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Article

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Practical Advice on Unilateral Change of Position and Salary by Employer in China



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I. The Problem

After the execution of employment contract, employer may sometimes need to change an employee's position and salary for various reasons. Such a change may be a "bilateral" one which means both the employer and the employee particularly agreed on the conditions of such an individual change, or it could be a "unilateral" one which means the employer made such a change without obtaining the agreement of the employee.

The Article 35 of the Employment Contract Law allows the employer and employee to modify the employment contract based on mutual agreement, therefore "bilateral" change of position and salary are rarely disputed between the employer and the employee. However, unilateral change of position and salary is among the issues that are most likely to raise an employment dispute. According to a study, among all the employment disputes, around 20-30% are caused by unilateral change of position and salary by employerⁱ.

In most cases, when an employer decides to make a unilateral change of position and salary, it will usually rely on the grounds including (1) employer's general power of employment management, (2) prior agreement by either the employment contract or the internal regulations or (3) a circumstance specially provided by laws or regulations.

Another study, based on a review of almost 200 employment disputes occurred between 2016 and 2020, has showed how the employer would choose the grounds for their unilateral change of position and salary (the total ratio is more than 100% because employer may sometimes rely on more than one ground to justify their unilateral

change of position and salary)ⁱⁱ.

	Laws and Regulations	Management Powers	Employment contract	Prior Agreement
Number of cases	22	143	127	35
Ratio	11.1%	72.2%	64.1%	17.7%

However, China's employment law does not set out clear rules on how to determine whether a unilateral change of position and salary is lawful as well as the proper procedures to make such a change. Such a situation has caused a fragmented application of laws in different places. The key problem here is to keep a proper balance between the employer's power to manage employment related matters and the protection of the employee's lawful rights and interests. Especially, employer shall not use change of position as a method to achieve unlawful termination of employment contract. This article will discuss a few aspects with respect to the unilateral change of position and salary from a practical perspective and to provide some practical advice.

Although we are discussing the problem of "change of position and salary", but it is worth bearing in mind that position and salary do not need to be changed at the same time. In the rest of this article, we will first focus on the problem of "change of position" and then turn to the problem of "change of salary".

Also, as an employee would not disagree with a promotion or a raise of salary, these kind of changes in favor of employee would not be covered in this article.

II. Unilateral Change of Position Based on Employer's Management Powers

In China, it is generally recognized that during the performance of an employment contract, employer and employees are not completely equal from a legal perspective. The employees shall follow the instructions of the employer, to abide by internal regulations and rules and provide services as required by the employer. And the employers can oversee, monitor and value the performance of the employees and even to impose some sanctions when the employee is in violation to internal regulations and rules. These powers are generally referred to as the employer's "management powers".

As pointed out above, management powers may be the ground that most frequently relied on by the employer when making unilateral change of employee's position. But management powers do not allow employer to unilaterally change employee's position in any manner without any limitation or restriction. In some provinces and cities, to avoid the abuse of management powers, courts or other governmental authority set out local rules on how to make a lawful change of employee's position based on employer's management powers. While the rules vary between different provinces and cities, by reading those rules we can see there are a few elements that are more frequently referred. The following form is a simple summary of the local rules regarding the unilateral change of employee's position in some provinces and cities.

	Objective Necessity	Salary	Other Conditions	Method	Capability	Others
Beijing	Proper purpose and genuine necessity	No adverse change	No adverse change	/	New position shall be suitable to the employee	Agreement on change of position shall be included in employment contract
Tianjin	Business and operational necessity	Generally same level	/	Not offensive and punitive	/	Employment contract may include agreement on unilateral change of position
Shanghai	The employer shall explain the reasonableness of the change of position to the employee at the time of such change.					Agreement on change of position shall be included in employment contract
Jiangsu Province	The employer shall bear burden to prove the reasonableness of the change of the employee's position and salary.					Employment contract or internal regulations may include agreement on unilateral change of position
Zhejiang Province	Business and operational necessity	No adverse change	No adverse change	/	/	
Guangdong Province	Business and operational necessity	Generally same level	/	Not offensive and punitive	/	No other violation to relevant laws
Chongqing	Business and operational necessity	No material adverse change	No material adverse change	Not offensive and punitive	/	Consider whether will cause material effect on employee's work and life

Based on the above local rules and our review of cases regarding unilateral change of position, we think it would be advisory for the employers to pay attention to the following issues.

