# Labour & Employment

*Contributing editors*
**Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek**

Morgan Lewis

2018

GETTING THE DEAL THROUGH

# China

**K Lesli Ligorner**
**Morgan, Lewis & Bockius LLP**

## 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:

- Joint Implementation Pilot Scheme of Maternity Insurance and Medical Insurance (19 January 2017);
- Measures Announcing Significant Violations of Labour and Social Security Laws (1 January 2017);
- Interim Provisions on Labour Dispatch (1 March 2014);
- Regulations on Exit-Entry Administration for Foreign Nationals (effective as of 1 September 2013);
- Amendments to the Labour Contract Law (effective as of 1 July 2013);
- Interpretation (IV) of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (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);
- Regulations on Paid Annual Leave of Employees (1 January 2008);
- Labour Contract Law (1 January 2008);
- Employment Promotion Law (1 January 2008, and the amendment effective as of 24 April 2015);
- 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 Regulations (1 December 2004);
- Collective Contract Regulations (1 May 2004);
- Regulations on Minimum Wages (1 March 2004);
- Regulations on Work-Related Injury Insurances (1 January 2004, and the amendment effective as of 1 January 2011);
- Occupational Disease Prevention Law (1 May 2002, and two amendments effective as of 31 December 2011 and 2 July 2016);
- Interpretation of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Labour Dispute Cases (30 April 2001);
- Interim Administrative Rules on Registration of Social Insurance (19 March 1999);
- Interim Regulations on Collection and Payment of Social Insurance (22 January 1999);
- Administrative Provisions on Employment of Foreigners in China (1 May 1996 and the amendment effective as of 13 March 2017);
- Regulations on Labour Working Hours (1 May 1995);
- Regulations on Medical Care Period for Enterprises' Employees for Illness or Non-Work-Related Injury (1 January 1995);
- Labour Law (1 January 1995 and the amendment effective as of 27 August 2009);
- Interim Rules on Salary Payment (1 January 1995); and
- Trade Union Law (3 April 1992, and two amendments effective as of 27 October 2001 and 27 August 2009).

The Labour Law is the fundamental legislation governing labour and employment matters, which was written into law approximately 23 years ago. There has been no substantial amendment since 1995 when it was first enacted. The other significant piece of legislation governing the employment relationship 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 relationships in China, but their implementation and enforcement rely on various regulations or rulings by the governmental agencies in charge of labour matters at the national, provincial and local levels. 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 discriminatory 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, ethnicity, race, 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 forbids sexual harassment against women. Victims are entitled to file complaints with the competent governmental agencies and to bring civil suits against the harassers. The Special Rules for Labour Protection of Female Employees impose an affirmative obligation on employers to prevent or prohibit sexual harassment against female employees. Local regulations provide further guidelines on the definition of 'sexual harassment' and the duties of employers to address sexual harassment complaints and prohibit retaliation against the complainant.

### 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 the 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. However, in practice, the enforcement often relies on the local labour arbitration commission or courts when a party files a lawsuit.

## Worker representation

### 4 Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

According to the Trade Union Law, employees may establish trade unions voluntarily and employers are prohibited from restricting such rights of workers. Provincial and municipal governments have also promulgated local regulations to implement the principles set out in the Trade Union Law. China has only one overall trade union, the All-China Federation of Trade Unions, under which many provincial, municipal and more local branches and divisions are established. An employer is periodically required to contribute a minimum percentage of gross salaries to the trade union. A portion of the dues is provided to the trade union set up within the employing entity, and the remainder is paid to the external, higher-level unions. The law is not clear as to whether an employer with fewer than 25 employees is mandated to set up a trade union.

### 5 What are their powers?

According to the Trade Union Law, the basic goal of a trade union is to safeguard the legitimate rights and interests of the employees. The Trade Union Law and the Labour Contract Law give a trade union the power to:

- request that an employer rectify its violations of regulations related to the employees' representative congress system and other democratic management systems;
- assist and provide guidance to employees when executing employment contracts with the employer;
- represent employees as they conclude a collective bargaining agreement with their employer;
- require that an employer bear liability pursuant to the law when an employer violates a collective bargaining agreement; a trade union also has the right to file for arbitration if the labour dispute cannot be resolved through friendly negotiations; a trade union may presumably file a lawsuit if filing for arbitration is rejected or if the trade union is not satisfied with the arbitral award;
- raise objections to improper disciplinary actions imposed by an employer;
- be consulted before an employer unilaterally terminates an employee; and if the trade union's opinion favours the employee, the employer must take the trade union's opinion and report into consideration in its final decision;
- investigate an employer's violation of an employee's legitimate rights, and the employer must provide assistance during the investigation;
- provide support and assistance pursuant to the law when an employee applies for arbitration or files a lawsuit;
- negotiate with an employer as it drafts company policies related to employee benefits like salary, working hours, annual leave, work safety, social insurance and benefits, training, etc. The trade union also has the right to request that an employer revise improper company policies; and
- express its opinion in the event of economic layoffs; the employer must give 30 days' prior notice to the trade union and consider the opinions of the trade union in its formal layoff plan.

