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Company Relocation and Avoiding Connected Labor Disputes

1st HR Summit South China

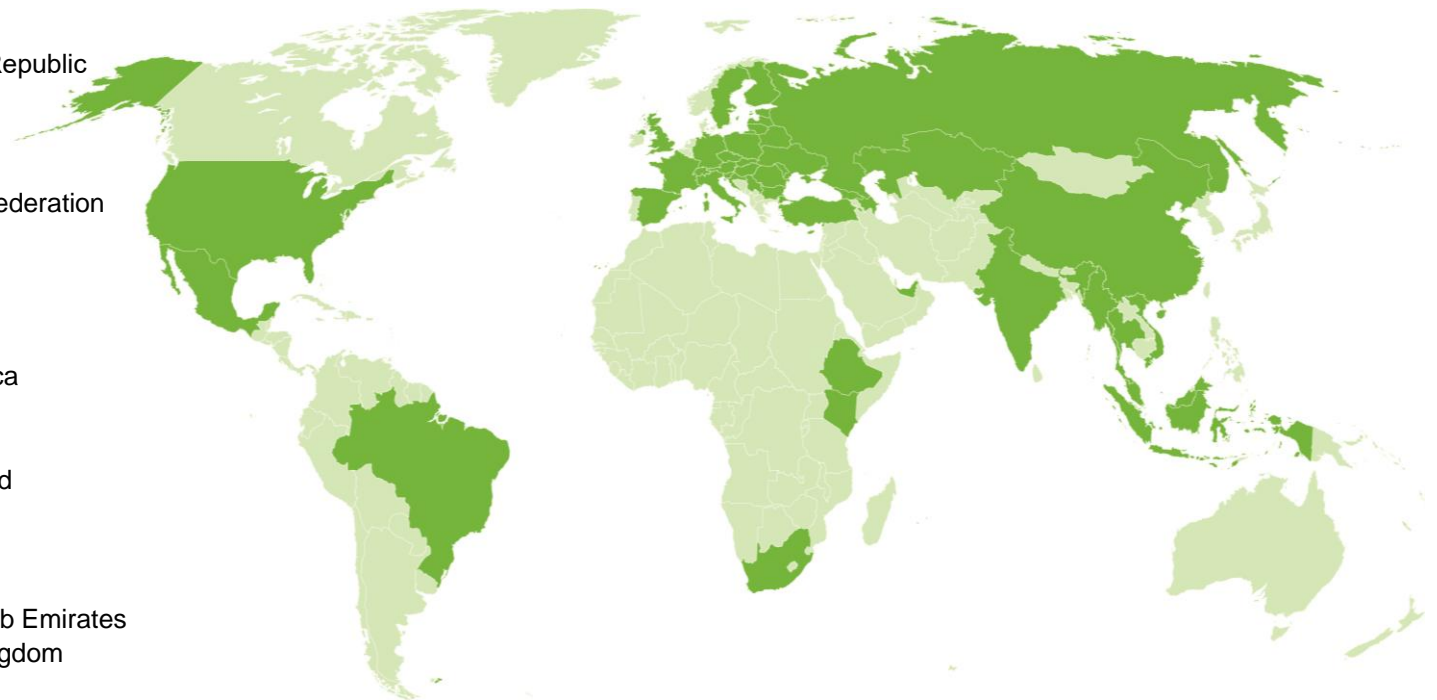
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- | | |
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Relocation, Employment Termination and Severance Pay

Key Legal Questions in the Context of Relocation:

- Whether the original contract can still be performed
- Whether the employment contract shall be changed
- Whether the employee is entitled to refuse to move, to terminate the employment and to demand the payment of severance pay

Major Changes to Objective Circumstances

Key Provisions of PRC Labor Contract Law:

Article 40:

An Employer may terminate an employment contract by giving the worker 30 days' prior written notice or giving him/her one month's wage in lieu of notice if:

第四十条有下列情形之一的，用人单位提前三十日以书面形式通知劳动者本人或者额外支付劳动者一个月工资后，可以解除劳动合同：

(1), (2) ...

(3) the objective circumstances relied on at the time of the conclusion of the employment contract have materially changed, making performance thereof impossible and the Employer and worker fail to reach agreement on amending the employment contract after consultations.

劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容达成协议的。

Severance Pay

Key Provisions of PRC Labor Contract Law:

Article 46:

An Employer shall pay an Employee severance pay if:

- (1) ...
- (2)...
- (3) the Employer terminates the worker's employment contract pursuant to Article 40 hereof;
- (4)...

Further Defined: Objective Circumstances

Article 26 of the *Explanation of the Ministry of Labor Concerning the Various Regulations of the Labor Law of the People's Republic of China*:

The “objective circumstances” refer to force majeure or other circumstances that cause the inability to fulfill all or part of the provisions stipulated in the employment contract, which shall include relocation of the enterprise, mergers and transfer of the assets of the enterprise. However, this term excludes the situations under which the employees are retrenched as a result of insolvency and reorganization, or serious difficulties in production and operations.

