Labour & Employment

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2016

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China

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Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main statutes and regulations relating to labour and employment at the national level are as follows:

- Interim Provisions on Labour Dispatch (1 March 2014);
- Amendment to the Labour Contract Law (effective as of 1 July 2013);
- Interpretation of the Supreme People's Court on Several Issues on the Application of Laws of Employment Disputes (1 February 2013);
- Interpretation of the Supreme People's Court on Several Issues on the Criminal Cases of Refusing to Pay Labour Remunerations (23 January 2013);
- Special Rules for Labour Protection of Female Employees (28 April 2012);
- Social Insurance Law of the People's Republic of China (1 July 2011);
- Amendment (VIII) to the Criminal Law of the People's Republic of China (1 May 2011);
- Interpretation (III) of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (14 September 2010);
- Tort Liability Law (1 July 2010);
- Implementing Regulations of Labour Contract Law (18 September 2008);
- Labour Disputes Mediation and Arbitration Law (1 May 2008);
- Labour Contract Law (1 January 2008);
- Employment Promotion Law (1 January 2008);
- Employment Service and Employment Management Regulations (1 January 2008);
- Interpretation (II) of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (1 October 2006);
- Labour and Social Security Supervision Regulation (1 December 2004);
- Collective Contract Regulation (1 May 2004);
- Regulations on Minimum Wages (1 March 2004);
- Regulation on Work-Related Injury Insurances (1 January 2004, and the amendment effective as of 1 January 2011);
- Occupational Disease Prevention Law (1 May 2002);
- Trade Union Law (27 October 2001);
- Interpretation of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (16 April 2001);
- Interim Administrative Rules on Registration of Social Insurance (19 March 1999);
- Interim Regulation on Collection and Payment of Social Insurance (22 January 1999);
- Regulation on Labour Working Hours (1 May 1995);
- Regulation on Medical Care Period for Enterprises' Employees for Illness or Non-work Related Injury (1 January 1995);
- Labour Law (1 January 1995); and
- Interim Rules on Salary Payment (1 January 1995).

The Labour Law is the fundamental legislation governing employment matters, which was written into law around 21 years ago. There has been no substantial amendment since 1995 when it was first enacted. Another significant piece of legislation in the labour sector is the Labour Contract Law, effective 1 January 2008; the implementing regulations of the Labour Contract Law were introduced later in 2008. Many of the provisions in the Labour Law are restated or supplemented in the Labour Contract Law and its implementing regulations to make them easy to implement and reduce ambiguities. These two laws set out the basic principles for employment, but their implementation and enforcement rely on various regulations or rulings by the governmental agencies in charge of labour matters. Given such regulations are not always crystal clear or consistent with one another, the relevant governmental agencies in charge of labour administration usually have broad discretion to interpret such regulations in practice.

In addition to national legislation, governments at provincial and municipal levels are authorised to make rules to regulate labour and employment matters according to the local situation. Such local legislation constitutes an integral part of the Chinese labour and employment laws.

Finally, the judicial interpretations of the national laws by the Supreme People's Court provide practical and clearer guidelines to local courts in trying labour or employment cases.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Any type of discriminative activities or sexual harassment is generally prohibited by law and an affected employee may file a lawsuit to ask for damages if an employer violates such principles in the relevant legislation. Non-discrimination principles are adopted by the Employment Promotion Law, which requires employers to offer equal employment opportunities, terms and conditions to their employees regardless of their gender, nationality, physical condition or religious belief. The Trade Union Law also provides that blue and white-collar workers whose main source of livelihood is their wages are entitled to take part in and organise a trade union regardless of ethnicity, race, gender, occupation, religious belief or level of education. In addition, the Employment Service and Employment Management Regulations prohibit employers from incorporating any discriminatory content in their recruitment materials.

There are also specific laws and regulations that provide protection against certain categories of discrimination:

- the Law on Protection of Women's Rights and Interests stipulates that women enjoy equal rights to work as men and equal pay for identical work;
- the Law on Protection of Disabled Persons prohibits any discrimination against disabled persons in recruitment, employment, promotion, remuneration, welfare, social security, etc; and
- the Employment Promotion Law and the Employment Service and Employment Management Regulations stipulate that an employer cannot refuse to employ an applicant because such applicant is a carrier of any infectious pathogens.

