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劳动与雇佣

## 如何避免签署无固定期限劳动合同 How to Avoid Concluding a Non-fixed Term Employment Contract?

“连续订立二次固定期限劳动合同后，用人单位是否必须与劳动者签订无固定期限劳动合同”成为了用人单位最关心的问题之一。我们拟针对签署无固定期限劳动合同的利弊分析，结合司法实践中对于无固定期限劳动合同的操作，对此问题发表我们的一些建议和看法。

“After the conclusion of two consecutive fixed-term employment contracts, whether the employer is required to conclude non-fixed term labor contracts with workers” have become one of the most concerned issues for them. We intend to address some of our suggestions and views regarding this issue by analyzing the pros and cons of concluding a non-fixed term employment contract and combining the operation of judicial practice of non-fixed term employment contract.

### 无固定期限劳动合同订立的前提

### The premise of concluding a non-fixed term employment contract

根据《劳动合同法》第 14 条的规定，连续订立二次固定期限劳动合同，且劳动者不存在《劳动合同法》第 39 条和第 40 条第 1 项、第 2 项规定情形的，劳动者提出或同意续订劳动合同的，除劳动者提出订立固定期限劳动合同外，应当订立无固定期限劳动合同。

According to the provision of Article 14 of the *Employment Contract Law*, if employee proposes or agrees to renew the employment contract when having concluded two consecutive fixed-term labor contracts, and he is not characterized by any of the circumstances set forth in Article 39 and the items 1 and 2 of Article 40 of hereof, a non-fixed term employment contract shall be concluded save that the employee requests the conclusion of fixed-term employment contract.

此规定界定了订立无固定期限劳动合同的基本前提，即：

This provision defines the basic premise of concluding the non-fixed term employment contract as follows:

- 连续订立二次固定期限劳动合同；  
The employee has concluded two consecutive fixed-term employment contracts;
- 用人单位和员工双方同意续订劳动合同；  
Both employer and employee agree to renew the employment contract;
- 劳动者不提出订立固定期限劳动合同。  
Workers don't require concluding the fixed-term employment contract.

**对订立无固定期限劳动合同的担忧****The concerns on non-fixed term employment contract**

在实践中，大部分用人单位均对连续订立二次固定期限劳动合同后，用人单位需要与员工签署无固定期限劳动合同表达了不同程度的担忧。这些担忧存在以下理由：

In practice, most employers express varying degrees of concern on the liability of concluding a non-fixed term employment contract with the employees who have concluded two consecutive fixed-term employment contracts. These concerns exist for the following reasons.

- 无固定期限劳动合同订立后，员工即成为企业的永久员工，用人单位无法再行解雇员工。这样，一旦用人单位对该员工工作表现不满意，则没有能力采取解雇措施；  
After entering into a non-fixed term employment contract, employee will become permanent one who can not be dismissed by the employer. Thus, once the employer is not satisfied with the performance of the employee, no dismissal measures can be taken for them.
- 用人单位将丧失用人的自主权和灵活性。  
Employer will lose the autonomy and flexibility of the employment.

对于签署无固定期限劳动合同的弊端，尽管上述担心尚存在一定的误区，例如，即使签署无固定期限劳动合同的员工，用人单位按照《劳动合同法》的相关规定行使单方解除权的权利并未受到影响（例如第 39 条，第 40 条，第 41 条，以及员工手册规定的用人单位可以合法行使解雇权利的情形），例如，员工严重违纪、不能胜任工作等。但是，结合法律规定，我们认为，用人单位对于无固定期限劳动合同的员工至少会丧失以劳动合同期满为由行使单方解除权的权利是毫无异议的。而此项权利的行使又比较关键的，原因包括：

For the drawbacks of concluding a non-fixed term employment contract, there still exists some misunderstandings of the above concerns. For example, although the employee has concluded a non-fixed term employment contract, the employer have one-sided dissolution right to terminate contract pursuant to the *Employment Contract Law* (such as the circumstances that the employer can exercise the dismissal rights legally according to Article 39, Article 40, Article 41 of the *Employment Contract Law* and the provisions of the employee handbook), the employee's serious disciplinary violation, incompetency and so on. However, combined with legal provisions, we believe it is no doubt that the employer will at least lose the one-sided dissolution right when the employment contract is expired for a non-fixed term employee. But the exercise of this right is relatively crucial, reasons including:

- 如合同期满，用人单位可以同意续订劳动合同，也可以不续订劳动合同；  
If the contract expires, the employer can choose to agree to renew the employment contract, or disagree to renew the employment contract.
- 如果用人单位在维持原有的工资标准和劳动条件的情况下同意续订劳动合同，而员工又希望在增加工资或劳动报酬的情况下才续订劳动合同，则一旦双方无法达成工资增长作为续订劳动合同的条件，则用人单位不负有续订的合同义务，同时，用人单位可通过一定的方式，免除其支付经济补偿金的义务；  
Once the parties cannot reach an agreement of a wage increase as a condition of renewing the labor contract when the employer agrees to renew the employment contract in the case of maintaining the original wage standards and working conditions,

but employee wants to renew the employment contract in case of an increase in salary or labor remuneration, the employer can relieve from the obligation of renewing contracts, meanwhile, the employer can exempt from its obligation to pay economic compensation in a certain way.

