PRC Labor and Employment Law Newsflash

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Termination of Employment with Senior Executives

A company's senior executives are not only management personnel of the company, exercising the rights of business management, instruction and commanding, but also employees hired by and rendering services to the company. Therefore, for the employment relation between a company and its senior executives, especially for termination of their employment, we should differentiate senior executives from general employees and pay special attention to potential legal risks.

1. Dual-Legal Governance on the Relation between a Company and its Senior Executives

Senior executive, as defined in Article 216 of *the PRC Company Law*, refers to "the manager, vice manager(s) and finance head of a company, the secretary of the board of directors of a listed company, and any other persons specified in the articles of association of a company". It is specified in Article 46 of *the PRC Company Law* that the board of directors of a company "makes decisions on the appointment or dismissal of the manager of the company and his remuneration, and decisions on the appointment or dismissal of the vice manager(s) and finance head of the company and their remuneration according to the manager's nomination". In addition, there are detailed provisions in Chapter 6 of *the PRC Company Law* with respect to a company's senior executives' qualifications and obligations as well as their liability for damage to the company.

On the other hand, senior executives are hired by, render services to, subject to the management of, and have employment relation with the company, and shall abide by *the PRC Employment Law*, *the Employment Contract Law* and other labor laws and regulations.

2. Termination of Employment with Senior Executives

As provided for by *the PRC Employment Law*, the board of directors of a company has the right to make decisions on the dismissal of the manager of the company and decisions on the dismissal of the vice manager(s) and finance head of the company according to the manager's nomination. In that way, can the board's decision on dismissal of a senior executive result in the company's termination of the employment relation with the senior executive?

We believe that the board's dismissal decision cannot directly result in a company's termination of employment relation with the senior executive. As mentioned above, the employment relation between a senior executive and the company should be governed by

employment laws and regulations due to his dual identity. Therefore, if a company unilaterally terminates the employment contract with its senior executive, the termination shall be made in accordance with *the PRC Employment Contract Law*, with legal grounds for termination, and in strict compliance with legal procedures. In other words, the board can make a decision on dismissal of a senior executive "without cause", but his employment relation should be terminated "for cause" which must be one of the statutory termination reasons as set forth in *the PRC Employment Contract Law*.

3. Potential Obstacle to Termination Set by use of the Power of Senior Executive

Senior executives as a company's management personnel exercise the power and authority of business management on behalf of the company, so they naturally have access to such power and authority. In practice, we got to know that some senior executives use their powers to hinder termination of their employment relation or fabricate contract or other documents unfavorable to the employer. For example, the general manager holds the company's official seal so he can act as the company's legal representative to affix the seal to forge contracts which tend to specify that the company shall pay a great amount of money to him; a senior executive holding a post of the company's labor union may manipulate the labor union to prevent the termination of his employment contract in the event that the company unilaterally terminates it.

As the employment of senior executives is quite special, we offer the following advice to protect, to the greatest extent, the employers from the legal risks in handling the employment of senior executives, especially in the process of unilateral termination of employment contracts:

1) Pay a special attention to conclusion of employment contract with senior executives. Because of the special status of senior executives, the employment contracts between the employer and its senior executives shall be dealt with differently from those between the employer and its general employees. For example, the employer is suggested to input the obligations and prohibitions of senior executives set forth in Chapter 6 of *the Company Law* to its internal bylaws and to specify in the employment contract to be executed with any senior executive that breaching any such obligation or prohibition shall constitute a serious violation of the employer's internal bylaws; any senior executive is required to issue a written commitment on his/her competence for the position before he/she is on board, and it should be specified in the employment contract that breaching such written commitment shall constitute "causing, by the means of deception, the employer to conclude the employment contract against its true intention".

2) Divide the important powers of senior executives. For the above-mentioned official seal affixing, the employer is suggested to formulate seal use application and registration policy and seal safekeeping policy and define the responsibilities of the seal keeper, make the official seal held by more than one persons, and specify that the seal use shall be subject to the signature and confirmation of the user and at least two competent approvers.