The Law on Protection of Women's Rights and Interests and Special Rules for Labour Protection of Female Employees forbid sexual harassment against women. Victims are entitled to file complaints with the competent governmental agencies and to bring civil suits against the harassers.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary governmental agency in charge of labour law enforcement is the Ministry of Human Resources and Social Security, including its counterparts at provincial, municipal and district levels. Those government agencies are authorised to order non-compliant employers to take corrective measures or impose administrative penalties on such employers under some circumstances, but in practice, the enforcement relies more on the local courts only if a party files a lawsuit.

Worker representation

4 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

According to the Trade Union Law, employees may establish trade unions voluntarily and no one can prohibit or restrict such right of workers. Provincial and municipal governments also promulgated local regulations to implement the principles set out in the Trade Union Law. An employer is required to contribute a minimum percentage of the gross salaries to the trade union periodically. It seems that an employer with fewer than 25 employees is not mandated to set up a trade union. In practice, most employers with more than 25 employees have established employer-friendly unions.

Background information on applicants

5 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No, there are no prohibitions or restrictions under the current law or regulations for a potential employer to conduct reasonable background checks on applicants. Disclosure of certain personal or sensitive information usually will require consent by the relevant individual, especially information related to his or her health status or other personal matters. In practice, employers may engage professional firms to do such checks, but such third parties should hold the proper qualifications and act within the boundaries of the applicable laws and regulations.

6 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Generally, employers may require their candidates to have medical examinations to determine whether their health conditions meet the requirements of the positions. In practice, the employers may determine the items of such examination based on specific job duties and require the candidates to submit their examination report. An employer must not, however, request that a candidate have a Hepatitis B test, request a report of such test or enquire whether the candidate is a Hepatitis B carrier. Except for those special occupations approved and announced by the Ministry of Health, such medical examination may not include a Hepatitis B test unless requested by the candidate.

Current laws and regulations in China do not provide whether an employer may refuse to hire an applicant who does not submit to such medical examination. In practice, it is analysed on a case-by-case basis.

7 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions under the current laws and regulations in China regarding drug and alcohol testing from a job recruitment perspective. In practice, however, some employers may request that their candidates go through drug or alcohol abuse testing in consideration of specific job duties and requirements.

Similarly, since the current laws and regulations in China do not indicate whether an employer may refuse to hire an applicant who does not submit to such a test, in practice, it is analysed on a case-by-case basis.

Hiring of employees

8 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Yes. According to the Labour Law, the Employment Promotion Law and other labour rules and regulations, employers may not discriminate against women, disabled persons, ethnic minorities, candidates who are carriers of infectious diseases during the recruitment process or secondees if dispatched to employers by any staffing firm.

Under the labour laws of China, if an employee is laid off due to a bankruptcy reorganisation, difficulties in production and business operations, enterprise operation mode adjustment, material changes in the economic conditions, etc, this employee will take priority if the employer intends to recruit new staff within six months.

9 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, an employer should execute a written employment contract with an employee within one month of such employee commencing his or her work. If an employer fails to sign an employment contract with an employee within one year, it must pay twice the monthly salary of the employee for each month services were provided without a written employment agreement, and the employment will be deemed 'open ended'; such open-ended employment cannot be terminated unless otherwise explicitly authorised by law. The essential terms of an employment contract are:

- the employer's name and address, and the name of its legal representative or chief person;
- the employee's name, address and ID number;
- the term of the employment contract;
- the nature of the employee's job duties, work requirements and workplace;
- the employee's working hours, leave and holiday;
- the employee's remuneration;
- social insurance;
- labour protection, working conditions and professional hazard protection; and
- other information as may be necessary for specific employment contracts.

