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Retroactive Signature of the Labor Contract

Case Presentation:

Mr. Xia started to work for Company X (the “**Company**”) on October 8, 2020 without the conclusion of a labor contract. On January 26, 2021, the Parties retroactively signed a labor contract, covering the period from October 8, 2020 to October 7, 2021.

Mr. Xia departed from the Company on January 30, 2021. Afterwards, he filed a labor arbitration, claiming for the double salary compensation for the period from November 8, 2020 to January 25, 2021 on the grounds of the non-conclusion of the labor contract. His claims were fully dismissed by the labor arbitration committee.

Mr. Xia then brought the lawsuit before the people’s court. During the hearing, Mr. Xia asserted that the Company, at the stage of labor arbitration, had already confirmed the facts that the labor contract was retroactively signed, and such behavior apparently was against the employer’s mandatory obligation of concluding the written labor contract with the employee within 30 days since the commencement of employment as provided by laws. Therefore the Company should be obliged to pay him the double salary for its non-conclusion of the written labor contract.

The Company applied to dismiss Mr. Xia’s claims by raising the defenses that although the labor contract was retroactively signed, the duration had covered the whole employment period and the relevant rights and obligations had been agreed between the Parties, thus the punishment should not apply to it.

Courts’ Opinions:

Both the courts of first-instance and second-instance supported Mr. Xia’s claims and hold the same opinion as follows:

According to the *Labor Contract Law*, it is a mandatory obligation for the employer to sign the labor contract within 30 days from the date when the employee commences the work, failing which, the employer shall pay the employee the double monthly salary from the date immediately following the expiration of the above-mentioned 30 days until the conclusion of the written labor contract, up to one year. The purpose of such legal requirement is to stabilize the labor relationship and better protect the parties’ lawful rights.

In this case, the company's behavior of retroactively signing the labor contract actually infringes Mr. Xia's rights and is against the spirit of the legal provision. Thus, the Company shall be obliged to pay the double monthly salary to Mr. Xia for the period of non-conclusion of labor contract, which is from November 8, 2020 to January 25, 2021.

DS Comments

According to Article 82 of the *Labor Contract Law of the PRC*, where the employer fails to conclude a written labor contract with the employee within one month from the date of the commencement of the employment, the employer shall pay the employee twice his monthly salary each month during such period of non-conclusion of labor contract until the expiration of one-year period. Therefore, in order to avoid paying twice the monthly salary when the actual signing date of the labor contract is beyond such one-month period, some employers choose to date the labor contract retroactively. Hence, here comes the question whether the employer can actually be exempted from the punishment of paying double salary by dating retroactively the employment contract.

In practice, there exists two different judicial opinions.

Opinion 1: The retroactive signature of the labor contract is based on the mutual agreement between the parties, which can be deemed as the employee's forgiveness for the employer's faults and his waiver of the right of claiming the double salary.

Opinion 2: The retroactive signature of the labor contract cannot be a legal remedy for the failure of concluding the written labor contract within the legal time limit. Thus, it shall not affect the application of the double salary punishment on the employer.

According to our legal research, the people's courts in many cities/provinces stand on Opinion 1, such as Beijing¹, Shenzhen², Guangzhou³, Suzhou⁴, Jiangxi⁵ province and Sichuan Province⁶ where some local regulations/official interpretations have been promulgated on this matter. In those cities/provinces, the employee's claims of the payment of double salary are dismissed in principle, unless the employee can prove that the retroactive signature of the labor contract is against his true willingness, such as under the employer's fraud or threats.

Despite the above, we also noted that some other cities/provinces stand on Opinion 2, for example, Zhejiang Province. The *Answers to Several Questions in the Trial of Labor Dispute Cases by the First Court of Civil Trial from Zhejiang High People's Court* clearly provide that the retroactive signature of the labor contract cannot exempt the employer from paying the double salary to the employee.

¹ *Minutes of the Seminar on the Application of Law in Labor Dispute Cases (II)*, jointly released by Beijing High People's Court and Beijing Labor Dispute Arbitration Committee, effective on May 7, 2014.

² *Notice on Issuing the Judgment Guidelines of Shenzhen Intermediate People's Court on the Trial of Labor Dispute Cases*, released by Shenzhen Intermediate People's Court, effective on October 22, 2015.

³ *Minutes of the Seminar on the Labor Dispute Cases*, jointly released by Guangzhou Labor Dispute Arbitration Committee and Guangzhou Intermediate People's Court, effective on May 27, 2011.

⁴ *Discussion Minutes of the Meeting of Judges from Forth Court of Civil Trial of Suzhou Intermediate People's Court*, released by Suzhou Intermediate People's Court, effective on September 29, 2015.

⁵ *Notice on Issuing the 'Answer to Several Questions Regarding Handling Labor Dispute Cases (Trial)'*, jointly released by Jiangxi High People's Court and Jiangxi Human Resource and Social Security Department, effective on May 9, 2020.

⁶ *Notice on Issuing the Answers to Several Questions in the Trial of Labor Dispute Cases*, released by the first court of civil trial from Sichuan High People's Court, effective on January 15, 2016.

As far as Shanghai is concerned, although no legal provision regarding this issue has been released in Shanghai so far, our case study shows that the judicial opinion tends to stand on Opinion 2.

DS Suggestions

It is strongly recommended to the employers to strictly implement their employment process, which shall include the signature of the labor contract within the legal time limit.

In case a labor contract is not signed within 30 days after the commencement date of the labor relationship, the employer could consider negotiating with the employee to have the labor contract retroactively signed. In order to reduce the legal risks in particular in those cities/provinces where no legal provision has been promulgated to support the Opinion 1, the following recommendations are to be considered:

1. The retroactive signature of the labor contract shall be based on the friendly negotiation between the employers and the employees. And the employers shall be aware to keep the proofs regarding the negotiation process such as email exchanges.
2. The commencement date indicated in a labor contract retroactively signed shall be the actual joining date of the employee.
3. It would be better if it could be expressly indicated in the labor contract that: i) the conclusion of the labor contract is based on the mutual agreement between the parties and confirming their true willingness and ii) the employee is fully aware of his rights arising from the delayed conclusion of the labor contract and agrees to waive such rights.

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