PRC Labor and Employment Law Newsflash

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What to Observe if Terminating Employment Contract for "Seriously Violating Corporate Rules and Regulations"

Employers in their human resources management tend to unilaterally terminate employment contracts on the grounds that their employees seriously violate corporate rules and regulations. In juridical practice, this type of cases occurs in a high proportion to labor dispute cases. Consequences were unfavorable for employers because they ignored some details in many such cases, which in our view could have been avoided. We discuss and summarize the points for employers' attention and reference at the unilateral termination of employment contracts as follows:

I. Legality, reasonability and validity of corporate rules and regulations

1. Corporate rules and regulations should be formulated through democratic consultation. For the legal basis, please see paragraph 2 of Article 4 of *the Employment Contract Law*[1], as well known.
2. Corporate rules and regulations must be publicized or informed employees. It is the publication procedure of, and a prerequisite towards bringing into force, corporate rules and regulations.
3. Corporate rules and regulations formulated by employees should comply with the law. Any corporate rules and regulations conflicting with any state law, regulation or rule might be held illegal and invalid and could not be taken as a ruling basis.
4. Corporate rules and regulations should also be reasonable. In another word, the severity of a disciplinary breach should match its punishment. In the event that severe punishment is given to an employee who makes minor disciplinary breach, it might be held unreasonable and therefore would be not accepted.

II. Fixing evidence of disciplinary breach

The employer should fix the evidence proving an employee's violation of corporate rules and

[1] Paragraph 2 of Article 4 of *the Employment Contract Law*: "When formulating or modifying the rules and regulations, or making decisions on important matters, which have a direct bearing on the immediate interests of employees, such as remuneration, working hours, rest and vacation, occupational safety and health, insurance and welfare, training, labor discipline and labor quota control, the employer shall, after discussion by the conference of workers or all the workers, put forward plans and suggestions and make decisions after consulting with the labor union or the employees' representatives on an equal footing."

regulations before termination of the employment contract. A disciplinary breach should be ascertained with evidences. According to Article 13 of *the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Labor Dispute Cases*[2], the employer shall bear the burden of proof for the argument that its employee seriously violates discipline. Therefore, it is essential to fix the evidence regarding employee disciplinary breach.

III. Timely handling disciplinary breach

A disciplinary breach should be handled promptly after being discovered and ascertained. If it is not handled in time, the punishment given by the employer might be held invalid. Moreover, if more than one disciplinary breach of an employee at different time is handled together, it should be inevitably held by judicial officers as framing up of disciplinary breach records for the purpose of terminating the employment contract.

IV. Timely notification

The handling decision should be notified to the employee concerned in writing, of which the proof of service should be kept. The notice of termination of employment contract shall not take effect until it is delivered to the employee concerned. In practice, many times handling decisions have not been delivered to the employee for any reason or, though having been delivered to the employee, there is no evidence proving such delivery, causing employer at an unfavorable position in the dispute.

V. Legal procedure of employer's unilateral termination of employment contract

Where an employer having established a labor union intends to unilaterally terminate an employment contract, it shall communicate with, and solicit and consider the opinion of, the labor union. In the event that the employer has not notified the labor union through the above procedure, if the employee claims damages for illegal termination of employment contract, the judicial authority should uphold such claim, and the employer should pay compensation even though the termination is on factual and legal basis.

Case Study: Lost in Lawsuit for Failure to Timely Handle Disciplinary Breaches

Mr. Shi is an employee of Company A. On February 8th 2012, Company A issued a Notice of Written Warning, giving a written warning to Shi for his neglect of management of Company A's important certificates and vouchers, but no evidence proving the delivery of such notice to Shi has been presented; and Shi declared that he had not received the notice. On December 14th 2012, Company A and its affiliate, Company B, jointly issued the Notices of Written Warning, giving two written warnings to Shi due to his disciplinary breaches. On January 7th 2013, Company A dismissed Shi on the grounds that it is set forth in the corporate rules and regulations that an employee shall be dismissed if three written warnings are given to him/her within two years, and the dismissal decision was examined and approved by the factory

[2] Article of the 13 of *the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Labor Dispute Cases*: "With regard to a labor dispute arising from the employer's decision on dismissal, removal, discharge, dissolution of employment contract, reduction of remuneration or calculation of work seniority, the employer shall bear the burden of proof."

director, the HR department, the labor union and the GM. On January 15th 2013, Shi applied for arbitration, claiming that Company A should pay the compensation for illegal termination of employment contract, RMB 422,717 and year-end bonus. Both parties refused to obey the arbitral award and brought a lawsuit at the court. Liwan People's Court found that the validity of the Notice of Written Warning issued by Company A to Shi on February 8th 2012 cannot be acknowledged because Company A failed to present any evidence proving the delivery of such notice to Shi and the validity of the Notice of Written Warning issued on December 14th 2012 cannot acknowledged because the violations set out in the notice occurred on March 9th 2012 and September 21st 2012 that Company A should have known no later than April 2012 and September 29th 2012, Company A should discover and handle the disciplinary breaches of Shi in a timely manner and the time limit had been exceeded according to the corporate rules and regulations. Therefore, the court held that the factual basis of Company A's dismissal of Shi is insufficient and ordered Company A to pay the compensation for illegal termination of employment contract, RMB 422,717 to Shi.

