

1. INTRODUCTION

In China, employment is mainly regulated by the Constitution (as amended in 2004), Labour Law enacted in 1994, Labour Contract Law enacted in 2007 and other regulations passed by the National People's Congress and State Council.

2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION

2.1 THE OPEN-ENDED EMPLOYMENT CONTRACT

An open-ended employment contract can be entered into whether it is the employee's first job or a conversion from a fixed term to an open-ended employment contract. Unless permitted by law, regulations or the contract itself, neither party has the right to vary or terminate the employment contract.

According to Chinese labour law, open-ended employment contracts must be entered into in the following instances:

- the employee has worked with the same employer for more than 10 consecutive years, and both parties agreed to renew the employment contract;
- the employee has worked with the employer for a long time and will retire within the next 10 years; or
- it is a veteran's first job after retiring from service.

If the employer fails to offer an open-ended employment contract in such instances, the court is empowered to imply an open-ended employment relationship between the employer and the employee.

2.2 THE FIXED-TERM EMPLOYMENT CONTRACT

Employers and employees can enter into fixed-term employment contracts to suit their requirements. However, to protect the employees' health, the contractual term for a mining job or other hazardous jobs cannot exceed eight years.

2.3 SPECIAL TASK EMPLOYMENT CONTRACTS

Employers may sign a "special task employment contract" with employees which will terminate when a specific task is completed. . This type of employment contract may apply with regard to temporary work, seasonal work or construction work.

2.4 THE TERMINATION OF EMPLOYMENT CONTRACT

TERMINATION BY EMPLOYER

An Employer may terminate an employment contract under any of the following circumstances:

- (1) The worker does not satisfy the conditions for employment during the probationary period ;
- (2) the worker materially breaches the Employer's rules and regulations;
- (3) the worker commits a serious breach of duty, is guilty of serious misconduct or causing substantial damage to the Employer;
- (4) the worker has simultaneously entered into an employment relationship with another Employer, which materially affects the completion of his tasks with the first-mentioned Employer, or the Employee refuses to rectify the matter after the same is brought to his attention by the Employer;
- (5) the employment contract is invalid due to the circumstances specified in item (1) of the first paragraph of Article 26 of the Labour Contract Law; namely that a party uses such means as deception or coercion, or takes advantage of the other party's difficulties to cause the other party to conclude an employment contract or to make an amendment thereto, which is contrary to that party's true intent. Further circumstances include where the Employer disclaims its legal liability or denies the worker his rights; or mandatory provisions of laws or administrative statutes are violated.
- (6) the worker is charged with a crime in accordance with the law.

An Employer may terminate an employment contract by giving the worker 30 days' prior written notice in the following circumstances:

- (1) Where, after a set period of medical care for an illness or non-work-related injury, the worker can no longer perform the work he was engaged to do or any other work arranged for him by his Employer;
- (2) the worker is incompetent and remains incompetent after training or adjustment of his position; or
- (3) a significant change in the objective circumstances relied upon at the time of the conclusion of the employment contract renders it impossible to be performed and, after consultation, the Employer and worker are unable to reach agreement on amending the employment contract.

Alternatively, the employer can pay one month's wage in lieu of the above-mentioned 30 days' prior written notice. If an employer terminates the labour contract with an employee in violation of these provisions, the employer will have to pay twice as much as the applicable termination compensation to the employee.

LAY OFFS

The law defines a "lay-off" as a workforce reduction involving the dismissal of more than twenty employees, or a number of employees that is less than twenty, but consists of more than 10 percent of the employer's total number of employees. In addition to situations where an employer is facing insolvency, reorganization or serious business and operational distress, the law also allows a lay-off when a company is changing its production lines; going through a major

technology reform or adjustment in its management method; or when, objectively, an employer's economic situation, upon which labour contracts were based, has changed substantively, rendering the employer economically unable to honour the contracts.

The employer has the obligation to inform the union and all employees 30 days in advance, to consult with the union and all employees of a contemplated lay-off, and to hire back employees who have been laid off if an employer is in the position to hire again within six months. In addition, the law requires an employer to exclude from a planned lay-off long-term employees, employees with open-ended contracts, and employees who are sole bread-winners with small children and elderly relatives to support at home.

