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Labor Law

Analysis on the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Labor Disputes (IV)

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The *Labor Contract Law*, the *Law on Labor-dispute Mediation and Arbitration*, the *Regulations on Implementation of the Labor Contract Law*, and other such laws and regulations have enhanced the protection on the employees' rights and interests, thus increasing awareness of labor rights. The number of labor dispute cases that the People's Court receives has also increased, but there are still a wide variety of problems that have yet to be solved within the judicial practice. For the purpose of guiding the judicial practice and solving various problems, the Supreme People's Court promulgated the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Labor Disputes (IV)* (hereinafter referred to as "**Interpretation IV**") on January 18, 2013. The Interpretation IV came into effect on February 1, 2013.

The 15 articles of Interpretation IV attempt to address issues such as the connection between court proceedings and arbitration proceedings, mediation, economic compensation, non-competition, oral amendments to the labor contract, and foreign employees.

The following is a summary and analysis of the main features of Interpretation IV.

I Connection Between Court Proceedings and Arbitration Proceedings

According to Article 47[1] of the *Law on Labor-dispute Mediation and Arbitration*, for some minor labor disputes, the arbitration award shall be final and take legal effect from the date the award

[1] **Article 47** For the following labor disputes, the arbitral award shall be final and take legal effect from the date such award is made, unless otherwise provided for in this Law:

(1) disputes involving the recovery of labor remuneration, medical expenses for job-related injury, economic compensation or damages, and the amount involved does not exceed that of the standard local monthly wage rates multiplying 12 months; and

(2) disputes arising over working hours, periods of rest and vacation, and social insurance, etc., in the course of applying the occupational standards of the State.

is made. However, such final arbitration award is only binding to the employer. Where an employee is dissatisfied with the arbitration award, he/she may file a lawsuit with a people's court pursuant to Article 48[2] thereof.

Interpretation IV specifies employers' rights on filing a lawsuit with a people's court in the following items:

(1) where an employer is dissatisfied with the final arbitration award, it may apply for revocation of such award with an intermediate people's court. Where an employer is dissatisfied with the non-final arbitration award, it may file a lawsuit with a basic people's court;

(2) whether the arbitration award is final or not shall be determined in accordance with its type as indicated therein. Where the type of arbitration awards is not indicated, it shall be determined by a basic people's court.

II Calculation of Employment Period when Employee is Relocated to New Employer due to Reasons not Attributable to Employee

Article 4 of Interpretation IV provides that where an employee is relocated to a new employer due to reasons not attributable to the employee (such as the division or merger of the employer, job transfers by the employer, the affiliates of the employer entering into labor contracts with the employees in rotations), when the employment contract with the new employer is terminated, the new employer shall pay the employee economic compensation or damages(if it is so obligated) by calculating both employment periods with the new employer and the former employer.

Article 4 also restrains the employer from evading payment of economic compensation. However, the employee might encounter difficulties in evidence collection. According to the general principles of law, the employee must prove the following facts:

(1) the reason why the employee terminated the labor relationship with his/her former employer and established a new labor relationship with the new employer is not attributable to the employee;

(2) the former employer was obligated, but failed, to pay economic compensation or damages;

(3) the new employer is obligated to pay economic compensation or damages;

(4) the employment periods with the former employer and the new employer; and

(5) the basic amount for the calculation of economic compensation or damages.

[2] **Article 48** Where an employee is dissatisfied with the arbitral award as prescribed in Article 47 of this Law, he/she may file a lawsuit with a people's court within 15 days from the date the employee receives the award.

Due to the difficulty in employees being able to prove the facts set forth in above item (1), the allocation of burden of proof between the parties by the court will directly influence the resolution of the dispute.

In addition to the above-mentioned items, Interpretation IV is silent on the following questions:

(1) Whether or not the employee has the right to claim against his former employer for economic compensation or damages after he has claimed for economic compensation or damages against this new employer pursuant to Article 4 of this Interpretation IV? From a legal perspective, the answer is no. Then the issue should be whether the new employer has the right to claim for a recovery against the former employer after the new employer has paid the economic compensation or damage? If yes, what standard shall be applied to calculate the amount to be recovered, since the overpaid amount by the new employer might be higher or lower than the amount ought to be paid by the former employer?

(2) Whether or not the former employer is responsible for the unpaid economic compensation or damage in the event that the employee voluntarily resigns from the new employer or the new employer duly terminates the labor relationship due to the employee's fault.

No answer to the above questions can be found in the Interpretation IV, and we expect either the legislative organs or the Supreme People's Court to promulgate new laws or judicial interpretation on the above questions.

Considering the degree of uncertainty in Interpretation IV with respect to the calculation of employment periods, we suggest that employers pay economic compensations and damages to employees in accordance with the current laws in order to avoid potential disputes that might arise in the event of company and employee resettlement. In regards to the ambiguity of the law, we recommend that employers fully communicate with their workers and conclude with written agreements in order to help guide any future disputes that may arise.

