Is it legal to terminate labor contract upon closure of branch office?

Description

One of my corporate clients for whom I have been providing outside legal counsel service in regard to labor laws or employment laws recently put forward another interesting problem before me. It is always a pleasure to research on a new legal topic and find a solution for it.

Here is the situation: this foreign invested company is headquartered in Shanghai but it has a branch (not a subsidiary) in Beijing which branch is duly registered in accordance with corporate registration rules. Quite a few employees have entered into labor contract with the branch (as opposite to entry into such contracts with headquarter company). For business reasons, the client wants to shut off its Beijing branch and terminate all employment contracts with employees. The client asked me: what is the best strategy in terminating these employment contracts while minimizing risks?

The big question boils down to one simple question: is the closure of a branch equal to “dissolution of employer” under Article 44 of China Labor Contract Law? If yes, it will be in the best interest of the client as it is a straightforward legal ground to terminate employment without incurring heavy compensation duty on the part of the employer.

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The answer will largely lie with the understanding and interpretation of the words of “employer” and “dissolution” under Article 44 of China Labor Contract Law.

On the one hand, the Labor Contract Law does not distinguish headquarter company and its branch offices, and given the common understanding about company branch being part of the headquarter company and having no separate legal personality, it is more reasonable to interpret that the word “employer” should refer to the company as a whole despite of the number of branch offices. In other words, a branch office should not be interpreted as an independent employer under the Law.

What confuses people is the provision in the Implementing Rules to the Labor Contract Law which says that a duly registered branch office with its own business license CAN enter into labor contracts as employer with its employees. On the face, based on this provision, a branch office can be regarded as an “employer”, lending ground for people to assert that a branch of a company itself can be regarded an employer as under Article 44. In other words, when the headquarter decides to close a branch office, the closure can be viewed as termination of an employer, and therefore all employment contracts signed with the branch office employer should terminate automatically thereby. There won’t be the risk of illegal termination of labor contract on the part of the employer.

It is my personal opinion that the provision of the implementing rules of labor contract law should be strictly and literally interpreted to the effect that it is provided there to facilitate the conclusion of labor contracts in a place that is generally far away from headquarter, and while a branch office is given the power to conclude labor contract with employees, it does not give full capacity or powers to a branch office to be an employer in its full meaning and sense. In other words, a branch office is regarded as an employer for creation of the employment contract but not for cease or termination of such employment contracts. Anyway, the nature of a branch office under corporate laws being unable to assume

liabilities independently and thus passing liabilities to headquater means that its closure does not mean end of the liabilities created in its name.

Given the above analysis, the closure of a branch office should be interpreted, according to Article 40 of Labor Contract Law, as a material change of objective circumstances on which the labor contract in question is created, which results in the inability to continue performing the labor contract, thus giving the power to the employer to consult with the employee to amend and change the terms of their affected labor contract. Failing positive result of such consultation, the employer (refering to the whole company) has the power to terminate the labor contract by serving a one-month prior notice to the employee or to terminate the labor contract immediately by paying one additional monthly salary to the employee. Irregularity in conducting the consultation here may lead to illegal termination of labor contract resulting hearvier liability on the employer.

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