

PRC Labor and Employment Law Newsflash
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Conditions of Concluding a Non-fixed Term Labor Contract

According to Article 14 of the *Labor Contract Law of the People's Republic of China*, when certain conditions are fulfilled, the employer shall conclude a fixed-term labor contract with the employee if it is proposed by the employee to renew the contract. Quite a number of enterprises deem this provision as an obstacle to the enterprise development and seek evasion of the statutory obligation as far as possible. This article briefly illustrates the conditions of concluding a non-fixed term labor contract and it is for your reference only.

I. Concept of Non-fixed Term Labor Contract

It is set out in Article 20 of the *Labor Contract Law* that the term of a labor contract may be fixed, non-fixed or set according to a certain amount of work to be fulfilled.

A non-fixed term labor contract, refers to a labor contract for which the employer and the employee have agreed that the date of termination is not fixed, namely, a labor contract without a specific termination date. Nevertheless, under the circumstances described in Article 19 of the *Implementation Regulations for the Labor Contract Law*, the employer may still terminate the non-fixed term labor contract.

II. Conclusion of a Non-fixed Term Labor Contract

Pursuant to Article 14 of the *Labor Contract Law*, a non-fixed term labor contract is normally concluded under three circumstances: a non-fixed term labor contract **may** be concluded; a non-fixed term labor contract **shall** be concluded or a non-fixed term labor contract **is deemed** to have been concluded.

1. situation that a non-fixed term labor contract **may** be concluded

Upon negotiation and consensus between the employer and the employee, a non-fixed term labor contract may be concluded. In light of the principle of autonomy of will, as long as the employer and the employee reach an agreement, a non-fixed term labor contract may be concluded by the two parties directly. Certainly, the conclusion of a non-fixed term labor contract does not affect the availability of probation period in the labor contract which may be agreed by the two parties. However, the probation period shall not exceed six months.

2. situations that a non-fixed term labor contract **shall** be concluded

A. The employee has worked for the employer for a period of 10 years consecutively.

The employee should have worked for the same employer for 10 years or above before he or she proposes to conclude a non-fixed term labor contract with the employer. In other words, the period for which the employee has worked in the enterprise should reach 10 years or above without any interruption of the period. By contrast, the condition of this situation will not be fulfilled in the event of any discontinuance of the employment relationship, even if the employee may have worked for the same employer for 10 years or above cumulatively.

B. When the employer first implemented the labor contract system or when a new labor contract is concluded upon restructuring of a State-owned enterprise (SOE), the employee has worked for the employer for a period of 10 years consecutively and will attain his or

her statutory retirement age in less than 10 years' time.

This situation arises along with some historical reasons of Chinese characteristics. Our country has carried out the reform of SOEs in middle-1980s and since then the employment system has been implemented in SOEs. From 1 October 1986, SOEs have been promoting and applying the contractual system of employment to the newly-recruited employees universally. And after the *Labor Contract Law* took effect, labor contract system has been widely executed by various enterprises. Nevertheless, before the system was introduced, some employees of enterprise had already served for quite a long period. After the implementation of labor contract system, many senior employees found it difficult to adapt themselves to the new type of employment relationship. In addition, the problem of weak competitiveness in the labor market emerged and the limitation by age made it difficult for them to improve and make progress. Those employees were concerned not only about whether the labor contract with the employer could be renewed, but also the period of the renewed contract in case it may affect their retirement treatment. Therefore, when formulating relevant laws and policies, the State took the interests of employees who had made much contribution to the country and the enterprise into full consideration. For those who have worked for the employer for a period of 10 years consecutively and will attain his or her statutory retirement age in less than 10 years' time, when concluding a labor contract, it is permissible that they propose to sign a non-fixed term labor contract with the employer. And if so required, the employer must conclude a non-fixed term contract with the employee. However, where an employee has worked for the employer for a period of 10 years but will not attain statutory retirement age in 10 years' time, the condition of this situation is not fulfilled.

- C. Where a fixed-term labor contract has been concluded twice consecutively and the employee who does not fall under any of the categories stipulated in Article 39 and item (1) and item (2) of Article 40 renews his or her labor contract.

Four conditions need to be fulfilled in order to apply the above situation:

- i. The fixed-term labor contract must be concluded twice consecutively by the employee with the same employer though there is no statutory restrictive requirement for the length of fixed-term of each contract.
- ii. No cause of unilateral termination by employer as stipulated in Article 39 could be applied to the employee, and the following situations do not exit:
 - a. The employee suffers from an illness or a non-work-related injury and is unable to undertake the original duties or other duties arranged by the employer following the completion of the stipulated medical treatment period;
 - b. The employee cannot perform his or her duties and remains to be incapable of performing the duties after training or job transfer.
- iii. The employee proposes or agrees to renew the labor contract.
- iv. The employee does not propose to conclude a fixed-term contract.

