

COMPENSATION PAID TO THE EMPLOYEE TO ENFORCE NON-COMPETITION OBLIGATIONS IN CHINA

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Under *PRC Labor Contract Law*, a labor contract will usually contain non-competition provisions. Where it does not, an employer and employee may enter into a separate non-competition or confidentiality agreement. Typically, non-compete obligations prohibit an employee from competing with the employer for up to two (2) years following expiry or termination of the labor contract. Employees holding positions in Senior Management or Senior Technician roles are generally required to comply with such non-compete obligations, while all employees should, under their labor contracts, be bound by confidentiality obligations.

Case law precedent provides authority for non-competition obligations applying during the term of employment, where parties agree.

In principle, an employer is required to pay economic compensation to the employee for observing the non-compete obligations (Compensation), with the amount of the Compensation to be agreed by the parties.

ENFORCING PAYMENT OF COMPENSATION

Where the labor contract does not specify the Compensation amount, or the parties are unable to agree, the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (IV)*, allows an employee to apply to the Court to seek a ruling on payment. The court in this case will support the payment of Compensation on a monthly basis (usually) at the rate of 30% of the average monthly salary for the 12 months before the labor contract is expired or terminated, or the applicable local minimum monthly salary, whichever is higher. In the event that the parties stipulate the amount of non-competition Compensation but the employer fails to pay the Compensation for whatever reason for three (3) months after the labor contract is expired or terminated, then a Court can, at the employee's request, order the termination of the non-competition provisions.

Accordingly, an employer is required to pay Compensation to the employee if it wishes to enforce the non-competition restrictions or it will be exposed to the risk of provisions being non enforceable.

Parties to a labor contract may agree on an amount of Compensation lower than 30% of the average monthly salary or the applicable local minimum monthly salary, but in practice the Compensation amount should not be too low to impair the legal interests of the employee.

While 30% is a useful guide, Compensation levels do vary depending on the location of the work and may be subject to local court judgments or arbitration awards. For instance, in Beijing, if the labor contract fails to specify the amount of Compensation, the employer will be ordered to pay an employee an amount between 20-60% of the remuneration of the employee in the preceding year before the termination or expiration of the labor contract.

IMPLICATIONS FOR BUSINESS

We recommend businesses review their existing non-competition clauses or agreements to ensure the relevant document expressly specifies a 'reasonable' amount of Compensation. This will ensure the Company can enforce compliance by the (former) employee and/or avoid having a Court determine the level of compensation.

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