An Analysis of the Resignation System with an Advance Notice of our Country

ANALYSE DU SYSTEME DE DEMISSION APRES UN PREAVIS EN CHINE

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Abstract: The Labor Law and EmploymentEmployment contract Law stipulate that employees can terminate all contracts of employment through an advance notice; labor administrative department provides that the contracts terminated by employees through an advance notice are limited to non-fixed term employment contracts; the administrative departments of some special industries formulate that employees are not entitled to terminate the employment contracts through an advance notice. The conflicts and contradictions among legal norms not only do harm to the unity of law, but also damage the employers' gains on long-term investments and the stability of employment relationship. A series of measurement need to be taken to solve these problems, including restricting the range of application of fixed-term contracts, adjusting the interim and long-term contracts of employment in different ways, and expanding the situations of application of shortest service term.
Key words: employees, termination with an advance notice, fixed-term contracts

Résumé: En Chine, Droit du Travail et Droit du Contrat de Travail stipule que les employés peuvent mettre fin à tous les contrats de travail après avoir préavisé, mais les réglementation de l'administration de travail stipule qu'il est limité seulement pour le contrat de travail sans délai qui peuvent être résilié après un préavis. Cependant, dans certains services adminstratifs, il est interdit que les employés résilient le contrat de travail après un préavis. Le conflit et la contradiction entre les normes juridiques non seulement compromettent sur l'unité du droit, et aussi endommagent les intérêts de l'investissement à long terme des employeurs, ainsi qu'ils nuisent à la stabilité de l'emploi. Il faut prendre des mesure à résoudre les problèmes, y compris les restrictions sur le champ d'application des contrats à durée déterminée, les ajustements différents sur les contrats de travail temporaires et à long terme, et aussi les élargissements du champ d'application des dispositions concernant la période de service minimum.
Mots-Clés: employés, résiliation le contrat de travail après un préavis, contrat à durée déterminée

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The employment lawof our country stipulates that employees are entitled to terminate all employment contracts through an advance notice of certain time span; they shall not be liable for compensation of the damage done to the employers therefor. This system has not only been self-contradictory, but also caused a series of harmful results. This paper attempts to analyze the defects and problems of this system, and put forward a countermeasure for solving these problems.

1. CONFLICTS AND CONTRADICTIONS OF THE RESIGNATION SYSTEM WITH AN ADVANCE NOTICE OF OUR COUNTRY

Article 31 of the Labor Law stipulates that "a employee who intends to revoke his employment contract shall give a written notice to the employer 30 days in advance". This article does not limit the object of termination to non-fixed term contracts. From the stipulation of the Labor Law of our country about types of contracts, fixed-term employment contracts are the normal state of employment; employers have the obligation of signing a non-fixed term contract with employees only under legal conditions[2]. Therefore, employees should be entitled to terminate fixed-term contracts and non-fixed term contracts through an advance notice. As the termination of unexpired contracts may cause damage to the employers, Article 102 of the Labor Law stipulates that "Employees who revoke employment contracts in violation of the conditions specified in this Law … and thus have caused economic losses to the employer shall be liable for compensation in accordance with the law". The implication of the stipulation seems to be very obvious; as long as employees revoke employment contracts in accordance with legal "conditions", even if "it causes losses to the employer", they shall not be liable for compensation. With regards to the issue of the employees' termination of the contracts through an advance notice, Employment contract Law follows Labor Law and provides that "an employee may terminate his employment contract upon 30 days' prior written notice to his employer" (Article 37); the employee is not liable for damages.[3]

Article 31 of Explanations of Certain Articles of PRC Labor Law by Ministry of Labor stipulates that "this article formulates the employees' right of resignation; apart from the procedures ruled by this article, no additional conditions are provided for the mployees to exercise their right of resignation. But in case of a violation of conditions specified by this law, the employees shall be held responsible". Here, "a employee gives a written notice to the employer 30 days in advance" to revoke his unexpired employment contract is both in compliance with the behavior of "exercising right of resignation" ruled by Article 31 of Labor Law, and seen as a violation of the contract for his violation of "agreements in the performance period" and held responsible. This explanation seems to be self-contradictory, but the original Ministry of Labor has actually limited the targets of resignation with an advance notice to non-fixed term contracts; it is ruled that in case a employee terminates an unexpired contract through an advance notice without proper reasons, his behavior shall be counted as a violation of the contract; he shall be held responsible and liable for compensation in case the employee causes losses to the employer. Article 33 of Opinions of Certain Questions on the Implementation of Labor Law of Ministry of Labor (abbreviated as "Opinions") has specified this definition even clearer. [4]

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[2] Item 2 of Article 20 of the Labor Law stipulates, "in case a employee has kept working in a same employer for ten years or more and the parties involved agree to extend the term of the employment contract, a employment contract with a non-fixed term shall be concluded between them if the employee so requested".

