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China Employment Law Guide

Abstract
[Excerpt] This guide comments on the general rules applicable under national Chinese laws and regulations, and the numerous local regulations, rules and practices that continually play a fundamental role in the application of law in China in each case. This guide provides helpful background information but is not a substitute for specific legal guidance, as the applicable rules and practice must be researched and analyzed according to the specific needs and issues of each case.

Keywords
China, labor law, employment, public policy, working conditions, immigration, discrimination

Disciplines
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China Employment Law Guide

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INTRODUCTION

Labor laws and regulations in the People's Republic of China have undergone marked changes in recent years. These changes are part of China's redesign of its legal framework to support the development of its socialist market economy, a process that began more than two eventful decades ago.

To help transform China's past labor system from an "iron rice-bowl" permanent employment system into a labor contract system based on greater freedom of employment, China promulgated the Labor Law of the People's Republic of China ("Labor Law"), effective 1 January 1995. The Labor Law applies to private and State-owned enterprises and companies and employees (not tenured State workers) in China. Thus, the Labor Law covers employment by foreign-invested enterprises (commonly called "FIEs") such as Sino-foreign joint ventures and wholly foreign-owned enterprises (commonly called "WFOEs"). In addition, for the time being, FIEs also are subject to the Administration of Labor in Foreign Investment Enterprises Provisions ("FIE Labor Provisions"). However, the Standing Committee of China's National People's Congress plans to repeal the FIE Labor Provisions in the near future.

At the national level, numerous specialized regulations and notices have followed the promulgation of the Labor Law in order to help fill out the legal system concerning employment in China. The Labor Law and national regulations are further supplemented by local regulations in many cases. For example, provinces, major cities such as Beijing, Shanghai and Shenzhen, and special economic zones, have their own labor contract regulations.

This plethora of legal sources has not answered all of the issues or questions facing businesses, employers and practitioners of law in China. Not only the legislation itself but also the interpretation of that legislation and local practice play important roles in China's labor market today.

Against this background, this guide comments on the general rules applicable under national Chinese laws and regulations, and the numerous local regulations, rules and practices that continually play a fundamental role in the application of law in China in each case. This guide provides helpful background information but is not a substitute for specific legal guidance, as the applicable rules and practice must be researched and analyzed according to the specific needs and issues of each case.

General Chinese Employment Law Concepts and Types of Employment and Service Relationships in China

Sources of Law and Administrative Authorities

The main Chinese laws and regulations governing the employment arena include the following, among others:

- The Labor Law of the People's Republic of China, effective 1 July 1995 ("Labor Law").
- The Opinion on Several Questions Regarding the Implementation of the Labor Law of the People's Republic of China, issued 4 August 1995 ("Labor Law Opinion").
- The Regulations on the Administration of Labor in Foreign Investment Enterprises, effective 11 August 1994 ("FIE Labor Regulations").
- Regulations for Administration of the Employment of Foreigners in China, 22 January 1996 ("Foreigner Administration Regulations").
- Labor Union Law of the People's Republic of China, 27 October 2001 ("Labor Union Law").
- Measures Concerning Economic Compensation for Breach and Termination of Labor Contracts, effective 1 January 1995 ("Severance Measures").
- Regulations of the People's Republic of China Concerning the Handling of Labor Disputes in Enterprises, effective 1 August 1993 ("Dispute Regulations").
- Provisions Concerning Reduction of Staff for Economic Reasons, effective 1 January 1995 ("Staff Reduction Provisions").

These State-level laws and regulations form the basis of the labor contract system in China. However, local legislation promulgated by China's major municipalities (such as Beijing, Shanghai, and Tianjin), Special Economic Zones ("SEZs") (such as Pudong Development Zone in Shanghai), open coastal cities, and many provinces may also govern. Local legislation should be consistent with national legislation,

but if conflicts are found, they should be carefully examined to determine, under law and in practice, what rule should be applied in a particular case.

Concept of Employment in China

The Labor Law specifically applies to "enterprises inside the People's Republic of China" and to "employees" (laodongzhe) with whom a labor relationship is created.

