

The People's Republic of China

Introduction

The People's Republic of China ("the PRC" or "China") has a civil law legal system. China's employment law is therefore based on statutory law, which is primarily adjudicated in labor arbitration tribunals and People's Courts.

Prior to January 1, 2008, the most comprehensive piece of national employment legislation was the Labor Law of the PRC ("Labor Law"), which became effective on January 1, 1995. In order to address the increasing labor unrest and widespread media reports of employer abuse of employee rights, the National People's Congress passed the Employment Contract Law ("Employment Contract Law"), which went into effect on January 1, 2008. While the Labor Law, which is still in effect, remains the foundational piece of legislation for the PRC's employment law regime, the Employment Contract Law made significant changes to the existing legal framework. Among the most significant changes are: specific penalties for not signing employment contracts with the employees; limits on the use of fixed-term contracts; specific employee consultation procedures in order to adopt company rules, policies and regulations; and greater protection for employees who are hired through employment service agencies. Aside from the Labor Law and Employment Contract Law, China has passed supplementing and related legislation at both the national and the local levels.

Among the most significant national laws and regulation, in addition to those mentioned above, are the following:

- Law of the PRC on the Promotion of Employment, effective from January 1, 2008.
- Law of the PRC on the Mediation and Arbitration of Employment Disputes ("Employment Disputes Law"), effective on May 1, 2008.
- Labor Union Law of the PRC ("Labor Union Law"), effective on April 3, 1992, and amended on October 27, 2001;
- Law of the PRC for the Protection of Disabled Persons ("Disabled Persons Law"), effective on May 15, 1991, and amended on July 1, 2008;

- Law of the PRC Concerning Protection of the Rights and Interests of Women (“Women Rights Law”), effective on October 1, 1992, and amended on December 1, 2005;
- Law of the PRC Concerning the Protection of Minors (“Minors Protection Law”), effective on January 1, 1992, and amended on June 1, 2006; and
- Regulations Prohibiting the Use of Child Labor (“Child Labor Regulations”), effective on December 1, 2002.

Terminations

Restrictions On Employers

In the PRC, all employees generally must enter into written employment contracts with their employers. Grounds for terminating those contracts, or to resolve employment disputes, are outlined in the Labor Law, Employment Contract Law, and related regulations. The basic national rules on termination are summarized below; local regulations often supplement these rules and should also be consulted before dismissing employees in China.

Expiration Or Ending Of Contracts

In China, the concept of “at-will employment” does not exist but the parties can decide whether an employment contract will have a fixed term or an open term. Employment contracts for an open term can only be lawfully terminated by the employer on one of the statutory grounds. Thus, employers in China are advised to use fixed term employment contracts that contain an expiration date. The Employment Contract Law and Labor Law both provide that fixed term contracts automatically end upon the expiry date. The Employment Contract Law also lists other circumstances upon which a fixed term contract will end, such as death of an employee or liquidation of the company. Some local regulations also call for the automatic ending of contracts in other cases.

Under the Employment Contract Law, however, an employer only has the option of signing two fixed-term contracts with an employee before an open-term contract must be signed. Further, it appears that the employee can demand an open-term contract at the end of the second fixed-term. In the absence of any binding ruling on this point, an employer should decide at the end of the first fixed-term contract whether to keep the employee long term, or let him or her go at that time.

Under the Employment Contract Law, severance is payable upon the expiration of a fixed-term employment contract unless the employee does not agree to renew the contract when the terms and conditions offered by the employer are the same as or better than those stipulated in the current contract. One unclear issue is how severance should be calculated when employment contracts signed prior January 1, 2008, expire after that date. Based on the grandfathering language in Article 97 of that law, severance generally would only need to be calculated based on years of service following January 1, 2008, and not any prior period of service since severance was not payable upon expiration under previous law.

Mutual Termination

An employment contract can also be terminated by mutual agreement between the employer and the employee. Where the employer initiates the mutual termination, the employer must pay severance.

