PRC Labor and Employment Law Newsflash

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The Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (Ⅳ) (Draft) Is Open for Public Comments

The Supreme People's Court's Interpretation on Several Issues Concerning the Application of the Law in Labor Dispute Trials (Ⅳ)(Draft)(Hereinafter referred to as **Interpretation Ⅳ**) has been issued and open for public comments and our team has analyzed several issues such as jurisdiction of the labor dispute litigation, final arbitration award, democratic procedures for internal rules and policies surrounding it in the last newsletters. We will illustrate the issues relevant to verbal amendment of employment contract, notification obligation for the trade union, the personnel system that the person graded last in it the will be laid off from his position, monetary compensation and the identification of foreign-related employment relationship in this newsletter for the consideration of employers.

1. Verbal amendment of an employment contract is valid if certain conditions are met. (Article 12)
   - This provision will change the previous practice in which the amendment of employment contract should be only in written form with verbal form permitted as the new method. Generally, the amendment of an employment contract mainly involves working place, position, payment, etc. Interpretation Ⅳ affirms the validity of verbal amendment of employment contract with conditions, but in practice, these verbal amendments will probably lead to the disputes between the employees and the employers. Therefore, we suggest the employers to amend the employment contract in writing; if oral amendment is not avoidable, relevant evidence shall be well reserved to prove the validity of the verbal amendment.

2. If the employer terminates the employment contract unilaterally without executing the notification obligation for the trade union, monetary compensation will be imposed. (Article 13)
   - This provision adds a new type of illegal termination of the employers and strengthens the supervision role of the trade union in employment contract termination. When the employer unilaterally terminates the employment contract and the employer has already established a trade union, the termination ground should be notified to it in advance. Without notification, the termination will be deemed as illegal.
   - How does the employer without a trade union execute termination procedures? Interpretation Ⅳ has no relevant provisions.
   - If the employee requires the employer to perform the employment contract instead of the monetary compensation, how to handle? In accordance with this provision, the requirement of continuing to perform the employment contract may not be supported.
   - At present, in Shanghai's judicial practice, some courts hold that if the employer has met the

conditions to unilaterally terminate, the procedural flaws in termination will not lead to compensation to the employees. The official issuance of Interpretation Ⅳ will change the present practice.

3. The article involving unwilling termination by the employees is detailed and the employer should pay monetary compensation when the operation period is expired and the company decides not to continue. (Article 14, 15, 17)
   - The employee terminates the employment contract on the ground that the employer fails to provide the labor protection or working conditions, and the employer should pay the monetary compensation to the employee. If the employee fails to execute the notification obligation, the employer can claim damages for the recruitment fees from the employee. However, if the employer has the situations under Article 38 of *the Employment Contract Law*, the employee terminates the employment contract without referring to this article but regrets later, the court will not uphold the employee.
   - Interpretation Ⅳ clearly specifies that the employer's subject qualification is no longer existed if the operation period is expired and the company decides not to continue, thus, the employment contract can be terminated. Under these circumstances, the employer should still pay monetary compensation to the employee.

4. The employer cannot use the personnel system that the person graded last in it the will be laid off from his position as the termination ground. (Article 16)
   - This provision emphasizes the legitimacy of unilateral termination by the employer. Only when the conditions of fault-based or non-fault-based termination are met can the employer unilaterally terminates the employment contract. The employer cannot use the personnel system that the person graded last in it the will be laid off from his position as the termination ground, or there is a high risk of illegal termination. The aforementioned personnel system is a HR management method. Employers which apply this method should pay close attention to the compliance audit.

5. The validity of the employment contract relationship of employees not from mainland China depends on the employment license. (Article 18)
   - Foreigners, stateless persons and people from Hong Kong, Macao and Taiwan can form the employment relationships with the employees if employment license is obtained.
   - Besides, in the following situations where the permanent representative institutions and offices of foreign-owned enterprises establish employment relationship with directly recruited Chinese laborers; where a foreigner with the foreign expert certificate and the foreign expert working permit establishes employment relationship with employers like domestic enterprises or colleges and universities in China, the employment relationship will be upheld between the two parties.
   - In the present judicial practice, courts in Shanghai will use the valid employment license as the criterion to identify the employment relationship of foreigners. With the valid employment license, the relationship will be handles as the employment relationship, or it will be handled as a normal civil dispute.

Case Study: The Foreign-Related Employment Contract Is Invalid If the Employee Doesn't Have the Employment License.

Mr. Xiong is a citizen from country A and was appointed as the general manager of company B on December 8th, 2009. On December 31st, 2009, both parties signed an employment contract of two years, specifying that each party could terminate the contract in written notice to the other at any time within the probation period. Mr. Xiong received the written notice of termination and payment suspension within the probation period. Besides, Mr. Xiong did not have the employment license when working at company B. on July 8th, 2012, Mr. Xiong applied for the labor arbitration to require company B to perform the employment contract and pay retroactively relevant salary. The arbitration commission rejected to handle the case on the ground that the dispute between the two parties was not within its trial scope. After the trial of the court, it held that the foreign employee who does not have the employment license is not a qualified subject of the employment contract and the signed employment contract is invalid. Therefore, the relationship between Mr. Xiong and company B belonged to the service relation subject to civil law, which respects and protects the autonomy of will between the parties, instead of employment law. The court upheld company B's agreed right of termination. From this case, we get to know that foreigners working in China need to apply for the employment license to the labor administrative department, or the subject qualification of employees will not be obtained and the protection of relevant employment laws cannot be enjoyed. The employers shall achieve the proper management of foreign-related employment relationship to realize the purpose of legitimate employment. After Interpretation Ⅳ is put into force, the judicial authority will refer to Article 18 of it to settle the foreign-related employment contract dispute without the employment license.