Under this definition, not every entity may be an employer: only enterprises inside China may be employers (with the possible exceptions discussed in the following sections.) In particular, the types of enterprises inside of China that may be employers governed by the Labor Law include State-owned enterprises, foreign-invested enterprises, Sino-foreign and Sino-Sino companies limited by shares, limited liability companies, branches of foreign companies and banks[1], and collectively-owned and privately-owned enterprises. Notably, strictly speaking Representative Offices are not considered to be employers under the Labor Law. (Moreover, Representative Offices are not permitted to employ Chinese workers directly, as detailed below.) Foreign companies also are not considered to be employers governed by the Labor Law. However, in certain circumstances, the Labor Law arguably may be applied to them as well.

The Labor Law provides no express limitation on who can be an employee. However, an indirect definition is provided in the Labor Union Law: employees are individuals that perform physical or mental work in enterprises, institutions and government authorities within the Chinese territory who earn their living primarily from wages or salaries.

Therefore, "employees" include blue-collar and white-collar workers as well as Chinese managers and even expatriate managers. Gone is the distinction between "cadres" (ganbu) and "staff and workers" (zhigong) that dominated Chinese labor law for four decades. In addition, unlike in many areas of the Chinese legal system, the Labor Law and Labor Union Law do not distinguish between Chinese citizens or non-Chinese ("Expatriate") citizens in the definition of employee.

1 *While the PRC Company Law, issued on July 1, 1994 (the "Company Law"), in principle permits foreign companies to establish branches in China, in practice local authorities have permitted only branches of foreign banks and insurance companies to establish branches in China.*

However, the term "employee" excludes independent contractors that are engaged on a contract for services (laowu hetong) basis. Yet, the rules distinguishing between labor contracts and contracts for services remain unclear.

Because of the grey areas in the definitions of employers, Representative Offices need to be aware of the relevant issues in this context when entering into supplementary contracts with Chinese employees; similarly, foreign-invested enterprises and foreign companies need to be aware of the relevant issues when entering into service contracts with individuals in China.

Minimum Presence

Foreign companies are not permitted to directly hire Chinese citizens in China. At a minimum, in order for a foreign company to base an employee in China, the foreign company should establish a registered resident Representative Office in China. (See below.)

Representative Office Labor Service Arrangements

Because Representative Offices are not employers under the Labor Law definition, Representative Offices are not permitted to directly employ their staff. Instead, Representative Offices obtain their Chinese-national staff through arrangements with the Chinese government-designated labor service companies, the largest and most well known of which is the Foreign Enterprise Service Corporation ("FESCO"). Expatriate (non-Chinese) staff of Representative Offices generally are employed by the foreign parent company and assigned to work at the relevant Representative Office.

For more detail concerning Representative Office employment, please see below.

Employment by Foreign-Invested Enterprises

FIEs, which include Sino-foreign joint ventures and wholly foreign-owned enterprises, may directly employ both Chinese nationals and expatriates in China. In accordance with the Labor Law, FIEs must enter into labor contracts with their Chinese national and expatriate employees. For expatriates, a significant issue can be the remittance of their salary abroad.

For more detail concerning employment by FIEs, please see our discussion below.

Services

- Independent Contractors

  While foreign companies cannot directly hire Chinese nationals inside China, they may be able to hire Chinese nationals to engage in services in China under certain circumstances. Such arrangements must be carefully constructed so as to avoid being construed as employment relationships and thus avoid liability as an employer.

- Service/Consultancy Agreements

  Foreign companies, particularly those without a registered presence in China or with only a Representative Office in China, may wish to enter into service arrangements with Chinese companies pursuant to which services may be carried out in China.

- Technical Services

  Where service arrangements have a technical element and expatriate employees will go into China in order to carry out services, China's legal requirements concerning technology and technical services may apply.

Dual Contract Arrangements

If expatriates will be deployed in China as employees of a FIE, tax consequences for the individual may be reduced if they are under an employment contract with the FIE governed by Chinese laws and under a separate employment contract with a company abroad that is governed by foreign law. In order to facilitate the preferred tax treatment, the arrangement must be carefully structured.

