



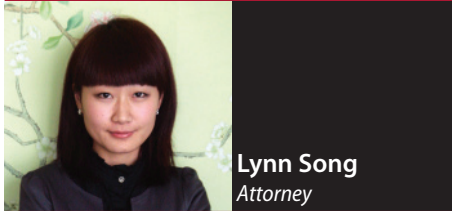
Edward E. Lehman
Managing Director

Message from the Managing Director

It is my pleasure to announce that Lehman, Lee & Xu has just attended its most successful INTA (International Trademark Association) event. Held from May 16-20 in Seattle, the annual INTA meeting hosted more than 7,500 intellectual property attorneys from around the world. Not only did our firm send the largest delegation, we continued our proud tradition of holding INTA's largest event by hosting our annual "Brand-owners Breakfast," attended by thousands of trademark attorneys.

One area which clients often overlook in protecting their intellectual property is employment policies. Companies should have non-disclosure and non-compete agreements in place as well as restrict access to confidential business processes and know-how. We stand ready to work with you to ensure that your employment policies protect one of your most valuable assets.

Edward E. Lehman



Lynn Song
Attorney



Scott Garner
Director, Shanghai Office

Survey Identifies Most At-risk Jobs In Shanghai

According to a recent survey conducted by 51Job.com, the Nasdaq-listed human resource services provider, sales, marketing and research and development professionals are now among the most vulnerable positions in China. 1,200 HR managers and financial professionals were asked about their layoff intentions this year. In the multiple choice questionnaire, about 60% of respondents said they would cut head count in their sales team this year, followed by 52% who said they would get rid of marketing employees. 46% said they would be laying off R&D professionals. Marketing and R&D staff are expensive but neither bring in cash in the short-term and are therefore among the first positions to be eliminated.

Employee Resigns and is Awarded Compensation for Annual Leave Not Taken

In 2006, Miss Huang entered into a labor contract as a store-keeper with a Shanghai wedding company. On June 3, 2008, Miss Huang resigned from her position and the labor relation between her and her company was terminated on June 13 of the same year.

After her employment terminated, her former employer failed to pay her for annual leave that she had not taken. Miss Huang submitted a claim to labor arbitration but it was rejected by the arbitration committee. Miss Huang then initiated a lawsuit against her former employer in the Shanghai Nanhui Court.

In court, Miss Huang claimed compensation for five days paid annual leave. According to Article 3 of the Regulation on Paid Annual Leave for Employees (2008), five paid annual leave days shall be granted to employees who have worked a cumulative 1-10 year(s). Although Ms. Huang had worked for her former employer for approximately two years, the employer had not arranged the statutory holiday for her during her employment.

In court, the former employer argued that Miss Huang was not entitled to receive the statutory five days of paid annual leave because the Regulation on Paid Annual Leave for Employees (2008) only came into effect on Jan 1, 2008, almost two years after Miss Huang's employment commenced. The employer further argued that Miss Huang was not entitled to the full five days because she resigned in June and therefore only worked half of 2008 rather than a full year.

The court ruled that according to the above mentioned regulations, if the employee worked for 1-10 year(s) from Jan 1 2008, then the annual leave shall be the statutory five days. Finding that Miss Huang had worked for her former employer for six months or approximately half of 2008, it ordered the employer to pay 2.26 day's salary to Miss Huang as the compensation for her untaken leave.

Manager Loses Claim for Overtime Pay Due to "Flexible" Work Time Policy

In May, 2006, Ms. Mao, was employed as the manager of a foreign consulting company. The term of the labor contract between Ms. Mao and her employer was two years. In May 2008, the contract expired and the company decided to not renew it. In July 2008, Ms. Mao filed a suit against her former employer in the Shanghai Jingan Court, claiming compensation for overtime work. In court, Ms. Mao insisted that she had always worked overtime during her employment, submitting her personal work records and emails with clients as evidence. However, Ms. Huang's former employer argued that it was approved by the labor authorities to institute a flexible work time schedule. Evidence was presented that showed that the flexible work time policy should also be applied to Ms. Mao's position within the company. The court found for the employer. According to Article 67 of the 'Opinion of Execution of Labor Law', employees under a flexible work time schedule are not limited to regular work hours and employers do not need to pay compensation unless the employee has worked enough hours during the period to constitute overtime. Generally, overtime work shall be prearranged by an employer and therefore the court concluded that Ms. Mao's personal work records and emails were not admissible as evidence of overtime work.

Lehman, Lee & Xu is a top-tier Chinese law firm specializing in labor, corporate, commercial and IP matters.

Please feel free to contact us for advice on all China-related labor and employment issues.

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In December 2008, Mr. Wang, sales manager with a foreign invested company, received by express mail a “Notice of Revocation of Labor Contract” from his employer. The notice stated that Mr. Wang had quarreled with one of the employer’s clients and had failed to make secure a sale to the client. The employer considered Mr. Wang’s behavior to have brought about a great loss to the company and that his actions had constituted a material breach of the company’s rules and regulations. Mr. Wang did not consider his actions to have breached the company’s rules and regulations and submitted a request for labor arbitration with the local labor dispute arbitration committee, requesting double financial compensation based on article 87 of Chinese Labor Contract Law. Article 87 provides that if an employer revokes or terminates a labor contract in violation of the Labor Contract Law, it shall pay to the employee double compensation.

However, according to Article 39, an employer may terminate the labor contract if the employee materially breaches the employer’s rules. Therefore, if the employer could prove that the employee’s actions constituted a material breach of the employer’s rules, the employer would not be required to pay the double severance.

According to “Interpretation of the Supreme People’s Court on Several Issues Regarding the Application of Laws for the Trial of Labor Dispute Cases”, where disputes arise regarding dismissal or termination of the labor contract, the employer bears the burden of proving all elements of the claim. Therefore, in this case, the employer was required to prove:

1. Mr. Wang had quarreled with the employer’s client during negotiation;
2. There is a causal relationship between Mr. Wang’s quarrel with client and the company’s failure to secure an agreement with client;
3. The failure to secure an agreement with client brought about great economic loss to the company;
4. The situation discussed above was clearly set forth in the company’s rules and regulations as a behavior constituting a material breach of those rules and regulations.
5. The rules and regulations were legally valid

In this case, it was centrally important for the company to provide evidence to the labor arbitration tribunal showing that Mr. Wang’s behavior constituted a material breach of the company’s rules and regulations and that the company had the right to terminate the labor contract immediately. If the company failed to prove all of the facts discussed above, then the company would be required to pay double compensation under the Labor Contract Law. However, if the employer could prove all of the facts above, it could avoid paying a severance altogether.

Page 2 of each edition of *China Labor Insights* is dedicated to a briefing on a particular aspect of Chinese employment law.

Material Breach

There is a high risk to terminating a labor contract based on a material breach of the rules and regulations. Employers bear the burden of proof and should pay special attention that they have sufficient and clear evidence showing that an employee breached the employers rules and regulations. Furthermore, the rules and regulations must be legally valid under Chinese law and approved by either the employee’s representative congress or all of the employees before they will bind the employees.

Lehman, Lee & Xu’s corporate and international taxation team, in association with Lehman Tax & Accounting, offers clients unrivalled and comprehensive services relating to both Chinese and international taxation matters, and provides a high standard of technical expertise with a practical and commercial approach.

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