



# **FROM HIRING TO FIRING**

## **A BASIC GUIDE TO THE CHINESE EMPLOYMENT LAW LIFE CYCLE**



## HIRING

For many employers, the key to having a productive and high-performing workforce is recruiting the right people to start with. 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, or religious beliefs.

### Basic requirements to be met by foreigners

Expatriates must also meet the following criteria:

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 two years of post-graduate work experience;
4. have no criminal record;
5. have a confirmed position; and
6. have a valid passport or equivalent international travel document.

### Existing restrictions

An employer should ensure that the 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

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.

Employment contracts are required to include:

1. the name, domicile and legal representative or main person in charge of the employer;
2. the name, domicile and number of the resident ID card or other valid papers of the worker;
3. the term of the employment contract;
4. the job description and the place of work;

5. working hours, rest and leave;
6. labor compensation;
7. social insurance;
8. labor protection and working conditions; and
9. other items that shall be included in the labor contract under any laws or regulations.

### **Immigration**

Expatriates should obtain an employment visa prior to entering China, except under special circumstances. Upon arrival in China, the expatriate will need to obtain employment and resident permits. It is further emphasized by the PRC Exit and Entry Administration Law, which became effective on 1 July 2013, that no employer is allowed to employ expatriates without work permits or work-related residence permits. In practice, many expatriates enter the country on tourist or business visas and then either obtain the employment visa in China once final approval is obtained, or hire the services of a consulting firm to obtain the visa (and related permits) for them. One of the stated objectives of the Exit and Entry Administration Law is to curb the illegal employment of foreigners in China.

## **MANAGING**

### **Benefits and Entitlements**

**Annual Leave** – Employees who have worked for one full year or more are entitled to annual leave with pay. 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' annual paid leave; an employee having worked for ten years or more but less than twenty years is entitled to ten days' annual paid leave; and an employee having worked for twenty years or more is entitled to fifteen days' annual paid leave. The statutory holidays and rest days stipulated by the State are not included in the annual leave calculation. Generally, 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 annual leave entitlement in writing, the unused annual leave during the year should be compensated at the rate of 300% of the daily wage of the employee.

In practice, many employers give their employees annual leave in excess of the legally required annual leave entitlement.

**Statutory Holidays** – In China, there are certain national public holidays where employees are entitled to paid time off. The holiday schedule changes slightly each year and is announced by the government in the beginning of each year. The current holidays include New Year's Day (1 day), Spring Festival (3 days), Tomb Sweeping Day (1 day), Labor Day (1 day), Dragon Boat Festival (1 day), Mid-autumn Festival (1 day) and National Day (3 days). It is common for the government to rearrange weekend and work days around some of the above holidays so the public has consecutive days off.

**Sick Leave** – The treatment of an employee's sick leave differs, depending on whether the illness or injury is work related or not. Normally, fully paid sick leave with respect to work related injuries should not exceed 12 months. An employee who suffers a non-work-related disease or injury will be entitled to a medical treatment period of no more than 24 months, depending on how long he or she has worked for all employers and how long he or she has worked for the current employer.

**Rest Days** – Employees are entitled to at least one day off each week.

**Maternity Leave** – Female employees are entitled to 98 days of maternity.

For female employees that experience a difficult childbirth, 15 or 30 extra days may be added depending on local regulation.

If the female employee gives birth to more than one child in a single instance (twins, triplets, etc.), 15 extra days may be added for each child.

After giving birth, female employees are entitled to one paid working hour per day for nursing purposes until the baby is one year old.

**Miscellaneous leave** – Other types of leave granted to employees include wedding leave, paternity leave, funeral leave, family planning home leave and public leave.

## Wages

Wages refer to the remuneration for labour which the employer pays directly to the employee in the form of currency, in accordance with the State regulations and as required by the employment contract. This generally includes wages calculated on a time basis or on a piece-rate basis and rewards and certain allowances.

The *Labor Law* states that employers should adhere to the following principles:

1. Payment according to the type of work  
Different levels of remuneration should be determined in accordance with the level of the quality and quantity of the work performed, the degree of expertise and the physical requirements for the job.

## 2. Equal pay for equal work

Where the quality and quantity of work produced by employees is similar, the remuneration provided to employees should also be similar. Additionally, wages should not differ on account of gender.

## 3. Increase in wages

Wage standards should be raised gradually according to the economic development of the employer.

## Social insurance

Employers and employees are required to contribute to certain mandatory social insurance and housing fund schemes in China. Social insurance includes pension, medical insurance, unemployment insurance, work-related injury insurance and maternity insurance. The minimum contributions required by employers and employees are determined by the local labor and social security bureaus.

The PRC Social Insurance Law, which came into effect on 1 July 2011, states that foreign nationals should also participate in the social insurance system in China. This requirement will apply to all foreign nationals working in China, not only foreign nationals employed directly by PRC-registered entities, but also expatriates seconded from overseas companies.

## Taxation

Depending on an employee's income level, the applicable individual income tax rate can range from 3% to 45%. Taxable income includes an employee's base salary and any cash allowances. Employees are allowed a standard monthly deduction, with expatriate employees enjoying a slightly higher deduction due to the higher costs of living for expatriates.

## Company rules

Company rules are required and the adoption or amendment of rules directly relating to the rights and interests of employees requires the following:

1. discussion with all employees or an employee representative congress;
2. proposal and comments by all employees or an employee representative congress;
3. negotiations with union or employee representatives; and
4. publication.

