

Understanding China's Labour (Contract) Law - Hiring and Firing in China

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For many foreign companies, it comes as a big surprise that Chinese Labour Law, Labour Contract Law and related rules and regulations are highly protective of employee rights. This can be difficult to navigate and become more costly without a properly written Employment Contract and Employee Handbook.

The following highlights some of the key legal areas such as: Employment Contract, Types of Employment, Probationary Period, Working Hour Systems, Overtime Work, Paid Vacation, Maternity and Paternity Leave, National Holidays, Social Insurance and Housing Fund, Employment Termination and Severance Payment.

Hiring

Employment Contract

In China, employers must sign a written employment contract with the employee within one month after the commencement of the employment or they will be required to pay the employee double the salary from the beginning of the second month until signed.

If no employment contract is signed within twelve months, the authorities will consider this as a non-fixed-term contract has been agreed to.

The company and employee can agree to include confidentiality and non-competition restrictions. During the non-competition period, which cannot exceed two years, the company shall pay monthly compensation to the employee following termination.

Types of Employment

In China, employment contracts are generally divided into 'fixed-term' contracts with an agreed termination date and 'non-fixed-term' contracts with no agreed termination date.

When a fixed-term contract has been agreed to twice in a row, any renewal shall be based on a non-fixed-term contract. The same non-fixed-term principle applies when an employee has worked for a continuous period of ten years for the same employer.

Probationary Period

In China, only the first employment contract between the employee and the same employer can include a Probationary Period. During the Probationary Period, the notice period of the employee is three days and for the employer it is immediately. No Probationary Period applies to part-time employees.

The Probationary Period depends on the Term of Employment:

- Term: < 3 months (Probation: none)
- Term: > 3 and < 12 months (Probation cannot exceed 1 month)
- Term: > 12 month and < 36 months (Probation cannot exceed 2 months)
- Term: > 36 months or non-fixed (Probation cannot exceed 6 months)

During the Probationary Period, the salary paid shall not be less than the lowest salary for the same job position in the company or 80% of the salary agreed in the employment contract.

Working Hour Systems

In China, there are three main working hour systems:

- Standard: 8 hours per day or 40 hours per week.
- Comprehensive: 40 hours per week on average calculated weekly/monthly/quarterly/yearly but only with the approval of the local labour bureau.
- Non-fixed: Where the number of working hours is impractical to measure such as for senior management and salespeople but only with the approval of the local labour bureau.

For full-time employment, the official working week shall be no more than 8 hours per day and maximum 44 hours per week on average with a least one resting day per week.

The related regulations provide for a 40-hour working week which has been widely adopted but this does not include the standard daily one-hour unpaid lunch break.

For part-time employment, the official working week shall be no more than four hours per day on average and maximum 24 hours per week. Salary payments shall not exceed 15 days.

Overtime Work

In China, overtime work shall in general not exceed one hour per day but can in special circumstances with the approval of the trade union and employee be up to three hours per day but shall not exceed 36 hours per month.

The employer is required to pay overtime compensation as a percentage of the hourly salary:

- Working days: not less than 150%
- Weekends: not less than 200%
- Official public holidays: not less than 300%

Paid Vacation

According to the “Regulations on Employees’ Paid Annual Leave”, an employee is entitled to Paid Vacation following a continuous twelve-month working period with one or more employers on a full-time basis.

1. Cumulative from 1 year to less than 10 years: 5 days per year
2. Cumulative from 10 years to less than 20 years: 10 days per year
3. Cumulative from 20 years: 15 days per year

Annual Paid Vacation should be taken during the current calendar year but can be carried forward to the following calendar year.

For new company employees, annual paid vacation is prorated and calculated as the percentage of the number of actual calendar days with the current employer in the same calendar year (365 days).

Maternity and Paternity Leave

According to the “Special Provisions on Labor Protection of Female Employees” from 18 April 2012, female employees are entitled to minimum 14 weeks (98 days) of Paid Maternity Leave which can begin 15 days prior to the childbirth.

With the implementation of the revised “Law on Population and Family Planning” from 1 January 2016 and the introduction of the two-child policy, couples that give birth to children “may be entitled to rewards of longer maternity leave or other benefits” in accordance with local rules and regulations.

Since then, 30 provincial areas in China have extended the maternity leave to an average of 138-158 days with Shanghai granting 128 days. Paternity leave has also been introduced which ranges from 10-30 days around China with e.g. 10 days in Shanghai and fifteen (15) days in Beijing and Guangdong Province.

Following the Paid Maternity Leave, the female employee is entitled to one paid working hour per day for nursing purposes until the child reaches the age of one year.

National Holidays

China's official National Holidays (11 days in total) are typically announced by the 'General Office of the State Council' in late November for the following calendar year.

Overseas companies should be aware that some official working days fall on Saturdays and Sundays to compensate for extended holidays dictated by the authorities to give employees consecutive days off.

Current National Holidays

- New Year's Day: 1-day, Spring Festival: 3 days*, Tomb Sweeping Day: 1 day, International Labor Day: 1 day, Dragon Boat Festival: 1 day, Mid-Autumn Festival: 1 day and National Day: 3 days*

* Extended to seven days including weekend but with other Saturday and Sunday selected as working days.