Secondment to China

Expatriates employed abroad may be seconded to companies in China. The seconding foreign company and the Chinese company receiving an expatriate must coordinate the arrangement concerning the employee. Significant issues can be the remittance of expatriates' salaries abroad and whether work and residency permits can be obtained, the rules concerning which can vary from location to location.

Businesses should consider (among other issues):

- Why are we going into China and which employment or services arrangement will benefit that arrangement? What's our goal?
- Is our arrangement in compliance with the legal restrictions in place for our business form?
- Do we want Chinese or expatriate employees and why?
- Are our employment contracts in compliance with local as well as national rules?

Representative Office Arrangements

A Representative Office is similar to a branch office insofar as it is not an independent legal person, nor is it an entity with limited liability. A Representative Office cannot engage in "direct" business activities, such as entering into business contracts on behalf of the foreign company; but rather may only engage in "indirect" business activities, which generally are equivalent to liaison activities.

In addition, strictly speaking, Representative Offices are not permitted to be direct employers under the Labor Law and other relevant regulations. According to relevant laws, regulations and practice, the arrangements by which Chinese nationals and expatriates may staff Representative Offices are quite different.

Chinese Nationals

In order to have Chinese staff, Representative Offices must enter into labor service contracts with government-designated labor service companies, pursuant to which Chinese nationals employed by the labor service companies are seconded to work as the staff of the Representative Offices. In exchange for seconding away their employees, labor service companies receive a service fee. Depending on the practice of the particular labor service company and the labor service contract agreed to by the relevant Representative Office, salary and social insurance payments in respect of the Chinese staff may be paid to the labor service company, which then distributes payments to the staff and social insurance authorities respectively, or salary and social insurance payments may be paid by the

Representative Offices directly to the staff and social insurance authorities. In determining these arrangements, one thing a business should consider is whether letting the labor service companies handle these payments in order to alleviate costs and administrative expenses outweighs the benefits for the business in keeping greater control over its payroll.

While there is no employment contract between Representative Offices and their Chinese staff, Representative Offices may enter into agreements with their Chinese staff that supplement the provisions of relevant labor service contracts. Such supplementary agreements typically cover subjects such as remuneration, position duties, certain company policies, and confidentiality and non-competition obligations.

From a strict legal perspective, these Chinese staff members of a Representative Office are actually employees of the Labor Service Companies and not the Representative Offices. Technically, Representative Offices should not be bound by the Labor Law or other employment-related laws and regulations but by the relevant labor service contract, which is governed by the Contract Law of the PRC, effective 1 October 1999 ("Contract Law"). However, this does not necessarily mean that Representative Offices need not abide by Chinese laws and regulations, since labor service contracts typically contain protections for Representative Office staff that mirror the Labor Law. Moreover, in recent years, Chinese labor arbitration commissions and People's Courts have been increasingly willing to apply the Labor Law and related legislation to the relationship between Representative Offices and their Chinese staff.

Registered Representatives

Expatriates working in Representative Offices generally are employed by the foreign parent company pursuant to employment contracts governed by foreign law. However, such expatriates should be registered as Representatives, which requires observance of the registration formalities set by the Chinese authorities.

Registered Chief Representatives

Each Representative Office in China is required to have a Chief Representative. Very often, Chief Representatives are expatriates who are assigned to the

Representative Office because of their experience with the foreign company's business. In other cases, PRC nationals are chosen as Chief Representatives. In either case, registration and approval formalities must be concluded with Chinese authorities.

Termination

Because the Chinese staff of Representative Offices are not considered employees of the Representative Offices at which they work, in principle the restrictions on termination under the Labor Law do not apply to them. Rather, Chinese staff of Representative Offices generally may be terminated in accordance with the terms of the labor service agreement between the relevant Representative Office and the relevant labor service company. Most labor service agreements throughout China permit termination so long as a prescribed period of notice is given and severance is paid to both the staff member and the labor service company. Nevertheless, there appears to be an increasing willingness on the part of Chinese authorities to apply Labor Law principles to Representative Offices, which must be considered in any case of termination of the Chinese staff of Representative Offices.

