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China

Employer Guide

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INTRODUCTION

In the People's Republic of China (PRC or China), the labor laws are in principle pro-employee and require the employer to undergo certain formalities to hire employees and undertake certain statutory obligations. The central government establishes the fundamental laws, e.g., the Labor Contract Law (amended in 2012) and the Labor Law (amended in 2018), while numerous regulations and rules are promulgated at the local government level, which may vary from city to city. Full-time employees in China are entitled to statutory social insurances and housing funds, overtime payments, paid public holidays, annual leave, etc., with the individual income tax withheld by the employer and deducted from each month's payment. It is important to note that an employer is required to have one of the statutory legal grounds to unilaterally terminate an employee; otherwise, wrongful termination may entitle the employee to receive double severance pay or request a reinstatement of the employment relationship.

Since late 2021, the PRC labor laws and the local regulations have strengthened the protection of the rights and interests of female employees, including an increase of maternity leave and parental leave, the prohibition of sexual harassment at the workplace, etc. The employer is also subject to the obligations under the data privacy law in the PRC with regard to the processing and handling of the personal information of the employees.

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EMPLOYMENT RELATIONSHIP

I. PRE-EMPLOYMENT

Immigration/Visa Requirements

As required by applicable laws of the PRC, employers must ensure their employees are lawfully allowed to work in China. Foreign nationals are prohibited from working in the PRC without obtaining a work visa, a work permit, and a residence permit. Otherwise, such foreign national may be subject to a fine of RMB5,000 to RMB20,000 (~US\$703 to US\$811), detention of five to 15 days in situations of serious violation, or deportation. In addition, the employer may be subject to a fine of RMB10,000 (~US\$1,405) for each unlawful hiring, not to exceed an aggregate amount of RMB100,000 (~US\$14,054) for all unlawful hirings.

Work permits are generally divided into three categories: Category A refers to individuals such as scientists, technology leaders, international entrepreneurs, and specialized talents; Category B is for talent meeting specific educational, professional, or work criteria; and Category C refers to individuals who align with the domestic labor market needs and are employed in temporary, seasonal, nontechnical, or service positions. Category A work permits usually have a term of two to five years, and the other two categories usually have a term of one year. If the employer intends to continue to employ a foreigner after the expiration of the work permit and the residence permit, the employer must apply for a renewal of the permits 30 days before their expiration. Otherwise, the employer and the foreign employee may be fined by the authorities.

Foreign employees should obtain a work visa (known as a Z visa), a work permit, and a residence permit according to PRC laws.

Reference/Background Checks

PRC labor laws do not prohibit employers from contacting or engaging a third party to contact a prospective employee's references and previous employers to gather and verify necessary employment-related information. However, the candidate's prior express consent should be obtained by the employer or the third party before conducting reference or background checks. Furthermore, the employer and the third party must keep in strict confidence the personal information collected and should not divulge, distort, or damage such information or sell or illegally provide the same to others.

Police and Other Checks

PRC laws do not prohibit employers from requesting candidates to conduct criminal checks with the police authority.

In practice, prior to employment, the employer may ask the candidate to conduct criminal checks with the police authority and provide an official report issued by the police authority.

Medical Examinations

PRC labor laws do not prohibit employers from requesting medical examinations to determine a candidate's fitness for a particular job. However, PRC laws and regulations expressly prohibit employers from testing applicants for hepatitis B.

II. TYPES OF RELATIONSHIPS

Employee

There is no at-will employment in the PRC. Individuals can be employed on a full-time or part-time basis, on a fixed-term or open-ended contract, or on an individual project basis.

Independent Contractor

The concept of “independent contractor” is not recognized under PRC labor laws. An individual independent contractor relationship in China is viewed as an employment relationship, with a few exceptions, such as housekeepers and professional insurance agents. Thus, an independent contractor would be entitled to employee protection/benefit under PRC labor laws and cannot be terminated at will. An entity independent contractor relationship is considered as a contractual relationship between two legal entities, which is governed by the PRC Civil Code.

Labor Hire

The PRC Labor Contract Law allows employers to hire an employee on an individual project basis. The employment relationship terminates when the project is completed or reaches a certain milestone agreed upon by both employer and employee.

In addition, an employer can fill its temporary, auxiliary, or substitutional positions via a labor dispatching arrangement according to the PRC Labor Contract Law. Under the labor dispatching arrangement, the worker is employed by a human resources company and dispatched to work for a business on a temporary basis.

