

EMPLOYMENT ISSUES

Employment contracts

Under China's Labor Law and Employment Contract Law, employers, including foreign-invested enterprises ("FIEs"), must conclude an individual written contract with each full-time employee.

Employment contracts may be for a fixed or open term (or, more rarely, the term may be determined based on the completion of a project), though in light of potential difficulties that employers may encounter in trying to terminate employees, it is generally advisable for employers to fix the term of an employment contract to keep the term relatively short. However, under the Employment Contract Law (and subject to local interpretations of the law), employers will only be able to sign or renew an employment contract with an employee for two fixed terms after January 1, 2008, before having to sign an open-term contract with that employee. As of the date of publication, with the exception of Shanghai, this requirement under the Employment Contract Law effectively shortens the time for an employee to become entitled to request an open-term contract from 10 years to the expiration of the second fixed term contract (which may take place in as short as two years if both contracts are for a one-year term).

Probationary periods are generally included in the first employment contract signed with an employer. Under the Employment Contract Law, the allowable length of the probationary period depends on the length of the contract term, with a maximum possible period of six months.

Restrictions apply to agency or contingency workers who can be hired only for "temporary" (lasting for no more than six

months), “auxiliary” (supporting core business of a company, as determined through the mandatory “employee consultation” procedures), or “substitutable” (where the employee who originally took the position is on leave for a certain period of time for full-time study or leave) positions, and cannot exceed 10% of a company’s total workforce (though companies are allowed to gradually reduce the use of agency workers to below this threshold by February 28, 2016).

Labor unions and collective contracts

There is strong political pressure to establish labor unions in FIEs, although national law assigns the primary responsibility for initiating union establishment with the employees rather than enterprise management. The labor union may be controlled by an enterprise branch of the Communist Party. Other bodies potentially participating in “democratic management” of FIEs are employee representative councils and employee representatives on Supervisory Boards.

Collective contracts may be concluded between an enterprise and its labor union or an elected employee representative. If an enterprise receives a written request for collective bargaining from its labor union or an elected employee representative, enterprise management cannot refuse the request unless it has a justifiable reason for doing so. Collective contracts are binding for all employees of the company. Accordingly, individual employment contracts cannot include standards that are lower than those set forth in the collective contracts. However, it is possible to agree in an individual employment contract on terms that are more favorable to the employee.

There are also special consultation procedures for the adoption of employee handbooks and other company rules and matters that directly affect the immediate interests of the employees.

Representative offices

Representative offices are a special case. Representative offices are not permitted to directly employ their staff. Instead, representative offices enter into labor service contracts with qualified labor service companies, pursuant to which Chinese nationals are employed by the labor service companies and are then seconded to work as the staff of the representative offices.

In exchange for providing this employment service, the labor service companies receive a service fee. Depending on the practice of the particular labor service company and the labor service contract agreed to by the relevant representative office, salary and social insurance and housing fund payments in respect of the Chinese staff may be paid to the labor service company, which then distributes payments to the staff and social insurance and housing fund authorities respectively, or salary and social insurance and housing fund payments may be paid by the representative offices directly to the staff and social insurance and housing fund authorities.

While there is no employment contract between representative offices and their Chinese staff, representative offices may enter into agreements with their Chinese staff that supplement the provisions of the relevant labor service contracts. Such supplementary agreements typically cover subjects such as remuneration, duties, certain company policies and confidentiality and non-competition obligations.

Though technically, representative offices are not the employer, labor service companies will generally bring in the

representative offices as co-defendants if the employee raises any claims against the labor service company in relation to a dispute with the representative office.

Expatriate (non-Chinese, including Hong Kong, Macao and Taiwan residents) staff of representative offices generally are employed by the foreign parent company pursuant to employment contracts governed by foreign law. Such expatriates should be registered as representatives in accordance with registration formalities prescribed by the Chinese authorities. One representative office is only allowed to have up to four registered representatives.