## Background information on applicants

### 6 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 current law or regulations for a potential employer to conduct reasonable background checks on applicants. 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.

However, disclosure of certain personal or sensitive information during the background check requires consent by the applicant, particularly with respect to information related to health status or other sensitive personal matters. The Cyber Security Law (effective as of 1 June 2017) requires any potential employer or background-check service provider to provide explicit notice to the data subject of the types of information to be collected, and the method, purpose and scope of data collection and use. Further, the potential employer or background-check service provider must now obtain the consent of the data subject before collecting or using any personal information. Moreover, the Cyber Security Law also mandates that the potential employer or the background-check service provider take technological or other actions to ensure the confidentiality and protection of the personal information collected from the applicant.

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

Generally, employers may require candidates to undergo a medical examination 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 candidates to submit their examination report. Blanket requirements for medical examinations were common until 2008, when the government restricted the use of medical examinations to learn whether a candidate was a hepatitis B or other infectious disease carrier. Now it is no longer lawful for an employer to require a candidate or employee to undergo 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 a medical examination. In practice, it is analysed on a case-by-case basis.

### 8 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, though such testing is not common among multinational employers.

Similarly, because 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

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

### 10 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 the employee commencing work, and both the employer and the employee should retain an original contract. If an employer fails to sign an employment contract within one month, for the period commencing from the first day of the second month and ending on the last day of the 12th month, it must pay twice the monthly salary of the employee for each month for which services were provided without a written employment agreement. The employment will be deemed 'open ended' if an employer fails to enter into a written employment agreement with an employee within one year of the employee commencing work; 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, including the probationary period;
- the nature of the employee's job duties, work requirements and workplace;
- the employee's working hours, leave and holiday entitlements;
- the employee's remuneration;
- social insurance;
- labour protection, working conditions and professional hazard prevention and protection; and
- other information as may be necessary for specific employment contracts.

### 11 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. When concluding or renewing an employment contract with an employee under any of the following circumstances, an employer is obligated to enter into an open-ended employment contract unless the employee requests to conclude a fixed-term employment contract:

- the employee has worked under two consecutive fixed-term contracts and the employment relationship is to continue;
- the employee has worked for the employer for more than 10 consecutive years; or
- the employer has not signed any written employment contract with the employee for more than a year.

However, in practice, expatriate employees should not receive open-ended contracts because the maximum term of a work permit is five years and many local authorities will only issue a work permit to an expatriate employee when the term of his or her employment contract is consistent with the term of the work permit.

### 12 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 generally not allowed under Chinese law.

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

In general, Chinese law does not recognise the concept of an independent contractor. 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 to enter into an employment relationship 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.

### 14 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. However, 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 the employees and make an announcement to all employees before it may fill these positions with dispatched workers. Further, 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 by using dispatched employees 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 in 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. While there are no regulations differentiating good-faith outsourcing from labour dispatch, the courts will examine the specific facts on a case-by-case basis.

## Foreign workers

### 15 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?

There is no numerical limitation on short-term visas. Visas are available for employees transferring from a corporate entity in a foreign jurisdiction to a related entity in China. A foreign employee may apply for a work visa on the 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 prospective employer must first obtain an employment authorisation certificate from the governmental entities for such foreign employee, as this is required for such application.

### 16 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 if he or she obtains independent employment and after his or her prospective 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.

### 17 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 work permit and residence permit issued by the governmental entities. An employer who hires a foreigner without a proper visa and work permit may be assessed a fine of 10,000 yuan for each foreign employee who is illegally employed, which is capped at 100,000 yuan, and any income (if any) generated by those illegal employees shall be confiscated. Further, a foreign national who works in China without a proper visa and work permit may be assessed a fine ranging from 5,000 yuan to 20,000 yuan, detained for a period ranging from 5-15 days, or deported from China depending on the seriousness of the violation. Foreign nationals who are deported from China will not be allowed to re-enter China within 10 years of the date of deportation.

