



FROM HIRING TO FIRING

A BASIC GUIDE TO THE CHINESE EMPLOYMENT LAW LIFE CYCLE



EVERYTHING MATTERS

Since the *PRC Employment Contract Law*, issued by the Standing Committee of the National People's Congress, came into force on 1 January 2008, employment related issues have attracted increasing attention in the Chinese and international media. The strike at Honda's facilities in Guangdong and the suicides at Foxconn highlighted the increasing tension in labor relations in China. The authorities are striving to maintain social stability by tackling income inequality and strengthening social security, bringing further reform to Chinese labor laws and regulations. The wave of unrest and continuing legal reforms create new challenges for all companies operating in China, especially foreign companies. It is time for employers to re-examine every step of the employment process and how it is handled, from hiring to firing, to avoid costly mistakes.

HIRING

For many employers, the key to having a productive and high-performing workforce is recruiting the right people. However, it is important for employers to be aware that even before an employee commences work, there are a number of legal issues which arise in the process of seeking, interviewing and selecting candidates for a position.

Recruitment

Employers are prohibited from discriminating against potential candidates for employment based on ethnicity, race, gender, age, physical disabilities, religious beliefs, being a communicable disease carrier or being

a migrant worker. The anti-discrimination provisions are contained in the *PRC Labor Law*, effective 1 January 1995 and issued by the Standing Committee of the National People's Congress and various regulations such as the *Law of the PRC on the Promotion of Employment*, effective 1 January 2008 and issued by Standing Committee of the National People's Congress.

Basic requirements to be met by foreign employees

Under the *Regulations for the Administration of the Employment of Foreigners in China*, effective 1 May 1996 and issued by the former Ministry of Labor and Social Security, foreign employees must meet the following basic requirements:

1. be at least 18 years of age and in good health;
2. have the necessary professional skills and work experience required for the post;
3. have no criminal record;
4. have a confirmed position; and
5. have a valid passport or equivalent international travel document.

Existing restrictions

An employer should ensure that a prospective employee does not have any restrictions which may prevent him or her from entering into the employment contract (for example, post-employment restrictive covenants imposed by his or her former employer).

Employment contract

Under the *PRC Employment Contract Law*, employers are required to have individual written employment contracts with each employee, subject to a limited exemption. If no employment contract is signed within one month of the commencement of an employee's work, the employee is entitled to double his or her wages for the period between the beginning of the second month of his or her term of employment, and when the contract is signed or the end of the first year of the employment (whichever occurs first). If no employment contract is signed within one year of the commencement of an employee's work, the parties are deemed to have signed an open-term contract.

Immigration

Foreign employees need to obtain an employment visa prior to entering China, except under special circumstances, and obtain work and resident permits upon arrival in China. Without a valid work permit, a foreigner's employment in China will be deemed to be illegal.

MANAGING

Wages

The Term "Wages" refers to the remuneration for labor which an employer pays directly to employees in the form of currency in accordance with the state regulations and the employment contract, which generally include wages calculated on a time basis or on a piece-rate basis, bonuses, subsidies and allowances.

Under the *Provisions on Minimum Wages*, effective 1 March 2004 and issued by the Ministry of Human Resources and Social Security, labor authorities at the provincial level are required to determine and adjust the minimum wage standard for their jurisdictions. Employers are not allowed to pay wages which are less than the stipulated standard.

Additionally, the Ministry of Human Resources and Social Security and the All China Federation of Trade Unions have recently picked up efforts to renew their Rainbow Plan initiative, which was put on hold during the financial crises. The goal of the Rainbow Plan is to get employers to put in place collective contracts. Since the restart of the initiative, there is a particular emphasis on collective contracts covering wage and wage related issues.

