

Guide to Employment Laws in the PRC



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Overview

THE PEOPLE'S REPUBLIC OF CHINA LABOUR AND EMPLOYMENT LAW

The foundation for labour and employment laws, rules, and regulations in the People's Republic of China (the "PRC") is the PRC Labour Law, which was passed by the Standing Committee of the National People's Congress of the PRC on 5 July 1994, and came into force on 1 January 1995. Another milestone for the PRC labour and social security legislation is the PRC Labour Contract Law, which was passed by the Standing Committee of the National People's Congress of the PRC on 29 June 2007, and came into force on 1 January 2008. The PRC Labour Law, the PRC Labour Contract Law, and other laws and regulations issued by the central legislature or government, are generally applicable to the whole of the PRC. There are also local regulations and rules issued by provincial, municipal, and other lower level authorities that are only applicable to relevant local regions.

This Guide focuses on the laws and regulations generally applicable to the whole of the PRC.

Hiring

AT-WILL V. JUST CAUSE

According to the PRC Labour Law, an employee has the right unilaterally to terminate a labour contract without reason, as long as the employer is given a 30-day written notice in advance (three days' prior notice for an employee within the probationary period). As stipulated by Article 38 of the PRC Labour Contract Law, if the employer acts in violation of law or labour contract, the employee is entitled unilaterally to terminate the labour contract without any prior notice required.

Such rights, however, have not been granted to the employer. Rather, the employer may generally only unilaterally terminate a labour contract in certain limited occasions, such as where the employee is not competent for the job assigned or reassigned, or the labour contract is no longer performable due to material changes in the objective conditions.

In any of the above cases, written notice of the termination must be given in person to the employee 30 days in advance. The employer may choose to give an additional month's salary to the employee in lieu of the 30 days in advance notice.

Article 39 of the PRC Labour Contract Law provides that the employer may also unilaterally terminate a labour contract without any advance notice to the employee when the employee:

- Fails to meet the standards for the job during the probationary period
- Seriously violates the employment rules of the employer
- Is in serious breach of his or her duties, or engages in misconduct that has caused material loss to the employer

- Has entered with an employment relationship with another employer which materially affects the completion of his tasks with the first-mentioned employer, or the employee refuses to rectify the matter after the same is brought to his attention by the employer
- Concludes the labour contract by means of fraud, threat, force or exploitation or
- Is prosecuted for criminal liability

DISCRIMINATION

The PRC Labour Law and the PRC Employment Promotion Law (which was passed by the Standing Committee of the National People's Congress of the PRC on 30 August 2007, and came into force on 1 January 2008) prescribe that employees or applicants for employment shall not be discriminated against on the basis of nationality, race, gender or religious belief. The PRC Employment Promotion Law further prescribes that during the recruitment process, discrimination against women, ethnic minorities, disabled people, rural workers or carrier of epidemic pathogens (e.g. Hepatitis B) is prohibited. The employee can bring legal proceedings in case of any employment discrimination.

EMPLOYMENT APPLICATIONS

Article 8 of the PRC Labour Contract Law provides that during the process of employment application, the employee is entitled to be told the content of the work, the working conditions, the place of work, occupational hazards, health and safety at work, remuneration and other matters which the employee requests to be informed about. The law does not provide what the "other matters" are, but it is reasonable to understand that such matters shall be in relation to the job the employee is applying for.

The employer has the right to require the employee to give certain information directly concerning the employee. Again, the law does not specify what information, but this is generally understood as relating to the job, such as health status, qualifications, education and working experience.

Use of employment/labour contracts

All enterprises in the PRC, which include PRC domestic companies, foreign invested enterprises (FIEs) (e.g., wholly foreign-owned enterprises), and state-owned enterprises must have written labour contracts with their employees.

Article 17 of the PRC Labour Contract Law prescribes that the labour contract shall be in writing and shall include the following main clauses:

- Name, domicile and legal representative or main person in charge of the employer
- Name, domicile and ID card number (or other valid identity document of the employee)
- Term of the contract
- Job description and place of work
- Working hours, rest and leave
- Remuneration
- Social insurance
- Labour protection, working conditions and protection against occupational hazards and
- Other matters which laws and statutes require to be included in labour contracts

ORAL CONTRACT

A written labour contract which satisfies Article 17 of the PRC Labour Contract Law (above) must be put in place within one month from the date of commencement of employment. Failure to comply with this provision results in the employer being required to pay to the employee salary at twice the amount of the agreed remuneration. If the employer fails to put in place a written labour contract with the employee within one year after the date when the employment commenced, it shall be deemed that an indefinite labour contract has already been executed between the employer and the employee.

EMPLOYMENT RELATIONSHIP

The PRC Labour Contract Law states that, where a labour contract is concluded before the date when an employee commences work for an employer, the employment relationship between the parties shall start from the date when the employee commences work for the employer. The legislative intent behind this principle appears to be that while a labour contract would be effective after its execution, if the employee has not actually commenced work pursuant to the contract, no employment relationship is established. Therefore, if the employee breaches the contract and goes to work for another employer, the original employer could sue the employee on a general contractual basis, instead of its capacity as an employer under a labour dispute case.