Termination – When Notice And Severance Required

An employer can terminate the employment contract by giving 30 days' prior written notice and paying severance to the employee in the following circumstances:

- (i) The employee has fallen ill or sustained an injury not caused by the employment and, at the end of the “medical treatment period”, can neither engage in the original work nor in other work arranged by the employer.
- (ii) The employee is incompetent and remains so even after training or assignment to another post.
- (iii) Performance of the original employment contract becomes impossible due to a major change in the objective circumstances upon which the employment contract was originally based, and consultations between the parties fail to produce an agreement on an amendment of the employment contract (this is referred to as the “Objective Circumstances Test”).

Termination During Probation

An employee in his or her probation period may be dismissed if he or she does not satisfy the conditions of his or her recruitment. In such terminations, prior notice and payment of severance are not required. The permissible length of probationary periods is determined by the duration of the relevant employment contracts. If an employment contract has a term of not less than three months but less than one

year, the probation period may not exceed one month; if an employment contract has a term of not less than one year but less than three years, the probation period may not exceed two months; and if an employment contract has a term of not less than three years or is open-ended, the probation period may not exceed six months. Employees are permitted to resign during probation by giving three days' prior notice; after probation, they are generally required to provide at least 30 days' notice, and more in certain cases.

Summary Dismissal For Misconduct

In the following limited instances, an employer can terminate an employment contract due to employee misconduct, without notice and without paying the employee severance:

- (i) If the employee seriously violates the employer's rules or regulations provided that the relevant rules or regulations have been validly formulated and adopted in accordance with legal rules. Under the Employment Contract Law, if an employer wishes to adopt certain HR-related rules, it must follow a specified employee consultation procedure. The procedure is as follows:
 - The employer should organize meetings with the employee representative congress (ERC) (similar to a Works Council in the EU) or employees at-large to discuss the company rules (without management being present).
 - The employer should ask ERC or employees at-large to put forward proposals or comments regarding the company rules.
 - The employer must consult with labor union or elected employee representatives regarding the company rules and employee proposals.
 - The company rules should be publicly communicated to all employees.

If an employer takes an action against an employee based on a set of company rules (e.g., termination for a serious violation of the company rules), but the company rules were not adopted according to the above procedure, the employee can challenge the legal basis for such action.

- (ii) If the employee commits serious dereliction of duty or graft resulting in major harm to the employer's interests ("major harm to the employer's interests" may be defined by the enterprise's internal rules or regulations).

“Graft” generally refers to actions by an employee that take advantage of his or her position of employment for illegal ends. The classic example is employee embezzlement.)

- (iii) If the employee is “prosecuted according to the law.” (Examples of this ground are explained under Article 29 of the Opinion on the Labor Law).
- (iv) If the employee has an employment relationship with a second employer that materially affects his or her employment relationship with the first employer, and the employee refuses to rectify the matter after the first employer brings the problem to his or her attention.
- (v) If the employee used coercion or deception, or took advantage of the employer’s difficulties to make the employer sign the employment contract. However, given that an employer is generally in a stronger bargaining position than an employee, employers might face a greater burden when trying to rely on this ground as the basis for summary dismissal.

Lay-Offs

When an employer needs to reduce its workforce by 20 or more persons, or by a number of persons that is fewer than 20 but accounts for 10 or more percent of the total number of the enterprise’s employees, the employer may conduct layoffs, under Article 41 of the Employment Contract Law, in any of the following circumstances:

- (i) The employer is to undergo restructuring in accordance with the Enterprise Bankruptcy Law;
- (ii) The employer is experiencing serious difficulties in its production and operations;
- (iii) The enterprise is to switch production, introduce a major technological innovation or revise its business method and, after amending the employment contracts, still needs to reduce its workforce; or
- (iv) The employer is to undergo a material change affecting the objective economic circumstances relied upon at the time of the conclusion of the relevant employment contracts, rendering them impossible to perform.

