



## PRC Labor and Employment Law Newsflash

August 2015

### **System Improvement to Guard against Company Executives'**

#### **Disciplinary Violation and Malpractice**

Company executive's disciplinary violation/malpractice refers to a company executive's behavior of leveraging his position or power for his own or others' personal gain against loyalty duty to the company. Company executive's disciplinary violation/malpractice, as an essential abuse of organizational power, not only violates the company's personnel policies but also might go against the criminal laws and constitute a criminal offence. I sum up the patterns of disciplinary violation and malpractice of company executives based on the precedent cases, and therefore present advices on how to improve employment and personnel policies.

#### **I. Major Crimes and Behavior Patterns of Executives' Disciplinary Violation and Malpractice of Executives**

According to substantial laws, executive malpractices mainly relate to the following crimes: official embezzlement, non-national official bribery, selling commodities bearing counterfeit registered trademarks, and breaching business secrets, of which the first two crimes are most common. The main performance of official embezzlement is plundering the company's transaction opportunities, setting up false transaction process, retaining the company's profits for own use or causing increase in the company's costs for personal gain. Non-national official bribery mainly shows accepting rebate, favor fee or other advantages from the related party in the engineering, procurement or other field.

#### **II. Advices on Improvement of Executive Employment and Personnel Policies**

We noticed that for various reasons an enterprise eventually chooses only in few circumstances to report to the security authority a case which then will be transferred to the judicial authority for criminal liabilities. However, the enterprise usually needs not a few inputs of human efforts and material resources to obtain evidence during the investigation on the disciplinary violation and malpractice. The board may dismiss an executive "without cause" pursuant to the Company Law, while in accordance with the Employment Law employment should be terminated "for cause" and the legality and legitimacy of such termination could not be proven only by a board resolution. If a company cannot present

evidence proving the facts and punishment basis for a particular disciplinary violation of an employee, it shall bear the legal consequence for illegal dismissal, either payment of compensation or reinstatement of employment relation. Therefore, a company should take careful consideration and make full preparation before dismissal of an executive.

From the cases in practice, an executive's malpractice is usually under the cover of transaction, with a certain organizational labor division, of which the participant is a relative by blood or marriage, so that it is easy to establish an offensive and defensive alliance. Due to the concealment of the malpractice, the executive has the tricks of counter investigation and punishment escaping, and it brings difficulty for the company to discover, investigate and punish such behavior.

Moreover, when a company's aware of a suspicious transaction, in order to investigate and verify the illegal act or disciplinary violation, the company needs to collect the individual information of the executive's family members and other persons. However, it is very difficult to obtain the information of the executive's relative through any public channel due to the State's protection for individual information, so it almost always need take informal channel or means, sometimes even tracking, which is very likely to be suspected of criminal offence on citizen information and place the company in a very passive position.

Now, given that, we think it is necessary to collect adequate pre-employment information of employee and add specific provisions on "types of serious violation of labor discipline" in the employment contract or the labor and personnel system, so as to strength the employment management of enterprise executives:

1. Collect information at the entry and sign employment contract

The employer should collect adequate information of the executive and his relatives. A policy on information collection should be established and improved. It is equivalent to the background investigation and examination of prospective employee. In addition, the employer should regularly gather the executor's residential address and other important information.

Meanwhile, attention should be paid to gathering adequate supplier information, such as supplier's shareholder information (ID), supplier's letter of undertaking and guarantee.

2. Set up the interest conflict reporting system and add specific provisions on "types of serious violation of labor discipline" in the employment contract or the labor and personnel system

The following behaviors may be added in the employment contract, the staff handbook and other bylaws as serious violation of labor discipline, which cannot only intensify employment management but also give the company a reason for unilateral termination of the employment contract to avoid any labor dispute:

- 1) A company established by the employee's close relative or specific related person signs a contract or conducts transaction with the employer; and
- 2) The employee or his close relative or specific related person receives any client's remittance through personal account.

### **III. Reporting a Criminal Case**

Once a company finds any disciplinary violation or malpractice of its executive and chooses to report to the security authority to protect its interests, it is advised to pay attention to: sorting out more basic evidence, drafting the report around constitutive elements of crime which should make the focal points stand out and be well-organized and coherent, and pacing the case process and fixing conversation and other evidence when the company has positive contact with the suspect, and meanwhile enhancing communication with the officer of judicial authorities handling the case to prevent the intervention of abnormal influence factors.

#### **Case Study:**

From September 2009 to July 2010, Defendant Xu and other four persons colluded with Defendant Lin and other 12 employers of UPS to deliver packages abroad through UPS Express. In the process, Xu and other persons contacted clients, received packages and opened accounts at UPS, and 13 UPS employees made use of their position convenience to cheat on the packages' weight, so that only a small amount of express fees had been paid to UPS. During the period, UPS suffered freight loss of RMB 9.8 million, of which Zhu participated in the cheat of RMB 6.3 million, Xu RMB 3.7 million, Zhu RMB 3.6 million, Huang RMB 540,000, Yao RMB 480,000, Jiang RMB 230,000, and Wang RMB 110,000.