10 To what extent are fixed-term employment contracts permissible?

There are three types of employment contracts under Chinese law: fixed-term employment contracts, open-ended employment contracts and employment contracts with a period to complete the prescribed work. In practice, most employment contracts are fixed-term contracts, and there is no maximum duration for such contracts. An employer will be obliged to enter into an open-ended employment contract if requested by an employee if:

- the employment contract has been renewed twice after expiry of the original term;
- the employee has successively worked for the employer for more than 10 years; or
- the employer has not signed any written employment contract with the employee in more than a year.

11 What is the maximum probationary period permitted by law?

The probationary period varies depending on the nature and term of the relevant employment agreement as stated below:

Term of labour contract	Maximum term of probation
Less than three months or a contract with a term to expire upon completion of certain work	No probation allowed
Three months or more but less than one year	Up to one month
One year or more but less than three years	Up to two months
Three years or more or open-ended employment	Up to six months

There will be only one probationary period throughout the term of employment, and an extension of the probationary period is not allowed under Chinese law.

12 What are the primary factors that distinguish an independent contractor from an employee?

In practice, labour arbitration tribunals or courts tend to recognise the establishment of an employment relationship if the following main conditions are satisfied:

- the employer and the individual are both legally qualified in accordance with applicable laws and regulations;
- employment-related rules and policies of the employer apply to the individual, and the individual works for remuneration under the management and supervision of the employer; and
- the work carried out by the individual is an integral part of the employer's business.

13 Is there any legislation governing temporary staffing through recruitment agencies?

Yes. According to the Labour Contract Law and the Interim Provisions on Labour Dispatch, recruitment agencies shall apply for and obtain labour dispatch Operation Permits from competent human resources authorities to engage in staffing businesses. Employers should engage staffing firms with valid permits. Temporary staff will enter into fixed-term labour contracts for at least two years with qualified recruitment agencies and be dispatched to the employer. But the roles of such dispatched employees are limited to those of a temporary, auxiliary or substitute nature. There are some additional restrictions or requirements for an employer's use of staffing services. For instance, if a dispatched employee works for more than six consecutive months, this role shall not qualify as temporary and, as a result, the arrangement arguably breaches the regulatory restrictions. In addition, if an employer plans to engage dispatched employees to work in auxiliary positions, it should consult the trade union or employees' representative and make an announcement to all employees. What is more, the regulations require that the number of dispatched employees shall not in any event exceed 10 per cent of the total number of employees, which is designed to prevent any abuse of staffing business to bypass legal obligations otherwise owed to non-dispatched employees. Dispatched employees, as a matter of law, are entitled to 'equal pay' treatment as other employees at the same positions and discrimination is not permitted. Significantly, the Interim Provisions of Labour Dispatch have a general anti-abuse provision that prohibits employers from using staffing services in the name of outsourcing when the substance of the arrangement is labour dispatch. Unfortunately, neither the regulations nor the courts set up any standard to differentiate good-faith outsourcing from labour dispatch. Therefore, the risks to employers shall be analysed based on the totality of the facts and circumstances and planning may be desirable.

Foreign workers

14 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

A foreign employee may apply for a work visa on condition that he or she meets all of the requirements and submits all of the documents to the governmental entities as required by the applicable regulations. Before a foreign employee applies for a work visa, the employer must first obtain an employment authorisation certificate from the governmental entities for such foreign employee, as this is required for such application.

15 Are spouses of authorised workers entitled to work?

The spouses of authorised foreign workers are not allowed to work in China. The spouse of an authorised foreign worker may only work in China after his or her employer obtains an employment authorisation certificate from the governmental authorities for him or her, and then obtains a work permit from the relevant governmental entities.

16 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

An employer may only employ a foreign national with a valid employment authorisation certificate, work permit and residence permit issued by the governmental entities. An employer who hires a foreigner without a proper visa and work permit will pay a fine of 10,000 yuan for each foreign employee illegally employed, which is capped at 100,000 yuan, and any income (if any) generated by those illegal employees shall be confiscated.

17 Is a labour market test required as a precursor to a short or long-term visa?

No labour market test is required as a precursor to a short-term or long-term visa. It is a basic principle under Chinese law and regulations that an employer may recruit foreign workers for positions with special requirements when no domestic candidates are available for such positions. However, a labour market test need not be conducted prior to the recruitment of foreign workers.

