PRC Labor and Employment Law Newsflash

February, 2013

Analysis on Critical Articles of *the Supreme People's Court's Interpretation on Labor Dispute Trials (IV)*

On 31 January 2013, the Supreme People's Court issued *the Supreme People's Court's Interpretation on Labor Dispute Trials (IV)* (Herein after referred to as "Interpretation IV"), which has been effective as 1 February 2013. The Supreme People's Court promulgated *The Supreme People's Court's Interpretation on Labor Dispute Trials (III)* in September 2010. After more than two years, Interpretation IV came out, which implies the needs of reconciling the application of the relevant laws and regulations in labor disputes in the judicial practices, and many application criteria on labor disputes have still remained unspecified. Considering the above, our labor law team hereby analyzes the relevant articles of Interpretation IV concerning the common problems found in everyday corporate human resource management work for your kind reference.

Article Five: Where an employee has been arranged to work for a new employer for reason(s) that is not attributable to him/her and the employee has not been paid for his/her severance, the employee is entitled to consolidate his/her previous working years for the original employer into the current employer's working years, and the people's court shall support such request when calculating the severance or penalty due to the employee terminating his/her employment contract with the current employer in accordance with the Article 38 of *the Employment Contract Law* or if the current employer proposes the termination or expiration of the employment contract.

An employer will be deemed to have made an arrangement for an employee to work for a new employer for reasons not attributable to the employee if:

1. The employee works at the same place and the same position but the party of the employment contract changes from the previous employer to the new employer;
2. The employer transfers the employee in the name of an assignment or appointment;
3. The transfer of the employee is due to the merger or division, or other equivalent reasons of the employer;
4. The employer and its affiliated enterprises take turns signing employment contracts with the employee; and/or
5. Any other reasonable circumstances.

- **Article Analysis**

Article Five is an illustration and extension of Article 10 of *the Implementing Regulation for the Employment Contract Law*, namely "If an employee has been transferred from the original employer to a new employer for a reason that cannot be attributed to the employee, the

employee's service years with the original employer shall be consolidated into the employee's service years with the new employer. In the event that the original employer has paid severance to the employee, the employee's service years with the original employer shall be deducted from the employee's service years with the new employer when the new employer calculates severance for termination or expiration of the employment contract pursuant to law. " It also further specifies that, due to the reasons of the employer causing the party of the employment contract changes from the previous employer to the new employer, the service years of the previous employer shall be consolidated into the service years of the employee with the new employer.

In practice, some employers change the body of the employer to empty the number of service years of an employee in order to reduce the severance payments for the termination or expiration of an employee's employment contract. Therefore, based on the Article 10 of *the Implementing Regulation for the Employment Contract Law,* Article Five further clarifies that where an employee has been arranged to work for a new employer for reason(s) not attributable to him/her which have thus caused a change to the original employer in the employment contract, and the employee has not been paid his/her severance, the current employer shall consolidate any previous working years the employee may have already worked.

Article Six: If the employer and the employee have agreed on a non-competition clause but fails to specify the amount of monetary compensation therein after the termination or expiration of his/her employment contract and the employee has fulfilled the non-competition obligations, then the employee will have the right to request the employer to pay him/her the relevant compensation of 30 percent of his/her average monthly salary prior to the 12 months of the termination or expiration of his/her employment contract, and the court shall support such request.

If 30 percent of the average monthly salary listed above is lower than the standard minimum salary in the location in which the employment contract concerned is performed, then it shall be paid in accordance with the actual minimum salary standard.

- **Article Analysis**

The Employment Law allows the employer and the employee to stipulate non-competition and the monetary competition clauses privately. In practice, some employers abuse their position and only specify the employee's non-competition obligation in the employment contract but actually ignore the monetary compensation. With regard to this circumstance, if both sides cannot reach an agreement through negotiations, what standard will apply? There is no national-wide uniform regulation for such standard, and the local regulations vary by provinces and municipal cities. For instance, in Shanghai, if the employer and the employee have agreed on a non-competition clause but fail to specify the monetary compensation therein and cannot reach agreement through negotiations, the compensation amount shall be determined based on a standard of 20%～50% of the employee's salary.