In contrast, because expatriate staff of Representative Offices generally are employed by the foreign parent company pursuant to contracts governed by foreign laws, their termination generally must be carried out in accordance with that foreign law. However, depending on the circumstances, in certain cases expatriates may be able to claim that the terms of their employment and termination should be protected under the Labor Law.

Employment by FIEs and Other Domestic Enterprises

Employment Contracts

An employing company in China must conclude an individual employment contract with each employee. An employment contract between a FIE and an employee must be in writing in Chinese, and may also be in a foreign language. However, in the event of a conflict, the Chinese version will prevail.

The Labor Law provides that employment contracts must include seven basic mandatory terms:

1. Term of the contract;
2. Job description;
3. Labor protection and work conditions;
4. Remuneration;
5. Labor discipline;
6. Termination; and
7. Liability for breach of contract.

In addition to the above, relevant local regulations may stipulate additional matters to be included in employment contracts. (For example, Beijing requires employment contracts to address labor insurance and welfare benefits in addition to the above, among other items.) Moreover, in practice, employers generally wish to supplement the minimum applicable requirements with other commercial terms. Employers also have the option of providing supplemental explanations concerning the mandatory terms and other terms in the employment handbook.

While the Labor Law requires that employment contracts be in writing, Chinese law recognizes employment contracts-in-fact. Where an employment contract-in-fact is deemed to exist, employers owe all of the same duties to an employee as are required by the Labor Law and related regulations where a written contract is in place. Local regulations, such as those for Shanghai, may provide special treatment in regard to employment contracts-in-fact as opposed to written employment contracts.

Selected Employment Contract Provisions

1. Contract Term and Probationary period

   Under the Labor Law, employment contracts can have open or fixed terms. In light of potential difficulties that employers may encounter in trying to terminate employees under the Labor Law (discussed below), it is generally advisable for employers to fix the starting date and the term of an employment contract and to keep the term relatively short.

   Although not a required term, a probationary period is generally included in employment contracts. National rules set a maximum period of six months,

while local regulations generally provide that probationary periods vary from two weeks to six months depending on the term of the contract.

2. Job Description

   An employment contract must state the employee's position. It is generally advisable to provide that the employer may vary the position in accordance with the employee's performance and/or business needs, although arguably once the position is agreed on it may be difficult for an employer to change it unilaterally. An appendix may be attached to the employment contract to specifically describe the duties of the employee, or the specifics of a job specification may be included in the employee handbook provided to the employee.

3. Remuneration

   An employment contract must state an employee's wages or salary. An employee's total compensation should include an element of basic fixed wages or salary which generally may not be unilaterally adjusted by the employer. However, an employee's total compensation package may include discretionary or performance-based bonuses and allowances that can be unilaterally adjusted by the employer. Because of Chinese securities, foreign exchange and other legal issues, the implementation of stock option plans for employees in China may be problematic, depending on the circumstances.

   Under the Labor Law, enterprises may independently determine their own methods of wage distribution and wage levels. In FIEs, however, wages must be determined by the board of directors or through collective bargaining. Collective bargaining may be required where it is requested by the labor union or at least one-half of the employees, provided that the FIE has formally commenced production or business operations and further provided that the enterprise "has the basic data and information required to carry out collective wage bargaining."

4. Conditions For Termination

   Although an employment contract may specify conditions for the termination of

an employment contract, as a practical matter these conditions generally must accord with the Labor Law and related laws and legislation. Under the Labor Law and such related legislation, the circumstances under which an employer may unilaterally terminate an employee are limited. (See our discussion below.)

5. Liability For Breach Of Contract

   Under the Labor Law, either an employee or employer may be held liable to the other for breach of contract and may be required to pay compensation.

6. Employee Handbooks, Personnel Guidelines and Company Policies

   Employers may supplement the terms of employment contracts with employee handbooks, guidelines and policies.