Case Study: High Remuneration to Pay under a Contract Forged by a Manager by Use of Seal

Mr. Lu joined a machinery company in September 2008 as deputy general manager, and his pre-tax monthly salary is RMB 8,000. Mr. Lu resigned in December 2012 and signed a letter of acknowledgement with the company on December 7th 2012 acknowledging that the company does not owe any money to him. But later Mr. Lu applied for labor dispute arbitration and presented a group of evidence in the court: 1. an agreement with the official seal of the company and the seal of the company's legal representative as well as the signature of Mr. Lu, executed in September 2008; and 2. an agreement with the official seal of the company and the seal of the company's legal representative as well as the signature of Mr. Lu, executed in December 2012, under which the company is required to pay the difference of the remuneration specified in the agreement signed in September 2008, USD 200,000, equivalent to RMB 1,240,000 (term "Bonus" in the agreement). The labor dispute arbitration commission overruled the arbitration application of Mr. Lu. Mr. Lu refused to accept the ruling and brought a lawsuit before the people's court. The first instance court upheld Mr. Lu's claim based on those two agreements, requiring the company to pay RMB 1,240,000 to Mr. Lu.

The company refused to accept the first instance judgment and instituted an appeal, with Dacheng lawyer as its agent ad litem in the second instance trial who required judicial expertise (no judicial expertise was required in the first instance trial) on the time of sealing and stamping the two agreements provided by Mr. Lu. It was found out the two agreements were sealed at the same time (while different signature dates are indicated in the two agreements, 4 years away from one to another). In addition, Mr. Lu made inconsistent statements on the time of formation of the two agreements in the trials. The second instance court affirmed that the two agreements were not signed with the company through consultation but being fabricated by Mr. Lu, therefore it abrogated the first instance judgment and dismissed Mr. Lu's claim.

In this case, the employer finally won a judgment in its favor after the second instance proceeding. However, in judicial practice, it is the asserting party, usually the employer, that has to prove with evidence that the agreements were affixed with the company's seal by the employee without permission. It is very difficult to prove the behavior of sealing without permission, particularly in the event that the time of sealing is in consistence with the signature date indicated in the agreements. Therefore, it is the optimal path of avoiding such legal risk to prevent senior executives from taking advantage of their powers to affix official seal to forge any document not in favor of the employer.

If you have any inquiries regarding the PRC employment law matters, please contact us at hrlaw@dachenglaw.com.

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中国劳动法资讯速递
二零一五年七月刊

公司高管劳动关系的解除处理

公司高管不仅是公司的管理者，代表公司行使经营管理权和指示命令权；同时还是受聘于公司、向公司提供劳务的劳动者。因此，在处理公司高管的劳动关系，尤其是劳动关系解除事宜时，应当区别于普通劳动者对待，关注其中存在的特殊法律风险。

一、公司与高管关系的双重法律规制

《公司法》第二百一十六条规定，高级管理人员“是指公司的经理、副经理、财务负责人，上市公司董事会秘书和公司章程规定的其他人员。”第四十六条规定，公司董事会“决定聘任或者解聘公司经理及其报酬事项，并根据经理的提名决定聘任或者解聘公司副经理、财务负责人及其报酬事项。”除此以外，《公司法》第六章也详细规定了公司高管的资格、义务，以及对公司的损害赔偿责任。

另一方面，高管受公司聘任，为公司提供劳务，接受公司的管理，与公司之间构成劳动关系，受《劳动法》、《劳动合同法》等劳动法律法规的规制。

二、高管劳动关系的解除

根据《公司法》的上述规定，公司董事会有权决定解聘公司经理，并根据经理的提名决定解聘公司副经理、财务负责人。前述董事会依职权解聘高管，《公司法》并未规定法定或是正当的解聘理由。那么，公司董事会作出的解聘高管的免职决议，是否能产生公司与高管解除劳动关系的效力？

我们认为，董事会的免职决议不能直接产生公司与高管劳动关系解除的效力。如前所述，因高管的双重身份，其与公司之间的劳动关系仍应受劳动法律法规的规制，公司单方解除高管的劳动合同应当按照《劳动合同法》的相关规定，需有法定解除劳动合同的理由，并应当严格按照法定的程序解除。换言之，董事会作出的高管免职决议可以是“无因”的，但解除高管的劳动关系必须是“有因”的，且解除理由必须符合《劳动合同法》规定的法定解除理由。