(1) Genuine Necessity

First, the employer must prove it is truly necessary to unilaterally change the employee's position. Such a necessity usually arises from the change of the employer's business and operational conditions. In one case, the employee is a sales staff of a company's international cruise business department. But due to the Covid-19 pandemic, the international cruise business has been completely suspended and the employer decided to relocate such employee to the marketing department. In this case, the court held that the employer does have reasonable and genuine necessity to change the employee's position. In another case, an employee was no longer needed to serve at the previous position because the employer has introduced a new type of technology thus changed the manufacturing process. The employer relocated such employee to another position in the same department. In this case, the court also held that the employer has genuine necessity to change the employee's position.

(2) Fairness

Change of employee's position shall also be fair to be valid. However, there is no clear rule on how to judge if a change of position is fair or not. It can only be determined by considering all surrounding facts on a case-by-case basis. However, it is worth pointing out that in practice, when judging the fairness problem, court will usually consider (1) whether such change will cause any material adverse change to the employee's employment conditions (most importantly, the salary), (2) whether such change will incur extra unreasonable burden upon the employee (such like increase of commuting time and costs, time and effort that would cost for the employee to get familiar with the new position) and (3) whether the change of position was done in an offensive or punitive manner (for example, change the position of department manager to a cleaning staff or security staff maybe deemed as offensive and punitive).

In one case, the employer relocated the employee to another department of the company which was located in a different address but in the same city. The court held that although the work of place has been changed but the new workplace is not very far from the previous one and the

employer has promised to arrange proper transportation method for such employee, thus such a change of position did not cause any unfair extra burden to the employee. In another case, the employer relocated one sales staff to its subsidiary in another city. The court held that because the salary of such sales staff is greatly dependent on his sales performance, moving to another city means the sales staff must rebuild his business network in that city out of nothing and there may also incur extra costs for the employee to commute to the new city, thus such a change of position has caused unfair extra burden to the employee.

However, overall, change of salary is the most important fact when the court decides whether the change of position is fair enough. We will discuss this point in detail in the later part of this article.

(3) Prior Agreement

Although not a safe harbor, but if the employer and employee reached a general agreement on possible unilateral change of position by the employer in the employment contract or internal regulations, it will be more likely that the court will hold a subsequent change of position as a fair one. Because by doing so, the employee was given an expectation for possible change of position in the future. We will discuss this point in depth in the following paragraphs.

III. Unilateral Change of Position Based on Prior Agreement

Prior agreement means the employee has agreed that the employer can change the employee's position any time during the employment based on the employer's judgement. A prior agreement can be reached by individual employment contract between the employer and the employee or by internal regulations as a policy generally applied to all employees.

As mentioned above, although prior agreement is not a safe harbor, but by reviewing relevant cases we can see a clear trend that when there is a prior agreement the court is much more likely to hold the unilateral change of position valid. But it is important to bear in mind that the court has the power, and did so in many cases, to deny the validity of prior agreement if the court found such agreement is unfair. Especially, employer shall pay attention to the following two problems.

(1) The Broadness of Contractual Provision

As mentioned above, in most cases we have reviewed, if

the employer and the employee reached an agreement on the future change of position in the employment contract, very likely the courts will rule in favor of the employer. Therefore, in practice, many employers would include a provision in the employment contract allowing the employer to change the employee's position and relocate the employee to any position the employer deems necessary, and the employee shall obey.

However, we also see in a few cases that the court denied the validity of such a provision in the employment contract because such a provision is too broad. Allowing such a broad provision means the employer would have an unlimited power to change employee's position which would damage the employee's rights and interests. In such cases, the court would still look at the reasonableness and fairness of employer's change of position to make a judgement on case-by-case basis.

(2) The Procedural Requirements of Internal Regulations

When the employer changed the employee's position based on its internal regulations, the employer shall pay attention to the procedural requirements which is necessary to invalid its internal regulations.