AUTOMATIC TERMINATION OF LABOUR CONTRACTS

An employment contract shall end if:

- (1) its term expires;
- (2) the worker has commenced drawing his basic old age insurance pension in accordance with the law;
- (3) the worker dies, or is declared dead or missing by a People's Court;
- (4) the Employer is declared bankrupt;
- (5) the Employer has its business license revoked, is ordered to close or is closed down, or the Employer decides on early liquidation.

In comparison with the legal system before the Labour Contract Law came into force, the new Labour Contract Law provides for several more new events, the occurrence of which will trigger automatic termination of labour contracts—i.e. when an employer's business registration is cancelled by regulatory authorities, when an employer is ordered to close down its business operation or when an employer decides to dissolve its business operation before expiration of its duration.

An equally important new requirement is contained in Article 46(5) of the new Labour Contract Law. In the past, an employer was not required to pay any economic compensation (or, severance pay) when a labour contract terminated upon expiration of its term. The new Labour Contract Law, however, provides that this will remain true only if the employer has offered to renew the labour contract with the same or more favourable terms and conditions, but the employee refuses to take up the offer for renewal. Additionally, a new requirement under Article 46(6) requires an employer to pay economic compensation/severance pay to its employees when their labour contracts terminate automatically upon cancellation of the employer's business license by administrative authorities, or if the employer is ordered to shut down or close its business operation, or when the employer decides to dissolve its business operation before expiration of its approved duration.

SEVERANCE PAY

Circumstances in which the employer is under an obligation to pay economic compensation upon the termination of the employment contract include:

- Pursuant to the Labour Contract Law, an employer should pay an employee a certain amount of severance pay when terminating the labour contract with the employee

unless the labour contract is terminated by the employee under certain circumstances or due to the misconduct or disqualification of the employee.

- The employer has to make a severance payment upon termination by an employee in circumstances where the employer has failed to provide labour protection or conditions as agreed to in the labour contract, or where the employer has not paid the full salary amount in a timely manner, or has used force, threat or illegal measures that restrict the personal freedom of the employee.
- The Labour Contract Law also provides that an employer must make a severance payment upon termination of a labour contract by an employee if the termination is based upon the employer's failure to pay social insurance on behalf of the employee in accordance with law; or if the employer's rules and policies have violated laws and infringed upon the employee's rights and interests; or if the employer has cheated or threatened the employee into signing the labour contract rendering the contract invalid.
- Severance is payable if the employment contract is terminated and such termination was proposed to the employee by the employer and the parties reached agreement thereon after consultation.
- The employer must make a severance payment where the employment contract is a fixed-term contract that ends upon expiry of its term, unless the worker does not agree to renew the contract even though the conditions offered by the Employer are the same as or better than those stipulated in the current contract;

CALCULATION OF SEVERANCE PAY

Generally speaking, when calculating severance pay, an employee shall be paid compensation for termination at the rate of one month's salary for each full year worked with the employer. Any period of six months or more but less than one year shall be counted as one year. The compensation payable to an employee for any period of less than six months shall be half of his or her monthly salary.

Article 97 of the Labour Contract Law provides that in calculating severance pay payable under labour contracts entered into before the new Labour Contract Law comes into effect, but which are terminated after the new Labour Contract Law's effective date, the economic compensation payable by an employer pursuant to the new Labour Contract Law will be calculated based upon the number of years of service, starting from the date the new Labour Contract Law comes into effect. In the event that an employer is obliged to pay an employee economic compensation pursuant to the law before the new Labour Contract Law, the amount of economic compensation will be calculated pursuant to the provisions in force in the past.

There is a cap imposed on the severance pay. If the monthly wage of a worker is greater than three times the average monthly wage of employees in the employer's area (as published by the People's Government at the level of municipality directly under the central government or municipality divided into districts of the area where the employer is located), the rate for the severance pay paid to him shall be three times the average monthly wage of employees and shall be for not more than 12 years of work. Thus, if the average monthly salary of the previous year published by a certain locality is 1,000 RMB, the economic compensation payable by his/her employer, if any, will be calculated using a monthly salary capped at the amount of 3,000 RMB, even if an employee's monthly salary is 4,000 RMB or higher.

