

TERMINATION OF EMPLOYMENT CONTRACT IN MAINLAND CHINA

Foreign enterprises are often unaware of legal conditions under which an employee's labor contract may be unilaterally terminated. In China, it is very difficult for an employer to unilaterally terminate a labor contract and in practice, the employee may easily find legal ground against his employer to requalify such termination as a wrongful termination. Nowadays, employees are more and more aware of their rights and ready to challenge their termination. They may ask for reinstatement, which is very costly for the employer and mutually embarrassing, or for double severance payment if they do not want to continue to work for the employer or if reinstatement is not possible.

Even knowing the legal framework, employers should also be prepared to deal with unexpected situations and labor disputes. Labor arbitration committees and Chinese courts often rule in favor of the employees, so employers shall take all possible precautions to avoid such disputes.

1. Rules applicable to unilateral termination of an employee's contract

❖ Statutory grounds

Chinese Labor Contract Law restricts the possibilities for employers to unilaterally terminate employment contract. The Employer shall be able to prove that such termination is based on specified statutory grounds. Unilateral terminations can be divided into two types: (1)

termination due to fault or misconduct and (2) termination without fault.

(1) "Termination due to fault or misconduct" refers to termination resulting from the fault or misconduct of the employee.

In this case, no prior written notice is required, the termination is effective immediately upon receipt of the termination notice by the employee, and no severance payment is due to the employee. Faults are listed under Labor Contract Law and Chinese jurisdictions adopt a strict interpretation of the notion of "fault".

(2) "Termination without fault" or "economic layoff" arises from:

- the employee's inability to resume his original work nor engage in other work arranged for him by the employer after the expiration of the prescribed medical treatment period for an illness or non-work-related injury;
- the incompetence of the employee, even after training or adjustment of his position;
- a material change of the objective circumstances based on which the employment contract was entered, resulting in the non-performance of the labor contract and no agreement between the two parties can be reached as to amend the terms and conditions of the original contract;

- special circumstances that make it necessary to reduce the workforce.

In this case, the employer shall give the employee 30 days' prior written notice or one month's wage in lieu thereof. In addition, the employer shall pay the employee a severance payment based on the seniority, i.e. number of years he has worked for the employer. Such severance payment is generally equal to one month's wages for each full year of employment. Severance pay is limited to a maximum of 12 months' wages and if an employee's monthly wage exceeds 300% of the average monthly wage in the municipality where the employer is located, then the average monthly wage of the employee (for severance calculation purposes) will be capped at 300% of the local average monthly wage.

The employer shall also inform the labor union. If the labor union suggests adjustments to the planned termination, the employer shall consider them and notify the labor union in writing of the outcome of its handling of the matter.

❖ Legal obstacles

In some cases an employer may not legally terminate a labor contract even if one of the circumstances allowing unilateral termination without fault or economic layoff is satisfied because the law provides special protection to the employee. This is the case in the event:

- The employee is suspected of having contracted an occupational disease and is waiting for diagnosis;
- The employee has completely or partially lost his labor capability due to an occupational disease or work injury;
- The employee remains within the legally defined medical treatment period for a non-work-related illness/injury;

- The employee is pregnant, on maternity leave or in the nursing period; and
- The employee has continuously worked for the employer for not less than 15 years and is less than 5 years away from the legal retirement age.

2. How to handle delicate situations?

Enterprises operating in China should be aware that difficulties arising from a dismissal can be seriously detrimental to their business and must take necessary precautions before considering the dismissal of an employee.

❖ Main difficulties encountered by employers

An employee willing to challenge his or her termination can easily disrupt the company's operations. In practice, the employee may, in order to obtain a higher compensation or to force the employer not to carry out the termination:

- threaten the employer to turn over sensitive information to the Chinese tax authorities, to other government authorities, or to a competitor;
- intentionally create a "blocking" circumstance to the termination, by repeatedly and continually providing medical certificate for example;
- physically threaten or harass his supervisor or other employees.

The conflict can be more difficult to solve in the event the employee is a member of the board of directors or, even worse, the employer's legal representative.

❖ Practical recommendations

In order to prevent such situations, every employer should:

- ensure that the company's operations are squeaky-clean and that they comply with applicable Chinese laws;
- protect the company's confidential information by way of confidentiality/non-disclosure agreements or confidentiality clauses in labor contracts of employees;
- issue detailed and specific internal employment guidelines or policies which relate to employees and their conduct. By doing so, the employer may ensure

that employees cannot exploit any loopholes in the internal policies;

- collect, to the greatest extent possible, documentation of non-performance and misdeeds.

These preventive measures and the assistance of an experienced legal counsel would give employers the best chances to avoid any of the situations described above. Besides, employers, particularly foreign companies doing business in China, should keep in mind that even though a termination might be lawful under the Labor Contract Law, it may sometimes be best to negotiate and reach an agreement with the concerned employee.

Our dedicated team remains at your entire disposal for any additional information you may need.



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