Terms of employment

18 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The general principle is that the daily working hours must not exceed eight hours, and the average weekly working hours must not exceed 44 hours. If an employer cannot guarantee the foregoing working hours system for any particular reason, the employer may apply an alternative working hours system with the approval of the government entities in charge of labour administration. If the employer needs an employee to work overtime, the employer may consult the employee's trade union and the employee, and the overtime working hours generally will not exceed one hour per day; if longer overtime working hours are needed for some special reason, they may not exceed three hours per day, and the monthly overtime working hours may not exceed 36 hours, given that the employee's health condition must be guaranteed. However, there are exceptions to the aforementioned limitations on overtime working hours: natural disaster, accident or other events that endanger the health, life and property and thus require emergency handling; malfunction of manufacturing equipment, traffic line or public facilities that influences operations and public interest, and thus require urgent repair; and other circumstances prescribed by laws and regulations. In addition, employees are entitled to at least one rest day every week.

Employees may not opt out of the above restrictions or limitations.

19 What categories of workers are entitled to overtime pay and how is it calculated?

An employee is entitled to overtime pay calculated as follows:

- overtime on a regular working day: at least 1.5 times the regular salary;
- overtime on an off-work or rest day: at least twice the regular salary; and
- overtime on a statutory holiday: at least three times the regular salary.

However, the above calculations do not apply to employees who work under a non-fixed working hours system.

20 Can employees contractually waive the right to overtime pay?

No. It is mandatory for an employer to pay an employee for his or her overtime work. In practice, any waiver of the right to overtime pay or a similar agreement will most likely be deemed unenforceable against employees.

21 Is there any legislation establishing the right to annual vacation and holidays?

Yes. According to the Regulations on Paid Annual Leave of Employees, employees of authorities, organisations, enterprises, public institutions, private non-enterprises or individual private businesses (with hired staff) who have continuously worked for more than one year will be entitled to paid annual leave.

Annual leave entitlement is worked out as follows:

- for employees who have cumulatively worked for more than one year but less than 10 years – five days;
- for employees who have cumulatively worked for more than 10 years but fewer than 20 years – 10 days; and
- for employees who have cumulatively worked for more than 20 years – 15 days.

Statutory holidays, rest days and other leaves stipulated by law, such as marriage leave, bereavement leave and maternity leave, are not calculated as annual leave.

22 Is there any legislation establishing the right to sick leave or sick pay?

Yes. In accordance with the Regulations on Medical Period for Employees who are Sick or have a Non-Work-Related Injury, such employees are entitled to between three and 24 months of medical leave, depending on the employees' total working life and the time working for the current employers.

For certain employees who suffer from certain diseases (such as cancer, mental illness or paralysis), if such employees are unable to recover within 24 months, the medical leave can be extended appropriately subject to the employer's approval and that of the local labour authority.

Employers should pay sick leave wages in terms of the labour contracts entered into with employees. Such sick leave pay will be no lower than 80 per cent of the local standard minimum salary, which can vary depending on local regulations. For example, the minimum wage in Beijing in 2014 was at least 1,560 yuan per month, so sick pay should be no less than 1,248 yuan per month.

23 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Employees are entitled to receive pay during the following periods of leave according to relevant laws and regulations.

Maternity leave

According to the Special Provisions on Labour Protection of Female Employees, pregnant employees are generally given maternity leave of 98 days, including 15 days of antenatal leave. An extra 15 days of leave may be granted if the employee experiences a difficult childbirth. Employees who give birth to more than one baby in a single birth will be granted extra maternity leave of 15 days for each additional baby. If an employee suffers a miscarriage when she is fewer than four months pregnant, 15 days of leave will be granted. If an employee has a miscarriage after the fourth month of the pregnancy, 42 days of maternity leave will be granted.

Leave for late childbirth

A female employee who gives birth late (ie, giving birth for the first time at or after the age of 24 years old) will be entitled to an additional 30 days of leave. The female employee will enjoy the same benefits as employees on maternity leave during this period.

Marriage leave and bereavement leave

One to three days, subject to specific circumstances and approval of the employer.

