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Can Employer Terminate the Labor Contract with Employee Who Violates the Salary Confidentiality Policy?

By Patrick Gu | Xun Yang | Baoyan Shen

Recently, a labor dispute occurring in Nanjing caused widespread concerns in the society. According to the news, Ji, an employee of Dianping.com, was dismissed by the company on the ground that she allegedly disclosed her own payroll on an anonymous social networking APP in violation of the company's salary confidentiality policy. The employee filed a lawsuit with the Court against the company and after the trials of first and second instances by the Nanjing Qinhuai District People's Court and the Nanjing Intermediate People's Court, it was ruled in the final judgment that the company should pay CNY160,000 in damages to the employee for the wrongful termination. The courts held that: 1. the evidence submitted by the company could not support that it was the employee Ji who disclosed the salary; 2. the company's Employee Manual was formulated without going through democratic procedures; 3. through the screenshot of payroll payment, a third party could identify neither the name of the company or that of the employee, nor the total salary involved, it was unlikely for any other person to get aware of the company's salary structure. Consequently, it was ruled that the dismissal was illegal, and the judgment was made that the company should pay the corresponding damages.

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At present, many companies have established a salary confidentiality policy to prohibit employees from disclosing the amount and composition of their wages to any other employee or third party as well as respective salary systems of the companies. However, in practice, as many employees wish to know the salary status of their peers, and in the Internet era, it is simple and convenient to display one's daily life online, as such, labor disputes can easily arise because employees “disclose their own salaries” or “inquiry about other's salaries”.

Then, whether the salary confidentiality policy implemented by an employer has legal binding on employees? Whether it is legitimate for an employer to terminate the labor contract with an employee on the ground that he/she violates the salary confidentiality policy, or what risks it may face by doing so? Based on relevant legal provisions and judicial trial practices, we would like to make specific analyses as follows.

I. Legal Basis for Salary Confidentiality

Currently, there is no express provision on salary confidentiality policy in laws of China. It is stipulated in Article 23 of the Labor Contract Law of the PRC that, “an employer may reach an agreement with its employees in the labor contract on keeping its trade secrets and intellectual property-related matters confidential.” Therefore, employers generally regard their internal salaries as a trade secret under the Anti-Unfair Competition Law of the PRC and further restrict their employees through stipulations in labor contracts or internal rules and regulations, requiring them to keep their own salaries confidential. For employees who violate the salary confidentiality obligation, employers may generally terminate the labor contracts unilaterally in accordance with Article 39 (2) of the Labor Contract Law of the PRC, “(circumstances) seriously violating the rules and regulations of the employer”.

II. Judicial Practice and Operational Recommendations Regarding Salary Confidentiality Policy

In practice, we find that labor dispute arbitration commissions or courts in various places have different views on whether a labor contract can be directly terminated on the ground of “salary-disclosure” which is alleged in serious violation of discipline. Not all salary confidentiality policies are legitimate and have legal binding under all circumstance. In many cases, courts eventually ruled that it was illegal for employers to terminate the labor contracts with their employees allegedly in violation of salary confidentiality policy, in which there were many objective elements of adjudication that might have been ignored. Therefore, in order to avoid the salary confidentiality policy being identified as “illegal” or “having insufficient binding force” where a dispute arises, companies shall pay attention to the following three aspects:

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1. The salary confidentiality policy is only applicable to specific employees.

Generally speaking, in a company, the responsibilities of employees are often different, so not every employee shall be bound by the salary confidentiality policy without distinction. There must be a legal basis upon which employers may restrict their employees' disclosure of salaries on the strength of salary confidentiality policy.

In accordance with Paragraph 3 of Article 9 of the Anti-Unfair Competition Law of the PRC, “trade secret refers to any technology information or business operation information which is unknown to the public, has commercial value and is subject to corresponding confidentiality measures taken by the obligee.” That is to say, to qualify as a trade secret, three conditions shall be met: (1) confidentiality (2) value (3) confidentiality measures. According to common sense, it is difficult for enterprises to determine the significant commercial value of basic post salaries, as such, employers require their employees in basic posts for keeping salary confidential may be deemed to have no legal basis.

For example, in a judgment rendered by the Foshan Intermediate People's Court of Guangdong Province for a case of salary confidentiality, as the employee concerned held a post as a security guard, the Court finally ruled that, “salary confidentiality policy generally applies to posts where it is difficult to measure the work effectiveness through specifically quantitative assessments, or circumstances such as special treatment or introduction of special talents... For security guards, it is more important to ensure their equal pay for equal work than to restrict them from knowing each other's salary. It is excessively harsh to require a security guard for keeping salary confidential to a certain extent.”