- 用人单位可以此为由，与续订劳动合同的员工达成双方均可接受的新的工资标准和劳动条件。

On the above grounds, the employer can reach an agreement on mutually acceptable new wage standards and working conditions with the employee who renews the employment contract.

此外，对于劳务派遣单位，如果其一旦与员工签署了无固定期限劳动合同，则在无用工单位可派遣的情况下，劳务派遣单位必须自行承担员工待岗期的所有工资和劳动报酬，而无法以劳动到期为由结束劳动合同，这也是很多劳务派遣单位坚决不同意签署无固定期限劳动合同的原因之一。

In addition, regarding to Staffing Firm, if it signs a non-fixed term labor contract with employee, in the case of the absence of labor dispatching units, Staffing Firm must bear all wages and labor compensation for post-waiting staff by itself, and can not terminate the labor contract on grounds of labor contract expiration, which is one of the reasons why many Staffing Firms strongly disagree to sign a non-fixed term employment contract.

### **如何避免签署无固定期限劳动合同**

### **How to avoid concluding a Non-fixed term employment contract**

不可否认，对于无固定期限劳动合同，用人单位都存在这样那样的担心。但是，受限于《劳动合同法》第 14 条的规定，用人单位是否没有任何机会在连续订立二次固定期限劳动合同后，再次订立固定期限劳动合同呢？

There is no denying the fact that the employer has worry of one sort or another for the non-fixed term labor contract. However, subject to the provisions of Article 14 of the *Employment Contract Law*, whether the employer indeed has not any chance in entering into a fixed-term labor contract again after conclusion of two consecutive fixed-term labor contract ?

这里引申出一个非常现实的问题，如果在连续订立了二次固定期限劳动合同后，如用人单位再次与员工签署了固定期限劳动合同，该固定期限劳动合同的效力又如何呢？

It hereby comes out of a very practical problem: what's the effect of the fixed-term employment contract which is concluded by the employer and employee again after the second successive fixed-term employment contract?

根据我们的司法实践，特别是上海市相关法院的司法判例，我们的结论是：只要新的固定期限劳动合同已经过双方的签字盖章，则其应当合法有效。

According to our judicial practice, especially the related Court's jurisprudence in Shanghai, we make a conclusion that as long as the new fixed-term employment contract has been signed and sealed by both parties, then it should be legal and valid.

我们认为，这种操作其实并不违反《劳动合同法》第 14 条规定的精神，原因是《劳动合同法》第 14 条对于连续订立二次固定期限劳动合同后订立无固定期限劳动合同的要求并非无任何例外情形，其中最明显的是如果员工要求/同意订立固定期限劳动合同，则双方可以再次订立固定期限劳动合同。

We believe that this operation does not violate the spirit of the provision of the Article 14 of the *Employment Contract Law*, for the reason that the provision of the Article 14 of *Employment Contract Law* which is about entering into non-fixed term employment contract after the second consecutive fixed-term labor contract does have expectation circumstances. Obviously, if employee requests or agrees to enter into a fixed-term labor contract, the parties may enter into fixed-term labor contract again.

其实，在续订劳动合同时，我们认为除了极个别情况，用人单位在续订劳动合同的问题上大多是占据主动权的。用人单位完全可以利用其优势，要求员工订立固定期限劳动合同，从而避免了无固定期限劳动合同的订立。

In fact, at the time of renewal of employment contracts, we believe that in only a very few cases, the employer mostly take the initiative regarding renewing the employment contract. Employer can take advantage and require employee to enter into a fixed-term employment contract so as to avoid entering into non-fixed term employment contract.

当然，是否订立无固定期限劳动合同，从本质上说，仍然是用人单位针对具体员工需要个案考虑到问题。对于对用人单位有创造价值的优秀员工，我们相信用人单位是不会就签署无固定期限劳动合同产生犹豫的，因为这符合双赢的价值标准。

Certainly, whether enter into a non-fixed term employment contract, in essence, is still a problem that the employer should consider when referring to specific employee. For the excellent staff who has create value, we believe the employer have no hesitation on the signing of a non-fixed term employment contract with him because this meets a win-win value criteria.

**如您对本文有任何问题，请联系：**

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