24 What employee benefits are prescribed by law?

Pursuant to national and local labour laws and regulations, employees are entitled to receive basic social benefits, including endowment insurance, medical insurance, maternity insurance, work-related injury insurance, unemployment insurance and housing accumulation funds. In addition, employees have the right to enjoy statutory holidays, paid annual leave, marriage leave, maternity leave, etc.

25 Are there any special rules relating to part-time or fixed-term employees?

The principal rules regulating part-time employment are set out in the Labour Contract Law. Generally, an employee working on a part-time basis for one employer may not work in excess of four hours per day or 24 hours per week. The employer and the part-time employee may have a verbal contract. A part-time employee may enter into a labour contract with more than one employer, given that the contract entered into during the term of an existing contract may not influence the performance of an existing contract. No probation period may be stipulated in a part-time labour contract, and either party may terminate the employment by notice at any time. In addition, the part-time employee is not entitled to any severance upon termination. The hourly salary may not be lower than the minimum hourly salary published by the local government in the municipality in which the employer is located.

The rules regulating fixed-term employment are set out in the Labour Contract Law and its implementation rules.

Post-employment restrictive covenants

26 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

According to the Labour Contract Law, employees subject to non-compete covenants are limited to an employer's senior management, senior technicians and other personnel with a confidentiality obligation. The scope, territory and term of such restrictions will be agreed to between the employer and the employee, and such agreement may not violate laws and regulations. Any non-compete covenants lasting longer than two years after the termination of the employment contract are not enforceable. Non-solicitation clauses are not specifically addressed by the current employment-related laws and regulations. It is common practice for the parties to be reasonable regarding non-solicitation covenants.

27 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Reasonable compensation is widely seen as a precondition to the enforceability of the competition restrictions. Generally, the compensation may not be less than 30 per cent of the employee's average salary in the 12-month period immediately preceding the termination of the employment contract. If this amount is lower than the minimum salary periodically announced by the local government, the employer must pay an amount no less than the minimum local salary. The minimum compensation for non-compete restrictions can be raised by local regulations. For instance, in Shenzhen, the compensation may not be lower than 50 per cent of the employee's average salary in the past 12 months. There is no specific requirement on the compensation for non-solicitation covenants.

Liability for acts of employees

28 In which circumstances may an employer be held liable for the acts or conduct of its employees?

It is a well-established legal principle that an employer will be held liable for damages caused by its employees in the course of the employees performing their employment duties.

Taxation of employees

29 What employment-related taxes are prescribed by law?

Employees are subject to individual income tax on wages, salaries, bonuses and other employment-related income. An employer, as a withholding agent under the tax law, is liable to withhold applicable taxes and pay the same to the competent tax authorities upon payment to its employees. In practice, an employer will file tax returns on behalf of its employees.

Employee-created IP

30 Is there any legislation addressing the parties' rights with respect to employee inventions?

Yes. According to the Patent Law, as amended, an employee invention is an invention completed by an employee in the course of performing duties for the employer or completed by substantially using the material and technical conditions of the employer. The employer will have the right to apply for a patent for an employee invention and shall become the patentee upon approval. The employer and the employee inventor are allowed to enter into an agreement with regard to the ownership of such invention.

When the employer has been granted patent rights for an employee invention, it may reward the employee inventor, and when the patent is implemented, the employee inventor should be given reasonable remuneration according to the scope of implementation and the economic benefits subsequently received. The Implementation Regulations of the Patent Law, as amended, provide further detailed rules on what constitutes an employee invention and how much remuneration shall be paid to the employee inventor.

On 5 January 2013, the State Intellectual Property Office and other governmental agencies jointly issued Several Opinions on Strengthening the Protection of the Lawful Rights and Interests of Employee Inventors and Promoting the Implementation of the Intellectual Property Rights, which provides further rules increasing the economic compensation to the employee inventor.