Article Six of Interpretation IV has unified the judicial standard by specifying that if the non-competition compensation amount is not agreed upon, then the compensation amount will be equal to 30 percent of the employee's average monthly salary in the 12 months prior to his/her termination or the expiration of his/her employment contract. If the 30 percent amount is actually lower than the standard minimum salary in the place where the employment contract concerned is performed, it shall be paid in accordance with the actual minimum salary standards. This

article balances the employment freedom of employees and the needs of protecting employer trade secrets.

Article Eight: If the employer and the employee agree on a non-competition clause and the monetary compensation amount in the employment contract or the confidentiality agreement, and the employer fails to pay the monetary compensation for three months due to its own reasons after the termination or expiration of the employment contract, then the employee may request to rescind the non-competition agreement, and the court shall support such request.

- **Article Analysis**

Before the promulgation of Interpretation IV, there were different opinions on the local regulations of provinces and municipal cities regarding whether the failing to pay compensation would lead the non-competition clause to be invalid or not. Article Eight now unifies the practice that if the employer fails to pay non-competition compensation due to its own reasons for three months, the employer will be deemed to have committed a fundamental breach of the contract, and the employee therefore may rescind the non-competition agreement. Nonetheless, if the failure to pay is due to the employee's reasons, and the employer is not at fault at all, then the employee shall continue to perform the non-competition obligation. In practice, some employees purposely cancel their bank accounts to escape the non-competition obligations, which then does not allow the employer to pay the compensation amount, or the compensation payment is returned to the employer by the bank. In accordance with Article Eight, the employee shall continue to perform the non-competition obligations under such circumstance. If the employer does not pay the compensation for a comparably long time (three months or more) due to its own reasons, the employee may rescind the non-competition agreement and will no longer be obligated to it.

Article Ten: If the employee breaches the non-competition agreement, the employer may still requests the employee to continuously perform the non-competition agreement after he/she has paid the liquidated damages to the employer, and the court shall support such request.

- **Article Analysis**

In practice, if the employee job-hops to a new employer that is in direct competition with the previous employer, the new employer may pay the liquidated damages that the employee is held to due to the non-competition agreement with the previous employer on behalf of the employee to realize the purpose of buying out the non-competition period. Article Ten specifies that after the payment of the liquidated damages, the employee will still bears the obligation of non-competition. The payment of liquidated damages cannot replace the performance of the obligation, which effectively safeguards the trade secrets of the employer and maintains fair market competition.

Article Twelve: If an employer who has established a labor union organization terminates the employment contract in accordance with Articles 39 and 40 of *the Employment Contract Law* but fails to inform the labor union beforehand in accordance with Article 43 of the same Law, and if the employee thereby requests the employer to pay the penalties for illegal termination, then the court shall support such request unless the employer had rectified the situation by going through the relevant notice procedures before the employee files the claim.

- **Article Analysis**

In the form of a judicial interpretation, Article Twelve again specifies that an employer who has established a labor union organization shall inform the labor union and listen to its opinion before unilateral termination, and that even if the employer has sufficient facts and legal grounds

in this regard, it will still be deemed to "illegal termination," and damages shall therefore be paid to the employee accordingly. The purpose of the law is not to punish, so in Article Twelve, the employer is allowed to have a chance to rectify the mistake by informing the labor union and listening to its opinion before the labor dispute goes to court, and can the employer will no longer bear the consequences and responsibilities for the illegal termination of the employment relationship.

Case Study: Payment of the Non-competition Compensation

In January 2009, Mr. A was invited to work at Company B to serve as the sales director. Both parties signed the employment contract, agreed on the monthly salary amount (which includes non-competition compensation), and both signed a non-competition agreement with a two years non-competition period and a RMB 100,000 penalty for breach of the clause. In May 2009, Mr. A was recruited by a competing company to serve as the sales manager. Company B learned about this and applied for arbitration to require that Mr. A pay the breaching penalty of RMB 100,000.

During arbitration trial, Mr. A held the opinion that Company B did not pay him any compensation after he left his job so he did not have to perform the non-competition obligation. Company B had the opinion that the compensation amount was included in the monthly-paid salary. The arbitrator denied Company B's claim on the grounds that the company did not pay Mr. A his monthly compensation payment after the termination of his employment contract. Afterwards, the first and second trials of the court maintained the award of the labor arbitration.