TERM OF EMPLOYMENT

Under the PRC Labour Law and the PRC Labour Contract Law, the term of a labour contract may be definite, indefinite (i.e., no term), or piecemeal (i.e., dependent on the completion of certain work assignments). However, in accordance with Article 14 of the PRC Labour Contract Law, an indefinite labour contract is deemed to exist:

- Where, as mentioned above, an oral contract has subsisted for one year or more (for computing whether an oral contract has subsisted for one year or more, while the PRC Labour Contract Law does not specify, it is generally understood that only service after 1 January 2008 would count)
- In case an employer and an employee have entered into a fixed term labour contract twice successively and the parties intend to renew such contract upon its expiry (except where the employee has requested for a fixed term labour contract) (in the case of two successive fixed term labour contracts, it is expressly provided that only labour contracts concluded after 1 January 2008 would count for this purpose) or
- Where an employee has worked for an employer continuously for 10 years or more (except where the employee has requested for a fixed term labour contract) (services prior to 1 January 2008 count when computing if an employee has worked for an employer for 10 continuous years or more)

PROBATIONARY PERIOD

A probationary period could also be stipulated in the labour contract. The maximum period for such probationary period will depend on the term of the labour contract:

Term of the Labour Contract	Probationary Period
Piecemeal/less than 3 months/Part-time	N/A
3 months or more but less than 1 year	Not exceeding 1 month
1 year or more but less than 3 years	Not exceeding 2 months
3 years or more/indefinite term	Not exceeding 6 months

Only the first contract in any series of contracts by an employer with an employee can include a probationary period.

LABOUR CONTRACT WITH RESPECT TO THE PRC REPRESENTATIVE OFFICE OF A FOREIGN COMPANY

There is a special issue applicable to the PRC Representative Office (the “Rep. Office”) of which prospective employers should be aware. Unlike the FIEs, a Rep. Office is not allowed to employ staff directly; instead, it can only use the employees of certain designated labour agencies under a third-party arrangement. Such labour agencies include Shanghai Foreign Service Co., Ltd. (FESCO) and China International Intelligence Co., Ltd. (CIIC), which shall have at least RMB 500,000 of registered capital.

In order to obtain labour, the Rep. Office should first sign a labour service contract with the labour agency. When the Rep. Office finds a suitable candidate, it arranges with the labour agency for that agency to sign a labour contract with that candidate for a term of at least two years. The individual therefore becomes an employee of the labour agency. However, the labour contract between the labour agency and the employee will stipulate that the employee is contracted to the Rep. Office and the Rep. Office may in turn set out a separate agreement with the employee including more specific employment details.

The wages of such labour agency employees are dependent on the agreement between the Rep. Office and the employee. However, they must not be less than the local minimum salary. The method of payment of wages and social insurance premium, including whether the labour agency or the Rep. Office should pay the employee directly, may be agreed by the parties.

When using the contracted employees, the Rep. Office must (as imposed by the Labour Contract Law):

- Enforce the State labour standards and provide the corresponding labour conditions and labour protection

- Inform the contracted employees of the job requirements and labour remuneration
- Pay overtime salary and performance bonus, and provide benefits appropriate for the job
- Provide the contracted employees who are on the job with necessary training and
- Implement a normal wage adjustment system for continuously used employees

An important point for the Rep. Office to note is that it is jointly and severally liable with the labour agency for any claim by the employee arising from any violation of the labour law and regulations by the labour agency. It is therefore important for the Rep. Offices that they include an indemnity clause in the agreement with the labour agency to cover any loss or damage due to a breach by the labour agency.

The employee may terminate the labour contract with the labour agency by agreement with both the Rep. Office and the labour agency. Similarly, as stipulated by Article 38 of the PRC Labour Contract Law, the employee can unilaterally terminate the employment at once if the labour agency or the Rep. Office:

- Does not provide labour protection or other conditions as agreed in the labour contract
- Does not pay the employee in full and on time
- Does not pay social insurance premium as required by law
- Performs work rules and regulations which violates law and regulations, leading to violation of the employee's interest
- Puts in place the labour contract by means of fraud, threat, force or exploitation, or in the labour contract the employer disclaims its legal liability or denies the employee's rights or
- Forces the employee to work by means of violence, threat, force, or illegal detention; issues illegal directions, or compels risky operations, which endangers the safety of the employee

If a contracted employee:

- Acts as prescribed in Article 39 of the PRC Labour Contract Law (see the subsection At-will v. Just Cause on page 1)
- Suffers from a disease or from non-work-related injuries, and is unable to perform his or her original job or any other job arranged by the employer or
- Is not competent to do the work assigned, even after receiving training or being assigned to other work

then the Rep. Office can send the employee back to the labour agency and the labour agency can terminate the contract with the employee. While the law does not restrict the Rep. Office from sending back any employee to the labour agency for causes different from the above, under such circumstances, the labour agency cannot terminate the labour contract with such employee, and has to pay the employee monthly at the minimum wage rate published by the local government until the expiry of the labour contract or the employee is contracted to another position.

ADVERTISING/RECRUITMENT

The employer must not hire any applicant who is under 16 years of age.

Any employer that hires an employee who has not properly terminated his or her prior employment relationship is jointly liable with such employee to compensate any pecuniary loss of his or her previous employer. Since the law does not require the new employer to be aware of the prior relationship, this would appear to be a strict liability situation regardless of the new employer's knowledge.

EMPLOYMENT REFERENCES/BACKGROUND INVESTIGATIONS

There are no laws or regulations in the PRC that specifically address employment references/background investigations. However, an employer should note the provisions of the General Principles of the PRC Civil Law (the “General Civil Principles”) regarding the protection of reputation and personal dignity.

