

FEATURES OF LABOR CONTRACT LAWS IN CHINA

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Prior to the implementation of *Labor Contract Law* on January 1st, 2008, the labor relations between foreign-funded enterprises in China and their employees were mainly regulated by *Regulations on the Labor Management of the Foreign-Funded Enterprises* (which will be referred to as *the Regulation*). Since the newly enforced *Labor Contract Law* (which will be referred to as *the Law*) has changed many existing rules concerning labor relations, foreign-funded enterprises in China need to pay careful attention to the differences between these two laws. We will hereby compare these two laws to help you better understand the differences.

Conclusion of Non-Fixed Term Labor Contracts

According to the Regulation, only those who have been working with the same employer for ten years may request to conclude a non-fixed term labor contract. To better protect employees' rights and interests, the Law expands the scope of non-fixed term labor contracts. It states that a labor contract shall be concluded as non-fixed term if the following circumstances take place:

1. An employer and its employee reach an agreement on the conclusion of a non-fixed term labor contract;
2. The employee has already worked consecutively for the employer for 10 full years;
3. The labor contract is to be renewed after two fixed-term labor contracts have been concluded consecutively;
4. If the employer fails to sign a written labor contract with an employee after the lapse of one full year from the date when the employee begins to work, it shall be deemed that the employer and the employee have concluded a non-fixed term labor contract.

Termination of Labor Contracts

Compared to the Regulation, the Law specifies additional circumstances under which labor contracts may be terminated. According to the Regulation, an employer may generally

terminate the labor contract only under the following circumstances:

1. An employer and an employee reach an agreement for the termination through consultations;
2. An employer may terminate the labor contract during the probation period of a certain employee when it is evident that the employee does not meet the qualifications for the position, fails to carry out the contract, seriously violates labor discipline and the policies of the enterprise, or has been convicted of reeducation-through-labor or criminal punishment;

In addition to these clauses, the Law grants more rights to the employer by adding the following circumstances under which the employer may terminate the labor contract:

1. The employee causes any severe damage to the employer because he seriously neglects his duties or seeks private benefits;
2. The employee simultaneously enters an employment relationship with other employers and thus seriously affects his completion of the tasks of the employer, or the employee refuses to make the ratification after his employer points out the problem;
3. The labor contract is invalidated because the employee deceives, coerces, or takes advantage of the employer's difficulties to force the employer to conclude a labor contract or to make an amendment to a labor contract, which is contrary to employer's will.

Although the Law grants employers more rights in terms of the termination of the labor contracts, the main purpose of enacting the Law is to provide better protection of employees' rights and interests. While the Regulation only states that an employee may terminate the labor contract if forced to work for the employer under violent treatment, threat, or imprisonment or other means of restricting personal freedom by the employer or if the employer fails to carry out the labor contract or violates the State laws, administrative regulations and infringes upon the legal rights and interests of the employee, the Law adds many more circumstances under which an employee may terminate the labor contracts. These circumstances include:

1. The employer fails to provide labor protection or work conditions as stipulated in the labor contract;
2. The employer fails to timely pay the full amount of remunerations;
3. The employer fails to pay social security premiums for the employees;
4. The labor contract is invalidated because the employer employs the means of deception or coercion or takes advantage of the employee's difficulties to force the employee to conclude a

labor contract or to make an amendment to a labor contract, which is contrary to employee's will;

5. An employer violates the safety regulations or forces any employee to perform dangerous operations that endanger the employee's personal life.

Termination of Labor Contracts of Specific Employees

The Regulation prohibits the termination of labor contracts if the employee is excused of absence, absent due to occupational disease or work-related-injury, or in regular medical treatment for illness. Furthermore, if a female employee is pregnant or is on maternity leave, the labor contract cannot be terminated. However, the Law does not have restrictions on this type of termination. The employer may terminate labor contracts with the employees who meet the aforementioned conditions through consultation or according to Article 39 of the Law which specifies six circumstances under which the labor contracts of specific employees may also be terminated.

Establishment of Economic Layoff System

Due to China's commitment to create a market economy during the past decades, layoffs have become inevitable for enterprises that want to survive in the market. However, since there is no clause in the Regulation to regulate layoffs, the Law states the employer may lay off 20 or more employees, or to lay off less than 20 employees but the layoff accounts for 10% of the total number of the employees if it is necessary and meets the following criteria:

1. It is under reorganization according to the Enterprise Bankruptcy Law;
2. It encounters serious difficulties in production and business operation;
3. The enterprise changes products, makes important technological renovation, or adjusts the methods of its business operation, and it is still necessary to lay off the number of employees after changing the labor contract; or
4. The objective economic situation, on which the labor contract is based, has changed considerably and the employer is unable to perform the labor contract.

But before laying off any employees, the employer shall make an explanation to the labor union or to all its employees 30 days in advance. After it has solicited the opinions from the labor

union or of the employees, it may lay off the number of employees upon reporting the employee reduction plan to the labor administrative department.

Replacing Living and Medical Allowance with Severance Pay

The Regulation specifies that the employer must provide living and medical allowance when the labor contract is duly terminated. However, the Law replaces the concept of living and medical allowance with severance pay, which has a wider applicable scope than living and medical allowance. Moreover, the Law also set a limit on the maximum amount of severance pay.

New features of the Law

Aside from the aforementioned differences, the Law has a few noteworthy features. For example, it states that the persons subject to non-competition shall be limited to senior managers, senior technicians, and the other employees who have access to trade secrets and sets a cap on length of the non-competition period. In addition, it increases the price the employers need to pay if they violate the Law. This is mainly reflected in the following aspects:

1. If an employer concludes a written labor contract with an employee more than one month but less than one year after the date on which it started using him, it shall pay to the employee his monthly wages at double amount.
2. The labor administrative department shall order the employer to pay the remunerations, overtime remunerations or economic compensations within a time limit if it fails to pay such payments in time and in full. If the remuneration is lower than the local minimum wage, the employer shall pay the shortfall. If payment is not made within the time limit, the employer shall be ordered to pay an extra compensation to the employee at a rate of no less than 50 percent and no more than 100 percent of the payable amount.
3. If an employer violates this Law by dissolving or terminating the labor contract, it shall pay compensation to the employee at the rate of twice the severance pay.

Conclusion

After careful examination of the above mentioned information, it is very clear that the new law has imposed more limitations on the conclusion and termination of labor contracts; thereby

establishing a new system for economic layoff and severance pay and narrowing the application of non-competition clause. All these changes aim to better protect employees' rights and interests and balance the relations between employees and employers. Employers must be well aware of these changes as the costs of breaching the law are even higher than before.

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