



Client Alert

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Shanghai Court Adjusted Tones in Implementing Labor Contract Law

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From the perspective of human resources management, the Chinese Labor Contract Law poses two major problems: one is the complex democratic process of making corporate rules; the other is the increased instances where the employee can easily become the permanent employee and the term of his/her employment agreement is open-ended.

Early in 2009, Shanghai People's High Court started to signal different tones in implementing the Chinese Labor Contract Law. The tones can be

understood to make the Chinese Labor Contract law less onerous to companies to a certain extent. Such tones are reflected in a judicial document called "Opinions on Several Issues in Application of the Labor Contract Law"关于适用《劳动合同法》若干问题的意见(沪高法[2009]73号)(the "Opinions"), which was issued in March 2009 by the High People's Court, the highest level court in Shanghai. For sensitive reasons, the Opinions were not officially released. However, the Opinions are widely circulated

online, which can be viewed at least as an indication of local judicial tendency in adjudicating labor disputes.

I. Corporate Rules and Policies

Under the Labor Contract Law, the corporate rules and policies are not binding on the employee if not approved by the trade union or employees' representatives through a process of equal consultation. If an employee commits misconduct, the company has no right to terminate the employment agreement with the employee unless the misconduct seriously violates the corporate rules and policies. If the corporate rules and policies are not binding, the company will not be able to terminate the employment on the basis of serious violation of corporate rules and policies.

However, the Opinions offer a new tool for the company to take disciplinary actions including termination even if the corporate rules and corporate policies are not binding on the employee. Such tool is contractual provisions. According to the Opinions, the employee has the obligation to comply with the employment agreement. Such obligation is derived from the principle of good faith. Even if the corporate rules and policies are not binding, the company may invoke the provisions of employment agreement to take disciplinary actions.

II. Employment with an Open-ended Term

With permanent employees, the company does not have the chance to discharge employment through expiration of the

employment agreements. Under the Labor Contract Law, the company does not have the right to terminate an employment agreement unless the company can prove existence of a terminating event permissible under the same law. Otherwise, the employee can seek reinstatement or claim damages. Often, reinstatement is used as the leverage on the part of the employee to seek high settlement compensation from the company.

Regarding the open-ended term, the Opinions clarify that the employee is not guaranteed an open-ended term after the second round of signing (or the first time renewal of) the employment agreement. In other words, the company may let the employment agreement as renewed for one time expire without the second renewal. This means that the company has a chance to evaluate, before expiration of the employment once renewed, whether to renew for the second time to make the employee permanent, or simply let the employment expire and pay the discharged employee with the mandatory compensation.

Furthermore, according to the Opinions, the company does not have the duty to enter into the open-ended term employment agreement unless the employee so requests. If no such request is made, a fixed-term employment agreement, if signed, is binding upon both parties.

The Opinions further specify that the fixed-term as agreed under the employment agreement shall be the only basis for calculating the working years for purposes of determining whether an open-ended term is a must. The statutory requirement for extension of employment to accommodate the mandatory period of medical care, pregnancy, confinement, nursing period and so on plays no role in determining issues of the open-ended term under the Labor Contract Law.

Conclusions

The Opinions can be understood as Shanghai version of the Labor Contract Law, which exhibits efforts to make the Labor Contract Law less onerous to companies registered or operating in Shanghai. Given the tones of the Opinions,

companies in Shanghai may try to insert some of the corporate disciplinary rules into the employment agreement so as to facilitate the human resources management. It will also be easy for human resources managers to manage the rhythm and process of execution of open-ended term employment agreements.

The Opinions totaling 22 articles are quite comprehensive. It also elaborates on de facto employment, standard compensation in lieu of notice, return of property by the employee, training and the contractual term, damages for wrongful termination, under-payment of social security contribution, non-competition, work-related injury, continuous working years. Please contact the authors of this alert for further details.

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