Compensation and Benefits

MINIMUM WAGE

The minimum wage is determined by the local authorities. In Shanghai, the current monthly minimum wage (since 1 April 2008) is RMB 960 (about USD 141), while in Beijing it is currently RMB 800 (about USD 117) per month (since 1 July 2008).

WAGE PAYMENT

According to the Interim Regulations on Wage Payment, the wage of an employee must be paid in monies (i.e., ready funds) at least once per month.

The wage of an employee during his or her probationary period must not be lower than 80% of the minimum wage for the same post of the same employer or 80% of the wage agreed in the labour contract. Of course it must also not be lower than the minimum wage published by local government in the area where the employer is located.

The employer may not deduct any salary of an employee except for the following reasons:

- Withholding the individual income tax of the employee
- Withholding the portion of social insurance that should be borne by the employee

- Deducting alimony or other court-decreed amounts and
- Deducting other fees in accordance with the laws and regulations

CHILD LABOUR

Regulations on prohibition to use child labour

The Regulations on Prohibition to Use Child Labour, which came into force on 1 December 2002, prohibit the employment of any person under the age of 16 years.

Regulations for protection of underage workers

The Regulations on Special Protection of Underage Workers came into force on 1 January 1995, and were issued to protect any worker who is younger than 18 years, but older than 16 years (known as an “underage worker”). An underage worker must not be assigned to work in mines and coal shafts, nor to do toxic or harmful jobs or the fourth class labour intensive work as prescribed by the State. An employer must arrange for regular health examinations for underage workers, and shall register all underage workers with the local labour authority.

There are no special provisions with respect to the wage and working hours of an underage worker.

HEALTH INSURANCE

With respect to health insurance, a concept of “basic medical insurance” is used in the PRC. According to the Decision of Establishing Basic Medical Insurance System for Urban Employees, which came into force on 14 December 1998, all employers (including FIEs) registered in the municipalities and counties of the PRC must pay basic medical insurance for their employees.

The amount of the basic medical insurance payable every month by the employer and the employee, respectively, shall depend on the monthly salary of the employee, according to the various regulations

issued by different local authorities. For example, currently in Shanghai (from 1 April 2009 to 31 March 2010), if the employee's salary is higher than RMB 9,876 per month, such amounts (calculated on a maximum base figure of RMB 9,876) shall be RMB 1,185.12 (RMB 9,876 x 12%) and RMB 197.52 (RMB 9,876 x 2%), paid by the employer and employee respectively.

OVERTIME ISSUES

An employee working under the Standard Working Hour System (see definition below) is entitled to receive overtime pay according to the following standards:

- For overtime worked during normal working days – not less than 150% of the hourly salary for each overtime hour worked
- For overtime worked during any rest day (generally Saturday and Sunday) and if no extra rest could be arranged in lieu thereof – not less than 200% of the hourly salary for each overtime hour worked
- For overtime worked during the legal holidays (i.e., public holidays) – not less than 300% of the hourly salary for each overtime hour worked

WORKDAY/WORKWEEK/WORKING HOURS

In the PRC, there are three kinds of working hour systems – the Standard Working Hour System, the Indefinite Working Hour System, and the Comprehensive Working Hour System.

Under the Standard Working Hour System, working hours must be no more than eight hours per day and no more than 40 hours per week. Article 38 of the PRC Labour Law provides that an employer must ensure that employees enjoy at least one rest day per week.

Prior approval from the local labour authority is required before an employer implements the Comprehensive Working Hour System. The Comprehensive Working Hour System means that the working hours are comprehensively calculated in terms of per week, per month, per quarter, or per year. However, the average working hours per day and per month shall be basically similar to those under the Standard Working Hour System.

The Indefinite Working Hour System is usually applicable to senior management personnel, field staff, salespersons, and others whose work cannot be measured under the Standard Working Hour System. However, prior approval from the local labour authority is also required before this system can be implemented.

According to the PRC Labour Law, an employer may extend working hours after consulting with the trade union and the employee. However, overtime must not exceed one hour per day. For special circumstances that require an extension of working hours, overtime shall not exceed three hours per day and 36 hours per month so as to ensure the health of the employee. The law does not provide what kind of circumstances may be considered as special, but the Opinion on Certain Issues regarding the Implementation of the PRC Labour Law (the “Labour Law Opinion”), which came into effect on 4 August 1995, provides that the employer may require any employee to work overtime, if such decision on overtime is necessary for the business and made upon negotiation with the trade union and the employee.

The extension of working hours shall not be restricted in any of the following cases:

- In emergencies, when the life and health of the employees and property are threatened due to natural disasters, accidents, or other causes

- Rush repairs that are necessary when production equipment, transportation lines, or public facilities are in trouble, and are affecting production and public interests
- Other cases as provided for by law or administrative decrees

Time Off/Leave of Absence

PAID LEAVE

According to the Regulations on Employee’s Paid Annual Leave (the “Annual Leave Regulations”) which were issued by the State Council and came into force on 1 January 2008, and the Implementing Measures of the Regulations on Employee’s Paid Annual Leave (the “Annual Leave Measures”), which were issued by the Human Resources and Social Security Ministry and came into force on 18 September 2008, any employee working for a continuous period of 12 months is entitled to paid annual leave.

The above continuous 12-month period includes the employee’s service period with any employer instead of only with the current employer.