Protections From Termination

In the following instances, an employer is restricted from using a reduction in workforce or from terminating an employee's employment based on one of the grounds requiring notice and severance:

- When an employee suffers from an occupational disease or has sustained an injury caused by the employment, and is confirmed to have lost or partially lost the ability to work.
- The employee is in a statutory medical treatment period for a non-work-related illness or injury.
- The employee is pregnant, or one year thereafter (constituting her confinement and the nursing periods).
- The employee is engaged in operations exposing him to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observations.
- The employee has worked for the employer continuously for at least 15 years and is less than five years away from his or her legal retirement age.
- The employee is still in his or her term as a union chairman, vice-chairman, or union committee member.
- The employee is still in his or her term as collective bargaining representative during collective bargaining negotiations.
- Other circumstances stipulated in legislation.

Notice Provisions/Consequences Of A Failure To Provide The Required Notice

In addition to the notice requirements discussed above, Article 21 of the Labor Union Law requires that the labor union be notified prior to any unilateral termination of employees by an employer. The union then has the right to challenge any terminations it views as improper, and the employer is required to listen to the union's opinion and to notify the labor union in writing as to how it handled the matter. Article 43 of the Employment Contract Law provides that when an

employer is to terminate an employment contract unilaterally, it shall give the labor union advance notice of the reason therefor. If the employer violates laws, administrative statutes or the employment contract, the labor union has the right to demand that the employer rectify the matter. The employer shall study the labor union's opinions and notify the labor union in writing as to the outcome of its handling of the matter.

This requirement is not yet widely enforced, but in theory it creates practical difficulties for employers. One potential difficulty is that it can hamper employers' ability to efficiently terminate, particularly in the case of summary dismissal, since the rule arguably suggests that the union should have time to challenge the termination before it is effectuated. The second is that it is not clear under the Labor Law or the Employment Contract Law how an employer should proceed if it does not have its own labor union. Court rulings in some localities suggest that in this case the employer must notify a higher-level organ of the union of the employer's locality, but this is not a settled issue under legislation and no practice norm has yet developed.

Termination Indemnities

Where severance is required, the entitlement is generally calculated as one month's average wages for each year of service. In terms of calculating the years of service, if an employee has worked for a period of less than six months, the employee would be entitled to half-month's wage for that period of service, but if the employee has worked for a period of between six months and one year, then that period shall be considered a full year of service for severance calculation purposes so that the employee would be entitled to a full month's wages. In cases of termination for incompetence and mutual termination, severance is limited to 12 months of average wages. Severance payments are normally due in a one-time lump sum payment on the day that termination becomes effective.

The average month's wage is calculated by taking the total amount of compensation paid to the employee during his or her final 12 months of employment (including base salary, overtime, bonuses, subsidies, allowances, and commissions) and dividing this amount by twelve. In addition, under the Employment Contract Law, if an employee's monthly wage exceeds 300% of the average monthly wage in the municipality where he works, his average monthly wage amount (for severance calculation purposes) will be capped at 300% of the local average monthly wage, and he would only be entitled to a maximum of 12 months' wages as severance

payment. If an employee is unilaterally terminated due to (1) inability to work because of illness or injury; (2) a major change in objective circumstances; or (3) serious difficulties in production or operations and if the employee's average monthly wage is below that of other employees at the enterprise, severance is calculated based on the average monthly wage for all employees at the enterprise.¹

It should also be noted that the Employment Contract Law includes a grandfather provision under which for any period of service prior to January 1, 2008, severance shall be calculated under the old formula existing prior to that date, and the new formula under the Employment Contract Law would be applied for any period of service after January 1, 2008.

Additional compensation may be required in some circumstances. For example, in terminations for an inability to work due to non-work-related illness or injury, employers must pay a medical subsidy of at least six months of wages upon termination. Additional subsidies are required where employees' illnesses or injuries are serious or terminal.

Law On Separation Agreements, Waivers, And Releases

It is advisable for employers and employees to enter into written mutual termination agreements that set out all of the terms of final payments, that recite or refer to confidentiality obligations and restrictive covenants affecting the employee, and that include a release of employer liability on the employee's part.

