Manage your manager

Description

A client came to my office telling a story that was shocking to an outsider. The client is a foreigner who has set up a WFOE in Shanghai two years ago producing cleaning products. As a foreigner unable to read any Chinese, she had to hire a Chinese manager as her right hand. In the WFOE, the manager is below one person only, the client, and above all other staff. This manager is a girl recommended by the client's friend. Client trusted the manager, took the manager as an intimate personal friend, and had been very nice and generous, offering various kinds of benefits.

As a startup company, the WFOE has been growing rapidly, and the client brought in a professional financial officer. It is at the time when the client came to discover the secretive and covert self-dealings and embezzlement of company's assets by the manager almost from the very outset of her taking position in the company. It is found that the manager had taken every opportunity to wring benefits from the company. The misconducts are mainly carried out by way of taking kickbacks from company's suppliers and by way of using fake invoices (fapiaos) to get reimbursements.

It is a real trauma for client who is now determined to bring this wrong-doing manager to justice.

I am prompted to ponder over the incident which is quite a commonplace in reality, not only in foreign invested enterprises or companies but in domestic companies as well. With focus on foreign invested companies, there are two angles from which we can look at, analyze and comment the incident.

I Business Culture and Employee Work Ethics

Again, such misconducts by senior corporate officers reflect the lack of a fundamental business ethic of fiduciary duty in Chinese workplace. From my observation from a comparative perspective on western and Chinese business culture and work ethics, fiduciary duty/obligation, a concept deeply rooted in western social and legal culture, is one of the most important legal basis for sound corporate governance in the west, widely applied in determining the liabilities of directors and senior officers of a company. However, it is a different picture in China in respect of fiduciary duty.

The concept of fiduciary duty in China is like an infant compared with that in the west. It is more of an import from the west than a home-grown one. In today's China, with the bad influence of rampant and pervasive political corruption, loyalty, honesty and faithfulness have become something rather scarce, and on the contrary, speculation, opportunism, free-riding and quick money have instead made their way into our life and society. Faced with personal gains, people who are subject to fiduciary duties such as agents, attorneys and corporate managers often betray their principals. I have known or learned such stories numerous times in my past law practice.

II Measures and Policies for Managing Your Manager

The problem of managers betraying their companies is probably more cute in foreign invested companies where the foreign bosses due to inability to understand Chinese language are more vulnerable to scamming risks by their unscrupulous Chinese managers.

So, how to tackle the problem?

Here I would like to give my suggestions from two aspects: practical tips and legal measures.

1. Practical Tips

(1) Keep your manager at arm’s length. This is an important lesson individual business owners shall learn. Unnecessary intimacy will result in relaxation of vigilance against your management team. In my case, client had even invited this manager to her house in her home country when this manager visited her friend there.

(2) Maintain reasonable check and balance in the management team. A repeated mistake committed by foreign investors is that they allow their general managers to appoint all other staff in the company. The managers will always hire their relatives and friends. As a result, the staff in the company will be loyal to the general manager instead of the company.

It is important that the financial officer shall be only appointed or engaged by the investors themsevles, who will have the courage to report any misconduct by the managers.

(3) If possible, the company may provide office facilities such as phones and computers to senior managers and install surveilance software to track employees’ conducts during working hours.

(4) Bosses shall be geared into alert when they discern some typical signs of misconducts by corporate managers. For example, if company is paying out without receiving due tax invoices (fapiaos), it is likely that your manager is playing tricks with company with an intention to steal money. Also, when your manager always cannot get along well with staff not directly hired by him or her, it probably means that he or she is trying to cover something by getting rid of people who he or she cannot control.

2. Legal Measures

In addition to practical tips, to radically mitigate the risk posed by managers, companies shall strengthen corporate internal regulations to the fullest extent allowed by laws with a view to detering and detecting misconducts and to effectively replacing managers found guilty of disloyalty. Foreign investors may consider overhaulling corporate bylaws in the following aspects:

(1) Amend company’s articles of association (“**AOA**“)

AOA is often likened to be the constitution of the company having the highest regulatory authority over the company. China Company Law has made it clear that AOA shall be binding on the company, its shareholders, directors, supervisors and senior officers. Senior officers in the case of private limited liability company include the general manager, deputy general manager, financial person-in-charge and other personnel designated in the AOA.

Companies shall first designate the personnel who are to be called “senior officers” of the company. Further, companies shall design and insert some detailed provisions in the AOA addressing discinplines, engagement and removal of senior officers.

(2) Amend corporate bylaws such as employment handbook. Clear provisions regarding various misconducts such as self-dealing, embezzlement and the like shall be put in place as the legal basis for terminating employment contract and imposing penalties.

(3) Revise the labor contract with the manager. This is a critical point. Senior managers, though not expressly given any special regards in China Labor Contract Law, are treated differently from ordinary employees in judicial practice, leaving more rooms for companies to regulate and discinpline their senior officers.

For example, since China Company Law has squarely placed the duty of care and duty of loyalty on senior officers, it will be reasonable for company to sitpulate in the labor contract with the manager that upon proving the guilt of the manager for conducting self-dealing, the company may terminate the labor contract.

Though there is still no authoritative view on the impact of China Company Law (esp provisions regarding appointment and removal of senior officers) on the employment (including termination and economic compensation) of senior officers, companies will be better off to stipulate stringent conditions towards senior officers.

(4) Last not the least is to get your supervisor to work. It is a common phenomena that supervisors of limited liability companies are often vase, dormant all the year, appointed only to meet Company Law’s requirement. However, the core value of having supervisor is to supervise the conducts of management team of the company, ensuring compliance in accordance with company’s AOA and laws.

Investors shall get their appointed supervisors to do their homework diligently, adding real value to the company.

The above is discussed from the perspective of preventing senior managers from misusing their powers. However, equally important is how to inspire and incent senior management team to work their best in serving the company, which will take a separate course to discuss.

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