Termination and resignation

In China, there is no concept of 'at will' employment as in some other countries. While employees generally may resign upon 30 days' prior notice to the employer or 3 days' notice during the probationary period, employers in China are permitted to unilaterally terminate employees only in accordance with circumstances stipulated in relevant laws and regulations.

In some permitted circumstances of termination (such as where an employee is incompetent and remains incompetent after training or assignment to another post), 30 days' prior notice (or pay in lieu) and severance payments are required. The severance payment will generally equal one month's total wages for each year of service. For any period of service after January 1, 2008, if the employee's monthly wage exceeds 300% of the average local wage, then his "monthly wage" amount is capped at that ceiling, and the employee would only be entitled to up to 12 months' wages for severance. The specific statutory calculation methods are subject to local regulations.

There are also grounds for summary dismissal with no severance payable (e.g. serious violation of company rules and regulations).

Social insurance and housing

Under Chinese law, both Chinese citizens and expatriate employees are required to participate in China's social insurance scheme. In practice, most cities now mandate expatriates working under a work permit in China to participate in the social insurance system, though some cities (e.g., Shanghai) currently have not yet implemented a system to mandate social insurance contributions for expatriate employees. China's social insurance scheme consists of five funds: Old Age Pension Insurance, Basic Medical Insurance, Occupational Injury Insurance, Unemployment Insurance and Maternity Insurance. Employers and employees are required to make contributions to the funds, and in some cases to individual employee government-held accounts, in accordance with rates determined by local authorities. In addition, employers and employees are required to contribute to a Housing Provident Fund for the purpose of buying, building and renovating employee housing. Housing fund contributions are currently not required for expatriates.

Visas and residence

Under various laws and regulations, all foreigners, except those with permanent resident status in China, may only work in China with prior permission of the relevant authorities. The term "work" in these rules is defined as engaging in behavior of a remunerative nature, and "work in China" means discharging one's employment duties in China pursuant to either (a) an employment contract signed directly with a legal person in

China, regardless of the length of employment in China or (b) an employment contract signed with a legal person outside China, the source of employment compensation is located outside China, and the work performed within China territory is for more than 3 months (90 days) in any year. According to a recently issued notice regarding the trial procedures for foreigners to enter China and accomplish short-term work assignments, there will be a short-term work certificate coming into effect as from January 2015. Foreigners who will stay in China not more than 90 days under the following circumstances must go through a certain process to obtain short-term work authorization in China: 1) to carry out assignments regarding technology, scientific research, management, guidance with domestic partners; 2) to be on trials with domestic sports institutions (including coaches, athletes); 3) to shoot films (including commercials, documentary); 4) to perform in fashion shows (including car models, models for print advertisement); 5) to participate in a commercial art performance; and 6) other circumstances as recognized by human resources and social security departments.

Generally, the immigration and labor registration procedures for a foreigner working in China can be summarized as completing the following six steps and obtaining the required permits as stated below: (1) medical examination; (2) Employment License; (3) Single Entry "Z" Visa; (4) Temporary Residence Registration; (5) Employment Permit; and (6) Residence Permit. A Residence Permit functions as a multi-entry Chinese visa, which will enable the foreigner to stay in China for a certain period of time (normally one year) and to exit and re-enter China for international travel within this period.

For foreign representative offices in China who wish to employ a foreigner as a chief representative or ordinary representative,

the Employment License is not required. Instead, the representative office should first register the foreigner with the local Administration Bureau for Industry and Commerce as its chief representative or ordinary representative. Thereafter, the foreigner can go through the above steps (other than step 2) to secure his/her Employment and Residence Permits. There is a cap (which is currently 4) on the number of representatives that a representative office may register.

Change of status, where the foreigner first arrives on either a business or a tourist visa, and then seeks to obtain an Employment Permit directly in China, may be possible in some localities but usually limited to very exceptional cases.

Different rules and application procedures apply to Chinese nationals with permanent residence abroad and permanent residents of Hong Kong, Taiwan and Macao.