

Analysis on the Related Practical Problems of Economic Compensation System of Competition Restriction

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Abstract

With the rapid development of economy, the competition among enterprises is increasingly intensified, and the flow of talents is difficult to avoid. In order to avoid the disclosure of trade secrets, more and more employers choose to sign non competition agreements with workers. Among them, economic compensation is an important part, but there are many problems in the current system of our country, such as: whether economic compensation is a necessary condition for the agreement to take effect; Whether the overdue compensation of the employer affects the effectiveness of the agreement; Whether the compensation standard can make up for the losses suffered by the workers. Based on this, this paper puts forward the following suggestions. First, it is recognized that the agreement without economic compensation is effective; Secondly, workers are allowed to exercise the right of rescission in an implied way; Finally, enrich the standard of economic compensation according to the actual situation.

Keywords

Non Competition; Economic Compensation; Business Secret.

1. Introduction

The Labor Contract Law issued in 2008 is the first time that China has explicitly recognized the economic compensation system for competition restriction in legal provisions, which is a major breakthrough. However, the provisions of Articles 23, 24 and 90 are too simple, resulting in different provinces and cities in understanding this provision and formulating relevant supporting provisions, which is not conducive to reasonable protection of the interests of workers. In 2013, Several Interpretations of the Supreme People's Court on the Application of Law in the Trial of Labor Dispute Cases (IV) (hereinafter referred to as "Judicial Interpretation (IV)") provided more detailed provisions on the economic compensation system for restrictions on business strife, but the provisions therein obviously cannot comprehensively supplement and summarize the complex social life, and there are still many deficiencies. This leads to the courts' different understanding and application of complicated cases and unclear legal provisions, making different decisions, and even the situation of "different judgments in the same case". Therefore, from the perspective of the relevant provisions of the Labor Contract Law and the Judicial Interpretation (IV), the system will be combed and analyzed on the basis of combining relevant judicial practices.

2. Practice of Economic Compensation for Competition Restriction

2.1. Types of Disputes over Economic Compensation for Non competition

In judicial practice, there are many labor dispute cases concerning non competition, and there are no few disputes involving compensation in these dispute cases. Therefore, the subjects of investigation are selected and determined mainly through the "Civil Cases" column of China's judicial documents website, and 1180 judgments were obtained in 2017-2021 based on the search condition of "non competition disputes+judgments". After removing the judgments that

do not meet the research purpose, 31 judgments of the first instance and 57 judgments of the second instance were finally selected, totaling 88 effective judgments. This article will analyze and study 88 cases, and try to sort out and summarize the types of economic compensation dispute cases and judicial trial practice under the non competition dispute.

Among the 88 cases selected by sampling, 64 supported the workers to bear the liability for breach of contract, and 24 did not. Through analysis, it is found that the types of economic compensation disputes under 88 non competition disputes are mainly as follows. First, whether the non competition clause of economic compensation is effective was not agreed. There were 47 cases of this kind, 37 of which considered the agreement effective and 10 of which considered it invalid. The second is whether the non competition agreement that fails to pay economic compensation as agreed and exceeds three months is valid. There are 34 cases of this kind, including 21 cases that believe the agreement is valid and 13 cases that believe the agreement is invalid. The third is whether the agreed compensation standard is too low and the non competition agreement that has not been paid for three months is valid. There are 7 cases of this kind, including 6 cases that believe the agreement is valid and 1 case that the agreement is invalid. Such cases mainly involve whether the agreed economic compensation is lower than the statutory standard of 30% of the average salary of the twelve months before leaving the company; The principle of handling when the employer claims that the liquidated damages are too high.

2.2. Trial Practice of Disputes over Economic Compensation for Competition Restriction

2.2.1. Effectiveness of Non competition Agreement without Economic Compensation

In today's society, enterprises pay more attention to the protection of their own trade secrets, and the non competition agreement has almost become one of the necessary materials for enterprises to recruit employees. However, some enterprises only agree on the liability for breach of contract and tort when signing the non competition agreement with workers, and do not mention or explicitly agree on the economic compensation that workers should enjoy. Then, what is the effectiveness of the non competition agreement in this case?

