



Operations in China? Employers Should Not Terminate an Employee in Haste

Insights

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Fisher Phillips attorneys had the pleasure and privilege of presenting with Jingbo Lu, Esquire, a lawyer from China, at a recent International Employers Forum event in Washington D.C. Jingbo kindly accepted our invitation to answer some of questions about employment relationships in China. More particularly, we will delve into how employment relationships may be legally terminated in China, a jurisdiction that requires employers to have cause to terminate an employee.

Jingbo, welcome to the Cross Border Employment Blog. We would love to have you tell us more about the employment relationship in China.

Q: What are the basic types of contract that are lawful in China, and are there any particular provisions that a legal contract must contain?

A.: Generally speaking, there are three types of employment relationships an employer can enter into when hiring an employee: full-time employment, part-time employment and labor dispatch (or “agency”). Three types of contract could be formulated for full-time employment based on the term of contract, which are fixed-term contract, open-ended contract and project-based term contract. An employment contract shall contain the following essential contents: including basic information of both employer and employee, term of contract, job description and work location, working hour, break time and vacation, remuneration, social security and work safety and health.

Q: Is it necessary for employers to have their own set of rules and regulations, and are there local labor laws and regulations that could impact the terms of an employment relationship?

A: It is quite necessary for employers to have their own work rules and regulations. For the reason that the purpose of work rules is often to manage the affairs of the employees as a group. Accordingly, though a valid work rule must go through the democratic procedures and obtain the approval of the employees’ congress (body of worker representatives providing democratic management of the enterprise), the rule maker is the employer and it is not necessary to repeat the democratic procedures whenever employees enter or leave. By contrast, the employer concludes an employment contract with the employee directly and the contents of the contracts are usually defined for each individual employee.

In China, regarding the legal priority of the employment contract and work rule, the employment contract outweighs the work rule due to its individuality. If the work rule formulated by an employer conflicts with the contents of a contract, the court will apply the stipulations in the contract with the priority at the employee's request.

Q: In what circumstances may an employer terminate an employee?

A: ***Basically, the employer can terminate an employee with or without a notice period, by mutual agreement, by mass lay-off procedure, due to expiration of contract, or due to loss of subject eligibility. Besides termination by mutual agreement, an employer must terminate an employee under circumstances required by law. For example, an employer can terminate an employee with a notice period (30 days) only when:***

- 1. the employee is sick or is injured for a non-work-related reasons, and is unable to take up his or her original post after the expiration of his or her prescribed medical treatment period, nor is he or she able to take up another post assigned by the employer;***
- 2. the employee is incompetent to his or her post, and is still so after being trained or being transferred to another post;***
- 3. the objective circumstance on which the conclusion of the employment contract is based has changed so considerably that the employment contract has not been able to be performed. Moreover, no agreement on the amendment to the employment contract can be reached after negotiation between the employer and the employee.***

An employer can terminate an employee without a notice period only when:

- 1. it is proved that the employee does not meet the recruitment conditions during the probation period;***
- 2. the employee severely violates the employer's work rules;***
- 3. the employee causes severe damage to the employer because of his or her serious neglect in duty or malpractice;***
- 4. the employee simultaneously establishes an employment relationship with other employers and may seriously affect the performance of his or her own job, or he refuses to make a correction though the employer has pointed it out;***
- 5. the employment contract is invalidated due to the fact that it is concluded or amended by the employee's deception, coercion or taking advantage of the employer's jeopardy and thus in contrary to the employer's true will;***
- 6. the employee is subject to criminal liabilities in accordance with the law.***

Q: How can the employment relationship be terminated by an employee?

A: ***An employee can terminate the employment relationship with or without a notice period. An employee may unilaterally terminate an employment relationship for any reason, provided that***

a 30-day written notice (or a 3-day notice during probation) is given to the employer in advance. An employee can also terminate the employment relationship at any time upon the employer's fault under any of the following circumstances:

- 1. failing to provide occupational protection or working conditions as agreed upon in the employment contract;***
- 2. failing to pay remuneration on time and in full;***
- 3. failing to pay the social insurance premiums for the employee in accordance with the law;***
- 4. having work rules and regulations that are contrary to the law, thereby infringing the rights and interests of the employee;***
- 5. the employment contract is void for which the contract is concluded against a party's true intention by fraud or duress, or by taking advantage of the other party's difficulties;***
- 6. other circumstances in which an employee may have the right to terminate the employment as provided by law and administrative regulations.***

In certain situations, the employee can terminate the employment relationship without informing the employer if the employer forces the employee to work by violence, threat or illegal restriction of personal freedom, or if it gives instructions that are contrary to laws and regulations or forces the employee to perform hazardous operations that endanger the latter's personal safety.

Q: What are the legal consequences or remedies for the employer or employee who terminates an employment contract illegally?

A: If an employee terminates an employment contract illegally by violating the obligation of notice period or the agreement on the term of service, the employee shall be liable for compensation, covering the recruitment cost paid by the employer, the training fee paid by the employer and direct economic loss of the production, operation and work.

If an employer terminates an employment contract illegally, for example, terminating without substantive grounds or procedural grounds, the employee is entitled to demand reinstatement or compensation. If the employee demands the reinstatement, the termination will be compulsorily revoked and the employer must back pay the remuneration and social insurance premiums that the employee would otherwise have received during the unlawful termination of employment contract. If the employee does not demand the reinstatement or if the reinstatement is impossible, the employer shall pay compensation at double the cost of severance pay.

Q: Are there any particular issues that have been highlighted in recent cases, and common mistakes made by employers seeking to end an employment relationship?

A: Social media in the workplace is widely discussed in recent cases. An employee in an express company was found inciting other employees to gather and make disturbances in the employees' Wechat group. The employer dismissed the employee due to serious violation of work rules. The employee argued that he was discussing about the proposals of safeguarding their legal rights and the content was in the scope of free speech. The courts held that the employee violated the duty of loyalty and obedience, and the speech content beyond the scope of free speech may cause severe social consequences. The social media content was definitely inappropriate and the dismissal was upheld.

Termination without substantial or procedural grounds are common mistakes made by employers which usually leads to illegal termination. For example, while an employer terminates an employee due to serious violation of work rules and regulations, mistakes are usually found that:

- 1. the work rules and regulations are not approved via democratic procedure or are not appropriately punished;***
- 2. the misconduct is not specified as a serious violation in the work rules and regulations;***
- 3. the classification of the conduct as a serious violation is not rational;***
- 4. it is not fully proved that the employee has committed the serious misconduct;***
- 5. the employer has not performed his obligation to inform the trade union of the decision of termination before each party has filed a lawsuit to the court.***

Thank you, Jingbo. From what you have told us, work rules are very important in China, and although there are procedures regarding the introduction and revision of work rules, employers often slip up and invalidate a termination by failing to follow the democratic procedure to have them approved, or by failing to include all types of serious misconduct in the work rules. So, international employers need to learn the lay of the land, and make sure they follow all the local laws and regulations – the consequence could be the reinstatement of an employee you no longer want.

International employers know that there are few countries where “at-will employment” is permitted and in most countries employees may only be terminated for cause. Jingbo has outlined for us the circumstances when an employment relationship may be terminated, and has reminded us of the common mistakes employers make. Labor and employment laws differ greatly from country to country, but there are some good practices that hold everywhere: employers should maintain a policy of documenting all issues that arise in any employment relationships, investigate all allegations of misconduct, and take advice on the local laws and regulations.