

03/03/2021

Keep away from employees with “bad faith”

Case study

Ms. Li joined the Company X in January 2019 in the role of Sales Director. A three years' labor contract was concluded between the parties, including a probation period of three months. The employee's performance failed to meet the Company's requirements in the first two months.

During the third month of the probation period, upon submission of the medical certificate issued by the hospital, the employee applied for 12 days' sick leave. Before the expiration of her probation period, she submitted a new medical certificate applying for an additional 14 days' sick leave.

In such context, during the abovementioned sick leave period, the Company decided to early terminate her labor contract on the ground of the employee's failure to meet the recruitment conditions during the probation period as provided in Article 39 of the PRC Labor Contract law.

Upon the receipt of the dismissal notice, Ms. Li replied in written indicating the following points:

- She was entitled to a 3 months' medical period according to the PRC laws and it was illegal to early terminate her labor contract during her sick leave;
- She could accept the dismissal if the Company agrees to pay her an economic compensation of RMB 100,000.00, which was more than 6 times her monthly salary;
- She threatened to report the non-compliance aspects of the Company to the competent authorities and to initiate a labor arbitration proceeding against the Company on the ground of illegal dismissal, should the Company reject her claim.

The Company refused to bow to her threats, so the employee engaged in labor arbitration proceeding with the local arbitration committee, asserting the illegal termination of her labor contract and claiming for the double economic compensation.

At the beginning, the Company was in an adverse position as the employee understood very well the “rules”, and clearly knew how to use the legal means to cover up her dishonest intention. Fortunately, the labor arbitrator recognized this employee and disclosed to the Company that she had filed more than 3 labor arbitration proceedings with the same labor arbitration committee in the previous 2 years, all the cases having more or less the same “scenario”.

This important information was used in the negotiation with the employee. The Company clearly indicated to her that it will keep fighting in order to protect its legal interests and, if need be, to have this case accessible to the public.

Under such circumstances, the employee has reached the following settlement with the Company:

- The employee confirmed that the labor contract was terminated through mutual negotiation;
- The employee agreed to withdraw the labor arbitration as long as the Company pays the social insurance for the month of termination.

This settlement agreement was signed in triplicate under the witness of the labor arbitrator and one copy was submitted to the labor arbitration committee for record.

By virtue of the settlement agreement signed, the Company successfully closed this file and avoided the subsequent costly and time-consuming legal proceedings.

DS Comments:

The phenomena of employees abusing the litigation rights granted by Chinese laws and regulations to obtain “personal benefits” seems to have been regularly increasing.

For instance, it haven identified the following common scenarios:

- 1) The employees deliberately delay the conclusion of their written labor contract in order to claim double salaries¹;
- 2) The employees require the employer to pay the salary in cash and not to subscribe to the social insurance for them. Later on, they terminate the labor contract and ask for the economic compensation on the ground of the employer failing to pay the social insurance in accordance with the law;
- 3) The employees start to take sick leave continuously right after being hired so as to obtain the salary payment without providing any work and, then, pushing the employer to adopt an “illegal dismissal” for which they could get an economic compensation.

The case presented here falls into the third scenario. As a matter of fact, the Company was facing a high risk of being judged for illegal termination because it was sensitive to dismiss an employee during her sick leave, unless any serious misconduct of the employee was identified. Furthermore, in our case, the evidences collected by the Company were not sufficient to prove any serious misconduct. Hence, if the provisions of the Labor Contract Law would have been applied literally, the employee’s intention of obtaining the economic compensation would have been probably achieved.

Obviously, such behaviors have seriously affected the labor market and led to the increase of labor disputes, drawing the attention of the relevant authorities, some of which have taken

¹ Article 82 of the PRC Labor Contract Law: “Where an employer fails to conclude a labor contract with an employee for the period of more than one month but less than one year from the date of commencement of work, the employer shall pay the employee double salaries each month [...]”

some actions to equally protect the legal rights and interests of the employees and the employers.

For instance, Huzhou South Taihu People's Court of Zhejiang Province (the "**Court**") released the *Implementing Opinions for the Formation of Directory of Abnormal Labor Rights Protection* on April 30, 2020, setting forth the circumstances² under which an employee may be recorded on a directory of abnormal labor rights protection (the "**Directory**").