The Copyright Law, as amended, provides that a work created in the course of fulfilment of the work assignment is an employee work. The

author of the work will be entitled to the copyright to such work and the employer will have priority in using such work within its scope of business. However, for the following works, the author will solely enjoy the right of authorship, and the employer will enjoy other rights pertaining to the copyright, and may reward the author at its discretion:

- drawings of engineering designs, product designs, maps, computer software and other author works that are created mainly by using the materials and technical conditions of the employer and for which the employer bears responsibility; or
- author works whose copyright belongs to the employer according to the law or contract requirement.

The Copyright Law, as amended, further provides that for a period of two years after the completion of the employee work, without the employer's consent, the author may not allow a third party to use the work in the same way as his or her employer does. The Implementation Regulations of the Copyright Law, as amended, offer explanations as to the meaning of the terms 'work assignment' and 'materials and technical conditions'.

31 Is there any legislation protecting trade secrets and other confidential business information?

Yes. According to the Labour Law, the Labour Contract Law and the Contract Law, employers and employees may agree upon the protection of trade secrets and other proprietary confidential information in labour contracts or by signing separate confidentiality and non-competition agreements. Employees in breach of such confidentiality obligations shall be liable for compensation to employers for any loss caused. There could also be criminal liabilities under the Criminal Law depending on the circumstances, which could result in serious consequences and up to seven years' imprisonment for blatant violation. The Law of the PRC against Unfair Competition also prohibits any and all unauthorised obtaining, disclosure, use or permission of others' use of trade secrets which is in violation of any confidentiality or similar obligations. The Law of the PRC on Promoting the Transformation of Scientific and Technological Achievements further provides for the protection of technical know-how and forbids any disclosure of, transfer of, or competition based on such technical know-how by employees without employers' authorisation.

Data protection

32 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

Yes. According to the Employment Service and Employment Management Regulations, employers are required to keep their employees' personal data confidential. Employers must obtain their employees' written consent before disclosing their personal information. It is an established civil law principle that a party that breaches another party's civil rights (including the right to privacy) may be liable for damages in respect of monetary losses and, where applicable, damages for mental distress. Thus, if an employer discloses its employees' personal data without authorisation, the affected employees may file a civil lawsuit against the employer.

Business transfers

33 Is there any legislation to protect employees in the event of a business transfer?

Yes. If an employer intends to lay off any of its employees, it must go through the statutory procedures as specified by the Labour Contract Law by giving prior notice to the affected employees, carrying out consultation with the affected employees and reporting the layoffs to the local labour administrative authorities. If an employer intends to terminate employment contracts with certain employees who are not part of the lay-off, it must first negotiate with such employees; the employer is also obligated to pay severance payments in such cases. The Implementing Regulations of the Labour Contract Law and a recent judicial interpretation by the Supreme People's Court further clarify that, in the case of the transfer of an employee to a new employer for reasons not attributable to the employee, the years of service with both the former and new employers will be cumulative, unless the former employer has paid a severance payment for its ex-employee's years of service. As a result, if the former employer has not made sufficient severance payment, the employee may ask the continuing employer to pay such amount accrued (as a result of his or her service with the former employer) by the time the former employer has transferred such employee to the continuing employer.

Termination of employment

34 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may terminate an employee only for 'cause'. The Labour Contract Law provides that employers may dismiss employees without prior notice if the employees:

- fail to meet the conditions set out for the probationary period;
- severely violate the employer's internal rules and policies;
- are corrupt or neglectful in performing their duties, causing severe damage to the employer's interests;
- fraudulently induced the employer to employ them;
- are simultaneously employed by another employer, severely affecting the performance of their duties, or the employees refuses to rectify the situation after receiving the employer's request; or
- are prosecuted for a crime.

An employer may also dismiss an employee under the following circumstances, but 30 days' prior notice or one month's salary in lieu of such notice is required:

- if, after the completion of the medical treatment for an illness or non-work-related injury, employees are unable to perform their original jobs or any other work position arranged for them by the employer;
- if employees are incompetent in their jobs and fail to make any improvement after training or adjustment of their positions; or
- if material changes of the objective circumstances have made the employment contract no longer executable, and the employer and employees cannot reach agreement on a change to the employment contract.

35 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Under some circumstances, prior notice or one month's salary in lieu of such notice will be required – see question 34.

