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Are Employees Protected in China? Or, What To Keep in Mind if You Intend To Hire Individuals in China

Caroline Berube* and Ralf Ho**

1. Introduction

Since the 1980s, China has established a wide range of regulations to protect employees, which many are still surprised to discover about the country. As China's share of world trade and investment continues to increase, its labour environment has attracted more attention. With comprehensive standards in place, employees have learned to better defend their legal rights and the number of labour disputes has risen as a result. This article will discuss the main employment law issues in China that companies should be aware of when hiring Chinese and foreign employees in China.

2. Background of Employment Law in China

Employment law in China is primarily governed by two statutes – *the Labour Law of the People's Republic of China* ("Labour Law") and *the Labour Contract Law of the People's Republic of China* ("Labour Contract Law").

The Labour Law, enacted in 1994 and in force in 1995, sets forth the main requirements for employment law in China, including employee work hours, leave, and related elements. The Labour Contract Law, enacted in 2007 and in force in 2008, stipulates the baseline requirements that must govern the labour relationship between the employer and employee. A revised Labour Contract law became effective on July 1st, 2013.

The revised Labour Contract Law increases the obligations of the employer. For one, if the employer fails to sign a labour contract within one (1) month of the commencement date of employment, the employer is liable until the labour contract is signed for double payment of the salary. In the event that the employer fails to conclude a contract within one (1) year of the commencement date, the labour relationship will be treated as a non-fixed term contract with the employee.

Also, the revised Labour Contract provides further details regarding the maximum terms of the probationary period and stipulates that the salary during the probationary period shall not be less than 80% of the salary stipulated in the labour contract.

In addition, the revised Labour Contract provides additional job security for employees that have been with the same employer for a period of time. Specifically, the revised Labour Contract provides that if an employee has worked for the same employer for ten (10) consecutive years, the labour relationship will be treated as a non-fixed term contract with the employee.

3. Key Issues to Have in Labour Contract With Your Staff in China

This Section summarizes key issues in the Labour Contract Law and discusses other issues employers should take into consideration.

Les employés sont-ils protégés en Chine? Ou ce qu'il ne faut pas oublier quand on a l'intention d'embaucher en Chine

Caroline Berube* et Ralf Ho**

Depuis les années 1980, la Chine a établi un vaste éventail de réglementations pour protéger les employés, ce qu'un grand nombre de personnes apprend encore avec surprise au sujet de ce pays. Alors que la part du commerce mondial et de l'investissement que s'arrogue la Chine continue à croître, son milieu de travail a attiré une attention plus soutenue. Forts d'un ensemble complet de normes, les employés ont appris à mieux défendre leurs droits, ce qui s'est traduit par une augmentation du nombre des conflits de travail. Cet article porte sur les principales questions en matière de droit chinois du travail dont les sociétés devraient être conscientes lorsqu'elles embauchent des employés chinois et étrangers en Chine.

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A. Language

A Chinese language version of the labour contract is required in accordance with the *Response to the Labour Department of Jilin Province Regarding the Implementation of the Regulations on the Labour Management of Foreign-funded Enterprises* issued by the Ministry

of Labour on July 14th, 1995 (the "Response to Jilin"). Furthermore, if there are multiple language versions of the labour contract, the Response to Jilin stipulates that the Chinese language version shall prevail.

Note that although the Response to Jilin was only directed to the Labour Department of Jilin Province, it applies nationwide because it was issued by the State Ministry of Labour. Furthermore, most local authorities have similar policies that require a Chinese language version of the labour contract and stipulate that the Chinese language version shall prevail in the event of any dispute.

As an employer, you should make sure that the Chinese version of the contract you sign is consistent with the English version you understand and agree to abide to.

B. Required Terms

Article 17 of the Labour Contract Law sets forth a number of terms which must be provided in each labour contract. In particular, these include:

- i. Basic corporate information about the employer (ie company registration number, registered address, etc);
- ii. Basic information of the employee (ie Chinese ID number, passport number, etc);
- iii. Term of employment;
- iv. Probationary period as well as any training period, if any;
- v. Job description and location;
- vi. Working hours;
- vii. Annual leave;
- viii. Remuneration; and
- ix. Social insurance.

C. Controlling Law and Dispute Resolution

All Chinese labour contracts shall be subject to the relevant Chinese regulations, including, without limitation, the Labour Contract Law and the Labour Law. This is true for labour contracts with either local or foreign employees you intend to hire in China.

Any dispute arising out of or in relation to a labour contract shall first be submitted to the local labour arbitration committee. In the event that either party disagrees with the decision of the labour arbitration committee, that party may submit an appeal to the local district court for review.