Judging from the trial practice in various places, the main reasons are: First, the labor contract and competition restriction clauses signed between the employee and the employer, although there is no compensation or the agreement on compensation is not clear, both parties expressed their true intentions when signing the contract, did not violate relevant laws, and did not belong to the provisions of the Contract Law and the Labor Contract Law on the invalidity or cancellation of the contract, It is binding on both parties and the agreement is valid; Second, according to Article 6 of the Judicial Interpretation (IV), this provision does not explicitly stipulate that the agreement is invalid in the absence of non competition compensation, but stipulates that workers have the right to require the employer to pay economic compensation according to law after performing the non competition obligation. It can be seen that in the absence of an agreement on economic compensation for workers, it does not mean that the non competition clause is invalid, so workers are still bound by the non competition agreement in this situation; Third, it is believed that the provisions of the Labor Contract Law involving the non competition agreement are intended to protect the legitimate rights and interests of both employers and workers. However, if the agreement on economic compensation is taken as an important element for the effectiveness of the non competition agreement, workers will not be bound by the provisions, obviously over protecting the legitimate rights and interests of workers, which will seriously violate the legitimate rights and interests of employers, and is contrary to the legislative purpose and spirit of the Labor Contract Law, It is not conducive to establishing a normal and orderly market operation environment. However, if the agreement without economic compensation is confirmed to be valid and the employee's right to claim for

compensation for non competition is guaranteed, the rights and interests of both the employee and the employer will be effectively balanced. Fourth, the two parties believed that they had expressed their true intentions at the time of signing, did not violate the relevant laws and regulations, and the terms were valid. According to Article 24 of the Regulations of Shenzhen Special Economic Zone on the Protection of Enterprise Technical Secrets, which was formulated by the local government, it was believed that the regulations stipulated the situation where the amount of economic compensation was not agreed, that is, the legal provisions filled in the situation where the two parties did not agree, and it was believed that it would not necessarily lead to the invalidity of the non competition agreement, The terms are still binding on workers. Of course, there are also a few courts that believe that the non competition agreement without economic compensation is invalid. The main reasons include: First, the non competition agreement without economic compensation is obviously unfair and should be considered invalid. This view is basically based on the principle of fairness. For workers, the restrictions on competition will inevitably limit their right to choose jobs, so that workers will lose most of the job opportunities in the fields they are familiar with, leading to the reduction of economic income of workers, and even loss of living security, which is obviously extremely unfair to workers; Secondly, starting from Article 26 of the Labor Contract Law of the People's Republic of China, it is believed that economic compensation is, in a sense, a kind of basic living guarantee for workers. The employer restricts workers' freedom of employment through a non competition agreement with "blank" economic compensation clauses, which obviously circumvents its own legal liability, increases workers' liability, and excludes workers' rights, In this regard, the non competition agreement should be deemed invalid. Even more, it can be considered that the worker in this case has not actually reached an agreement with the employer on economic compensation for non competition, and the non competition agreement has not been established. Third, starting from the second paragraph of Article 23 of the Labor Contract Law of the People's Republic of China, it is believed that one of the preconditions for the employee to pay liquidated damages to the employer in violation of the non competition agreement is that the employer will give the worker economic compensation on a monthly basis within the non competition period after the cancellation or termination of the labor contract. It is unfair to the worker to require the worker to comply with the non competition clause and claim the liquidated damages arising from the violation of the non competition clause for the reason that the economic compensation is not agreed to be paid after the cancellation or termination of the labor contract, let alone the actual payment of the economic compensation. Therefore, the non competition agreement agreed by both parties is not binding on the worker. In addition, there are also a few courts that believe that the non competition agreement without economic compensation is in a state of pending effectiveness, which is not binding on workers unilaterally. Workers have the right to choose to continue to perform the non competition obligations, and require the employer to pay compensation after performance, or they can choose not to perform the non competition obligations. As for the right of workers to choose not to perform the agreement, it can be understood that the necessary terms of the contract are missing, the competition restriction has not been fully agreed, and has not been "concluded in accordance with the law", which is not binding according to the law.

