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Is it possible to transfer the employee's position unilaterally?

Introduction:

Working position is an essential element of a labor contract. In case of any change, it is subject to the agreement of both the employer and the employee.

Furthermore, the *PRC Labor Contract Law* published on January 1st 2008, grants the employer the rights to transfer the employee's working position in the following circumstances ("*Legal Causes*"):

- The employer can prove that the employee is not qualified for his/her position,
- The employee is unable to engage in his/her original work at the end of the medical treatment period, or
- The objective circumstances upon which the conclusion of the labor contract is based have undergone significant changes, such as move, merge, asset transfer, etc..

The employer might wonder whether it is possible to transfer the employee's position unilaterally even if the employee does not fall in one of the above *Legal Causes*. In today's cases, we will talk about such possibilities.

Cases Presentation:

	Case Facts	Opinion of the court
<p>Case A (Beijing)</p>	<p>J was employed by LQX as a sales director. He received a notification in January 2017 which removed him from his current position. He got a lower salary payment after this removal.</p> <p>Thus, J terminated his labor contract based on unilateral transfer of position and decrease of salary by LQX without legal grounds, and J thereupon filed a lawsuit to claim for compensation.</p>	<p>As LQX <u>failed to prove the reasonability of the position transfer (removal) and salary decrease</u>, the court finally supported J's claims.</p>
<p>Case B (Shanghai)</p>	<p>L was the complete workshop installer of NQ. It is provided in his labor contract that due to production and operation needs as well as L's physical situation, NQ is entitled to adjust L's position, duties and working place by notifying the reason.</p> <p>In November 2016, NQ decided to <u>transfer the redundant installers of complete</u></p>	<p>The provision in the labor contract was binding on L who should obey the position transfer decision made by NQ <u>due to its needs of production and operation</u>.</p> <p>Regarding the salary, <u>NQ did not make fundamental change to L's gross salary amount</u>; a temporary decline in</p>

Case C (Beijing)

workshop to transformer workshop. L was in the transfer list. But he refused this transfer and did not go to work. NQ finally dismissed him due to his absenteeism. Then L filed a lawsuit to claim for compensation for illegal termination. Besides, L claimed that his performance salary was reduced after position transfer.

performance salary on a new position was unavoidable; according to the performance salary of the other transferred employees on the same position, it could be expected that L's salary could reach his previous level. The court finally confirmed that the transfer decision of NQ was within a reasonable range, and thus rejected L's claims.

S was employed by XY as an HR Manager. In their labor contract amendment, it is provided that XY is entitled to change S's working place (in Beijing), working position (including but not limited to promotion, demotion, etc.) in terms of the operation needs of XY and S's working performance. During performance of labor contract, due to a business expansion, XY changed S's position (from HR Manager to deputy HR Manager) and working place (in Beijing) for the first time in May 2017, and increased her basic salary. This adjustment was refused by S. Then, XY changed again her position (from deputy HR Manager to Customer Service Manager) and working place (in Beijing), and changed the salary composition by decreasing the basic salary but increasing the allowance. The second adjustment was also refused by S. Then, S terminated her labor contract due to unilateral transfer of position and working place by XY and decrease of her salary level, and filed a lawsuit for compensation.

The employer had the right to adjust the employee's working position in terms of its operation needs within a reasonable range. This is the employer's labor autonomy right.

The first adjustment was confirmed reasonable for the reasons as follows:

- Such adjustment was made by XY on account of its needs for the business expansion,
- XY increased S's basic salary,
- The new position was what S can be qualified for,
- The adjustment of working place did not bring any inconvenience to S.

XY made a second adjustment to S without decreasing her gross salary. Thus, the second adjustment should be considered reasonable.

The court finally rejected S's all claims.

Case analysis:

1. Regarding the unilateral transfer of working position

From the above cases, we could learn that in addition to the *Legal Causes*, when the employer transfers the employee's position on account of its needs for production and operation, such as position vacancy (see Case B) and business development and expansion (see Case C), such motivations could be accepted by the court.

Moreover, in these cases, the court examines whether the position transfer is within a reasonable range, such as whether the employee could be qualified for the new position (see Case C), whether his/her salary has been reduced (see Case B and Case C), and whether other conditions have been changed, such as working place.