[3] Refer to Article 90 of Employment Contract Law.

4 Article 33 of Opinions of Certain Questions on the Implementation of Labor Law from Ministry of Labor stipulates that "in case a employee terminates an employment contract not in compliance with the rules of Labor Law or stipulations of the employment contract (e.g. dimission with no authorization) and causes economic losses to the employer, the employee shall be liable for compensation as ruled by Article 102 of Labor Law and Measures for Economic Compensations due to Violation or Rescission of Labor Contracts formulated by Ministry of Labor (1995)". Article 4 of the regulation stipulates that in case a employee terminates an employment contract not in compliance with the rules of Labor Law or stipulations of the employment contract and causes losses to the

Ministry of Labor is entitled to conduct an administrative explanation about questions related to Labor Law, but its explanation should first respect stipulations of the law; second, the explanation should not go beyond the stipulations of Labor Law and give extra burden to the employees, which is determined by Employees' Legal Rights and Interests Protection Principle, basic principle of Labor Law. Article 33 of "Opinions" formulated by Ministry of Labor not only goes beyond the stipulations of Labor Law, and also adds to the employees' burden and responsibility set up by Article 102 of Labor Law. According to Article 102 of Labor Law, only employees who violate terms on secret-keeping matters agreed upon in the employment contracts and thus have caused economic losses to the employer shall be liable for compensation; while Article 33 of "Opinions" stipulates that "in case a employee terminates an employment contract not in compliance with the rules of Labor Law or stipulations of the employment contract (e.g. dimission with no authorization) and causes economic losses to the employer, the employee shall be liable for compensation as ruled by Article 102 of Labor Law and About Compensation for Violating Rules of Labor Law or Employment contract formulated by Ministry of Labor (1995)". However, the original Ministry of Labor makes an explanation in violation of Article 31 and 102 of Labor Law by restricting the range of contracts that the employee is entitled to terminate through an advance notice to non-fixed term contracts, providing that employees' behavior of terminating an unexpired contract is a violation of the contract and the employees shall be held responsible. Although this stipulation made by the original Ministry of Labor is reasonable, it is a violation of Article 102 of Labor Law and not in compliance with principles of law explanation, and shall be seen as invalid.

The trouble caused by the system of the employees' resignation through an advance notice to some special industries is more salient. Five departments including Civil Aviation Administration of China (CAAC) jointly promulgated Opinion on Standardizing the Flow Management of Aircrew and Guaranteeing the Stability of Aircrew in Civil Aviation (CAAC (2005) No. 104), and it stipulates that with regards to either fixed-term or non-fixed term contracts, aviators have no right of unilateral termination of the contracts; after the formulation of Labor Law, it stipulates that except that the time is expired, aviators can only terminate the contracts with the aviation company with an agreement. The "Opinions" stipulates clearly that aviators have to be approved by the aviation companies before resigning and pay the related training expenses. If there is penalty clause in the contract, aviators should also pay penalty in accordance with the contract. This stipulation clearly rules out aviators' right of unilateral termination of the employment contract. In fact as there is a shortage of aviators in our country, aviation companies, especially state-owned aviation companies in general signs a contract of 99 years with the aviators.[5] Therefore, once an aviator enters an aviation company, he will have to serve the company all his life until retirement. The more and more intensified disputes between aviators and aviation companies, especially the recent "aviators' strike",[6] are all directly related to this stipulation.

The relationship between aviators and aviation companies is a special labor relationship. The development of aviators takes the aviation companies a long period of nurturing and training; thus, the signing of a long-term employment contract between an aviation company and an aviator is reasonable. Meanwhile, aviators are the employees of aviation companies. Their basic labor rights should be protected. When their rights related to working time, payment, etc. are violated, aviators should have the right to safeguard their own rights by terminating the contracts; moreover, even if the aviation company does not violate the rights of a certain aviator, when the aviator has served the company for a certain period of time and the training expenses spent by the company has been earned, the aviator should have

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employer, the employee shall be liable for compensation—the recruitment expenses spent by the employer ; training expenses—where both parties have agreed on certain regulations, matters shall be handled in accordance with the regulations; direct economic losses caused to the production, operation and work; other items for compensation agreed in the labor contract.