7. Social Insurance and Housing

   Under Chinese laws and regulations, both Chinese citizens and expatriate employees in principle are required to participate in China's social insurance scheme. In practice, however, expatriates may not be able to participate due to the limitations of local bureaucratic mechanisms for the implementation of the scheme.

China's social insurance scheme consists of five funds:

- Old Age Pension Insurance
- Basic Medical Insurance
- Occupational Accident Insurance
- Unemployment Insurance
- Maternity Insurance

Employers and employees are required to make contributions to funds, and in some cases to individual employee government-held accounts, in accordance with rates determined by local authorities. In addition, employers and employees are required to contribute to a Housing Provident Fund for the purpose of buying, building and renovating employee housing. As in the case of social insurance, contributions may not be required in regard to expatriates.

Recruitment

Generally, Representative Offices and employers may directly recruit Chinese citizens. However, the following groups of people may not be recruited:

- Minors under 16
- Minors aged 16-18 and women may not be recruited for dangerous work
- Civil servants need State approval to move into private sector employment
- Currently enrolled students
- Farmers need special approval to be employed

Recruitment channels may include:

- Employment agencies
- Headhunters or other intermediaries
- Chinese party to a joint venture
- Local labor authorities
- Direct recruitment
- Advertising (in principle, must be pre-approved by local labor authorities)
- Campus interviews/college graduates

In some localities, according to local rules, temporary employment agencies also may be used to recruit employees.

Under national law, companies no longer need to submit recruitment plans to the authorities for approval. However, they are still required to register employees and report their recruitment in special files.

Employers are jointly and severally liable for compensation where the newly recruited employee has failed to terminate his employment contract with the previous employer. Employers must issue a certificate to the departing employee when a labor contract is terminated or expires. The new employer may use this certificate as evidence that the employee is in fact employable.

Depending on the case, it may be advisable for employers to receive the following before recruiting a new employee:

- Proper occupational certificate
- Health certificate
- Local residency permit
- Transfer of personnel files (to the FIE or a third party holding agency)
- Release certificate from previous employer

Discrimination and Employment Principles

Employers in China must comply with the following general principles established under the Labor Law:

- No discrimination based on nationality, race, sex or religious affiliation
- Equal employment rights for men and women
- Equal pay for equal work

In addition, employees have the following rights under the Labor Law:

- The right to obtain employment and to choose their occupation
- The right to labor safety and hygiene
- The right to social insurance and welfare

In practice, without proper advice, it can be difficult for employers in China to know whether they are in compliance with these principles because they are not well developed and there is no specific legislation implementing them. In addition, even though Representative Offices are not the legal employers of their staff, in many cases Representative Offices may be required to abide by these principles.

Exiting The Employment Relationship

Termination and Resignation

In China, there is no concept of "at will" employment as in some other countries. While employees generally may resign upon 30 days' prior notice to the employer (they may be restricted from resigning in certain cases), employers in China are permitted to unilaterally terminate employees only in accordance with circumstances stipulated in relevant laws and regulations.

For example, an employer may terminate an employee without notice or severance during the probationary period where the employee fails to satisfy the terms of recruitment; where the employee seriously violates labor discipline or the employer's rules or regulations, or is seriously derelict of duty, or engages in graft resulting in major harm to the employer's interests; or where the employee is prosecuted according to law.

In most other permitted circumstances of termination (such as where an employee is incompetent and remains incompetent after training or assignment to another post), including cases of a mutual employer-employee agreement to terminate employment, 30 days' prior notice and severance are required. Severance generally is calculated as the payment of the equivalent of one month's total wages (including basic wages and other benefits such as bonuses) for each year of service, but severance calculations may be modified by local rules. In some locations, payment in lieu of notice may be permissible.

Employers are prohibited from unilateral termination of employees with occupational diseases or injuries, sick or injured employees (not occupation-related), and female employees who are pregnant, on maternity leave or nursing, unless the employee is terminated during probation or for cause. However, it may be possible for an employer and such employees to reach a settlement regarding mutual termination.

