the dilemmas for expat employees in China

Description

Recent two labor dispute cases in Shanghai I came to learn have further demonstrated the dilemmas that are faced by foreigner employees in China, which do not seem to be solved any time soon. Bear in mind, in this post, I discuss the dilemma for expat employees whose monthly salary is well above three times the average monthly salary (RMB 3896 in 2011) in Shanghai.

Case 1: a lawyer from another law firm in Shanghai after reading my article (you can find the English version of the article here) called me saying her client was just caught in the same situation where during the labor arbitration proceeding, the expat employee's work permit was revoked by Shanghai Labor Department without giving any prior notice to the client. Now the lawyer was not so sure about her original litigation strategy under which she helped her client to reinstate the labor relationship between her client and the employer.

I am indeed surprised and disappointed that Shanghai Labor Department has not stopped their malpractice even when there has been a clear decided judgement ruling that their cancellation of expat's work permits unilaterally without verifying whether the labor contract has been terminated legally is illegal.

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Dilemma 1: Expat employees when mistreated by employers may confront their employers by taking them to arbitration or court. But given the illegal practice by Shanghai Labor Department, expat employees may well find themselves trapped in the legal proceeding when their work permits are revoked by Shanghai Labor Department.

Case 2: A Hong Konger was fired by his company in Shanghai after working in the company for only six months. His monthly salary is well above RMB 50,000. The company offered no economic compensation, much less damages (i.e. damages payable by employers to employees that are illegally fired). He sued the company for reinstatement in a bid to have a settlement with company that may result in payment of bigger amount of damages. He won an arbitration award, and failed in court which dismissed his claim for reinstatement on the ground that the company had already hired a new employee for that position, and at the same time ordered the company to pay an amount of damages of RMB 11,688, which seemed ridiculous to the employee.

I still remembered not long ago, a German expat came to me for advice on his situation where his boss fired him but offered him legal compensation based on his actual salary, he felt that he was wrongly fired and wanted to fight for more benefits. But sadly, I had to tell them if he fighted in arbitration or court, he would get less.

Dilemma 2: when an expat employee is fired by his or her employer but is offered with reasonable compensation based on his or her actual salary, even though he or she is not satisfied and feel wronged, he may end up with less compensation from their employers and more loss because of attorney fee and time. On the other hand, the employer will in the end benefit from their illegal termination since he ends up paying less.

Solutions for the Dilemmas

Well, maybe, I should not call it “solutions” but rather “pratical tips” to counter or hedge your risks of working in China. Such dilemmas are caused by poor legislation and misreading of existing rules.

For Dilemma 1

Once you decide to go to arbitration or court to solve the dispute with your employer, the only possible action to stop Shanghai Labor Department from cancelling your work permit is to inform in writing the department immediately or even before you file your case. The earlier, the better. You need to tell your department that your employer has illegally terminate your employment contract and you are going to sue the employer soon, and request the department not to revoke your work permit when the employer applies to have the work permit cancelled.

I have not tried this before, but I believe with this proper notice served on the department, they will be more careful and cautious in deciding to cancel your work permit upon your employer’s unilateral application. You may also cite the court decision of my successful case in which court declared illegal the cancellation of work permit by the department upon employer’s one-sided application.

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For Dilemma 2

There is really no easy, if at all, solution for this because you cannot fight against the law.

Expat employees when find their labor contract to be terminated by employers shall try to settle disputes peacefully and get better compensation.

Probably the best thing an expat can do is to bargain for and stipulate in their labor contract some clauses addressing the dilemma. For example, if the employer terminates the labor contract without due cause, the employer shall pay certain amount of liquidated damages which is calculated based on the expat actual salary. Of course, I understand it is not gonna be anything easy for an employee to ask for such clauses or commitment from employers esp in the current world of financial crisis. But give it a try.

Another Thought on Reinstatement

Ever since the adoption of China Labor Contract Law, lawyers have been keen to advise clients to sue for reinstatement of their labor contract in arbitration and court. This has been a very successful strategy for some time from the enactment of Labor Contract Law when employers are not clear about court’s attitude on reinstatement.

Over time, courts have showed reluctance to support reinstatement which is often manipulated by employees only as a way of bargaining for higher compensation or damages, and in practice very often

employers have already employed new person to fill the position, leaving it awkward for courts to support reinstatement claim.

Recent development has proved that it may not be advisable for expat employees to sue for reinstatement the long proceedings of which only prolong the anxiety and anguish on the employee who in the end get less compensation, and lose more money on attorney fee as well as, maybe more importantly, other job opportunities.

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Author
admin

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