

A positive change in favor of expat employees in Shanghai

Description

Shanghai is hot destination for expat workers. However, Shanghai city is not really as nice towards expat employees as towards foreign capital.

One of the things that make an expat working in Shanghai not all that pleasant and joyful is the local regulation in Shanghai that allows employers to stipulate, almost at will, conditions for terminating the employment contract with the expats. The local regulation was stepped up in April, 1998 in order to implement the “Administrative Measures on Foreigners Working in China” promulgated in 1996 by then Ministry of Labor. In this Shanghai implementation rules, it is provided that an employer may upon agreement with the expat employee hired by it stipulate in the employment contract, among other things, the term of employment, position, remuneration, insurances, working time, conditions for terminating employment, and default liability. In practice, it is interpreted that companies may stipulate conditions for termination which may not be allowable in the case of employment with Chinese nationals. For example, in some cases we handled in the past, we found that typically the employer will avail itself in the labor contract of the right to terminate the contract without cause by giving a one-month prior notice to the expat employee. In one case, a WFOE even reserves the right to terminate the employment contract with the expat employee “at will” so long as it pays an amount of severance pay. Unfortunately, despite the fact that such stipulation of terminating conditions is not in compliance with the then effective regulations, arbitration agencies and courts in Shanghai are all applying this Shanghai local rule in labor disputes.

This Shanghai local judicial practice is still ongoing even in the face of China Labor Contract Law coming into force on January 1st, 2008, while in most of other cities in China expat employees are more or less treated equally as Chinese nationals under China Labor Contract Law. Lawyers frequently, as we have done, argue in both arbitration and court proceedings that Shanghai’s local regulations should be deemed as invalid because the local rules are clearly not in line with the new Labor Contract Law, and not in line with national treatment of foreign nationals in China.

Earlier in March, Shanghai No.2 Intermediary People’s Court that has jurisdiction over the appellate court proceedings initiated in the northern part of Shanghai published its second “white book” on the trial of labor disputes in respect of year 2010. In this “White Book”, there is a special section devoted to address expat employment in Shanghai. The heading of this section reads “expat employment to be further standardized”.

Under this section, the White Book notes that Article 26 of China Labor Contract Law provides employment terms in a labor contract shall not run counter to compulsory provisions in laws and administrative regulations (for reference to China legislation hierarchy, click here), and otherwise such terms shall be held null and void. Though Shanghai local rules allow the parties to a labor contract to agree on certain terms, if the terms agreed in the labor contract with the expat transgress compulsory provisions in laws (mainly China Labor Law and China Labor Contract Law) and administrative regulations (mainly, Implementation Rules for China Labor Contract Law), such terms shall be held null

and void. The White Book advises employers that hire expat employees to check up and revise their labor contract terms that are not in compliance with China Labor Contract Law.

This is the first official message so far we have come to know that signals a challenge to the decade-old local biased practice against expats. I myself interpret this as a positive change, a step of progress in protecting expat employees' interests in Shanghai.

It shall be noted that, as mentioned above, Shanghai No.2 Intermediary People's Court has jurisdiction over only the northern part of Shanghai. In other words, its policy will not be applicable in the southern part of Shanghai including Pudong, Luwan, Huang Pu etc. Even though, I believe that this change will finally be extended throughout Shanghai. Just a matter of time.

What do you think?

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