PRC Labor and Employment Law Newsflash

February, 2012

Tips on Layoffs in the New Year

Shocked by the US and Europe debt crisis, the external market is going weak together with the domestic demand slowing down, followed by the potential risks increasing in the fields such as real estate market, investment and financing platforms and private sector borrowing. As a result of all these unfavorable factors, the pressure on operation costs of enterprises is quite heavy. In order to lower the costs, several large and medium sized foreign investment enterprises adopt job cutting strategies since the second half of 2011. However, after entering the year of 2012, the aforementioned situation is not obviously improved. Hence, many people are afraid that they will see the repeat of the layoffs in 2008. After handling and summarizing a large amount of job cuts, the Labor Law Team of Dacheng Law Offices offers the following issues and suggestions for your reference.

1. Can "payment in lieu of notice" substitute for "issuing a statement to the trade union or to all employees with thirty days' prior notice"?

The procedural requirement is stipulated in Article 41 of *Labor Contract Law of PRC* which includes issuing a statement to the trade union or to all employees with thirty days' prior notice. The job cut is not due to the faults of employees or the personal reasons and it always causes inconvenience to employees' life and other aspects. Therefore, the opinion of the trade union or employees shall be heard and considered and the employees have the right to negotiate the lawfulness and reasonableness of the workforce-reduction plans with the enterprises. "The thirty days' prior notice" hereby represents not only one-month salary, but the employees' rights of knowing and supervising as well. In summary, "payment in lieu of notice" cannot substitute for "issuing a statement to the trade union or to all employees with thirty days' prior notice".

2. Is the standard for severance payment of layoffs "N" or "N+1"?

In accordance with the stipulation in Article 46 of *Labor Contract Law of PRC*, enterprise shall pay severance to employees where the enterprise cuts down the number of employees and Article 47 further specifies the standard for the severance payment. Synthesizing the regulations of Article 41, 46 and 47, the severance standard is "N", which represents the number of years that the employee worked for the enterprise. Nevertheless, in the practice, some labor administrative departments regard the standard should be "N+1" since the written notice of the employee shall be thirty days in advance (the workforce-reduction plan is normally conducted immediately after filing with the labor administration authority, so it is almost impossible to inform each employee thirty days in advance.); if the severance standard of the plan provided by the enterprise is "N", the labor administration

authority may not accept the record and thus renders the layoffs illegal. In the consideration of these, the enterprises shall have sufficient communications with local labor administration authority before any workforce-reduction plan is carried out.

3. Which clause shall be applied when major changes occur in the objective circumstances, layoffs or Item 3 of Article 40 of *Labor Contract Law of PRC*?

"Major changes have occurred in the objective circumstances" is the precondition for both layoffs and employment contract termination in Item 3 of Article 40 of *Labor Contract Law of PRC.* However, its application remains confused in practice. We are of the opinion that although the consequences of the aforementioned are the same, namely the enterprises terminating the labor relations laterally, layoffs is different for the reason that it cuts large numbers of employees under special circumstances which may cause social shock. Out of this consideration, the law sets up relatively strict substantial and procedural requirements. In contrast, the termination of Item 3 of Article 40 of *Labor Contract Law of PRC* is more suitable for individual layoffs. Therefore, when major changes have occurred in the objective circumstances, the application of law depends on the involving number of employees and the proportion of involving employees against the total staff. If individual layoff is involved, Item 3 of Article 40 of *Labor Contract Law of PRC* shall be applied; if large number of layoffs is involved (twenty or more employees, or a number of employees fewer than twenty but comprising more than ten percent of the enterprise's workforce), the relevant legal requirements for layoffs shall be met and procedural requirements shall be satisfied.

4. Strategies on ingenious combination of different labor relation in termination.

Terminations through negotiation, major changes occurring in the objective circumstances and layoffs are all lawful strategies to terminate the labor contracts, while labor contract expiration is also one efficient method of staff reduction. There are many successful cases in practice. When choosing a specific strategy, the enterprise shall take several factors into account, for example, the production and operation condition, industrial characteristics, reason of job cut, education degree of the employees, workforce source, age, gender, marriage and maternity status, length of service, skills and so on so as to find the most reasonable strategy or strategy combinations.

Case Study: What Is the Legal Consequence When Layoffs Is Made Through Procedural Violation?

