



PRC Labor and Employment Law Newsflash

March, 2013

Strikes and Company Response

In recent years in mainland China, cases of collective action of Chinese labor disputes have taken off. One form of the collective action is the strike, breaking out at famous companies like International Paper, Foxconn, Toyota, etc. The impacts of the strike and its by-products include: walking off the job, preventing other employees or vehicles from entering the plant area, sealing the road and even detaining the corporate senior management or life threatening behaviors. Our team has recently received invitations from companies to cope with the strike crisis and to supply legal services. Hence, this newsletter will briefly introduce the legal nature of Chinese strikes and the essential steps a company should take in the event of a strike.

1. The definition of strikes

A strike is the refusal to work by employees as a form of protest, typically to gain concessions. In the industries of collective labor like plants, coal mines, etc., strikes will quickly attract attention from the employers, the government and the public. Therefore, the requirements of the workers may be secured.

2. Do employees have the right to go on strike?

a. constitutional level

The regulation of the right to go on strike in the four constitutions since the foundation of China has changed over time. In the 1954 version, there is no regulation of such right in citizen's rights. In the 1975 and 1978 versions, there is the regulation of "strike freedom". In the 1982 version, namely the present one, the "strike freedom" is canceled.

In 1983, a book named *Q&A of Constitution of the People's Republic of China* published by Gansu people's publishing house described strikes as "things any citizen with consciousness will not do". It seems to indicate that strikes are illegal. In fact, in the mid and late 1980s, many foreign invested companies used this to deem the strikes as illegal, requiring the Chinese government to prosecute in accordance with the law. However, many scholars believe that even though the state does not have the obligation to protect strikes, it cannot mean that strikes are illegal.

b. legal dimension

Article 27 of *Trade Union Law* regulates: "In case of work-stoppage or slow-down strike in an enterprise or institution, the trade union shall, on behalf of the workers and staff members, hold consultation with the enterprise or institution or the parties concerned, present the opinions and

demands of the workers and staff members, and put forth proposals for solutions. With respect to the reasonable demands made by the workers and staff members, the enterprise or institution shall try to satisfy them. The trade union shall assist the enterprise or institution in properly dealing with the matter so as to help restore the normal order of production and other work as soon as possible.” According to this, many believe this is the legal ground of China’s recessive right to go on strike.

c. international convention

In 1997, China joined *the International Covenant on Economic, Social and Cultural Rights* of the United Nations. Article 8 of the Covenant regulates, parties to the Covenant shall protect the right to strike of the workers. When approving this Covenant, China did not raise any reservations, which means China agrees and abides by this regulation.

3. How to handle the strikes?

a. Precaution

None of the strikes break out incidentally. It must be designed and launched by organizers. So, the management of the companies must pay close attention to these trends, especially before the company takes actions affecting the vital interests of the employees, like changing the remuneration, internal rules and regulations, moving plant site, etc. The company shall do sufficient investigation, survey and communication, and once the suggestion of the strike is found, the company shall immediately identify the organizer and use the carrot and stick approach to nip the collective action in the bud.

b. Communication Channel Construction

In the strike dispute, the employees always make excuses and defend their legal and reasonable strikes by blaming a lack of communication with the company. Hence, the company shall attach importance to the construction of the following ways of communication:

(1) Trade union

In accordance with Article 2 of *Trade Union Law*, “Trade unions are mass organizations of the working class formed by the workers and staff members on a voluntary basis.” The company shall value the effects and worth of the trade union by using it as the communication bridge between the company and the employees in their daily management. At the same time, the trade union will serve as a firewall, when the dispute between the company and the employee is relatively tense. Even though a strike may happen, the trade union can play a key role to ease the conflicts and divergences.

(2) Employees’ (representative) conference

Item 3 of Article 3 of *Regulations of Shanghai Municipality on Employees’ Representative Conference* regulates: “the employees’ (representative) conference is the basic form of democratic management for enterprises and public institutions, an important system to coordinate labor relationship and the organization for employees to exercise power of democratic management.”

(3) Other communication channels

The company can use manager mailbox, employee benefit committee or other forms to realize the smooth conveying of intentions of companies and employees.

c. Evidence preservation

In the event of a strike, some employees may make use of the chaotic situation to destroy plant site and equipment, beat and illegally detain management staff, holding the mentality that the law cannot punish the majority. The company shall record these illegal, even criminal behaviors to preserve the evidence for the future grounds of lawful handlings.

d. Crisis response and lawful handlings

When confronting a strike, the company shall not only rely on its own ability to resolve the dispute, but the need to coordinate with the trade union of the higher level, labor administration department, and the police security department as well to stabilize the situation in time by joint participation; the participation of labor law lawyers is also essential. After analyzing the case, the lawyer could tailor solution plans for different groups based on the realistic circumstances and pleadings of various employees to realize the purpose of disorganizing.