2.2.2. Effectiveness of Non competition Agreement with Overdue Economic Compensation

In judicial practice, although some employers and workers have agreed on economic compensation related to competition restrictions, when it comes to specific payment of compensation, employers often fail to pay as agreed, which may be delayed for one month, two months, or even more than three months, so that workers cannot receive economic compensation on time or at all. Of course, in this case, Article 7 of the Judicial Interpretation (IV) stipulates that if the employee fails to receive economic compensation for three months due to

the employer's reasons, he or she can apply to the people's court to cancel the non competition agreement, so as to get rid of the restrictions on non competition. However, some workers are not clear about the right of rescission granted by this provision, and they often choose to directly implement competitive behavior when the employer fails to pay compensation for more than three months, rather than apply to the people's court to exercise the right of rescission. What is the effectiveness of the non competition agreement when the employer fails to pay the economic compensation for more than three months?

Different opinions have also been formed in the trial practice for this case. The mainstream view holds that the non competition agreement is effective in this case. The reasons include: First, starting from Article 8 of the Judicial Interpretation (IV), it is believed that if the employer fails to pay the compensation for more than three months, the worker has the corresponding right to terminate, but this right is a right of claim rather than a right of formation, The termination effect does not necessarily or naturally occur due to the unpaid behavior, and the right must be exercised by the obligee to have the corresponding legal effect. Therefore, the agreement is still valid before the termination of the agreement, and the worker still bears the responsibility. The agreement is valid. Second, it is considered that the restriction on business strife is an obligation of omission, and the legal provisions on the right of defense cannot be applied, because once a worker uses the trade secret of the employer to engage in competitive activities, it not only violates the principle of good faith, but also may cause the employer's trade secret to be completely open, resulting in irreparable losses, which makes it difficult to achieve the purpose of the restriction agreement on business strife.

Of course, there are also some courts that believe that the non competition agreement is invalid in this case. The reasons include: first, the employer violates the agreement and fails to pay compensation for more than three months. The employee's non competition behavior is that he proposes to cancel the non competition agreement with a realistic behavior. The employee does not need to bear the responsibility for breach of contract, and the agreement is invalid; Second, non competition refers to the act of restricting workers from engaging in the same industry, service or operating the same product or service after leaving the company. The non competition agreement takes the economic compensation paid by the employer to the workers as the effective element. According to Article 8 of the Judicial Interpretation (IV), it is considered that the act of failing to comply with the agreed content and failing to pay for more than three months indicates that the Non competition Agreement between the labor and the management has been lifted, the worker is not bound by the non competition agreement, and the agreement is invalid. Third, the employer has not paid the compensation for more than three months. Although the employee has not yet asked to cancel the agreement, the employer has not fulfilled the obligation to pay the non competition compensation, but requires the employee to abide by the non competition agreement, which is unfair to the employee. Therefore, the non competition agreement agreed by both parties is invalid, and the employee does not have to bear responsibility. The fourth is based on the normative legal documents of the province. For example, according to the provisions of Paragraph 2, Article 28 of the Jiangsu Provincial Labor Contract Regulations, the Jiangsu Provincial Court believes that when the employer fails to provide economic compensation to the employee as agreed, the employee has the right to choose whether to continue to perform his obligations or not. Its view is roughly similar to the third view. The non competition agreement is a bilateral contract between the employer and the employee, and the employer shall pay economic compensation as the consideration for the employee to perform the non competition obligation during the performance of the agreement. Workers are required to continue to perform their obligations without receiving economic compensation. Their rights and obligations are obviously unequal, which does not conform to the principles of fairness and equal value compensation in the civil law.