On May 18th, 2011, Company A, a famous video site, suddenly cut 20% of its staff (almost 200 sales people) on the grounds of business model adjustment. This job cut issue triggered a war of words between the laid off workers and Company A which has not ended yet. The laid off workers held the opinion that the conduct of Company A is unacceptable and they held several media conference to condemn Company A. In contrast, Company A expressed grievances to the media that the sales cost remained high, accounting for over 80% of the gross income in 2010. Because of the continuous loss, Company A once suggested reducing the sales commission of the employees but no agreement reached. The job cut was only to reduce the sales cost. May 26th, 2011, the Bureau of Human Resources and Social Security in Haidian District of Beijing deemed the layoffs illegal and null and void and requested correction within limited time before May 30th in accordance with Article 26 of *Labor Law of PRC* and Article 41 of *Labor Contract Law of PRC*.

Based on this typical case, we can draw a conclusion that the layoffs could be deemed as null and void if the enterprise fails to complete all the necessary procedural requirements, such as issuing a statement to the trade union or to all employees with thirty days' prior notice, listening to the opinions of the trade union or employees and filing for the record of the workforce-reduction plan with the labor administrative department. The invalid layoffs means the termination of the labor relations is invalid and the employees have the rights to restore the employment relations or ask for severance compensation.

Dramatically, on May 20th, 2011, Company A presented cut proposal to the local labor administrative department. The conduct firmly reflected that the cutting plan remained unchanged. Of course, the lawfulness and success of this "second" wave of cutbacks largely depends on the lawfulness of the layoffs procedures. By report, the negotiation and settlement work between Company A and those laid off workers are still continued.

This newsflash is prepared by the Labor Law Team of Dacheng Law Offices, including Anderson Zhang, Elle Gao, Maggie Kong, Susan Shan, Novel Sun, Kent Xu and John Zhou. If you have any inquiries regarding the PRC employment law matters, please contact us at laborlaw@dachenglaw.com.

Disclaimer: this newsflash is for reference only and does not constitute any legal advices. Readers may contact us for legal advice on any particular issues. The copyright of the entire content is owned by our team. Reproduction and distribution of this newsflash in whole or in part without the written permission of our team is expressly prohibited and we reserve all the lawful rights.

Dacheng Law Offices
3/F, 30/F, China Development Bank Tower
500 Pudong South Road, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888 Direct: 86-21-3872 2417
Fax: 86-21-5878 6218 Mobile: 86-188 0176 6837
www.dachenglaw.com

中国劳动法资讯速递
二零一二年二月刊

新年话“经济性裁员”

受美、欧债务危机冲击，外部市场走弱，加之国内需求也存在放缓压力，房地产市场、投融资平台、民间借贷等领域的潜在风险增大，这些不利因素已经对企业的经营成本产生很大的压力。为了减少成本，自 2011 年下半年起，陆续有大、中型外商投资企业采取了经济性裁员的措施。在进入 2012 年后，前述不利因素并没有获得明显改善，因此，很多人担心 2008 年的那波“裁员潮”又要卷土重来。大成劳动法团队在主办并总结了多起裁员项目后，提出如下常见性问题及我们的意见，供大家参考：

1、“代通金”能否代替“提前三十日向工会或者全体职工说明情况”？
劳动合同法第四十一条对于经济性裁员设置的程序要件就包括“提前三十日向工会或全体职工说明情况”。 裁员既非员工的过错也非员工本身的原因，且裁员总会给员工造成生活等方面的不便，因此，裁员前应听取工会或员工的意见，员工可以就裁员方案的合法性、合理性向企业提出交涉。这里的“提前三十天”并不仅仅代表一个月的工资，也意味着员工的知情权、监督权，因此，企业不能以所谓的“代通金”代替“提前三十天”的程序要件。

2、经济性裁员的补偿标准是“N”还是“N+1”？
根据劳动合同法第四十六条的规定，企业施行经济性裁员的，应向被裁减的员工支付经济补偿；劳动合同法第四十七条规定了经济补偿的标准。综合第四十一条、第四十六条、第四十七条的规定，经济性裁员的补偿标准是“N”，即被裁减员工在本企业的工作年限。但在实践中，少数劳动行政部门认为，经济性裁员的补偿标准是“N+1”，其理由是企业裁员前应提前三十天书面通知被裁减的员工（而裁员方案通常是在劳动行政部门接受备案后立即实施，不太可能再提前三十天通知每一位被裁减的员工）；如果企业呈报的裁员方案中的补偿标准是“N”，劳动行政部门将不接受裁员方案的备案，企业也就不能合法裁员了。鉴于此，企业在做裁员方案前应与当地劳动行政部门作充分的沟通。