Where a foreign investor chooses to only establish a resident office rather than a subsidiary company in the PRC, such resident office should entrust local labor service providers to engage its employees and is not allowed to execute labor contracts with its employees directly.

III. INSTRUMENTS OF EMPLOYMENT

Contracts

Employment contracts must be in writing as required by the PRC Labor Contract Law. The employer is required to sign a written employment contract with the employee within one month from the starting date of employment. An employer who fails to do so will owe double wages to the employee for each month of employment after one month without a written contract. If the employer fails to enter into a written contract with the employee for over a year, it is deemed that the employer and the employee have entered into an open-ended employment contract.

However, a part-time employee who works no more than 24 cumulative hours per week and an average of four hours per day is subject to different requirements and may be employed under an oral contract.

Codes or Rules

Codes or rules should be prepared and published by an employer in writing. For the codes or rules concerning the remuneration, working time, break, vacation, work safety and sanitation, insurance and welfare, training of employees, labor discipline, or management of production quota, which are directly related to the interests of the employees, an employer is required to go through consultation with the labor union or employee representatives.

In order to be enforceable under PRC labor laws, internal policies and rules must be acknowledged by each employee. Therefore, the best practice for the employer is to obtain a written acknowledgment, such as an employee's signed copy of the internal policies and rules or an acknowledgment form from the employee.

Registered Agreements

Registered agreements are generally not applicable under PRC labor laws. However, a copy of an employment contract concluded with a foreign national will be submitted to the labor authority when applying for a work permit.

Policies

Policies should be prepared and published by an employer in writing, and an employer is required to go through consultation with the labor union or employee representatives.

In order to be enforceable under PRC labor law, internal policies and rules must be acknowledged by each employee. Therefore, the best practice for the employer is to obtain a written acknowledgment, such as an employee's signed copy of the internal policies and rules or an acknowledgment form from the employee.

IV. ENTITLEMENTS

Minimum Employment Rights

Hours of Work

Generally, under the standard working-hour system, employees will work for no more than eight hours per day and 44 hours per week, and employers should ensure that employees take at least one day off per week. Hours worked beyond this are generally considered overtime, which entitles an employee to overtime pay. Depending on the employee's job title, duty, and salary, and upon filing with the local labor bureau, employers can also implement a flexible working-hour system for eligible employees, under which employers are not obligated to pay overtime.

Annual Leave (Statutory Minimum Requirement)

- Five days for employees who have worked for one to 10 years.
- Ten days for employees who have worked for 10 to 20 years.
- Fifteen days for employees who have worked for 20 years or more.
- Annual leave is in addition to public holidays and weekends.

Public Holidays

Employees are entitled to paid leave for each day that is proclaimed a public holiday in the PRC. If an employer requests an employee to work on a public holiday, the employee is entitled to additional pay, which shall be no less than 300% of the employee's wages.

Maternity Leave

The maternity leave of female employees is generally 98 paid days under the national law, including 15 days of antenatal leave. Extra maternity leave of 15 days will be granted in cases of dystocia. Female employees who bear more than one baby in a single birth are granted extra maternity leave of 15 days for each additional baby born. Different provinces and cities also provide additional days according to local policies.

In accordance with the relevant local regulations of certain provinces and cities that were released from late 2021 to 2023, the additional maternity leave provided by the local government has been increased by 30 to 90 days. There are 28 such provinces and cities with additional maternity leave, including Beijing, Tianjin, Shanghai, Guangdong, Guangxi, Hubei, Hunan, Shaanxi, Gansu, Qinghai, Ningxia, Xinjiang, Yunnan, Guizhou, Fujian, Zhejiang, Chongqing, Hebei, Henan, Anhui, Heilongjiang, Liaoning, Jiangsu, Hainan, Shandong, Shanxi, Jiangxi, and Sichuan.

Male employees may be entitled to paid paternity leave of varying length, depending on the locality. In accordance with the relevant local regulations of certain provinces and cities that were released from late 2021 to 2023, the paid paternity leave provided by the local government has been increased by 10 to 30 days.

Female employees who have a miscarriage before the fourth month of pregnancy are granted 15 days of maternity leave, and female employees who have a miscarriage in or after the fourth month of pregnancy are granted 42 days of maternity leave.

In accordance with the new PRC national law on family planning of August 2021, a married couple can have up to three children, which is more than the two children under the old regulation in 2015.