To conclude the above three situations, it is not hard to detect there is a prerequisite that the employer and the employee should remain a consecutive and stable employment relationship for the purpose of entering into a mandatory non-fixed term labor contract. The requirement is to the benefit of striking a balance between the need of short-term employment in order to reduce labor costs and the protection of the legitimate rights and interests of the employees, as well as preserving a stable employment relationship.

3. situation that a non-fixed term labor contract **is deemed** to have been concluded

Where an employer fails to conclude a written contract with an employee after one year has lapsed since the date of employment, the employer and the employee shall be deemed to have concluded a non-fixed term labor contract. It is noteworthy that a deemed concluded labor

contract could not take place of the formal contract. In case the employer fails to conclude a non-fixed term labor contract, it shall pay the employee double monthly wages for the period of more than one month but less than one year from the date of employment.

III. Change and Termination of a Non-fixed term Labor Contract

A labor contract is concluded by the employer and the employee on the basis of mutual agreement and the same applies to a non-fixed term labor contract. After negotiated consensus has been reached, the two parties could make changes or adjustments to the contents of the non-fixed term labor contract.

Once entered into, a non-fixed term labor contract is not absolutely free from the possibility of being terminated. The employer may terminate the contract under any of the fourteen circumstances stipulated in Article 19 of the *Implementation Regulations for the Labor Contract Law*.

Case Study:

Mr. A entered Company ONE in January 2000. In February 2005, Mr. A terminated the labor contract with Company ONE by mutual agreement and they had gone through the formalities of termination. In May 2005, Mr. A was employed again by Company ONE and the two parties agreed that the term of the labor contract should start from 9 May 2000 to 31 December 2010. In the beginning of December 2010, Company ONE informed Mr. A in writing that the labor contract would expire on 31 December 2010 and accordingly invited him to negotiate on a renewal of labor contract for a term of 3 years. Mr. A considered that he had concluded fixed-term labor contract twice with the company consecutively. Additionally, he has worked for the employer for over 10 years, therefore Mr. A requested a non-fixed term labor contract to be concluded which was refused by Company ONE. As a result, Mr. A filed a petition to the local Labor Dispute Arbitration Committee claiming for a non-fixed term labor contract with the company. After trial, the Committee rejected his claim.

In this case, despite that Mr. A had concluded fixed-term labor contract with the company twice and the cumulative term served has amount to 10 years, the two contracts were not concluded consecutively and also the years of service were not cumulative. Mr. A could not rely on Article 14 item (2) of the *Labor Contract Law* to claim a non-fixed term labor contract and Company ONE was entitled to reject the proposal of a non-fixed term labor contract.

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中国劳动法资讯速递

二零一六年十月刊

无固定期限劳动合同的订立条件

根据《中华人民共和国劳动合同法》第十四条的规定，达到一定的条件，劳动者提出续订劳动合同的，用人单位应与劳动者签订无固定期限的劳动合同。此条一出，多数企业对其避而远之，视其为企业发展之羁绊，本文就无固定期限劳动合同的订立条件做简要阐述，以供大家参考。

一、关于无固定期限劳动合同的概念

根据《中华人民共和国劳动法》第二十条的规定，劳动合同的期限分为固定期限、无固定期限和以完成一定的工作为期限。

无固定期限劳动合同，是指用人单位与劳动者不约定终止日期的劳动合同，劳动合同没有一个确切的终止时间，但一旦出现《劳动合同法实施条例》第十九条规定的情形，用人单位可以据此终止无固定期限劳动合同。

二、关于无固定期限劳动合同的签订

根据《中华人民共和国劳动合同法》第十四条的规定，订立无固定期限劳动合同的情形主要分为三种类型：可以签订无固定期限的合同；应当签订无固定期限的合同；视为签订无固定期限的合同。

（一）可以签订无固定期限劳动合同的情形

劳动者与用人单位协商一致，可以订立无固定期限的劳动合同。本着意思自治的原则，劳动者与用人单位如均同意签订无固定期限劳动合同的，双方可以直接签订无固定期限的劳动合同。当然，无固定期限劳动合同的签订并不影响双方当事人劳动合同中约定试用期，但试用期不得超过六个月。

（二）应当签订无固定期限劳动合同的情形

1、劳动者在该用人单位连续工作满十年的。

劳动者必须在同一单位连续工作了十年以上（含十年），才有资格向用人单位提出与用人单位签订无固定期限的劳动合同，即劳动者在同一用人单位工作的期限须连续达到十年及以上，期间不存在间断情形。如劳动者在同一用人单位工作年限累计达到十年及以上，但期间存在劳动关系中断的，则不符合本情形的条件。