If the unilateral position transfer is lack of any reasonability, it could be considered as a breach of labor contract (see Case A) and the employee is entitled to refuse to work on the new position.

From the legal perspective, pursuant to Article 5 of the *Interpretation of Beijing Municipal High People's Court and Beijing Labor Dispute Arbitration Commission on the Application of Law to the Hearing of Labor Dispute Cases* published on April 24th 2017 (the "*Interpretation*"), under one of the following conditions, the unilateral transfer of position could be accepted:

- Special provision + reasonable adjustment (case of Case B and Case C)
If the employer and employee have agreed that the position of the employee may be adjusted in light of the situation of production and operation, and if, upon examination, the employer can prove that the situation of production and operation is changed and the post adjustment is reasonable.
- Unclear position + production and operation needs
If the employer and employee have not agreed on the employee's position or such agreement is not clear in the labor contract, and if the employer has justified reasons to adjust the employee's position as what is needed for production and operation, such cases shall fall under the scope of the employer's labor autonomy right.
To judge the reasonability, the factors such as (a) necessity of the employer's operation, (b) legitimacy of the purpose, (c) the employee's competency for the adjusted position, and (d) nonexistence of unfavorable changes in labor conditions like the salary and benefits, shall be taken into account.

However, the unilateral transfer of position could not be accepted in the following case:

- Clear position + no transfer provision (case of Case A)
In the event that the position is clearly agreed upon in the labor contract that the employer and the employee enter but the way to adjust the position is not agreed upon, if it fails to satisfy the circumstance provided for in Article 40 of the *PRC Labor Contract Law* (the *Legal Causes*), the unilateral adjustment of position by the employer shall be identified as a breach of contract.

In addition, the courts in Guangdong province assert in their published Minutes of Meeting on July 23rd 2012 that a position transfer within a reasonable range shall simultaneously meet the conditions as follows:

- The position transfer is due to the employer's needs for production and operation;
- The salary level after the position transfer is approximately the same with that before such a transfer;
- The position transfer is not designed to insult or punish the employees, and;
- The position transfer does not violate any other laws and regulations.

2. Regarding the decrease of salary following the position transfer

From the legal perspective, according to the *Interpretation* in Beijing, in the event that the employer adjusts the salary and the position at the same time, if the employee accepts the position adjustment but refuses the salary adjustment at the same time, the employer shall explain the reasons. Whether or not the employer infringes upon the legitimate rights and interests of employee shall be determined comprehensively on the basis of such factors as the actual situations of the employer, the nature of the employee's position after adjustment and agreement of both parties in the contract, etc.

In our legal opinion, as salary is another essential element of a labor contract, the salary adjustment is also subject to the agreement of both the employer and the employee. Although, from above provisions, it seems possible to adjust (decrease) the employee's salary following the position transfer, it is much more difficult (the employer is always required by the court to prove that it has a published internal salary system) than working position transfer. In most cases, the position transfer can be supported, but the salary decrease will be confirmed as a breach of labor contract.

Furthermore, above cases show that if the gross salary remains (almost) unchanged (see Case B and Case C), even if the composition of salary is changed, such adjustment could be considered reasonable

by the court. Whereas, if the salary is decreased without any grounds, such an adjustment will be absolutely considered unreasonable (see Case A).

It should be well noted that the above legal provisions are exclusively binding on the arbitration commissions and courts in Beijing or Guangdong province. For the employers located out of Beijing or Guangdong province, local provisions shall prevail.

Tips for DS clients:

- In case of change of working position, we recommend to proceed a negotiation firstly to explain the reason/necessity of this change, introduce the new position and objectives, etc., with a purpose to obtain the agreement of the employee regarding the change.
- We strongly recommend to include one clause in the labor contract with the employee, especially for the enterprises located in Beijing, that: "*The working position of the employee may be adjusted in light of situation of production and operation of the company.*"
- Position transfer should be within a reasonable range. It is not advisable to change the employee's position with the original intention to decrease his/her salary or get rid of him/her.
- When the position is transferred (including the *Legal Causes*), it is better to keep the gross salary and benefits unchanged. In case of salary decrease without the approval of the employee, it is compulsory for the employer to have a published internal salary system, in order to be able to demonstrate that the new level of salary is fully in line with the salary system of the employer.

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