Under the Labor Union Law as revised in 2001, an employer must give notice to the labor union (if any) prior to any unilateral termination by the employer, regardless of the particular grounds for the unilateral termination. The labor union has a right to challenge the termination.

Mass Lay-Offs

Where employers wish to lay off large numbers of employees, they may do so if they meet the so-called "economic hardship grounds" test which describes circumstances such as adjustments in connection with bankruptcy, or meet the "objective circumstances" test, under which the "performance of the original labor contract becomes impossible due to a major change in the objective circumstances upon which the labor contract was based at the time of its conclusion" and the parties cannot agree on amending the contract. In cases of lay-offs based on economic hardship grounds, a detailed set of procedures must be completed before termination. This includes obtaining the opinions of the labor union (if any) or all staff and workers and submitting a redundancy plan to the labor bureau in order to obtain its opinion. Cooperation with the labor bureau can be important for achieving the employers' goals.

Mergers and Acquisitions and Transfers of Employment

The treatment of employees in mergers and acquisitions is heavily fact-dependent. For example, in cases of merger by absorption – wherein one entity absorbs another, with only the absorbing entity continuing to exist – FIEs (provided they are the absorbing entity) should be able to unilaterally terminate employees in many cases. In other mergers and acquisitions, such as in the case of the establishment of Sino-foreign joint ventures, employment issues are a primary concern.

Employees from the Chinese Joint Venture Partner, Transfer of Business and Continuity

The takeover of an existing work force from the Chinese joint venture partner, such as in the case where the joint venture acquires assets and/or business from the original Chinese party, can be complicated. For example, Chinese laws and regulations provide no transfer-of-business rules pursuant to which employment relationships are automatically transferred when a business is transferred. Further, no general rules exist to the effect that a joint venture must take over all or any fixed percentage of the employees that previously worked in the plant converted into a joint venture (or into a WFOE, as the case may be).

Often, one of the reasons compelling the Chinese side to establish a joint venture in the first place is its concern for securing the livelihood of its employees. Certain local regulations provide that joint ventures must employ workers from the Chinese partner on a priority basis. In the case of an acquisition of an existing plant, the question is not whether employees shall be taken over by the joint venture, but how many employees shall be taken over and whether compensation should be paid for the active and/or retired employees of the Chinese partner not absorbed by the new venture.

If a joint venture has agreed to employ certain employees, the terms of their employment cannot be negotiated freely. Under Chinese law, the Chinese plant and the joint venture plant are deemed to be the "the same enterprise." This may have an impact on issues such as the term of the employment contract, the probation period, the amount of severance payments in case of termination, the length of the medical treatment period during which an employee may not be dismissed, and the

amount of pay during sick leave. Another consequence may be hidden liabilities: for example, whether or not obligations with respect to retired employees of the Chinese joint ventures partner are taken over by the joint venture. Due to the increasing unemployment rate throughout China, issues such as the takeover of employees and the amount of compensation for not taking over employees have become major obstacles in joint venture negotiations.

Mergers or Acquisitions Involving State-Owned Enterprises

If the creation of an FIE involves the transfer of the assets or the equity rights (or certain other rights) of a State-owned enterprise and the creation of the FIE therefrom, the FIE must formulate a plan to resettle its employees. This plan is subject to the approval of the employees.

In non-asset deals, the new FIE must pay off all wages, non-refunded pooled contributions, unpaid social insurance premiums, or other expenses to or in respect of the employees of the former State-owned enterprise. The FIE may either take on these employees or terminate them. Employees who are kept on should enter into new or amended employment contracts with the FIE. Terminated employees should be paid severance in accordance with law. In addition, if responsibility for these terminated employees is transferred to the social insurance authority, the FIE must pay social insurance contributions in respect of these employees in a single lump sum payment out of funds deducted from the net assets of the pre-FIE State-owned enterprise or from the proceeds derived by the State-owned enterprise from the assignment of the relevant equity or other rights.