Parental Leave (Applicable in Certain Provinces/Cities Only)

In accordance with the relevant local regulations of certain provinces and cities that were released from late 2021 to 2023, as mentioned above, both female and male employees who have a child of less than 3 years old or 6 years old, depending on the area, are entitled to five to 15 working days of paid parental leave for each year.

Nursing Leave (Applicable in Certain Provinces/Cities Only)

In accordance with the relevant local regulations of certain provinces and cities that were released from late 2021 to 2023, as mentioned above, employees are provided with five to 20 days of paid nursing leave on a cumulative basis to take care of their parents, if and when their parents need nursing care, under certain conditions.

Probation Period

The employer and employee must agree on only one probation period. If the term of an employment contract is:

- More than three months but less than one year, the probation period may not exceed one month.
- More than one year but less than three years, the probation period may not exceed two months.
- Fixed for three or more years or is open-ended, the probation period may not exceed six months.

Mandatory Social Insurance and House Fund

Employers are required by applicable PRC labor laws to contribute to the mandatory social insurance fund and housing fund in accordance with local standards.

Discretionary Benefits

Bonus or Stock Option

Employers may choose to incentivize employees by including bonus or stock option provisions in employment contracts. Bonus or stock option provisions are usually dependent on individual, department, or business performance and are usually paid at the employer's discretion. Otherwise, they will be considered part of the normal income in terms of calculation of severance.

House and Transportation Allowance

Some employers offer a house and transportation allowance for certain groups of employees, usually management employees.

Unpaid Administrative Leave

Some employers offer unpaid administrative leave schemes at the employer's discretion.

TERMINATION OF EMPLOYMENT

I. GROUNDS

In the PRC, it is relatively difficult to terminate an employee since PRC labor laws are designed to protect an employee's interests.

Termination must be based on justified causes specified by the PRC Labor Contract Law, including mutual agreement, unilateral termination by the employee, expiry of the employment contract, retirement, or termination by the employer with a legal ground/cause under the PRC Labor Contract Law.

II. MINIMUM ENTITLEMENTS

Payments/Notice

When an employer terminates a full-time employee based on incompetence, non-work-related illness, or substantial change of employment, the employer is required to provide 30 days' written notice in advance or one month's salary in lieu of the 30 days' advance notice. The employer also is required to provide severance pay to the employee.

The employer can terminate an employee with immediate effect without giving notice in advance and paying severance if the employment contract is terminated based upon the employee's serious misconduct, serious violation of internal rules and policies, incompetency during the probation period, invalid employment due to the employee's fraud or coercion, criminal liability of the employee, or if the employee takes up a second job harming the first employer.

When an employee unilaterally resigns, the employee is required to give 30 days' written notice in advance or a three-day advance notice during the probation period. However, the employee may unilaterally resign without prior notice if the employer is at fault, for example, the employer fails to timely pay the remunerations in full or fails to pay social security premiums for the employee.

Statutory Entitlements

Under certain circumstances specified by the PRC Labor Contract Law (e.g., termination by an employee due to the fault of the employer, employee's incompetence for the job, termination by the employer with the consent of the employee, not renewing a contract (unless the employee refuses to renew upon maintained or raised provisions)), an employee is entitled to severance payment upon termination. Severance is based on the length of the employment period, which is one month's salary for each year of service with the employer. An employment period of less than six months entitles an employee to half a month's salary as severance pay. An employment period of between six and 12 months entitles an employee to one month's salary as severance pay. The salary, adopted on a severance-calculation basis, refers to the employee's 12-month average monthly salary prior to termination. However, where the monthly salary of the employee exceeds three times the average monthly salary in the city where the employer is located, severance pay is capped at three times the local average salary and the employment period for calculation of severance should be capped at 12 years.

Accrued but untaken annual leave at the total rate of 300% of the average daily wage for each unused leave day (100% has been included in the monthly salary, and therefore, only 200% needs to be additionally paid), overtime, and normal salary should be paid to an employee on termination, which can be offset by any amount an employee owes to the employer.

III. REDUNDANCY

Genuine Redundancy

If any of the following circumstances make it necessary to reduce the workforce by 20 persons or more, or less than 20 persons but accounting for 10% or more of the total number of employees of the employer, the employer may conduct economic layoffs under the following conditions:

- Restructuring pursuant to the enterprise bankruptcy law.
- Serious difficulties in production or business operation.
- The enterprise switches production, introduces significant technological innovation, or adjusts its business model and still needs to reduce its workforce after amending the labor contracts.
- A material change in the objective economic conditions relied upon at the time of conclusion of the labor contracts renders it impossible for the parties to perform.