In this case, as the company is an international well-known company, for such behavior of its employees, reporting and investigation could be carried forward smoothly. Only the prosecuting authority had different opinions on determination of the behavior's nature. However, after the company had a full communication with judicial authorities and made strong argument on factual and legal basis, the expected targets were realized at last.

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## 中国劳动法资讯速递 二零一五年八月刊

### 针对公司高管人员违纪舞弊行为的劳动人事制度完善

公司高管人员的违纪舞弊行为，指公司的管理人员利用职务上或者工作中的便利条件，违背对公司的忠实义务，为自己或他人谋取私利的行为。公司高管的违纪舞弊行为，本质上是一种组织权力的滥用，不仅违反了公司的人事管理制度，而且可能触犯刑法，构成刑事犯罪。现针对实践中发生的案例，归纳高管人员违纪舞弊的行为类型，并据此提出完善劳动人事制度的若干建议。

#### 一、高管人员违纪舞弊行为的主要罪名与行为类型

从实体法的角度来看，高管人员的舞弊行为主要涉及以下罪名：职务侵占罪、非国家工作人员受贿罪、销售假冒注册商标的商品罪、侵犯商业秘密罪，其中以职务侵占罪、非国家工作人员受贿罪最为常见。职务侵占罪主要表现为掠夺公司交易机会，虚设交易环节，截留公司利润或使公司成本增加，中饱私囊。非国家工作人员受贿主要表现为在工程和采购等领域，收受交易方的回扣好处费等。

#### 二、高管劳动人事管理制度完善的若干建议

我们发现，企业基于各种考虑，最终选择报案并移送刑事司法机关处理的只占少数。但为了查证违纪舞弊行为，公司往往需要投入不少人、物力调查取证。根据《公司法》，董事会解聘高管执行“无因解聘”，根据《劳动法》，解除劳动关系必须是“有因解聘”，一纸董事会决议不能证实解除劳动关系的合法性与正当性。对于违纪员工，如果公司不能提供证据证明具体的违纪事实和处理依据，就应当承担违法解雇的法律后果，要么被判赔偿金、要么被判恢复劳动关系。因此，辞退高管应当非常慎重，必须要有充分的准备。

从实践中发生的案例来看，高管人员的舞弊行为，通常是以交易作为掩护，且有一定组织分工，参与人员有亲属等血缘或姻缘的关系，易建立攻守同盟，具有隐蔽性强的特点，行为人具有较强的反侦查和逃避追究的特点，给公司发现和查处此类行为造成很大难度。

另外，公司在发现可疑交易时，为了查证违纪违法行为，需要收集高管人员亲属等人员的个人信息。但是由于国家对个人信息的保护，很难通过公开渠道获得高管人员亲属的信息，往往需要采用非正规渠道或手段，有时甚至采取跟踪等方式，极有可能涉嫌公民信息类的违法犯罪行为，企业也会处于非常被动的地位。

鉴于以上情形，我们认为应加强员工入职前的信息采集以及在劳动合同或劳动人事制度中完善“严重违反劳动纪律类型”等具体规定，加强对企业高管人员的用工管理：

### 1. 入职及签订合同时的信息采集

对于高管人员，用人单位应强化对其个人及亲属信息的采集，将其作为一项制度来完善，其作用相当于对拟聘任员工的背景调查和审查，同时定期采集公司高管人员的住址等重要信息。

同时，注重对供应商信息的充分采集，如供应商股东信息（身份证）、供应商承诺书以及保证书。

### 2. 建立利益冲突报告制度，完善劳动合同或劳动人事制度中“严重违反劳动纪律类型”的规定

在劳动合同或员工手册等规章制度中，可以将以下行为作为严重违反劳动纪律的类型，既加强用工管理，又有利于公司单方面解除合同，避免劳动争议发生：

- 1) 近亲属、特定关系人成立的公司，同公司之间签订合同或从事交易的。
- 2) 本人、近亲属、特定关系人的个人账户，接收来自客户的汇款等情形。

## 三、刑事报案

公司一旦发现高管人员实施违纪舞弊行为，并选择刑事报案维护自身利益时，我们建议应注意以下事项：加强基础证据材料梳理；围绕犯罪构成要件撰写报案书，报案书要突出重点、条理清楚；在公司初步正面接触嫌疑人时要把握案件节奏，注重通过谈话等形式固定证据，同时加强与办案机关工作人员沟通，防止非正常影响因素的介入。

### 案例分析：

2009 年 9 月至 2010 年 7 月，被告人徐某等五人经商议，采用内外勾结的方法，由徐某等人联系客户、货物的收发、在 UPS 公司开设账户等，利用 UPS 公司内部工作人员被告人林某等十三人在各个工作环节上的职务便利，在货物的重量上做手脚，通过 UPS 公司运送货物至国外后只支付少量运费的方式从 UPS 公司偷逃运费（俗称逃重），被告人徐某等 11 人参与偷逃运费人民币 980 万余元（以下所涉币种均为人民币），被告人朱某参与偷逃运费 634 万余元，被告人徐某参与偷逃运费 370 余万元，被告人朱某参与偷逃运费 360 余万元，被告人黄某参与偷逃运费 54 万余元，被告人姚某参与偷逃运费 48 万余元，被告人姜某参与偷逃运费 23 万余元，被告人王某参与偷逃运费 11 万余元。

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