According to the People's Supreme Court's judicial interpretation, employer's internal regulations can be relied on in determining the rights and obligations of the employer and employee so long as such internal regulations have been formed through democratic procedures and do not in violation of laws and regulations. The law and the judicial interpretation do not clearly define what does the word "democratic procedures" mean. However, in practice, "democratic procedures" require the employer at least publish the internal regulations and ensure employees had the opportunity to review, study and discuss the draft. And the employer shall hear and look at employee's comments and suggestions and revise the internal regulations if deems necessary.

IV. Unilateral Change of Position Based on Statutory Cause

The laws also allow the employer to unilaterally change the employee's position under a few certain circumstances. In the cases that we have reviewed, we noticed that among all cases involving unilateral change of employee's position based on statutory causes, there two causes that

are most frequently relied upon by employers, namely (1) incompetence and (2) physical conditions.

(1) Incompetence

Article 40 of the Employment Contract Law says if the employee is not competent to his or her current position, and even after training or change of position, the employee is still incompetence to his or her position, the employer can terminate the employment contract. Therefore, the employer is allowed to change the employee's position if the employer deems such employee as incompetent.

However, by reviewing relevant cases, it is clear that the employer's power to change employee's position based on incompetence shall also meet certain requirements, the courts would not allow employers to change employee's position in a too arbitrary manner. Firstly, the employer shall establish a set of objective standards (for example, a target sales volume for sales staffs or a target production volume for manufacturing staffs) to judge if the employee is competent and ensure employee was aware of such standards in advance. Of course, such a standard shall not be unreasonably demanding. In one case, the employer changed a sales staff's position because that employee failed to reach the target sales volume for a consecutive two quarters. The court held that although the employee did fail to reach the target, but since the market condition has greatly changed due to the Covid-19 pandemic, it is unfair to judge the employee's competence based on previous standards. Secondly, the employer shall adopt fair and objective procedures to judge if the employee has met the standards. In one case, the employer has adopted a "grading system" to value if employee has met the standards. During the lawsuit, the employer failed to explain who in the company has the right to grade on employee and how the grading system operates. Thus, the court denied the validity of such valuation system.

Therefore, when employer changing employee's position based on incompetence, employer shall particularly pay attention to the positions which are not suitable for setting objective standards. A quantified standard, such like sales volume, production volume and rate of defecting products, is more likely to be deemed as objective standard while mere "diligence" or "performance" are likely to be deemed as too difficult to be measured in an objective manner. The employer shall also ensure that the employee knows, in advance, the standards and the consequences if failed to meet such standards.

(2) Physical Conditions

There are several articles in the Employment Contract Law and Employment Law allowing the employer to unilaterally change the employee's position on employee's physical conditions.

For example, Article 40 of the Employment Contract Law says if an employee got sick or injured and could neither handle the previous work after the expiry of medical period nor handle the work otherwise arranged by the employer, the employer can terminate the employment contract. Which means employer may unilaterally change the employee's position if such employee could not handle the work due to physical conditions after the expiry of the medical period.

Usually, the court will uphold employer's change of employee's position if the court believes that there is a physical condition that would cause the employee being unsuitable for the previous position and such a change of position would protect the employee's interest. Thus, in the cases involving changing employee's position based on physical conditions, the courts will pay attention to whether there are reasonable grounds to believe that the employee is not able to handle the previous position. Also, the court will look if the new position is more suitable for the employee considering the employee's physical condition. Salary and other employment conditions are also elements to be considered by the courts. The employee shall ensure that salary and other conditions will not be greatly changed.

V. Change of Salary

As mentioned above, position and salary do not need to be changed at the same time. But in most cases, when an employee's position was changed, salary and other conditions need to be changed accordingly, because employer has the responsibility to maintain employment equality in workplace, employees at same level or same position shall generally be treated equally.

