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劳动与雇佣

竞业限制补偿金可在工资中预付吗？

NON-COMPETITION COMPENSATION CAN BE PREPAID IN THE SALARY?

I. 问题的提出

The Question

竞业限制协议可有效减少因知晓用人单位商业秘密的雇员在离职后到竞争单位就业或者自行开业经营相竞争业务发生的泄露用人单位商业秘密或者不正当使用而发生的风险。但是，在实际操作中，为有效执行竞业限制协议，用人单位必须在雇员离职后按月向雇员支付竞业限制补偿金。竞业限制补偿金的金额，根据目前的法律规定，可由用人单位和雇员双方协商确定，如双方未明确具体金额的，则雇员可主张按照劳动合同解除或终止前 12 个月平均工资的 30% 按照支付补偿金。

Non-competition agreement can effectively reduce the risk of the disclosure of confidential information belonging to the employer or improper use of the confidential information by the employee due to employer's working for competitive companies or engaging in start of business by the employee himself which is competitive with the employer's after the employee leaves the employer. However, according to the law, the employer is liable to pay the non-competition compensation on a monthly basis after the employee leaves the employer. With regard to the amount of compensation, under current law, it can be negotiated by both the employer and the employee. However, if no specific amount is agreed, the employee is entitled to request for 30% of the average monthly salary of the previous 12 months back from the termination of the labor contract.

很多用人单位将竞业限制补偿金视为额外的财务负担。因此，有一种观点和做法颇为流行，即在竞业限制协议中，用人单位会约定雇员所收到的每月工资中，已经包括了单位预付的竞业限制补偿金。因此，在雇员离职后，用人单位无需额外再行向雇员支付竞业限制补偿金。

Many employers regard the non-competition compensation as an extra financial burden for the employer. Therefore, for saving purpose, some employer will put a clause in the non-competition agreement that the salary received by the employee has included the non-competition compensation to be paid by the employer. So after the employee leaves the employer, the employer does not need to pay additional compensation to the employee.

那么，这种做法是否合法？如果不合法，用人单位又会承担何种后果呢？

So is such practice legal? Or if it is not legal, what the consequence will be?

II. 法院判例

Court Decree

2013 年，上海市松江区人民法院审结了一起竞业限制劳动争议案件。在该案件中，用人单位和雇员约定用人单位支付雇员的薪资中包含预期支付的竞业限制补偿金。雇员则主张，根据法律规定，竞业限制补偿金应在离职后按月补充，且具体竞业限制补偿金的金额约定不明，用人单位亦无法证明支付了多少竞业限制补偿金。

In 2013, the Songjiang Court in Shanghai made a judgment toward a labor dispute in relation to the non-competition. In this case, the employer and the employee agree that the salary paid by the employer to the employee has included the anticipated non-competition compensation for the employee. The employee claimed that the compensation shall be paid on a monthly basis after he left the employer and furthermore, no specific amount for compensation has been agreed and the employer also cannot prove how much compensation has been paid to the employee.

法院经过审理，认为雇员的工资单中未显示用人单位向雇员支付了竞业限制补偿金，且双方约定的补偿金金额不明、期限不明，故法院无法认定用人单位是否已经支付了该费用。据此，法院支持了雇员提出的用人单位另行支付竞业限制补偿金的主张。

After the hearing, the court determined that the employee's salary receipt does not indicate any item in relation to the non-competition compensation. Furthermore, no specific amount of such compensation and terms for paying the compensation was ever agreed. Therefore, the court is not able to recognize if the employer has actually paid the compensation. On that basis, the court supported the claim of the employee for payment of non-competition.

在该案中，用人单位试图以“所支付工资中已包含预付的竞业限制补偿金”条款来规避其额外的支付竞业限制补偿金的义务，但最终未能如愿。

In above case, the employer intended to avoid its liability of payment for non-competition compensation by entering into the clause of “the salary has included the pre-paid non-competition compensation” but was not successful.

III. 建议

Suggestion:

尽管上述法院判例对于用人单位的这种做法予以了否定，但是，仔细考察，我们认为预付竞业限制补偿金的做法事实上并非完全行不通。如果用人单位确需以预付的形式支付补偿金的，则我们建议需要注意一下几个方面：

Although the court has given negative judgment towards the employer's practice as described above, the approach of prepaying the non-compensation is not always impossible. However, if the employer intends to pre-pay the compensation, the followings shall be noted:

1. 竞业限制补偿金与雇员的工资应当分别列明，且约定具体金额，竞业限制补偿金的支付期限应当根据约定的竞业限制期（最长不超过 2 年）来确定；

1. The non-competition compensation and salary of the employee shall be listed separately in employee's receipt of remuneration. The specific amount of compensation and the time period for payment (maximum 2 years for the term of non-competition according to the law)

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shall be agreed in the non-competition agreement;

2. 用人单位每月发放的薪酬单中应当分列工资和竞业限制补偿金，且要求雇员签字确认收到相关款项；

2.The receipt of remuneration shall include salary and non-competition compensation separately with details. The employee shall be required to sign the receipt;

3. 预付的竞业限制补偿金达到约定的期限后，用人单位应当停止发放且在薪酬单中不再体现竞业限制补偿金项目。

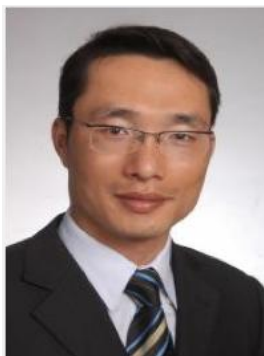
3.After the pre-paid non-competition compensation has been paid off in accordance with the agreed term for non-competition, the employer shall stop paying and remove the item of non-competition compensation from the receipt of remuneration.

在符合上述条件的情况下，我们认为预付竞业限制补偿金应当是合法、有效的。

By doing so, we believe the practice of pre-paying compensation shall be legal and effective.

如您对本文有任何问题，请联系：

If you have any questions about this article, please contact us via:



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