Minimum Entitlement

Employee’s cumulative service years (X)	Entitled annual leave
1 year \leq X < 10 years	5 days
10 years \leq X < 20 years	10 days
X \geq 20 years	15 days

The above cumulative working period includes any period when the employee works on a full-time basis with any employer.

The visitation leave, marriage leave, bereavement leave, maternity leave and other statutory leave, as well as the one year of sick leave

granted for any work-related injury, which the employee is legally entitled to, do not count for the period of their entitled annual leave.

Exclusion

In the case of any of the following circumstances, the above paid annual leave for the current year will not be provided:

- Where the employee is entitled to winter and summer vacation and the days of such vacation are more than their entitled annual leave (if, due to the request of work, the number of days of such winter or summer vacation taken by the employee is less than the days of their entitled annual leave in a current year, the employee is still entitled to take the balance of such annual leave)
- Where the employee has enjoyed accrued private matters leave of 20 days or more and the employer made no salary deductions
- Where the employee with the following cumulative service years (X) has enjoyed sick leave (Y) as listed in the table below:

Cumulative service years (X)	Accumulated enjoyed sick leave (Y)
1 year \leq X < 10 years	Y \geq 2 months
10 years \leq X < 20 years	Y \geq 3 months
X \geq 20 years	Y \geq 4 months

New recruit's entitlement

Calculation of annual leave shall be on a calendar year basis. Therefore, in case of any new recruit eligible for the paid annual leave entitlement (i.e. they have worked continuously for any employer for 12 months or more), the paid annual leave they are eligible for in the calendar year when they are employed by the current employer shall be calculated based on their actual calendar days with the current employer in that calendar year. Any such calculated period of less than one day does not count for this purpose.

The said formula is as follows:

(the new recruit's actual calendar days with the current employer/365 days) X the applicable days of annual leave granted for their one full year service.

When to take annual leave

The employer can arrange the employee to take their annual leave in consideration of both the business needs and the employee's request. The employee shall generally be arranged to take their entitled annual leave within the current calendar year. Where the employer cannot do so for reason of business needs, the unused annual leave granted this year can be carried over to the next year.

Compensation for unused annual leave

Where the employer cannot arrange the employee to take their annual leave due to the needs of business, the employer may, with consent of the employee, omit to offer such paid annual leave, but shall pay the employee concerned 300% of the normal daily salary (which 300% includes the salary paid by the employer to the employee for their normal workday) as compensation for the untaken annual leave.

Exemption

The employer can be exempted from paying the above 300% compensation if the employee, for their own reason, waives such entitlement in writing.

Daily salary calculation

When calculating the compensation for the employee's unused annual leave, the employee's daily salary is equal to their monthly salary divided by 21.75 days. The above "monthly salary" refers to the employee's average monthly salary (exclusive of any overtime pay) of the last 12 months before the above compensation is paid.

Compensation upon termination of employment

In case of any termination or expiry of the labour contract, where the employee has any accrued but untaken annual leave, the employer shall provide for the relevant payment in lieu of such untaken leave on a pro-rata basis.

The above pro-rata annual leave for the current year shall be calculated based on the following formula :

(the past calendar days of the current calendar year/365 days) X the days of annual leave granted for such calendar year of service - the used days of annual leave in such calendar year.

Any such calculated period of less than one day does not count for this purpose.

It is unclear as to whether compensation for any untaken annual leave upon termination or expiry shall be made on the 300% basis, or just on the 100% basis.

Where it has been arranged for the employee to take paid annual leave in excess of the number of days of their entitled annual leave upon the termination, the excess days shall not be deducted back from their salary.

PAID SICK LEAVE

In the PRC, the treatment of an employee's sick leave differs depending on whether the disease or injury is work-related or not.

Work-related injury (WRI)

According to the Regulations on Work-Related Injury Insurance, which came into effect on 1 January 2004, all employers in the PRC shall pay for work-related injury insurance for their employees. The rates of the insurance vary according to the different industries in which the employer may be engaged.

The employee shall be considered to have WRI in any of the following circumstances:

- Any injury caused by an accident relating to work that occurs in the work place and during the working hours
- Any injury caused by an accident relating to the preparation for or the ending of work that occurs in the work place and before or after working hours
- Unexpected injury caused by violence when performing work duties during working hours and within the work place
- Occupational disease
- Injury caused by work or an accident during a business trip or
- An accident while commuting to the office or to home after work

The employee would also be deemed to have WRI in any of the following circumstances:

- Death due to a break-out of disease during working hours when the employee is on duty, or death of an employee within 48 hours of medical aid after a break-out of such disease
- Injury caused by activities in protecting the State's interests or public interests, such as dealing with a disaster or an emergency or
- Recurrence of any injuries during employment caused by war or while serving public interests during service in the army, as long as the employee has obtained the Revolutionary Disabled Army Member Certificate

The fully paid sick leave with respect to WRI does not normally exceed 12 months. In addition, the employer may be required to pay additional compensation to the employee according to local regulations. For example, as regulated by Implementation Rules of Work-related Injury Insurance in Shanghai, the employer must also

pay the hospital meal subsidy, equal to 70% of a business trip meal allowance, to an employee who needs to be in a hospital for the WRI.

Non-work-related disease/injury

An employee who suffers a non-work-related disease/injury shall be entitled to a medical treatment period of no more than 24 months, depending on how long they have worked for any employer and how long they have worked for the current employer.

According to the Labour Law Opinion, the salary or medical subsidy fees for a non-work-related disease/injury during the medical treatment period shall not be less than 80% of the local minimum salary standard.