When the situation is mitigated, for pleadings which are legal and reasonable, the company shall respond positively at the guidance of the lawyer, while for those unreasonable and illegal, the company shall refuse firmly.

The relevant governmental authorities will not blindly take sides in the employee when handling a strike, because an inappropriate handling will lead to unfavorable copycat claims and will further harm the local social stability.

Case Study: A Shenzhen Supermarket Fired the Employee Representative in strike Upheld by the Court

At the beginning of June 2012, several employees from a supermarket in Shenzhen asked their superiors for a salary raise but got nowhere. On June 28th 2012, Mr. Jiang, Mr. Huang and some other employees had a meeting discussing the salary raise and overtime payment raise as well as the planning of a collective action if the company refuses. After a few days, the employees learned the salary adjustment scheme. (It was referred to as PIP by the supermarket.) In the scheme, it read: “the total amount of the salary remains the same, and the income of the employees is increased.” The employees found out the previous housing subsidy had been moved into the basic salary, which then increased by RMB 1500. The employees felt angry and regarded it as going back on promises by the company.

On July 5th 2012, after several negotiations but failing to reach an agreement, 40 employees gathered at the distribution center of the supermarket and went on a strike to safeguard their rights by revealing slogans reading “high prices”, “low salary” and “salary raise”. They hoped that the higher management would pay attention to them and take the bottom layer employees’ requirements seriously.

At around 9 a.m. that day, the local policemen took away four employees including Mr. Jiang and Mr. Huang and they were released at 4 p.m. that day.

On July 6th 2012, when Mr. Jiang and Mr. Huang came back to the supermarket, they were fired on the spot. The reason was: “(walking off the jobs) seriously disturbed the order of production, affected the public order and seriously violated the labor disciplines...in accordance with the employee handbook, the punishment was to terminate the employment contract...”

Mr. Jiang and Mr. Huang then applied for arbitration to the local labor arbitration commission and asked for damages of illegal termination by the supermarket.

On August 22nd 2012, the commission ruled that Mr. Jiang and Mr. Huang seriously violated the labor disciplines and that it was in compliance with Article 39 of *the Employment Contract Law* that the supermarket terminated the employment contracts. Therefore, the supermarket did not need to pay damages. Afterwards, Mr. Jiang and Mr. Huang sued before the court and the court dismissed their case.

Our team believed, pursuant to Article 19 of *the Supreme People's Court's Interpretation on Labor Dispute Trials*: “the labor rules and regulations, formulated by an employer through democratic procedures in compliance with the laws, regulations and policies of the state and made public to the employees, can be used as trial grounds for the people's court”. The behaviors of walking off the jobs seriously violated the relevant regulation of the employee handbook, so the company could lawfully and unilaterally terminate the employment contracts.

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中国劳动法资讯速递 二零一三年三月刊

罢工与企业的应对

最近几年中国大陆劳资领域的群体性事件呈逐年递增的形势，群体性事件的主要表现形式之一是罢工，涉及的企业包括国际纸业、富士康、丰田汽车等知名企业。这些罢工的影响和“副产品”包括：停止生产，阻止其他员工、车辆等进入厂区，封锁道路，甚至“软禁”企业高级管理人员、发生命案等。本团队近期又接连收到企业的邀请，帮助被卷入罢工纠纷的企业应对危机，为其提供法律服务。为此，本期速递将简要介绍中国式罢工的法律性质及企业在罢工事件中应有的作为。

一、罢工的定义

罢工是工人为了表示抗议，而集体拒绝工作的行为。在以集体劳动为主的工作行业，如工厂、煤矿等，罢工往往能够迅速得到雇主、政府和公众的注意，从而工人所提出的要求就更可能获得保证。

二、员工有权罢工吗？

1、宪法层面

在建国后的四部宪法中，关于罢工权的规定是有变化的。1954 年《宪法》关于公民的权利中没有罢工的规定。我国 1975 年《宪法》和 1978 年《宪法》有“罢工自由”的规定。1982 年通过的现行宪法中，则取消了“罢工自由”的规定。

1983 年甘肃人民出版社出版的名为《〈中华人民共和国宪法〉问答》中描述罢工“是任何一个有觉悟的公民都不容许做的事情”，似乎暗指公民罢工是违法的行为。事实上，20 世纪 80 年代中后期也确实曾经出现过外商投资企业据此认定其工人罢工是违法行为，要求中国政府“依法追究”的案例。但很多学者认为，国家不负有保护罢工的义务，并不意味着罢工是违法行为。

2、法律层面

《工会法》第二十七条规定，“企业、事业单位发生停工、怠工事件，工会应当代表职工同企业、事业单位或者有关方面协商，反映职工的意见和要求并提出解决意见。对于职工的合理要求，企业、事业单位应当予以解决。工会协助企业、事业单位做好工作，尽快恢复生产、工作秩序”。据此，很多人认为，这是中国“隐性罢工权”的法律依据。