Certain required procedures must be followed, including explaining the situation to the labor union or to all of its employees 30 days in advance, submitting its workforce layoff plan to the labor administrative department, and considering the opinions of the labor union or the employees.

Consultation

Consultation with the labor union or all employees is required.

Payment

Employees are entitled to severance pay based on the length of their employment with the employer.

IV. REMEDIES

Dismissal Action

An employee is required to first bring employment claims to the employer's local labor arbitration committee (where the employer is registered). After the labor arbitration decision, either the employer or the employee can appeal the case to the district court. Either party can then appeal the case to the municipal court for the final decision if not satisfied by the district court's decision.

An employer can bring counterclaims against an employee, including relating to the return of company property and reimbursement for damages caused by the employee.

In the case of wrongful termination, an employee can choose to request either reinstatement of the employment contract or double severance pay.

BUSINESS TRANSFER AND RESTRUCTURING

I. LEGAL REQUIREMENTS

Transfer of Business

Share Transfer

- Where the original investors in the business transfer their shares to other investors, the employment relationship will not be affected since the legal entity of the employer does not change.
- Where the business is merged, divided, etc., the existing employment contract will remain valid and continue to be performed by the new employer.
- A business does not need to obtain an employee's consent to conduct a share transfer.

Asset Transfer

- Employees cannot be transferred from one employer to another without the employees' consent when the legal entity of the employer changes.
- If an employee agrees to transfer and the new employer agrees to hire, the initial employment contract with the original employer needs to be terminated and a new employment contract needs to be signed with the new employer. In such cases, the original employer is obligated to pay severance to the employee based on his or her service period with the original employer; alternatively, if agreed by the employee, the new employer should recognize the years of service of the employee for future severance purposes.
- An employer is not required to obtain its employees' consent to transfer an asset.

II. RESTRUCTURING

Notification

If the restructure does not involve any layoffs, notification to employees is not required. If the restructure will result in economic layoffs, the employer is required to notify all employees or their labor union 30 days in advance to collect the employees' or the labor union's opinions. Also, the plan for layoffs needs to be filed with the local labor bureau.

Consultation

If the restructure does not involve any layoffs, consultation with employees is not required. If the restructure will result in economic layoffs, the employer is required to consult all employees or their labor union 30 days in advance to collect the employees' or the labor union's opinions, but the employer has discretion to make the final decision.

PROTECTION OF ASSETS

I. CONFIDENTIAL INFORMATION

Pursuant to the PRC Labor Contract Law, the employer and employee in the contracts of employment may include provisions protecting the confidentiality of an employer's information, including intellectual property, client information, and other confidential information. If the employee has divulged confidential information to any third party, the employer may claim any damage incurred thereof against the employee. However, pursuant to the PRC Labor Contract Law, the employer is not allowed to stipulate with the employee that the employee shall pay liquidated damages for breach of his or her confidentiality obligations. Therefore, liquidated damages agreed by the employee and employer in the employment contract are not recognized in breach of confidentiality obligations cases.

In legal proceedings where the employer claims the breach of a confidentiality obligation by the employee, the burden of proof lies with the employer. Among other things, the employer is required to provide preliminary evidence that the employer has taken proper measures to protect its confidential information and that its confidential information has been infringed by the employee. Then the burden of proof will shift to the employee, who is required to prove the information used or divulged is not confidential information as specified under PRC laws.

II. CONTRACTUAL RESTRAINTS AND NONCOMPETITION

According to the PRC Labor Contract Law, an employer and an employee may add a post-termination noncompete clause in an employment contract or confidentiality agreement. Noncompete provisions can only be applied to senior management, senior technical, and other employees subject to confidentiality obligations. These provisions usually prevent employees from competing with their former employer for a period of up to 24 months within a certain business scope and geographic region.


In order to enforce noncompete provisions, an employer is obligated to pay an employee on a monthly basis after the termination of employment. The amount is based on an agreement between the parties. In practice, monthly compensation is typically set between 20%–50% of the average monthly salary of the employee. If the agreement is silent on the amount, normally 30% of the employee's average monthly salary for the prior 12 months will be viewed as reasonable. But such amount will not be less than the local minimum salary.

Under the PRC Labor Contract Law, the employee may be required to pay liquidated damages to the employer if he or she is in violation of a noncompete obligation. In practice, the employer and employee usually will agree on a liquidated damage amount in the employment agreement or confidentiality agreement.