2、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合同时，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。

此情形的出现，有着中国特色的历史原因。我国自二十世纪八十年代中期开始进行国有企业改革，随之在国营企业中推行劳动用工制度，自1986年10月1日起，国营企业在新招收工人中普遍推行劳动用工合同制。随着劳动合同法法的施行，劳动合同制度在各类企业当中广泛推行。而在推行劳动合同制度前，用人单位的有些职工已经在本单位工作了很长时间。推行劳动合同制度以后，很多老职工难以适应这种新型的劳动关系，而且存在难以适应市场竞争的问题，年龄的局限又使其没有充足的条件来提高、改进。这部分劳动者不仅担心是否能与原用人单位继续签订劳动合同，还担心续签后的劳动合同期限短，以致影响其退休的问题。因此，国家在制订相关法律和政策时，充分考虑了那些给国家和企业作出

过很多贡献的劳动者的利益，对于已在原用人单位连续工作满十年并且距法定退休年龄不足十年的劳动者，在订立劳动合同时，允许劳动者提出签订无固定期限劳动合同，用人单位应当与其签订无固定期限的劳动合同。如果一个劳动者已在该用人单位满十年，但距离法定退休年龄超过十年，则不属于本项规定的情形。

3、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。

此情形的适用需要满足以下四个条件：

(1) 劳动者与同一用人单位连续订立二次固定期限劳动合同，二次劳动合同必须连续订立，且法律对每次劳动合同的固定期限长短没有作限制性规定。

(2) 劳动者不存在用人单位可以依据《劳动合同法》第三十九条单方面解除合同的情形；不存在患病或者非因工负伤，在规定的医疗期满后不能从事原工作，也不能从事由用人单位另行安排工作的情形；不存在劳动者不能胜任工作，经过培训或者调整工作岗位，仍不能胜任工作的情形。

(3) 劳动者提出或者同意续订劳动合同。

(4) 劳动者未提出签订固定期限劳动合同的要求。

纵观以上三类情形，不难看出法律规定应当签订无固定期限劳动合同的情形均要求劳动者与用人单位之间存在连续、稳定的劳动关系，一方面有利于解决企业用工短期的问题，减少用工成本；另一方面，也有利于保护劳动者的合法权益，使劳动关系处于一种稳定的状态。

(三) 视为签订无固定期限劳动合同的情形

用人单位自用工之日起满一年不与劳动者订立书面劳动合同的，视为用人单位与劳动者已订立无固定期限劳动合同。需要注意的是，虽然已经视为用人单位与劳动者签订了无固定期限劳动合同，但并不代表用人单位已经与劳动者签订了劳动合同。一旦出现这种情况，用人单位除应立即与劳动者补签书面劳动合同外，还应当向劳动者支付自用工之日起超过一个月不满一年的每月二倍的工资。

三、关于无固定期限劳动合同的变更和解除

劳动合同是用人单位与劳动者之间意思自治的产物，无固定期限劳动合同亦如此。在双方协商一致后，可对无固定期限的劳动合同中的相关内容进行变更、调整。

无固定期限的劳动合同并非一经签订，便不可解除，在出现《劳动合同法实施条例》第十九条规定的十四种情形之一时，用人单位可以解除无固定期限劳动合同。

案例分析

A 先生于 2000 年 1 月进入甲公司工作，2005 年 2 月，A 先生与甲公司协商解除劳动合同，并办理了劳动合同的解除手续。2005 年 5 月，A 先生又回到甲公司工作，双方约定合同期限为 2005 年 5 月 9 日至 2010 年 12 月 31 日。2010 年 12 月初，甲公司书面通知 A 先生，因劳动合同于 2010 年 12 月 31 日到期，遂要求其于 2010 年 12 月 28 日与公司洽谈是否同意续订 3 年期限的劳动合同，如逾期不前来协商或者拒绝续签合同的，甲公司将其终止劳动合同。A 先生认为其与甲公司连续两次签订了固定期限劳动合同，且工作期限已经达到 10 年，遂要求甲公司与其签订无固定期限劳动合同，但甲公司不同意签订无固定期限劳动合同。A 先生遂向当地劳动争议仲裁委员会提起了申诉，要求甲公司与其签订无固定期限

劳动合同，劳动争议仲裁委员会经审理后驳回了其请求。

本案中，A 先生与甲公司虽签订了两次劳动合同，且两次劳动合同的期限累计达到 10 年，但其两次劳动合同并非连续签订，且工作时间并非连续累计，不能依据《劳动合同法》第十四条第二款的规定，要求甲公司与其签订无固定期限合同，甲公司有权不与其签订无固定期限合同。

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