2.2.3. The effectiveness of the Non competition Agreement that the Agreed Compensation Standard is too Low and Overdue

In trial practice, occasionally, some enterprises not only want to protect their business secrets from disclosure, but also do not want to pay reasonable economic compensation, so they agreed on extremely low economic compensation when signing non competition agreements with workers, and did not pay economic compensation more than three months after the worker left office. After knowing that the worker violated the non competition agreement, they sued the court for liquidated damages or damages. Then, what is the effectiveness of the non competition agreement in this case?

Judging from the trial practice in various places, the main reason is that: first, the competition restriction system is an important legal system that limits the employment, employment and scope of creation of workers to protect the competitive interests of enterprises in the market and prevent the trade secrets of enterprises from flowing to competitors due to their workers; Second, the non competition agreement is an expression of the true intentions of both parties, which does not violate national laws and regulations and should be valid; Third, the agreed amount of compensation is too low, which can only mean that the clause is invalid, but not that the entire non competition agreement is invalid. Moreover, the worker can request the employer to pay economic compensation according to 30% of the average monthly wage of the twelve months before the termination or dissolution of the labor contract according to Article 6 and Article 7 of the Judicial Interpretation (IV), and 30% of the average monthly wage is lower than the minimum wage standard in the place where the labor contract is performed, You can request to pay according to the minimum wage standard of the place where the labor contract is performed, or you can get rid of the restriction of the non competition agreement according to the right of rescission given in Article 8 of the Judicial Interpretation (IV).

Of course, some courts hold that the non competition agreement in this case is invalid. The reason is that the non competition agreement not only protects the business secrets of the employer, but also protects the right to survival of workers when the freedom of employment of workers is restricted. The extremely low economic compensation agreed in the agreement is in violation of the statutory standard of 30% of the average salary of the twelve months before leaving the company. In addition, the economic compensation has not been paid for more than three months, and it also violates the provisions of Article 23 of the Labor Contract Law, which makes the workers unable to get the due compensation while performing their obligations of competition. Therefore, the non competition agreement in this case is not binding on workers.

3. Problems in the Current Regulations on Economic Compensation for Competition Restriction

3.1. Whether Economic Compensation is a Necessary Condition for the Effectiveness of the Non competition Agreement

Looking at the judicial cases listed above, the disputes over the effectiveness of the non competition agreement without economic compensation can be divided into the following views: First, the view that whether the economic compensation is agreed has no impact on the non competition agreement, and the agreement is still valid; The second is the invalidity theory, which holds that the non competition agreement without economic compensation is invalid; The third is the unilateral non binding force theory, which holds that whether the non competition agreement without economic compensation is valid is subject to the wishes of the employee. If the employee is willing to recognize the non competition agreement, both parties are allowed to supplement the economic compensation terms through negotiation. On the contrary, if the employee is unwilling to recognize the non competition agreement, the agreement will be deemed invalid according to its claims.

Through the analysis of judicial cases, it is found that the reason why the effectiveness of the non competition agreement without economic compensation is ambiguous is that the provision on economic compensation in Article 23 of the Labor Contract Law is "may" rather than "should". Therefore, the economic compensation is not an effective element of the non competition agreement, which can be understood as a free agreement between the parties, and the law does not make mandatory provisions. Article 6 of the Judicial Interpretation (IV) only affirms that workers can claim economic compensation after performing their obligations, and also does not specify the effect of economic compensation not stipulated in the non competition agreement. This leads to the court's divergence in the judicial application of the law when hearing such cases, which leads to the appearance of different judgments in the same case.

