同续订意向。此后，双方邮件往来讨论续签劳动合同及岗位薪酬事宜，但未能达成一致。同年 5 月 24 日，公司书面通知蒋小姐，称由于双方协商未达成一致，劳动合同到期后不再续签。

蒋小姐认为其已经与公司连续签订 4 次固定期限劳动合同，根据《劳动合同法》规定，满足续订无固定期限劳动合同之条件，公司必须与其续订劳动合同，无权单方面终止。

蒋小姐遂先后诉至劳动仲裁委员会、法院。劳动仲裁委员会与法院均裁判蒋小姐败诉并认为，根据《劳动合同法》，劳动者已经与用人单位连续订立二次固定期限劳动合同且同意续签合同的，除双方同意订立固定期限劳动合同外，应当订立无固定期限劳动合同。现蒋小姐与公司已经订立了 4 次固定期限劳动合同，第 4 份固定期限劳动合同对双方均具有约束力，在该合同期满时，由于双方未能就新劳动合同协商一致，公司在该份劳动合同期满后终止与蒋小姐的劳动关系，并无不当。

最后，需要说明的是，上述内容均系对目前上海域内劳动仲裁与法院的审判案例进行的引用与分析，用人单位在日常劳动人事管理中仍需审慎操作。

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