

Draft Implementation Rule Addresses Vague Issues in the Labor Contract Law

A draft Implementation Rule (“**Draft Rule**”) recently exposed reveals Chinese labor authorities’ efforts to clarify vagueness in the implementation of the Labor Contract Law for the past years. The following deserve more attention:

1. How to publicly announce the employer’s rules and regulations

The employer’s rules and regulations will not be effective or binding upon the employees until and unless

- (1) They are in compliance with the applicable Chinese laws, regulations and polices;
- (2) They have gone through the democratic process (including consultation with the employees or labor union);
- (3) They have been publicly announced to the employees.

However, the current laws keep silent over statutory standard or method of how to make public announcement to the employees. The Draft Rule for the first time makes it clear that the employer may announce the rules and regulations to the employees by collecting their signatures of receipts or organizing training, etc..

2. Headquarters’ rules and regulations need to be “localized”

The Draft Rule does not allow to apply headquarters’ rules and regulations directly to the employees. Those headquarters’ rules or regulations do not have binding effect on Chinese employees before they have been localized by the Chinese employer after satisfying the above-mentioned three conditions.

《贯彻实施劳动合同法若干规定（意见稿）》的亮点

从最新获得的《贯彻实施劳动合同法若干规定》意见稿（“**意见稿**”）得知，中国人力资源和社会保障部门正努力通过制订劳动规章对《劳动合同法》实施过程中存在的诸多重点难点问题进一步释明。我们现将意见稿中的“亮点”予以归纳并分享如下：

1、明确如何“公示”规章制度

现行中国劳动法律法规规定用人单位的规章制度必须同时满足三项条件后才能生效并对员工有约束力：

- (1) 符合法律法规、政策规定；
- (2) 通过民主程序制订；
- (3) 向员工公示或告知。

然而，现行法律对规章制度“公示”和“告示”的标准和形式并无明确。意见稿明确用人单位可采取“劳动者签收”、“组织员工培训”等方式向员工公示或告知规章制度。

2、“总部”规章制度不可直接适用

意见稿规定子公司或分公司不可直接适用母公司或总公司规章制度，

<p>3. Labor contract may be suspended due to statutory causes</p> <p>Except for several provincial labor contract rules, there are no existing national-level laws or regulations on the suspension of a labor contract. The Draft Rule provides that a labor contract would be suspended due to statutory causes, and the parties should continue to perform it after the cause of suspension disappears. At the same time, the term of suspension shall not be calculated into the employee's years of service. The statutory causes include:</p> <p>(1) The employee needs to perform the state obligations;</p> <p>(2) The employer has to suspend the labor contract due to force majeure;</p> <p>(3) Other reasons as specified in the laws and regulations.</p> <p>4. An employer will have more power to request performance of non-compete obligation</p> <p>Normally a non-compete clause without agreed compensation will not be automatically deemed invalid; however, its performance and enforcement always face difficulties when both parties cannot agree to compensation. With an aim to improve the efficiency of non-compete obligation performance, the Draft Rule stipulates that in the event of no prior agreement on compensation, an employee must honor non-compete obligation as long as his/her employer provides a monthly compensation no less than 70% of average monthly salary for the past 12 months prior to employment termination.</p>		<p>需按照《劳动合同法》第四条规定颁布，否则“总部”规章制度对子公司或分公司的员工无约束力。</p> <p>3、劳动合同因法定事由可“中止履行”</p> <p>对劳动合同中止履行，除少数省份的劳动合同条例有所涉及外，现行国家层面的法律法规并无规定。而意见稿提及劳动合同可因法定事由中止履行，待法定事由消失后恢复继续履行；同时中止履行的期间不计入劳动者的工作年限。意见稿目前列举的中止履行的法定事由较为笼统，具体如下：</p> <p>(1) 劳动者履行国家义务；</p> <p>(2) 用人单位因不可抗力中止履行劳动合同的；</p> <p>(3) 法律、法规另有规定的。</p> <p>4、用人单位可强制要求员工履行竞业限制条款</p> <p>一般而言，未约定补偿金额的竞业限制条款仍然有效，但往往用人单位与员工因为补偿金额无法达成一致而产生种种纠纷。</p> <p>为了进一步增强竞业限制履行效果，意见稿规定，在没有约定补偿金额的情况</p>
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5. Off business secrete period – a longer prior notice period for resignation

The Labor Contract Law requires a 30-day prior notice for resignation. Some provinces introduced longer notice period in order to give the employers time to separate the employees from business secret. In practice, there are two different opinions on this issue under the Labor Contract Law: (1) 30-day prior notice period is fixed, which cannot be extended or shortened; (2) an off business secrete period, longer than 30-day prior notice period, is permissible and it is applicable to those employees who bear the confidentiality obligation.

The Draft Rule endorses the second opinion, stipulating that both employer and employee may agree to an off business secret period up to 6 months and such period should be calculated into the 2-year non-compete period.

下，只要用人单位能够提供员工前12个月平均工资70%的补偿金，员工就必须履行竞业限制义务。

5、脱密期

《劳动合同法》规定员工离职只需提前30日通知用人单位即可。一些省份的劳动合同法条例允许约定更长的通知期以使用用人单位有时间安排涉密员工脱密。但在《劳动合同法》下，对于负有保密义务的员工可否要求更长离职通知期，实践中有两个截然不同观点：（1）按照《劳动合同法》规定，只需提前30日通知；（2）负保密义务的员工与用人单位可约定离职前“脱密期”，员工离职应按照“脱密期”期限提前通知用人单位。

意见稿观点更倾向于上述第（2）点，即规定对于负有保密义务的劳动者，用人单位可与其就劳动合同解除的“提前通知期”进行约定，且通知期最长不超过六个月，脱密期与竞业限制的总期限不超过两年。

上述内容虽是意见稿中的观点，但代表了中国劳动法律法规的发展，建议用人单位密切关注上述最新立法趋势。

