



China Labour Law: Hiring & Firing In China

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### Background

Knowing the Labour Laws of any country is essential for conducting business with or within that country. China is no exception: regardless of the perception you might have about how business is done in China, the labour laws are often in favour of the employee's rights. This is not to imply that businesses have no power over decisions regarding their employees, but rather to show that employees in China are treated better in comparison with other high GDP countries in many situations. Perhaps this contrasts with many preconceived notions about unfair employee treatment in China.

It should also be noted that interns in companies working in China are regarded as employees as long as the internship was not set up by a university or other organisation.

### Set-up of the Contract and Employment Rules

Generally, there will be negotiations before the employee's contract is set up to set terms of employment that benefit both employer and employee. However, sudden changes such as a change in terms before starting or in the case of a possible renewal may permanently end the contract. This contract is mandatory, and should be finalized at latest by the end of the employee's first working month; if not, the employer will have to pay double salary until a year after the employee's initial start date, whereupon the employer and employee are in an open-ended labour contract.

As well as recognising the rules of the contract, an employer must recognise that the People's Republic of China (PRC) labour laws do not outline specific situations that might be regarded as a breach of company policy. This is why you must be sure to create a **Staff Handbook**. In your handbook, you should describe policies specific to your company; hours of commitment expected, employee benefits, and other such details that should be clarified to your employees but are not stated in the contract. Make sure that your employees sign every page of the handbook, ensuring that they have read through it before signing. If you have a flexible work-hours system, be sure to go over the system with the Labour Bureau first.

The agreement terms of your contract, even if accepted by the employee, must not overlook regulatory requirements set up to help that employee. The contract becomes invalid if there is evidence that the contract was not agreed on voluntarily, or was procured by fraud or duress.

As an employer, the law allows you to have the employee agree to a set service period. The compensation for the employee is not measured in monetary terms, but by the expense of the professional technical training you provide. This is a cautious time for employees, because if they resign before completing the service period, the employer is allowed to collect for "liquidated damages" caused by the resignation.

If an employer decides to revise certain rules relating to the terms of employment, discussions should be held both with the employee (representatives of employee may take place of employee) and with the labour union before making the decision to revise.

## **Hiring as a Foreign Company**

If you have a representative office in China without Chinese legal status, then you cannot directly employ a Chinese national; instead, you must recruit through a labour service organization that will hire employees for the representative office on your company's behalf. The exemption is for foreign invested enterprises (FIEs) that not only have the capacity to directly hire employees, but can generally hire foreigners with greater ease than domestic enterprises, so long as the proper work visas and permits are obtained.

## **Term of Contract**

There are several different types of terms that can be carried out for a specific contract. Contracts may be set for a fixed term or an open-term agreement. An employee who has worked for the same employer for over 10 years is entitled to an open-term contract, referred to in the United States as tenure. An employee who has served two consecutive fixed term contracts is also entitled to a fixed term contract. In addition, the duration of an open-term contract can be concluded after the performance of a certain task. A contract has officially expired at the end of the stated term unless renewed beforehand. At the end of the stated term, a contract has officially expired unless renewed beforehand.

## **Probation**

A probation period can be included in a contract if the employee works full-time, and also has a contract term lasting over three months. This set period can only be included once however, and wages during any probation period may not fall below of 80% of agreed wages.

The length of the probation period which is permitted depends on the length of the contract. If your contract lasts less than a year, then the maximum probation period which is permitted is one month. If your contract lasts between 1-3 years then probation may be set at two months maximum; however, if your contract lasts over 3 years, or is an open-term contract, the probation period will be 6 months maximum.

## **Termination of Labour Contract**

The termination of an existing contract may occur at any time by negotiation and consensus between the employer and employee, where the employer is liable to pay a severance compensation based on the number of years of service of the employee.

If the employee decides to terminate the contract, the required time to give notice depends on the circumstances. If the employee is under probation, only three days' notice is required, but for most other circumstances there must be a 30-day notice. However the only exception is that the employee can terminate his/her contract immediately if the employer does not provide external rewards previously agreed upon, or unlawfully violates rules and regulations put in place to protect the employee. An employee may also terminate the contract immediately if he or she has a part-time contract.

In certain circumstances, an employer may terminate the contract immediately without compensation to the employee of any kind. If the employee is on probation and fails to measure up to the standards given, then the employer may terminate. The employer also has the right to terminate if the employee commits a serious breach of policy, is guilty of dereliction of his duties, or holds another employment relationship that affects his duties; Outside of work, a contract may also be terminated if the employee is subject to a criminal proceeding. Part-time contracted employees may also be terminated immediately.

If the employee is under special circumstances, then the employer may terminate his/her contract with either a 30-day notice or payment in lieu of notice. For example, if the employee reaches the end of a medical treatment period for a non-work related injury, and is unable to take up the original work or maintain a new position, the employer may terminate his or her contract appropriately. Similarly, if an employee is incapable of performing designated tasks after training or transferring, the employer may once again terminate him/her. However, with discussion, a change in objective circumstances may be necessary if the objective circumstances directly make the performance of a specific task impossible.

There are several circumstances where the employer may not terminate the contract. If the employee is on a statutory medical treatment period, or has lost capacity to work due to a work related injury, then the employer may not fire that employee; also, if a female employee is either pregnant or nursing (up to the child's first birthday) then the employer may not terminate the contract. If an employee has been working for the employer for fifteen years and is within five years of retirement, then the employer again has no legal standing to terminate.