FAMILY AND OTHER LEAVE

In the PRC, the following two kinds of leave relate to the family of the employee:

Visitation leave

The Provisions of the State Council regarding the Treatment of Employee Visitation Leave, which came into effect on 14 March 1981, provides that an employee who serves in a state or people's organisation, state-owned enterprise, or a public institution, and who has worked therein for one full year (the State Employee), does not live with their spouse, and cannot visit their spouse during public holidays, has the right to enjoy the benefit of spousal visitation leave. Such visitation leave shall be once per year for a period of 30 days.

A State Employee who does not live with their parents, and cannot visit their parents during public holidays, shall be entitled to enjoy the benefit of parental visitation leave. However, if the State Employee can visit their father or their mother during public holidays, they are not entitled to such visitation leave. Unmarried State Employees shall have parental visitation leave once per year

for 20 days; married State Employees shall be given such leave once every four years for 20 days. However, if an unmarried State Employee cannot take visitation leave in the current year due to the needs of their working unit, or is willing to visit their home only once every two years, it is permissible to postpone the parental visitation leave, and the said leave shall be 45 days.

It seems arguable that employees of FIEs (who are not State Employees) shall also be entitled to visitation leave.

Bereavement leave

In accordance with the Notice regarding Marriage Leave, Bereavement Leave, and Visitation Leave of Employees of State-Owned Enterprises, which came into effect on 20 February 1980, an employee of a state-owned enterprise shall have one to three days of bereavement leave (depending on the circumstances) with pay, following the death of the employee's parent, spouse, or child.

Similarly, it seems arguable that employees of FIEs shall also be entitled to enjoy bereavement leave.

Having said that, some private enterprises only treat the above-mentioned visitation leave and bereavement leave as guidelines when formulating their leave policy and the classifications are not followed strictly in the belief that the courts would probably look at whether one's policy is fair and generous as a whole.

Maternal leave

Maternity leave is 90 days, of which 15 days can be taken before delivery. Extended maternity leave shall be provided to a female employee subject to specific circumstances.

Termination Issues

As mentioned in the section Hiring on page 1, PRC laws do not appear to allow the employer unilaterally to terminate a labour contract without reason.

However, the PRC Labour Laws and regulations do not specifically address such distinct issues as “discrimination claims,” “severance pay,” or “harassment” in the same way as they exist under some western jurisdictions.

COMPENSATION FOR EARLY TERMINATION OF THE LABOUR CONTRACT

The Rules on the Economic Compensation for the Breach and Termination of the Labour Contract (the “Compensation Rules”), which came into force on 1 January 1995, the Labour Law Opinion, and the Circular regarding the Implementation of the Regulations of Labour Contract (the “Labour Contract Circular”), which came into force on 31 October 1996, and the PRC Labour Contract Law, all prescribe the standards of compensation for early termination of the labour contract, as well as other relevant issues.

CALCULATION BASE OF THE COMPENSATION

Under Article 47 of the PRC Labour Contract Law, an employee shall be paid compensation for early termination at the rate of one month’s salary for each full year worked with the employer. Any period of not less than six months but less than one year shall be counted as one year. The compensation payable to an employee for any period of less than six months shall be one-half of their monthly salary.

If the monthly salary of an employee is more than 300% of the average monthly salary of all employees in the local region for the previous year as published by the local government, the rate for the

compensation paid to him or her shall be capped at 300% of the average monthly salary of all employees in the relevant locality for the previous year and for such employees, the number of months of compensation is capped at 12.

The term “monthly salary” means the employee’s average monthly salary for the 12 months prior to the termination of their labour contract.

Where the labour contract is terminated early by the employer

Articles 40(1) and 46(3) of the PRC Labour Contract Law and Article 6 of the Compensation Rules provide that if an employer terminates the labour contract early for an employee who suffers from a disease or from non-work-related injuries, and is unable to perform his or her original job after the set medical treatment period, or any other job arranged by the employer, the employee shall, in addition to the basic compensation as set out in the “Calculation base of the compensation”, be entitled to a medical subsidy. Such subsidy must be not less than six months of his or her salary. Furthermore, the medical subsidy is increased by 50% for those employees who suffer serious diseases and by 100% for those employees who suffer terminal diseases.

Under Articles 40(2) and 46(3) of the PRC Labour Contract Law and Article 7 of the Compensation Rules, if an employer terminates the labour contract early because an employee is not competent to do the work assigned, and remains so even after receiving training or being assigned to other work, the amount specified in “Calculation base of the compensation” shall be paid, which shall not exceed 12 months of salary.

According to Articles 40(3) and 46(3) of the PRC Labour Contract Law, if the employer terminates the labour contract early because material changes in the objective conditions have made the

labour contract no longer performable, and the parties cannot agree through consultation on a modification, the employer shall compensate the employee as prescribed in the “Calculation base of the compensation”.

According to Articles 41 and 46(4) of the PRC Labour Contract Law, if the employer terminates the labour contract early because it needs to reduce staff (by 20 people or more or by less than 20 people but which account for 10% or more of the total number of employees) due to

- Conditions of reorganisation under the PRC Enterprise Bankruptcy Law, which came into force on 1 June 2007
- Serious difficulties in production or business operations
- Switch of production, introduction of a major technological innovation or revision of its business method, and, after amendment of labour contracts, still needs to reduce staff, or
- Other major change in the objective economic circumstances relied upon at the time of conclusion of the labour contracts, rendering them incapable of being performed

the employer shall compensate the employee as prescribed in the “Calculation base of the compensation”.