## Work safety and health

Employers hold the primary responsibility for the health of their employees at work and are required to establish a system to protect health and safety.

Effective measures should be taken by employers to control workplace hazards and prevent occupational diseases. Employers should establish in-house occupational health organisations to handle occupational health management and provision of related services. Plans for controlling workplace hazards should be formulated and put into practice and workplaces should be regularly monitored and evaluated to determine the effectiveness of hazard control measures. Occupational health records relating to workplace hazard monitoring and employee health examinations should be kept up-to-date.

Employees who are exposed to hazardous conditions at the workplace should have regular health examinations paid for by the employer. Employers should provide regular training courses to educate employees regarding health and safety at the workplace. When negotiating or concluding an employment contract, employers are required to inform employees of any occupational diseases that may be contracted at work, the consequences thereof, and the measures adopted by the employer to protect against the harm. Employers must specify this information in the employment contract.

### Data Privacy

China does not presently have a general data protection law. However, the *Regulations on Employment Services and Employment Management* require that an employee's personal data be kept confidential and not be publicised without the employee's consent.

## FIRING

### Termination for cause

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

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 the 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.

An employer may make redundancies if it intends to terminate the employment contracts of at least 20 employees or 10% of the workforce while:

1. it is under restructuring according to the PRC Enterprise Bankruptcy Law;
2. it encounters serious difficulties in production and business operation;
3. the enterprise changes products, makes important technological innovation, or adjusts the methods of its business operation, and it is still necessary to lay off the number of employees after changing the labor contract; or

4. a major change in the objective economic circumstances relied upon at the time of conclusion of the employment contract renders it unperformable.

In the above mentioned redundancy, the employer is required to explain the situation to the union or all employees 30 days in advance and solicit the opinions of the union or the employees, and file the redundancy plan to the local labor administrative department before proceeding with the redundancy. Otherwise, the redundancy will be deemed illegal.

### Termination payments

In any of the following circumstances, the employer is required to pay an employee severance pay:

- (a) the employment contract is terminated by the employee for any of the reasons stipulated under the *PRC 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 *PRC 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.

After 1 January 2008 (the enforcement date of the *PRC Labor Contract Law*), 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 not less than six months but less than one year shall be counted as one year. The severance pay payable to an employee for any period of less than six months shall be one-half of his or her monthly wage.

For purpose of the calculation of severance, the "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 the termination or ending of his or her employment contract. However, if an employee's monthly salary is greater than three times the average monthly salary of the employees in the local jurisdiction, as promulgated by the statistic bureau on an annual basis, the severance pay paid to him or her shall be three times the average monthly salary of the employees and shall be for no more than 12 months.

### **Protected employment**

Female workers and juvenile workers (i.e. those workers that are over the age of 16, but younger than 18) are given special protection under PRC law.

### **Confidential information/post-termination restrictive covenants**

Confidential information that is disclosed to or becomes known to employees during their employment is often protected through confidentiality/non-disclosure agreements or confidentiality clauses in employment contracts and in some cases, a restrictive covenant or non-compete agreement. 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 post-termination non-competition compensation shall be stipulated in the employment agreement or non-competition agreement. If no compensation is stipulated or the amount of the compensation is not stated, according to the *Fourth Interpretation on Certain Issues regarding the Law Applicable to Trials of Labor Dispute Cases* issued by the PRC Supreme Court on 1 February, 2013, the employee is entitled to claim a monthly compensation equal to 30% of his or her monthly average salary during the 12 months preceding the termination if he/she has fulfilled the non-competition obligation.

### Dispute resolution

Parties to labor disputes are encouraged to seek alternative dispute resolution procedures such as consultation and mediation. Prior to

litigating the dispute before a court, arbitration before the local labor arbitration commission is mandatory. After arbitration, court proceedings remain an option except where an arbitration award is issued in relation to:

- disputes in relation to labor remuneration, work-related injury medical fees, economic compensation or damages which do not exceed 12 months of the standard local monthly wage; or
- disputes arising from implementation of the State labor standards such as working hours, rest and leave entitlements and social insurance;

in which case the arbitration award is final.

The limitation period for bringing labor disputes before a labor arbitration committee is one year.

## CONTACTS



**Julia Gorham**

Partner

T +852 2103 0818

[julia.gorham@dlapiper.com](mailto:julia.gorham@dlapiper.com)



**Johnny Choi**

Of Counsel

T +86 10 8520 0709

[johnny.choi@dlapiper.com](mailto:johnny.choi@dlapiper.com)



**Alan Wang**

Associate

T +8621 3852 2131

[alan.wang@dlapiper.com](mailto:alan.wang@dlapiper.com)

Like all other foreign law firms with offices in the People's Republic of China ("PRC") we are not permitted under existing law to advise on the laws of the PRC. The views expressed in this publication as to the laws and regulations of the PRC are based on our own research, experience and the advice of our correspondents in the PRC.

This publication is intended as a general overview and discussion of the subjects dealt with. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. They are not legal advice, and should not be used as a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

If you have finished with this document, please pass it on to other interested parties or recycle it, thank you.

[www.dlapiper.com](http://www.dlapiper.com)

**DLA Piper UK LLP** is part of **DLA Piper**, a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at [www.dlapiper.com](http://www.dlapiper.com).

Copyright © 2015 DLA Piper. All rights reserved. | MAR15 | 2864649