Paid Annual Leave

In accordance with the *Measures for the Implementation of Paid Annual Leave of Enterprise Employees*, effective 1 January 2008 and issued by the Ministry of Human Resources and Social Security, employees who have worked for one full year or more are entitled to paid annual leave. The duration of leave for each employee is determined by reference to his or her accumulated years of work (with all employers, not just the current employer). An employee having worked for one year or more but less than ten years is entitled to five days' paid annual leave; an employee having worked for ten years or more but less than twenty years is entitled to ten days' paid annual leave; and an employee having worked for twenty years or more is entitled to fifteen days' paid annual leave. Statutory holidays and

weekends are not included in the paid annual leave calculation. Generally, paid annual leave should be taken during the current calendar year and not be carried over to the next calendar year. Unless an employee expressly waives his or her paid annual leave entitlement in writing, the unused paid annual leave during the year should be compensated at the rate of 200% of the employee's daily wage.

In practice, many employers grant more paid annual leave to their employees than the statutory entitlement.

Social insurance

In order to achieve the goal of improving the social security system as proposed in the 12th Five-Year Program (2011–2015) on National Economic and Social Development, China's top legislature enacted a law addressing certain social insurance issues, which took effect on 1 July 2011.

The *PRC Social Insurance Law* restates the mandatory obligation of employers to contribute to the five different types of insurance covered under the social security system, namely pension, medical insurance, work-related injury insurance, unemployment insurance and maternity insurance.

The law overcomes many of the obstacles under the old regulations, which had the effect of restricting the movement of the country's increasing migrant population. It allows employees to transfer their pension accounts from one residence to another, and indicates that a new medical payment system should be established to allow medical insurance in one location to be repaid in another location.

The law also gives equal national treatment to foreigners working in China by stating that such employees should also contribute to social insurance.

Company rules

Under the *PRC Employment Contract Law*, company rules, such as the employee handbook, must go through the following procedures when issued or amended to be legally binding:

1. discussing the rules with all employees or an employee representative congress;
2. consulting with union or employee representatives; and
3. publishing the final version of the rules.

Work safety and health

A patchwork of laws and regulations hold employers responsible for the health of their employees at work and require employers to establish a system to protect health and safety. Effective measures should be taken by employers to control workplace hazards and prevent occupational diseases.

Data Privacy

China does not have a general data protection law. However, the *Regulations on Employment Services and Employment Management*, effective 1 January 2008 and issued by the Ministry of Human Resources and Social Security, requires that an employee's personal data be kept confidential and not be publicised without the employee's consent.

Union and Collective Bargaining

In recent years, the Chinese government and the All China Federation of Trade Unions have been pushing unionisation and collective bargaining.

The *PRC Labor Union Law*, effective 27 October 2001 and issued by the National People's Congress, will reportedly be amended in the near future. The amendments are expected to provide more details in relation to collective bargaining at the industry level and democratic management within employers. Additionally, the draft *Payment of Wages Regulation*, which is currently under review at the national level, reportedly indicates that if an employer unjustifiably refuses an employees' request for collective bargaining in relation to wages, and fails to correct such violation within the period stipulated by the authorities, the employer may be liable to a fine of up to RMB200,000.

FIRING

Termination for cause

There is no "at-will" employment in China and termination of employees must be for cause.

Under the *PRC Employment Contract Law*, an employer may terminate an employment contract without notice if the employee:

1. is proven during the probation period not to satisfy the conditions for employment;
2. materially breaches the employer's rules and regulations;

3. commits serious dereliction of duty or practices graft, causing substantial damage to the employer;
4. has additionally established an employment relationship with another employer which materially affects the completion of his or her tasks with the original employer, or he or she refuses to rectify the matter after the same is brought to his or her attention by the employer;
5. uses such means as deception or coercion, or takes advantage of the employer's difficulties, to cause the employer to conclude an employment contract, or to make an amendment thereto, that is contrary to the employer's true intent; or
6. has his or her criminal liability pursued in accordance with the law.

An employer may terminate an employment contract by giving an employee 30 days' prior written notice, or one month's wage in lieu thereof, if:

1. after the set period of medical care for an illness or non-work-related injury, the employee can neither engage in his or her original work nor in other work arranged for him or her by the employer;
2. the employee is incompetent and remains incompetent after training or adjustment of his or her position; or
3. a major change in the objective circumstances relied upon at the time of conclusion of the employment contract renders it unperformable and, after consultations, the employer and the employee are unable to reach agreement on amending the employment contract.