Company A filed the first instance ruling to a higher court, and the case was closed upon mediation led by the second instance court that Company A should pay RMB 330,000 to Shi.

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

二零一五年六月刊

以“严重违反规章制度”为由解除劳动合同需要注意的问题

在人力资源管理中，用人单位常常以劳动者严重违反公司的规章制度为由单方解除劳动合同。在司法实践中，此类型的案件在劳动争议案件中也占有相当大的比例。其中很多案件因用人单位忽视了一些细节而导致出现不利于用人单位的结果，而在我们看来，这些不利的结果本可以避免。大成劳动法与人力资源管理专业委员会对用人单位单方解除劳动合同需要注意的问题进行探讨和总结，现将我们认为需要注意的问题概括如下，供用人单位参考。

一、首先，规章制度要合法、合理、有效

1、规章制度的制订应当通过民主协商的程序。其法律依据是大家所熟知的《劳动合同法》第四条第二款[1]。

2、规章制度必须公示或告知劳动者。这是规章制度的公示程序，也是规章制度有效的必要条件。

3、用人单位制订的规章制度须具备合法性。如果规章制度与法律、法规或者规章等相抵触，也可能会被认定为违法而无效，而不能成为裁判的依据。

4、规章制度还应当具有合理性。即违纪行为的严重程度与处罚结果应当成比例关系。一个轻微的违纪行为而给予严厉的处罚，就可能会被认定为不具有合理性，从而不被认可。

二、违纪行为的证据固定

用人单位在解除劳动合同前，应当固定劳动者违反规章制度的证据。违纪事实的确定需要依靠证据来证明。根据《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》第十三条的规定[2]，用人单位对劳动者存在严重违纪的事实承担举证责任。因此，固定劳动者的违纪证据非常重要。

三、违纪处理的及时性

违纪行为被发现并确认后要及时处理。处理不及时，用人单位的处罚可能会被认定为无效。另外，不同时间的多个违纪行为集中处理，难免被司法人员认为是为了解除合同而刻意罗织违纪记录。

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1 《劳动合同法》第四条第二款规定：“用人单位在制定、修改或者决定有关劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利、职工培训、劳动纪律以及劳动定额管理等直接涉及劳动者切身利益的规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定”

2《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》第十三条规定：“因用人单位作出的开除、除名、辞退、解除劳动合同、减少劳动报酬、计算劳动者工作年限等决定而发生的劳动争议，用人单位负举证责任”

四、通知的及时性

处理决定应当书面通知员工并保留送达证明。解除劳动合同的通知只有送达至劳动者才会发生解除的效力。实践中由于各种原因，存在处理决定没有送达给劳动者，或者虽然送达给劳动者但没有证据证明的情形，使用人单位在争议中处于不利的地位。

五、用人单位单方解除劳动合同的程序应合法

用人单位成立了工会组织的，用人单位单方解除劳动合同前，应当与工会沟通，听取并研究工会意见。用人单位违反程序、未通知工会的，劳动者请求支付违法解除劳动合同的赔偿金，司法机关应当支持。即使解除劳动合同有事实和法律依据，用人单位也须支付赔偿金。

案例分析：违纪行为处理不及时、未通知，公司承担责任

时某系 A 公司员工。2012 年 2 月 8 日，A 公司作出《书面警告通知书》，以时某对公司重要证件疏于管理 ，作出书面警告的处罚，但 A 公司并未提供证据证明该通知送达给时某，时某则表示没有收到该通知。2012 年 12 月 14 日，A 公司及其关联企业 B 公司共同作出两份《书面警告通知书》，分别以时某存在违纪行为而给予两个书面警告。2013 年 1 月 7 日，A 公司辞退时某，辞退原因为：公司制度规定，两年内累积 3 个书面警告的，给予辞退处理。辞退决定经由厂长、人力资源部、工会、总经理审批通过。2013 年 1 月 15 日，时某申请仲裁，请求 A 公司支付违法解除劳动合同的赔偿金 422717 元及年终奖等。该案经过仲裁程序后，双方均不服，均向法院提起诉讼。荔湾区人民法院认为：A 公司 2012 年 2 月 8 日向时某发出《书面警告通知书》，但未能提供证据证明送达给时某，故对该证据的效力不予认可。2012 年 12 月 14 日发出的《书面警告通知书》，记载的情况分别发生于 2012 年 3 月 9 日和 2012 年 9 月 21 日，公司最迟应在 2012 年 4 月和 2012 年 9 月 29 日已经知悉， A 公司对于时某的违纪行为应当及时发现并及时处理，参照公司制度的规定，已经超过处理期限，故对 2012 年 12 月 14 日作出的《书面警告通知书》的效力不予认可，法院因此认定 A 公司辞退时某的事实依据不充分。判决 A 公司向时某支付违法解除劳动合同赔偿金 422717 元。

一审判决后，A 公司不服并提出上诉，该案经二审法院主持调解达成一致，A 公司向时某支付 33 万元结案。

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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