It shall also be noted that the term “monthly wage” means the worker’s average monthly wage for the 12 months prior to the termination or ending of his employment contract.

2.5 SETTLEMENT OF LABOUR DISPUTES

In China, labour disputes that are not amicably resolved, are brought to the Labour Disputes Arbitration Commissions ("LDACs") for arbitration within two months of the dispute.

Unlike in commercial arbitrations, the parties to a labour dispute have no choice in respect of the arbitration bodies, the composition of the arbitration tribunals, and the arbitration process, except in so far as they have the right to challenge one or more of the appointed arbitrators.

The labour arbitration awards are not final. Either party is entitled to appeal to a court within the statutory time limit. If neither party appeals then the decision of LDAC is binding and can be enforced, if necessary by a court order.

3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT KINDS OF BENEFITS IN CHINA

3.1 PRESENTATION OF THE CHINESE SOCIAL SECURITY SYSTEM

China has already put in place the basic framework for a social benefit system. This includes pension, unemployment insurance, insurance for work-related injuries, social welfare for the elderly, social welfare for disabled people, and social mutual help.

3.2 PENSION

The basic old-age pension consists of two elements: the base pension and the pension in personal accounts. The base pension is covered by the mutual assistance funds, a monthly sum amounting to 20 percent of the average social wage of employees. The monthly pension in personal accounts equates to 1/120 of the accumulated amount in personal accounts. Pensions in personal accounts can be inherited. Those who started working before or retired after the implementation of this new system are entitled to an additional pension covering the transitional period.

Employees of all urban enterprises may participate in the basic old-age insurance program, and all enterprises and employees in towns and cities are required to pay the basic old-age insurance premiums. At present, about 20 percent of the enterprise wage bill and 8 percent of personal wages should go towards such insurance. Part of the basic insurance premiums from enterprises is used for mutual assistance funds, with the rest funding personal accounts. The basic old-age insurance premiums paid by individuals go entirely towards their personal accounts.

3.3 UNEMPLOYMENT INSURANCE

The Regulations on Unemployment Insurance, which were introduced in 1999, effectively standardised and improved the unemployment insurance system of China.

Range of participation and premium payment

All enterprises and institutions in urban areas and their employees must participate in the unemployment insurance program, under which employers pay two percent of their total wage bill and individuals pay one percent of their personal wages as unemployment insurance premiums.

Qualifying conditions for unemployment insurance

Individuals must meet three requirements to qualify for unemployment insurance:

- they must have paid unemployment insurance premiums for at least one year;
- they must not have voluntarily terminated their employment; and
- they must register as unemployed and be willing to be re-employed.

Rate of unemployment insurance allowance

The general principle is that the unemployment insurance allowance will be lower than the minimum wage in the employees' locality but higher than the minimum living allowance for urban residents. Provisions regarding the time limit during which one receives the benefits are as follows:

- an unemployed person who together with his/ her former employer has continually paid unemployment insurance premiums for more than one year but less than five years is eligible for benefits for up to 12 months;
- if the employee and employer have paid the premiums for more than five years but less than 10 years, the unemployed person is eligible for benefits for up to 18 months;
- if they have paid the premiums for more than 10 years, the unemployed person is eligible for benefits for up to 24 months.

3.4 INSURANCE FOR WORK-RELATED INJURIES

In January 2004, *the Regulations on Insurance for Work-related Injuries* came into force. They stipulate that all enterprises and all individual businesses in industry and commerce employing employees must participate in the work-related injury insurance scheme, and pay insurance premiums for all their employees, whether permanent or temporary. The government sets the differential premium rates according to the degree of risk of injury involved in different sectors, and the insurance payments and occurrence rates of such injuries in each sector of activity.

The work-related injury insurance scheme adopts the principle of "no-fault compensation." The benefits include mainly medical expenditure for work-related injuries; injury and disability subsidy, allowance and nursing fees in proportion to the degree of loss of the ability to work; funeral subsidy, pension for the upkeep of family members and a lump-sum payment in the event of death, all of which go to the directly-related family members in the case of death resulting from a work-related accident..

3.5 SUPPLEMENTARY SOCIAL PROTECTION

Social Welfare for the Elderly

In accordance with *the Law of the People's Republic of China on the Protection of Elderly People's Rights and Interests*, the state has adopted measures to improve the living conditions for the elderly, their health and participation in social development.