Social Insurance and Housing Fund

According to the latest Social Security Law of the PRC from 29 December 2018 both the employee and employer shall contribute to China's Social Insurance system and Housing Fund scheme.

Since 1 January 2011, foreign nationals have been required to participate but in Shanghai the authorities currently do not require foreigners to contribute towards social insurance. Foreigners are generally not required to contribute to the Housing Fund scheme in China.

The contributions rates are announced every year in June by the local Labor Bureau and local Social Security Bureau and are generally calculated as a lower level (typically 60%) and upper level (typically 300%) of the official local Average Monthly Salary of the preceding year.

The employer's contributions are added on top of the employee's gross salary while the employee's contributions are deducted from the gross salary.

Shanghai Contributions (April 2019):

- Pension Insurance: 16% employer and 8% employee
- Medical Insurance: 9.5% employer and 2% employee
- Unemployment Insurance: 0.5% employer and 0.5% employee
- Employment Injury Insurance: 0.16% employer and 0% employee
- Maternity Insurance: 1% employer and 0% employee
- Housing Fund: 7% employer and 7% employee (matching percentage)

It is the employer's responsibility to calculate, withhold and make timely payments for both parties. The social security contribution base is determined by the employee's average income in the previous year (Social security contribution base = previous year's total income divided by 12).

Firing

Termination with Cause

In China, there is no "at-will" termination of employees whereby the employer can only terminate an employee according to a few specified conditions.

The employer can terminate the employment contract **without any notice** if the employee:

- 1) Fails to meet the specified employment requirements during the probationary period.
- 2) Seriously violates the labour discipline or internal rules and regulations of the company.
- 3) Causes serious damage to the company through gross neglect of duty or malpractice for personal gains.
- 4) Establishes a labour relationship with another employer at the same time which has a serious impact on the completion of the work tasks for the company.
- 5) Is being investigated or prosecuted for criminal liability according to the law.
- 6) The employment contract is invalidated due to e.g. fraud or duress.

The employer can terminate the employment contract **with a 30 days' notice** if the employee:

- 1) Suffers an illness or non-work-related injury and is unable to perform the original work duties or other work after the prescribed medical treatment.
- 2) Is not qualified to perform the job after training is given or readjusting the position.
- 3) Cannot perform the work due to significant changes in the objective circumstances of the original employment contract, and the parties fail to reach an agreement on a revised contract.

Even if one of the above three conditions exist, the termination can be legally **blocked** if the employee:

- 1) Is exposed to or suspected of having contracted an occupational disease, fails to complete a pre-departure occupational health examination or under medical observation.
- 2) Suffers from an occupational disease or work-related injury and is confirmed to have lost the ability to work partially or totally.
- 3) Suffers from an illness or non-work-related injury and is under the prescribed medical treatment.
- 4) Is a female who is pregnant, on maternity leave or in the one-year nursing period.
- 5) Has worked for the same employer for minimum 15 years and reaches retirement in less than 5 years.

Termination without Cause

Other than the listed reasons under Termination for Cause, any unilateral termination by the employer is considered illegal and must be resolved through settlement, arbitration or litigation. Or else, the employee can demand immediate employment reinstatement or shall be paid double Severance Payment.

For part-time employees, the employment can be terminated at any time by the employee and employer.

Severance Payment

In general, an employee shall be paid compensation equal to one month's Average Monthly Salary during the previous 12 months for each full year of employment. This also applies when a fixed-term employment contract expires and is not renewed.

Any period less than 6 months counts as half a monthly salary and any period above 6 months counts as a full monthly salary. The maximum severance payment cannot exceed 12 months' salary.

The annual severance payment is capped at three times the official local Average Monthly Salary, but this does not apply to employment before 1 January 2008.

If the employer terminates the employment without cause as stipulated in the law, the employee shall be paid compensation equal to **double** the standard Severance Payment.

For part-time employees, no Severance Payment is required on termination by the employer.

Severance payment shall be paid regardless if:

- 1) Fixed-term employment contract expires and is not renewed
- 2) Employer fails to provide labour protection, fails to pay full salary and social insurance on time, the company rules violate the law and harm the rights of the employees, or the contract is ruled invalid.
- 3) Employee is terminated by the employer in accordance with the conditions for a 30-day notice.
- 4) Employer is declared bankrupt, the business license is revoked, or the company is liquidated.
- 5) Employer is being restructured in accordance with the Enterprise Bankruptcy Law.
- 6) Employer and employee reach consensus through consultation.

Factor in the Costs of Firing when Hiring

To achieve success in China, recruiting and employing the right people from the start is critical to any business. It is therefore important that foreign companies understand the legal requirements and consequences of hiring and firing people in China as ignoring this can later lead to unforeseen uncertainty, conflict and costs.

Chinese Labour Law, Labour Contract Law and other related rules and regulations provide employees with great protection against termination which can cost the employer large sums in severance payments.

It is therefore crucial that companies continuously evaluate their recruitment and employment needs in the rapidly evolving Chinese labour markets and from the start factor in the potential costs of firing when hiring.

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