D. Probation Period

According to Article 19 of the Labour Contract Law, employers must abide to probation period fixed by the laws depending on the duration of the labour contract.

For example,

| Probation Period | |
|---------------------------------|-------------------|
| Duration of the labour contract | Maximum probation |
| 3 months to 1 year | 1 month |
| 1 year to 3 months | 2 months |
| 3 years or more | 6 months |

E. Non-Compete Clause – Are They Enforceable in China? Yes, but You Must Pay the Employee for the Duration of the Non Compete Clause

Non-Compete clauses do exist in China. Such clauses shall be reasonable, like in most Western countries like Canada, in term of restrictions regarding the nature of the work (scope), duration and territory.



In accordance with Article 23 of the Labour Contract Law, an employer may elect to include a non-compete period in their labour contract. The term of the non-compete period may be determined by the employer, but is subject to a maximum term of two (2) years in accordance with Article 24 of the Labour Contract Law.

Similarly, Article 24 limits the application of the non-compete period to senior managers, senior technicians, and other personnel who have an obligation to maintain company secrets.

Chinese laws and regulations differ from most Western jurisdiction regarding the validity of a compete clause... as the employer needs to pay the employee.

Indeed, in order to be valid and enforceable, the employer must pay the employee over the course of the non-compete period. The amount of payment may be agreed to by the parties. However, in the event the parties are unable to agree to the amount of non-compete payment, many local authorities provide a standard amount that will apply. For example, Article 13 of the Opinions of the Shanghai Higher People's Court on Some Issues Concerning the Application of the Employment Contract Law provides that the employer shall pay between 20% to 50% of the employee's average salary over the past twelve (12) months. The non-compete payments shall be made on a monthly basis after termination of employment and for the entire duration of the non-compete clause.

F. Termination – It is Not Easy to Terminate Employees in China – Watch Out!

The Labour Contract Law sets forth the scenarios under which an

employer may terminate an employee as well as the requisite notice for each period.

Under Article 40 of the Labour Contract Law, employers are required to provide the employee with thirty (30) days' written notice for termination under the following normal circumstances:

- i. The employee falls ill or is injured (non-work related) and remains unable to return to work upon the expiry of the medical treatment period and is either unable to take or the employer is unable to provide an alternative position;
- ii. The employee is unable to perform the requisite work assigned and remains unfit to do so after training and/or an adjustment of the work; or
- iii. The objective circumstances under which the labour contract was based are substantively changed rendering the purpose of the labour contract impossible to execute and the parties are unable to reach an agreement to amend the labour contract.

Under Article 39, an employer may terminate a labour contract with immediate effect in any of the following circumstances:

- i. The employee is unable to meet the work requirements during the probation period;
- ii. The employee has seriously violated the internal rules of the employer;
- iii. The employee has caused serious damage to the employer due to his/her gross negligence in carrying out his duties or pursuit of personal gain;
- iv. The employee has concluded a separate labour contract with

another employer that is likely to seriously impair the performance of his work with the original employer and the employee refuses to remedy the additional contract when requested by the employer;

- v. The labour contract is invalid because it was concluded by way of deception, coercion, or force; or
- vi. The employee is convicted of a crime.

Note that the Labour Contract Law also provides that termination by the employer is not permitted in any of the following situations:

- i. The employee is ill or injured and such illness or injury was caused by his/her employment;
- ii. The employee is ill or injured for a non-work related ailment, but is still in the medical treatment period;
- iii. The employee is pregnant or on maternity leave; or
- iv. The employee has worked for the employer for fifteen (15) continuous years and has not yet reached the age of legal retirement (55 for women and 60 for men).

However, note that the above-listed restrictions do not prevent an employer from terminating the employee under any circumstances. In particular, an employer would still be permitted to terminate an employee in accordance with Article 39 of the Labour Contract Law.

An employee is permitted to terminate the labour contract for any reason by providing sufficient notice to the employer. Unless stated otherwise in the labour contract, the employee shall provide thirty (30) days' notice to the employer.

Also, note that in accordance with Article 24 of the *Regulations on the Implementation of the Labour Contract Law of the People's Republic of China*, an employer must provide an employee with a certificate of termination upon termination. The certificate of termination must include the effective date of termination, the date on which termination occurred, the position held by the employee, and the total duration of employment.

Similarly, note that whenever an employer unilaterally terminates a labour contract, the employer must notify the labour union, if any, in writing of the termination.