36 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

See question 34.

37 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

Yes. According to the Labour Contract Law, an employer must make a severance payment upon termination of employment if:

- the employee terminates the employment contract due to the employer's fault;
- a severance payment has been provided for in an agreement between the employer and the employee for termination of the employment contract;
- the employer terminates an employment contract with 30 days' notice or payment of one month's salary in lieu of notice;
- the employer carries out collective dismissals owing to the need to restructure the enterprise in accordance with the applicable laws and regulations;
- a fixed-term labour contract expires, except that the employee refuses to renew the employment contract while the employer offers the same or more favourable terms;
- the employer is declared bankrupt in accordance with the law, has its business licence revoked, is subject to a lawful order to shut down, or is closed down or decides to go into liquidation; or
- any other circumstances prescribed by law and administrative regulations.

The aggregate amount of a severance payment is calculated primarily based on the employee's monthly salary for each completed year of service with the employer. A period longer than six months but less than one year will be rounded up to a full year of service, and a period of less than six months gives rise to an entitlement to half a month's salary. In calculating the severance payment, the monthly salary used is the employee's average

Update and trends

As a signal by the central government that it will safeguard employment during an expected economic slowdown, on 31 December 2014, the Ministry of Human Resources and Social Security released a Circular on the Draft Provisions on Redundancy by Enterprises (the Draft Provisions) for public comment.

The Draft Provisions reiterate the legitimate basis for mass lay-offs and other restrictions and requirements in article 41, section 1 of the Labour Contract Law. If an employer seeks to make redundant 20 or more employees (or fewer than 20 employees if they account for at least 10 per cent of the total workforce), such activity will be subject to the Draft Provisions.

According to the Draft Provisions, before implementing any redundancy procedure, an employer should take measures to reduce the number of employees affected. The Draft Provisions specifically provide that an employer may take measures such as providing training, reducing salaries and working hours, and rotating job positions. If those measures are taken, the government will provide the employees with subsidies and allowances. However, it is not clear how long those measures and government financial aid will last, or how the government subsidies will be calculated.

To conduct a mass lay-off, an employer should follow these steps:

- inform all employees of the context of the proposed redundancy, the current business situation of the employer and the measures taken to decrease the number of employees to be terminated;
- provide a preliminary plan by specifying the statutory basis for the lay-off, the scope, number and percentage of employees affected, the standards for the selection of employees to be terminated, the timeline and steps to follow and the severance package;
- solicit comments from the employees or the trade union, and revise and announce the lay-off plan and list of employees; and
- submit a comprehensive report to the local government agency in charge of labour and employment matters including the final redundancy plan, the pre-lay-off measures adopted, the number and names of employees affected, the supporting documents and other materials required by the government.

Redundancy may be officially initiated within 10 days of the local government agency issuing a written notice acknowledging receipt of all required documents. An employer will be subject to monetary penalties if any of the information submitted to the government is misleading and should take remedial actions at the request of the government.

Finally, if 20 or more employees are terminated by mutual agreement instead of a redundancy initiated by the employer unilaterally, the Draft Provisions also require the employer to issue a prior notice to all employees and the trade union (if any) and to make a filing with the local government. However, it is not clear how these 20 or more employees will be counted for the purpose of the Draft Provisions. For instance, will all the mutually terminated employees count if they are terminated over a period of time (eg, three, six or 12 months)? The lack of clear answers to such questions may result in inconsistent practice in different places or by different employers.

Unfortunately, the Draft Provisions have neither been enacted into law nor amended for reconsideration by the public or the government for more than a year. It is not clear why the Draft Provisions remain in limbo and the process has been suspended.

per month salary in the 12-month period immediately preceding the termination. If the monthly salary of an employee is three times higher than the average monthly salary for the relevant year as announced by the Central People's Government at the municipal level directly under the central government or at the level of district where the employer is situated, the monthly salary used to calculate the severance payment must be capped at three times the average monthly salary announced by the government. In such a scenario, the number of service years for calculating the severance amount of the concerned employee may not, in any case, exceed 12 years. However, if an employee was hired before 1 January 2008 (the effective date of the Labour Contract Law) and terminated thereafter, the calculation may vary significantly depending on the reason for the termination and the circumstances involved.

