

dependent personal service or independent personal service?

Description

There is a question in my mind for long, or I should rather say it is more of a contradiction or confusion rather than a question.

For expats working in Shanghai as chief or general representatives in representative offices, in the case of employment disputes with the rep office, their relationship with the rep office is not regarded as the normal labor relationship under Chinese labor laws, and instead, it has been established in Shanghai judiciary system that for the representatives not hired through the designated third party employment agency, their relationship with rep office is more of an independent contractors (or in Chinese pinyin “lao wu”, equally, independent personal service) rather than the typical labor law relationship. Consequently, the representatives will not be able to claim for the economic compensation (one month salary for every one year employment) or severance pay from the rep offices, a substantial risk for expats working as representatives at rep offices.

However, ironically, while the Shanghai courts refuse to recognize the rights and benefits of these expat representatives that should otherwise be available under Chinese labor laws, the income received by those representatives are still taxed at the rate applicable to salaries and wages rather than at the rate applicable to income derived from independent personal services. Salaries, wages and other similar remuneration is always regarded as income derived from dependent personal services, equivalent of employment and labor services.

The contradiction or confusion arising from the different interpretations and treatments of services offered by expat representatives to representative offices is very harmful and detrimental to expats working at rep offices, leaving expats unfairly dismissed by the rep offices or parent companies have little to claim from their employers. This shall alarm foreigners that are appointed to serve as chief or general representatives at a rep office in China. Those foreigners should have a well-written service contract with the rep office or the parent company addressing the risks and concerns of working in China in such capacities.

Again, as I have always called, China should abandon its biased practice against foreigners working in China. A foreigner shall be treated equally as a Chinese national in work place so long as they offer the same service and do the same job or work. A foreigner should not be deprived of his or her basic labor benefits only because he or she is foreign.

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