good faith attempt/consultation to sign labor contract?

Description

In a recent case involving a labor dispute in which I represented the employer, a foreign invested trading company set up by an investor from Africa, an interesting question came up in regard of the double salary claim often raised by employees.

CASE FACTS: the employee (Chinese national, not expats) left the company after working for half a year and immediately made two claims with local labor arbitration commission (a special arbitration body handling labor disputes only): one for double salary for the working period, and the other for making up of her social insurances.

As social insurances are mandatory obligations of employers, there are generally no leeway for employers to escape the obligations. Now the focus is on the first claim for double salaries.

The employee claimed that there had been no labor contract concluded between the parties. True as it is, I learned from the manager of the company that he had sent a contract to the employee immediately after she started working in the company and for some reasons the contract was not signed. I was kind of relieved about the losing in regard of the double salary claim. Shanghai High People's Court has interpreted in its opinions on implementing China Labor Contract Law that where the employer has made good-faith consultation with the employee with respect to conclusion of the labor contract, and for reasons of force majeure, unexpected accidents, or refusal by employee, the said labor contract fails to be concluded, the employer shall not be liable to pay the double salaries to the employees.

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Based on these local rules, I was quite confident that we should be able to quell the double salary claim. However, my confidence was called into question when I came to realize that the contract sent by the manager to the employee for execution is a poor-drafted inappropriate contract in which some of the requisite clauses as required by China Labor Contract Law are missing and even there is one unlawful clause which requires the employee to give an 8-week notice in advance before submitting resignation. The Chinese labor laws require employee to give a one-month prior notice before resignation.

Now the question comes down to the point: whether it can be regarded as good-faith consultation with the employee when an employer asks the employee to sign such a sub-standard labor contract.

My answer is negative.

While people may argue that the substandard contract is just a starting point of the consultation for conclusion of labor contract and the parties should engage in a few rounds of consultation to finalize and sign the contract. Further given that the contract was given by the parent company in Africa who is not supposed to know Chinese labor laws well, it should be still considered a "good-faith" attempt by the company to enter into the labor contract with the employee. However, this plausible argument may not stand to reason under Chinese laws. Employers incorporated in China are supposed to know the relevant labor laws in particular the China Labor Contract Law which is enacted back in 2008. Asking

the employee to sign such a substandard contract which seems to deprive some of the rights and benefits that would otherwise be available to employees would be more likely to interpreted as demonstrating bad-faith, esp on the backdrop that in China, employees are widely regarded as the week party in the employment relationship.

The case is later settled with the mediation of the arbitrator and the company agreed to pay some money to the employee and the employee withdrew the case.

The lesson drawn from the case is that foreign investors doing business in China should be aware of the serious consequences of violation of Chinese labor laws and take actions to stop the loopholes in their employment practice.

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