[5] Aviators sign a contract of 99 years with the aviation companies. Refer to http://www.airnews.cn/consultation/45122.shtml (Accessed time： April, 7th, 2008)

[6] On March, 31st, 2008, as all aviators put on a strike, 14 airlines of 6 cities from Kunming to Dali from China Eastern Yunnan Branch returned to base after arriving over the destination, causing delay of a great number of airlines in Kunming and detainment of many travelers. http://news.eastday.com/c/20080403/u1a3507412.html

the right to flow among different aviation companies reasonably. "Opinions" formulated by the five departments including CAAC not only violates the stipulation of the employees' resignation through an advance notice of Labor Law, but also infringes on the basic rights and freedom of the eemployees of our country. It reflects the defects in the system of the employees' rights of resignation through an advance notice of our country from a different perspective.

2. PROBLEMS OF THE SYSTEM OF EMPLOYEES' RESIGNATION THROUGH AN ADVANCE NOTICE

Like legislation of other countries, the term of a employment contract shall be divided into fixed term, non-fixed term or taking the completion of a specific amount of work as a term. But different from other countries, our country takes fixed-term employment as the normal state of employment, setting up no restriction to its range of application and specific deadlines; besides, in terms of the termination of the employment contract, our law does not distinguish the characteristics of fixed-term and non-fixed term contracts, applying the right of resignation through an advance notice to the two types of contracts with different natures indiscriminately. This system has brought in a series of problems.

2.1 It violates the basic principle of Employment contract Law

That "Contracts must be abided by" is the basic principle of Employment contract Law. Article 3 of Employment contract Law stipulates that a lawfully concluded employment contract is binding, and both the employer and the employee shall perform their respective obligations stipulated therein. In order to realize this basic principle, Article 29 of this law stipulates that "the employer and the employee shall each fully perform its/his obligations in accordance with the employment contract". According to this requirement, employment contracts signed in accordance with the employment contract law have the legal effect; both parties of the contract shall each fully perform its/his obligations in accordance with the employment contract. Before the time limit is expired, any party must not terminate the contract unless in the case of important matters or force majeure. Even if the contract is terminated in accordance with the law, the party who terminates the contract shall be liable for compensation of the losses caused to the other party. However, as is ruled by law, employees are entitled to terminate fixed-term contract through an advance notice,[7] and if the termination of the contract causes economic losses to the employer, employees shall not be liable for compensation.[8] This has obviously violated the above principles stipulated by Labor Law.

2.2 It damages the reasonable interests of the long-term investments of the employer to human capital.

The investments of the employer to human capital include the planning of the employees' career development and the correspondent vocational training for the employees; the investments have to be regained after a certain period of time. Employment contract Law of our country does not provide the employer with the conditions of realizing this expectation. First, as is ruled by Article 37 of this law, the employer cannot ensure the stability of the labor relationship even before the contract is expired by making an agreement with the employee on the expiration time. Second, there are very few conditions for the employer to make an agreement with the employee on his shortest service term, which do not

[7] Article 31 of Labor Law.

[8] The range of employers' damage compensation in Labor Law is limited to the situations specified in Article 102, that is, employees revoke employment contracts in violation of the conditions specified in this law or violate terms on secret-keeping matters agreed upon in the employment contracts and thus have caused economic losses to the employers.

cover all opportunities of early investments. The shortest service term agreed in the employment contract is to ensure that the employer can regain its early investments to specific employees. On most occasions, the investments from the employer consist of its payment for the related training expenses spent on the employees; but apart from this, there are also other forms of early investments, such as the introduction of related equipment, the deployment of assistants, expenses for early designing and publicity and the special expenses for introducing the specific employees. These early investments can be the conditions for the employer and the employees to agree on the shortest service term. Employment contract Law of our country only stipulates the situation that an employer provides special funding for an employee's training;[9] other forms of expenses are not included.

2.3 It damages the stability of employment relationship

A comparatively stable labor relationship is not only the condition for the employer to regain human resources, but also the basis and guarantee for maintaining the stability of labor income, planning career development and improving vocational skills. The stability of employment relationship is the main goal pursued by employees as well as one of the objectives of the legislation of modern Labor Law. Article 1 of Employment contract Law of our country stipulates from the very beginning that its legislation goal is "to build and develop harmonious and stable employment relationships". In the employment relationship both parties are not equal in nature; the employers are always in the leading position. If employers cannot regain their long-term investments to human capital, they will lack the inner motive of maintaining the stability of employment relationship. Meanwhile, the law in effect takes fixed-term contracts as a normal state of employment without restricting the range of application and length of time limit of the fixed-term contract. The employers can choose to sign a fixed-term contract with the employees freely and terminate their employment relationship at will. Thus, the formulation of this system has greatly damaged the stability of employment relationship of our country.

3. THE PERFECTION OF THE SYSTEM OF THE EMPLOYEES' RESIGNATION THROUGH AN ADVANCE NOTICE

The application of the employees' right of resignation through an advance notice to all employment contracts including fixed-term contracts has caused a series of harmful results. With regards to these problems, we have to distinguish clearly the characteristics and functions of contracts with different natures and types and establish a systematic measurement of regulation.