Information Privacy and Internet Issues

Chinese laws and regulations concerning information privacy are not well developed. However, issues such as reasonableness of disclosure and employee consent should be considered in cases where employee information is disclosed or transferred from one entity to another, even where the entities are affiliates.

Under relevant Chinese laws concerning the Internet, employers may have the duty to ensure that certain types of information are not communicated over the Internet. This results in Chinese employers having the right and even the obligation to monitor employee activity and infringe on employees' privacy in some cases.

Immigration – Visas, Work Permits and Procedures

Expatriates coming to work in China for FIEs or Representative Offices are regulated by the Foreigner Administration Regulations. Under the Foreigner Administration Regulations, expatriates must obtain a single-entry work visa to enter China; however, in practice this is not required in all localities. Thereafter, they must register with the Public Security Bureau, undergo a health screening, and obtain a multiple-entry work visa, a work permit, and residency permit. The expatriate's employer in China must help the employee to complete the required steps to obtain these documents. Similar rules apply to Chinese individuals with permanent residency abroad, including permanent residents of Hong Kong, Taiwan and Macau.

These largely bureaucratic procedures apply even to short-term employment in China, and also apply to expatriates and foreign premanent residents employed by non-Chinese companies outside China if the expatriate or foreign permanent resident works for more than three months in China, with the exception of expatriates and foreign premanent residents working in China under technology transfer agreements.

The recruitment of expatriate experts to work in the fields of education, media, publishing, culture, art, public health and sports is subject to a license and registration system supervised by the State Bureau of Foreign Experts. In addition, some expatriate professionals, such as lawyers and reporters, maybe subject to additional work permit approvals.

The employment of expatriates by Chinese companies (not Representative Offices) is governed by Chinese law. Disputes may be arbitrated and litigated in China pursuant to Chinese law.

Individual Income Tax

Chinese nationals and expatriates working in China are both subject to China's individual income tax laws and regulations. However, expatriates may benefit from reduced tax bases and rates depending on their residency status. Tax is one of the foremost considerations in expatriate employment in China. Expatriate employment must be structured properly in order to allow expatriates to benefit

from beneficial tax rules. In some cases, dual employment contracts may be appropriate. Foreign permanent residents may be treated like expatriates for individual income tax purposes in some cases.

Employer Protections

Employers may wish to protect themselves against damaging competition and misuse of confidential information by an express restrictive covenant in a labor contract.

Confidentiality

Chinese laws protect trade secrets, and employers may provide for additional protection in the form of confidentiality agreements in employment contracts or in separate agreements. Employees who breach the confidentiality agreements may be required to compensate employers for the economic losses incurred by the employer.

Non-Competition

A significant national notice provides that, pursuant to agreement, an employer may restrict an employee who possesses trade secrets from competing with the employer for up to three years after termination, so long as the employer pays the employee a "certain amount of compensation." The national notice does not define what may constitute a sufficient certain amount of compensation, but regulations in some localities provide that in order to secure the enforceability of non-competes, an employer must provide an employee with up to two-thirds of the salary that the employee received during employment. Where employers wish to include a non-competition clause, it is vital to check the relevant local rules as well as to inquire with local authorities concerning local practice.

Non-Solicitation

Key or senior employees who terminate their own employment may wish to take other personnel with them to a competing organization. A possible protection for the former employer is a non-solicitation clause. While Chinese law and court

cases apparently do not directly deal with these clauses, it is not unlikely that they can be included in a labor contract and enjoy similar protection as non-compete clauses.

Poaching

Under the Labor Law, employers that take on employees still under contract may be held liable to the original employer for damages incurred.

Labor Unions and Collective Contracts

In principle, the Labor Union Law requires that all enterprises in China with 25 or more employees should establish a labor union. In practice, however, the enforcement of this requirement is haphazard and many large companies do not have labor unions.

