

Beijing Court Finds Non-Competition Agreement Unenforceable

Mr. Liu was formerly employed by a high-tech medical company, where he entered a two year labor contract with his employer. As part of his employment, Mr. Liu also signed a Non-Competition Agreement.

According to the non-competition agreement between Mr. Liu and the company, Mr. Liu was not allowed, during his employment, to engage in any part time work of in a similar or competitive enterprises. He was also prohibited from establishing a company or investing in another company which engaged in the same business as his employer. The agreement also prohibited Mr. Liu, during his employment or after his termination of employment, from soliciting his employer's clients or employees to leave the employer. However, the non-competition agreement did not specifically state what rights or compensation Mr. Liu would receive if he fully complied with the non-competition agreement.

In January 2007, Mr. Liu offered his resignation to his employer and requested compensation for complying with the non-competition agreement. The company refused to pay Mr. Liu any compensation for his compliance with the non-competition agreement. At the same time, the company believed that Mr. Liu had violated the non-competition agreement and filed a claim with the Beijing Labor Dispute Arbitration committee, claiming RMB

300,000. The arbitration committee denied the company's claim for lack of evidence. The company then filed an appeal with the Beijing First Intermediate People's Court.

Per Article 23 of the Labor Contract Law, a non-competition agreement should provide for equality between both an employee's rights and obligations under the agreement. Under Article 26 of the Labor Contract Law, the labor contract will be wholly or partially invalid if the contract absolves the employer from legal liability and denies the employee his/her rights. In other words, if a non-competition agreement states that it is binding on the employee yet provides no compensation to the employee for honoring the agreement, the agreement will be invalid and unenforceable on the employee. For non-competition agreements to be binding on employees, the non-competition agreement must state what amount of compensation will be paid to the departing or terminated employee for abiding by the agreement and the employer must actually pay the compensation during the period the employer wishes to bind the former employee.

In this case, the People's Court ruled that since the non-competition agreement only stipulated the responsibilities of Mr. Liu without granting the necessary compensation, the agreement was obviously unfair; violated the Labor Contract law, and therefore resulted in the invalid of this agreement. The court upheld the decision of the Labor Arbitration committee and found the non-competition agreement invalid.

Sunstroke Recognized as Industrial Injury

The Tianjin Municipal Human Resource and Social Security Bureau has determined that under Chinese labor law, sunstroke from working in the heat shall be regarded as an industrial injury. After an employee experiences sunstroke, he or another employee who is present shall immediately report the condition to the employer. The employer shall submit the reported condition and the application of industrial injury recognition to the local labor and social security authority. After the injury has been recognized, the injured employees may enjoy industrial injury status. For enterprises which pay into the industrial injury insurance scheme, medical expenses shall be paid from the industrial injury insurance funds. Enterprises that do not pay into the fund, are responsible for covering the industrial injury expenses themselves.

Shanghai Introduces Flexible Working Hours During Expo 2010

During the Expo, all units in Shanghai are expected to adopt "flexible working hours" measures, the tentative versions which have already been introduced. It is revealed that the relevant authorities will take actions of traffic restrictions in the areas nearby the institutions and enterprises that are able but unwilling to adopt the measure of "flexible working hours" in order to urge those enterprises to consider adopting the measures.

PEO - China Employment Express

We are currently in the process of translating the draft Rules into English. If you would like to receive a copy, please contact us at mail@lehmanlaw.com.

Lehman, Lee & Xu is a top-tier Chinese law firm specializing in labor, corporate, commercial, and IP matters.

Please feel free to contact us for advice on all China-related labor and employment issues.

**mail@lehmanlaw.com
www.lehmanlaw.com**

July Labor Briefing:
Chengdu Labor Case Illustrates the Various Penalties Under the Labor Contract Law

China Labor Insights

July 2009

Mr. Cheng (employee) was hired as the HR director of a company located in Chengdu, Sichuan on January 2, 2008. Employee and employer both agreed that the probation period would be one month and the salary to be RMB 3500 RMB per month. On February 1, 2008, Mr. Cheng filled out a 'Labor Relationship Registration Card', and his salary was adjusted to 4000 RMB per month month. Throughout the employment period, the company failed to sign a written labor contract with Mr. Cheng.

On July 30, 2008, after Mr. Cheng has worked for the company for six months, the company orally notified Mr. Cheng that he was terminated and required him to transfer his work to other employees. On the same day, Mr. Cheng sent a letter to the company, stating that the company had terminated his employment contract unilaterally, requesting that the company pay his July salary as well as severance and damages. On August 4, 2008, Mr. Cheng finished transferring his work yet the company did not pay him his July salary. On August 14, 2008, Mr. Cheng submitted an application to the Chengdu Labor Dispute Arbitration Committee, claiming unpaid salary, severance, and damages.

While this case primarily involves the unilateral termination of a labor contract by an employer in violation of the Labor Contract Law, it also brings up the issue of an employers liability when an employee has been employed without a written labor employment contract. According to Article 87 of the Labor Contract Law, "If an employer revokes or terminates a labor contract in violation of this Law, it shall pay the employee double the amount of damages provided for in Article 47 of this law." Article 47 provides that severance shall be paid based on "on the number of years he has worked for the Employer at the rate of one month's wages for each full year worked. Any period of not less than 6 months but less than one year shall be counted as one year". Article 82 of Labor Contract Law states that " if an employer concludes a written labor contract with an employee more than one month but less than one year after the date on which the employee has started work, the employer shall, each month, pay to the employee twice his wage."

Under the facts of this case, the company was ordered to pay the former employee the following three amounts:

- 1) RMB 4,000 [July pay owed]
- 2) RMB 8,000 [one month salary as severance + double penalty for terminating employment contract without cause]
- 3) RMB 24,000 [six months salary at RMB 4000 per month, as penalty for failing to have a written labor contract with the employee]

Page 2 of each month's edition of *China Labor Insights* is dedicated to a particular aspect of Chinese labor and employment law, focusing on the main issues affecting companies doing business in China.

1 in 4 Chinese Women Discriminated Against In Job Search

Sex-based discrimination in the workplace is widespread in China as one in four female job applicants are denied employment based on their gender, a recent study has found. The research findings, released by the Center for Women's Law and Legal Services of Peking University, are based on polling and personal interviews with more than 3,000 women over one year's time.

According to the report, one in 25 of the surveyed women were forced to sign labor contracts that contained clauses forbidding them to marry or become pregnant within a set period of time. More than 20 % said that their employers had cut salaries of women who had become pregnant or given birth, and 11.2 % lost their jobs after having given birth. 28 % of women said that employers had set different criteria during recruitment and that women had to perform much better than their male peers during the interviews for the same job.

Lehman, Lee & Xu's labor and employment team offers unrivalled and comprehensive services relating to all manner of Chinese and international labor issues, providing clients with the highest standards of technical expertise together with a practical and commercial approach.

For more information, please visit: *Lehman, Lee & Xu* — www.lehmanlaw.com