If the labour contract is terminated early due to the employee’s fault as prescribed by Article 39 of the PRC Labour Contract Law, the employer need not pay any compensation.

Where the labour contract is terminated early by the employee

According to Articles 38 and 46(1) of the PRC Labour Contract Law, if the employee terminates the labour contract early due to the fault of the employer, the employer shall compensate the employee as prescribed in the “Calculation base of the compensation”.

Where the labour contract is terminated early upon agreement by the parties

According to Articles 46(2) and 47 of the PRC Labour Contract Law, if the employer requests for termination of the labour contract before the date of expiry, and the employee agrees to such early termination after negotiation between the parties, the employer shall compensate the employee with one month's salary for each full year worked. Of course, the 300%/12-month limit, as specified in the "Calculation base of the compensation", applies to such situation.

According to Article 20 of the Labour Contract Circular, if the employee requests for termination of the labour contract before the date of expiry, and the employer agrees to such early termination, the employer need not pay any compensation.

Where the labour contract expires

Articles 44(1) and 46(5) of the PRC Labour Contract Law state that compensation shall be payable upon the natural expiry of the labour contract unless it is the employee who chooses not to extend his or her service and the employer has offered no worse conditions than those in the last labour contract.

If the employer is declared bankrupt, has its business license revoked, is ordered to close or is closed down, or decides on early liquidation, the employer shall compensate the employee as prescribed in the "Calculation base of the compensation".

DAMAGES FOR ILLEGAL TERMINATION OF THE LABOUR CONTRACT

According to Articles 47, 48 and 87 of the PRC Labour Contract Law, if an employer terminates the labour contract of an employee in breach of law, the employee may request for a specific performance, i.e., reinstatement to his or her job position; if the employee does not so request or the contract is no longer capable of being performed, the employer shall pay twice the usual severance payment amount as

specified in the “Calculation base of the compensation” as damages to the employee.

Where an employee terminates his or her labour contract in breach of law or breaches the confidentiality obligations or competition restrictions stipulated in his or her labour contract, and if such behaviour causes the employer to suffer loss, the employee shall be liable for damages.

ADMINISTRATIVE PENALTY UPON THE EMPLOYER’S IMPROPER PERFORMANCE

According to the PRC Labour Contract Law, and Labour Protection Supervision Regulations, which came into force on 1 December 2004, an employer may be ordered by the relevant authorities to pay to its employee any unpaid salary (including overtime payment), any difference between an employee’s salary and the local minimum salary standard, or the economic compensation for termination of a labour contract within a specified term, as the case may be, in any of the following circumstances:

- The employer fails to pay the employee’s salary in a timely manner and in the full amount as stipulated in the labour contract or as provided by the State
- The employer pays the employee lower than the local minimum salary standard
- The employer arrange overtime without paying overtime payment or
- The employer fails to pay economic compensation to the employee according to the PRC Labour Contract Law upon termination of the labour contract
- Failing which, the employer would be ordered to pay the employee additional compensation equivalent to between 50% and 100% of the amount unpaid

NON-TERMINABLE EMPLOYEE

Under the PRC Labour Contract Law, an employer may not terminate the labour contract with an employee under Articles 40 and 41 of the PRC Labour Contract Law, nor end the employment if the contract has expired, if such employee:

- Is engaged in occupationally disease-prone work and has not had a medical examination to determine they are free from such disease, or is in any diagnostic or observation period pending such determination
- Has been confirmed as having lost or partially lost his or her capacity to work due to an occupational disease contracted or a work-related injury sustained with the employer
- Has contracted an illness or sustained a non-work-related injury, and the set period of medical care therefore has not expired
- Is a female employee that is pregnant, in confinement or in the nursing period
- Has worked continuously for the employer for at least 15 years and is within five years of the legal retirement age

Layoffs/Work Force Reductions/Redundancies

APPLICABLE CONDITIONS

The employer seek to terminate its employees by reason of redundancy, only if it is necessary to lay off 20 or more employees, or less than 20 employees but which account for 10% or more of the total number of its employees.

Furthermore, the employer must apply and justify one of the following circumstances when it seeks to terminate its employees by reason of redundancy:

- The employer undergoes reorganization pursuant to the PRC Enterprise Bankruptcy Law, which came into force on 1 June 2007
- The employer encounters serious difficulties in production or business operations
- There is a switch of production, introduction of a major technological innovation or revision of its business method, and, after amendment of labour contracts, the employer still needs to reduce staff or
- Other major changes in the objective economic circumstances relied upon at the time of conclusion of the labour contracts, rendering them incapable of being performed

PROCEDURE

The employer is required to explain such circumstances 30 days in advance to the union or all of the employees, and take the opinion or suggestion from the union or any employee into consideration. After that, a retrenchment plan shall be reported to the local labour authority.

Personnel who have priority to be retained are those:

- Who have entered into a comparatively longer fixed term labour contract with the employer
- Who have entered into an indefinite term labour contract with the employer or
- Who are the only ones employed in their family, and have to support the elderly or minor family member(s)

When selecting the employee to be made redundant, in addition to the Personnel who have priority to be retained, the employer shall not lay off employees as specified in 'Non-terminable employees above.