3.1 To restrict the range of application of fixed-term employment contracts

Labor Law of various countries usually takes non-fixed term employment contracts as the normal state of employment, and fixed-term contracts as an exception, and specifies their range of application. For instance, Article 14 of Part-time and Fixed-term Employment contract Law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) of Germany stipulates that "the fixed-term employment contracts signed by the two parties of employment shall be valid with factual reasons. Only the following situations are counted as having factual reasons. The situations include "temporary needs", "probation-oriented", "temporarily filling in the position of another employee", basing on reasons provided by the labor book", etc.[10] French Labor Code stipulates clearly that fixed-term contracts shall not target at work related to normal and regular contracts of the company; it shall not have the effect either. The Code also makes a list of the situations of signing fixed-term contracts, including temporary, seasonal situations and the

[9] Article 22 of Employment Contract Law.
[10] Refer to Item 1 of Article 14 of Part-time and Fixed-term Labor Contract Law of Germany

situation of replacing permanent employees, etc.[11] Employment contract Law of our country should cancel the related rules that the employers should sign non-fixed term contracts with the employees with a long length of service, but require employers to sign such contracts under general conditions; with fixed-term contracts taken as an additional type, it stipulates that employers can only sign contracts with the employees on some temporary and special posts.

3.2 To distinguish the long-term and temporary contracts—the two different types of fixed-term contracts

With regards to fixed-term contracts signed for completing temporary and seasonal work, both parties have a full grasp of information within the range of time and hope to maintain a stable labor relationship within the range of time through the contracts and plan reasonably their respective activities. Therefore, the law should set up the situations, time limit and updating times applicable to temporary and short-term contracts, and limit them to the temporary and short-term posts to avoid employers' overuse of this type of contracts for evading their responsibilities; meanwhile, Item 5 of Article 46 of Employment contract Law should be cancelled, that is, the stipulation of requiring employers to pay economic compensation when employers do not continue to employ employees without reason. The law should formulate that in regard of this type of contracts, when the time limit agreed is expired and the relationship of rights and obligations comes to an end, no party is liable for other obligations; when the time limit is not expired, any party shall not exercise general rights of revocation; and the law should stipulate that except for special situations or force majeure, even if revoking the contract in accordance with legal particular matters, the party shall be liable for compensation of the losses caused to the other party.

With regards to contracts with a long fixed term or lifelong employment contracts, the law should set up certain rules for regulation. First, the law should formulate that employees with special knowledge and skills can sign a long-term employment contract or a lifelong employment contract with the employer. This type of contracts belongs to fixed-term employment contracts, whose duration may last till the retirement or death of the employees. Within the time limit, both parties shall not exercise general right of revocation. Second, when the duration of long-term employment contracts amounts to a certain time, employees should be allowed to revoke them through an advance notice. For example, Article 624 of German Civil Law Code stipulates that with regards to employment relationship with the time limit being the life time of the employees or more than five years, after five years' duration of the contracts, the employees are entitled to terminate the contracts through an advance notice of six months. Article 15 of Labor Standards Law of Taiwan region of our country stipulates that with regards to special fixed-term contracts whose time limit has been expired for three years, employees are entitled to terminate the contracts three years after the expiration; but employees shall notice the employers 30 days in advance.

3.3 To expand the range of application of shortest service term properly

Generally speaking, the situations when employers can reach an agreement with employees on "the shortest service term" should be those when employers have legitimate interests to be protected, including the training investments of employers to employees and other reasonable interests. Item 1 of Article 22 of Employment contract Law of our country stipulates that if an employer provides special funding for an employee's training and gives him professional technical training, it may conclude an agreement specifying a term of service with such employee. This stipulation only takes "the funding for training" as the condition under which employers can require employees to undertake the obligations of "shortest service term", and ignores other high early investments cost paid by the employer. It will not only damage the reasonable interests of the employer, but also have a negative impact on the development of special employees and the improvement of research and development abilities of the

[11]Refer to Article L122-1, L122-2, L122-1-1 of French Labor Code.

entire society. Therefore, the law should expand the range of application of "shortest service term" properly.

CONCLUSION

The system of the employees' termination of contracts through an advance notice of the law in effect not only causes conflicts and contradictions, but also brings a series of problems. It violates the basic principles of Employment contract Law, damages the unity and seriousness of law and harms the legitimate interests of employers as well as the stability of employment relationships. To solve these problems, systematic measurements should be taken, which include restricting the range of application of fixed-term contracts, distinguishing the two types of fixed-term contracts and regulating them by taking different measurements respectively and expanding the range of application of "the shortest period term" properly.