If an employer has a noncompete agreement with an employee but does not want to enforce such agreement, the employer should expressly waive the noncompetition duties before the termination of employment. Otherwise, once the employment is terminated, the employer will be obliged to pay the noncompetition compensation on a monthly basis.

III. PRIVACY OBLIGATIONS

Relevant PRC laws, including the Cybersecurity Law, the Data Security Law, and the PRC Personal Information Protection Law, protect an individual's privacy rights and impose certain obligations with respect to an employer's collection, storage, transmission, use, and disclosure of an employee's personal information. The employer should inform and obtain written consent from the employee in advance of any collection, storage, transmission, use, or disclosure of an employee's sensitive personal information.



The PRC Personal Information Protection Law imposes certain obligations on the employer, including a transfer impact assessment, if it intends to transfer any employee's personal data overseas for human resources management purposes or other commercial purposes.

IV. WORKPLACE SURVEILLANCE

The PRC Personal Information Protection Law only permits surveillance if the relevant devices are installed in public places, with notable signs, and for public safety only, unless such surveillance has specific consent from the data subject.

According to the principles of PRC law, an employer is prohibited from monitoring employees in areas such as toilets, bathrooms, and changing rooms.

V. WORKPLACE INVESTIGATIONS

Employers use workplace investigations as a management and conflict resolution tool to determine policy breaches, misconduct, or misuse of confidential information. These investigations cannot violate an employee's legitimate rights, such as privacy rights and personal freedom. Outcomes of workplace investigations are often used to manage the performance of employees or to determine whether to terminate an employee's employment.

WORKPLACE BEHAVIOR

I. MANAGING PERFORMANCE AND CONDUCT

Internal policies and rules must be published by an employer in writing.

In order to be enforceable, PRC labor laws require internal policies and rules be acknowledged by each employee. Therefore, the best practice for the employer is to obtain a written acknowledgment, such as a signed copy of the internal policies and rules or an acknowledgment form from the employee.

Employee misconduct may lead to a warning, disciplinary action, or, if the conduct is serious, termination of employment. All rules and policies must be specified in detail in the internal policies and rules.

Employees terminated for serious violation of internal policies and rules are not entitled to any severance pay or notice in advance.

II. BULLYING AND HARASSMENT

Bullying

PRC labor laws do not have specific provisions regarding bullying. The relevant term is usually specified in the internal policies and rules as a form of misconduct.

Harassment

The PRC Law on the Protection of the Rights and Interests of Women (effective from 1 January 2023) prohibits sexual harassment of women/female employees against their will by way of word, text, image, physical behavior, or by any other means. A female employee who suffers from sexual harassment may lodge complaints with the employer, and the employer is required to take measures in a timely manner and inform the female employee of the results in writing.

PRC law also provides the general principle requiring employers to ensure workplace safety and provide protection to employees against workplace injury. The relevant term in relation to harassment is usually specified in the internal policies and rules as a form of misconduct.

III. DISCRIMINATION

PRC labor law prescribes that regardless of their ethnic group, race, sex, religious belief, or residence status, employees will not be discriminated against in employment.

Women will enjoy the equal right, with men, to employment. With the exception of special types of work or posts deemed unsuitable to women as prescribed by the law, no employer may, in employing staff and workers, refuse to employ women by reason of sex or raise employment standards for women that lead to unequal employment. Employers are not allowed to terminate a female employee during her pregnancy and breast-feeding period, and a female employee is entitled to maternity leave.

There are also special protections in respect to the employment of the disabled, people of minority ethnic groups, and veterans.

IV. UNIONS

Labor unions in the PRC do not have significant power compared to Western countries. In certain circumstances (e.g., employment termination), an employer is only required to notify and consult with

the labor union, which can offer suggestions; however, an employer has the right to make the final decision, despite any suggestions provided by a labor union.

Representation

Not applicable under PRC labor laws.

Right of Entry

Not applicable under PRC labor laws.

Industrial Disputation

Not applicable under PRC labor laws.

V. REMOTE/HYBRID WORK

Not applicable under PRC labor laws. If remote work is adopted as a company's policy, the change of policy should be documented by the company, with the best practice of obtaining acknowledgement from the employee. If remote work is set forth in an employment contract, the change would require consent from the employee.

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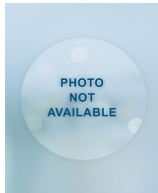
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