

bargain for a liquidated damages clause in your employment contract

Description

Very often, foreign employees feel screwed by China labor laws in the case of labor dispute with their companies.

A typical case will be like this: an expat employee with a high monthly salary well above RMB 23,375, is unlawfully dismissed lately before expiry of the one year labor contract term, say with another two or three months left. Now, the company or employer agrees to pay the employee an amount of severance compensation equal to one month salary. The employee does not want to accept the compensation, instead, insisting on continuous performance of the labor contract to its end.

Now what is the best option for the employee? Accept the severance pay and go home or fight a labor case with the company hoping for more benefits?

The answer is accepting the pay and go home. This will more than often upset the foreign employee. But this is in China.

Under China Labor Law and China Labor Contract Law, in the case of unlawful termination of employment contract, the employee will be entitled to claim damages which is two times the amount of economic compensation. According to Article 47 of China Labor Contract Law, economic compensation is paid based on the the number of years worked with the employer at the rate of one month salary for each full year worked. Any period of not less than six (6) months but less than one (1) year shall be counted as one year. It is further provided in this Article that, if an employee's monthly salary is greater than three times the average monthly salary of the city (e.g. Shanghai) in the previous year, monthly salary for calculating the economic compensation shall be three times the said average monthly salary.

As per the rules above, this employee will be only able to get an amount of damages equal to 2X three times the average monthly salary in Shanghai in 2010. The average salary is RMB 3896, three times which is RMB 11688. Therefore, the damages receivable by the employee will be RMB 23375.

Assuming the monthly salary of the dismissed expat employee is RMB 35,000 in the hypothetic case, with the company's offer of additional one monthly salary presented before him, even though he feels humiliated and angry about the dismissal, there is simply no better choice than accepting the employer's offer. Many in similar situation are scrambling for legal help from local lawyers in order to fight for justice only to find that there is no better option at all.

The lesson an expat employee shall draw from the assumed case is that in order to protect himself from such unfair treatment, it is important to bargain for a liquidated damages clause in your labor contract, providing more compensation than what is offered by the laws in the case of unlawful termination by the employer of your labor contract.

Though it is not easy for many to bargain for such a clause, it is for sure that there are many

companies that may be willing to be so generous as to meet that demand in order to get top talent.

We are happy to represent foreigners who are relocated to China to negotiate their China labor contract with their employers to ensure best protection for them while working in China.

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