Unfair Competition/Covenants Not to Compete

TRADE SECRETS

Article 23 of the PRC Labour Contract Law prescribes that “an employer and an employee may stipulate relevant issues regarding protection of the trade secrets or intellectual property of the employer.” The confidentiality or trade secrets and intellectual property protection clause is not a requisite clause in the labour contract, but shall be freely chosen by the parties.

The Against Unfair Competition Law of the PRC, which came into force on 1 December 1993, defines “trade secrets” as being technical information and business operation information that are unknown to the public, which can bring about economic benefits to the employer, have practical utility, and for which the employer has adopted secret-protection measures.

An employee must compensate his or her employer for any loss incurred by the breach of confidentiality clause. If the loss cannot be calculated, the amount of compensation shall equal to the profit the employee earned as a result of the infringement and the reasonable fees the employer has paid for investigating such infringement by the employee.

In this respect, the employer shall also note Article 149(7) of the PRC Company Law, which came into force on 1 January 2006, and which states that “the directors, supervisors and senior management of the company shall not disclose the secrets of the company without authorization.” It appears that the directors, supervisors, and senior management are obliged not to disclose the confidential information of the company, even if there is no confidentiality agreement between them and the company.

Covenants not to compete

As stipulated in Article 24 of the PRC Labour Contract Law, the personnel subject to competition restrictions shall be limited to the employer's senior management, senior technicians and other personnel with a confidentiality obligation. The scope, territory and term of the competition restrictions shall be agreed upon by the employer and the employee, and such agreement shall not violate laws and regulations.

An employer may stipulate that an employee shall not be employed by any entity that produces similar goods or engages in a similar business and, therefore, is in competition with the employer, within a certain period (not to exceed two years) following termination of the labour contract, under the condition that the employer shall provide a certain monthly amount of compensation, which can be agreed between the parties, to the former employee.

NON-SOLICITATION OF CUSTOMERS AND EMPLOYEES

Currently, no regulations have been issued in the PRC addressing the issue of non-solicitation of customers and employees. As such, employers should be able to prescribe a non-solicitation clause in the labour contract.

Personnel Administration

REQUIRED TRAINING

Under Article 66 of the PRC Labour Law, the State must take various measures to expand vocational training, develop the professional skills of employees, improve their qualities, and raise their employment capability and work ability. However, such responsibilities have not been imposed on the employer.

However, if the employer provides professional skills training to the employee and has incurred separate training costs in providing such training, the employee may be bound by the employer to serve for a pre-determined period (on pain of paying liquidated damages if in breach). The liquidated damages cannot be more than the proportionate costs of such training based on the remaining pre-determined period.

EMPLOYEES' LIST

The Labour Contract Law requires each employer to establish a list of employees for future reference. The Implementing Regulations of the PRC Labour Contract Law further stipulate that such a list must include the employee's name, gender, ID number, address of their registered domicile, contact information, employment arrangement (e.g. direct employment or labour secondment), commencement date of employment, contract term, etc. In case the employer breaches this requirement, it may be ordered to rectify its conduct by the labour administrative authority and should it fail to do so, a penalty of RMB 2,000-20,000 could be imposed.

GIVING EMPLOYMENT REFERENCES

There are no mandatory requirements for an employer to give employment references.

RECORD KEEPING

Under the PRC Labour Contract Law, an employer is required to keep a register of its employees for possible supervision. Where a labour contract between the employer and any employee has been terminated or has expired, the employer is required to keep the labour contract for at least two years.

According to the Interim Regulations on Wage Payment, the employer shall record the amount of wages, time for payment, name of the employee and the employee's signature. The employer is required to keep such a record for at least two years.

PRIVACY

There are no dedicated laws or regulations for privacy protection of employees in Mainland China. However, according to the Employment Services and Management Regulations, which were issued by the Labour and Social Security Ministry (currently known as Human Resources and Social Security Ministry) and came into force on 1 January 2008, the employer is obliged to keep confidential of the employee's personal data, and has to obtain the employee's written consent if it will publicize any of such personal data or utilize any of the employee's technological or intellectual achievements.

DRUG TESTING

Employers in Mainland China are not required to conduct drug testing of their employees. In practice, however, the employer can request the employee to provide a health certificate proving that their health qualifies the employee for their particular occupation.

OFF -DUTY CONDUCT

Employees are entitled to participate in specified lawful activities during working hours without deduction of salary. For example, employers cannot prevent employees from exercising their political voting right during working hours. Although there are no specific laws or regulations, it would appear that PRC employers may not discipline employees for engaging in lawful activities (such as smoking or drinking) outside working hours. Otherwise, an employer may be challenged as having infringed the employees' personal rights protected under the General Civil Principles.

MEDICAL INFORMATION

PRC employers shall maintain statistical reports with respect to accidents involving injury or death, and situations of occupational diseases occurring to employees in the process of their work. Although there are no specific laws and regulations, it would appear that the employer may not disclose the medical records of an employee to others without the employee's consent. Otherwise, the employer could be regarded as having violated such employee's rights protected under the Employment Services and Management Regulations.

SEARCHES

PRC laws and regulations do not provide for searching employees' property brought on to company premises. Employers that do conduct such searches, however, must be careful since a search could be in breach of the provisions of personal rights protection provided by the General Civil Principles.

LIE DETECTOR TEST

There are no regulations governing whether PRC employers may require employees to take a polygraph test.

FINGERPRINTS

There are no regulations or practices regarding whether PRC employers may require their employees to furnish fingerprints.

