Fire the General Manager of a China Company

Description

A foreign client approached me for advice to fire the general manager of its WFOE subsidiary in Shanghai.

Indeed, firing a general manager can be a real headache in China.

Following the high-profile case in Shanghai, in which a fired general manager of a listed company wrestled with his employer and won (not really in a strict sense) the fight by having the court find him a new job in the company, since then, the ruling by Shanghai Second Intermediary Court that a company's board of director can remove a general manager from his position but cannot terminate the labor relationship between the general manager and the company, has become a mainstream view on the issue, and many lawyers seem to uphold the logic therein.

But I disagree. You can find another two posts on this blog regarding this topic. How to fire a general manager of a Company in China? Update on Jahwa General Manager Employment Case

Shanghai Landing Law Offices

I General Manager under China Company Law

Under China Company Law, a limited liability company (not the same thing as the LLC in American laws) MAY (not "shall"), and a stock company shall, have a general manager who shall be appointed and fired by, and accountable to the board of the director (or the executive director in the absence of a board). However China Company Law does not specify any specific reasons or grounds for firing a general manager from his or her position. In other words, the board of directors does not need any reason to fire the general manager, and the firing or removal of GM from his position is legal and valid.

This is universally true. A general manager appointed by the board to serve the company is in a legal sense the agent while the company (represented by board) is the principal. In other words, there is the agency relationship between the general manager and the board/the company based on trust. When the trust factor is gone, then the principal/the board can terminate the agency immediately.

While the Sino-foreign joint venture enterprises have a slightly different corporate governance (mainly their board of the directors is the highest authority of the company?, the principle is the same in respect of firing the general manager by the board of directors.

II General Manager under China Labor Contract Law

Under China Labor Contract Law, no distinction is made among various employees with "all" being offered the protection umbrella. So a cleaning staff in a company is viewed as the same as the general manager of the company in the eyes of China Labor Contract Law, a point that has invited a lot of criticism from legal professionals.

Due to this for-all blind love, high-ranking officers are caught in a catch-22 situations where:

(1) on the one hand, they can enjoy the full protections as available to ordinary employees, such as double salary in absence of written labor contract, no liquidated damages imposed on them except for the two occasions prescribed in the law, economic compensation upon termination of employment in certain circumstances, and also the protection that companies cannot terminate employment at will and shall only be deprived of their jobs in those prescribed circumstances set out in the China Labor Contract Law; and

(2) on the other hand, they feel very embarrassed and ashamed when they realize that their enconomic compensation standards are degraded to the level offered to the ordinary employees. Namely the economic compensation is capped at the amount three times the preceding-year average monthly salary of all workers in the city where they work. Even in Shanghai, for example, the three times average salary won't be more than RMB 20,000, which is way lower than many high-ranking officers in multinational companies. So when caught in labor disputes with their employers, high-ranking officers find themselves in a very difficult situation with good options for them. Indeed, since the enactment of China Labor Contract Law, we no longer advise clients that receive higher salary than three times the preceding-year average monthly salary to go to labor arbitration, but resort to amicable settlement with their employers.

III Conflict of the Laws

Now as happening in Jahwa case, when the board of directors of a company fires a general manager without ground in compliance with China Labor Contract Law, the general manager is considered validly removed from his position as allowed by China Company Law, but on the other hand, he is not legally fired under China Law Contract Law, meaning his employment with the company is still in effect.

Shanghai Landing Law Offices

While this sounds absurd, it has gained recognition as correct in China judiciary system.

IV Tips for both Employers and Employees

So it is actually a lose-lose situation for both corporate employers and high officer employees.

On the other hand, Chinese labor arbitration commissions and courts have also recognized the room for contractual bargaining in the labor contract between companies and their high-ranking officers. Both employers and employees should make use of this contractual power to ensure the ending of their relationship will be done in an appropriate way.

For employers, to avoid the awkward situations where they can remove the general managers from their position but shall have to keep the labor contract relationship, it should seek to insert a clause in the labor contract requesting the general manager to agree that their labor law relationship shall come to an end at the same time as they are fired from their position.

For employees of high ranks, you should try to bargain for a compensation without being subject to the three times preceding-year annual average salary rule, when dismissed from your positions. This has already been recognized by some courts as valid provision.

Date Created
March 2017

Author
admin

Shanghai Landing Law Offices