Further Defined: Objective Circumstances

- In legal practice, there is controversy about whether all kinds of relocations belongs to the criterion of “major change of the objective circumstances”
- Core issue: Whether the relocation will lead to the consequence that the contract cannot be performed continuously

More Criteria: Substantial Disadvantage

- Whether relocation will bring substantial disadvantages on employee's life and work. Aspects which shall be considered include:
 - Distance:
 - Relocation within the same city
 - Relocation from one city to another
 - Remedial Measures
 - Provision of traffic vehicles
 - Provision of traffic allowance
 - Adjustment of the working time

Relocation from one city to another

- Falls into the category of major change of the objective circumstance, which results in that the contract cannot be performed continuously
- The employer shall negotiate with the employee in respect of the change of the employment contract
- If no agreement can be reached, the employer may terminate the employment with a 30-day notice, but severance pay shall be made

Relocation within the same city

View of the Supreme People's Court:

- According to the opinion of one judge (Mr. Wang Linqing) of the Supreme People's Court, the relocation within the same city shall have no impact on the employment and the employee must follow the instruction of the employer. However:
 - The employer shall provide a traffic allowance or a shuttle bus, if relocation has lead to traffic inconvenience or increase of the traffic costs; and
 - The same city shall only be limited to the traditional old city area and shall not include those suburban districts.

Explanation of the Higher Court of Guangdong Province:

Explanation of Higher People's Court of Guangdong Province on Problems concerning Trial of Labor Dispute Cases (published on August 1, 2017) 《广东省高级人民法院关于审理劳动争议案件疑难问题的解答》

Relocation of an enterprise based on its development plan falls into the category of material change of the objective circumstances which the conclusion of the employment contract was relied on and the employer shall negotiate with the employee in respect of the change of the employment contract. If no agreement on alternation of the employment contract can be reached, the employee's for employment termination and payment of the economic compensation shall be supported. However, if the relocation has no obvious impact on employee and the employer has taken remedial measures (such as shuttle bus, traffic allowance, etc.) and the termination ground of the employee is insufficient, the employer is not liable to pay economic compensation.

Guidance of the Shenzhen Intermediate Court:

Guidance of the Shenzhen Intermediate People's Court on Trial of Labor Dispute Cases 深圳市中级人民法院关于审理劳动争议案件的裁判指引

- Where the relocation of the enterprise is within the same city, the employee's claim for economic compensation shall not be supported.
- 用人单位在深圳市行政区域内搬迁，劳动者要求用人单位支付经济补偿的，不予支持。
- Where an enterprise relocates from one city to another, the employee's claim for economic compensation shall be supported.
- 用人单位由深圳市行政区域内向深圳市行政区域外搬迁，劳动者要求支付经济补偿的，应予支持。

Case Study 1: Moving within Shanghai

An enterprise move from one district to another in Shanghai. The distance between the new and old work place is about 18 kilometers.

The employer published an announcement in advance and took some remedial measures such as providing relocation allowance, traffic allowance and shuttle bus.

Mr. Li, one of the employees, refused to move and was therefore absent from the work.

The employer served him with several notices urging him to go to work. Mr. Li failed to follow the instruction.

18 days later, the employer terminated the employment according to its internal rules.

Mr. Li filed the case with the labor arbitration commission, the courts at first and second instance successively.

Case Study 1: Moving within Shanghai - Verdict

- His claim for payment of severance pay was **denied**. The judge found:
 - Key criteria is whether the relocation will bring substantial influence and difficulties on the performance of the employment contract.
 - Relocation falls into the category of major change of the objective circumstance, but because the employer has taken remedial measures, the contract can still be fulfilled.
 - Since no substantial difficulties has brought to the employee, the latter shall tolerate the relocation

Case I: (2013)沪一中民三(民)终字第1922号

Case Study 2: From Huangpu to Baiyun (Guangzhou)

In 2014, an employer in Guangzhou planned to move from Huangpu District to Baiyun District, and issued an “Intention Letter” to Ms. Sun.

This letter states that, if the employee has no intention to move, he/she shall select the item of “unwillingness” so that the company can give a 30-notice to terminate the employment.

Ms. Sun selected “unwillingness” and terminated the employment contract without paying economic compensation.

Ms. Sun then filed the case with the labor arbitration commission and demanded the payment of economic compensation.

Case Study 2: From Huangpu to Baiyun - Decision

- The arbitration commission, the courts at the first instance and the second instance **supported** the claim of Ms. Sun.
 - Change of the working place belongs to the significant change
 - Employer and employee were unable to reach agreement in respect of the change of the working place
 - Based on the Intention Letter, it can be regarded that the employer has proposed the employment termination and the employee has agreed. Therefore, the severance pay shall be made in accordance with Article 40 of PRC Labor Contract.

Case II: (2015) 穗中法民一终字第4029号

Avoiding Legal Risks

Analyze and classify:

- Relocation from one city to another
- Relocation within the old city areas
- Relocation from the old city area to the suburban district
- Relocation from one suburban district to another

Avoiding Legal Risks

- Relocation plan
- Publication of the plan
- Seeking opinions from the employees about the relocation
- If labor contract can be fulfilled further: No negotiation in respect of the employment termination
- Serving warning letter before termination

Relocation and Merger

Basic Provision:

Article 34 of PRC Labor Contract Law:

If an Employer undergoes a merger or division, etc., the existing employment contracts shall survive and continue to be performed by the Employer that succeeded to the rights and obligations thereunder.

Relocation and Merger

- Article 26 of the Explanation of the Ministry of Labor Concerning the Various Regulations of the Labor Law of the People's Republic of China:
- The “objective circumstances” refer to force majeure or other circumstances that cause the inability to fulfill all or part of the provisions stipulated in the employment contract, which shall include relocation of the enterprise, **mergers and transfer of the assets** of the enterprise. However, this term excludes the situations under which the employees are retrenched as a result of insolvency and reorganization, or serious difficulties in production and operations.

Employment transfer to an affiliated company due to the liquidation of the original employer

- The employee is entitled to refuse to move to the affiliated company
- Economic compensation must be paid in case no agreement can be reached

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