It is not uncommon for employers to seek a release from liability from employees in other cases of termination as well. However, Chinese law is silent on the legal effect of such releases. If a release were challenged, it would be likely to protect an employer against potential liability for any contractual obligations that have been released and waived; however, this approach is less likely to be effective for waivers and releases of statutory rights, such as the right to severance.

¹ *Compensation Measures*, Art 11.

Litigation Considerations

There are four different methods that employers and employees generally use in the PRC to resolve employment disputes:

- Consultation
- Mediation
- Arbitration
- Litigation

Settlement is the preferred method of labor dispute resolution in China, and consequently employers and employees should consult with one another as the first step in attempting to resolve disputes in China.

If the issue cannot be settled through consultation, the employer and employee may engage in mediation through a mediation commission set up within the employing enterprise. Mediation is not mandatory, and either the employer or the employee can apply for arbitration without going through mediation. The labor dispute mediation commission is composed of representatives from the employees and enterprise management (usually the board chairman or general manager). If the company has a labor union, a union official will generally be the employee representative. Since mediation can be a cumbersome process, employers oftentimes skip over mediation in the event of any dispute.

The next stage is labor arbitration. If mediation fails to resolve the dispute, or either party chooses to skip the mediation process, the employer or employee may apply to the local labor dispute arbitration commission for arbitration. Under the Employment Disputes Law, the party requesting arbitration should submit a written application to the labor dispute commission within one year from the day when the employment dispute arose, which is the day on which the party knew or should have known of the infringement of rights. The commission will decide whether or not to accept a case within five days from the date of receipt of the application. If a case is accepted, the commission will form a labor dispute arbitration tribunal of one to three arbitrators. During the arbitration, the parties may submit their statements, counterclaims, and evidentiary support. Since settlement is preferred even at this stage, the arbitration tribunal will ask the parties if they would like to try again to reach a settlement on their own or if they would like the tribunal to

mediate a settlement. If a settlement is reached through mediation at this stage, the tribunal will issue a mediation letter that is legally effective from the date it was served to the parties and is enforceable by the People's Court from the date it has been served on the parties. An arbitral award will be issued if no settlement agreement or mediation letter was issued. The deadline for issuance of an arbitral award is normally 45 days from the receipt of the application for arbitration, and an extension of up to 15 days may be granted for more complicated cases, subject to the approval of the Employment Dispute Arbitration Commission.

If either party is dissatisfied with the arbitration award, it may file an appeal with the relevant local People's Court within 15 days from the date of receipt of the written arbitral award. If a party neither files a suit within the statutory term nor performs according to the arbitral award, the other party may apply to the People's Court for enforcement.

Employment Discrimination

Laws On Employment Discrimination And Employee Protections

Non-Discrimination Principles

Employers in China must comply with the following general principles established under the Labor Law:

- No discrimination based on nationality, race, sex, religious affiliation, disability or being a communicable disease carrier or a migrant worker;
- Equal employment rights for men and women; and
- Equal pay for equal work.

Discrimination based on handicapped status is also prohibited under the Disabled Persons Law. In addition, under the Employment Promotion Law, discrimination against migrant workers or individuals who are carriers of infectious diseases is prohibited unless there are laws or regulations prohibiting workers with certain diseases from engaging in certain types of work. The Employment Promotion Law is the most recent legislation addressing the employment discrimination issue. Chapter 3 of the Employment Promotion Law expressly declares that each level

of government shall establish a fair employment environment, eliminate employment discrimination and provide support and aid to people who encounter difficulty in employment.

Legally Protected Groups

The Labor Law and related regulations protect employees with disabilities, women and minors in the employment arena. The legal principles are better developed in these areas than in the general non-discrimination arena.

(i) Disabled Employees

Chapter 4 of the Disabled Persons Law specifies that disabled employees should be provided with job types and posts that are “suitable” for them. Article 34 prohibits discrimination against disabled employees in their “recruitment, employment, change to permanent status, promotion, evaluation, remuneration, fringe benefits, work insurance, etc.,” and requires employers to provide disabled employees with work conditions and work protections appropriate to the special characteristics of their disability.