三、高管可能利用其职权优势阻碍劳动关系的解除

高管作为公司的管理者，代表公司行使经营管理的职权，天然拥有便利的职权优势。在实践操作中，我们也遇到了一些高管利用其职权优势阻碍公司与其解除劳动关系的进程，

或者是编造不利于用人单位的合同文书等。如：公司总经理在职期间掌握公司公章，又是公司的法定代表人，利用此便利，私盖公章伪造合同，这些合同往往会约定公司向该总经理进行高额的金钱给付；再如：高管在公司工会担任职务，在公司单方解除其劳动合同的过程中，利用此职权便利，操纵工会阻碍劳动关系的解除，等等。

针对高管劳动关系的特殊情况，我们给出如下建议，以尽量避免用人单位在处理与高管之间的劳动关系，尤其是单方解除劳动合同过程中的法律风险：

1、劳动合同的订立应区别对待。因高管身份的特殊性，用人单位与高管之间的劳动合同应区别于与普通员工之间签订的劳动合同。如：将《公司法》第六章规定的高级管理人员的义务及禁止行为写入公司的规章制度中，并在与高管签订的劳动合同中明确，违反前述义务或禁止行为的规定，即构成严重违反用人单位的规章制度；高管入职前要求其出具自身具备任职资格的书面承诺，并在劳动合同中约定违反该书面承诺即构成“以欺诈手段、使用人单位在违背真实意思的情况下订立劳动合同”，等等。

2、分散高管人员的重要职权。如前述私盖公章的情形，建议用人单位建立公章使用的申请和登记制度，公章的保管制度，并且明确保管人的责任；公司公章由多人保管，使用公章需要有公章使用人及至少两名有权限的批准人签字确认，等等。

案例分析：高管利用职务便利私盖公章，伪造合同，要求公司支付高额“劳动报酬”

陆某于2008年9月进入某机械公司工作，担任公司副总经理，税前工资每月8000元。陆某于2012年12月辞职，陆某与机械公司于2012年12月7日签订《确认书》，确认机械公司并无拖欠陆某任何款项。但之后陆某申请劳动仲裁，庭上陆某呈上一组证据：1、盖有机械公司公章和法定代表人印章，以及陆某本人签字的协议，签订日期为2008年9月；2、盖有机械公司公章和法定代表人印章，以及陆某本人签字的协议书，签订日期为2012年12月，要求机械公司支付2008年9月签署的协议中约定的劳动报酬差额（协议用语为“分红”）20万美元，折合人民币124万元。劳动仲裁委员会驳回了陆某的仲裁申请。陆某不服，向人民法院起诉，一审法院依据这两份协议，支持了陆某的诉讼请求，判决机械公司向陆某支付人民币124万元。

机械公司不服一审判决并提起上诉，委托大成律师担任其二审诉讼代理人。上诉方代理人要求对陆某提供的两份协议进行司法鉴定（一审未提出司法鉴定申请），鉴定两份协议上的印章、印文的形成时间。后经鉴定，两份协议系同时印文形成（两份协议标注的签订时间是不一样的，间隔超过4年）；再加上陆某在几次开庭谈话过程中，对两份协议何时形成的陈述前后不一致，多次反复。二审法院最终认定该两份协议系陆某单方制作，并非与机械公司协商一致而签订的。二审法院撤销了一审判决，驳回了陆某的诉讼请求。

本案中的用人单位经过二审程序，最终获得了有利于自身的判决。但司法实务中，对于主张合同文书系当事人私自盖印公司印章的，需由主张的一方，通常是用人单位来举证证明。而对于私盖公章的举证是很困难的，尤其在实际盖印时间确与文书上注明的签署时间一致的情况下。所以，从根源上防范高管利用职务便利私盖公章、伪造不利于用人单位的文书，才是防范此类法律风险的最佳途径。

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 hrlaw@dachenglaw.com 联系我们。

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