The amount of severance pay payable was originally stipulated under Article 28 of the Labour Law, but is now governed by the Labour Contract Law. In the event of termination for any of the above-listed normal reasons as provided in Article 40 of the Labour Contract Law, the employer must pay the employee one (1) month's salary per year of service in accordance with Article 47 of the Labour Contract Law. Note that any period between six (6) to twelve (12) months will be considered one (1) year for the purposes of this calculation.

This amount is based on the employee's average salary over the past twelve (12) months, inclusive of any bonuses, allowances, and other benefits. However, the base amount is limited to three (3) times the average monthly salary of employees in the region as published by the regional government. Similarly, the total number of years that may apply is limited to twelve (12) years.

Note that the Labour Law did not include these limits on severance payment. Therefore, the severance

pay that would be payable prior to the enactment of the Labour Contract Law (pre-2008) would be different from the severance pay that would be payable after the enactment of the Labour Contract Law (post-2008).

Finally, in the event that the employer violates the Labour Contract Law when terminating the labour contract, the employer may be required to pay double the severance payment that would normally be payable under the Labour Contract Law.

4. Summary of Key Employment Law Issues

This section discusses the key elements of both the Labour Law and discusses the impact these have on employers.

A. Working Hours

Article 36 of the Labour Law provides that the maximum normal working hours for employees is eight (8) hours per day and forty-four (44) hours per week. Employers are permitted to extend their employees' working hours as required by the employer's production or business needs after consultation with the relevant employees and/or trade union. However, the amount of overtime may not exceed thirty-six (36) hours per week in accordance Article 41 of the Labour Law.

Also, note that Article 40 of the Labour Law sets forth standard wage increases for overtime work. Specifically, employees shall receive 150% of their normal salary for any overtime worked during the week. Employees shall receive 200% of their normal salary for any overtime worked on weekends or public holidays, provided that no replacement holidays are provided by the employer. Finally, employees shall

receive 300% of their normal salary for any overtime worked on statutory public holidays.

Since most Chinese statutory holidays differ from public holidays in other jurisdictions, employers would be wise to review the list of Chinese public holidays beforehand to plan their operations. The official public holidays are published each year by the Chinese public authorities.

B. Minimum Wage

The minimum wage required is set by local governments on an annual basis. As would be expected, the minimum wage is generally higher in first tier cities than in second and third tier cities.

We have summarized the monthly minimum wages in renminbi ("RMB") for Beijing, Guangzhou, and Shanghai below for your reference, which have almost more than doubled within four (4) years:

| Monthly Minimum Wages in RMB | | | |
|------------------------------|---------|-----------|----------|
| | Beijing | Guangzhou | Shanghai |
| 2009 | 800 | 860 | 960 |
| 2010 | 960 | 1,100 | 1,120 |
| 2011 | 1,160 | 1,300 | 1,280 |
| 2012 | 1,260 | 1,300 | 1,450 |
| 2013 | 1,550 | 1,400 | 1,620 |

1,000 RMB is equal to approximately CAD \$172.50.

C. Annual Leave

Article 91 provides the minimum amount of annual leave that employers are required to provide. The minimum amount of annual leave is determined by the employee's time



spent with the company in as per the following:

- i. 0 to 10 years – 5 days annual leave;
- ii. 10 to 20 years – 10 days annual leave; and
- iii. 20+ years – 15 days annual leave.

Note that these are only the minimum amount of annual leave required – each labour contract may provide for additional days annual leave, but must provide at least the amount specified above.

D. Marriage Leave

The amount of marriage leave an employee is given depends on the age of both the employee and his/her spouse when they are married. The *Notice on the State-Owned Enterprise Employees' Application for Marriage Leave, Funeral Leave, and Traveling Leave* issued in 1980 (the “Notice for SOE Leave”) provides that employees shall be given between one (1) to three (3) days for marriage leave. In practice, employees are generally given at least three (3) days marriage leave. Note that although the Notice for SOE Leave states that it is for the employees of State-owned Enterprises (“SOEs”), in practice, it is also applied to non-SOEs.

Couples that qualify for “late” marriages are given between ten (10) to thirty (30) days leave, depending on the local regulations. In order to qualify as a “late” marriage, the husband must be at least twenty-five (25) years old and the wife must be at least twenty-three (23) years old at the time of the wedding.

Note that the same standards apply for any subsequent marriages, if any.

E. Maternity Leave

Article 7 of the *Special Provisions on Labour Protection for Female Employees*, which was promulgated and became effective on April 18th, 2012 (“Special Provisions for Female Employees”) provides that employees shall be given ninety-eight (98) days maternity leave. This amount includes fifteen (15) days antenatal leave.