If there are serious business losses or management difficulties within the company, the situation could result in a mass layoff of employees. In the event of a mass layoff (10% or twenty employees, whichever is fewer), the employer must give 30-days' notice to employees and/or the labour union. Five conditions will determine which employees will be retained by priority.

- Firstly, the employee who has the longest tenure with the company.
- Secondly employees who have fixed-term contracts, and thirdly employees with non-fixed term contracts.
- The fourth and fifth factors are not directly work related; employees who are the sole breadwinners in their families, and employees who care for elders and/or minors.

If an employee meets none of these conditions or holds a lower position on the hierarchy, he or she is most in danger of losing their job in the event of a mass layoff.

If an employer does unlawfully terminate a contract, then they must reinstate that employee if the employee requests it. If the employee does not request to reinstate or it is "not possible" for them to reinstate, then the employee will be paid additional compensation at 100%

In the original labour contract, a non-compete obligation may have been imposed on the employee on termination or expiration of the contract. This circumstance applies only to senior management, technical staff or other personnel with confidentiality obligations who plan to work for a competitor producing similar products or providing similar services. The non-compete obligation has a maximum of a two-year period and the employee is liable if the obligation is breached.

### **Termination Process**

There are four steps in the process of terminating someone from their position. The first is to collect evidence that can be used to further support your claim for justifiable termination of the contract. After the evidence has been collected, an employer should meet with the employee to present his findings. After discussion, an arbitration process should take place to determine what the status of the employee's position in the company should be after the conversation has ended, if necessary. However, the process is only over once the termination agreement has been signed by both parties.

If you are conducting a mass termination under redundancy (greater than twenty people or 10% of your labour force) then you must pre-file your decision with the labour bureau, or at least inform them that you are declaring redundancy. According to the law, a report from the company labour union on the redundancy is required when the company files the redundancy with the Labour Bureau. Both the chairman's signature and the company labour union chop are required on the report; afterwards, an all-staff meeting should be held to make the announcement. Several rounds of face-to-face meetings will then be conducted with employees, including discussion and negotiation about keeping their position. Following this, termination agreements will be signed and the labour bureau will be notified of the decisions.

If possible, conduct redundancy termination in several batches in order to normalize the process. It would also be wise not to begin the termination process near a sensitive period such as a national holiday, or significant personal holiday to the employees. Staff negotiation should be held individually as opposed to collectively to allow more freedom of expression and reduce conformity. Remember to always handle easy cases first so as to avoid serious amounts of litigation from employees.

### **Compensation**

All employees are entitled to compensation for overtime pay. If employees are on a regular weekday schedule and work overtime, then each hour of overtime will be compensated at 1.5x that of the employee's base pay. If the employer has employees work on a weekend or set day of rest, overtime will increase to 2x base pay, and if on a public holiday, overtime must be 3x base pay.

Calculating the proper severance compensation is based upon the number of years the employee had worked for the employer, one-month salary for each year of service with maximum payment of twelve months. This figure is based on the City Average Salary and should be capped at 300% of that average. For example, Shanghai has a higher average salary than Sichuan, so the severance compensation cap would be higher in Shanghai than if you were in Sichuan. Be sure to make a payment within fifteen days of the employee's termination, otherwise, as an employer, you may have to pay an additional 50-100% of additional compensation.

Not everyone has worked several years for a firm; therefore, calculating compensation for an employee has additional steps. For every year of work, a month of salary will be paid as for compensation. If the employee works between half a year and a full year, then that time will count as a month's salary in compensation; however, if the time is below half a year, then the employee will receive half a month's salary as compensation.

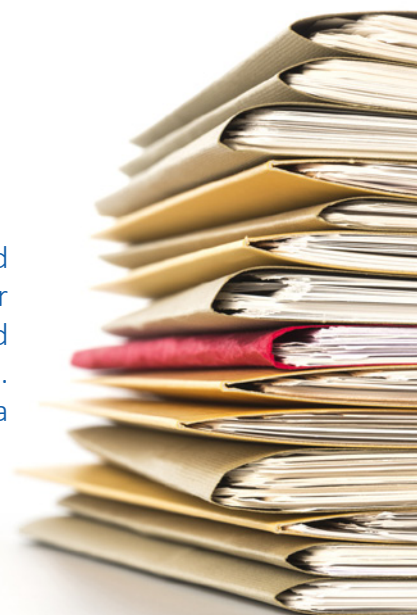
After January 1st of 2008, some changes were made in standard calculation of compensation. The salary used when calculating monthly payment should be based upon the past twelve months, instead of on the entire time the employee has worked at the company. So, if an employee received a raise in pay two years ago, this would not affect how the amount he was compensated before the change. It should also be noted that the salary includes all forms of income, including annual bonus, travel and meal allowance, etc.

Remember as stated earlier in the article, a woman may not be considered redundant, nor can be terminated, if pregnant or nursing an infant up to the infant's first birthday. Severance for maternal leave shall be paid all twelve 12 months after pregnancy is over. The only issue to be resolved is reimbursement from a social insurance centre, which would be considered with a supplementary agreement.

If the employee is being compensated in one lump sum, then individual income tax does apply if the sum is over three times the local average wages. Non-compete and severance bonus should be split from compensation to reduce overall tax.

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