

Can employer use additional leave to set off the three times salary during National Holiday?

Description

The national holiday has passed. Many walks of people were actually staying on duty during the golden holiday. Under China Labor Law, companies are obligated to pay three times salaries to employees who worked in the holiday.

Companies are trying to see whether there is any legal way of circumventing the legal obligation to pay the three times salaries. I got an email enquiry from a foreign invested company asking whether the company can offer those employees additional leave days instead of paying three times salary. A good question.

As we know under China Labor Law, where an employee is required to work at weekend (Saturday and Sunday), the employer shall pay two times the salary received by this employee in normal working days. On the other hand, the law has provided that the employer can arrange additional leaves for the employee later instead of paying the two times salary. Further in a notice by Ministry of Labor and Social Security, the employer has the right to opt for payment of two times salary or granting of additional leaves even if the employee disagrees with employer's option.

The law is however silent on whether employers can choose to grant additional leaves in lieu of paying high salaries to employees who work on statutory holidays or work overtime on working days (Monday to Friday). Considering that judicial interpretation of labor laws and regulations is often made in favor of employees, without clear authorization by law, employers shall not have the right to choose to give additional leaves instead of paying 1.5 or 3 times salary. This was indeed affirmed by the Ministry of Labor and Social Security in a circular recently ordering employees to pay full salaries according to China Labor Law.

So be it. What if an employee who works overtime on working days or statutory holidays applies to company asking for additional leaves instead of receiving overtime payment?

Recently, in drafting an Employee Handbook for a corporate client, we were also confronted with this question. Finally, we decide to put a clause to the effect that if an employee applies in writing to company for additional leaves in stead of overtime payment, the company may grant consent to such application. We believe that such clause should be legal as it does not violate the interests of employees who initiate the application. The next thing for employers to do is to get (without leaving evidences of this action) your employees to submit written application for additional leaves so that overtime payment may be legally avoided.

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