3.2. The provisions on the Effectiveness of Non competition Agreements with Overdue Economic Compensation are Vague

With regard to the handling of the employer's failure to pay economic compensation more than three months after the employee leaves his post, there are also different views in judicial practice: First, effectively speaking, starting from Article 8 of the Judicial Interpretation (IV), this view believes that the employee enjoys the right to rescind rather than the right to form, which requires the employee to claim in an explicit way. Before the employee claims the right to rescind, The non competition agreement is still valid. On the other hand, from the perspective of rights and obligations, the author believes that the restriction on business strife is an obligation of omission, and the legal provisions on the performance of the right of defense cannot be applied, that is, workers cannot claim that the agreement on the restriction on business strife is invalid after the implementation of the act of business strife. The second is the invalidity theory. On the one hand, based on Article 8 of the Judicial Interpretation (IV), this view also holds that the right of rescission enjoyed by workers can be exercised in an implied way, without claiming to the employer for rescission of the agreement, and without requesting to the arbitration institution and the court for rescission of the agreement. On the other hand, based on the principle of fairness and the principle of compensation for equal value in the civil law, it is believed that the non competition agreement is a bilateral contract, and the economic compensation paid by the employer is considered as the consideration of the worker's non action obligation. Workers are required to continue to perform their obligations without receiving economic compensation, and their rights and obligations are obviously unequal.

There are two reasons for the above two different views. On the one hand, Article 8 of the Judicial Interpretation (IV) gives the laborer the right to terminate the non competition agreement, that is, when the laborer fails to pay economic compensation for more than three months due to his own reasons, the laborer has the right to terminate the agreement, but it does not specify how to exercise the right to terminate, Whether it is necessary to explicitly express to the employer in writing or in other ways to rescind the agreement, or to request to rescind the agreement in the form of arbitration or litigation, or to adopt both implicit ways to recognize that the worker can exercise the right to rescind in the implicit way of the actual competitive action, which is not stipulated in the judicial interpretation. It is precisely because the judicial interpretation of the provisions on this issue is vague, which makes the understanding of this provision different in local courts, resulting in two different judgments. On the other hand, although competition restriction is an obligation of omission and cannot be applied to the legal provisions on the performance of the right of defense, the economic compensation, as the consideration of the worker's omission, can be applied to the principle of fairness and the principle of compensation for equal value in the civil law to claim that the agreement is invalid when the employer does not pay the economic compensation for a long time and seriously affects the daily life of the worker.

3.3. Low Standard of Economic Compensation for Competition Restriction

From many judicial decisions, some employers often agree on high liquidated damages when signing non competition agreements with workers, but they also agree on economic compensation far below the legal standard, and do not pay economic compensation for a long time after workers leave. For the cases under this situation, there are also different views in judicial practice. One is effective. This view holds that the purpose of the establishment of the non competition system is to protect the use of enterprises. The economic compensation of workers is insignificant in the face of the huge interests of enterprises, and the agreement signed is the true intention of both parties. Workers can claim their rights through law. One is the invalidity theory, which holds that the competition restriction system should not only protect the business secrets of enterprises, but also protect the right to life of workers. It will seriously affect the normal life of workers if the compensation is too low and not paid for a long time.

The reasons for the conflict of judicial decisions are: on the one hand, although Article 8 of the current Judicial Interpretation (IV) allows workers to claim economic compensation based on 30% of the average salary of the 12 months before leaving the company, if the amount is lower than the local minimum wage standard, the local minimum wage standard will be applied, but this provision is sometimes not enough to make up for the economic losses of workers, and the standard is not mandatory, If the worker does not take the initiative to apply, the court will not take the initiative to adjust the agreement of both parties. When signing a labor contract, the employer often plays a leading role. It is difficult for workers to negotiate with the employer on an equal footing. In order to obtain work and basic labor remuneration, workers often choose to compromise and give way, and finally they can only choose to sign a non competition agreement that is not conducive to their own. In the process of trial, the court will, according to the principle of autonomy of will, even if the employing unit does not pay economic compensation for more than three months, as long as it does not violate the prohibitive provisions of the law, it will almost be recognized as effective. On the other hand, whether the purpose of the establishment of the non competition system is to protect the business secrets of enterprises, or to protect the legitimate rights and interests of workers, or to protect both the business secrets of enterprises and the legitimate rights and interests of workers. In judicial practice, courts in different regions often have different understandings of this.