38 Are there any procedural requirements for dismissing an employee?

Yes. The Labour Contract Law prescribes certain procedures to dismiss employees. If an employer plans to terminate an employment contract unilaterally, it must notify the affected employee's trade union in advance. If the employer violates any laws, regulations or the employment contract, the union may ask the employer to take corrective measures. The employer must consider the union's opinions and notify the union in writing of the outcome. Usually, no prior government approval is required to terminate an employee's contract, but such approval will be necessary in practice in the event of mass lay-offs.

39 In what circumstances are employees protected from dismissal?

Certain employees are protected from dismissal with prior notice and collective dismissal (but not summary dismissal) of their employment contracts under the following circumstances:

- employees engaged in positions with the risk of occupational disease who have not undergone proper health examinations before leaving the position, or employees who are suspected of having occupational diseases, are being diagnosed for such diseases, or are under medical observation;
- employees who have lost or partially lost the ability to work due to a work-related injury or disease;
- employees within the statutory period for medical treatment due to illness or non-work-related injuries;
- employees who are pregnant, in confinement or in a nursing period;
- employees who have worked for 15 consecutive years with the same employer and are within five years of the statutory retirement age; and
- employees otherwise protected by the relevant laws and administrative regulations.

40 Are there special rules for mass terminations or collective dismissals?

Yes. If an employer is to dismiss 20 persons or more, or fewer than 20 persons who represent 10 per cent or more of the total number of its employees, such dismissal must be based on statutory reasons including restructuring according to the Enterprise Bankruptcy Law or serious difficulties in production or business operations. In addition, the employer should give a 30-day advance notice of the background of and reasons for the dismissals to the affected employees' trade union, or to all of its employees. The employer should consider the opinions of the union or the employees, and file the collective dismissals plan with the labour administrative authorities.

41 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

In theory, class actions are allowed in China. According to the Civil Procedure Law, where the subject matter of an action is of the same category and one of the parties has numerous litigants but the exact number of the litigants is uncertain when the lawsuit is filed, the people's court may issue a public notice to explain the nature of the case and the claims, as well as notify interested persons who are also entitled to claims to register their claims with the people's court within a specified time period. In practice, however, no such type of class action has been brought; in most cases, an employee will file a claim on an individual basis. When there is a breach of a collective agreement, as authorised by the Labour Contract Law, a labour union may apply for arbitration or bring a lawsuit against the employer. However, labour disputes filed in the name of labour unions are not common in practice.

42 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Yes. The mandatory retirement ages of 60 (for males) and 55 (for females) under the current law only apply to employees of state-owned enterprises, but most businesses, private or foreign-owned, follow such standards in practice. Employees who work underground, at high altitudes or at extreme temperatures, or whose work is especially physically heavy or otherwise harmful to their health, are entitled to an early retirement age (ie, 55 for males and 45 for females).

Dispute resolution

43 May the parties agree to private arbitration of employment disputes?

No. Private arbitration over employment matters is not allowed under Chinese law. The law encourages the parties to resolve their disputes by way of friendly negotiation. Furthermore, the law specifically mandates arbitration at government-controlled labour arbitration organisations if there is any dispute between the employer and employee. If a party disagrees with the arbitration award granted by the labour arbitration organisation, such party may challenge such award within a certain period of time by filing a lawsuit with the competent people's court.

44 May an employee agree to waive statutory and contractual rights to potential employment claims?

No. As a general principle, Chinese labour laws do not allow waiver of potential employment claims to be made by employees. According to the Labour Contract Law, if any employer evades its mandatory legal liability or denies an employee's rights in an employment contract, such employment contract will become invalid or partially invalid.

45 What are the limitation periods for bringing employment claims?

Any claim for arbitration must be made within one year from the day when 'the employee knows or should have known of the infringement of rights' according to the Law on Labour Dispute Mediation and Arbitration. Regarding disputes over salary payment with current employees, the one-year limitation starts running only after the termination of the employment contract.

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