Collective contracts may be concluded between an enterprise and its labor union or an elected employee representative. Collective contracts must address the following issues:

- Labor remuneration
- Working hours
- Rest and holiday
- Insurance and welfare
- Labor safety and hygiene
- Term of contract
- Procedures for amendment and termination of the collective contract
- Rights and obligations of both parties in the performance of the collective contract
- Resolution of disputes
- Breach of the collective contract

Collective contracts are binding for all employees of a company. Accordingly,

individual employment contracts cannot include standards that are lower than those set forth in the collective contracts. However, it is possible to agree in an individual employment contract on terms that are more favorable to the employee.

Working Hours and Safety

Working Hours and Overtime

Chinese regulations provide for a standard working hours system consisting of five eight-hour work days and two rest days (usually Saturday and Sunday) per week. Under the standard working hours system, employees that work over 40 hours per week are entitled to the following compensation:

- Overtime on work days – 150% of normal wages
- Overtime on rest days – compensatory leave or 200% of normal wages
- Overtime on statutory holidays – 300% of normal wages

Before having employees work overtime, employers must consult with the employees and the labor union (if any). Overtime hours generally should not exceed one hour per day, or three hours per day under special circumstances, and no more than 36 hours per month.

However, Chinese law also provides for certain alternative working hours systems. Upon government approval of an employer's application, an employer may institute the Comprehensive Working Hours System or the Flexible Working Hours System with regard to employees in certain industries, such as seasonal workers. Under the Comprehensive Working Hours System, employers may require employees to work longer hours during a certain period so long as the average hours worked in that period do not exceed the limit on total hours for that period. If the limit is exceeded, then overtime compensation must be paid. Under the Flexible Working Hours System, an approved employer may require certain staff, such as high-ranking managerial staff and sales staff, for examples, to work in excess of 40 hours per week without paying overtime compensation. Local rules must be checked in regard to alternative working hours systems.

Labor Protection and Work Conditions

Employers in China must establish their own systems for labor safety and hygiene, provide workers with safe labor and hygienic conditions and protective gear, educate workers concerning labor safety and hygiene, and prevent work accidents and reduce occupational hazards in accordance with Chinese laws and regulations.

Chinese laws and regulations also provide special protection for female employees who are pregnant, in their menstrual periods or nursing their babies, as well as minors between 16 and 18 years. Employment of children younger than 16 is prohibited.

Labor Dispute Resolution

The resolution of labor disputes is governed mainly by the Labor Law and the Dispute Regulations. Labor disputes may be settled using one or more of the following procedures:

- Consultation
- Mediation
- Arbitration
- Court proceedings

Parties to a dispute normally are expected to consult with each other to try to resolve their differences, but consultation is not a legal requirement under the Labor Law. If an employment contract provides for consultation, it is advisable to limit the consultation period.

Mediation is handled internally within an enterprise. It is a voluntary process, but, if successful, the parties must honor the mediation agreement. A mediation committee must be composed of representatives from among employees, the enterprise and the enterprise's labor union (if any). A representative of the labor union must act as the chairperson of the mediation committee.

If mediation is not undertaken or fails, either party may initiate labor arbitration proceedings. (Mediation is deemed failed if not completed within 30 days from the date of application for mediation.) Labor dispute arbitration committees are

established at the local (county or municipal) level, and in a particular case an arbitration tribunal, usually composed of three arbitrators, is formed. However, simple cases may be handled by a single arbitrator.

Preliminary matters such as jurisdiction, statute of limitations, and evidentiary sufficiency must be decided by the tribunal.

Parties can appoint lawyers to represent them in hearings. At the beginning of formal arbitration hearings, the panel of arbitrators must attempt to settle the dispute. If the parties agree to settle the dispute, the arbitration tribunal must prepare a settlement agreement. This agreement shall be legally effective from the date on which it is served.

If the attempt to settle fails or one of the parties challenges the settlement before it has been served with the settlement agreement, the arbitration tribunal must proceed with the arbitration hearing. An arbitration award must be made within 60 days from the date of receipt of the application. An extension of up to 30 days may be granted for more complicated cases.

If a party is dissatisfied with the award, it may bring a lawsuit to a People's Court within 15 days from the date of receipt of the written arbitral award. A People's Court may refuse to recognize an award on broad grounds, including insufficient evidence or incorrect application of the law.

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