### 18 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

### 19 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 should not exceed eight hours, and the average weekly working hours should not exceed 40 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 trade union and the employee, and the overtime working hours generally should not exceed one hour per day; if longer overtime working hours are needed, 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 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.

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

An employee is entitled to overtime pay or benefits if the employee works more than eight hours on a workday or 40 hours in a workweek or if the employee works on a statutory holiday. Overtime pay is 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 (if compensatory time off is not provided); and
- overtime on a statutory holiday: at least three times the regular salary.

An employee may receive compensatory time off for overtime work performed on an off-work or rest day at the rate of one hour off for each hour worked.

However, the above calculations do not apply to employees who work under an alternative working hours system. The calculation of overtime pay for employees who work under an alternative working hours system is subject to special rules.

### 21 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.

### 22 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. The statutory annual leave entitlement is allotted as follows:

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

Service is measured against all employers, not just the current employer.

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.

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

Yes. In accordance with the Regulations on Medical Care Period for Enterprises' Employees for Illness or Non-Work-Related Injury, employees who suffer from a non-work-related illness or injury 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 employer.

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, 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 varies depending on local regulations. For example, the minimum wage in Beijing in 2017 was 2,000 yuan per month, so sick leave pay must be no less than 1,600 yuan per month. Subject to the minimum requirement for sick leave wages at the national level, authorities at the provincial or municipal level may implement a higher rate for sick leave pay to apply locally.

**24 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 an early termination when she has been pregnant for fewer than four months, 15 days of leave will be granted. If an employee has an early termination after the fourth month of the pregnancy, 42 days of maternity leave will be granted. Local legislation may provide additional maternity leave according to the PRC Population and Family Planning Law. For example, maternity leave is extended by 30 days in Beijing.

**Paternity leave**

While there is no national entitlement to paternity leave, local legislation generally provides male employees with some paid paternity leave. In Beijing, for example, the entitlement is 15 days, while in Shanghai the entitlement is 10 days.

**Marriage leave and bereavement leave**

One to three days, subject to specific circumstances and approval of the employer. Marriage leave may be extended by local government. For example, local rules in Beijing extend marriage leave for all employees by seven days.

Local legislation may also grant other types of paid leave. For example, the Administrative Provisions on Population and Family Planning in Guangzhou (effective as of 1 February 2018) grant an employee, who is the single child of the family, 15 days of 'parental care leave' per year to take care of his or her parent that is no younger than 60 years old and has been hospitalised for treatment of a medical condition.

**25 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 a pension, medical insurance, maternity insurance, work-related injury insurance, unemployment insurance and the housing fund. In addition, employees have the right to enjoy statutory holidays, paid annual leave, marriage leave, maternity leave, etc.

**26 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 on average or in excess of 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.

**27 Must employers publish information on pay or other details about employees or the general workforce?**

Under the labour and employment laws in China, employers are not required to publish information on pay or other details about employees or the general workforce. However, publicly traded companies, which do not include subsidiaries of multinational companies, are subject to certain disclosure requirements, including the names of senior management and information regarding their remuneration.

## Post-employment restrictive covenants

**28 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 should be agreed 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. Employees bound by the non-compete obligations are entitled to monthly non-compete compensation payable by the employer during the non-compete period. With respect to the amount of the non-compete compensation payable to an employee, local legislation provides different standards. For example, in Jiangsu Province, the monthly non-compete compensation should be no less than one-third of the employee's average monthly salary in the 12-month period immediately preceding the termination of the employment contract. In contrast, in Shenzhen it should be no less than 50 per cent of the employee's average monthly salary. In Shanghai and Beijing, there is no statutory minimum requirement. If for any reason caused by the employer the monthly compensation is not paid to the employee for three months, the employee may file a claim to terminate the non-compete covenant.

Clauses on non-solicitation of either employees or company customers are not specifically addressed by the current employment-related laws and regulations. Thus, their enforceability is unpredictable. While the common view is that no payment of additional consideration is required for the non-solicitation of employees, there is the risk that a Chinese arbitration commission or court will deem a non-solicitation of company customers to be a form of non-compete obligation, which requires the payment of financial consideration.

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

Yes, reasonable compensation is 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, given the lack of regulation around them.

## Liability for acts of employees

**30 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. Further, under the amendments to the Anti-Unfair Competition Law (effective as of 1 January 2018), employers are now vicariously liable for an employee's violations of that law, including commercial bribery.

## Taxation of employees

**31 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

### 32 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 during the employment term or within one year of its termination. 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 26 November 2012, 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 Implementing Regulations of the Copyright Law, as amended, offer explanations as to the meaning of the terms 'work assignment' and 'materials and technical conditions'.

