

Things need to know on payment of double salary



CASE PRESENTATION

Ms. ZHANG joined Company X (the “Company”) on July 2, 2018 and concluded a labor contract with the duration from July 2, 2018 to July 2, 2020.

On August 31, 2020, two months after the expiration of the labor contract, the Company started to negotiate with Ms. ZHANG for the renewal of her labor contract and sent her the renewal agreement for signature. Ms. ZHANG refused to sign but raised some requests on the increase of her salary. Starting from September, the Parties have been negotiating on the terms and conditions for the renewal for several times while no consensus could be reached.

On December 1, 2020, the Company sent an official notice to Ms. ZHANG by proposing an additional performance bonus as a compromise. Ms. ZHANG refused again and insisted on the increase of her salary.

After further several rounds of communication which failed, the Company had no alternative but to terminate the labor relationship by a formal notice on January 12, 2021.

Ms. Zhang filed a labor arbitration claiming for the double salary compensation for the period from August 3, 2020 to January 12, 2021 on the grounds of non-conclusion of the labor contract (around 5.5 months). The labor arbitration committee only supported one month’s double salary as compensation (from August 3 to August 30) while dismissed the remaining request.

As Ms. ZHANG was not satisfied with the arbitration award, she then brought the lawsuit before the people’s court for the part of the salary compensation dismissed by the labor arbitration committee.

COURTS’ OPINIONS:

The people’s court held the arbitration award with the following opinion:

According to the facts proved, despite the expiration of the labor contract on July 2, 2020, Ms. ZHANG kept working for the Company, which shall be deemed as the establishment of the factual labor relationship between the Parties.

The Company sent the renewal agreement to Ms. ZHANG for her confirmation on August 31, 2020, later then, several rounds of negotiation have been carried out between the Parties by emails during the following months. Thus, as it is fully proved that the Company has performed its negotiation obligation in good faith while the failure was caused by Ms. ZHANG’s unilateral refusal, her claim of double salary compensation for the period from August 31, 2020 to January 12, 2021 shall not be supported.

DS COMMENTS:

According to the *Labor Contract Law* and the *Regulations on the Implementation of Labor Contract Law*, the employer shall end the employee’s labor relationship in writing and pay the salary according to the employee’s actual work if the employee, upon the employer’s notification, refuses to sign a written labor contract within one month since the commencement of employment. Otherwise, the employer shall pay the double salary from the second month until the conclusion of the written labor contract, up to one year.



When it refers to the renewal of labor contract, the judgment on the period during which the payment of double salary shall apply varies from one city to another.

As far as Shanghai is concerned, the *Opinions of Shanghai High People's Court on Several Issues relating to the Application of the Labor Contract Law* ("Shanghai Opinion") provides its guidance based on the following two criteria: (1) whether the employer has fully negotiated with the employee honestly and in good faith; (2) whether the employee has refused to sign the renewal agreement.

Firstly, the employer can legally end the labor relationship by a written notice and by the payment of severance in case the employee refuses to sign the renewal agreement despite the notification and communication by the employer in good faith. In addition, it shall be deemed as the employee's unilateral ending of the labor contract if the employee neither signs the renewal agreement nor performs the work, which will not trigger any severance pay.

Secondly, if the employer has already performed its communication obligations with the employee in good faith, the double salary will only apply to the period starting from the second month following the expiration of the labor contract until the day when the employer started the negotiations of renewal agreement in good faith.

However, the legal practice in Beijing is quite different, the period during which the double salary shall apply starts from the day following the expiration of the labor contract and ends on the conclusion of the renewal agreement. One-month grace period does not apply for the renewal of labor contract and the good faith of the employer for the negotiation of the renewal agreement does not fully count.

DS SUGGESTIONS

It is strongly recommended to the employers to perfect their employment process, which shall include the signature of the labor contract with the employees on board within one month.

Furthermore, the employer shall review the expiration of the labor contract of each employee on regular basis and shall conduct the renewal before the expiration.

In addition, if a labor contract extends automatically at its expiration due to some legal situations (e.g. maternity leave, lactation period and medical treatment period etc.), it is recommended to the employer to send a written notice to the employee stating the reason and duration of extension in order to avoid the double salary payment.

In case the labor contract has expired when it is discovered by the employer, the employer shall carry out the signature of the renewal agreement with the employee as soon as possible. While no consensus can be reached through negotiations between the parties, the employer should end the labor relationship timely.



For any additional information
please contact:

DING Laura
Associate - Shanghai Office
dingyu@dsavocats.com

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