3、国际公约

1997 年，中国签署加入了联合国的《经济、社会及文化权利国际公约》，该公约第 8 条规定，缔约各国应该保证劳动者享有罢工权。在批准时中国并没有对该规定提出保留意见，这也就表明：中国是同意遵守此项规定的。

三、罢工的应对

1、预防

任何罢工的发生都不是偶然的、瞬间爆发的，其发生必然经历组织者发起、酝酿、召集等过程。因此，企业管理者要密切关注这些动向，尤其是在企业采取改变员工薪酬福利、规章制度、搬迁厂址等影响员工切身利益的举措前，企业要做好充分的调研、沟通，一旦罢工的苗头，立即锁定组织者，晓之以利害，将群体性事件化解在萌芽状态。

2、沟通渠道的建设

罢工纠纷中，员工往往以缺乏与企业的沟通渠道为由，为自己罢工行为的合法性、合理性作辩解。因此，企业必须重视建设如下沟通渠道：

工会

根据《工会法》第二条的规定，“工会是职工自愿结合的工人阶级的群众组织”。企业应当重视工会的作用、价值，在日常管理中，通过工会在企业 and 员工之间建立起沟通的桥梁；在劳资矛盾比较尖锐时，建立一道防火墙。即使发生罢工事件，工会也可以发挥协调作用，化解矛盾和分歧。

职工（代表）大会

《上海市职工代表大会条例》第三条第三款规定，“职工代表大会（或者职工大会）是企事业单位实行民主管理的基本形式，是协调劳动关系的重要制度，是职工行使民主管理权力的机构。”

其他沟通渠道

企业可以通过设立总经理信箱、职工福利委员会等形式，实现劳资双方意愿的畅通传达。

3、证据固定

在罢工事件中，个别员工本着“法不责众”的心态，利用混乱的场面，破坏厂区和设备，随意殴打、非法拘禁管理人员。企业应通过各种方式对这些违法、甚至可能构成犯罪的过程予以记录，完成证据固定，为将来的依法处理提供依据。

4、危机应对及依法处理

企业在应对罢工事件中，不仅要依靠自身的力量化解纠纷，也需要协调（上级）工会、劳动部门、公安部门等相关机构共同参与，及时稳定局面；劳动法律师的介入更是必不可少。律师在分析案情后，将根据不同员工的实际情况和诉求，化整为零，度身制定出不同人群的解决方案。

局面缓和后，员工合理、合法的诉求，企业应在律师的指导下予以积极的回应；但对无理的、非法的要求，企业则应坚决予以拒绝。

相关政府部门在处理罢工事件时，也不会一味偏袒员工方。毕竟，如果处理不当，当地其他企业的员工也将群起而效仿，影响当地的社会稳定。

案例分析：深圳某超市解雇罢工事件的员工代表获法院支持

2012 年 6 月初，深圳某超市多名员工多次向上级领导反映要求加薪，但毫无进展。2012 年 6 月 28 日，江某、黄某与部分员工召开座谈会，讨论集体向上级部门反映要求加薪、增加加班费，并酝酿在公司拒绝的情况下采取集体行动。数日后，员工们获悉上级部门初步制订的调薪方案（深圳某超市称之为 PIP 计划），内容中表述“工资总额不变、增加员工收入”。员工们发现：原来 500 元的住房补贴“转”到了底薪这一块，表面上底薪增加到了 1500 元。员工们气愤地称这是现代版的“朝三暮四”。

2012 年 7 月 5 日 8 时，经多次交涉无果，40 多名员工在超市配送中心大门口举着“物价高涨、工资极低、要求加薪”的标语进行停工维权活动，希望得到公司高层的关注，能够重视这些底层员工的诉求。

当天 9 时左右，当地派出所民警将江某、黄某等四名员工带走。当天下午 4 时此四人被放回。

2012 年 7 月 6 日，当江某、黄某回到超市后，立即被超市解雇。解雇理由是“（停工行为）严重扰乱公司生产秩序，也影响了公共秩序，严重违反劳动纪律……根据《员工手册》相关规定对其进行（解除劳动合同）处罚……”。

江某、黄某遂向区劳动人事争议仲裁委员会申请仲裁，要求超市支付违法解除劳动合同的赔偿金。

2012 年 8 月 22 日，区劳动人事争议仲裁委员会裁决认为江某、黄某的（停工行为）严重违反劳动纪律，超市以此为由解除劳动合同符合《劳动合同法》第 39 条的规定，无须支付赔偿金。后，江某、黄某诉至法院，亦被驳回诉求。

本团队律师认为，依据《最高人民法院关于审理劳动争议案件适用法律若干问题的解释》第十九条规定，用人单位通过民主程序制定的规章制度，不违反国家法律、行政法规及政策规定，并已向劳动者公示的，可以作为人民法院审理劳动争议案件的依据。员工停工行为严重违反《员工手册》有关规定的，公司可以依据《员工手册》单方辞退员工。

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