What ensues when your China labor contract expires?

Description

We are talking about fixed term China labor contract or employment contract. While this topic may not be very interesting to expat employees in China, it may be very relevant for foreign investors operating business in China.

Assuming that A signs a two-year labor contract with his employer, upon expiration of the contract term, his employer does not wish to renew his labor contract for whatever reasons. What will happen then?

In this scenario, A will not have any other option than to accept the fact that he will have to look for a new job. For the company, it shall pay to A an economic compensation equal to two-month salaries (assuming that the monthly salary does not exceed three times the average salary of the previous fiscal year in the place in question), unless the company can prove that it has offered to renew the contract with the same or better terms with A but A refuses to renew the contract with it.

Further assuming that A renews the labor contract with his employer for another two years, or in other words, A now has his second fixed term labor contract with the same employer, what will happen upon expiration of the second fixed term labor contract?

The intrigue lies here, arising from a controversial provision in China Labor Contract Law in regard of conclusion of open-ended labor contract. Below is the law provision causing confusion in practice:

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> Article 14. An “open-ended employment contract” is an employment contract for which the Employer and the worker have agreed not to stipulate a definite ending date.
>
> An Employer and a worker may conclude an open-ended employment contract upon reaching a negotiated consensus. If a worker proposes or agrees to renew his employment contract or to conclude an employment contract in any of the following circumstances, an open-ended employment contract shall be concluded, unless the worker requests the conclusion of a fixed-term employment contract:
>
> (1) the worker has been working for the Employer for a consecutive period of not less than 10 years;
>
> (2) when his Employer introduces the employment contract system or the state owned enterprise that employs him re-concludes its employment contracts as a result of restructuring, the worker has been working for the Employer for a consecutive period of not less than 10 years and is less than 10 years away from his legal retirement age; or

> (3) **prior to the renewal, a fixed-term employment contract was concluded on two consecutive occasions and the worker is not characterized by any of the circumstances set forth in Article 39 and items (1) and (2) of Article 40 hereof.**
>
> If an Employer fails to conclude a written employment contract with a worker within one year from the date on which it starts using the worker, the Employer and the worker shall be deemed to have concluded an open-ended employment contract.

It is the paragraph in bold and italics that has been subject to two opposite interpretations that have led to completely different practice in HR management in China.

(1) Shanghai, Guangzhou

In both Shanghai and Guangzhou, local practice has held that in this circumstance, the open-ended labor contract shall only be concluded upon mutual agreement between employer and employee in extending their employment. In other words, upon expiration of the second fixed term labor contract, if both employer and employee agree to continue the employment, an open-ended contract must be signed (unless the employee requests to conclude a third fixed term contract).

(2) Beijing

Beijing has however taken a different stance on this point. Beijing local practice has held that, for the purpose or goal of this whole Article 14, namely, encouraging long-term stable employment between employees and employers, in this circumstance, so long as the employee wants to continue the employment after the expiration of the second fixed term labor contract, an open-ended labor contract must be concluded. In other words, the employers have no choice but to sign the open-ended labor contract with the employee.

This contradicting practice under the same labor contract law has given rise to confusion. But at the moment, without a clear interpretation from China Supreme Court on the Article 14 cited above, this abnormal situation will persist in the near future.

Date Created
November 2013
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