

China employment and labour guide

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Introduction

As one of the fastest-growing economies and most populous countries, China plays a crucial role in the regional and global economy and politics.

However, many foreign entities find themselves in challenging and uncomfortable situations when dealing with employment issues in relation to China due to their poor understanding of the employment laws and regulations in China.

This guide provides a high-level overview of the legal regime for employment matters and common practical issues in a question-and-answer format. We hope that it will facilitate better understanding of PRC labour laws and assist you to effectively deal with any potential employment and HR issues you may encounter in your daily operations.

Key employment-related legislation and regulations

The main employment-related legislation in PRC

The employment-related legislation in People's Republic of China has not yet been codified in an overall Labour Code and is composed of a series of laws, administrative regulations and normative documents. The key sources are:

- Labour Law of PRC (effective January 1, 1995)
- Labour Contract Law of PRC (effective January 1, 2008)
- Employment Promotion Law of PRC (effective January 1, 2008)
- Social Insurance Law of PRC (effective July 1, 2011)
- Regulation on Work-Related Injury Insurances (effective April 27, 2003)
- Provisions on the Employment of Foreigners in China (effective May 1, 1996)

Hiring Practice

Direct hiring of employees in China by a foreign employer

PRC labour laws are typical domestic laws, which apply to the employment relationship established between employers within mainland China (excluding Hong Kong, Macau and Taiwan) and their employees.

A company located anywhere in the world may employ a Chinese individual to physically work in China. However, the agreement and legal relationship between both parties may not be recognized as a legitimate labour relationship under PRC labour laws unless the company has established a WOFE (Wholly Owned Foreign Enterprise) or FIE (Foreign Invested Enterprise) in Mainland China.

For a foreign enterprise which only establishes a representative office (RO) in China, the RO in China cannot establish lawful employment relationship with its staff directly because the RO is not a capitalized legal entity in China. Instead, the staff must be seconded to the RO from a licensed labour despatch agency, which will take on the official legal role of an employer.

Restrictions on employing a foreigner in China

According to the Exit and Entry Administration Law of PRC and Provisions on the Employment of Foreigners in China, foreigners who want to work as a formal employee in China must obtain a work permit and a work-type residence permit (work visa).

No entities or individuals can employ foreigners who do not have these two permits. Foreigners holding business visit visas may only provide temporary and limited consultation services and are not allowed to provide any other services as formal employees do. Otherwise, their employment will be considered illegal.

Employment Contract

Essential elements of an employment contract

An employment contract must contain the following information:

- Contact information of the employer and its legal representative
- Contact information of the employee
- Contract terms
- Position
- Work location
- Working hours
- Remuneration
- Social insurance
- Working conditions and workplace safety protections

Formal requirements for employment contracts

To establish a formal employment relationship with an employee, an employer must enter into a written employment contract with the employee within one month from the date of employment.

If the employer fails to enter into a written employment contract with an employee within a month, but does so less than one year from the date of employment, it must pay the employee double their salary during the relevant period.

If the employer has still failed to enter into a written employment contract with the employee after one full year from the date of employment, the employer and the employee are deemed to have entered into an open-ended employment contract.

Provisions regarding the term of an employment contract

The employer must specify the contract term in employment contracts with employees. Contract terms are classified in China as one of the following:

- Fixed-term employment contracts
- Open-ended employment contracts
- Employment contracts which expire upon the completion of a given job

Probation periods

An employer and an employee may agree upon only one probation period. The maximum length of probation period is determined as follows:

- If the term of an employment contract is no less than 3 months but less than 1 year, the probation period must not exceed 1 month.
- If the term of an employment contract is no less than 1 year but less than 3 years, the probation period must not exceed 2 months.
- For an employment contract with a fixed term of 3 years or more or which is an open-ended contract, the probation must not exceed 6 months.

For an employment contract that expires upon the completion of a given job or is for a fixed term of less than 3 months, probation periods are not applicable.

