Can My Employer Terminate Me Without Cause and Severance Pay?

Description

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It is quite common for Chinese employers to stipulate in the employment contracts with foreign employees that either party can terminate the contracts upon giving the other party three to six months' written notice in advance.

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Labor disputes arise frequently under such circumstances, and the major focal points of disputes are as follows: (1) Is such kind of stipulation valid? (2) Will the employers be deemed to wrongfully dismiss the employees if they terminate the employment contracts according to such stipulation? (3) Should the employers be ordered to pay wages in lieu of notice if they fail to give notice in advance? (4) Do the employees have the right to claim both wages in lieu of notice and severance pay?

Case 1: The stipulation is null and void.

The employment contract between an employer in Shanghai and a foreigner stipulates that "if the company intends to terminate the employment contract, it shall notify the employee in writing 3 months in advance." The employer terminated the employment contract upon giving the employee 3 months' written notice as agreed.The employee filed employment dispute arbitration and claimed reinstatement of employment relationship, arguing that the dissolution of employment contract by the employer has no legal basis, and the employment relationship between the two parties should be regulated by *PRC Labor Contract Law* and the law does not empower the employer to terminate the employment contract without any reason. The Arbitration Commission did not support her claim, so the employee filed a lawsuit.

Court Decision

The court rules that *PRC Labor Contract Law* applies where a Chinese employer establishes employment relationship with a foreign national who has obtained Work Permit according to relevant Chinese laws, therefore, the employer must abide by the *Labor Contract Law* in terminating a foreign employee. According to the *Labor Contract Law*, an employer can terminate an employee only for the reasons stipulated by the law, among which there is no such stipulation as to terminating an employee freely by giving certain period of written notice. The court finds that the employer has wrongfully terminated the employee by giving 3 months' notice and supports the employee's request for reinstatement of employment relationship.

Case 2: The stipulation is valid and the employee is entitled to severance pay.

In another dispute between a Shanghai employer and a foreign employee, the employment contract

also stipulates that either party can terminate the employment contract by giving a 3 months' written notice to the other party. The employer terminated the employee by giving 1 month notice instead of 3 months' notice. The employee filed labor dispute arbitration, claiming 3 months' salary in lieu of notice and severance pay. The Arbitration Commission supported the claim, but the employer rejected the arbitral award and filed a lawsuit.

Court Decision

The court rules that employers can reach agreements with foreign employees with regard to length of employment term, employees' positions, remuneration, insurance, working hours, termination of employment contracts and liability for breach of contract. The court decided against the employer, ruling that its failure to give 3 months' notice breached the employment contract, and ordered it to pay the employee wages in lieu of notice equivalent to three months' salary and severance pay.

Case 3: The stipulation is valid but the employee is not entitled to severance pay prescribed by *PRC Labor Contract Law*.

In yet another case, the employment contract stipulates that "within the contract period, if the project of Party B (employee) is terminated or rescinded, the employment contract will also be terminated, but Party B must be notified in writing 30 days in advance." Within the contract period, the employer negotiated with the employee about adjusting his position after the project was completed. However, the parties failed to reach any agreement and the employer notified the employee to terminate the contract as agreed. The employee filed arbitration and claimed compensation for wrongful dismissal, arguing that the stipulation that the employer has the right to terminate the employment contract by giving 30 days' notice in advance should be null and void according to *PRC Labor Contract Law*. The Arbitration Commission did not support the employee's claim, so he filed a lawsuit.

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Court Decision

The court rules that *PRC Labor Contract Law* applies only when it concerns minimum wages, working hours, holidays and leaves, employment safety and sanitation and social insurance of a foreign employee, so the employer and a foreign employee have the right to agree on the conditions for terminating the employment contract and liability for breach of the contract. Therefore, the court ruled that the stipulation to terminate the employment contract by giving a certain period of written notice was valid and the court decided against the employee, stating that the employment contract concluded by the parties only stipulated the conditions for terminating the contract and the number of days of advance notice, but the contract did not stipulate liability for breach of the contract, therefore there was no legal basis for the employee to ask the employer to pay compensation for wrongful dismissal.

Case Analysis

It is obvious from the above cases that the court decisions vary on the validity of the stipulation in the employment contracts that grants employers the power to terminate foreign employees for no cause by just giving notice in advance. The reason for such difference is that different courts hold different views on whether or not *Labor Contract Law* shall be applied to cases regarding foreigners working in China. The court in the first case holds that *Labor Contract Law* shall be applied to cases regarding the disputes on the formation, fulfillment, change, dissolution, or termination of employment contracts between employers and foreign employees. Since *Labor Contract Law* does not grant employers the

right to terminate employment contracts with no cause, employers must abide by the *Labor Contract Law*. Thus, the court decided that the employer's dissolving the employment contract by giving 30 days' notice in advance violates *PRC Labor Contract Law*. The courts in the other two cases rule that according to the Provisions on the Administration of the Employment of Foreigners in China, foreigners working in China enjoy the same protection of *PRC Labor Contract Law* only in the areas of minimum wages, working hours, holidays and leaves, employment safety and sanitation, and social insurance as Chinese employees. Employers may reach an agreement with foreign employees on the conditions for terminating the employment contracts and the liability for breach of the contracts. Employers are not obliged to pay wages in lieu of notice if no agreement is reached on this matter even if there is stipulation on terminating employment contracts with no cause but notification.

Conclusion

Termination of employment is always a critical issue for employees, especially for foreign employees whose spouse and children follow them to China. Therefore, it is strongly advised that foreign employees pay close attention to the conditions for termination of employment contracts and the liability for breach of contracts when concluding employment contracts. It is a must for a foreign employee to make sure that the employment contract contains terms which either stipulate that the employer can unilaterally terminate the employment contract only for cause and the employer must pay liquidated damages for unilaterally terminating the contract without any cause, or the employer must pay wages in lieu of notice and severance pay for its unilateral termination of the employment contract.

Date Created
May 2021
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