(ii) Female Employees

The Women Rights Law specifically protects women against discrimination in employment and provides for equal employment and promotion rights. Article 12 of the Labor Law and Article 21 of the Women Rights Law provide that unless work is not suitable for women (as defined by statute), an employer should not, for the reason of gender, refuse to employ women or increase the recruitment standards for women. The law requires that men and women be treated equally on matters of promotion and assessment of professional skills. Further, Article 23 of the Women Rights Law specifies that men and women should be paid equally for equal work and should enjoy the same housing and welfare benefits.

The law also sets out specific parameters designated to protect the safety and health of women during employment. It restricts the level of physical labor to which a female employee can be assigned. The levels are set out in the “Physical Intensity of Labor Classification System,” a set of regulations promulgated by the State. Those tasks considered too labor intensive for women include work in mines, pits, and steel factories.

Women are also protected by the Women Rights Law during their menstrual, pregnancy, confinement, and nursing periods. During these periods, women are further restricted as to the types of tasks they can perform (e.g., they cannot be assigned to operations at heights or low temperatures, to physical labor, etc.). During pregnancy, female workers past seven months also cannot work extra hours or night shifts. Employers are prohibited from dismissing or terminating a female worker during pregnancy, maternity leave, or nursing. The general maternity leave entitlement for women is 90 days, commencing 15 days before the baby is due. However, the 90-day entitlement can be increased in a number of circumstances, such as for labor difficulties, multiple births, and caesarean sections.

(iii) Children and Minors

The Labor Law, Minors Protection Law and Child Labor Regulations prohibit employers from recruiting, employing or introducing jobs to children under 16 years of age. Limited exceptions apply to the cases of child entertainers or athletes and to labor for practical education purposes or vocational skill training purposes; in these cases, steps must be taken to ensure the physical safety and physical and mental health of the children. The Child Labor Regulations remove other exceptions that existed under prior regulations, which permitted children under 16 to engage in “family labor” and “supplementary labor approved by local authorities.” The rules also indicate that local governments no longer have the authority to determine that certain kinds of child labor may be allowed. In order to help ensure compliance, employers are required to examine the identity cards of employees and to retain all recruitment and inspection records.

The legislation also sets out stipulations on types of work, working hours, labor intensity, and protection measures employers must follow when employing minors (individuals above 16 but below 18 years of age). For example, Article 28 of the Minors Protection Law prohibits employers from assigning minors to work which is considered toxic, harmful, or dangerous. Article 64 of the Labor Law specifies that minor employees should not be assigned to work in mines and pits, work involving dangerous poisoning or harm, or work requiring intense physical labor as specified by the State. Article 65 of the Labor Law requires employers to conduct regular physical examinations of minor employees.

Potential Employer Liability For Employment Discrimination

General Liability

Several articles of the Labor Law, the Employment Promotion Law and local rules afford protection to employees in general and therefore apply in the non-discrimination context. An employer can face the following if it engages in prohibited discrimination or violates protections for employees afforded under the Labor Law or regulations:

- The government may stop or order rectification of the violating acts;
- The employee or potential employee may bring a claim for unlawful discrimination;
- The employer must compensate its disabled employees for harm caused to them by the employer's rules or regulations that violate relevant legislation; and/or
- The employer must be punished in accordance with law for infringing lawful rights and interests of employees.

Specific Liability For Violation Of The Rights Of Legally Protected Groups

(i) Violation of Protections for, or Discrimination Against, Disabled Employees

The Law on Protection of the Disabled provides enforcement and penalty mechanisms in addition to those provided under the Labor Law:

- Article 49 gives a disabled person the right to take an employer to court or to ask the government to handle a situation where the employer infringes his or her lawful rights or interests.
- According to Article 51, if an employer causes harm to its disabled employee the employer must pay corresponding damages to the employee.
- Article 52 provides for criminal penalties in certain extreme cases.