Working Conditions

Salary payments

An employer must pay an employee a monthly salary no lower than the local minimum monthly wage standard specified by the people's government in the place where the employer is located; this is usually updated annually.

Moreover, the employers must withhold individual income tax from an employee's salary pursuant to the Individual Income Tax Law of PRC.

Working hours and overtime

An employer is usually required to adopt a standard working hour system which provides that employees work for an average of no more than eight hours a day and 40 hours a week. The employer must guarantee its employees at least one day off a week.

An employer who cannot implement a standard working hour system because of the particular characteristics of its business operation may adopt a special working hour system (such as a flexible working hour system or a comprehensive working hour system) if it obtains approval from the local labour authorities.

For overtime working, extended working hours under a standard working hour system must not exceed three hours a day or 36 hours a month.

Overtime Pay

Employers are required to pay overtime to employees under the standard working hour system as follows:

- No less than 150% of an employee's normal salary for extended working hours on workdays;
- No less than 200% of an employee's normal salary for working on rest days (or employers can provide time off in lieu);
- No less than 300% of an employee's normal salary for working on statutory public holidays.

Holidays and Welfare

Contributions to social insurance or other public welfare

Employers are obliged to contribute to social insurance (including pensions, medical insurance, maternity insurance, work-related injury insurance and unemployment insurance) and a housing provident fund for employees.

The requirement is mandatory and cannot be waived by mutual agreement between an employer and an employee.

Public holiday entitlement

Currently there are 11 days of statutory public holidays in China, including:

- New Year's Day, one day (January 1);
- Spring Festival, three days (from the first to third day of the first month in the lunar calendar);
- Tomb-sweeping Day, one day (on Tomb-sweeping Day in the lunar calendar);
- Labour Day, one day (May 1);
- Dragon Boat Festival, one day (on Dragon Boat Festival in the lunar calendar);
- Mid-Autumn Festival, one day (on Mid-Autumn Day in the lunar calendar);
- National Day, three days (from October 1 to 3).

Where a statutory public holiday falls on a Saturday or Sunday, the government will arrange a compensatory day off on an adjacent working day.

Statutory leave entitlement

In addition to the statutory public holidays, employees are entitled to a certain number of days of paid annual leave (five/ten/15 days), depending

on the length of cumulative service with all employers.

An employee is also entitled to the following leave:

- Sick leave
- Maternity, Paternity and Parental Leave (full pay)
- Marriage Leave (full pay)
- Bereavement Leave (full pay)

Termination of Employment

At-will employment

At-will employment is not permitted under PRC labour law. An employee has the right to terminate an employment contract without cause by giving a written notice to the employer, while the employer can only terminate the employment contract on limited grounds expressly provided by law.

Termination of an employment contract

The statutory grounds for termination under PRC labour laws are:

- **Mutual termination**
 - (a) An employer and an employee may terminate an employment contract at any time upon mutual agreement.
- **Termination by employee**
 - (a) An employee may terminate an employment contract by giving 30 days' written notice. During a probation period, the notice period is three days.
 - (b) An employee has the right to terminate an employment contract immediately if the employer has done any of the following:
 - Failed to provide a safe working environment
 - Failed to pay remuneration on time and in full
 - Failed to contribute to social insurance as required by law
 - Imposed rules and regulations that diverge from legal requirements in such a way as to impair the employee's rights and interests

- Used violence, threats or detention to coerce an employee into working

• **Termination by employer**

- (a) An employer may immediately and unilaterally terminate an employment contract if there has been certain misconduct by the employee or if the employee is proved not to meet the recruitment conditions during the probation period.
- (b) An employer may terminate an employment contract by giving 30 days' written notice or by paying the employee an extra month's salary in lieu of notice in the following circumstances:
 - The employee is sick or is injured for a non-work-related reason and cannot resume the original position or assume any other position arranged by the employer once the legally-stipulated period for medical treatment has expired
 - The employee lacks competence to carry out the role and remains so after training or adjusting the role
 - The circumstances upon which the employment contract was based have changed significantly so that the contract is unable to be performed, and the parties are unable to agree appropriate changes to the contract.
- (c) The employer may lay off employees in certain circumstance, following consultation with the labour union or all the employees and submitting the lay-off plan to the labour authorities.

