Can a Chinese employer lay off employees on the ground of business suspension?

Description

There has been a slew of news on the internet telling layoff stories in big companies. The other day, it is AMD, the chip manufacturer, that was to slash 15% of its manpower throughout the globe. Today, the leading Chinese wind power company, SinoVel, sent dozens of its employees back home for “long vacation”, sparking anger among its staff. These are big names. In practice, there must be layoffs happening in many places in China without even being noticed at all.

My team has recently been retained by a foreign invested company in helping to lay off all their staff before they dissolve their manufacturing factory in Shanghai.

The foreign parent company of the Shanghai company operating the factory wants to close the factory (all manufacturing businesses are conducted in this only factory) and shift facilities to their manufacturing base in Guangdong province in China. Generally, once factory is closed, the Shanghai company shall be dissolved and liquidated. In order to avoid complicated legal procedures of winding up a Chinese company, the parent company in USA has adopted the approach of merging this Shanghai company into their Guangdong company and in the meantime closing the factory.

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We, as their lawyers, are required to advise the best plan or scheme of carrying out the layoff without violating the laws (which may lead to heavy financial liability on the company) and without arousing strong hostility among the workers that are going to lose their jobs.

However the situation is actually quite tricky and delicate. On one hand, if the company declares to its staff that the company is going to be merged by another company, this will trigger the application of Article 34 of China Labor Contract Law which says where an employer is the subject of a merger or division, the labor contract shall remain effective and shall be performed by the entity that carry on the rights and obligations of the said employer. This poses great risk for client that they will not be able to terminate those people at all. On the other hand, though the company/ factory is going to be closed, we cannot afford to let local government to know the very fact of closure which may invite unnecessary scrutiny from foreign investment department or may render it impossible for foreign investment department to approve contemplated merger plan.

Apparently, the best way to go is to negotiate with each worker and get them to agree on termination of their employment which is clean and trouble-free. However, we need also get prepared for those who may refuse to agree on termination. Here comes the core issue of finding or creating the lawful ground to dismiss those people who refuse to accept company’s offer.

Much of the brain-racking narrows down to whether the company can lawfully terminate employee’s employment contracts by just declaring that the company has suspended its business for an open-ended period. We originally thought that suspension of manufacturing business can be interpreted as “material change in the objective circumstances based on which the employment contract is initially concluded” as prescribed in Article 40 of China Labor Contract Law. The employer can terminate the

labor contract with employees if the company cannot arrive at terms with employees on amendment of the employment contract in the case of such “material change in the objective circumstances”.

It is a very plausible lawful ground for our purposes. On the one hand, business suspension is definitely a material change to the basis of the original employment contract. Come on, we don’t have any business now and it is unfair for us to keep you employees any longer. Further, there are no clear rules on what government approval, if any, is needed for this corporate action. In other words, we don’t have to apply for any approval from either foreign investment department or industry and commerce bureau which will not be happy to see suspension of business by any company in its jurisdiction.

But further thought on the idea of business suspension left us unsure about its legality and feasibility. Shanghai local regulation on payment of salaries and wages provide that in the event of suspension of business by a company, the company shall pay full salary for the first ensuing month and pay otherwise agreed salary (not less than the minimum salary) for the time of suspension thereafter. In summary, these rules have not allowed the company to terminate the employment contract. We also noticed that China Company Law has indicated its negative attitude towards suspension of business by a company in its provision that any company that has stopped operation for a period of more than six months should be stripped of its business license.

Given these negative factors, we believe it is not suitable to advise our clients to go that route. Instead, we advise on the more conservative approach of ask staff to be on long vacation during which the company may just pay the minimum salary till the completion of the merger deal, and then the company shall find ways of terminating employment contracts with those employees.

Fortunately, we have managed to get all staff to accept our the company’s offer and all employees are peacefully dismissed in the end.

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