III Non-competition Compensation

Before the promulgation of Interpretation IV, the amount of non-competition compensation was mainly determined by mutual agreement between the employee and the employer, since there was no national statutory standard. Article 4 of Interpretation IV adopts a fixed standard for non-competition compensation: namely 30% of the employee's monthly salary for the 12 months prior to the revocation or termination of the labor contract or equal to the local minimum salary standard, whichever one is higher.

IV Termination of Non-competition Clauses

Article 8 of Interpretation IV provides that the employee shall have the right to claim for the termination of non-competition clauses in the event that the employer fails to pay non-competition compensation for three months due to the employer's reasons. Article 9 provides that the employer may terminate non-competition clauses at any time, provided that the employee has the right to claim for three months' additional non-competition compensation.

We understand that the employee is entitled to non-competition compensation for the period during which the employee has fulfilled his non-competition obligation, where the employee claims for termination of the non-competition clauses pursuant to Article 8 of Interpretation IV. We also gather that the termination right under Article 8 and Article 9 of Interpretation IV does not conflict with the contractual termination right. Therefore, in the event that both parties have reached an alternative agreement on the termination of non-competition clauses, such agreement should prevail.

V Effectiveness of Oral Amendments to Labor Contracts

Article 11 of Interpretation IV confirms that the oral amendment to the labor contract is effective provided that the parties have carried out the oral amendment for more than one month.

We think that Article 11 of Interpretation IV is incomplete for the following reasons:

(1) Section 1 of Article 35 of the *Labor Contract Law* explicitly prescribes that "An employer and an employee may amend the provisions of the labor contract if they reach consensus on the matter through consultation. Any additional amendments in a labor contract shall be made in writing." It can be easily found that Article 11 of Interpretation IV conflicts with the *Labor Contract Law*.

(2) Changes in the labor contract may include a wide range of content. There may be amendments to the essential clauses set forth under Article 17 of the Labor Contract Law, such as labor remuneration, scope of work, workplace, labor contract term. There may be amendments any non-essential clauses as well. Since Interpretation IV has not yet placed restrictions on the application of oral amendments, we can infer that such oral amendments may apply to both essential clauses and non-essential clauses.

(3) To allow for certain provisions of oral amendments in the labor contract may prejudice the employee's rights and interests. For example, the employer reaches an oral agreement with the employee to extend the term of the labor contract before the expiration of the term. In that case, Article 11 of Interpretation IV may preclude the employee from either claiming for dual payment of salary for the period during

which there is no written labor contract pursuant to Article 82[3] of the *Labor Contract Law*, or claiming for the establishment of non-fixed term labor contract pursuant Article 14[4] of the *Labor Contract Law*.

(4) Allowing oral amendments in the labor contract may lead to new disputes arising. For example, parties may face difficulties in proving the new term of the labor contract in case the parties reach an agreement to extend the term of the labor contract, and the parties' performance of the amended labor contract cannot prove the new term, then the people's court may also have difficulties in fact-finding.

Our above analysis has shown that despite how Interpretation IV recognizes the effectiveness of oral amendments in labor contracts, there is still the possibility of new disputes arising. Therefore, we recommend that the employers and the employees amend labor contracts in written form.

[3] **Article 82** Where an employer fails to conclude a written labor contract with an employee for more than a month but less than a year from the date it starts employing he/she, it shall pay the employee two times his salary for each month.

Where an employer fails to conclude a non-fixed term labor contract with an employee in violation of the provisions of this Law, it shall pay the employee two times his salary for each month, starting from the date on which a non-fixed term labor contract should be concluded.

[4] **Article 14** A non-fixed term labor contract is one where the employer and the employee have agreed not to stipulate a definite ending date.

An employer and an employee may conclude a non-fixed term labor contract upon reaching consensus through consultation. If a employee proposes or agrees to renew the labor contract or to conclude a labor contract in any of the following circumstances, a non-fixed term labor contract shall be concluded, unless the employee requests the conclusion of a fixed-term labor contract:

(1) The employee has been working for the employer for a consecutive period of 10 or more years;

(2) The employee has been working for the employer for a consecutive period of 10 or more years but less than 10 years away from the statutory retirement age when the employer introduces the labor contract system or when the State-owned enterprise has to conclude a new labor contract with him as a result of restructuring; or

(3) The employee intends to renew the labor contract after he has consecutively concluded a fixed-term labor contract with the employer twice and he has not been found in any of the circumstances specified in Article 39 or Subparagraph (1) or (2) in Article 40 of this Law.

If an employer fails to conclude a written labor contract with an employee within one year as of the date when it employs the employee, it shall be deemed to have concluded a non-fixed term labor contract with the latter.

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