In view of this judgment, we can see that, employers shall clarify the targets to which the salary confidentiality policy they develop applies, and when implementing the policy, those employees in basic posts whose wages are of little difference and who shall enjoy the right to equal pay for equal work in accordance with the law shall be excluded, so as to ultimately avoid any legal risk arising from illegally severing labor relationship due to improper application of the policy.

2. The procedures for developing salary confidentiality policy shall comply with laws and regulations and specific agreements with employees.

In practice, when identifying the legality of salary confidentiality policy, a court will first ascertain “whether the formulating procedures comply with the law” in the adjudication process.

It is stipulated in Article 4 of the Labor Contract Law of the PRC, “when developing or modifying rules and regulations, or making decisions on major matters, which have a direct bearing on the

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immediate interests of employees, such as..... labor discipline....., the employer shall, after discussion by the employees' congress or all the employees, put forward plans and suggestions and make decisions after consulting with the trade union or the representatives of the employees on an equal footing, or, where the trade union or any employee holds that such rules, regulations or decisions are inappropriate, it shall be entitled to put forward the opinion to the employer so that relevant modification and improvement may be made through consultation. The employer shall make public or inform employees of the rules and regulations, and the decisions on major matters which have a direct bearing on their immediate interests.” Consequently, employers must follow the above democratic procedures when developing the salary confidentiality policy.

For example, we notice that, a judgment made by the Shanghai No. 2 Intermediate People's Court states that: “the salary confidentiality policy implemented by employers is advantageous for protecting employees' privacy, preventing employees from keeping up with Joneses, reducing employee conflicts and turnover and facilitating corporate management, which shall be respected by the law and binding on the contracting parties to some reasonable extent”, which can be deemed as a confirmation of the legitimacy of salary confidentiality policy developed by an enterprise.

The Court further held that, “enterprises enjoy autonomy in employment, and salary confidentiality policy formulated by them through democratic procedures shall indicate the employee's approval and be legitimate”; similarly, in the judgment of the Foshan Intermediate People's Court of Guangdong Province, the Court regarded “development procedures in line with the law” as an important fact as well.

As a result, when formulating salary confidentiality policy, an employer must perform relevant democratic procedures, and shall confirm that its employees have acknowledged and consented to abide by such policy, which otherwise may be deemed invalid due to procedure defect.

3. The liability for breach of salary confidentiality policy shall be adaptable to the limits of corporate governance needs.

In view of the definition of salary confidentiality policy determined by courts in judicial practices, salary confidentiality policy is a rule or regulation, for the purpose of improving and optimizing corporate governance, formulated by employers in light of industry characteristics, business models and operation situations, etc., while in line with the actual production and operations, with an aim to restrict employees from knowing each other's salary and prevent them from keeping up with Joneses or their malign competition.

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If an employee violates the company's salary confidentiality policy, the liability for such violation shall be in conformity to the actual damage caused to the employer concerned. Where a dispute arises, an important criterion for the court to adjudicate on the legality of severing labor relationship is the actual impact of such employee's violation on the employer.

The Beijing No. 2 Intermediate People's Court pointed out in a judgment that: "the punishments imposed by an employer shall be proportionate to the damage caused by its employees concerned to it. That is to say, the employee's fault shall be equivalent to punishments imposed by the employer in the degree." The Foshan Intermediate People's Court of Guangdong Province also pointed out in a judgment that, "with respect to employees' acts of negligence, especially those under significantly slight circumstances, employer shall take reasonable management measures to strengthen guidance and regulation thereof, and even impose punishments on such employees rather than directly dismiss them."

The above cases show that, when adjudicating on such disputes, the courts tend to believe that the liability for violation thereof shall not exceed the limits of corporate governance needs. Therefore, in the process of developing salary confidentiality policy, employers shall attach importance to the moderation of punishments and conduct prudent assessments with respect to the degree of fault of employees concerned where applicable.

In conclusion, when an employer asserts its right to legally terminate the labor relationship on the grounds of its salary confidentiality policy, first of all, there must be a clear salary confidentiality policy formulated through democratic procedures; secondly, the objects and posts subject to salary confidentiality restriction shall be reasonable; finally, the handling measures and consequences for violation of salary confidentiality policy shall be appropriate. In practice, prior to specific rescission of labor contracts for violation of disciplines, employers are better to attach importance to the collection and preservation of evidence of actual damage caused due to the default of employees concerned (including employees' acts in violation of salary confidentiality policy, and the actual damage caused to the employer due to such acts). If an employer fails to provide any or sufficient evidence, it may face such risk of the illegal rescission of labor contracts.

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