

Understanding the Rights and Obligations When a Fixed-term Employment

Contract Expires in China

- China.direct.biz, by Daisy DU (9 November 2020)



What are the options of employers and employees when a fixed-term employment contract expires? The short answer is “it all depends”.

According to the current Labour Contract Law of the PRC (LCL) and related rules & regulations, an employment contract can be terminated or renewed upon its expiration date, either by choice or by law. The related legal rights and obligations vary depending on the actual circumstances.

This article will briefly summarize the available options of employer upon the expiration of a fixed term employment contract under different circumstances.

1. Expiration of the initial fixed term employment contract

Upon the expiration of an initial fixed-term labour contract, the employer is entitled to either 1) terminate the employment contract or 2) renew the employment contract.

A. Terminate the Employment Contract

If the employer decides to terminate the employment relationship upon the expiration, the employer shall send a written notice of termination to the employee before the expiration and pay economic compensation based on the number of years of service of the employee (Articles 46 & 47 of the LCL).

B. Renew the Employment Contract

If the employer wishes to renew the employment contract with the employee, the employer may propose a renewal. If the terms & conditions of the proposal are the same or better than the current employment contract, and the employee agrees to it, the parties can renew the employment contract with either a fixed-term or non-fixed-term. If the employee does not agree to the renewal, the employment contract will terminate upon the expiration, and the employer does not need to pay any economic compensation for termination (Article 46 of the LCL).

If the employer proposes to the employee to renew the employment contract with terms & conditions that are worse than the current employment contract (i.e. lower salary or change of position) and the employee disagrees with the proposal, the employment contract will terminate upon the expiration, and the employer needs to pay economic compensation for termination (Article 46 of the LCL).

2. Expiration of the second fixed-term employment contract

Upon the expiration of a second fixed-term employment contract, the employer's options vary depending on the local rules & regulations.

According to Article 14 in the LCL, "...under any of the following circumstances, an employee may propose or agree to renewal or conclusion of a labour contract; except where an employee proposes for the conclusion of a fixed-term labour contract, a non-fixed-term labour contract shall be concluded: ...(3) where a fixed-term labour contract has been concluded twice consecutively and the employee does not fall under any of the categories stipulated in Article 39 and item (1) and item (2) of Article 40 renews his/her labour contract."

There are two different opinions on the interpretation of Article 14 in the LCL as to whether an employer is entitled to terminate the employment relationship upon the expiration of the second fixed-term employment contract.

The first opinion holds that subject to the fulfilment of the following two conditions: "... where a fixed-term labour contract has been concluded twice consecutively ..." and "... the employee does not fall under any of the categories stipulated in Article 39 and item (1) and item (2) of Article 40 of the LCL ...", the employer shall sign a non-fixed term employment contract if the employee wishes to renew.

However, another opinion holds that the employee can only insist on a non-fixed term employment contract if both parties wish to renew which means there is one more precondition in addition to the above mentioned two whereby the employer should also wish to renew rather than terminate. This means that the employer is entitled to terminate the employment contract upon the expiration by its own will.

So far, there is no single unified interpretation at the national level in China. In practice, some provinces accept the first interpretation such as Beijing, Jiangsu and Guangdong while others accept the second interpretation such as Shanghai. Thus, before and when dealing with this situation, it is essential to take the local rules & regulations into consideration.

3. Is it possible for an employer to renew an employment contract with a fixed-term “where a fixed term employment contract has been concluded twice consecutively and the employee does not fall under any of the categories stipulated in Article 39 and item (1) and item (2) of Article 40”?

Yes, this is possible subject to any of the below two situations:

- A. The employee voluntarily proposes a fixed term employment contract.
- B. The employer has discussed the terms & conditions of the renewal of the employment contract with the employee and has obtained the written consent from the employee.

4. Upon the expiration, if the employer does not notify the employee of termination or renewal, and the employee continues to work after the expiration date, what are the employer’s risk?

Where an employer violates the provisions of the LCL in failing to conclude a non-fixed-term employment contract with an employee, the employer shall pay the employee double wages each month with effect from the expiration date of the non-fixed-term employment contract (Article 82 of the LCL).

Where an employer fails to conclude a written employment contract with an employee after one year has lapsed since the date of commencement of work, the employer and the employee shall be deemed to have concluded a non-fixed-term employment contract (Article 14 of the LCL).

Be Prepared and Plan Ahead

When an employer decides to either terminate or renew an expiring fixed-term employment contract in China, it is essential to understand the related rights and obligations, and not least the applied local rules & regulations when a second fixed-term employment contract expires. It is important to know that the expiration of an employment contract does not mean automatic termination and should be given proper care and attention.

Contact

Daisy DU, Co-founder & Legal Advisor

daisy.du@china-direct.biz

Mobile: +86 136 1175 0012

www.china-direct.biz

China-direct.biz is a business advisory & service firm in Shanghai that offers practical advice and support to mostly Scandinavian companies with their market access, company establishments and business operations in China. Our partner team has a strong legal and business background combined with many years of experience in assisting foreign-invested companies in China.

©**Copyright 2020** All rights reserved. The information contained herein is of a general nature and the author cannot be held liable for the accuracy and validity of the information and opinions expressed. Reproduction or redistribution of this material is permitted if quoting author and **china-direct.biz**.