It is worth noting that, in the future, the above case will likely be handled differently. The non-competition agreement will not become invalid immediately after the failure of an employer to pay monetary compensation upon the termination or expiration of an employment relationship. Due to the regulations of Article Eight of Interpretation IV, namely if the employer does not pay the compensation amount for three months due to its own reasons, the employee may rescind the non-competition agreement and is no longer bound to the obligation.

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中国劳动法资讯速递
二零一三年二月刊

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）》之重要条款解读

2013 年 1 月 31 日，最高人民法院发布了《关于审理劳动争议案件适用法律若干问题的解释（四）》（以下简称"解释四"），并于 2013 年 2 月 1 日起正式实施。最高人民法院曾于 2010 年 9 月公布实施了《关于审理劳动争议适用法律法规若干问题的解释（三）》，两年多后，又出台了解释四，可见劳动争议在司法实践中仍然需统一相关法律法规的适用，有许多劳动争议适用标准仍不能明确。鉴于此，我们劳动法团队对解释四中涉及公司人力资源日常工作中常遇问题之相关条款进行解读与分析，供大家商榷。

第五条 劳动者非本人原因从原用人单位被安排到新用人单位工作，原用人单位未支付经济补偿，劳动者依照劳动合同法第三十八条规定与新用人单位解除劳动合同，或者新用人单位向劳动者提出解除、终止劳动合同，在计算支付经济补偿或赔偿金的工作年限时，劳动者请求把原用人单位的工作年限合并计算为新用人单位工作年限的，人民法院应予支持。

用人单位符合下列情形之一的，应当认定属于"劳动者非因本人原因从原用人单位被安排到新用人单位工作"：
（一）劳动者仍在原工作场所、工作岗位，劳动合同主体由原用人单位变更为新用人单位；
（二）用人单位以组织委派或任命形式对劳动者进行工作调动；
（三）因用人单位合并、分立等原因导致劳动者工作调动；
（四）用人单位及其关联企业与劳动者轮流订立劳动合同；
（五）其他合理情形。

➢ 条款解读

第五条是对《劳动合同法实施条例》第十条"劳动者非因本人原因从原用人单位被安排到新用人单位工作的，劳动者在原用人单位的工作年限合并计算为新用人单位的工作年限。原用人单位已经向劳动者支付经济补偿的，新用人单位在依法解除、终止劳动合同计算支付经济补偿的工作年限时，不再计算劳动者在原用人单位的工作年限"的释明与延伸，进一步明确因用人单位的原因导致劳动者用人单位主体变更的，劳动者在原用人单位的工作年限应当合并计算到新用人单位。

实践中，一些用人单位为规避或减少解除、终止劳动合同的经济补偿，通过变更劳动者用人单位主体的形式，"清洗"劳动者先前的工龄。为此，第五条在《劳动合同法实施条例》第十条的基础上进一步明确，只要非劳动者非本人原因而是用人单位安排，致使劳动者用

人单位主体变更的，原用人单位先前未支付经济补偿，现用人单位就应当合并计算劳动者在前用人单位的工作年限。

第六条 当事人在劳动合同或者保密协议中约定了竞业限制，但未约定解除或者终止劳动合同后给予劳动者经济补偿，劳动者履行限竞业限制义务，要求用人单位按照劳动者在劳动合同解除或终止前十二个月平均工资的30%按月支付经济补偿的，人民法院应予以支持。

前款规定的月平均工资的 30%低于劳动合同履行地最低工资标准的，按照劳动合同履行地最低工资标准支付。

➢ **条款解读**

劳动法赋予劳资双方自行约定竞业限制及其补偿金的权利。在实践中，有些用人单位依其强势地位在竞业限制协议中仅约定劳动者的竞业限制义务，未约定竞业限制补偿。对此情形，在双方不能协商一致的情形下，按何标准支付？对此，先前国家层面未出台相关规定，而各省市地方性规定不一，例如：上海市，用人单位对竞业限制补偿金未作约定且双方未能协商一致的，按劳动者工资标准的 20%～50%确定。解释四第六条统一了各地司法裁判标准，明确未约定竞业限制补偿的，统一按劳动者解除或终止劳动合同前十二个月平均工资的 30%支付经济补偿。如果月平均工资 30%低于劳动合同履行地最低工资标准的，按劳动合同履行地最低工资标准支付。本条款重新平衡了劳动者的择业自由和用人单位保护商业秘密的需要。