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中国劳动法资讯速递
二零一二年十月刊

《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（四）（征求意见稿）》向社会征求意见

《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（四）（征求意见稿）》（以下简称“《解释四》”）公布并公开征求意见。本团队已经针对劳动争议管辖、一裁终局、规章制度民主程序及竞业限制等问题进行了评析。本期将对口头变更劳动合同、通知工会义务、末位淘汰、经济补偿、涉外劳动关系认定等问题给予解读，以备用人单位参考。

1. 口头变更劳动合同符合条件的有效（第十二条）
   - 此规定改变了用人单位与劳动者变更劳动合同时必须采取书面形式的局面，增加了变更劳动合同的形式。通常劳动合同变更的内容主要涉及工作地点、工作岗位、劳动报酬等，本次司法解释虽然确立了符合条件下的口头变更劳动合同的效力，但实践中劳动者与用人单位常常因口头形式变更工作地点、工作岗位、劳动报酬等内容产生纠纷，因此，我们建议用人单位应尽可能采用书面形式变更劳动合同；不得不采用口头变更劳动合同时，仍需保留与口头变更劳动合同相关证据，以便证明变更劳动合同的有效性。

2. 用人单位单方解除劳动合同未通知工会需支付赔偿金（第十三条）
   - 此规定增加了用人单位违法解除劳动合同的类型。强化了工会在用人单位解除劳动合同中的监督作用。建立了工会组织的用人单位在单方解除劳动合同时，应事先将理由通知工会，未通知工会的，将被认定是违法解除。
   - 没有成立工会的用人单位如何履行解除程序？《解释四》没有明确规定。
   - 如果劳动者要求用人单位继续履行劳动合同而不是支付赔偿金，该如何处理？根据该条款所述的情形，劳动者要求继续履行劳动合同将可能不会得到支持。
   - 目前上海司法实践中，部分法院认为用人单位已经具备单方解除条件，只是在办理解除程序上存在瑕疵，一般无需向劳动者支付赔偿金。《解释四》的出台或将改变目前的实践作法。

3. 劳动者被迫单方提出解除劳动合同条款具体化、用人单位经营期限届满不继续经营需支付经济补偿金（第十四条、第十五条、第十七条）
   - 劳动者以未获得劳动保护或劳动条件为由解除劳动合同，用人单位应向劳动者支付经济补偿金。如果劳动者未履行提前通知义务，用人单位可向劳动者主张招工费用的损失。但是，用人单位存在劳动合同法第三十八条情形时，劳动者不援引此条与用人单位解除劳动合同后，又反悔的，法院不支持劳动者的主张。
   - 《解释四》把用人单位经营期限届满不再继续经营认定为用人单位主体资格灭失，故被列为是劳动合同终止情形之一，用人单位如遇到这种情形也要向劳动者支付经济补偿金。

4. 用人单位不得以“末位淘汰”为由解除劳动合同（第十六条）
   - 此条强调了用人单位单方解除劳动合同的法定性，劳动者只有符合“过错性解除”、“非过错性解除”法定条件的，用人单位才可以单方解除劳动合同。用人单位不得以“末位淘汰”形式单方解除劳动合同，否则会认定用人单位是违法解除。“末位淘汰”是一项人力资源管理措施，

采取这项管理措施的用人单位须注意合规审查。

5. 非中国大陆劳动者的劳动合同关系有效以办理就业证为前提（第十八条）
   - 外国人、无国籍人及台港澳人员办理了就业证，可与用人单位之间建立劳动关系。
   - 例外情形，外企常驻代表机构及代表处与直接招录的中国大陆劳动者建立用工关系的，持外国专家证并取得在华工作许可证的外国人与中国境内企业、高校等用人单位建立用工关系的，认定双方之间存在劳动关系。
   - 目前在司法实践中，上海法院在认定外国人劳动关系时，以外国人是否持有有效的就业证为标准的。如果持有有效的就业证，按劳动关系处理；否则，按普通民事纠纷处理。

案例分析：未办理就业证的涉外劳动合同无效。

熊某系 A 国公民，于 2009 年 12 月 8 日被 B 公司任命为总经理。2009 年 12 月 31 日，双方签订了 2 年期的劳动合同，合同约定试用期内任何一方可随时以书面形式通知对方解除合同。熊某在试用期内收到 B 公司解除劳动合同、停止支付工资的书面通知。熊某在 B 公司任职期间未办理《外国人就业证》。2010 年 7 月 8 日，熊某申请劳动仲裁，要求 B 公司继续履行劳动合同，并补发相应工资，劳动仲裁委员会以双方的争议不属于其审理范围为由不予受理。后经法院审理，法院认为未取得就业证的外籍劳动者不具有劳动合同主体资格，其所签劳动合同无效。熊某与 B 公司之间系劳务关系，不受劳动法相关规定的调整，属于民法范畴，应尊重、保护当事人的意思自治。法院认可 B 公司享有约定解除权。由本案我们可以了解到，外国人在中国就业需要到劳动行政部门申办就业证，否则其不具有我国劳动法要求的劳动者主体资格，不受劳动法的保护；用人单位亦应做好涉外劳动关系管理，实现合法用工。《解释四》生效后，司法机关在解决未办理就业证的涉外劳动合同纠纷时，将会援引《解释四》第十八条。

本资讯速递系大成劳动法团队撰拟，责任编辑：高海燕、单训平、孔琪、周军、徐智强、张根旺、孙颖、罗欣和杨傲霜。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。*

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