4. Suggestions on Perfecting Relevant Provisions of Economic Compensation for Competition Restriction

4.1. Low Standard of Economic Compensation for Competition Restriction

From the expression of Judicial Interpretation (IV), the mainstream view of the Supreme People's Court is that the separation non competition agreement without economic compensation is effective. Although the "invalid theory" may be more in line with the original intention of the Labor Contract Law when it was legislated. However, the theory of "invalidity" also has an inevitable problem, that is, when the separation non competition agreement is invalid, the basis of workers' claim rights will no longer exist. In addition, if the non competition agreement without economic compensation is deemed invalid, it is contrary to the original intention of today's market economy. Once it is deemed invalid, it will lead to a series of social problems. For example, the cost of raising transaction costs wastes a lot of human and material resources. Therefore, when legislating the non competition clause, legislators have considered that such special workers must be legally regulated, otherwise it will lead to incalculable consequences for employers. Because the economic value that trade secrets can bring cannot be clearly quantified with economic figures, and once the trade secrets are disclosed, it may not only affect the economic interests of the employer, but also infringe the reputation of the

employer. If the non competition agreement is invalid only because there is no provision for economic compensation, from the perspective of economics, this will artificially increase the risk cost of the employer, which is bound to make the employer, as the main body of the market economy, unable to devote itself to the market competition. On the other hand, it may also encourage workers with "illegitimate purposes" to change jobs maliciously, leaving the employer in a passive position, and even lead to vicious competition between enterprises, ultimately affecting the development of the entire national economy.

4.2. Allow Workers to Exercise the Statutory Right of Rescission in an Implied Way

The law stipulates that workers have the statutory right of rescission, but the law does not clearly specify how to exercise the right of rescission, whether it must be done in an explicit way or by the same tacit way, recognizing that workers can exercise the right of rescission in the implicit way of actual competitive action. Here, it is believed that it is feasible for the disadvantaged workers to exercise the right of rescission by implied means, because the original intention of the establishment of the competition restriction system is to safeguard the interests of both the employer and the workers. The long-term failure of the employer to pay economic compensation will inevitably have a negative impact on the daily life of workers. Therefore, in order to protect workers, whether express or implied, as long as the employee's intention to rescind the agreement reaches the employer, the agreement should be rescinded. After the termination of the agreement, workers can resume their free choice of jobs, so as to better protect the interests of both labor and capital. Workers should be allowed to exercise their statutory termination right in an implied way.

4.3. Revise the Standard of Economic Compensation for Competition Restriction and Determine it as a Mandatory Provision

Compensation for non competition is the most important part of the compensation system, and it is also the most concerned issue of workers and employers. On the other hand, the compensation for non competition is the "alimony" or "consent fee for temporary non employment" given by the employer when the worker is unemployed.

However, the existing laws and regulations of our country only set a minimum standard for economic compensation, which is too low and too single, and does not take into account the specific situation of the workers' work, and cannot cope with the complex social situation. For employers, in order to obtain the maximum benefits, they will calculate economic compensation according to the minimum wage standard to a large extent, which is obviously unfair to workers with high skills and a large number of trade secrets. Even for ordinary employees who master simple skills or a small amount of trade secrets, setting a long-term non competition period will seriously affect their normal life, which is contrary to the purpose of establishing this system. Therefore, in terms of economic compensation standards, we can learn from the principle of reasonable review abroad, combine various factors to make more detailed provisions, realize the interests of both labor parties, and ensure the stable and orderly development of social market order.

5. Conclusion

With the continuous development of the economy, more and more enterprises attach importance to the non competition. Economic compensation plays an important role in coordinating the interests of both labor and capital. It is not only an important condition to ensure the smooth implementation of the non competition agreement, but also to a certain extent, it can make up for the economic losses of workers caused by the non competition agreement. However, the legal provisions of our country are not specific and clear enough, and

there is a lack of a set of unified and clear review standards for effectiveness identification. Therefore, in order to give play to the guiding role of justice in practice, it is necessary to constantly summarize and analyze experience from the trial practice in order to build a unified standard of judgment, so as to constantly improve the system of competition restriction, so that the system can play an important role in protecting the rights and interests of both labor and capital and helping to establish a harmonious labor capital relationship.

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