Social Welfare for Disabled People

The Law of the People's Republic of China on the Protection of Disabled People provides legal guarantees for disabled people's rehabilitation, education, employment, cultural life and social welfare.

Social Mutual Help

The state encourages and supports members of society to organise and participate voluntarily in the efforts to help the poor and needy; it promotes the development of a social donation system, sets up and improves regular social institutions, and coordinates a network of offices and storage facilities to receive donations from the general public. China's trade unions at all levels are also actively involved in organizing mutual help and social security activities.

4. FOREIGNERS WORKING IN CHINA – TRANSFERS OF UNDERTAKINGS

4.1 FOREIGNERS WORKING IN CHINA

The main regulations on the employment of foreign nationals in China are *the Law on Administration of Exit and Entry of Foreign Nationals*, *Regulation on Employment of Foreign Nationals in China*, and *Labour Law of the People's Republic of China*.

Employment Permits and Certificates

Employment permits are a pre-condition for foreigners wishing to work in China. In general, it is easier for foreigners in senior positions to get these permits than for those in junior ones.

For an employment permit, the foreign worker is required to adduce the following:

- proof of health;
- proof of work experience;
- absence of criminal record;
- a prospective employer in China.

Some foreign employees do not require work permits or Employment Certificates. These include specialists hired and remunerated by the Chinese government, or specialists hired and paid for by a government authority or institution, including foreign specialist technicians or management personnel with high-level technical job titles or other credentials in respect of skills. Such titles/skills must be confirmed by an authoritative technical or administrative authority or professional association in the foreigner's home country, or by an authoritative international technical or administrative authority or professional association.

In addition, foreigners who hold a Foreign Expert Certificate issued by the Bureau of Foreign Experts need not apply for a work permit or Employment Certificate.

Procedures for Employing Foreign Nationals in China

The general procedure to hire a foreign national in China is as follows:

- The employer must apply to the relevant competent authority in its industry for approval by submitting an Application for Employing Foreign Nationals and all related documents;

A foreign invested enterprise may, however, apply to the labour authority for an Employment Permit for Foreign Nationals (the "Employment Permit") by submitting its joint-venture contract, articles of association, certificate of approval, certificate of legal identity etc.;

- After being approved, the employer must apply to the labour authority for assessment and be granted an Employment Permit.

However, employment of foreign nationals, who are appointed as chief representatives or representatives of an agency, shall not be subject to this procedure;

- Foreign national employees must apply for a work visa by submitting the Employment Permit, a notice of the visa application issued by the authority and their passport;
- An employer must apply to the authority which issued the Employment Permit for an Employment Certificate within 15 days of the employee's entry into China by submitting the Employment Permit, labour contract, and his or her passport;
- A foreign national employee has to apply to the authority of public security for a residence permit within 30 days of his entry into China by submitting his Occupation Certificate.

4.2 TRANSFERS OF UNDERTAKINGS

Term of Labour Contracts

A new employer usually inherits the responsibility for the target company's existing labour contracts, unless otherwise provided for in the agreement. In addition, if the target company has employees who have been working in the target company for more than 10 consecutive years, such employees have the right to request to enter into open-ended labour contracts. The new employer cannot refuse such requests.

Wage Payment

Unless agreed otherwise, Chinese labour law requires the new employer to inherit the target company's obligations under any existing labour contracts, including salary payment. The post-transfer salary shall not be lower than the pre-transfer salary, nor shall it be lower than the local government prescribed minimum wage.

Social Insurances and Housing Fund

The new employer should perform in-depth due diligence to determine whether the target company has duly complied with its obligations in this area and whether it has implemented any supplemental insurance programs.

The relevant local authorities oversee the "Five Insurances and One Fund" and other supplemental insurance programs, and payment to such insurance funds should be made on a monthly basis.

Retirement Related Issues

In China, enterprises, especially state-owned enterprises, may be required to provide retirees with a pension in addition to other benefits. Thus, it is vital that the new employer is aware of and observes all such obligations, including contractual obligations to retirees, carefully addressing all relevant retirement issues in the appropriate agreements.

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