第八条 当事人在劳动合同或者保密协议中约定了竞业限制和经济补偿，劳动合同解除或终止后，因用人单位的原因导致三个月未支付经济补偿，劳动者请求解除竞业限制约定的，人民法院应予支持。

➢ **条款解读**

解除四出台之前，各省市地方性规定关于用人单位未支付竞业限制补偿金，是否导致竞业限制协议无效，存在不同于意见。第八条现予以统一明确，即如果因用人单位的原因导致未按协议约定支付竞业限制补偿金达三个月的，则用人单位属于根本违约，劳动者可以要求解除竞业限制协议。但是，如果由于劳动者或者其他原因导致用人单位无法支付竞业限制补偿的，则用人单位不存在过错，劳动者仍然应当继续履行竞业限制义务。实践中，有些劳动者为了逃避竞业限制义务，故意注销自己的银行帐号，导致用人单位无法支付或支付的钱款被退回。根据第八条规定，此种情形，劳动者仍然应当继续履行竞业限制义务。同样，如果由于用人单位较长时间（三个月以上）不支付竞业限制补偿，劳动者有权请求解除竞业限制约定，不再履行竞业限制义务。

第十条 劳动者违反竞业限制约定，向用人单位支付违约金后，用人单位要求劳动者按照约定继续履行竞业限制义务的，人民法院应予支持。

➢ **条款解读**

实践中，劳动者跳槽到与原用人单位有竞争关系的新用人单位，可能由新用人单位代劳动者支付与原用人单位竞业限制协议中约定的违约金，以达到“买断”竞业限制期限之目的。第十条明确规定，劳动者在支付竞业限制违约金之后仍应当继续履行竞业限制义务，不允许以“罚”代“履”，从而有效保护用人单位的商业秘密，维护市场公平的竞争秩序。

第十二条 建立了工会组织的用人单位解除劳动合同符合劳动合同法第三十九条、第四十条规定，但未按照劳动合同法第四十三条规定事先通知工会，劳动者以用人单位违法解除劳动合同为由请求用人单位支付赔偿金的，人民法院应予支持，但起诉前用人单位已经补正有关程序的除外。

➢ **条款解读**

第十二条以司法解释的方式再次明确，有工会组织的用人单位在单方面解除与劳动者的劳动合同前，应当告知工会并听取工会意见，否则即使用人单位单方面解除与劳动者的劳动合同有充足的事实与法律依据，也将按违法解雇处理，向劳动者支付赔偿金。法律并不是以处罚为“目的”，第十二条同时给予了用人单位补正的机会，即只要用人单位在劳动争议诉至法院之前及时通知工会并听取了工会的意见，则可以不再因此承担违法解除劳动关系的后果及责任。

案例分析：竞业限制补偿的支付

2009 年 1 月，A 先生应聘至 B 公司工作，担任销售总监一职，双方签订劳动合同，其中约定：公司每月发放的工资中包含竞业限制补偿金；同时双方又签订了“竞业限制协议”，其中约定竞业限制期限为 2 年，否则赔偿违约金 10 万元。同年 5 月，A 先生被另一家有竞争关系的公司挖走，担任销售经理。B 公司得知后提起劳动仲裁，要求 A 先生赔偿违约金 10 万元。

劳动仲裁庭审中，A 先生认为，B 公司没有在他离职后支付竞业限制补偿，所以其不必履行竞业限制义务；B 公司则称，公司每月均发放 A 先生的工资中均包含竞业限制补偿。其后，劳动仲裁作出裁决，不支持 B 公司的请求，理由是公司未在解除劳动合同后按月支付 A 先生经济补偿。其后，一审、二审法院均维持了劳动仲裁的裁决。

需要注意的是，上述案情的审判实践将就此改变，用人单位在劳动合同关系解除或终止后未支付竞业限制补偿的，竞业限制协议并不会立即无效。根据解释四第八条的规定，由于用人单位原因未支付竞业限制经济补偿并达三个月的，劳动者有权请求法院解除竞业限制约定，不再履行竞业限制义务。

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