Mutual Termination

In addition to termination for cause, the *PRC Employment Contract Law* states that an employer and an employee may terminate their employment contract by mutual agreement.

Under the *Interpretation on Several Issues Concerning the Application of the Law to Trials of Employment Disputes (3)* released by the Supreme Court on 14 September 2010, if an agreement entered into between an employee and his or her employer pertaining to termination procedures, payment of wages, overtime pay, severance or other compensation does not violate the mandatory provisions of laws and regulations, and no fraud, coercion or similar situation exists, the agreement will be determined valid.

Termination payments

Under the *PRC Employment Contract Law*, the employer is required to pay an employee severance pay in the following circumstances:

- (a) the employment contract is terminated by the employee for any of the reasons stipulated under the *Labor Contract Law* where the employee is allowed to terminate the employment contract without notice due to a fundamental breach of the employment contract by the employer;
- (b) the employment contract is terminated after such termination was proposed to the employee by the employer and the parties reached agreement thereon after consultation;

- (c) the employment contract is terminated by the employer in certain circumstances stipulated under the *Labor Contract Law* where the employer is allowed to do so upon giving 30 days notice;
- (d) the employment contract is a fixed term contract whose term expires, unless the employee does not agree to renew the contract even though the conditions offered by the employer are the same or better than those stipulated in the current contract;
- (e) the employment contract ends because the employer becomes bankrupt, has its business license revoked, is ordered to close or is closed down or the employer decides on early liquidation.



An employee shall be paid severance pay based on the number of years an employee has worked with the employer at the rate of one month's wage for each full year worked. Any period of at least six months but less than one year shall be counted as one year. The amount of severance payable to an employee for any period of less than six months is one-half of his or her monthly wage.

For purpose of calculating severance, “monthly salary” refers to the employee’s average monthly pre-tax income (including but not limited to base salary, overtime and other monetary allowances and subsidies) during the 12 month period immediately prior to termination. For service years after 1 January 2008, the amount of severance for each year is subject to a cap of three times the average monthly salary of employees in the local jurisdiction, as indicated by the local statistics bureau on an annual basis.

Confidential information/post-termination restrictive covenants

Confidential information is often protected by way of confidentiality/non-disclosure agreements or confidentiality clauses in employment contracts. Under the

PRC Employment Contract Law, non-compete agreements can only be imposed on senior management, senior technicians and other employees that have a confidentiality obligation. The scope, territory and term of non-compete agreements needs to be agreed between the employer and employee, but in any event, the post-termination non-competition term cannot exceed two years. Additionally, the employer is required to pay compensation to employees on a monthly basis during the post-termination non-compete period. The required amount of compensation is not indicated in the law at the national level and local legislation or practice needs to be taken into consideration in each locality to determine the amount of compensation that should be paid compensation in a particular situation.

CONTACTS



Pattie Walsh
Partner
T +852 2103 0840
pattie.walsh@dlapiper.com



Chris Lin
Of Counsel
T +8610 6561 1788 ext 859
chris.lin@dlapiper.com



Alan Wang
Legal Assistant
T +86 21 3852 2131
alan.wang@dlapiper.com



Sarah Gao
Associate
T +86 21 3852 2197
sarah.gao@dlapiper.com

This publication is a general overview and discussion of the subjects dealt with and is up to date as at 3 October 2011. It should not be used as a substitute for taking legal advice in any specific situation. DLA Piper or its Employment, Pensions and Benefits Group accepts no responsibility for any action taken or not taken in reliance on it.

www.dlapiper.com

DLA Piper UK LLP is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com

In the People's Republic of China, we are restricted for regulatory reasons (as are all international law firms) from practising local law. This means we work with local law firms if a matter needs advice on local law (e.g. the production of local law legal opinions).

A list of offices across Asia Pacific, Europe, the Middle East and the US can be found at www.dlapiper.com

Switchboard +86 10 6561 1788 (Beijing) +86 21 3852 2111 (Shanghai) + 852 2103 0808 (Hong Kong)

Copyright © 2012 DLA Piper. All rights reserved. | JAN12 | 1684259