SURVEILLANCE AND MONITORING

The PRC Labour Law does not provide any regulations regarding the surveillance and monitoring of employees by their employers. However, employers must be careful, as such actions could offend the personal rights of employees and thus, violate the General Civil Principles or the Criminal Law. If the purpose of the monitoring is legitimate and the means reasonable, it is not likely to be considered invalid.

Employee Injuries/Workers' Compensation

As discussed above, the PRC has established a system of social insurance for employee and worker injuries. PRC employees shall receive compensation from employers or from the social insurance institutions when they are unable to work due to injuries.

Unemployment

Under the PRC Rules of Unemployment Insurance, which came into force on 22 January 1999, the PRC has an unemployment insurance system to meet the minimum living requirements of unemployed people. The PRC government has initiated various policies to create working opportunities for unemployed people.

Safety and Health and Unions – Industrial Relations

SAFETY AND HEALTH

The PRC Labour Law provides that employers must:

- Establish a system of occupational safety and health; strictly implement the rules and standards of the State with regard to occupational safety and health; educate employees in occupational safety and health; prevent accidents in the process of work; and lessen occupational hazards.

Facilities of occupational safety and health must meet the standards set by the State.

Employers are required to provide employees with the necessary conditions for occupational safety and health, as well as the

necessary articles of labour protection. Employees engaged in specialised operations must receive specialised training. Employees shall have the right to criticise, report, and file charges against any acts that endanger the safety of their life or health.

UNIONS

According to the PRC Labour Law, employees shall have the right to participate in and organise labour unions. The PRC Labour Union Law provides that labour unions shall represent and safeguard the legitimate rights and interests of employees, and independently carry out their activities in accordance with law.

Employees shall take part in democratic management, or negotiate with employers on an equal footing regarding the protection of their legitimate rights and interests through the assembly of staff and workers, their unions, or other organisational forms provided by law.

The labour union, on behalf of employees, can conclude a collective contract with the employer. A draft of the collective contract shall be submitted to the congress of the staff and workers or to all staff and workers for discussion and adoption. The employer is also obliged to meet to discuss the collective contract proposals. The collective contract, however, can only be concluded upon mutual agreement between the employer and employees (or the labour union on their behalf). Upon its conclusion, a collective contract shall be submitted to the labour authority for review. If the labour authority does not raise any objections within 15 days of receiving the collective contract, it shall go into effect automatically. A collective contract shall be binding on both the employer and all employees. Finally, the standards of working conditions and remuneration agreed upon in a labour contract concluded between an individual employee and the employer shall not be lower or less than those stipulated in the collective contract.

Each labour union is endowed by the PRC Labour Contract Law, with the following power and rights:

- In case of the termination of a labour contract initiated by the employer, the union shall be notified of the reason in advance. If such termination has been in violation of the laws, regulations or any provision under the labour contract, the union may request the employer to rectify such violation and the employer shall take the union's opinion into consideration and notify the union in writing of its final decision thereon.
- In case of breach of a collective contract by the employer, the union may request the employer to undertake responsibilities for such breach. If any dispute arising from the implementation of the collective contract cannot be resolved through negotiation, the union is entitled to apply for arbitration or commence litigation against the employer in its own name.
- In the formulation or amendment of internal work rules and regulations, the union may be entitled to participate in collective negotiations with the employer, and enjoy rights of requesting the employer to amend any inappropriate decision as discussed above. Unfortunately, as to what constitutes an "inappropriate" decision, the law does not provide any guidance, but any illegal or unreasonable decision would probably be included.

Part-time Employees

WORKING HOURS

Under the PRC Labour Contract Law, a part-time employee is one who on average works generally not more than four hours a day in a week and not more than an aggregate of 24 hours a week for the same employer.

REMUNERATION

The hourly wage rate of the part-time employee shall not be lower than the minimum hourly wage rate published by the local government. Wages shall be paid to each part-time employee at least every 15 days.

LABOUR CONTRACT

No written contract is required between an employer and a part-time employee. Both the employer and the part-time employee are entitled to terminate such a part-time employment relationship at any time.

A part-time employee may conclude one or more part-time labour contracts with one or more employers, but a subsequently concluded contract may not prejudice the performance of a previously concluded contract.

PROBATIONARY PERIOD

No probationary period may be stipulated in the part-time labour contract.

Validity of Employment Manual Provision

Under the PRC Labour Contract Law, any provision in the employee manual, handbook or other set of work rules and regulations or any decision on major matters regarding the employee's labour remuneration, working hours, rest and leave, labour safety and hygiene, insurance and benefits, training, labour discipline and work quota control or other issue directly involving the immediate interest of employees, can be finalised only after discussion with, and proposals and suggestions by, the employee representative congress

or all the workers, and negotiation on equal basis with the union or the employee representatives.

In a previous draft of the PRC Labour Contract Law, the word “passed” instead of “finalised” was used when describing the establishment process of the employment manual. The legislative intent behind such word change appears to only require the consultation instead of consent of the employees or the union. In other words, where the employer has gone through discussion and negotiation with the relevant body upon the provisions of the employment manual or other work rules and regulations, the consent from the employee or the union is not required for the establishment of such provisions, and the employer may have the final say in determining such provisions.

In the process of implementing such manual, handbook or other rules and regulations, the union or any employee may raise any issue they feel inappropriate with the employer and the provision shall be amended after negotiation.

In order to validate the employee manual, handbook or other set of work rules and regulations or any decision on major matters directly involving the immediate interest of employees, the employer shall make them public or communicate the same to the employees.

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