(ii) Female and Minor Employees

The Labor Law and related regulations set out very specific penalties for employers that discriminate against female or minor employees. If an employer infringes upon the lawful rights and interests of female or minor employees stipulated in the Labor Law or in employment contracts, the employer could be liable for compensation to the injured employees. If the infringement

causes salary loss to the employee, the employer is liable to pay the employee the lost salary plus 25% of that salary as compensation. In addition, the labor administration department could order rectification and impose a fine. Article 11 to Article 15 of the Penalties Measures specify the fine in each type of violation; however, in general, the fine is under RMB3,000 (around US\$350) per violation.

In addition to the above, violations of the Child Labor Regulations may result in penalties including fines (up to RMB30,000 - around US\$3,500 - in some cases); revocation of the employer's business license; liability for all medical and living expenses if minors become ill or are injured; compensation to the minor's direct relatives if the minor dies or becomes handicapped, in accordance with national occupational injury insurance regulations; and/or criminal penalties in accordance with the PRC Criminal Law.

Managers and supervisors may also be liable in instances of sex discrimination. According to Article 50 of the Women Rights Law, if the rights and interests of women are damaged in any of the following situations, the unit to which they belong or the superior organization may impose an administrative penalty on the personnel directly responsible:

- Refusing to recruit or increasing the recruitment standard in situations in which women should be recruited pursuant to laws and regulations;
- Violating the principle of “equality between men and women” and damaging the rights of women during allocation of apartments, promotion, or assessment of professional skills; or
- Dismissing female employees for the reasons of marriage, pregnancy, maternity leave, or nursing.

Practical Advice To Employers On Avoiding Employment Discrimination Problems

Employers should ensure that their contracts, policies, and practices are in accordance with both national and local legislation concerning non-discrimination and protections for the disabled, women and children. Senior management is advised to make sure that their written policies - such as employee handbooks - reflect the legal rules and that management teams realize and observe the relevant requirements. Such policies must be validly adopted through employee consultation procedures (see above).

Sexual Harassment

Laws On Sexual Harassment And Employee Remedies For Sexual Harassment

The Women's Right Law as amended in August 2005 explicitly prohibits sexual harassment. Article 40 specifically provides that the "sexual harassment of women is prohibited, and the victim is entitled to complain to her employer and the relevant government bodies."

While Article 40 presents a step toward protecting women in China from sexual harassment, it is not very specific and far from sufficient to fully protect a woman's rights to equality, freedom from discrimination and personal dignity and reputation. Article 40 does not define what types of behavior are considered to be sexual harassment, nor does it specify the punishments for sexual harassment. Thus, even though the Women's Rights Law provides that a victim of sexual harassment can use the courts to seek administrative punishment or civil liability against her harasser, in reality the lack of detailed provisions makes it difficult to successfully prosecute a claim of sexual harassment.

Having said that, some local regulations also prohibit sexual harassment. For example, the Shanghai Women's Rights Measures contain provisions prohibiting five types of sexual harassment (i.e., verbal harassment, written harassment, image harassment, and electronic message harassment) and the Measures also provide for certain punishments for those who have engaged in sexual harassment.

Moreover, claims so far have mainly been by individual plaintiffs against colleagues, rather than against employers of the plaintiffs and defendants.

Potential Employer Liability For Sexual Harassment

The national Women's Right's Law does not specify whether employers (as opposed to the individual harasser) are also liable in the case of sexual harassment. However, some local regulations, such as the Shanghai Women's Rights Measures, specify that employers are responsible for setting up a system to prevent sexual harassment and allow female employees to submit complaints about harassment. Therefore, under these local measures, employers can also face liability if they have failed to take sufficient measures to protect female employees from sexual harassment.

Practical Advice To Employers On Avoiding Sexual Harassment Problems

In light of the fact that employers may face liability for harassment, employers should provide training to employees about sexual harassment, establish a system under which female employees feel free to submit complaints of harassment and feel confident that the company will take action against such harassment. They should also adopt company rules and policies prohibiting sexual harassment that give the company the right to take disciplinary action, up to and including termination, in the event an employee engages in sexual harassment. As mentioned in the section on “*Summary Dismissal for Misconduct*” above, such company rules and policies are only valid if they have been adopted through a specified employee consultation procedure.