3、客观情况发生重大变化，在经济性裁员与劳动合同法第四十条第（三）项之间如何选择适用？
客观情况发生重大变化是经济性裁员和第四十条第（三）项“情势变更解除”的条件之一，但法律适用问题在实践中经常被混淆。我们认为，虽然经济性裁员的结果与劳动合同法第四十条第（三）项“情势变更解除”的结果是一样的，即企业单方解除员工的劳动关系，但经济性裁员是企业在特殊情形下大量解雇员工，可能引起局部的社会震荡，出于社会稳定的考量，法律设置了较为严格的实质条件和程序条件；而情势变更解除主要适用于个别解雇。因此，客观情况发生重大变化后，解除劳动关系的法律适用主要取决于涉及员工的数量和涉及员工占员工总数的比例。如果是个别解雇，则适用劳动合同法第四十条第（三）项；如果是大量解雇（20 人以上或员工总数 10%以上），则应严格按照法律有关经济性裁员的要求，履行全部的程序要件。

4、巧妙组合不同的解除劳动合同的策略。
协商解除、情势变更解除、经济性裁员等都是合法解除劳动合同的策略，劳动合同终止也是企业减员的有效方法，且均有大量的成功实践的案例。各企业在选择具体策略时，应结合自身的生产经营状况、行业特点、减员的原因、员工的受教育程度、来源地、年龄、性别、婚育状况、工龄、技能等因素，选择最合理的策略或策略组合。

案例分析：程序违法的裁员，法律后果是什么？

某知名视频网站 A 公司以调整商业模型为由，于 2011 年 5 月 18 日起突击裁员 20%，涉及约 200 名销售人员。该裁员事件引发了被裁员工与 A 公司间至今尚未结束的口水战。被裁员工认为，A 公司是“暴力裁员”，并举行多场媒体见面会，口诛笔伐 A 公司。A 公司则向媒体大倒苦水：公司的销售成本居高不下，2010 年公司总销售成本占到毛收入的比重超过 80%；由于持续亏损，公司曾经提出降低销售人员的销售提成，但未得到销售人员的同意；而裁员也是为了减少销售成本。2011 年 5 月 26 日，北京市海淀区人力资源和社会保障局根据《劳动法》第二十六条、《劳动合同法》第四十一条，认定 A 公司此次裁员事件为违法行为，确认此次裁员无效，并责令 A 公司 5 月 30 日前限时整改。

通过这起典型案例，我们可以得出的结论是：如果裁员时企业没有依法完成全部的程序要件，如：提前三十天向工会或者全体员工说明情况、听取工会或员工的意见、裁员方案向劳动行政部门备案，裁员很可能被认定为无效。裁员无效意味着企业的解除行为违法，员工有权选择要求企业恢复劳动关系或支付赔偿金。

戏剧性的是，2011 年 5 月 20 日，A 公司向当地劳动行政部门提交了裁员报告。这个行为坚定地表明，A 公司裁员的计划不变。当然，“第二次”裁员是否合法、能否成功，仍在很大程度上取决于裁员程序的合法性。据悉，A 公司与第一次被裁减员工的协商、和解工作仍在继续。

本资讯速递系大成劳动法团队撰拟，本期责任编辑：张根旺；其他编辑：高海燕、孔琪、单训平、孙颖、徐智强和周军。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 laborlaw@dachenglaw.com 联系我们团队。

声明：本资讯速递仅供参考，不构成法律意见。读者如有任何具体问题，应及时联系本团队以征询适当的法律意见。本资讯速递所有内容由本团队创作、编辑、翻译或整理，本团队对该等内容享有著作权。未经本团队书面明示同意，任何个人或实体不得转载或以任何其他方式使用本资讯速递内容之任何部分，否则我们将追究其法律责任。

大成律师事务所
上海市浦东南路 500 号国家开发银行大厦 3 层、30 层（200120）
电话：86-21-5878 5888　直线：86-21-3872 2417
传真：86-21-5878 6218　手机：86-188 0176 6837
www.dachenglaw.com