Entitlement to severance pay for termination

An employer must pay the employee severance pay upon mutual termination proposed by the employer, unilateral termination by the employee due to the employer's fault, and unilateral termination by the employer where an employee is not at fault (as described above).

Severance payments are made on the basis of the employee's number of years' service with an employer, the rate being one month's salary for each full year of service. For ease of reference, see the table below:

Service year of an employee	Rates of severance pay
Less than 6 months	0.5 months' salary
No less than 6 months and no more than 12 months	1 month's salary
More than 12 months and less than 18 months	1.5 months' salary
No less than 18 months and no more than 24 months	2 months' salary

- Monthly salary means the average monthly salary for the 12 months prior to termination of the employment contract.
- If an employee's monthly salary is more than three times the local average monthly salary for the previous year, the employee is entitled to receive severance pay equivalent to three times the local average monthly salary; the maximum number of years for calculating severance pay is a maximum of 12 years.

Legal liability for wrongful termination

Except for the statutory grounds for termination described above, unilateral termination will be considered wrongful.

In the event of wrongful termination, an employee can ask for reinstatement. If the employee does not want to work for the employer any longer or if reinstatement is impossible, the employer must pay compensation to the employee equivalent to twice the severance pay prescribed by law.

Restrictive covenants

Imposition of restrictive covenants on employees

There is no definition of restrictive covenants under PRC labour laws but they are generally recognised as contractual provisions which prohibit an employee from carrying out certain activities after termination of employment.

Restrictive covenants may take several forms, including:

- **Non-compete:** prohibits the employee from working for a competitor of a former employer, or participating in the same field of business.
- **Non-solicitation:** prohibits the employee from contacting a former employer's customers or clients.
- **Non-poaching:** prohibits the employee from soliciting or hiring former colleagues to work in another business.

Under the PRC Labour Contract Law, employees who can be subject to non-compete obligations are limited to senior management, senior technicians, and other employees who are subject to confidentiality obligations. The maximum non-compete period is 24 months after termination or expiry of employment, during which the employer must pay compensation to the employee.

Apart from non-compete obligations, PRC laws and regulations are silent on restrictive covenants, and employers may agree them with employees based on business needs.

Liability for breach of a restrictive covenant

Under the PRC Labour Contract Law, an employee is required to pay liquidated damages to the employer only if that employee is in breach of a non-compete obligation or if the employee is in breach of a covenant in relation to the service period related to training bond.

If the employer purports to impose liability for breach of contract otherwise than in these circumstances, the term is likely to be invalid.

In order to avoid this dilemma, some employers include a non-solicitation obligation and a non-poaching obligation in the clause that contains the non-compete obligation and then pursue the

employee for breach of the non-compete obligation. Nonetheless, if the employee is involved only in solicitation or poaching, the courts will usually impose a heavier burden of proof on the employer in practice.

Trades Unions

All employees in China have the right to join a trades union under the Trades Union Law of PRC. However, trades union in China differ from those in the United States or Europe. Trades unions in China are highly bureaucratic since all enterprise unions must be affiliated with the All-China Federation of Trades Unions.

Trades unions in China mainly conduct collective bargaining on employment conditions and labour rights, for example salary standards among employees in labour-intensive industries, such as factory workers and couriers.

Labour Disputes

PRC laws provide special procedures for the resolution of labour disputes. The labour dispute resolution process in China is one-track process, consisting of three stages:

1. Optional mediation by an internal or public mediation committee,
2. Mandatory arbitration by a local labour dispute arbitration committee, and
3. Litigation through the People's Court (which consists of first instance, second instance and has a retrial procedure).

The labour arbitration procedure is mandatory and any labour dispute case that has not been heard or reviewed by the labour tribunal will not be accepted by the court.

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