In addition to the standard maternity leave, employees may be given an extra fifteen (15) days leave for dystocia as well as an additional fifteen (15) days for each additional baby born (in the event of twins, triplets, etc).

In the event of a miscarriage, employees shall be given fifteen (15) days leave for a pregnancy that has lasted less than four (4) months or forty-two (42) days leave for a pregnancy that has lasted four (4) months or longer.

F. Social Charges

Finally, note that social charges are a big burden on a company financially. They can't be avoided and must be taken into account when drafting the business and financial plans when setting up an entity in China. The social charges will vary from city to city – the big cities having higher charges, which explain why many foreign companies move their facilities to second tier cities in China to reduce the social charges burden.

Indeed, social charges must be paid for each employee in accordance with Article 97 of the *Social Insurance Law of the People's Republic of China*. Note that this applies to both local and foreign employees and are in addition to the salary paid by the employer.

Payment of social charges to foreign employees is a new requirement by the Chinese government. The government believes that they would get higher social charges paid as the salaries of foreigners are usually higher than the Chinese employees. This brings a lot of discussion by the foreign companies established in China as they usually hire foreign individuals. For a long time they did not have to pay social charges on their salaries, which made hiring foreigners competitive with hiring Chinese employees. Now that the situation has changed, foreign companies have second thoughts about hiring foreigners.

The amount of social charges payable depends on the local regulations. We have summarized the social charges payable for Beijing, Guangzhou, and Shanghai in chart form that can be found in Appendix A for your reference.

Conclusion

The Labour Law and the Labour Contract Law set forth a number of specific requirements that foreign employers may be unfamiliar with.

A diligent employer should familiarize itself with the considerations discussed above to ensure it is in compliance with Chinese employment law. Consequences for not respecting Labour Law and Labour Contract Law can have drastic effect on an employer leading to blacklisting of the company and its key employees, enormous fines and penalties and jail terms in some cases.

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Appendix A - Summary of the Social Charges Payable for Beijing, Guangzhou, and Shanghai

| BEIJING | | | | |
|---|----------------------------------|----------------|--------------------|----------------|
| Type of Social Insurance (if applicable) | Rates for Employer | | Rates for Employee | |
| | Urban Employee | Rural Employee | Urban Employee | Rural Employee |
| Social Endowment Insurance | 20% | | 8% | |
| Maternity Insurance | 0.8% | | N/A | |
| Workplace Injury Insurance | 0.2% to 2% depending on industry | | N/A | |
| Unemployment Insurance | 1% | | 0.2% | 0 |
| Staff Medical Treatment Insurance | 10% | | 2% + RMB 3.00 | |
| Medical Subsidy Insurance | N/A | | N/A | |
| Housing Fund | 12% | | 12% | |
| Total | 44% | | About 22% | |

| GUANGZHOU | | | | |
|---|--|-----------------------|---|-----------------------|
| Type of Social Insurance (if applicable) | Rates for Employer | | Rates for Employee | |
| | Resident Employee | Non-Resident Employee | Resident Employee | Non-resident Employee |
| Social Endowment Insurance | 20% | 12% | 8% | |
| Maternity Insurance | 0.85% | | N/A | |
| Workplace Injury Insurance | 0.5% / 1% / 1.5% depending on industry | | N/A | |
| Unemployment Insurance | 1.5% | | 0.5% | N/A |
| Social Medical Insurance | 8% | | 2% | |
| Medical Subsidy Insurance | 0.26% of average salary in Guangzhou | | N/A | |
| Housing Fund | 5% to 20% | | 5% to 20% (not less than the amount paid by the employer) | |
| Total | About 35% (if the employee gives 10% as housing funds) | | 22% | |

| SHANGHAI | | | | |
|---|--------------------|----------------|--------------------|----------------|
| Type of Social Insurance (if applicable) | Rates for Employer | | Rates for Employee | |
| | Urban Employee | Rural Employee | Urban Employee | Rural Employee |
| Social Endowment Insurance | 22% | | 8% | |
| Maternity Insurance | 0.8% | N/A | N/A | |
| Workplace Injury Insurance | 0.5% | | 0.5% | |
| Unemployment Insurance | 1.7% | N/A | 1% | N/A |
| Staff Medical Treatment Insurance | 12% | 6% | 2% | 1% |
| Medical Subsidy Insurance | N/A | | N/A | |
| Housing Fund | 7% | | 7% | |
| Total | 43% | | 19% | |