Once recorded on the Directory, the individual may face the following consequences:

1. more difficulties when seeking a job, as the Directory will be disclosed to the local labor agencies;
2. in case of a new labor arbitration or litigation proceeding filed, the labor arbitrator or the judge will review the case more strictly;
3. a punishment imposed by the local court in case of a lawsuit is brought with malicious intention.

The Court also provided the typical case where an employee, within a 3 years-period, was found of having initiated 22 labor arbitration applications and engaged in 4 lawsuits, as well as filed frequent complaints against her previous employers before the local labor bureaus. Based on the above facts, the employee was finally recorded on the Directory and her claim for unreasonable economic compensation in a new labor dispute case was rejected by the court.

It is worth noting that, up until now, this Directory has been applicable only in Huzhou, Zhejiang Province; while, per our knowledge, no other cities have released a similar directory.

We have also realized that when these employees having abusive behaviors raise their unreasonable claims for payment against the employers, the claims are often accompanied by implied threats from the employees regarding some misconducts of the employers in their business activities. Since a significant number of companies are not fully compliant and, considering the time and costs of the labor arbitration and litigation proceedings, most of them end up paying an amount of economic compensation to the employees which is much higher than as calculated according to the labor law.

In light of this, to better protect their legal interests and keep away from the abusive employees, companies are recommended to be more cautious by paying higher attention to the employees' background check. It is also suggested to hire professional assistance during the dismissal process in order to avoid falling into the traps of these abusive employees.

² (1) *Within three consecutive years, the same individual has filed more than 10 complaints with the same labor protection supervision department, or more than 20 with the labor protection supervision departments of the municipality;*

(2) *Within three consecutive years, the same individual has engaged in more than 5 labor arbitration proceedings with the same labor dispute arbitration committee, or more than 7 labor arbitration proceedings in the municipality;*

(3) *Within three consecutive years, the same individual has brought more than 3 lawsuits regarding labor dispute before the same people's court, or more than 5 lawsuits regarding labor dispute in the municipality; etc...*

Tips for DS Clients:

We highly advise taking into consideration the following points when hiring and dismissing employees.

● **Before hiring and signing the labor contract**

The companies shall carry out a full background check on the selected candidates before hiring:

- 1) Require the employee to provide the necessary documents for background check, including:
 - The employee's diploma;
 - The employee's health examination report;
 - The employee's resignation/labor contract termination proof issued by the previous employer;
 - The employee's CV including the work experience since his graduation from the university, which shall be signed by the employee.(All the documents provided for check shall be original, and the companies shall keep a copy).
- 2) Require the employee to sign a statement, which shall indicate the following information and representations:
 - All the documents provided by the employee for the job application are true and valid;
 - A list of the employee's claims against any of his previous employer(s) either by negotiation or by legal actions (labor arbitration or litigation), if any, as well as the corresponding results of the claims;
 - The employee guarantees the authenticity of his statement. In case any false declaration is discovered by the company at any time, the employee will be deemed to have seriously violated the internal rules and the labor discipline, which will entitle the company to immediately terminate his labor contract without paying any economic compensation.
- 3) Contact the employee's previous employer(s) to check his work experience, to verify the occurrence of any dispute and the reason for the termination of the employment.
- 4) Check on the website of "China Judgments Online" (<https://wenshu.court.gov.cn/>) if the employee has been involved in litigation cases.
- 5) Refuse abnormal requests of the employee, such as the proposal of non-payment of the social insurance; and pay attention to the employee's abnormal behavior, such as reluctance in signing the labor contract in due time.

● **Before terminating the labor contract**

Once any labor dispute occurs with these abusive employees, and as far as the law provides limited circumstances for an employer to legally dismiss an employee, it is suggested to:

- 1) Formulate with the in-house lawyer or an external law firm a proper dismissal strategy based on the specific situation of each employee. For instance, if an employee has made a false declaration during the job application, the company may consider a dismissal on the ground of serious violation of the internal rules, which constitutes a lawful termination as per the labor law.
- 2) Collect all the relevant evidences before sending the dismissal notice to the employee because, in practice, the evidences collected afterwards cannot be used to justify the dismissal.
- 3) Keep consistent during the whole process of negotiation with the employee and show the company's determination by persisting in the litigation proceeding, if need be, regardless of any threat from the employee.

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