However, employer shall be noted that agreement to change of position does not mean the employee also agreed to change of salary and other conditions. In one case, the employer and the employee have reached on a change of position but did not mention the change of salary. The employer later changed the employee's salary based on ground that since employee has agreed to the change of position, the employee shall be deemed as has also agreed

to the change of salary. Court in that case held that both position and salary are important terms and conditions of an employment contract. Agreement on change of position and salary shall be reached individually by the parties. Although the employee has agreed to the change of position, the employer has never informed the employee with the new salary and never consulted with employee. Thus, the court held the change of salary unlawfulⁱⁱⁱ.

Furthermore, as mentioned above, when employee's position and salary are both changed, to what extent the salary is changed is a very important factor for the court to determine if such a change is fair and reasonable. In one case, the court held that although the employer has the power to change employee's position but shall not greatly reduce the employee's salary^{iv}. In another case, the court also held the employer's unilateral change of employee's position invalid because the employee's salary has been greatly reduced^v.

But since there is no clear quantified standard as to what extent the employer is allowed to change (reduce) employee's salary when change employee's position. Employer is advised to be cautious when reduce employee's salary together with the change of position. It is necessary and advisable for the employer to refer to previous cases regarding change of salary that have occurred in the same area.

Also, when the employer includes in its internal regulations that the employer has the power to change employee's salary according to the change of position, the employer shall ensure that such internal regulations would not be deemed as invalid due to procedural flaws.

VI. Summary

As mentioned above, although employer may change employee's position and salary based on its management power, prior agreement in the employment contract or internal regulations or statutory causes, because there is no national level law or regulation addressing this problem and rules in different provinces or cities may vary from each other on some aspects, in order to ensure the legal compliance of a change of employee's position and salary, employers are advised to pay attention to the following points.

(1) Reasonableness as A Key Factor

As we can see from the cases, reasonableness is the most

important factor that the court will look at when determining a change of employee's position and salary is lawful or not. Employer shall ensure that there are reasonable reasons to make such a change, the previous and new position are not totally irrelevant and the salary and other employment conditions are changed within a reasonable scale as not to cause any material adverse impact upon the employee. Employer shall also be noted that there is no single decisive factor, but the court and other authority would review the change of position and salary as a whole to determine if such a change is reasonable or not.

(2) Set Out Clear Rules

Since the courts will review the change of position and salary on a case-by-case basis, this is very difficult to set out clear and unified standards with respect to the problem of reasonableness, but it is going to be a plus if the employer has made a clear set of rules in advance which would establish expectation by employees on when and how a change of position may be carried out.

Employer shall make it clear that under what circumstance would the employer change employee's position, such like close of a certain branch office or a department, suspension of a business, change of the company's strategy. Especially, when employer intends to change employee's position and salary based on incompetence, employer shall make it clear on what standards and method that the employer would value the performance and competence of the employee and try to set the standards as objective as possible.

Also, employer shall make employee informed of how a change of position would be carried out, whether employee's salary or other employment conditions would be changed accordingly and what is the employee's rights if the employee objects to such a change.

At last, employer shall make sure that such rules have been through "democratic procedures" which means employer shall at least make sure such rules are accessible to all employees and employees had opportunities to express their comments and concerns on such rules.

(3) Fair Procedures

Employer shall also make sure that a change of position and salary would be carried out in fair procedures. If employer's internal rules have set out the procedures for change of employee's position and salary, then such procedures shall be strictly followed. If there are no prescribed rules on procedures, the employer shall make sure communications with employees are all carried out in writing. Notice to employee shall clearly state the reasons for change, the new position and the employment conditions after the change (such like location and salary). In the case of change position based on employee's incompetence, the employer shall inform the employee as on what grounds that the employer has made such a conclusion. Also, when the employee objects to such a change, the employer shall ensure that such employee had the opportunity to hear the further explanation by the employer and express his or her objection.

ⁱ Shuhong Yu, *On Employment Contract Law*, Wuhan University Publishing House, 2009, p.104

ⁱⁱ Wenwen Lu, *An Empirical Study on the Lawfulness of Employer's Unilateral Change of Position*, Jiangsu University Master's Degree Graduation Papers, April 2021, p.18

ⁱⁱⁱ 2018 Jing 02 Min Zhong 2651

^{iv} 2016 Jing 02 Min Zhong 2500

^v 2018 Su 01 Min Zhong 1046

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