### 33 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 criminal law, depending on the circumstances, which could result in serious consequences and up to seven years' imprisonment for a blatant violation. The Anti-Unfair Competition Law 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. If a third party knows or should have known that an employee or a former employee of the owner of a trade secret or any other entity or individual has obtained any unauthorised trade secrets, he or she is also prohibited from obtaining, disclosing, using or permitting another party's use of that confidential information. The recent amendment to the Anti-Unfair Competition Law also requires regulatory bodies and their employees to keep trade secrets learned through their investigations confidential. 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

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

Yes. Under the Cybersecurity Law (effective as of 1 June 2017), employers are required to obtain 'express consent' from employees when collecting, using, processing, retaining and transferring their personal information outside of the employing entity. In addition, the Draft Measures on Security Assessment of Outbound Transfer of Personal Information and Important Data further clarifies that employees should grant their consent expressly and voluntarily. Although the Draft Measures are not legally binding, they provide the best practice published by the government. Such 'express and voluntary consent' can be obtained through the signing of a separate consent form.

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. The employer may also face the legal risk of being fined by competent authorities.

## Business transfers

### 35 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 prospective layoffs to the local labour administrative authorities. If an employer intends to terminate employment contracts with certain employees who are not part of the layoff, it must first negotiate with such employees; the employer is also obligated to pay severance payments in such cases. In the case of an equity transfer, the employment contract will not be affected and will continue to be performed. The Implementing Regulations of the Labour Contract Law and a 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

### 36 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 dismiss 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 through means such as fraud, deception or coercion;
- are simultaneously employed by another employer, severely affecting the performance of their duties, or the employees refuse to rectify the situation after receiving the employer's request; or
- are convicted of 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 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.

**37 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 36.

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

See question 36.

**39 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;
- the employer does not renew the employee's fixed-term employment contract;
- the employer initiates the termination of the employment contract and a severance payment has been provided for in the resulting mutual agreement to terminate the employment contract;
- the employer terminates an employment contract with 30 days' notice or payment of one month's salary in lieu of notice, as set out under question 36;
- 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 monthly 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 may 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 be capped at 12 years. However, if an employee was hired before 1 January 2008 (the effective date of the Labour Contract Law), the calculation may vary significantly depending on the reason for the termination, the work location of the employee, the location where the employer is registered (if different from the work location of the employee) and the circumstances involved.

**40 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 layoffs.

**Update and trends**

The following changes have taken place in China:

- Potential amendments to the Labour Contract Law.
- Repeal of Measures for Economic Compensations due to Violation or Termination of Labour Contracts.
- Protection of personal data.
- Draft regulations around working hours since April 2012.

**41 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, on maternity leave or in the 'nursing' period, which is the period from the baby's birth until the baby's first birthday;
- 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.

**42 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 30 days' advance notice of the background of and reasons for the dismissals to the 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.

**43 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 class actions have been brought; in most cases, an employee will file a claim on an individual basis. When there is a breach of a collective bargaining 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.

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

Yes. Under the current law, the mandatory retirement age is 60 for males, generally 55 for females who hold 'desk jobs' or positions not requiring manual labour, and 50 for other female workers. When this law was promulgated several decades ago, it applied only to employees of state-owned enterprises; however, it now also applies to other businesses, private and foreign-owned. Employees who work underground, at high altitudes or in extreme temperatures, or whose work is especially physically taxing or otherwise harmful to their health, are entitled to an early retirement age (ie, 55 for males and 45 for females). Employers, however, are allowed to hire retirees using a labour service contract. Retired employees hired under labour service contracts are not entitled to termination protections and some other benefits provided under the Labour Contract Law.

## Dispute resolution

**45 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 for most causes of action. 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, though some arbitration awards may not be challenged by the employer depending on the amount or subject matter at issue.

**46 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. In practice, when mutually terminating the employment relationship, an employee may agree to waive certain claims by signing an agreement with the employer, and such waiver may be supported by the arbitration commission and court.

**47 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 payments with current employees, the one-year limitation starts running only from the date of termination of the employment contract.

Morgan Lewis

**K Lesli Ligorner** **lesli.ligorner@morganlewis.com**

5th Floor, The Center
989 Changle Road
Shanghai 200031
China

Tel: +86 21 8022 8588
Fax: +86 21 8022 8599
www.morganlewis.com

*Getting the Deal Through*

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

*Also available digitally*

# Online

www.gettingthedealthrough.com

ISBN 978-1-78915-038-4